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## Table of Contents

<b>Abstract</b> .....	<b>V</b>
<b>Acknowledgement</b> .....	<b>VI</b>
<b>List of Abbreviations</b> .....	<b>VII</b>
<b>Declare of Author</b> .....	<b>X</b>
<b>Chapter 1. An Introduction – The Organization of ASEAN</b> .....	<b>1</b>
<b>1.1. General Background of Research</b> .....	<b>1</b>
<b>1.2. The Scope and Research Hypothesis</b> .....	<b>7</b>
<b>1.3. Methodology and Structure</b> .....	<b>9</b>
<b>1.4. Introduction to the Organization of ASEAN</b> .....	<b>12</b>
1.4.1. Personality of ASEAN .....	<b>13</b>
1.4.2. Structure of ASEAN .....	<b>14</b>
<b>1.5. Introduction to ASEAN Regional Integration</b> .....	<b>18</b>
1.5.1. The origins of ASEAN regional integration.....	<b>18</b>
1.5.2. The Framework of ASEAN Regional Integration – the ASEAN Charter .....	<b>21</b>
<b>Chapter 2. ASEAN Economic Community and The Legal regime</b> .....	<b>23</b>
<b>2.1. Introduction</b> .....	<b>23</b>
<b>2.2. ASEAN Economic Community</b> .....	<b>25</b>
2.2.1. Building the ASEAN Community – the Transformation .....	<b>25</b>
2.2.2. Evolution of ASEAN Economic Community .....	<b>29</b>
2.2.3. Consolidating the ASEAN Economic Community .....	<b>33</b>
<b>2.3. The Emergence of a Law Regime and Soft Legal Regime in ASEAN</b> .....	<b>37</b>
<b>2.4. A Soft Legal Regime in the ASEAN Community</b> .....	<b>38</b>
<b>2.5. The Current AEC Soft Legal Framework</b> .....	<b>42</b>

2.6.	A Brief of Legalization in the APSC and ASCC.....	46
2.7.	Chapter Summary and Concluding Remarks .....	49
<b>Chapter 3. ASEAN Legal Modernization – the E-commerce Law</b>		
.....		<b>52</b>
3.1.	Introduction.....	52
3.2.	Development of E-commerce Law in International Scenario .....	54
3.3.	ASEAN’s Policy Development on e-Commerce .....	57
3.4.	Development of E-Commerce Law in ASEAN .....	59
3.4.1.	Development through Soft Instruments and regional Agreements .....	61
3.4.2.	Development through trade agreements.....	67
3.5.	The Current Status of ASEAN E-Commerce Law .....	70
3.5.1.	Legal Harmonization.....	71
3.5.2.	ASEAN Agreement on e-Commerce .....	72
3.6.	A Gap of ASEAN E-Commerce Law.....	74
3.6.1.	Jurisdiction of Court in Singapore .....	75
3.6.2.	Malaysia’s Jurisdiction of Court.....	76
3.6.3.	Thailand’s Jurisdiction of Court.....	77
3.7.	Chapter Summary and Concluding Remarks .....	78
<b>Chapter 4. Compliance of ASEAN E-commerce Law – Case Study</b>		
<b>of CLMV Countries.....</b>		<b>80</b>
4.1.	Introduction.....	80
4.2.	E-commerce Law of Cambodia .....	81
4.2.1.	Cambodia’s Policy on e-Commerce Development.....	81
4.2.2.	Legal and Regulatory Framework on e-Commerce .....	83
4.3.	E-commerce Law of the Lao PDR.....	86
4.3.1.	The Lao PDR’s e-Commerce and Policy Development .....	86

4.3.2.	Legal and Regulatory Framework .....	89
<b>4.4.</b>	<b>E-commerce law of Myanmar .....</b>	<b>93</b>
4.4.1.	Myanmar’s Policy on e-Commerce Development.....	93
4.4.2.	Legal and Regulatory Framework on e-Commerce .....	94
<b>4.5.</b>	<b>E-commerce Law of Vietnam.....</b>	<b>97</b>
4.5.1.	Vietnam’s Policy on e-Commerce Development .....	97
4.5.2.	Legal and Regulatory Framework on E-commerce .....	99
<b>4.6.</b>	<b>Legal Harmonization of The CLMV countries to ASEAN e-Commerce Legal Framework.....</b>	<b>104</b>
<b>4.7.</b>	<b>Chapter Summary and Concluding Remarks .....</b>	<b>109</b>
<b>Chapter 5. ASEAN’s Legal Protection and Future Dispute Resolution for Online Consumers .....</b>		<b>111</b>
<b>5.1.</b>	<b>Introduction.....</b>	<b>111</b>
<b>5.2.</b>	<b>ASEAN Legal Protection.....</b>	<b>113</b>
5.2.1.	ASEAN Dispute Settlement Mechanisms.....	114
5.2.2.	Dispute Resolution Enforcement .....	118
5.2.3.	ASEAN Peaceful Resolution Process: Cambodia vs Vietnam.....	119
<b>5.3.</b>	<b>ASEAN’s Policy on E-commerce Consumer Protection .....</b>	<b>123</b>
<b>5.4.</b>	<b>Protection of E-commerce Consumer Framework in AMS .....</b>	<b>126</b>
5.4.1.	Brunei Darussalam .....	126
5.4.2.	Cambodia.....	127
5.4.3.	Indonesia .....	128
5.4.4.	The Lao PDR.....	129
5.4.5.	Malaysia .....	130
5.4.6.	Myanmar.....	131
5.4.7.	The Philippines .....	131
5.4.8.	Singapore .....	133

5.4.9.	Thailand.....	134
5.4.10.	Vietnam .....	135
<b>5.5.</b>	<b>Online Dispute Resolution for E-Commerce.....</b>	<b>136</b>
5.5.1.	United Nations.....	137
5.5.2.	European Union .....	140
<b>5.6.</b>	<b>Online Dispute Resolution System in ASEAN.....</b>	<b>144</b>
5.6.1.	ASEAN Online Dispute Resolution Framework .....	145
5.6.2.	ASEAN Online Dispute Resolution System and Way Forward .....	146
<b>5.7.</b>	<b>Chapter Summary and Concluding Remarks .....</b>	<b>152</b>
	<b>Chapter 6. ASEAN’s Legal and Regulatory Challenges – the e-Commerce Law .....</b>	<b>154</b>
<b>6.1.</b>	<b>Introduction.....</b>	<b>154</b>
<b>6.2.</b>	<b>Legal Challenges in General .....</b>	<b>155</b>
6.2.1.	Difference in Politic and Economy .....	155
6.2.2.	Difference in legal system.....	156
6.2.3.	Different levels of legal development .....	157
<b>6.3.</b>	<b>Challenge in e-Commerce Law .....</b>	<b>158</b>
6.3.1.	Difference in Legal Cultures.....	158
6.3.2.	Challenges in the legal framework Development .....	159
6.3.3.	Challenges in Digital and Electronic Signatures .....	160
6.3.4.	Challenges in Consumer Protection.....	164
6.3.5.	Challenges in Data Protection and Privacy .....	172
<b>6.4.</b>	<b>Chapter summary and Concluding Remarks.....</b>	<b>175</b>
	<b>Chapter 7. Conclusion – Toward ASEAN Soft Law Regime and E-commerce Legal Modernization.....</b>	<b>177</b>

## Abstract

This research project is an investigation of the regional legal regime in the ASEAN Community. The thesis has adopted a functional, rather than conceptual, approach to understand the regional legalism of ASEAN. The study also provides a contemporary topic related to highlights of the ASEAN's recent engagement in the regional economic integration to help understand the historic background of its community-building.

The main question in this thesis is what law regime of ASEAN Community without supranational structures is, in which the thesis narrows the case study on development of e-commerce law of ASEAN under economic community-building. To answer this question, the thesis firstly investigates the ground of regional integration and legalization in the Community-building, where ASEAN has adopted an instrumentalist conception of the legalism and one based on 'thin' constitutionalism. The features of the legal regime in the ASEAN Community are – state-controlled, limited, evolutionary and resting on soft legal regime unlike the European Union that depends more on hard law regime. Despite this, it is argued that even though the European Union model is often utilized as a mother of inspiration, each regional integration bears different model constituent in order to make the best adapt to their regional or local contexts.

This thesis examines the ASEAN's approach in developing regional legal system through the case of e-commerce law development, as well as the challenges in connection with the legal regime and e-commerce laws under the regional integration. The thesis establishes the findings to the exact legal development methods taken by ASEAN in chasing regional e-commerce law and policy. The findings indicate that ASEAN applies a soft legal regime through approach of legal harmonization regarding substantive commerce law, while abstaining from building a centralized representative body or institution. The study also reveals that although ASEAN has made a great progress in developing principles of e-commerce law among ASEAN jurisdictions and series of e-commerce laws are developed and harmonized, but the complex legal and institutional regime can significantly undermine implementation and enforcement of regional laws of ASEAN. and remain some key challenges.

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## **List of Abbreviations**

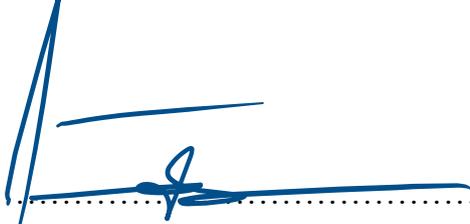
ASEAN	Association of Southeast Asian Nations
AMS	ASEAN MemberkState
AEC	ASEAN Economic Community
ASC	ASEAN Security Community
AFTA	ASEAN Free Trade Area
ASCC	ASEAN Socio-Cultural Community
SAA	South East Asia Association
AICHR	ASEAN Intergovernmental Commission on Human Rights
AFMM	ASEAN Foreign Ministers Meeting
ATIGA	ASEAN Trade in Goods Agreement
ACIA	ASEAN Comprehensive Investment Agreement
AFAS	ASEAN Framework Agreement on Services
AIA	ASEAN Investment Area
AEM	ASEAN Economic Ministers
ACWC	ASEAN Commission on the Promotion and Protection of the Rights of Women and Children
AG STRACAP	ASEAN Guideline on Standards, Technical Regulations, and Conformity Assessment Procedures
ACCSQ	ASEAN Consultative Committee for Standards and Quality
AANZFTA	ASEAN-Australia-New Zealand FreekTrade Area
AJCEP	ASEAN-Japan Comprehensive Economic Partnership
ACFTA	ASEAN-China Free Trade Agreement
AIFTA	ASEAN-India Free Trade Area
AKFTA	ASEAN-Korea Free Trade Area
ASAPCP	ASEAN Strategic Action Plan on Consumer Protection 2025
ACCP	ASEAN Committee on Consumer Protection
ADR	Alternative Dispute Resolution
AIM	ASEAN ICT Master Plan
B2B	Business to Business
B2C	Business to Consumer

C2C	Consumer to Consumer
CEPT	Agreement on the Common Effective Preferential Tariff
CAFTA	China–ASEAN Free Trade Area
CLMV	Cambodia, Lao PDR, Myanmar, and Vietnam
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DFS	Digital Financial Services
EU	The European Union
ECJ	The European Court of Justice
EPG	Eminent Person’s Group
FDI	Foreign Direct Investment
GRP	Good Regulatory Practice
HAP	The Hanoi Action Plan
ICT	Information and Communication Technologies
LDC	Least Developed Country
Lao PDR	Lao’s People Democratic Republic
MRAs	Mutual Recognition Arrangements in Services
NAFTA	North American Free Trade Agreement
OECD	Organization for Economic Cooperation and Development
ODR	Online Dispute Resolution
PTA	ASEAN Preferential Trading Agreements
RCEP	The Regional Comprehensive Economic Partnership
SEOM	Senior Economic Officials Meeting
SMEs	Small and Medium-sized Enterprises
OSEAT	Organization of Southeast Asia Treaty
TFEU	Treaty on the Functioning of the European Union
The Charter	The ASEAN Charter
TAC	Treaty of Amity and Cooperation
UNCTAD	The United Nations Conference on Trade and Development
UNCITRAL	The United Nations Commission on International Trade Law
UNESCO	The United Nations Educational, Scientific and Cultural Organization

VAP                      Vientiane Action Program  
WTO                     World Trade Organization

## Declare of Author

“I hereby declare that this study is my own work and to the best of my knowledge, except references those are made to the contribution of the works, and this work has not been submitted for any degree at the University of Pecs or any other institutions. Some parts of this study are a slightly modified version of the author’s published works in Journals and have been reproduced with my retained copyright”

Signed .....  .....

Date ..... 09 May 2022 .....

# Chapter 1. An Introduction – The Organization of ASEAN

## 1.1. General Background of Research[1]

Before the establishment of ASEAN in 1967, there were many attempts for forming a bloc in the Southeast Asia but unsuccessful. In the year 1954, the Philippines, South Korea, and Japan were pushed by the United States to establish a security alliance organization namely the Organization of Southeast Asia Treaty. In the year 1961, the Southeast Asia Association was initiated by Thailand, Malaysia, the Philippines, and Indonesia. Later, in the year 1963, the stillborn Organization of Maphilindo was attempted by the Philippines, Indonesia, and Malaysia.<sup>2</sup> Nevertheless, the foresaid attempts were unsuccessful.

Finally, the creation of ASEAN was decided, because of the threat of domino consequence after victory of the socialist in Vietnam, by the endorsing of the ASEAN Declaration in 1967 (the declaration is also known as the Bangkok Declaration). This ASEAN Declaration did not intend to create a common market nor mentioned the economic cooperation. Initially, ASEAN priorities aimed at diplomacy and policy cooperation and laid down a framework to deal with territory disputes resolution and to steady relationships among the member states after Post–Vietnam War.<sup>3</sup>

After the Vietnamese threat faded away, ASEAN has recognized an importance in the economic issues, and it launched number of small cooperation mechanisms. During the end of decade of the 1980s to the beginning of the 1990s, they were motivated by external evolutions to propose for establishing a free trade zone, where the ASEAN Free Trade Area (AFTA) was finally established in the year 1992. Moreover, the Asian crisis in 1997 did not stop the endeavor of ASEAN to launch regional integration, and on December 15<sup>th</sup>, 1997, the ASEAN Vision 2020 was affirmed for further at the 2<sup>nd</sup> ASEAN Informal

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<sup>1</sup> Some part of this section is a modified version of the author's published works from "Sengpunya, P. (2019). ASEAN E-Commerce Legal Framework and Alignment of Lao PDR: A Review", published in *Lentera Hukum*, 6(3), 371-392. doi:10.19184/ejllh.v6i3.13709

<sup>2</sup> Chaponni, JR. & Marc Lautier, M. (2016). By Chance or by Virtue? The Regional Economic Integration Process in Southeast Asia. In *ASEAN Economic Community: A Model for Asia-wide Regional Integration?*. Palgrave Macmillan. P.37.

<sup>3</sup> Ibid.

Summit in a city of Kuala Lumpur, Malaysia<sup>4</sup>, and at that same time ASEAN ratified the ASEAN Charter that established an ASEAN's institutional framework.<sup>5</sup>

In 1997, the ASEAN's 30<sup>th</sup> anniversary, the organization announced its ASEAN Vision 2020 which required to form an ASEAN Economic Community (AEC) as an integral portion of the vision for a product base and single market. Six years later, in 2003, the commitment for the creation of the AEC, along with two others pillars, was reaffirmed by the ASEAN Concord II Declaration in Bali, the Republic of Indonesia.<sup>6</sup> In 2007, ASEAN set aim for the creation of the AEC to 2015 in the Cebu Declaration – the declaration that speeds up the creation of an ASEAN Community and they introduced the ASEAN Economic Community Blueprint (2008) for developing a roadmap and driving the implementation of the AEC.

The AEC is regarded as the deepened framework of AFTA for competing with other regional integration. As in the beginning of 1990s, there was a trend on establishing regional integration worldwide, for instance, the NAFTA and the EU. Consequently, the South-East Asian States felt an urgent need of their regional bloc, and an integration of economies in Southeast Asia was greatly necessary. The AEC has not been recognized only as an initiative of regional integration, but it has also been recognized as a significant driver of a novel model for regional integration and development in the South East Asia region in which ASEAN has been performing an important role<sup>7</sup>. The AEC presents a product base and single market along with a free flow of investments, goods and services, skilled labours, and capital. It sets competition policies and consumer protection in the region, promotes e-commerce development, enhances a better intellectual property protection and development of infrastructure, supports SMEs, strengthen development cooperation within the geographical region and a coherent method to economic relations with externals.

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<sup>4</sup> See Introduction of Hanoi Plan of Action. At <https://asean.org/hanoi-plan-of-action/> [02 December 2021].

<sup>5</sup> Chaponni, JR. & Marc Lautier, M. (2016). By Chance or by Virtue? The Regional Economic Integration Process in Southeast Asia. In *ASEAN Economic Community: A Model for Asia-wide Regional Integration?*. Palgrave Macmillan. P.37.

<sup>6</sup> See generally the ASEAN Concord II Declaration (Bali Concord II). At [https://asean.org/?static\\_post=declaration-of-asean-concord-ii-bali-concord-ii](https://asean.org/?static_post=declaration-of-asean-concord-ii-bali-concord-ii) [3 August 2020]

<sup>7</sup> Ponciano Intal, Jr., Fukunaga, Y., Kimura, F., Han, P., Dee, P., Narjoko, D., & Oum, S. (2014). *Asia Rising ASEAN and AEC beyond 2015*. ERIA Jakarta. P. 426.

Furthermore, the AEC has also established frameworks and regional legal structures contributing to an improved environment for business.<sup>8</sup> By establishing ASEAN Community, a legal regime is evolving the “ASEAN Way” through a soft regulatory framework depending on commitment and voluntary action of the member states to make compliance instead of hard law that provides for more specific and precise statement of obligations and corresponding punitive provisions in case of non-compliance.

Electronic commerce has become a new approach of carrying out commercial activities, and it has also recognized as a potential driver tool to promote the growth of economies and tighten development all over the globe.<sup>9</sup> Electronic commerce or e-commerce implies commercial transactions through electronic transmission and processing of data through the internet, plus the transfers of funds electronically, and the electronic data exchange. The e-commerce occurred when the first contract was made through the telegraph in the mid-1800s. Nevertheless, the expression “electronic commerce or e-commerce” is regularly used concerning in commerce expansion through modern communications and computers, especially the cyberspace and internet.<sup>10</sup>

The e-commerce has been introducing many advantages to commercial parties such as larger choice, ease of access, broaden browsing of products, shopping convenience from the internet and great efficiencies. Together with the advantages, there are too some disadvantages, especially privacy invasion and security risks. However, the acceptance of electronic services and products has significantly grown.<sup>11</sup>

By the application of standard legal principles and rule, it will be able to satisfactorily answer legal issues emerging through the usage of e-commerce. To this end, commercial law, law on contract, law on protection of data and privacy and law on protection of consumer, all must recognize email communications, electronic banking, the internet, and cyberspace generally. Nevertheless, the commercial transactions over the internet and cyberspace usually gives an increase to new and unusual contexts, relationships, privileges, and rights

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<sup>8</sup> ASEAN Community. at <https://asean.org/storage/2012/05/7.-Fact-Sheet-on-ASEAN-Community.pdf> [5 August 2020]

<sup>9</sup> Sanderson, C. (2000). EU Forges Ahead on E-commerce. *International Tax Review*, 11(8). p. 51.

<sup>10</sup> Davidson, A. (2009). *The Law of Electronic Commerce*. Cambridge University Press. P. 1.

<sup>11</sup> Ibid

those are inadequate to cope with by traditional law. By this, it has made laws and international treaties necessary to resolve series of questions. Hence, several international organizations have worked on resolving difficulties and legal issues in-e-commerce activities, for examples: “the United Nations Commission on International Trade Law (UNCITRAL)”, “the World Trade Organization (WTO)”, “the Organization for Economic Cooperation and Development (OECD)”, and “the Association of South East Asian Nations (ASEAN)”. The e-commerce law has arisen as a new body of law. The expression “electronic commerce or e-commerce law” refers to all changes and additions to the law that derive from the transactions over internet and cyberspace in this electronic age.<sup>12</sup>

The e-commerce growth has profound implications on almost all aspects of our society and life, which has recently called for new legal framework, both at global and regional level, in order to better regulate the commercial transactions carried out through the utility of the ICTs or internet. Indeed, the quick growth of the utility of ICTs or internet for commercial activities worldwide have pushed law-makers, both at national and international level, to adopt new laws and regulations to govern e-commerce and promote its development.<sup>13</sup> However, it is not possible for a single state to completely regulate e-commerce. Therefore, to harmonise the existing rules and establish legal environment to facilitate e-commerce, cooperation amongst States and international organisations is necessary.

Transformation of digital is currently a trend of the globe. In 2018, the revenue of global e-commerce achieved with 1.6 trillion US dollar, and it is expected to increase the growth to 2.7 trillion US dollar by the year 2023. In 2018, ASEAN achieved revenue of regional e-commerce more than USD72 billion. ASEAN’s regional e-commerce market is expected to increase at average rate of 25%-35% in the next five to ten years, and the ASEAN’s revenue of e-commerce is expected to reach USD240 billion by 2025.<sup>14</sup>

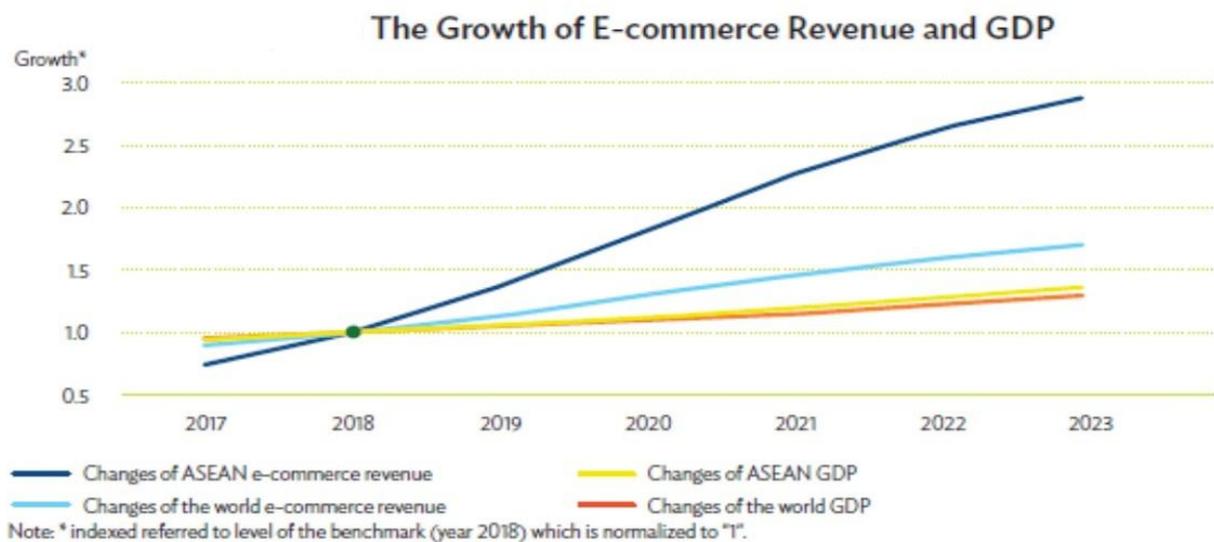
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<sup>12</sup> *Supra Note 63*, at 2.

<sup>13</sup> Ferriter, C. (2001). E-Commerce and International Arbitration. *University College Dublin Law Review*, 1. pp. 51-53.

<sup>14</sup> See e-Commerce SEA 2018: *Southeast Asia Internet Economy Hits an Inflection Point*, Google TEMASEK, p. 4.

Considering the e-commerce growth in 2018 as the year of baseline, the below figure will show the growth of revenue of e-commerce and GDP for both ASEAN and the globe. From 2018 to 2023, the annual growth of the revenue of e-commerce in ASEAN is expected to become four times more than the regional GDP which the total revenue of e-commerce of ASEAN will grow by almost 200%. Under RCEP framework, ASEAN together with India and China, the region could be part of e-commerce epicenter of the globe by 2023, which could take over 40% of the e-commerce market of the globe. At the same time, revenue of e-commerce of the globe is expected to be twice much more than the global GDP.



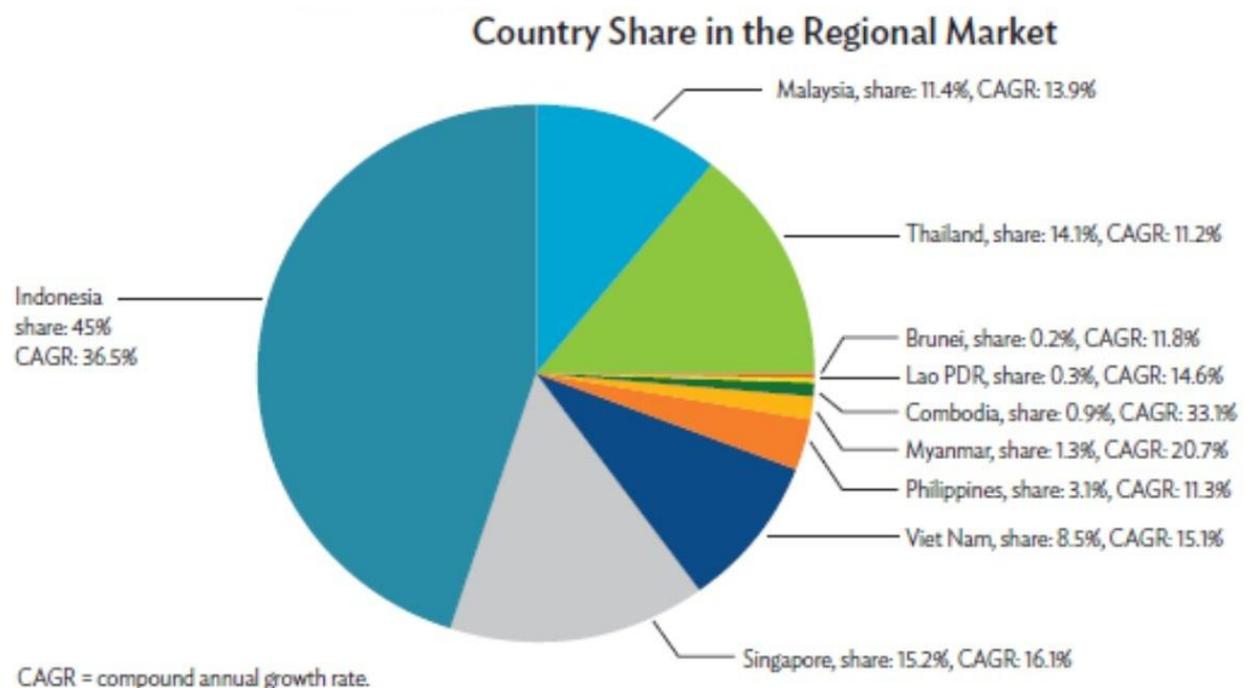
*Source: IMF (2019) and Chen, L. (2020)*

ASEAN is also one of the most internet-used regions globally. As of June 2018, there are over 350 million users of internet in the ASEAN region and the users spend daily on average four hours on their mobile phones for using the internet, in which such amount of the internet using is literally higher than users of any other countries in this globe.<sup>15</sup> More than 50% of population of ASEAN is young generation of age under thirty and they have greater motivation over the digital technology and transactions on internet base.<sup>16</sup>

<sup>15</sup> Google TEMASEK (2018). E-Commerce SEA 2018: Southeast Asia Internet Economy Hits an Inflection Point. pp. 3-4.

<sup>16</sup> See Factsheet on ASEAN Agreement on Electronic Commerce. At <https://www.mti.gov.sg/-/media/MTI/Newsroom/Press-Releases/2018/11/17th-AECC/Annex-A-Factsheet-on-ASEAN->

At national level, the growth of e-commerce of the ASEAN member states is expected to reach an average rate of double-digit. The fastest growing and largest e-commerce market in ASEAN is Indonesia, which the country achieved nearly 45% of revenue of the regional e-commerce in 2018. In the below figure, the revenue of e-commerce of Indonesia is expected to grow to be over 60% in the next 5 years, since the online market of the country is growing at the average rate of over 30% each year. Malaysia Singapore, and Thailand also reached a market share of double-digit average rate, and their e-commerce markets are also expected to become high-speed or grow in a double-digit average rate in the coming years.



*Source: Chen, L. (2020)*

The e-commerce sector in ASEAN is growing quickly. ASEAN takes e-commerce sector into account as an essential contributor to regional integration and to an economic development. By this recognition, ASEAN has continued its deavour developing legal and regulatory framework in order to facilitate the growth e-commerce in the region. Recently, an advisory body of public-private sector was formed by ASEAN with an aiming of

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[Agreement-on-e-Commerce.pdf#:~:text=The%20ASEAN%20Agreement%20on%20e%2DCommerce%20recognises%20the%20potential%20of,digital%20connectivity%20in%20the%20region. \[5 September 2020\].](#)

developing a broad-based and comprehensive plan of action for evolving the ASEAN's e-community.<sup>17</sup>

In the legal aspect towards e-commerce, ASEAN has also keep working on establishing necessary legal infrastructure through the so-called ASEAN Way aiming at best effort to govern the e-commerce transactions in ASEAN Community. The member countries of ASEAN have commenced to work together for developing legal climate to promote of e-commerce in the past decade. Its first initiative towards e-commerce legal and regulatory development is by an adoption the ASEAN Vision 2020 and followed with loads of action plan that present initiatives for development of legal environment for e-commerce activities. To this effort, ASEAN has established its legal framework for facilitating the e-commerce sector in the region by the approach of harmonizing interrelated laws and regulations of the ASEAN member countries.<sup>18</sup> Among other developing regions, ASEAN becomes the first region that prepare harmonized legal infrastructure for e-commerce transactions. The legal harmonization of ASEAN primarily comprises of the common principles and objective for the laws on e-commerce.<sup>19</sup>

Furthermore, ASEAN lately adopted a regional agreement for governing e-commerce activities in its region, namely the ASEAN Agreement on E-commerce. The agreement primarily aims to strengthen legal development and to deepen cooperation, also boost the development of e-commerce within the region. These are significant steps for ASEAN's legalization, especially the development of the laws on e-commerce sector in the ASEAN Economic Community.

## **1.2. The Scope and Research Hypothesis**

The research is to present the legal concept of the Global South Regionalism, in which the research underlines the scope with an investigation of the ASEAN's legal regime, in which focus on the case study of the development of e-commerce law in the ASEAN Economic Community, including its relevant legal challenges concerning the development and

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<sup>17</sup> Anil, S. (2001). *Electronic Commerce in Asia: The Legal, Regulatory and Policy Issues*. Int. Journal of Law and Information Technology, Vol.9 No. 2. Oxford University Press. P. 97.

<sup>18</sup> Art. 5, Agreement on e-ASEAN Framework (2000); and *see generally* ASEAN Economic Community Blueprint 2025 (2015); and ASEAN ICT Masterplan 2015.

<sup>19</sup> UNCTAD (2013). Review of E-commerce Legislation Harmonization in the Association of Southeast Asian Nations – *Summary Executive*. p. ix.

enforcement of the e-commerce laws of ASEAN. This thesis is an investigation rather than a definitive conception of ASEAN law.

The thesis will examine legal system and regional integration taken by ASEAN. The introductory statement about organization of ASEAN below in this chapter shows that ASEAN takes its path by the so-called “ASEAN Way” without supranational elements, and it does not have any power in legislating laws on behalf of the regional organization, unlike the EU. Hence, it is hypothesized that ASEAN has taken an alternative model of legal system or soft legal mechanism in governing the economic relation or help develop uniform rules among the member states.

According to Zerilli, F.M. (2010), soft law can be as effective as hard law<sup>20</sup>. To prove this, this thesis will conclude whether soft legal regime of ASEAN can effectively govern the regional activities. Notwithstanding, it is hypothesized that the soft law taken by ASEAN can be an alternative model for regional institution where the member states do not desire to surrender parts of their national sovereignty, and the legal system could be effective depending upon the pressure and sanctions approach.

ASEAN is not a supranational organization; therefore, it is believed that ASEAN lacks a regional autonomous body in driving compliance and enforcement of regional laws and instruments. By this, it could be difficult for ASEAN to achieve its goal in developing a legal infrastructure in the region. In consideration of this concern, it is hypothesized that legal development in ASEAN could face key difficulties such as the compliance and enforcement of the regional legal framework or legal instruments, harmonization of laws among the member states, and so on.

Furthermore, it can be far behind for ASEAN in handling cross-jurisdiction dispute resolution. However, with the growth of e-commerce and the increasing use of e-commerce in the region, there seems to be an increase in e-commerce transaction disputes too, especially disputes arising from cross-border e-commerce which concern the protection of consumers and their rights. The author hypothesizes that ASEAN without

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<sup>20</sup> Zerilli, F.M. (2010). The Rule of Soft Law: An Introduction. *Focaal – Journal of Global and Historical Anthropology* 56 (2010). Pp. 5–6.

supranational elements could hardly have its regional judicial body in handling cross-jurisdiction disputes, especially the disputes arising from the new emergence of economy like the e-commerce sector. By this, it can lead to complexity in effectiveness of legal protection and finally it can undermine legal system of ASEAN, along with unstable and uncertain path.

To this end, this thesis seeks to answer the questions whether ASEAN can design its alternative regional model of legal system; how effective its legal system can be, for governing its regional activities; should ASEAN's model of legal system be able to achieve the uniform rules of e-commerce; and how ASEAN manages disputes in the region, especially the disputes in connection with emerging e-commerce activities.

### **1.3. Methodology and Structure**

To seek answers to the questions in the section above, the researcher applies Qualitative Research Methodology for carrying out the study. Since this research is to investigate the regional legal development in ASEAN Community where the organization does not have any supranational structure to establish a regional legal structure, which is not like the European Union that is a supranational bloc and has power on legislation for whole community. Hence, this qualitative research method is considered as a suitable research methodology for seeking data about the unexplored regional legal regime of ASEAN, in order to describe and explain legal phenomenon of ASEAN from the inside in multiple ways.

Taking into account to this context, qualitative research method will help researcher to have access to detailed and in-depth data, in which the researcher can use such the data to develop a comprehensive theoretical framework regarding ASEAN legal regime. Therefore, the researcher will be able to create findings which assist to enhance the understanding and knowledge about the phenomenon of ASEAN regional legal development. The utilization of qualitative research approach for this study is in accordance with the deductive method that is based on the fundamental principle of transforming from general data to the development of a specific and comprehensive theoretical concept.

For the collection of data in this research, the researcher will depend upon documents, largely depend on secondary data sources such as from peer reviewed journals and books,

and official document and reports from relevant institutions and organizations, but also primary data source such as laws, regulations, policies, and relevant instruments. The data collected from the relevant sources will be utilized to develop theoretical concept and raise understanding of the phenomenon of ASEAN regional legal development.

An analysis of documents will be divided into two main categories. Firstly, the researcher will analyze books and articles from peer reviewed journal will provide the researcher contents which he can use them for evaluating the validness of the notion of the research, and the research will review official documents and reports from relevant institutions and organizations in order to analyze initiatives and the perspectives of ASEAN regarding its legal regime and legal modernization. Secondly, the research will examine regional policies, laws and instruments and domestic policies, laws and regulations of the ASEAN member states. This will help research monitor whether there is any legal development in the region and in the member states under the legal development framework of ASEAN.

Since this research discusses mainly about the legal system of ASEAN and the development of e-commerce laws in ASEAN, hence it is important to understand about ASEAN and its general background. The Chapter 1 intends to provide a brief introduction of ASEAN, its road of integration and organizational structure. This chapter also it provides the information about the structure and the research methodology of the thesis to help readers understand the concept of the thesis. The Chapter 2 firstly starts with a review of the ASEAN Economic Community, one of three Pillars of the ASEAN Community and it is believed to be flagship of ASEAN regional integration. This will ensure readers to understand the aim and purpose of the establishment of the ASEAN Economic Community and the transformation of the ASEAN Community. Secondly, this chapter will investigate the emergence of legal regime in the ASEAN Economic Community and the legal concept that it is pursuing in order to govern economic integration in the region. This chapter will help answer a question about the unknown legal regime of ASEAN and how ASEAN designs its regional legal system. After understanding legal regime of ASEAN, the Chapter 3 will introduce how ASEAN laws are developed under the ASEAN's legal concept, in the case study of the development of e-commerce laws. Firstly, this chapter will review the international initiatives in developing and promoting e-commerce law at international level in order to help understand the international trend in

developing e-commerce laws worldwide. Secondly, it will examine ASEAN regional policies on development of e-commerce laws in the region, in order to seek answer whether ASEAN policies are in line with international trends. And thirdly, this chapter will investigate which method exactly used by ASEAN in developing e-commerce laws and this will help answer whether ASEAN's legal development method can help the region achieve its goal on e-commerce law.

To demonstrate the effectiveness of the ASEAN's approach in developing and managing legal structure in the region, the Chapter 4 will examine the compliance by ASEAN member states to the regional legal framework, which case study of the selected member states – CLMV countries. Firstly, this chapter will review the development of laws and policies on e-commerce of these countries to help clarify how ASEAN's legal development approach, without supranational elements, can make changes in facilitating regional integration and legal development in the region, as well as establish uniform rules among the member states. Secondly, it will conclude whether the laws and policies of the selected member countries comply with the commitments or provisions agreed under the regional legal framework, where the organization lacks autonomous body in driving compliance and enforcement. This chapter can be an answer to question whether ASEAN Way is effective enough for legal development in order to govern e-commerce activities in the region.

When investigate a legal system of any region, it is also necessary to discuss about legal protection or dispute resolution in order to understand the effectiveness of the legal enforcement of such legal system. By this, the Chapter 5 will examine the regional legal protection in ASEAN. Firstly, this chapter will introduce how ASEAN resolve regional disputes and what mechanisms it has, and whether the ASEAN's mechanism is effective, or it only exists on the paper. Secondly, it will also examine ASEAN's consumer protection in connection with e-commerce matters and investigate the future of dispute settlement mechanism of ASEAN for online consumers, together with a review of international rules dispute resolution for protection of e-commerce-related consumers. It is also evitable that there are difficulties for ASEAN in developing the regional laws and enforcing the laws and instruments; hence, the Chapter 6 will investigate the challenges that ASEAN is currently experiencing. This will significantly contribute an understanding or more clarification regarding strength and weakness of ASEAN Way or regional integration,

which will be able to help readers could better consider ASEAN legal regime and approach of legal development. Finally, the Chapter 7 provides conclusion of the thesis and concluding remarks of the author. This chapter will also repeat or emphasize the main points or problems from the study, so that the author will provide recommendation or concluding remarks accordingly.

#### **1.4. Introduction to the Organization of ASEAN**

ASEAN, officially the Association of Southeast Asian Nations, is a regional establishment of the South East Asian countries, which was formed on August 8<sup>th</sup>, 1967 by the endorsement of the ASEAN Declaration in the city of Bangkok, Thailand (also recognized as the Bangkok Declaration)<sup>21</sup>. ASEAN was found by its so-called five Father Nations – including the Philippines, Singapore, Indonesia, Malaysia, and Thailand. After that, Brunei Darussalam participated ASEAN on January 7<sup>th</sup>, 1984; participated by Vietnam on July 28<sup>th</sup>, 1995; participated by the Lao PDR and Myanmar on July 23<sup>rd</sup>, 1997; and lastly participated by the Kingdom of Cambodia on April 30<sup>th</sup>, 1999. At the present time, ASEAN consists of ten Member States.<sup>22</sup>

Similar to the formation of a regional institution in the Global North regionalism – the European Union (the EU), ASEAN as the regional organization in the South was established to boost regional cooperation amongst its Member Countries with aims and purpose for regional steadiness and peace, and social-economic development. However, the establishment of the EU was to end the frequent wars within Europe, while the establishment of ASEAN was to resolve a territorial dispute within ASEAN where each member had such dispute with at least one of their neighbouring countries, yet it kept those issues aside and focused on economic cooperation.<sup>23</sup>

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<sup>21</sup> Darminto, H., & Soekotjo, H. (October 2018). *Legal Perspective on ASEAN Economic Community*. Diponegoro Law Review, Vol. 03, No. 02. P. 1; and *See also* About ASEAN: Establishment. At <https://asean.org/asean/about-asean/#> [23 May 2019].

<sup>22</sup> Seah, D. (2009). The ASEAN Charter. *The International and Comparative Law Quarterly*. ICLQ, Vol. 58, No. 1. Pp. 197-198; and *See also* About ASEAN: Establishment. At <https://asean.org/asean/about-asean/#> [23 May 2019]

<sup>23</sup> Tripathi, M. (2015). *European Union and ASEAN: A Comparison*. IJR Vol-2, Issue-1. P. 376.

#### 1.4.1. Personality of ASEAN

Unlike the European Union, ASEAN was not formed with a supranational element. ASEAN is not a sovereign nor supranational bloc, it is an inter-governmental organization,<sup>24</sup> grouped by sovereign states of the South East Asia region.<sup>25</sup> The organization is carefully designed in the approach that the current ASEAN Charter is the only proof of the legal reality that ASEAN is provided legal personality as an inter-governmental organization. However, it is important to be noted that in fact ASEAN has already enjoyed the personality under international law before the Charter was born. Therefore, this does not imply that ASEAN does not have any international legal personality before, nor that it possesses the personality in any specific way now.<sup>26</sup>

ASEAN's capacity to build relations or cooperate with other nations or organizations and its competence to conclude agreements or treaties under international law has been affected by its legal personality as an inter-governmental institution. The legal personality of ASEAN given by Article 3 of the Charter is to assist to support external comprehension of ASEAN as a political performer on the global stage, although the certain nature of ASEAN's legal feature may remain unclear. It is apparently true that the essence of the competence of ASEAN under international law has not been altered by the ASEAN Charter.<sup>27</sup>

As ASEAN has a status as an inter-governmental organization, hence it cannot be a party to an international treaty. It largely depends on its component instruments to restrict the organization's legal personality and the necessary powers.<sup>28</sup> The China-ASEAN Free Trade Area (CAFTA) can be the example to confirm that the organization cannot be a party, on behalf of the whole bloc, to an international agreement, unlike the EU that the Union can

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<sup>24</sup> Damos, A.D. (2013). *Treaty Making Power in ASEAN: Legal Analysis on ASEAN Practices*. Jurnal *Opinio Juris*, Vol. 14. P. 11; and *See also* Art. 3, the ASEAN Charter.

<sup>25</sup> Davidson, Paul J. (1994). *ASEAN: The Legal Framework for Its Trade Relations*. *Int. J.* XLIX SUMMER. P. 592.

<sup>26</sup> *Supra* Note 10.

<sup>27</sup> Seah, D. (2009). The ASEAN Charter. *The International and Comparative Law Quarterly*, ICLQ. Vol. 58, No. 1. Pp. 197–212

<sup>28</sup> Wang, J. (2006). International Legal Personality of ASEAN and the Legal Nature of the China-ASEAN Free Trade Agreement. In *China-ASEAN Relations: Economic and Legal Dimensions*, John Wong, Zou Keyuan, Zeng Huaquan, eds., Singapore: World Scientific, 2006. P. 14; and *See also* *Supra* Note 10, at 16.

be a party to international agreement in the name of the member states of the Union<sup>29</sup>. Arguably, along with the conclusion of political engagements for strengthening ASEAN's institutional character, the parties' subsequent conducts are an indicator that ASEAN is an inter-governmental organization with some power. Nevertheless, there is no instruments providing absolute legal power nor treaty-making power to ASEAN to for concluding international treaty.<sup>30</sup>

ASEAN rejects being supranational organization like the European Union, thus the ASEAN's legal framework is largely based on regime of international legal framework. ASEAN does not have a formal structure with supranational law-making power<sup>31</sup> that can issue legal instruments binding for Member States. Dissimilar to the EU that the bloc has the European Parliament as a legislative body for the Union and it has the power to legislate for the Union as whole, as well as the power to veto budgets and appointments.

#### 1.4.2. Structure of ASEAN

The structure of ASEAN consists of eight organs<sup>32</sup> as below:

The ASEAN Summit, consist of leaders of government or state of the ASEAN member countries, serves as the highest organ of ASEAN for decision-making, implementation and compliance, and disputes settlement. It has the sole control of all major areas of governance in ASEAN. The ASEAN Summit is given a role as the ASEAN's supreme body of policy-making.<sup>33</sup> It is the highest authority to make a decision on severe violation to the ASEAN Charter or non-conformity of ASEAN instruments by any member states.<sup>34</sup> Any disputes remain unresolved shall also be transferred to the ASEAN Summit for making further decision.<sup>35</sup> This ASEAN Summit is organized twice in a year and it is hosted for organizing the ASEAN Chairmanship by the member countries.<sup>36</sup> The Country-in-Chair is headed by

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<sup>29</sup> European Council, "The role of the Council in international agreements – Exclusive or shared competency?". At <https://www.consilium.europa.eu/en/council-eu/international-agreements/> [03 December 2021].

<sup>30</sup> *Supra Note* 14.

<sup>31</sup> Muntarbhorn, V. (1987). *The Challenge of Law: Legal Cooperation among ASEAN Countries*. Bangkok: Institute of Security and International Studies. P. 17.

<sup>32</sup> *See generally* Chapter IV, ASEAN Charter.

<sup>33</sup> Art. 7(2a), The Charter.

<sup>34</sup> Art. 20(4), Art. 27(1), The Charter

<sup>35</sup> Art. 26, The Charter.

<sup>36</sup> Art. 7(3a), The Charter.

an ASEAN government head which is filled by rotation amongst the member countries' leaders.

The ASEAN Coordinating Council, include the foreign ministers of the ASEAN member countries, acts as the policy and legislation initiator in the ASEAN Community and as the link or intermediary between the ASEAN Summit and the ASEAN Community Council and the interrelated bodies for the implementation of the agreement or decisions of the Summit.<sup>37</sup> It prepares the assembly of the ASEAN Summit and collaborate with the ASEAN Community Councils to improve the policy consistency, cooperation and efficiency of the three Councils. It also takes into account the Secretary-General of ASEAN's annual report over the ASEAN's works and the works of the operations and functions of the ASEAN Secretariat. As its name implies, the work of the Coordinating Council is that it coordinates the works of the main organs of ASEAN and to provide feedback about them to the ASEAN Summit.

The ASEAN Community Councils comprises of the three pillars – Council of ASEAN Political and Security Community, Council of ASEAN Economic Community, and Council of ASEAN Social and Cultural Community.<sup>38</sup> The ASEAN Community Councils are, along with the Sectoral Ministerial Bodies of ASEAN (Ministerial Body/Bodies), the main implementing organs in ASEAN. The Community Councils, whose members are designated by member states, have responsibility in implementing the ASEAN Summit's relevant decisions. Each of the ASEAN Community Council must include the interrelated Ministerial Body, under its competence, which is in turn specifically tasked with implementing the ASEAN Summit's agreements and decisions under its designated areas of responsibility and also have responsibility to submit recommendations and reports to the respective Community Councils.<sup>39</sup>

The Sectoral Ministerial Bodies of ASEAN is a principal organ of ASEAN that has a role in implementing the ASEAN Summit's decisions and agreements, and functioning in conformity with their respective given mandates, enhancing necessary collaboration in their

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<sup>37</sup> Art. 8(1,2a-f), The Charter.

<sup>38</sup> Art. 9(1), The Charter.

<sup>39</sup> Art. 9(2), Art. 10, The Charter.

respective areas in order to boost the integration of ASEAN, as well as submitting recommendations and reports to their respective Councils of ASEAN Community.<sup>40</sup>

The Secretary-General of ASEAN and the ASEAN Secretariat are an organ that acts as a central administrative body for ASEAN.<sup>41</sup> The Secretary General of ASEAN is assigned for a fixed term of five-years and will be selected on the basis of integrity, capability and professional experience.<sup>42</sup> Moreover, member states undertake to respect the independence of the Secretary-General and the Secretariat by refraining from influencing them in carrying out their duties.<sup>43</sup> The ASEAN Secretariat's institutional capacity is also being enhanced with the appointment of not just two but four Assistant Secretary-General to the Secretary-General of ASEAN. Two of the Assistant Secretary-General will be appointed based on excellence while the other two will be appointed from ASEAN nationals dependent upon rotation according alphabet of names of the member countries.<sup>44</sup> The ASEAN Secretariat whose functions not only performs administrative or secretariat function for ASEAN but also entrusted with monitoring and facilitating the advance in implementing the ASEAN's decisions and agreements.<sup>45</sup> The Secretary-General of ASEAN and the ASEAN Secretariat is currently granted a central role in monitoring alignment with the findings, decisions or recommendations which result from an dispute resolution mechanism of ASEAN.<sup>46</sup> The Secretary-General is additionally given a prominent role in the AICHR by bringing relevant issues to the Commission in relation to his role in monitoring the ASEAN agreements implementation and submitting an yearly report on the ASEAN's work.<sup>47</sup> The Secretariat is also to hand imperative secretarial assistance to the AICHR to make sure of its virtual operation.<sup>48</sup>

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<sup>40</sup> Art. 10, ASEAN Charter.

<sup>41</sup> D. J. Paul, *Ibid*, p. 591.

<sup>42</sup> Art. 11(1), The Charter.

<sup>43</sup> Art. 11(9), The Charter.

<sup>44</sup> Art. 11(6), The Charter.

<sup>45</sup> Art. 11(2b), The Charter; Protocol Amending the Agreement on the Establishment of the ASEAN Secretariat, Manila, the Philippines, 22 July 1992. At <http://agreement.asean.org/media/download/20160901032000.pdf> [03 November 2020].

<sup>46</sup> Art. 27(1), The Charter.

<sup>47</sup> Par. 7.1, ToR of AICHR.

<sup>48</sup> Par. 7.2, ToR of AICHR.

A Committee of Permanent Representatives (Committee) includes with Permanent Representative of each member states of ASEAN which will have an Ambassador rank to carry out their duties in Jakarta.<sup>49</sup> Unlike the COREPER in the EU, the Committee does not perform any decision-making function nor does it have any precise or specific responsibility provided in The Charter in the three core areas of regional governance.<sup>50</sup> The Committee's function is vaguely defined as providing support or coordinating the work of other organs of ASEAN, with the exception of the ASEAN Summit.<sup>51</sup>

The National Secretariats of ASEAN serves as the domestic focal point of ASEAN member states and serve as the information repository of all matters in connection with ASEAN at the national level. They also coordinate for implementing ASEAN's decision at the national stage, collaborate and assist the national preparedness of ASEAN's meetings, promote identity of ASEAN and awareness regarding ASEAN at the national stage, as well as and contribute in building ASEAN Community.<sup>52</sup>

The Human Right Body of ASEAN is a body with an aim of boosting and protecting fundamental freedom and human rights in the ASEAN region, in compliance with doctrines and purpose of the ASEAN Charter, where the term of reference for the operations of the body are set by the Foreign Ministers of ASEAN's Meeting (the Coordinating Council of ASEAN).<sup>53</sup> The foresaid term of reference is called the "Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights" (ToR of AICHR). Under this ToR of AICHR, the Committee is given clearer function in being an intermediary between the Commission and the ASEAN Foreign Ministers Meeting (AFMM) on matters of human rights. It prepares and submit of the workplan and budget of the AICHR for approval by the AFMM.<sup>54</sup> It can also consider and present a request to

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<sup>49</sup> Art. 12(1), The Charter.

<sup>50</sup> The COREPER is a Committee attached to the Council of European Union staffed by senior national officials and whose function is to prepare the work of the latter in approving legislation.

<sup>51</sup> Art. 12(2d) of The Charter provides however that is responsible in facilitating cooperation with external partners of ASEAN.

<sup>52</sup> Art. 13, the ASEAN Charter.

<sup>53</sup> Art. 14, the ASEAN Charter.

<sup>54</sup> Pars. 8.1 & 8.2, Terms of Reference of the AICHR (ToR), 23 October 2009. At <https://www.asean.org/storage/images/archive/publications/TOR-of-AICHR.pdf> [20 August 2020].

the AFMM for amendment of the ToR by any ASEAN member countries.<sup>55</sup> The Committee is able to perform an outstanding role in the works and functioning of such newly constituted AICHR.

The Foundation of ASEAN is another organ of ASEAN that assist the Secretary-General and collaborate with the other bodies of ASEAN aiming to assist the building of the ASEAN Community. The Foundation is tasked for promoting identity of ASEAN and raise awareness regarding ASEAN, promote people-to-people interaction, civil society, academia, as well as promote closer cooperation between the business or private sector and other interrelated stakeholders in the region. It has responsibility to help the Secretary-General in preparing and submitting reports, through the Coordinating Council of ASEAN, to the ASEAN Summit.<sup>56</sup>

## **1.5. Introduction to ASEAN Regional Integration**

### **1.5.1. The origins of ASEAN regional integration**

At the beginning of the establishment of ASEAN was primarily aimed at political concerns. Until 1991, the ASEAN Free Trade Area (AFTA) was established<sup>57</sup>, which is considered as the achievement in liberal economic reforms in ASEAN.<sup>58</sup> It is possible to say that the AFTA is a key initial model of ASEAN regional integration. This idea in establishing a regional free trade zone was a progress coinciding with the majority of member states' desire for a step-by-step movement to ASEAN regional integration.<sup>59</sup>

The procedure of ASEAN regional integration was initiated by the signing of two economic instruments – the AFTA Agreement and the Enhancing Economic Cooperation Framework Agreement in Singapore, at the ASEAN Summit in the year 1992. These documents provided the core objective of regional cooperation in economy intending to

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<sup>55</sup> Par. 9.3, ToR of AICHR.

<sup>56</sup> Art. 15, the ASEAN Charter.

<sup>57</sup> The Agreement on the CEPT Scheme for the AFTA was signed by the ASEAN Heads of State on 28 January 1992 at Singapore during the Fourth ASEAN Summit.

<sup>58</sup> Ponciano Intal, Jr. (1997). *ASEAN and the Challenge of Closer Economic Integration*. Philippine Institute of Development Studies. Pp. 3-4; and Stubbs, R. (2000). *Signing on to liberalization: AFTA and the politics of regional economic cooperation*. *The Pacific Review*, Vol. 13, No. 2. Pp. 297-318.

<sup>59</sup> Chirathivat, S., Pachusanond, C., & Wongboonsin, P. (April 1999). *ASEAN Prospects for Regional Integration and the Implications for the ASEAN Legislative and Institutional Framework*. ASEAN Economic Bulletin, Vol. 16, No. 1. Pp. 28-30.

promote the development of economies in the ASEAN member states as are significant to ASEAN's regional prosperity and stability.<sup>60</sup> The Enhancing Economic Cooperation Framework Agreement includes the broad cooperation on economy outlines on the basis of the global trade liberalization principle, as well as the mutual benefit principle for stronger economic relation between the member countries, while the target of AFTA is to improve ASEAN's competitiveness as a commodity base in the global market<sup>61</sup> by getting rid of obstacles on tariff and non-tariff.

Regional integration in ASEAN is a reaction to combined economic and political procedures in the ASEAN member states and in the region itself. The political repercussion of the economic crises, during the recession in mid-80s and the financial crisis in 1997, drew attention of the member states to pioneer a deeper regional economic cooperation and started to discuss about institutional reforms in ASEAN. During the financial crisis in 1997, Most ASEAN economies were struck which crumbled the economies and regimes simultaneously on the crisis tension. Thus, the integration of economies of the region is considered as a key strategy to restore the economies in the member states, intending to increase the economic competitiveness and expand the external market of member states.<sup>62</sup> Economic integration through the CEPT/AFTA, as a key policy initiative, was considered as a political decision at the political decision of ASEAN.<sup>63</sup> It was state-centred project with very minimal participation of private stakeholders, as shown by the relatively short period of time it was negotiated among member states and the brevity of its provisions, almost ten provisions.<sup>64</sup>

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<sup>60</sup> Signed by the Heads of State of ASEAN 6 in Singapore, 28 January 1992. At [https://asean.org/?static\\_post=singapore-declaration-of-1992-singapore-28-january-1992](https://asean.org/?static_post=singapore-declaration-of-1992-singapore-28-january-1992) [21 August 2020].

<sup>61</sup> Questions and Answers on the CEPT, AFTA Reader, Volume 1, (November 1993). At [https://asean.org/?static\\_post=afta-reader-volume-1-november-1993-table-of-contents](https://asean.org/?static_post=afta-reader-volume-1-november-1993-table-of-contents) [2 September 2020].

<sup>62</sup> Guangsheng, L. (August 2006). *Assessment on Performance of ASEAN Economic Integration*. International Review, Vol. 44. Pp 68-71.

<sup>63</sup> Cuyvers, L., De Lombaerde, P., & Verherstraeten, S. (2005). *From ASEAN to AFTA*. Centre for ASEAN Studies, CAS Discussion Paper No. 6. At <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.526.2840&rep=rep1&type=pdf> [2 September 2020].

<sup>64</sup> Stubbs, R. (2000). *Signing on to liberalization: AFTA and the politics of regional economic cooperation*. The Pacific Review, Vol. 13, No. 2. Pp. 303-306.

AFTA is considered as a relative success, particularly when considered with the broader project of regional integration. However, ASEAN regional integration as a strategy to improve economic growth of the member states has remained indirect and limited.<sup>65</sup> AFTA for one was initially obstructed by deterioration of commitments of the member states and by its institutional weakness.<sup>66</sup> The scope of CEPT/AFTA is likely covered only with manufactured goods, including processed agricultural goods, capital products, and those goods which are in outside the definition of agricultural goods.<sup>67</sup>

Unlike in the European Union where the removal of non-tariff barriers was an important goal through legislation and judicial enforcement, removal of non-tariff barriers in ASEAN is conditional ‘upon concessions enjoyment practicable to those projects’<sup>68</sup> and is highly discretionary on member states. The agreement also provides a common exception clause that permits countries to perform and measures what are essential to protect their domestic security, human, morals of public, animal, or life of plant or people’s health, value of history and archaeology, and artistical articles.<sup>69</sup>

Formal initiative of ASEAN regional integration was taken place at the peak of the 1997 Asian crisis when the Hanoi or ASEAN Vision 2020 was announced at the 2<sup>nd</sup> ASEAN Unofficial Summit in Malaysia. The member countries’ leaders of ASEAN agreed to map a new pathway for the year 2020, called the “*ASEAN 2020: Partnership in Dynamic Development*”, in which it will enlighten deeper integration of economies amongst the ASEAN member states.<sup>70</sup> ASEAN Vision 2020 affirms commitment of ASEAN to open and inclusive regional integration and frames an extensive programme for economic cooperation which is based on the establishment of “a free flow of investments, goods and services, skilled labours and capital; equitable development of economy; and lowered

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<sup>65</sup> Guangsheng, L. (August 2006). *Assessment on Performance of ASEAN Economic Integration*. International Review, Vol. 44. P. 71.

<sup>66</sup> *Supra Note* 50, at 306-308.

<sup>67</sup> Art. 3, CEPT/AFTA Agreement. At [https://asean.org/?static\\_post=agreement-on-the-common-effective-preferential-tariff-cept-scheme-for-the-asean-free-trade-area-afta](https://asean.org/?static_post=agreement-on-the-common-effective-preferential-tariff-cept-scheme-for-the-asean-free-trade-area-afta) [3 September 2020].

<sup>68</sup> Art. 5.A, CEPT/AFTA Agreement.

<sup>69</sup> Art. 9, CEPT/AFTA Agreement.

<sup>70</sup> ASEAN Vision 2020, Kuala Lumpur, Malaysia, 15 December 1997. At [https://asean.org/?static\\_post=asean-vision-2020](https://asean.org/?static_post=asean-vision-2020) [05 June 2020].

disparity of socio-economy and reduced poverty”<sup>71</sup>. The Hanoi Action Plan (HAP) was subsequently announced in 1998 during the sixth ASEAN Summit in Hanoi city which outlined an action plan for regional economic integration.

#### 1.5.2. The Framework of ASEAN Regional Integration – the ASEAN Charter

When discussing about ASEAN regional integration, one of the most important documents of ASEAN will be the Vientiane Action Program (VAP). It represents an express acknowledgement by the member countries of the political on the basis of cooperation of economy and recognition of the imperativeness for broad public support for the integration in the region which declared the creation of the ASEAN Charter (The Charter). In order to focusing on enthusiastic goal of ASEAN for strengthening the integration of the region and lowering the barriers for development amongst the ASEAN member countries, the leaders of member countries declared in the VAP that “*We recognize the need to strengthen the ASEAN and shall work towards the development of an ASEAN Charter.*”<sup>72</sup>

At their eleventh ASEAN Summit in Malaysia in 2005, the member countries of ASEAN affirmed the ASEAN Charter Establishment Declaration which unequivocally acknowledged the significance of an institutional structure appropriate to the challenges of the ASEAN Community and the need for a charter that will play a role as a solid basement for the ASEAN in the future.<sup>73</sup>

The final adoption of the Charter on 20<sup>th</sup> November 2007 at the thirteenth ASEAN Summit is expected to turn a new leaf on the forty-year history of ASEAN. The Charter was enforced on December 15<sup>th</sup>, 2008, after all member countries of ASEAN deposited their ratification instruments. The objective of the Charter is to give an institutional structure and legal personality to ASEAN intending to enable the organization to accelerate the regional integration from 2015 to 2020.<sup>74</sup> The leaders of ASEAN announced their

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<sup>71</sup> Ibid.

<sup>72</sup> Par. 5, Sec. 1, Vientiane Action Program. At <https://www.asean.org/storage/images/archive/VAP-10th%20ASEAN%20Summit.pdf> [05 June 2020].

<sup>73</sup> Kuala Lumpur Declaration on the Establishment of the ASEAN Charter (Kuala Lumpur Declaration), 12 December 2005, Kuala Lumpur, Malaysia. At <https://asean.org/asean/asean-charter/kuala-lumpur-declaration/> [4 September 2020].

<sup>74</sup> The decision to speed up integration to 2015 was approved by ASEAN leaders on the occasion of the 12th ASEAN Summit in Cebu, Philippines on January 2007.

*“conviction that an ASEAN Charter will serve as a firm foundation in achieving one ASEAN Community by providing an enhanced institutional framework as well as conferring a legal personality to ASEAN”.*<sup>75</sup>

The ASEAN Charter is a historic step for a regional organization for ASEAN in which it aimed at giving ASEAN a legal personality and a more rules-based regime, better known for its informal and flexible manner of cooperation and a form of decision-making dependent upon ‘ASEAN Way’ – consultation and consensus. The ASEAN Way not only describes the conduct of member states’ relations but concludes the core principles and values of the organization which are based on the stringent adherence to the principles of non-interference and national sovereignty. The ASEAN Charter represents an evolution of new framework for regional cooperation in ASEAN. It came out with initiatives of ASEAN in promoting regional integration.

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<sup>75</sup> Cebu Declaration on the Blueprint of the ASEAN Charter, 12th ASEAN Summit in Cebu, Philippines on 13 January 2007, at <http://hrlibrary.umn.edu/research/Philippines/Cebu%20Declaration%20on%20the%20Blueprint%20of%20the%20ASEAN%20Charter.pdf> [06 June 2020].

## Chapter 2. ASEAN Economic Community and The Legal regime

### 2.1. Introduction

This chapter introduces the transformation of ASEAN from its highly political past to its new direction of economic cooperation. This chapter provides understanding on ASEAN Economic Community, a deepened framework of ASEAN regional integration. It also examines the legal concept and legal emergence in the ASEAN Economic Community.

Economic relation within ASEAN has been developed quite slow due the dominance of domestic interest of the member countries. Despite of this, the evolution of legal and regulatory framework for governing economic relation in ASEAN Community has been progressing. The framework evolution has been envisaged through the advance of the formation of an ASEAN free trade area (AFTA).<sup>76</sup> Like the move at the broader international level to a better rules-based regime in order to govern international relation on economics (for example, the developments within the WTO),<sup>77</sup> the developments towards greater legalism within ASEAN in order to govern the economic relations amongst the member countries has been revealed too. At the beginning, ASEAN had an extremely loose regulatory framework for their economic relation and meanwhile the member states were unwilling to be too legalistic for their cooperation. Even though at the present the ASEAN members states still desire to carry out their economic relations through the “ASEAN way”, however, there has been a legal and regulatory framework development for governing economic relations among the member states.<sup>78</sup>

ASEAN organization was founded at a time of political instability and uncertainty and military conflict and tension in the region; therefore, the ASEAN foundation was primarily aimed at political concerns. Even though the member states attempted a firm fundamental

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<sup>76</sup> Davidson, Paul J. (1994). *ASEAN: The Legal Framework for Its Trade Relations*. International Journal, Vol. 49, No. 3, 588-612. The World Trade Regime. P. 601.

<sup>77</sup> See, *among others*, Jackson, J. H. (1997). *The World Trading System: Law and Policy of International Economic Relations*, (2nd ed) Cambridge/London: The MIT Press; Trebilcock, M. J. & Howse, R. (1999). *The Regulation of International Trade*, (2nd ed.), London/New York: Routledge.

<sup>78</sup> For a more info, see Davidson, Paul J. (2002). *ASEAN – The Evolving Legal Framework for Economic Cooperation*. Singapore: Times Academic Press.

for development,<sup>79</sup> and even though economic cooperation was included in its founding document,<sup>80</sup> but they focused less on the economic field and focused more on political matters. ASEAN practiced a great remarkable role in keeping regional stability and peace. Nevertheless, the regional economic cooperation aims gradually become more protuberant within ASEAN, and as the development of economic relation *inter se* increases, more of a legal framework to regulate the relation is in need.

ASEAN's initial organizational structure was very loose, and a firm regional organization was avoided. Yet, an important ASEAN's evolution as a legal entity took place in 1976 when the Secretariat of ASEAN was established. The objective of the establishment of the Secretariat is to serve as ASEAN's central administrative organ for promoting a better effectiveness in the coordination amongst other organs of ASEAN and greater effectiveness of the implementation of ASEAN agreements, activities, and projects. In 1993, ASEAN decided to restructure the ASEAN Secretariat providing a broader set of responsibilities and functions for coordinating, advising, initiating and implementing ASEAN activities. Even though the ASEAN Secretariat has not been given any real power of decision-making, yet the evolution by the formation of the ASEAN Secretariat shows the development of ASEAN as a legal entity and this could be recognized as a primary movement to formalize ASEAN's legal personality as an entity regulated by laws and by its own constitution.<sup>81</sup>

Nevertheless, unlike the EU, the present structure of ASEAN does include no legal superstructure over the economy of the region. Even though ASEAN has had a gradual step towards development of the organization and institutions as a legal entity, an emergence of a firm identity of ASEAN has been being limited by the preoccupation of

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<sup>79</sup> Garnaut, R. (1998). ASEAN and the Regionalization and Globalization of World Trade. *ASEAN Economic Bulletin*, 14(3). p. 215. ISEAS – Yusof Ishak Institute.

<sup>80</sup> Joint Communiqué, First Ministerial Meeting, Bangkok, 8 August 1967—The ASEAN Declaration, 1967 reproduced in Davidson, Paul J. (1995). *Trading Arrangements in the Pacific Rim*. New York/London/Rome: Oceana Publications, Inc., Document I.B.2.

<sup>81</sup> Ingles, J.D. (1981). Problems and Progress in Regional Integration: The Case of ASEAN. In R.P. Amand & P.V.-Quisumbing, eds., *ASEAN Identity, Development and Culture*. Manila: U.P. Law Center and East-West Center Culture Learning Institute 217. P. 224.

consensus and by hesitation of a firm identity of ASEAN together with powers that are parallel to those of the member states in some fields.<sup>82</sup>

## 2.2. ASEAN Economic Community

To fully understand the ASEAN's legal regime, it is imperative to understand the ASEAN Economic-Community (AEC) – the integral force of ASEAN's regional integration and its Community-building. The formal formation of the AEC may be considered as the development of ASEAN's legal regime in the regional integration.

ASEAN regional integration initiative started in 1992 that brought an affirmation of the AEC-Blueprint in 2007 which set a comprehensive plan for an establishment of the AEC. A continuing agenda for such an establishment of the AEC was the formation of a free trade zone of ASEAN, meanwhile a new AEC Blueprint 2025 was adopted aiming to solve the gap between paper commitments and implementation.<sup>83</sup> ASEAN has accomplished modest gains, nevertheless it suffocates the realization of its far-reaching goals and the effective functioning of the AEC.

### 2.2.1. Building the ASEAN Community – the Transformation

Since its foundation, the ASEAN has evolved continuously. Given its simple roots, a primary transformation in both ideological content and structure was important to the survival of ASEAN in future ahead.<sup>84</sup> The membership expansion along with the known fear of the speedy development of China and India ushered in the changes in the ASEAN<sup>85</sup> which brought the awareness that the ASEAN was in need for reinvention.<sup>86</sup> The *Declaration of ASEAN Concord*<sup>87</sup> provided an important remark as the first cornerstone of ASEAN to economic cooperation. The aim of the declaration was to enlarge cooperation

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<sup>82</sup> Muntarbhorn, V. (1992). ASEAN and the Treaty-Making Process. In *ASEAN Economic Cooperation for the 1990s*. Philippines: Philippine Institute for Development Studies and ASEAN Secretariat 106. P. 116; and See also Santiago, J. (1995). A Postscript to AFTA's False Start: The Loss of Sovereignty Issue. *ASEAN Economic Bulletin*, 12(1), at 18.

<sup>83</sup> ASEAN Economic Community Blueprint 2015. Signed 15 December 2015, Kuala Lumpur.

<sup>84</sup> LIN, Chun H. (December 2010). ASEAN Charter: Deeper Regional Integration under International Law? *Chinese Journal of International Law*, Volume 9, Issue 4. at 821.

<sup>85</sup> Tay, S. S. (2008). The ASEAN Charter: Between National Sovereignty and the Region's Constitutional Moment. Singapore Year Book of International Law, 12. p. 151.

<sup>86</sup> Tay, S. S., Estanislao, J.P., & Soesastro, H. (2001). Reinventing ASEAN. ISEAS Publishing.

<sup>87</sup> ASEAN Concord Declaration (1976).

amongst ASEAN member countries in social, economics, political, and cultural areas. It primarily provided the trade and industrial cooperation general framework that ushered in an establishment of a number of programmes including the ASEAN Industrial Projects,<sup>88</sup> the ASEAN Preferential Trading Agreements (PTA),<sup>89</sup> the ASEAN Industrial Joint-Venture Scheme,<sup>90</sup> and the ASEAN Industrial Complementation.<sup>91</sup> However, none of those efforts yielded sufficient outcomes in the evolution of intra-regional investment and trade, instead the latter is explained as a “fruitless effort”<sup>92</sup> due to the flexibility of PTA that raised ubiquitous abuse of the lists of exclusion which has debilitated the PTA mechanism to the ridiculous point by critics.<sup>93</sup>

The final transformation of ASEAN Community took place in December of the year 1997 when the member states’ leaders of ASEAN adopted the Hanoi or ASEAN Vision 2020.<sup>94</sup> They attempted to establish a stable and peaceful community and seek a deeper integration of economy among the member states in the region.<sup>95</sup> To that end, the Hanoi Vision 2020 transformed the ASEAN’s security and originally political inter-governmental institution and began to steer it in a new pathway or direction. Nevertheless, it was argued that the morphology of ASEAN emerged from external threat perceptions, particularly the growth of China’s and India’s economic growth, rather than from the internal benefits confidence of stronger intraregional integration.<sup>96</sup> The afterward effect of the crisis of Asian finance in 1997 was another impulsion for the most significant transformation of ASEAN. At the

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<sup>88</sup> Basic Agreement on ASEAN Industrial Projects (1980).

<sup>89</sup> ASEAN Preferential Trading Agreements (1977).

<sup>90</sup> ASEAN Industrial Joint Venture Scheme (1983).

<sup>91</sup> Basic Agreement on ASEAN Industrial Complementation [1981].

<sup>92</sup> White, George O. III. (2000). *From Snowplows to Siopao – Trying to compete in a Global Marketplace: The ASEAN Free Trade Area*. 8 Tulsa J. Comp. & Int’l L. P. 177.

<sup>93</sup> Many observers mocked the inclusion of snow ploughs and other Southeast Asian nonessentials in the exclusion list, see, Kenevan, P. & Winden, A. (1993). *Flexible Free Trade Area: The ASEAN Free Trade Area*, 34 Harv. Int’l L.J. 224; White, George O. III (2000). *From Snowplows to Siopao—Trying to compete in a Global Marketplace: The ASEAN Free Trade Area*, 8 Tulsa J. Comp. & Int’l L. 177.

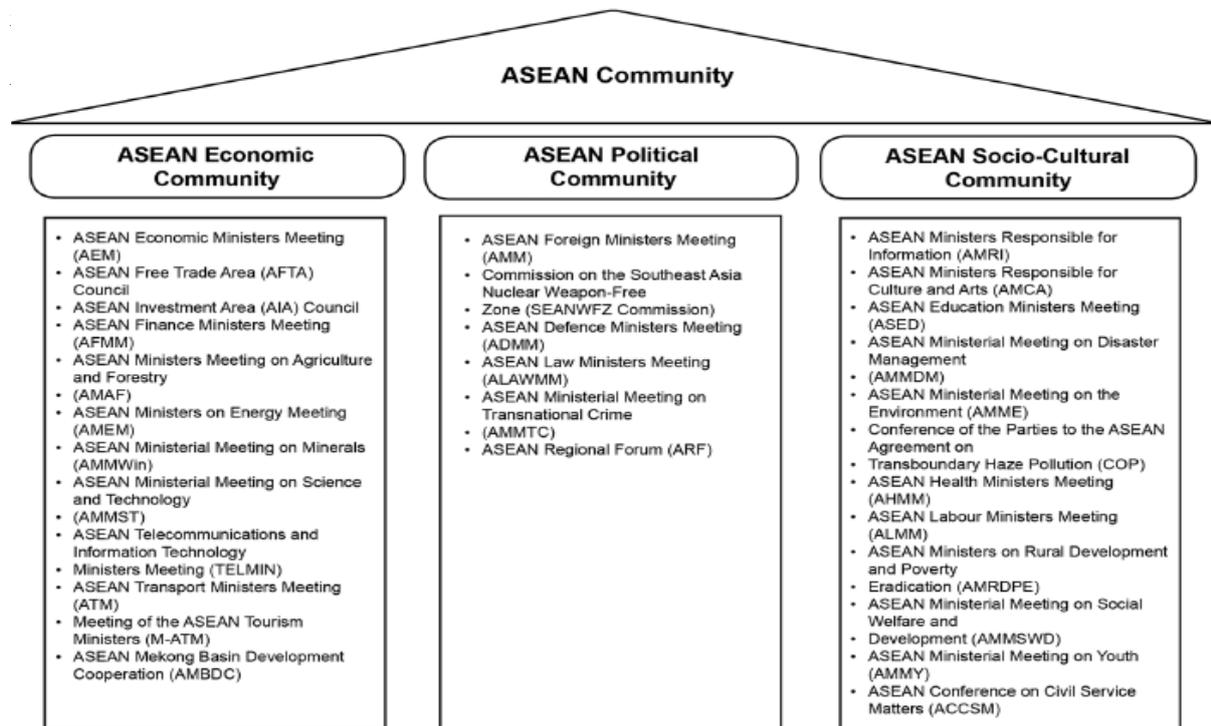
<sup>94</sup> ASEAN Secretariat, *ASEAN Vision 2020* (1997).

<sup>95</sup> See ASEAN Vision 2020.

<sup>96</sup> Chia, S., & Plummer, M. (2015). *ASEAN Economic Cooperation and Integration: Progress, Challenges and Future Directions* (Integration through Law: The Role of Law and the Rule of Law in ASEAN Integration). Cambridge: Cambridge University Press, at 3.

time, ASEAN was not able to react to crises, and it thus recognized the necessity of better regional cooperation.<sup>97</sup>

Following the ASEAN Vision 2020, on October 7<sup>th</sup>, 2003 the member states' leaders of ASEAN adopted second ASEAN Concord Declaration which declared that the ASEAN Community must be established in three community pillars, including the ASEAN Economic Community (AEC), the ASEAN Social and Cultural Community (ASCC), and the ASEAN Political and Security Community (APSC).<sup>98</sup> A Blueprint for each of the community has been adopted detailing programme of action and timetable for



Source: ASEAN Community Blueprint.

Under the ASEAN Community, the APSC embraces the security approach at regionalism in ASEAN which is to provide a regional umbrella to the member states' security dilemmas. It creates a significant component of an evolving comprehensive approach to the security

<sup>97</sup> Basu Das, S. (2015). *The ASEAN Economic Community and Beyond: Myths and Realities*. ISEAS–Yusof Ishak Institute. pp. 15-16.

<sup>98</sup> ASEAN Concord II Declaration (2003). [*hereinafter* ASEAN Concord II, also alternatively known as Bali Concord II]

<sup>99</sup> These are: Blueprint for ASEAN Economic Community adopted in 2007, Blueprint for ASEAN Political and Security Community, Blueprint for ASEAN Socio-Cultural Community, both adopted on 1 March 2009, at 14th ASEAN Summit in Cha-Am, Thailand.

issues of the member countries. The ASEAN-Community also carries a strong element of regional identity-building. For ASEAN, the economic development is a priority objective of Community-building and the AEC is to be the flagship for integration of the ASEAN region.

Under the regional integration initiative of ASEAN, the AEC is envisaged to have the following salient features: (a) a product base and single market, (b) an economic region with high competitiveness, (c) a region with a fair development of economy, and (d) a region with full integration into the world economy. As a product base and single market, ASEAN aims to achieve free movement of investment, goods and service, skilled labours, and capital. At the twelfth ASEAN Summit in the Philippines, the member countries consented to accelerate economic integration to 2015. Under the AEC Blueprint adopted to accelerate integration –

*“The AEC will establish ASEAN as a single market and production base making ASEAN more dynamic and competitive with new mechanisms and measures to strengthen the implementation of its existing economic initiatives; accelerating regional integration in the priority sectors; facilitating movement of businesspersons, skilled workers and talents; and strengthening the institutional mechanisms of ASEAN. As a first step towards realizing the ASEAN Economic Community, ASEAN has been implementing the recommendations of the High-Level Task Force (HLTF) on ASEAN Economic Integration contained in the Bali Concord II.”<sup>100</sup>*

The language choice remains no doubt that the transformation of ASEAN was modelled from the EU. Among the three pillars, it is believed that the AEC seems to be the most practicable.<sup>101</sup> The aim of the AEC is to bring economic integration in the region with free flow of investments, goods and services, skilled labours, and capital.<sup>102</sup>

In 2007, the ASEAN leaders reached a unanimous decision to speed up the creation of the-AEC to 2015, where the initial plan was the year 2020.<sup>103</sup> The reason behind such

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<sup>100</sup> See ASEAN Economic Community Blueprint. At <https://asean.org/wp-content/uploads/archive/5187-10.pdf> [9 June 2020].

<sup>101</sup> Roberts, C. (2012). *ASEAN Regionalism: Cooperation, Values and Institutionalisation*. Routledge. P. 187.

<sup>102</sup> ASEAN Economic Community. ASEAN Secretariat. At <https://asean.org/asean-economic-community/> [09 June 2020].

<sup>103</sup> See generally ASEAN Economic Community Blueprint (2007).

acceleration was because of the satisfaction of the leaders of ASEAN with the progress on removing the development gap in ASEAN. They agreed that the acceleration the establishment of the AEC to 2015 would enhance a more ardent attitude towards closer regional economic integration.<sup>104</sup> By this effort, the official formation of the ASEAN Community which comprises with three community pillars was finally declared on December 31<sup>st</sup>, 2015, in the capital city of Malaysia, Kuala Lumpur.<sup>105</sup>

The ASEAN Community represents a significant development especially when considered from its highly political past. The adoption of the ASEAN though not a radical break from its past, represents a milestone for ASEAN. Ambitious as it appears, the private sector in ASEAN pointed to several issues by which ASEAN Community could achieve its goals and be effective. To be a real Community, ASEAN needs to bring about substantive changes that address institutional and legal reforms but also tackle vital political and economic issues by member states.

### 2.2.2. Evolution of ASEAN Economic Community

Since ASEAN was since it was founded in 1967, it has become one among the most vigorous regions of the globe that has rapid economic growth in recent decades. ASEAN has made remarkable progress by transforming into an increasingly creative, vigorous and well-regulated community for trade and commerce, which regards as the most rapid growing economic region of the world.<sup>106</sup>

The ASEAN Economic Community (AEC) lies beneath the ASEAN Community, together with the APSC and the ASCC. The core of AEC was declared in the Hanoi or ASEAN Vision 2020 that was adopted in 1997, where it is built upon a confluence of the member states' national interests to enlarge and strengthen integration of economy in the ASEAN region in conformity with the rules and doctrines of an inclusive, outward-looking, market-driven and open economy in conformity with principles of multilateralism, together with

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<sup>104</sup> Ibid.

<sup>105</sup> Kuala Lumpur Declaration on the Establishment of the ASEAN Community (2015).

<sup>106</sup> A Blueprint for Growth – ASEAN Economic Community 2015: Progress and Key Achievements, Jakarta: ASEAN Secretariat, November 2015. P. 1. At [https://www.asean.org/wp-content/uploads/images/2015/November/media-summary-ABIS/AEC%202015%20Progress%20and%20Key%20Achievements\\_04.11.2015.pdf](https://www.asean.org/wp-content/uploads/images/2015/November/media-summary-ABIS/AEC%202015%20Progress%20and%20Key%20Achievements_04.11.2015.pdf) [24 September 2020].

the adherence to the systems of rules-base for effectual implementation and compliance of the commitments on economic relation.<sup>107</sup>

ASEAN envisioned the AEC as the economic integration goal for the first time in 2003, stated in Bali Concord II, setting out the year 2020 as the initial completion date. It was in consistence with the ASEAN Vision 2020, intending to turn ASEAN into a region of prosperity, stability, and high competitiveness along with reduce disparities of socio-economy, equitable development of economy, and reduce poverty. In January 2007, the leaders of ASEAN member countries collectively reaffirmed their desire for accelerating the formation of the AEC at the twelfth ASEAN Summit in a city of the Philippines, Cebu<sup>108</sup>, as formally announced in the Cebu Declaration – the declaration that intends to speed up the formation of ASEAN-Community.<sup>109</sup> In that same year, the first AEC Blueprint (2008-2015) was affirmed during the thirteenth ASEAN Summit in the Singapore,<sup>110</sup> intending to develop a coherent and single plan in order to gradually move forward to the AEC. The Blueprint was a substantial roadmap to chart the pavement on establishing the AEC,<sup>111</sup> where the contemporary agenda for the ASEAN regional economic integration was included and accordingly, the AEC's promise is to pursue the contemporary agenda of economic integration within the ASEAN conception of a community.<sup>112</sup> In consistence with the Bali Concord II, the Blueprint was affirmed by

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<sup>107</sup> ASEAN Vision 2020. At [https://asean.org/?static\\_post=asean-vision-2020](https://asean.org/?static_post=asean-vision-2020) [25 September 2020].

<sup>108</sup> A Blueprint for Growth – ASEAN Economic Community 2015: Progress and Key Achievements. Jakarta: ASEAN Secretariat, November 2015. P. 4. At [https://www.asean.org/wp-content/uploads/images/2015/November/media-summary-ABIS/AEC%202015%20Progress%20and%20Key%20Achievements\\_04.11.2015.pdf](https://www.asean.org/wp-content/uploads/images/2015/November/media-summary-ABIS/AEC%202015%20Progress%20and%20Key%20Achievements_04.11.2015.pdf) [25 September 2020].

<sup>109</sup> Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015. At <https://asean.org/cebu-declaration-on-th-acceleration-of-the-establishment-of-an-asean-community-by-2015/> [26 September 2020].

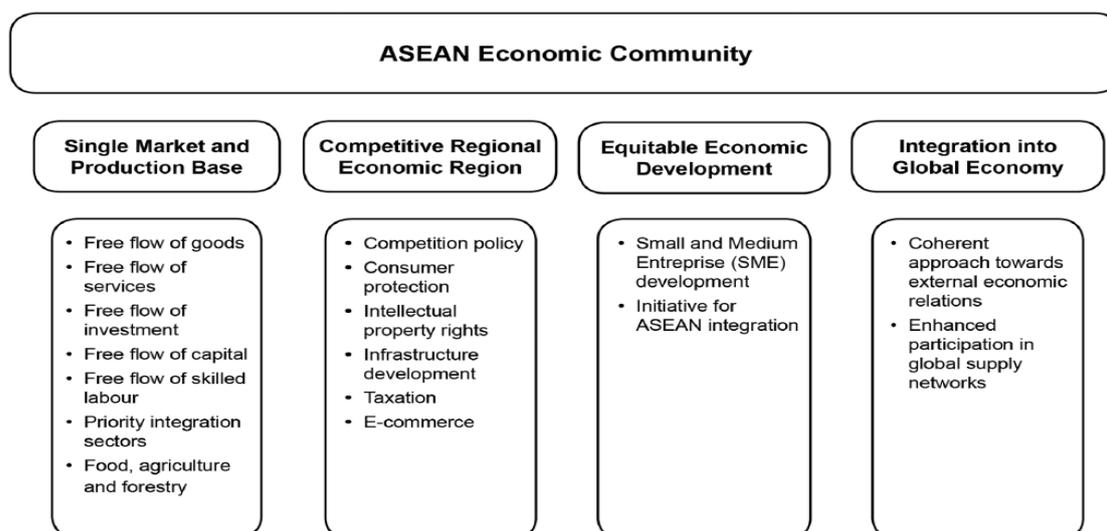
<sup>110</sup> AEC 2015: A Point of No Return for All Member States. At <https://www.thejakartapost.com/news/2016/01/14/aec-2015-a-point-no-return-all-member-states.html> [26 September 2020].

<sup>111</sup> Simon S.C. Tay, & Tijaja, J.P. (Eds. 2017). *Global Megatrends: Implications for the ASEAN Economic Community*. Jakarta: ASEAN Secretariat. P. 2.

<sup>112</sup> Hawke, G. (2017). The Promise and Challenges of ASEAN and AEC in a Fast-Changing East Asia: AEC Blueprint as Driver of Transformation of ASEAN Member States. In Rebecca Fatima Sta Maria, Shujiro Urata, Ponciano S. Intal, Jr. (Eds. 2017). *ASEAN@ 50 Volume 5 | The ASEAN Economic Community Into 2025 and Beyond*. ERIA: Economic Research Institute for ASEAN and East Asia.

identifying the AEC's elements and characteristics, together with clear objectives and timelines for implementation, while considering the different development stages of the ASEAN member countries.<sup>113</sup> The Blueprint laid down aims and detailed milestones<sup>114</sup> for:

- a) Product base and single Market (the free movement of investment, goods and services, skilled workers, and capital).
- b) Region with competitive economy (policy on competition, protection of consumer, rights on intellectual property, development of infrastructure, e-commerce, as well as taxation).
- c) Equitable development of economy (development of SMEs, initiative of ASEAN integration).
- d) Fully integrated into the world economy



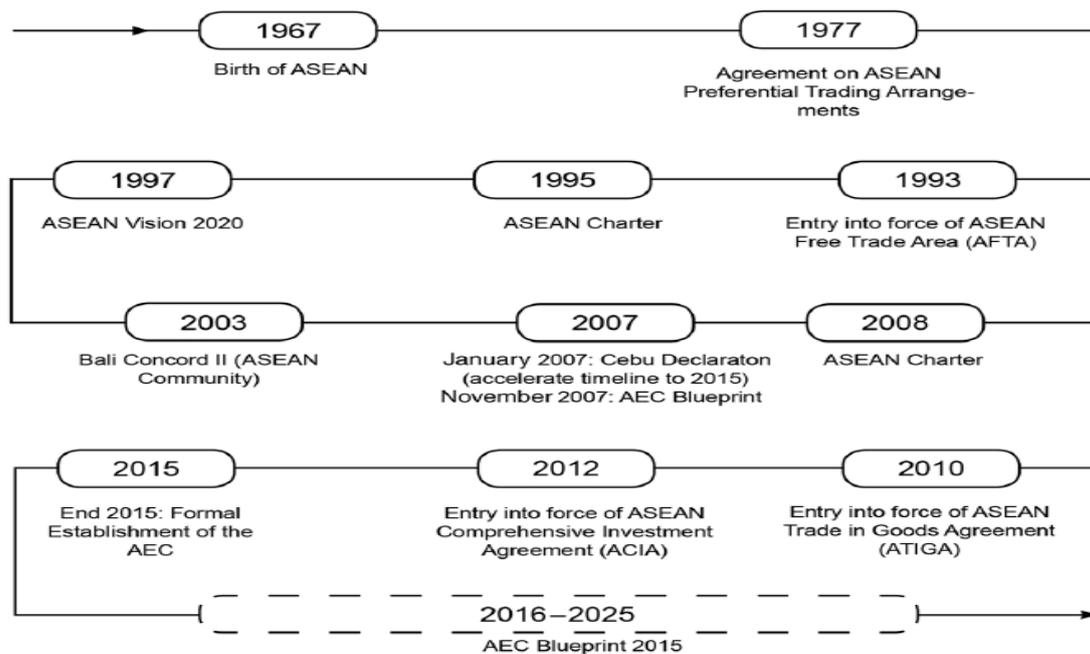
*Source: ASEAN Secretariat, Blueprint for Growth, 5.*

In 2015, ASEAN officially launched AEC, among two other ASEAN Community's pillars, which it was a milestone of the regional integration of economy of ASEAN. The launch of this AEC indicated the beginning of the collective actions of the ten member countries

<sup>113</sup> A Blueprint for Growth – ASEAN Economic Community 2015: Progress and Key Achievements. Jakarta: ASEAN Secretariat, November 2015. P. 3. At [https://www.asean.org/wp-content/uploads/images/2015/November/media-summary-ABIS/AEC%202015%20Progress%20and%20Key%20Achievements\\_04.11.2015.pdf](https://www.asean.org/wp-content/uploads/images/2015/November/media-summary-ABIS/AEC%202015%20Progress%20and%20Key%20Achievements_04.11.2015.pdf) [29 September 2020].

<sup>114</sup> See generally ASEAN Economic Community Blueprint. At <https://asean.org/wp-content/uploads/archive/5187-10.pdf> [29 September 2020].

of ASEAN as a regional economic community,<sup>115</sup> which became another historical step. The AEC presents a product base and single market with a free flow of investments, goods and services, skilled works, and capital. It sets competition policies and consumer protection in the region, promotes e-commerce development, enhances a better intellectual property protection and development of infrastructure, supports SMEs, strengthen cooperation towards economic development within the geographical region and a coherent method to economic relations with external. The AEC provides an open and integrated market to ASEAN people with more product choices and competitive costs, and it also supports businesses to experience markets and extend their market reach at reduced costs through improved investment environment and simplified cross-border trading processes. Furthermore, the AEC has also established frameworks and regional legal structures contributing to an improved environment for business.<sup>116</sup>



Source: ASEAN Secretariat, *Blueprint for Growth*, 4.

To structure the roadmap for the AEC, the leaders of member countries of ASEAN adopted a new AEC Blueprint 2025 at their twenty-seventh ASEAN Summit for the next phase of regional economic integration from the year 2016 to 2025, aiming to establish “a

<sup>115</sup> ASEAN Integration Report 2019. Jakarta: ASEAN Secretariat, October 2019. P. xii. At <https://asean.org/storage/2019/11/ASEAN-integration-report-2019.pdf> [30 September 2020].

<sup>116</sup> See ASEAN Community. At <https://asean.org/storage/2012/05/7.-Fact-Sheet-on-ASEAN-Community.pdf> [30 September 2020].

highly cohesive and integrated ASEAN economy”.<sup>117</sup> The new AEC Blueprint, together with the ASEAN Community Vision 2025, the ASCC Blueprint 2025, and the APSC Blueprint 2025, , builds as portion of the “*ASEAN 2025: Forging Ahead Together*”. Under the new AEC Blueprint, a more robust AEC is envisaged by the year 2025 with the salient features below<sup>118</sup>:

- a) A highly cohesive and deeply integrated economy.
- b) A dynamic, innovative, and competitive region.
- c) Enriched sectoral cooperation and connectivity.
- d) A people-centred, people-oriented, flexible, and inclusive ASEAN.
- e) An international ASEAN.

Based on the new AEC-Blueprint 2025, ASEAN-has placed higher ambition to deepen existing integration areas and incorporate new emphasized fields such as sustainable development, good-regulatory practice, international megatrends, global value chains, and to emerge trade-related issues. In 2016, various AEC sectoral work plans were adopted in order to put the fundamentals for effective operationalization of the AEC Blueprint in place. In that same year, the ASEAN Economic Community and the AEC Council affirmed the AEC 2025 Monitoring and Evaluation Framework in order to provide key reference for institutionalizing evaluation and monitoring mechanisms across AEC sectors. This framework enhances the previous mechanism, by not only monitoring the compliance but also monitoring the outcomes and evaluating the impact of regional economic integration.<sup>119</sup>

### 2.2.3. Consolidating the ASEAN Economic Community

As the integral segment of a newly established ASEAN Community, the ASEAN Economic Community marks a milestone in Asia and Pacific regionalism. The legalization of the ASEAN Economic Community, which interconnects ten diverse developing

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<sup>117</sup> ASEAN Economic Community Blueprint 2025 (2015), paras. 3–7.

<sup>118</sup> See ASEAN Economic Community (AEC), ASEAN 2025: Forging Ahead Together. Jakarta: ASEAN Secretariat, November 2015. P. 61-94.

<sup>119</sup> Fact Sheet on ASEAN Economic Community (AEC). At <https://asean.org/wp-content/uploads/2012/05/7c.-May-2017-Factsheet-on-AEC.pdf> [1 October 2020].

countries, exhibits the New Regional Economic Order by providing an emerging approach for the South-South cooperation.

The AEC consolidates the interrelated agreements and instruments of ASEAN that govern in-goods trade and services, investments, and dispute resolution schemes.<sup>120</sup> For examples, the ATIGA integrates previous goods-related agreements that had been signed since the 1990s. The agreement aims to eliminate tariffs and nontariff measures and improve trade facilitation measures. Based on its incremental modality, the AFAS enabled multiple rounds of negotiations that led to successive “packages” of services commitments. Having been negotiated as separate packages, the liberalization of air transport and financial services also forms an integral part of the AFAS. To facilitate the flow of intraregional professional mobility, ten states concluded the Movement of Natural Persons Agreement of ASEAN and mutual acknowledgement-arrangements for selected professional services. In addition, the ACIA increases competitiveness of the bloc to attract FDI. Importantly, the ACIA consolidates former agreements to streamline the reservations schedule and accord substantive benefits to investors. ASEAN has also developed multilayered schemes for the dispute settlement of trade conflicts. While state-to-state conflicts goes to the scope of the ASEAN Protocol for Enhanced Dispute Settlement Mechanism, the ACIA enables private investors to turn to available arbitration for resolving disputes between investor and state.

Adopted in the year 2015, the new AEC Blueprint 2025 accomplished its predecessor and is incorporated into the guiding-document, “*ASEAN 2025: Forging Ahead Together*,” which charts a layout for the ASEAN Community from the year 2016 to 2025.<sup>121</sup> To better understand the AEC, we currently turn to a much-needed analysis of major differences amongst the old AEC Blueprint and the new AEC Blueprint. In 2015, the implementation rate of original AEC goals was 79.5 percent.<sup>122</sup> On this basis, the new AEC Blueprint 2025 pushes for further liberalization to realize the ASEAN Community Vision 2025.

The new features of this new AEC Blueprint 2025 similarly fortify the linkage between the ASEAN architecture with domestic business and commercial laws. Five main

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<sup>120</sup> For the timeline of the key agreements, see ASEAN at 50: A Historic Milestone for FDI and MNEs in ASEAN (2017). Pp. 8–9.

<sup>121</sup> Kuala Lumpur Declaration on ASEAN 2025: Forging Ahead Together (2015).

<sup>122</sup> ASEAN at 50: Achievements and Challenges in Regional Integration. P. 15.

characteristics are found in the AEC Blueprint 2025. The first features, “A highly Cohesive and deeply Integrated Economy,” comprises the most significant steps for the new phase.<sup>123</sup> The AEC Blueprint 2025 builds “a more unified marketplace” by facilitating “the free flow of investment, goods and services, skilled works, and capital”.<sup>124</sup> This language modifies the aspirations of the previous AEC Blueprint 2015 to form “a product base and single market.”<sup>125</sup> This seamless movement provision suggests a step further than the previous Blueprint, which promoted the “free flow” of investment, goods and services, skilled labours, and capital.<sup>126</sup>

Given that the bloc has achieved over 98 percent of the intra-ASEAN tariff elimination, ASEAN’s tariff liberalization demonstrates clear progress for the AEC.<sup>127</sup> The key area for the trade in goods is to reinforce the ATIGA and to manage proliferating nontariff measures that hinder the result of tariff liberalization. As for services trade, the target of the AEC Blueprint 2015 is to remove substantially all restrictions for remaining sectors was unmet. The AEC Blueprint 2025 will lower barriers to services trade and integrates currently fragmented commitments by enacting the ATISA. On the investment side, the ACIA will finalize the built-in agenda for decreasing or eliminating investment restrictions.

Tellingly, the AEC Blueprint 2025 substantially expands the coverage for financial integration. It seeks to bolster Qualified ASEAN Banks under the Banking-Integration Framework of ASEAN and facilitate capital market linkages for multi-jurisdictional equity and debt offerings. Moreover, the completion of national single windows for trade facilitation and regulatory reforms that enhance participation of ASEAN in international value chains illustrate the salient features of the new Blueprint.

The second feature of the AEC Blueprint 2025, “A Dynamic, Innovative and Competitive ASEAN,” is built on the former Blueprint and reiterates regional cooperation of policy on competition, consumer protection and intellectual property rights.<sup>128</sup> The new focus on sustainable economic development as the growth strategy reinforces ASEAN’s collective

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<sup>123</sup> AEC Blueprint 2025, paras. 7–24.

<sup>124</sup> *Ibid.*, para. 7.

<sup>125</sup> AEC Blueprint 2015, paras. 6 & 9.

<sup>126</sup> *Ibid.*, para. 9.

<sup>127</sup> *Supra Note* 119, at 15–18.

<sup>128</sup> AEC Blueprint 2025, paras. 25–44.

commitments to the UN led 2030 Agenda for Sustainable Development.<sup>129</sup> The third characteristic, “Enhanced Connectivity and Sectoral Cooperation,” aims at implementing the ASEAN Connectivity Masterplan.<sup>130</sup> Particularly, the ASEAN Single Aviation Market Implementation Framework will commence the review of aviation agreements and further liberalize air transport ancillary services. More developed than in the previous Blueprint, the AEC Blueprint 2025 pledges to promote e-commerce transactions by developing an ASEAN Agreement on Electronic Commerce. With the “EU General Data Protection Regulation” taking effect in the year 2018, the global community places additional importance on privacy in digital trade. The personal data protection is also envisioned in this new Blueprint.

The fourth characteristic is “A Inclusive, Resilient, People-Centred and People-Oriented ASEAN.”<sup>131</sup> The AEC Blueprint 2015 focused on the SMEs development, whereas the AEC Blueprint 2025 extends the scope to cover micro enterprises.<sup>132</sup> Concrete steps are planned to increase the utilization of rules of origins under FTAs and the ASEAN self-certification scheme for exporters. In addition, the new initiative for Integration Work Plan III of ASEAN will limit the development gap of the region by providing CLMV countries with additional capacity-building assistance.

The fifth characteristic, “A Global ASEAN,” which aims to tighten the principle of ASEAN centrality by orienting the bloc as the center of today’s hub-and-spoke trade system.<sup>133</sup> The AEC Blueprint 2025 is far more ambitious other than its predecessor. The latest ASEAN+1 FTA was concluded with Hong Kong in 2017. In addition to advancing the Doha Development Agenda, ASEAN’s immediate priority is to accelerate RCEP negotiations and review and upgrade external FTAs. Finally, the success of the AEC hinges on an effective implementation mechanism. Departing from the conventional ASEAN Way, the AEC Blueprint 2025 mandates that the ASEAN Economic Community Council

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<sup>129</sup> Complementarities between the ASEAN Community Vision 2025 and the United Nations 2030 Agenda for Sustainable Development: A Framework for Action (2017). Pp.16–17. At <https://www.unescap.org/publications/complementarities-between-asean-vision-2025-and-2030-agenda> [05 November 2020].

<sup>130</sup> AEC Blueprint 2025, paras. 45–66.

<sup>131</sup> Ibid., paras. 67–78.

<sup>132</sup> E.g., Ibid., paras. 68–9; AEC Blueprint 2015, para. 60.

<sup>133</sup> AEC Blueprint 2025, paras. 79–80.

“enforce compliance of all relevant measures.”<sup>134</sup> The ASEAN Secretariat is also tasked with developing an enhanced monitoring.

### **2.3. The Emergence of a Law Regime and Soft Legal Regime in ASEAN**

In ASEAN Community-building, a legal regime is evolving the “ASEAN Way” and it is possible for the development of a “rule through law” regime. In this type of legal regime, regional authority dimension may be regulated by and acted through regional institutions and specific regulatory mechanisms.

The ASEAN Way has served the purposes of ASEAN particularly in its formative years. By enabling member states to direct their energies towards domestic problems without fear of intervention or criticisms from neighbouring states, the ASEAN Way has performed state-building or regime maintenance function in member countries. Autonomy, discretion and flexibility have been enhanced in member states through ASEAN’s reliance on its core values based on sovereignty, nonintervention and informality. The ASEAN Way has fostered solidarity among leaders of member states and even the maintenance of dictatorships. Informality and flexibility, as salient feature of the ASEAN Way, is not inviolable.

The legal regime of ASEAN is a complex combination of formal but less rigid laws, forms of soft legal mechanisms and decentralized policymaking in order to balance member states’ discretion of sovereignty. As the nature of most soft law regimes, the legal regime is not a systematic or coherent legal system, but a fragmented and uneven system. These soft legal mechanisms are also not bound to firm into hard law; however, they are a possibility to deepen institutionalization, harmonization, and legalization in ASEAN or in themselves they could be an end upon how both individual and collective purposes are perceived by member states.

In calls of proposals for stronger institutional and legal reforms in ASEAN, the soft legalization and greater institutionalization have become the integral framework in reordering relations among member states. ASEAN legal regime has been underpinned by soft regulation which is in line with its preference for regional integration. Soft regulation

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<sup>134</sup> Ibid., paras. 81–2.

means regulatory mechanism using persuasive, flexible, and non-binding coercions, in which ‘non-binding coercions’ refers to mechanisms directed at eliciting compliance but are not necessarily judicially enforceable.<sup>135</sup> Soft regulations, *per se*, are not non-coercive since they can direct compliance through methods such as persuasion, pressure, fear, shaming, self-interest, or opportunity that is possible to be as effective as hard law.<sup>136</sup>

#### 2.4. A Soft Legal Regime in the ASEAN Community

The AEC is often correlated to the European internal market. However, two basic legal differences need to be mentioned when comparing ASEAN with the EU. Firstly, ASEAN Charter mandates that the member countries shall take all imperative measures to implement ASEAN treaties<sup>137</sup> where the legal obligation of ASEAN member countries is limited to the “*endeavour to develop common positions and pursue joint actions*”.<sup>138</sup> ASEAN apparently has no council of ministers or regional parliament with powers of law-making, it has no regional judicial system nor powers of enforcement.<sup>139</sup> Whereas the EU has the Parliament and Council with law-making powers, and it has the judicial system, and EU treaties and regulations can have a direct effect over member states. Secondly, ASEAN has no power for the treaty making to negotiate and conclude international treaties.<sup>140</sup> Its power is severely restricted because it does not extend to the conclusion of agreements that would create obligations on individual member states.<sup>141</sup> In contrast, this matter includes in the EU’s exclusive competences that the EU alone can negotiate and conclude international treaties and it binds over member states and their citizens.

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<sup>135</sup> Zerilli, F.M. (2010). The Rule of Soft Law: An Introduction. *Focaal—Journal of Global and Historical Anthropology* 56 (2010). Pp. 5–6.

<sup>136</sup> Ibid.

<sup>137</sup> ASEAN Charter, art. 5(2).

<sup>138</sup> ASEAN Charter, art. 41(4).

<sup>139</sup> Asia Policy Lecture: What ASEAN is and What It Stands for, by Rodolfo C. Severino, Secretary-General of ASEAN, at The Research Institute for Asia and the Pacific, University of Sydney, Australia, 22 October 1998. At [https://asean.org/?static\\_post=asia-policy-lecture-what-asean-is-and-what-it-stands-for-by-rodolfo-c-severino-secretary-general-of-asean-at-the-research-institute-for-asia-and-the-pacific-university-of-sydney-australia-22-october-1](https://asean.org/?static_post=asia-policy-lecture-what-asean-is-and-what-it-stands-for-by-rodolfo-c-severino-secretary-general-of-asean-at-the-research-institute-for-asia-and-the-pacific-university-of-sydney-australia-22-october-1) [10 February 2020].

<sup>140</sup> Wang, J. (2006). International Legal Personality of ASEAN and the Legal Nature of the China-ASEAN Free Trade Agreement. In *China-ASEAN Relations: Economic and Legal Dimensions*, John Wong, Zou Keyuan, Zeng Huaquan, eds., Singapore: World Scientific, 2006, p. 14.

<sup>141</sup> ASEAN Charter, art. 41(7); Rules of Procedure for Conclusion of International Agreements by ASEAN (2011), rule 1.

In 2003, ASEAN leaders endorsed an action plan for establishing an ASEAN Community, which is supervised by the ASEAN Vision 2020.<sup>142</sup> Establishing the ASEAN community became a critical constitutional moment. However, the remarkable adoption of the ASEAN Charter in November 2007 codified the commitment of ASEAN and conferred ASEAN's legal character as an "inter-governmental organization",<sup>143</sup> which alters the legal basis nature for the institutional framework of ASEAN.

The Charter provides a comprehensive provision of responsibilities and rights of the ASEAN member countries, the functions of each organ of ASEAN, their composition and relationship among them. It clearly includes intention of the member countries to be adhered by its terms and establishes mechanisms for rulemaking, implementation, and adjudication of disputes. Yet, the Charter remains a discretionary and consensual approach as the key practice for decision-making, compliance and implementation, and dispute settlement even in the aspect of economic integration where there is strong demand for a formal legal framework.

The Charter recognizes consultation and consensus approach as the fundamental principle of ASEAN's decision-making process.<sup>144</sup> Indeed, approach of consultation and consensus is the only approach of ASEAN's decision-making provided in the Charter, having the ASEAN Summit as the only body authorized to consider, give policy guidance and decide essential matters and give instructions to the concerned Community Councils.<sup>145</sup> However, there is an exception to the power of decision-making of the ASEAN Summit or at least there is the possibility of delegation to other organs in ASEAN. Article 20(3) of the Charter declares that consultation and consensus shall be deemed not to affect the decision-making modes specified in relevant legal instruments of ASEAN. A legal document is one that confers rights and obligations on the parties and is legally enforceable.

Many ASEAN agreements, particularly economic instruments, are considered legal documents even though they do not have or have only weak enforcement mechanisms. By

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<sup>142</sup> Cha-am Hua Hin Declaration on the Roadmap for the ASEAN Community (2009–2015), (2009).

<sup>143</sup> Charter of the Association of Southeast Asian Nations (2007) (ASEAN Charter), art. 3.

<sup>144</sup> Art. 20(1), The Charter.

<sup>145</sup> Art. 7(2b,c), The Charter.

an affirmation of the Protocol on Dispute Settlement Mechanism in the year 1996, as amended by 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism (ASEAN Enhanced DSM), covered agreements referring to the forty-seven economic agreements entered since 1971 listed as Appendix 1 and interrelated economic instruments in the future, were to incorporate provisions of the new dispute settlement mechanisms.<sup>146</sup> These economic documents have certainly acquired legal effect. However, decision-making is not a function of ASEAN legal documents whose institutional components are mainly designed to implement obligations of the member states. For example, an inter-ministerial body to review, collaborate, and supervise the imperative implementation of the CEPT/AFTA had been created, the Council of AFTA, which is mandated to report any important matters to the ASEAN Economic Ministers (AEM).<sup>147</sup> But neither the Council of AFTA Council nor the AEM are given the power of rule-making. The newly signed ASEAN Comprehensive Investment Agreement (Investment Agreement) seems to suggest that an inter-governmental body, the ASEAN Investment Area (AIA) Council, could be delegated with authority to make rules on technical areas of cooperation. The Agreement provides the AIA Council with the function of giving guidance on policy on regional and global investment concerns regarding protection, promotion, liberalization and facilitation, as well as adopt any necessary decisions.<sup>148</sup>

In fact, ASEAN regional integration is framed through soft legal regime in contrast to ‘hard law’ which provides for more specific and precise statement of obligations and corresponding punitive provisions in case of non-compliance. In ASEAN, only the Investment Agreement provides for specific rules for bringing a claim and award of

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<sup>146</sup> Art. 1(1), Protocol on Dispute Settlement Mechanism, 20 November 1996, Manila, Philippines. At [https://asean.org/?static\\_post=the-1996-protocol-on-dispute-settlement-mechanism#:~:text=1.,the%20%E2%80%9Ccovered%20agreements%E2%80%9D](https://asean.org/?static_post=the-1996-protocol-on-dispute-settlement-mechanism#:~:text=1.,the%20%E2%80%9Ccovered%20agreements%E2%80%9D). [07 July 2020].

<sup>147</sup> Institutional Arrangements of CEPT for AFTA. At [https://asean.org/?static\\_post=institutional-arrangements-of-cept-for-afta](https://asean.org/?static_post=institutional-arrangements-of-cept-for-afta) [07 July 2020]; and Art. 7, Agreement on the Common Effective Preferential Tariff Scheme for the AFTA, 28 January 1992, Singapore. At [https://asean.org/?static\\_post=agreement-on-the-common-effective-preferential-tariff-cept-scheme-for-the-asean-free-trade-area-afta](https://asean.org/?static_post=agreement-on-the-common-effective-preferential-tariff-cept-scheme-for-the-asean-free-trade-area-afta) [07 July 2020].

<sup>148</sup> ASEAN Comprehensive Investment Agreement, 6 February 2009, Cha-am, Thailand. At [https://asean.org/?static\\_post=asean-comprehensive-investment-agreement-cha-am-thailand-26-february-2009](https://asean.org/?static_post=asean-comprehensive-investment-agreement-cha-am-thailand-26-february-2009) [07 July 2020].

damages between an investor and a member state.<sup>149</sup> Rules on sanctions in economic disputes involving the member countries are generally regulated by the ASEAN Enhanced DSM.<sup>150</sup> Other ASEAN instruments, particularly those in non-economic forms, exercised through declarations and commitments, do not provide for enforcement or dispute settlement mechanisms and mainly depend upon the continuing commitments of the member countries of ASEAN.

Technical standards harmonization and mutual-recognition agreements (MRAs) in certain areas is another feature of the soft legalization of ASEAN in the economic area of cooperation. This method for bringing about integration depends on the commitment and voluntary action of the member states to make local or domestic standards conform to international or regional standards. However, MRAs and harmonized standards still depend for their implementation on the member states' political will and do not seek to transgress upon member state's sovereignty particularly on the area of rulemaking. Therefore, the right to regulate the relevant area still fall within the powers of member states and that MRA "*shall not reduce, eliminate or modify the rights, power, and authority of each ASEAN member state.*"<sup>151</sup>

Therefore, the ASEAN Community, especially the AEC, strives to operate on the framework of soft legal regime, although on its initial and limited phase. It is leaning towards de-politicization of dispute mechanism but still works through the political framework in terms of rulemaking and implementation. However, there is an evolutionary tendency towards delegation of rulemaking in technical matters and development of uniform rules through voluntary reception into the domestic legal system through the method of harmonization. The development of rules-based systems for effective implementation and conformity of economic commitments declared in the ASEAN Economic Community Blueprint would depend on gradual and step-by-step process based on voluntary adoption of member states.<sup>152</sup>

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<sup>149</sup> Art. 33-44, ASEAN Investment Agreement.

<sup>150</sup> Art. 14 (Panel and Appellate Body Recommendations); Art. 16 (Compensation and Suspension of Concessions), CEPT/AFTA Agreement.

<sup>151</sup> Art. V, ASEAN MRA on Medical Practitioners, Cha-Am, Thailand, 26 February 2009.

<sup>152</sup> See generally AEC Blueprint.

## 2.5. The Current AEC Soft Legal Framework

The official launch of the ASEAN Economic Community (AEC) in 2015<sup>153</sup> became another historical step. The AEC presents a production base and single market with a free flow of investments, goods and services, skilled works, and capital. It sets competition policies and consumer protection in the region, promotes e-commerce development, enhances a greater protection of the intellectual property and development of the infrastructures, supports SMEs, strengthen cooperation on development of economy amongst the ASEAN member countries and a coherent method for external economic relations. The AEC provides an open and integrated market to ASEAN people with more product choices and competitive costs, and it also supports businesses to experience markets and extend their market reach at reduced costs through improved investment environment and simplified cross-border trading processes. Furthermore, the AEC has also laid down frameworks and regional legal structures contributing to an improved environment for business.<sup>154</sup>

In contrast of the ambitious goals of the AEC, ASEAN seems to be pursuing a loose approach of regional economic integration.<sup>155</sup> ASEAN has a weak soft law regime towards its regional economic integration. This weak legal regime could be a result of weak commitment of the member states regarding a greater approach of regional economic integration.

The ASEAN's decision-making process has been pursuing the "ASEAN way", which is approach of consultation and consensus.<sup>156</sup> The approach compiled in the terms from Malaysian language those are '*musyawarah* and *mufakat*'<sup>157</sup>, which largely depend upon highly

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<sup>153</sup> Fact Sheet on ASEAN Community. At <https://asean.org/storage/2012/05/7.-Fact-Sheet-on-ASEAN-Community.pdf> [2 October 2020].

<sup>154</sup> *Supra Note* 150.

<sup>155</sup> See Sally, R. (2013). ASEAN FTAs: State of Play and Outlook for ASEAN's Regional and Global Integration. In Basu Das, S., Menon, J., Rodolfo Severino, R., & Shrestha, Omkar L. (eds.), *The ASEAN Economic Community: A Work in Progress*. Singapore: Institute for Southeast Asian Studies. Pp. 320–81, 375; and Jenina Joy Chavez, J.J. (2007). Regionalism Beyond an Elite Project: The Challenge of Building Responsive Sub-Regional Economic Communities in Melissa G. Curley and Nicholas Thomas (eds.), *Advancing East Asian Regionalism*. New York: Routledge. Pp. 158–78, 171.

<sup>156</sup> ASEAN Charter, art. 20.

<sup>157</sup> Ewing-Chow, M., & Hsien-Li, T. (March 2013). *The Role of the Rule of Law in ASEAN Integration*, EUI Working Paper RSCAS 2013/16. European University Institute, Italy. P. 21.

patient consensus building to achieve informal agreements or ad hoc understandings amongst the member states. ‘*Musyawarah*’ means the approach of decision-making by consultation, and ‘*mufakat*’ means the unanimous decision or consensus.<sup>158</sup> In fact, ASEAN has made progress on the regional integration not through regulations and rules, instead through consultation and consensus.<sup>159</sup>

The decision-making concept of ASEAN involves processes as well as informal discussions behind the scenes to seek a general agreement before the final unanimous decision in more formal meetings, rather than bargaining and give-and-take at the table negotiations that bring outcome in practices executable in the court of law. The decision-making concept of ASEAN relies largely upon the personal method, unlike the Western concept that depends on institutional structures and functions of the institution.<sup>160</sup> The ASEAN’s approach of regional decision-making by the consensus approach reflects ASEAN’s decision of rejecting to become a supranational institution like the European Union.<sup>161</sup> This approach of consensus or the “ASEAN Way” is mirrored in ASEAN’s process and structures<sup>162</sup>, which is different from the formal legalism of most international institutions of Western countries.

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<sup>158</sup> ASEAN’s ‘Third Way?’. At <https://thediplomat.com/2011/11/aseans-third-way/> [05 November 2020].

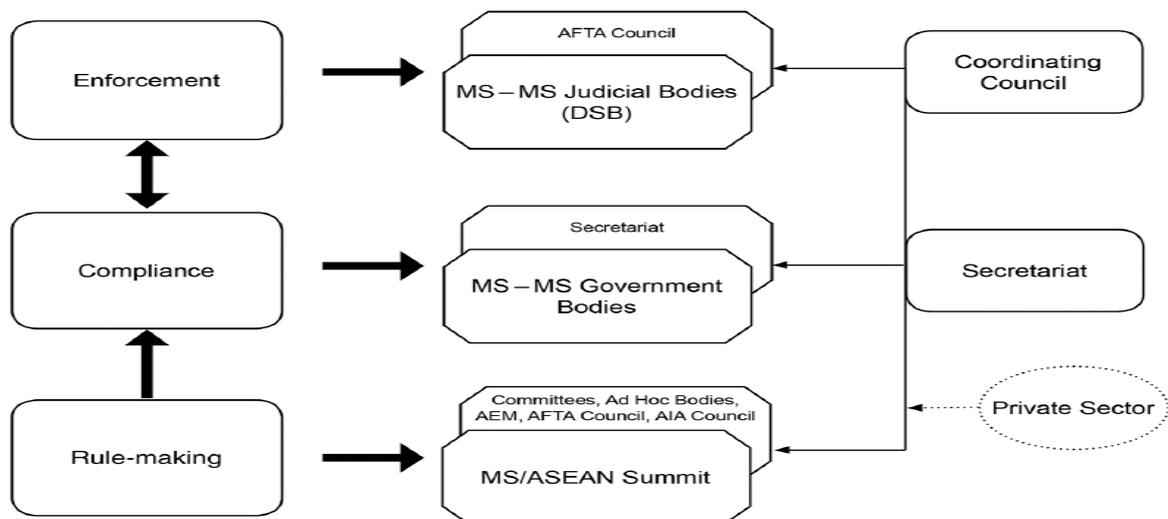
<sup>159</sup> ASEAN Secretariat (1982). The Opening Address of H.E. Lee Kuan Yew, the then Singapore’s Prime Minister, in fifteenth ASEAN Ministerial Meeting and Post-Ministerial Meeting with the Dialogue Countries, held in Singapore, June 14<sup>th</sup> – 18<sup>th</sup>, 1982, at No. 9. At [https://asean.org/?static\\_post=joint-communicue-of-the-fifteenth-asean-ministerial-meeting-singapore-14-16-june-1982](https://asean.org/?static_post=joint-communicue-of-the-fifteenth-asean-ministerial-meeting-singapore-14-16-june-1982) [05 November 2020].

<sup>160</sup> Solidum, E. (1981). The Role of Certain Sectors in Shaping and Articulating the ASEAN Way. In Anand, R.P. & Quisumbing, P.V. (eds. 1983), *ASEAN Identity, Development and Culture*. Manila: U.P. Law Center and East West Center Culture Learning Institute. p. 138; and see also, Solidum, E. An ASEAN Perspective on the Decision-Making Process in the European Community. In Quisumbing, P.V., & Domingo, B.B. (eds. 1983), *EEC and ASEAN: Two Regional Community Experiences*. Manila: Foreign Service Institute and UP Law Center. p. 127.

<sup>161</sup> Radhie, T.M. (1991). Regional Cooperation in Law and Development Study in the ASEAN Region. In Radhie, T.M., & Yasuda, N., (eds. 1993). *Law and Development Study in ASEAN Countries*. Tokyo: Institute of Developing Economies. P. 43.

<sup>162</sup> Naya, S., & Plummer, M. (1997). Economic Co-operation after 30 Years of ASEAN. ASEAN Economic Bulletin, 14(2), 117-126. p. 119. At <http://www.jstor.org/stable/25773477> [05 November 2020].

At the present time, the legal regime of ASEAN only consists of flexible and voluntary non-coercive principles, and it is likely no coercive principles to be decided for compliance. The legal regime in AEC governance is divided into three phases: rulemaking, implementation or compliance, and enforcement. Rulemaking is the phase where processes of establishment, adoption, and revision of norms and rules on trade and business between the member states and rules on disputes resolution in connection with regional trade have been taken. The establishment of rules and norms in the AEC is made at the hand of the ASEAN Summit – the highest body of ASEAN for policy-making. Also, the AEM, AFTA Council and AIA Council have recommendatory powers in connection with the establishment of relevant rules and norms, but all final decisions are decided in the Summit in the form of formal agreements. Furthermore, ASEAN Committees and ad hoc groups also significantly contribute to formulating regional policies. Through function in conducting studies and providing information, the ASEAN Secretariat also perform a significant role in policy and rule formulation.



*Source: Imelda Deinla (2017).*

Similarly, both compliance and enforcement aim at implementing the member states’ commitments and obligations under the ASEAN Charter and the other ASEAN agreements. Compliance refers to voluntary actions and initiatives of the member states to comply with the agreed commitments or agreements, just like self-enforcement, while enforcement goes to a degree of compulsion, through pressure of sanctions. To this end, both phases are exercised upon the member states’ discretion and a regional mechanism for supporting these processes and mechanisms remains sparse. In the AEC, the key

mechanisms in rulemaking as well as the mechanisms in implementation of economic activities are the member states themselves and national government bodies. An absence of a regional autonomous body for driving the compliance and enforcement might be a key flaw in the governance framework of the AEC. The key regional mechanism to facilitate the compliance of commitments or obligations by the member states is the ASEAN Secretariat. ASEAN has only ASEAN Secretariat as the main regional body that is responsible to superintend the AEC's governance functions by providing secretariat functions to all three pillars and AIA councils and the AFTA.

ASEAN has no supranational elements; hence, it does not legislate secondary law that directly apply to member states. ASEAN has the ASEAN Summit as supreme policy-making body.<sup>163</sup> Its common way of conducting policy is by an adoption of a declaration of ASEAN Summit. Nevertheless, the ASEAN Summit has as well adopted several treaties in the legal character of international agreement and often ratifications require to be deposited by the member countries of ASEAN. Furthermore, soft instruments play an important role for conducting policy in ASEAN, for instance memorandum of understanding. And in place of a Commission, ASEAN has a Secretary-General of ASEAN who has no decision-making powers but only monitors and facilitates the ASEAN agreements and decisions implementation<sup>164</sup>.

In a single market, ASEAN guarantees the free flow of investments, goods and services, and free flow of skilled labours, and capital, and promotes it by the harmonization of relevant laws and regulations of the member countries into the so-called regional legal system, and protects it against distortions of competition.<sup>165</sup> While the Treaty on the Functioning of the European Union (TFEU) and the Protocols lay down a legal basis of the EU's internal market in various procedural, substantive and institutional provisions, the ASEAN Charter does not provide any legal foundation of ASEAN single market like that. The ASEAN Charter is allowed to establish institutional structures at only the working

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<sup>163</sup> ASEAN Charter, art. 7.

<sup>164</sup> ASEAN Charter, art. 11.

<sup>165</sup> Prof. Dr. Thomas Schmitz (15 December 2014). The ASEAN Economic Community and the rule of law. the University of Göttingen. At [http://home.lu.lv/~tschmit1/Downloads/BDHK-Workshop\\_15-12-2014\\_Schmitz.pdf](http://home.lu.lv/~tschmit1/Downloads/BDHK-Workshop_15-12-2014_Schmitz.pdf) [3 October 2020].

level, for example the ASEAN Economic Community Council.<sup>166</sup> And in order to achieve the AEC's objectives, this subordinated institution works to make sure of the implementation of the ASEAN Summit's agreements and decisions, coordinates the different sectors' work and submits recommendations and reports to the ASEAN Summit – but it does not decide itself.<sup>167</sup>

## **2.6. A Brief of Legalization in the APSC and ASCC**

In the above sections the discussion points to the development of the legalism in the AEC from the instrumentalist conception. This section briefly examines how the rule of law is being fostered on the other pillars that lie beneath the ASEAN Community. These are the ASEAN Political and Security Community (APSC) and the ASEAN Social and Cultural Community (ASCC). The APSC contains the most sensitive matters of ASEAN cooperation. On the other hand, the ASCC deals in promoting solidarity and unity amongst the member states and their citizens by forging the common identity, as well as building a sharing and caring society.<sup>168</sup> Compared with the APSC, the ASCC deals with the less contentious areas of member states' interests or where there is convergence of interests.

Both pillars employ political or soft means to accomplish their objectives which show that these pillars, particularly the APSC, go into the heart of member states' vital political and security interests as discussed in Chapter Four. Compared with the AEC, these two pillars represent the 'least developed' areas in ASEAN in terms of rules formation and 'formal' institutionalization. The divergence of strategy, the AEC leaning more towards greater rules creation and institutionalization to ensure certainty and predictability of economic relations, reflects the prevailing view on the separation of economics and politics. For one, the Blueprint for each pillar was finalized two years later than the AEC or only in March 2009. Many of the covered areas however have been the subject of cooperation, interaction, or discussion among member states for many years. Solidarity in the region has been fostered through inter-state activities such as the holding of biennial Southeast Asia Games since 1958. Cooperation, consultation or discussion between ASEAN and private sector

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<sup>166</sup> ASEAN Charter, art. 9.

<sup>167</sup> ASEAN Charter, art. 9(4).

<sup>168</sup> ASCC Blueprint 2025. At <https://asean.org/storage/2016/01/ASCC-Blueprint-2025.pdf> [05 November 2020].

and civil society has also taken place in recent years in certain areas particularly those in the ASCC.

The areas of responsibility of the ASCC focus on the ‘individual’ or people component of the ASEAN Community although they overlap or are necessarily connected with those in the APSC. ASCC’s agenda are on social rights and justice, social welfare and protection, human development, environmental sustainability, and building of ASEAN identity. The ASCC Council and interrelated Ministerial Bodies of ASEAN are the principal organs directed to make sure of the implementation mainly through the process of mainstreaming the blueprint into each member states development plans, ratification of ASEAN Agreements, and engagement with dialogue partners, private sector, and civil society.<sup>169</sup>

There are however significant areas in ASCC that are in the process of institutionalization. This development has coincided with member states’ interests in dealing with inter-migration issues that have become critical agenda for negotiations among member states through bilateral or multilateral agreements.<sup>170</sup> Migration within Southeast Asia is largely driven by disparities in economic development among member states in ASEAN and by displacement of ethnic minorities as exemplified by Burma.

The current trend at institutionalization is also influenced by member states’ signing of international agreements or treaties and the push by civil society for member states to implement their commitments. Most notable are the initiatives at establishing the ASEAN Commission on the Protection and Promotion of the Rights of Women and Children (ACWC)<sup>171</sup> and the ASEAN Committee on the Implementation of the ASEAN Declaration on the Promotion and Protection of Rights of Migrant Workers<sup>172</sup> which depends upon member states’ signing of international agreement and voluntary

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<sup>169</sup> Chapter III A, ASCC Blueprint 2025.

<sup>170</sup> See for example, Kaur, A. (May 2015). International Labour Migration in Southeast Asia, Intersections: Gender, History and Culture in the Asian Context. Issue 15. At <http://intersections.anu.edu.au/issue15/kaur.htm> [10 June 2020].

<sup>171</sup> About ACWC. At <https://acwc.asean.org/about/> [10 June 2020].

<sup>172</sup> Statement of the Establishment of the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. At [https://asean.org/?static\\_post=statement-of-the-establishment-of-the-asean-committee-on-the-implementation-of-the-asean-declaration-on-the-protection-and-promotion-of-the-rights-of-migrant-workers](https://asean.org/?static_post=statement-of-the-establishment-of-the-asean-committee-on-the-implementation-of-the-asean-declaration-on-the-protection-and-promotion-of-the-rights-of-migrant-workers) [3 October 2020].

commitments. These initiatives have also opened opportunities for limited participation of non-government organizations, the academe and other civil members of the society through the establishment of multi-sectoral working groups and holding of consultation meetings.

The political objectives of the APSC is to tighten democracy, improve the rule of law as well as good governance, and to boost and protect basic freedom and human rights , by considering the member states' responsibilities and rights, in order to establish a rule-based Community with a sharing of norms and values amongst the member states.<sup>173</sup> Having placed matters of democracy, the rule of law, human rights, and the good governance under the APSC signifies that these are highly contentious issues for ASEAN member countries and also shows the dissimilarities in practices and perception of domestic interests of the ASEAN member countries. However, the segregation of children and women, and migrant workers' rights into the ASCC, means that there are certain areas of human rights which are less controversial and non-threatening that could be dealt with collectively.

The security objective is based on the principle of extensive security that consists not only of customary security, but includes also non-customary aspects concerning socio-cultural, economic, and dimensions of environmental development.<sup>174</sup> Merging the political and security in one umbrella indicates the prevailing attitudes of member states on the impact of political conditions on national security. As discussed in Chapter Four, most member states still regard political instability or domestic politics as a major threat to national integrity although there is increasing recognition of nontraditional aspects to security which were heightened with the rise of Islamist radicalism in the region.

The APSC Blueprint announced that efforts are being made to lay down the basis for an institutional framework on such areas as free flow of data based on domestic regulations and laws of each member country, combating and preventing corruption, cooperating to promote the good governance, the rule of law, and legal infrastructure and judiciary

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<sup>173</sup> Par. 12, Chapter II A.A., APSC Blueprint, 1 March 2009, Cha-Am, Thailand. At <https://asean.org/wp-content/uploads/images/archive/5187-18.pdf> [10 June 2020].

<sup>174</sup> Par. 17, Chapter II B.A., APSC Blueprint.

systems.<sup>175</sup> The strategy envisioned in achieving a rules-based Community is concerned with building intergovernmental institutions, developing norms, and socialization or through the soft method. For instance, the strategy in promoting democracy is through education, holding of ability-building programmes for government staffs, think-tanks, and interrelated organizations of civil society for exchanging opinions and sharing the experiences toward democracy, and conducting research.<sup>176</sup> The strategy of APSC clearly reflects a controlled top-down approach at norm creation and socialization and thus the engagement with non-state actors is deemed more selective.

Compared thus with the EU, many of the values contained in the two other pillars have already been judicialized or within the authority of independent institutions. In transposing these values to Central and Eastern Europe (CEE) countries had also required a mixed strategy of direct transplantation of laws and institutions and through socialization. For example, in the cooperation circumstance between third nations in Europe and the European Union, where the third states are attracted by their wish in order to cooperate more closer with the EU and are also pressured by their own traders who realize that to voluntarily harmonize the EU law is significant for simplifying their access to the EU market'.<sup>177</sup> This make the third states reform their legal basis for their own economic systems on the EU model as an irreversible regulatory infrastructure for integration. Or where soft methods are solely used in areas outside of the Union competence such as in social welfare, these were accompanied by clear guidelines, fully functioning institutions but also the participation of parliaments and civil society. ASEAN's approach therefore in these other pillars, particularly the APSC, still manifests an aversion to broader nonstate participation in regional affairs which is but a manifestation of state-executive identity or the preponderant power of executive over other state institutions.

## **2.7. Chapter Summary and Concluding Remarks**

The transformation of ASEAN Community endeavors to establish a stable and peaceful region and seek a better integration of economy in the ASEAN region. The ASEAN

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<sup>175</sup> Par. 15, Chapter II A.1, APSC Blueprint.

<sup>176</sup> Chapter II A.1.8, APSC Blueprint.

<sup>177</sup> Evans, A. (1997). Voluntary Harmonization in Integration between the European Community and Eastern Europe. 22 EL Rev 201, at 202.

Community represents a significant development especially when considered from its highly political past. The adoption of the ASEAN though not a radical break from its past, represents a progress for ASEAN. In the creation of the ASEAN Community, the economic development is a priority objective of Community-building and the ASEAN Economic Community (AEC), among other pillars, is to be the flagship of regional integration. Among the three pillars, the AEC is believed that it seems to be the most practicable community. The official launch of the AEC has been a milestone of the regional integration of economy of ASEAN. The launch of the AEC showed the beginning of the collective actions of the member countries of ASEAN as single regional economic community,<sup>178</sup> which became another historical step. Furthermore, the AEC has also established frameworks and regional legal structures contributing to an improved environment for business.<sup>179</sup> The AEC consolidates ASEAN's interrelated agreements that govern in-goods trade and services, investment, and dispute settlement schemes.<sup>180</sup>

ASEAN economic integration is framed through soft law regime in contrast to 'hard law' which provides for more specific and precise statement of obligations and corresponding punitive provisions in case of non-compliance. Other ASEAN instruments especially those in non-economic forms expressed through declarations and commitments do not provide for enforcement or dispute resolution mechanisms and mainly depend upon the continuing commitments of the member countries. The technical standards harmonization and MRAs in certain professional services is another feature of soft legal development in the economic field of cooperation in the region. This strategy for bringing about integration depends on the member state's commitment and voluntary action of making local or domestic standards conform to international or regional standards and voluntary recognition of professional qualifications of persons from another member state. MRAs and harmonized standards still depend for their implementation on the member countries' political will and

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<sup>178</sup> ASEAN Integration Report 2019, Jakarta: ASEAN Secretariat, October 2019, p. xii. At <https://asean.org/storage/2019/11/ASEAN-integration-report-2019.pdf> [10 June 2020].

<sup>179</sup> Fact Sheet on ASEAN Community. At <https://asean.org/storage/2012/05/7.-Fact-Sheet-on-ASEAN-Community.pdf> [3 October 2020].

<sup>180</sup> For the timeline of the key agreements, see ASEAN at 50: A Historic Milestone for FDI and MNEs in ASEAN (2017). Pp. 8–9.

do not seek to transgress upon member state's sovereignty particularly on the area of rulemaking.

ASEAN has no council of ministers or regional parliament with powers of law-making, it has no regional judicial system nor powers of enforcement.<sup>181</sup> It has no supranational elements; hence, it does not legislate secondary law that directly apply to member states. Therefore, the ASEAN Economic Community strives to operate on the framework of soft legal regime, albeit on its initial and limited phase. It is leaning towards de-politicization of dispute mechanism but still works through the political framework in terms of rulemaking and implementation. There is however an evolutionary tendency towards delegation of rulemaking in technical matters and development of uniform rules through voluntary reception into the domestic legal system through the method of harmonization. The legal framework of ASEAN depends upon the ability and willingness of its member states in order make imperative harmonization to their domestic laws. The soft law does not have direct effect over the Member States. Several soft instruments such as resolution, declarations, accords and memorandum of understandings only consist of provisions that induce the Member States adopt or develop their domestic laws and regulations relating to specific areas. They provide no sanctions against the member countries for non-compliance. As an outcome of the foreseen achievements, often ASEAN is compared to the EU in its endeavors regarding regional integration. However, the growth between both regional integrations is different, so it is difficult for ASEAN to use the legal regime of the EU as a model for its legal framework development.

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<sup>181</sup> Asia Policy Lecture: What ASEAN is and What It Stands for, by Rodolfo C. Severino, Secretary-General of ASEAN, at The Research Institute for Asia and the Pacific, University of Sydney, Australia, 22 October 1998. At [https://asean.org/?static\\_post=asia-policy-lecture-what-asean-is-and-what-it-stands-for-by-rodolfo-c-severino-secretary-general-of-asean-at-the-research-institute-for-asia-and-the-pacific-university-of-sydney-australia-22-october-1](https://asean.org/?static_post=asia-policy-lecture-what-asean-is-and-what-it-stands-for-by-rodolfo-c-severino-secretary-general-of-asean-at-the-research-institute-for-asia-and-the-pacific-university-of-sydney-australia-22-october-1) [10 October 2020].

## Chapter 3. ASEAN Legal Modernization – the E-commerce Law

### 3.1. Introduction

This chapter investigates the approach used by ASEAN in developing e-commerce laws under the framework of ASEAN Economic Community. It will come with understanding how ASEAN adopts the laws to regulates or govern economic activities in the region.

The WTO failure of the Doha Round that aims to lower trade barriers around the world has significantly boosted the regional trade agreement development, especially in the region of Asia-Pacific. The regionalism evolution of ASEAN has become significant for global trade. The legalization of the ASEAN Economic Community and ASEAN's external FTAs with major Asia-Pacific nations have introduced a remarkable case study of the South regionalism.

The primary foundation of ASEAN at the beginning of 1967 was not for an economic endeavour; it primarily concerned political considerations. However, with signing the Agreement on ASEAN Preferential Trading (PTA) in 1977, the significant step in economic cooperation and coordination of ASEAN was concluded.<sup>182</sup> Yet, the aim of the agreement was not for regional economic integration, but only for economic cooperation promotion.<sup>183</sup> And in 1992, in facing with the rise of India and China, ASEAN member countries came to emphasize on trade liberalization and built the ASEAN Free Trade Area.<sup>184</sup>

Alongside with the continuing development of ASEAN – the regional organization, the concept of ASEAN law revolution was begun. The ASEAN law is a unified law regime<sup>185</sup>, which consolidates separate ASEAN member states' legal systems into the so-called ASEAN legal regime. A remarkable development of ASEAN law is the ASEAN transformation from an “association” to a “community”, which introduces a higher level

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<sup>182</sup> Poon-Kim, S. (August 1977). *A Decade of ASEAN 1967-1977*. Asian Survey, Vol. 17, No. 8. P. 757.

<sup>183</sup> *Supra note* 184.

<sup>184</sup> Ibid; Siew Yean, T., & Basu Das, S. (2016). Introduction: The ASEAN Economic Community and Conflicting Domestic Interests. In Siew Yean, T., & Basu Das, S. eds., 2016, *Moving the AEC Beyond 2015: Managing Domestic Consensus for Community-Building*. Pp. 1, 3–4.

<sup>185</sup> See Declaration on the ASEAN Economic Community – “COGNISANT of the need to have a strengthened institutional framework and a unified legal identity as set forth in the ASEAN Charter by putting in place rules-based systems to realise the establishment of the AEC by 2015”.

of legal integration.<sup>186</sup> In 2003, ASEAN leaders endorsed an action plan for establishing an ASEAN Community, which is supervised by the Hanoi Vision 2020.<sup>187</sup> The target of the ASEAN Community is to create three strengthening pillars, including the ASEAN Economic Community, the ASEAN Political and Security Community, and the ASEAN Social and Cultural Community.<sup>188</sup> In December 2015, ASEAN officially embarked the much-foreseen ASEAN Economic Community (AEC), which became another historical step.

ASEAN law embodies both internal and external dimensions which mutually press economic integration in the region. The internal dimension is the intra-ASEAN agreements that underpin the AEC, and the external dimension is the ASEAN+1 FTAs signed by ASEAN with its dialogue partners. From 2002 to 2019, ASEAN signed free trade agreements with six dialogue partners, including India, China, Australia and New Zealand, Japan, Korea, and Hong Kong.<sup>189</sup> ASEAN and its free trade area partners, excluding Hong Kong, also launched an initiative for Regional Comprehensive Economic Partnership (RCEP), intending to further expand and to deepen regional economic integration.<sup>190</sup> The initiative was affirmed for the pledge of negotiation to consistently integrate the legal mechanism with coexisting ASEAN+1 FTAs.<sup>191</sup>

Concerning e-commerce in the age of information and communication technology, ASEAN has continued its effort on legal development in order to govern the e-commerce activities in the region. The ASEAN Member Countries have started to work together for establishing legal environment to promote e-commerce growth for years. Its first initiative

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<sup>186</sup> Mun, T. S. (2017). Is ASEAN due for a makeover? *Contemporary Southeast Asia*, 39(2). p. 243.

<sup>187</sup> Cha-am Hua Hin Declaration on the Roadmap for the ASEAN Community (2009–2015), (2009).

<sup>188</sup> Ibid

<sup>189</sup> Free Trade Agreements with Dialogue Partners. At <https://asean.org/asean-economic-community/free-trade-agreements-with-dialogue-partners/> [11 October 2020]; see ASEAN concluded the most recent ASEAN+1 FTA and investment agreement with Hong Kong in November 2017. For the history and framework of ASEAN's other external trade agreements; and see also Siong Chin, D. S. (2011). ASEAN's Journey towards Free Trade. In Lim, C. L., & Liang, M. eds., 2011, *Economic Diplomacy: Essays and Reflections by Singapore's Negotiators*. pp. 217–242.

<sup>190</sup> Joint Leaders' Statement on the Regional Comprehensive Economic Partnership (RCEP), 4 November 2019, Bangkok, Thailand

<sup>191</sup> Joint Leaders' Statement on the Negotiations for the Regional Comprehensive Economic Partnership (2017), para. 5.

regarding e-commerce legal development is by adopting ASEAN Vision 2020 in 1997, then followed by numbers of plan of action introducing legal initiatives concerning with e-commerce. ASEAN developed legal framework to facilitate the e-commerce development by harmonizing relevant regulations and laws of the Member Countries.<sup>192</sup> Its legal harmonization consists of the common objective and principles for e-commerce laws.<sup>193</sup>

### 3.2. Development of E-commerce Law in International Scenario

In all regions of the world, e-commerce is growing with offering new opportunities for business and citizens. E-commerce is an essential engine for the world economy growth in the 21<sup>st</sup> century, increase productivity across sectors of our economy, further promote trade in goods and service and investment, it creates new jobs, new sectors of activities, and provides new forms of selling and marketing, and new streams of revenue.<sup>194</sup>

In June 1996 a Model Law on Electronic Commerce was affirmed by the United Nations Commission on International Trade Law (UNCITRAL)<sup>195</sup> and on 30 January 1997 it was, by passing a resolution, further affirmed by the United Nations' General Assembly in order to facilitate information storage and the use of electronic methods of the communication. It is generally known as the first legislative text adopting the fundamental principle of e-commerce at international level. The main purpose of the Model Law was to bring uniformity in national laws regarding e-commerce.<sup>196</sup> To that end, the Model Law was drawn to encourage domestic legislators to adopt a set of globally acceptable principles for validation of e-commerce transactions, and to provide an equal treatment to the use of computer-based and paper-based documentation or data.

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<sup>192</sup> Art. 5, Agreement on e-ASEAN Framework (2000); and *See generally* ASEAN Economic Community Blueprint 2025 (2015); and ASEAN ICT Masterplan 2015.

<sup>193</sup> Review of E-commerce Legislation Harmonization in the Association of Southeast Asian Nations – *Summary Executive*. UNCTAD, 2013. P. ix.

<sup>194</sup> European Union – United States: Joint Statement on Electronic Commerce, “*International Legal Materials*”, Vol. 37, No. 3, May 1998. Pp. 667-668

<sup>195</sup> UNCITRAL Model Law on Electronic Commerce with Guide to Enactment 1996 – *History and Background of The Model Law*. Pp. 63-64.

<sup>196</sup> Rattan, J. (August 2015). *Law Relating to E- Commerce: International and National Scenario with Special Reference to India*, IJSSEI, Vol. 01 Issue 02. pp. 2-3.

After the Model Law on Electronic Commerce in 1996, later a Model Law on Electronic Signatures was adopted by UNCITRAL in 2001.<sup>197</sup> It is the form of a legislative text aiming to grant legal recognition to electronic signature and encourage national legislators to adopt their national laws regarding electronic signature.<sup>198</sup> Subsequently and indirectly relating to e-commerce, United Nations Convention on the Use of Electronic Communications in International Contracts was affirmed in 2005 and was enforced on March 1<sup>st</sup>, 2013<sup>199</sup> intending to facilitate the utility of electronic methods of communication in international contracts by ensuring the conclusion of contract and any other communication transacted electronically to be enforceable and valid as the paper-based equivalent.<sup>200</sup>

At the moment, the two UNCITRAL Model Laws directly concerning to e-commerce and the UN Convention indirectly concerning to e-commerce as mentioned above are the main legislative text relating to e-commerce law in the international scenario.

Meanwhile, Growth of internet integration in the European Union is increasing at a steady step. E-commerce is considered as a dynamic economic area of the European Union, and in 2017, the EU's e-commerce turnover made a rise by 12.75% to Euro 540 billion.<sup>201</sup>

In 1997, the European Initiative in Electronic Commerce was placed, and in April of the year, the European Commission adopted an electronic commerce policy paper aiming to promote the e-commerce growth in Europe, enhance the industry competitiveness in Europe, and ensure the benefit of consumers and businesses the international information networks. To this end, within a circumstance of international dialogue and cooperation, the European Initiative in Electronic Commerce intended to ensure the access to the

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<sup>197</sup> UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001 – *History*. pp. 11-17.

<sup>198</sup> *Supra* Note 217, at. 5; and *See also* UNCITRAL Model Law on Electronic Signatures with Guide to Enactment 2001 – *The Model Law as a Tool for Harmonizing Laws*. p. 18.

<sup>199</sup> *See* United Nations Treaty Collection, Multilateral Treaties Deposited with the Secretary-General, Chapter X International Trade and Development – 18. United Nations Convention on the Use of Electronic Communication in International Contracts. At [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=X-18&chapter=10&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-18&chapter=10&clang=en) [14 June 2020].

<sup>200</sup> *See* United Nations Convention on the Use of Electronic Communications in International Contracts “*Explanatory note by the UNCITRAL secretariat on the United Nations Convention on the Use of Electronic Communications in International Contracts*”.

<sup>201</sup> *See* European Ecommerce Report 2018: *Relevant Finding Outlined*, Ecommerce Europe, 61, 1040 Brussels (Belgium). At [https://www.eurocommerce.eu/media/159952/2018.07.02%20-%20Ecommerce%20report\\_annex.pdf](https://www.eurocommerce.eu/media/159952/2018.07.02%20-%20Ecommerce%20report_annex.pdf) [14 June 2020].

international marketplace; establish a legal infrastructure; and promote a business climate.<sup>202</sup> In May 1997, a Distance Selling Directive has been affirmed by the EU with an aim to protect consumers,<sup>203</sup> where the certain minimum requirements regarding e-commerce such as the providing of specific information and a seven-day cooling-off period in favor of customers were laid down.<sup>204</sup> By this initiative, The European Union had commenced its attempt in order to create a harmonized e-commerce legal framework within Europe by the year 2000, and an Electronic Signatures Directive and an Electronic Money Directive were adopted and enacted by the EU and were transposed into laws of member states.<sup>205</sup>

Within the EU, the certain aspects of electronic commerce law are practiced by a harmonized infrastructure by the mean of directives.<sup>206</sup> In 2000, The Electronic Commerce Directive 2000/31/EC was adopted creating an Internal Market framework for e-commerce which lays down legal certainty for online business and consumers. The Directive has created a basic legal and regulatory framework for the e-commerce in the Internal Market aiming to facilitate cross-jurisdiction online transactions in the territory of the EU and give legal distinctness in cross-jurisdiction online transactions to businesses and citizens.<sup>207</sup> The Directive creates harmonized rules on issues relating to e-commerce and also increase administrative cooperation on e-commerce activities amongst the EU member countries and enhance the role of self-regulation.<sup>208</sup>

In 2015, the EU placed an ambitious goal to create a Digital Single Market. Its primary aim is to enhance a better access for businesses and consumers to e-commerce, in particular online goods and services across the EU.<sup>209</sup> By this effort, a considerable amount of

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<sup>202</sup> Timmers, P. (1999). Electronic Commerce Policy and the European Commission. In D'Haenens, L. (Ed.), *Cyberidentities: Canadian and European Presence in Cyberspace*. Les Presses de l'Université d'Ottawa | University of Ottawa Press. pp. 196-1997.

<sup>203</sup> OJ L 144, 4.6.1997, pp. 19–27.

<sup>204</sup> Endeshaw, A. (1998). *The Proper Law for Electronic Commerce*. 7 Info. & Comm. Tech. L. 5. P. 5.

<sup>205</sup> Winn, J. (2001). Electronic Commerce Law: 2001 Developments. *The Business Lawyer*, 57(1). p. 551.

<sup>206</sup> Docter, N. N.; van Bellen, A. A. (1999). Model code of conduct for electronic commerce. *EDI Law Review*, 6(4). p. 188.

<sup>207</sup> OJ L 178, 17.7.2000, pp. 1-16 – *The Electronic Commerce Directive*, Recitals (3), (5), (6), (7), and (8).

<sup>208</sup> See Digital Single Market, Policies – *e-Commerce Directive*, European Commission. At <https://ec.europa.eu/digital-single-market/en/e-commerce-directive> [17 June 2020].

<sup>209</sup> Van Cleynenbreugel, P. (2017). The European Commission's Geo-blocking Proposals and the Future of EU E-commerce Regulation. *Masaryk University Journal of Law and Technology*, 11(1). p. 40.

enforcement and legislative at the EU regional stage for a cross-jurisdiction e-commerce transactions as a significant area for the achievement of the Digital Single Market attracts attention.<sup>210</sup> And at the moment, e-commerce of the EU is primarily regulated by the Electronic Commerce Directive 2000/31/EC. And also, other legislative instruments that are either related to digital economy such as the Data Protection Regulation (EU) 2016/679, Electronic Identification and Trust Services Regulation (EU) No 910/2014, and Consumer Rights Directive 2011/83/EU apply to feasible aspects of e-commerce.<sup>211</sup>

### 3.3. ASEAN's Policy Development on e-Commerce<sup>[212]</sup>

ASEAN, after China and India, has the third largest number of internet users in the world and it is one of the regions that has the fastest growth of internet usage. The major drivers of the growth of ASEAN e-commerce are its promotion of investment, infrastructure development and its regional strong participation in digital development.<sup>213</sup> To achieve this potential, however, the right policy and legal framework are required in order to promote further investment and participation by the private sector, and also to address significant challenges of the growth.<sup>214</sup>

The integration efforts of ASEAN intend to establish a single regional market in order to facilitate free movement of goods, services and investment, and free flow of capital, as well as free flow of skills across the region<sup>215</sup> and the integration is a significant driver of the digital economy development in ASEAN as well as its relevant legal framework. And in

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<sup>210</sup> Majcher, K. (2018). E-commerce in the E: Searching for Coherence of Data Protection and Competition Law in the Context of Geo-blocking. *Columbia Journal of European Law*, 24(3). p. 578.

<sup>211</sup> See E-Commerce in Europe - Regulatory Overview, International Trade Administration, Department of Commerce of the US. At <https://www.export.gov/article?id=e-Commerce-in-Europe-regulatory-overview> [18 June 2020].

<sup>212</sup> This part is a slightly modified version of the author's published works from "Sengpunya, P. (2019). ASEAN E-Commerce Legal Framework and Alignment of Lao PDR: A Review", published in *Lentera Hukum*, 6(3), 371-392. doi:10.19184/ejll.v6i3.13709 ; and also from "Sengpunya, P. (2020). Online Dispute Resolution Scheme for E-Commerce: The ASEAN Perspectives", published in *Pécs Journal of International and European Law - 2020/I*.

<sup>213</sup> ASEAN Investment Report 2018 – *Foreign Direct Investment and the Digital Economy in ASEAN*, Jakarta: ASEAN Secretariat, November 2018. P. 163.

<sup>214</sup> *Supra Note 292*.

<sup>215</sup> Invest in ASEAN – Single Market and Production Base. ASEAN, 2019. At <http://investasean.asean.org/index.php/page/view/asean-economic-community/view/670/newsid/758/single-market-and-production-base.html> [03 August 2020].

2015, the ASEAN Economic Community (AEC) was launched,<sup>216</sup> in which the ICT sector is recognized as a key driver for regional integration.

Over the last decade, ministers, regulators, policy makers, and industry of ASEAN came and worked together for developing the ICT landscape, as well as the legal framework.<sup>217</sup> The cooperation of ASEAN on ICT initiated before 2000 and it started becoming more concrete when an Agreement on e-ASEAN Framework was adopted in 2000. This Framework Agreement intends to enhance ASEAN's information infrastructure, facilitate the growth of e-commerce, and to foster investments in digital products and services. Along with the Framework Agreement, successive five-year ICT master plans were also adopted, where the first ASEAN ICT Master Plan was adopted in 2010 aiming at infrastructure development and bridging the digital divide.<sup>218</sup> And the more recent ASEAN ICT Master Plan or AIM 2020 was adopted in 2016 focusing on developing an integrated digital economy more broadly. It aims to drive ASEAN towards a digitally secured, enabled, and transformative economy; and to enable an inclusive, innovative, and integrated ASEAN Community.<sup>219</sup>

In November 2017, ASEAN adopted the Work Programme on Electronic Commerce 2017–2025 in order to strengthen the e-commerce development within the ASEAN's emerging single market.<sup>220</sup> The work programme aims to develop and implement coordination mechanisms, guidelines, and specific initiatives related to infrastructure of broadband, the modernization of legal frameworks on e-commerce, consumer protection, trade facilitation, payment systems, the security of electronic transactions, competition and improved logistics.<sup>221</sup> It also presents the adoption of an ASEAN agreement on e-commerce intending to enhance cross-border e-commerce transactions and connectivity

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<sup>216</sup> ASEAN Economic Community. ASEAN Secretariat, 2019. At <https://asean.org/asean-economic-community/> [03 August 2020].

<sup>217</sup> ASEAN, ASEAN ICT Master Plan 2015, p. 5.

<sup>218</sup> ASEAN Investment Report 2018 – *Foreign Direct Investment and the Digital Economy in ASEAN*. Jakarta: ASEAN Secretariat, November 2018. P. 238; *See also* ASEAN ICT Masterplan 2015 Completion Report. ASEAN, 2015. Pp. 8-11; and ASEAN ICT Masterplan 2015. Pp. 9-10

<sup>219</sup> *See generally* ASEAN ICT Master Plan 2020

<sup>220</sup> The Preamble, ASEAN Agreement on Electronic Commerce; *See also* ASEAN Work Programme on Electronic Commerce 2017 – 2025. At <https://asean.org/asean-economic-community/sectoral-bodies-under-the-purview-of-aem/e-Commerce/> [06 November 2020].

<sup>221</sup> *Supra* Note 292, at 239.

of digital by laying down trade rules on e-commerce, in which the agreement was endorsed by the ASEAN Economic Ministers at the fiftieth ASEAN Economic Ministers Meeting on 29 August 2018 and it was officially signed by the ASEAN Economic Ministers on 12 November 2018, on the side-lines of the thirty-third ASEAN Summit and Related Meetings.<sup>222</sup>

Besides, in 2016, ASEAN adopted the ASEAN Framework on Personal Data Protection to ensure recognitions of the importance of accuracy of personal data, personal data protection, and security safeguards within ASEAN. The framework seeks to contribute to the flows of information, and the growth and promotion of regional trade within ASEAN. In addition, ASEAN Framework on Digital Data Governance is currently being developed, leading by Singapore, in order to harmonize regulations on data and it was set to complete in 2019. These two frameworks will also play important role to help promote digital usage, consumer confidence, and growth of e-commerce within ASEAN.<sup>223</sup>

### **3.4. Development of E-Commerce Law in ASEAN<sup>[224]</sup>**

Inappropriate designed rules, regulations, and laws can be a major obstacle to the economic growth. In this regard, a question in mind of policymakers has arisen for years whether how much and how ASEAN regulates its regional integration. Quality and effective laws, rules and regulations are significant in promoting economic growth, markets functioning and society as whole.

Regulatory reform is a cross-cutting importance for ASEAN regulatory coherence and economic integration. ASEAN has recognized the importance of good regulatory practice (GRP) for effective regulations to enhance economic growth, innovation, investment, and the markets functioning and society of ASEAN as whole.<sup>225</sup> In general, GRP holds importance to objectives of integration of the region and agenda of the development of ASEAN, and it is becoming an attraction among AMS.

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<sup>222</sup> *Supra Note 279.*

<sup>223</sup> *Supra Note 292, at 239.*

<sup>224</sup> This part is a slightly modified version of the author's published works from "Sengpunya, P. (2019). ASEAN E-Commerce Legal Framework and Alignment of Lao PDR: A Review", published in *Lentera Hukum*, 6(3), 371-392. doi:10.19184/ejlh.v6i3.13709

<sup>225</sup> The ASEAN Good Regulatory Practice (GRP) Core Principles, FINAL (adopted by the AEM at the 50th AEM Meeting and endorsed by the AEC Council in November 2018)

The application of GRP of ASEAN allows policymakers and regulators to enable and keep a stable regulatory and legal context that promotes entrepreneurship and openness of economy, and also limits and even eliminates unnecessary administrative load for businesses in ASEAN. These are benefits of the integration context, where challenges and interfaces of policy transcend national borders.

ASEAN has made steady progress on the GRP implementation since the affirmation of the Work Plan. In 2018, ASEAN adopted the ASEAN GRP Core Principles in order to secure political commitments toward GRP.<sup>226</sup> The Core Principles aims to help Member States in enhancing their regulatory practice, and to promote more intense regulatory cooperation in ASEAN. ASEAN has put an effort in operationalizing these core principles by emphasizing clarification of institutional frameworks, better transparency, and participation and engagement of stakeholder across sectoral works of ASEAN. However, these are only basic initiatives. Moving forward, ASEAN shall take more substantial initiatives to mainstream these core principles through ASEAN's work, and it is significant that the concrete steps shall be taken within Member States. This is to ensure that Member States adopt new or review existing measures, initiatives, or regulations in all regional, national, and sectoral levels by bringing into consideration of both the region's economic integration agenda and the ASEAN GRP Core Principles.

From 1970s, the industrialization of ASEAN has been rapidly driven by the Information and communication technologies (ICT) revolution. ASEAN has considered the ICT as a key priority for its regional integration.<sup>227</sup> By adopting the ASEAN Vision 2020 in 1997, ASEAN set forth the initiative on ICT development. Under the ASEAN Vision 2020, ASEAN Member States resolved to accelerate the science and technology development including information technology by creating regional information technology network and establishing excellence centres for easy access to and dissemination of data and information.<sup>228</sup> Among others, the ASEAN Vision 2020 aims to make ASEAN economic region highly competitive, stable and prosperous in order to foster the free movement of

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<sup>226</sup> *Supra Note 208.*

<sup>227</sup> *See generally* Review of E-commerce Legislation Harmonization in the Association of Southeast Asian Nations. UNCTAD, 2013.

<sup>228</sup> *See generally* ASEAN Vision 2020.

goods, services, investment and free flow of capital and skilled labour, as well as promote the equitable economic development and reduce poverty and socio-economic disparities within ASEAN by the year 2020.<sup>229</sup>

After the adoption of the ASEAN Vision 2020 and in order to achieve its goals, ASEAN has commenced its effort to establish an e-commerce regulatory framework aiming to promote e-commerce development within the region. The Hanoi Plan of Action was launched and followed with endorsing e-ASEAN initiative intending to foster socio-economic development and employment; strengthen information and news worldwide access; provide better government services and promote better governance; and to foster cross-border business and networks.<sup>230</sup> The e-ASEAN initiative introduced series of plan of action focusing on legal framework. It has been a significant plan of action of ASEAN to develop e-commerce regulatory framework and encourage member countries to develop their domestic laws and regulations on e-commerce.<sup>231</sup> The development of e-commerce law of ASEAN can be seen through its plans of action or soft instruments and trade agreements.

#### 3.4.1. Development through Soft Instruments and regional Agreements<sup>[232]</sup>

For several months after the affirmation of ASEAN Vision 2020, The Hanoi Action Plan was launched.<sup>233</sup> The Hanoi Action Plan are established to realize the ASEAN Vision 2020 which aims at implementing the long-term vision. The Hanoi Action Plan is the first among other action plans that builds up to the realization of aims of the ASEAN Vision 2020. The Hanoi Action Plan sets out a wide vision to help ASEAN live in peace, prosperity as well as stability, committed together in partnership within the dynamic development and

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<sup>229</sup> Nazura, M.A. (2015). *Alignment of Malaysia to an ASEAN Agreement on ICT Law: A review*. Contemporary Issues in South-East Asia Countries. Brawijaya Law Journal, Vol. 2(S) No.1. P. 4.

<sup>230</sup> Tay, Simon S.C., Estanislao, Jesus P., & Soesastro, H. (2001). *Reinventing ASEAN*, Institute of Southeast Asian Studies, Singapore. p. 141.

<sup>231</sup> *Supra Note 233*, at 1.

<sup>232</sup> This part is a slightly modified version of the author's published works from "Sengpunya, P. (2019). ASEAN E-Commerce Legal Framework and Alignment of Lao PDR: A Review", published in *Lentera Hukum*, 6(3), 371-392. doi:10.19184/ejlh.v6i3.13709

<sup>233</sup> Quimbo, Rodolfo N. S. (2012). "The e-ASEAN Legal Framework and Its Challenges" *Harmonized development of legal and regulatory systems for e-commerce in Asia and the Pacific: Current challenges and capacity-building needs*. P. 82.

in a regional community of sharing and caring societies. The Hanoi Action Plan sets out goals as following:

*“To strengthen macroeconomic and financial cooperation; To enhance greater economic integration; To promote science & technology development and develop information technology infrastructure; To promote social development and address the social impact of the finance and economic crisis; To promote human resource development; To protect the environment and promote sustainable development; strengthen regional peace and security; To enhance ASEAN’s role as an effective force for peace, justice, and moderation in the Asia-Pacific and in the world; To promote ASEAN awareness and its standing in the international community; and To improve ASEAN’s structures and mechanisms”<sup>234</sup>.*

In the respect of e-commerce, under the aim of enhancing closer integration of economy, the Hanoi Action Plan encourages ASEAN member countries to establish policy and legislative climate to facilitate cross-border e-commerce, coordinate and adopt cross-border e-commerce framework in line with international standards and practices. The Action Plan also encourages Member States toward technical cooperation and technology transfer in the development of e-commerce infrastructure, services and applications.<sup>235</sup> The Hanoi Plan of Action was the first significant remark on e-commerce legal development of ASEAN.

On 28 November 1999, the e-ASEAN initiative was endorsed by the ASEAN leaders at their Summit Meeting in Manila, the Philippines.<sup>236</sup> A high-level advisory body for public-private sector was also established to expand a comprehensive and broad-based plan of action concerning with evolving the ASEAN electronic marketplace.<sup>237</sup> For a better ASEAN’s integration in the economy of global information, the e-ASEAN initiative intends to implement Member Countries’ national ICT strategies and to foster economic

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<sup>234</sup> See generally Hanoi Action Plan of Action, 1997. At [https://asean.org/?static\\_post=hanoi-plan-of-action](https://asean.org/?static_post=hanoi-plan-of-action) [29 July 2020].

<sup>235</sup> Section 2.8, Hanoi Action Plan of Action, 1997.

<sup>236</sup> Toward an e-ASEAN, ASEAN Secretariat. At <https://www.asean.org/wp-content/uploads/images/2012/Economic/TELMIN/TOWARD%20AN%20E-ASEAN.pdf> [29 July 2020].

<sup>237</sup> *Supra* Note 70, at 97.

development and competitiveness<sup>238</sup>. Under the e-ASEAN initiative, a comprehensive and broad-based action plan was mandated to develop in order to identify necessary legal, social, economic, physical, and logistical infrastructure required to foster an ASEAN e-community as a portion of an ASEAN branding as well as positioning strategy.<sup>239</sup>

After years of e-ASEAN initiative, the ASEAN adopted the Agreement on e-ASEAN Framework on November 24<sup>th</sup>, 2000, in Singapore in order to enhance the competitiveness and promote cooperation on ICT sector and trade liberalization in ICT investments, ICT products and services in ASEAN, to lower the digital divide among member countries of ASEAN and within individual member countries, and to boost collaboration between the private and public sectors in actualizing e-ASEAN<sup>240</sup>. To that end, the Agreement on e-ASEAN Framework consists of elements focusing on development of an e-commerce legal and regulatory infrastructure to foster the competitiveness of ASEAN industries and businesses, and development of the ASEAN information infrastructure by establishing the national infrastructure and strengthening the connectivity among the Member Countries.<sup>241</sup>

In the respect of an e-commerce legal development, through the Agreement on e-ASEAN Framework, Member Countries shall adopt their domestic e-commerce law and regulatory framework that establish confidence and trust for consumers and support the businesses transformation over the development of e-ASEAN, where the Agreement on e-ASEAN Framework provides that Member Countries shall:

*“expeditiously put in place national laws and policies relating to electronic commerce transactions based on international norms; facilitate the establishment of mutual recognition of digital signature frameworks; facilitate secure regional electronic transactions, payments and settlements, through mechanisms such as electronic payment gateways; adopt measures to protect intellectual property rights arising from e-commerce. Member States should consider adoption of the World Intellectual Property Organization (WIPO) treaties, namely: “WIPO Copyright Treaty 1996” and “WIPO Performances and Phonograms Treaty 1996”; take measures to promote personal data protection*

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<sup>238</sup> *Supra* Note 233, at iv.

<sup>239</sup> *Supra* Note 238, at 81-83.

<sup>240</sup> Dai, X. (2007). *e-ASEAN and Regional Integration in South East Asia*. University of Hull, UK. P. 416; and *See also* Art. 2, Agreement on e-ASEAN Framework.

<sup>241</sup> *Supra* Note 236, at 141.

*and consumer privacy; and encourage the use of alternative dispute resolution (ADR) mechanisms for online transactions”.*<sup>242</sup>

By the adoption of the above measures, the e-commerce legal framework development of ASEAN has been progressive. Along with the assistance of United Nations Conference on Trade and Development (UNCTAD) and AusAID/ASEAN projects, more electronic transactions laws of the ASEAN Member Countries were adopted.<sup>243</sup>

To enhance the e-commerce legal development within the region, ASEAN regulators have agreed to establish non-binding regulatory models concerning e-commerce. The regulatory models serve as guidelines and approaches for the ASEAN Member States to use as common reference to design or develop new legal and regulatory instruments or to create their respective legal and regulatory system and processes.<sup>244</sup>

After entering into the Agreement on e-ASEAN Framework, in 2001 ASEAN developed the e-ASEAN Reference Framework for E-commerce Legal Infrastructure intending to provide a guidance in assisting ASEAN member states that at that time did not have any e-commerce laws in place to develop their own and also assisting ASEAN member states that have already had e-commerce laws in place to accomplish cross-jurisdiction e-commerce and the cross-certification/cross-recognition of digital signatures/digital certificates.<sup>245</sup> This e-ASEAN Reference Framework for E-commerce Legal Infrastructure was developed by consultation of the legal experts from Brunei, the Philippines, Malaysia, Singapore, and Thailand which dependent upon the e-commerce laws of the foresaid member countries – Singapore’s Act on Electronic Transaction Act, Malaysia’s Act on Digital Signature, the Philippines’ Act on Electronic Commerce Act, Thailand’s Draft Electronic Transaction Bill, and Brunei’s Oder on Electronic Transaction.<sup>246</sup> In turn, the Member States’ e-commerce laws used as a model for developing the e-ASEAN Reference Framework for E-commerce Legal Infrastructure are largely based on UNCITRAL Model

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<sup>242</sup> Art. 5, the Agreement on e-ASEAN Framework.

<sup>243</sup> *Supra Note* 201, at iv.

<sup>244</sup> *See* Reference Framework for E-commerce Legal Infrastructure 2001, p. 1.

<sup>245</sup> *Supra Note* 238, at 84; And *Supra Note* 249.

<sup>246</sup> *Supra Note* 238, at 87; and *See also* Reference Framework for E-commerce Legal Infrastructure 2001, p. 1.

Law on Electronic Commerce and Draft Model Law on Electronic Signature, and also the electronic signature and e-commerce laws the EU (Germany) and the US (Utah, Illinois).<sup>247</sup>

The framework is a remarkable regulatory model of ASEAN in order to support Member Countries to develop their e-commerce law and regulations. It outlines general principles for e-commerce law which Member Countries must adopt in their domestic law. Key features of the general principles provided by the framework are:

*“They should conform to international standards such as UNCITRAL’s Model Law on Electronic Commerce and Draft Model Law on Electronic Signatures to be interoperable with similar laws of other countries; They should be transparent and predictable so that there is no legal ambiguity between transacting parties in an electronic transaction; They should be technology neutral, with no discrimination between different types of technology; and They should be media neutral, that is, paper-based commerce and e-commerce are treated equally under the law”.*<sup>248</sup>

Furthermore, the minimum provisions require member states to contain in their draft laws and regulations concerning e-commerce are stated by the framework, in which it provides that e-commerce laws should contain provisions on electronic transactions, normal rules of contracts applying equally to transactions online, the legal effect of the use of electronic signatures and electronic records, presumptions regarding the reliability of electronic signatures and electronic records; duties of certification authorities and trusted third parties, and the extent of legal responsibility for service providers.<sup>249</sup>

To continue its effort on regulating electronic commerce transactions in the region, in 2007 ASEAN affirmed first AEC Community Blueprint as a roadmap for regional integration until 2015, with an intention to turn ASEAN into the product base and single market, a region of highly competitive economy, a region of equitable development of economy, and a region with full integration into the world economy.”<sup>250</sup> An adoption of the Blueprint

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<sup>247</sup> *Supra* Note 236, at 144; and *See also* Reference Framework for E-commerce Legal Infrastructure 2001, p. 1.

<sup>248</sup> Reference Framework for E-commerce Legal Infrastructure 2001, p. 5.

<sup>249</sup> Reference Framework for E-commerce Legal Infrastructure 2001, pp. 7-9; and *See also Supra* Note 238, at 88.

<sup>250</sup> See Declaration on the ASEAN Economic Community Blueprint, signed on 20 November 2007 in Singapore. At [https://asean.org/?static\\_post=declaration-on-the-asean-economic-community-blueprint](https://asean.org/?static_post=declaration-on-the-asean-economic-community-blueprint) [06 November 2020].

remarked another significant move for laying the e-commerce policy and legal infrastructure and enable e-commerce sector in the ASEAN region by implementing the Agreement on e-ASEAN Framework and dependent upon the common reference frameworks.

Under the Blueprint, the member states affirmed their strong commitment on acceleration of community-building and the formation of the AEC and transforming ASEAN in a community with free flow of investments, goods, service, skilled labour, and capital. *Inter alia*, ASEAN recognizes an importance of e-commerce growth. It sets goal of actions and provides the legal and policy framework for e-commerce in the Blueprint as following:

*“Adopt best practices in implementing telecommunications competition policies and fostering the preparation of domestic legislation on e-commerce; Harmonise the legal infrastructure for electronic contracting and dispute resolution; Develop and implement better practice guidelines for electronic contracting, guiding principles for online dispute resolution services, and mutual recognition framework for digital signatures in ASEAN; Facilitate mutual recognition of digital signatures in ASEAN; Study and encourage the adoption of the best practices and guidelines of regulations and/or standards based on a common framework”, and Establish a networking forum between the businesses in ASEAN and its Dialogue Partners as a platform for promoting trade and investment”.*<sup>251</sup>

And to further structure the roadmap for the AEC, ASEAN approved a new AEC Blueprint 2025, with an aim at establishing “the deeply integrated and highly cohesive ASEAN economy”.<sup>252</sup> The Blueprint acknowledges that e-commerce sector plays an important role in cross-jurisdiction trade, in which it has remarkably reduced obstacles to cost of operating and cost of entry for businesses, and is particularly beneficial for MSMEs in the region.

In recognition of the potential of e-commerce sector in supporting regional integration of economy, an adoption of the Blueprint 2025 reaffirms the cooperation among the member states on building e-commerce sector in line with Article 5 of the Agreement on e-ASEAN Framework. Under the Blueprint 2025, ASEAN also seeks to develop an ASEAN

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<sup>251</sup> ASEAN Economic Blueprint, p. 23.

<sup>252</sup> ASEAN Economic Community Blueprint 2025 (2015), paras. 3–7.

Agreement on e-Commerce aiming at facilitating cross-border e-commerce activities in ASEAN. The Blueprint 2025 provides strategic measures in connection with e-commerce building which required to be put in place by the member countries as the following:

*“Harmonised consumer rights and protection laws; Harmonised legal framework for online dispute resolution, taking into account available international standards; Inter-operable, mutually recognised, secure, reliable and user-friendly e-identification and authorisation (electronic signature) schemes; and Coherent and comprehensive framework for personal data protection”*.<sup>253</sup>

The adoption of the AEC Blueprint has come up with clear commitments on e-commerce, in which ASEAN acknowledges that cooperation on e-commerce is integral part of the regional economic integration. However, it required a comprehensive legal framework in order to effectively regulate the e-commerce activities within the region. ASEAN continues its efforts on adopting legal regime to match with its vision and preference for community-building. In the event of e-commerce sector, ASEAN have worked on development of the legal framework through various initiatives based on soft legal regime which depend on commitments and voluntary actions of the member states.

#### 3.4.2. Development through trade agreements<sup>[254]</sup>

ASEAN has developed framework for economic integration over a decade and its framework for economic integration comprises of several layers of agreements and declarations. Moreover, ASEAN has strong external relationship with its dialogue partners for trade facilitation by entering into numbers of Free Trade Agreements, namely, ASEAN-Japan Comprehensive Economic Partnership (AJCEP), ASEAN-Australia-New Zealand Free Trade Area (AANZFTA), ASEAN-India Free Trade Area (AIFTA), ASEAN-Korea Free Trade Area (AKFTA), and ASEAN-China Free Trade Agreement (ACFTA).

By entering into the Free Trade Agreements, significant e-commerce legal development was introduced in ASEAN. However, only AANZFTA provides more detailed provisions on e-commerce. AJCEP, AIFTA, ACFTA, and AKFTA do not include specific provisions

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<sup>253</sup> ASEAN Economic Community Blueprint 2025, Section C.3, p.24.

<sup>254</sup> This part is a slightly modified version of the author’s published works from “Sengpunya, P. (2019). ASEAN E-Commerce Legal Framework and Alignment of Lao PDR: A Review”, published in *Lentera Hukum*, 6(3), 371-392. doi:10.19184/ejll.v6i3.13709

on e-commerce, they only identify e-commerce as a sector in which parties could strengthen the cooperation.<sup>255</sup>

The AANZFTA created a cooperation and coordination framework for e-commerce. Provisions on e-commerce are covered in the Chapter 10 of the Agreement. Provisions on e-commerce under AANZFTA aim to promote e-commerce between the parties, to promote the wider use of e-commerce globally, and to strengthen cooperation between the parties in order to foster the development of e-commerce.<sup>256</sup> The AANZFTA remarked a significant e-commerce legal framework for ASEAN. It requires the parties to adopt domestic law and regulations governing electronic transactions<sup>257</sup> which it is a driving force for e-commerce legal development within ASEAN. Under the terms of FTA, the parties, especially ASEAN member states that have no e-commerce laws in place, shall adopt their national laws and regulations that will govern electronic transaction considering the UNCITRAL 1996 Model Law on Electronic Commerce.

Furthermore, the AANZFTA requires each party to provide protection for e-commerce consumers<sup>258</sup>, protect the personal data of the e-commerce users<sup>259</sup>, and work on implementation of initiatives providing paperless trading. It also provides provisions on paperless trading, whereby the parties undertake to make documents of trade administration available in electronic form to the public and to recognize documents transmitted electronically as a paper-based equivalent, taking into account principles recognized by international organizations such as the World Customs Organization.<sup>260</sup> Also, in strengthening the promotion and development, the parties of AANZFTA have undertaken to persuade cooperation in the form of training and research on e-commerce.<sup>261</sup>

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<sup>255</sup> Wong, MH., & Pellan, M. I. (July 2012). *Trade Facilitation: The Way Forward for ASEAN and Its FTA Partners*. ERIA Policy Brief, No. 2012-04. P. 4.

<sup>256</sup> Findlay, C. (Ed., 2015). *ASEAN and Regional Free Trade Agreements*. London: Routledge. P. 51; and *See also* Art. 1 of Chapter 10, AANZFTA.

<sup>257</sup> Art. 4 of Chapter 10, AANZFTA.

<sup>258</sup> Art. 6 of Chapter 10, AANZFTA.

<sup>259</sup> Art. 7 of Chapter. 10, ANZFTA.

<sup>260</sup> *Supra* Note 260, at 52; and *See also* Art. 8 of Chapter 10, AANZFTA.

<sup>261</sup> Art. 9 of Chapter 10, AANZFTA.

Recently in the beginning of 2021, the Regional Comprehensive Economic Partnership (RCEP)<sup>262</sup> was adopted by the ASEAN and its trade partners, in which another assurance for e-commerce legal development in the ASEAN region is introduced. The RCEP is an Asia-Pacific regional agreement on free trade among ASEAN and Australia, China, Japan, Korea, and New Zealand<sup>263</sup>. This free trade agreement helps broaden and deepen engagement of ASEAN with Australia, China, Japan, Korea and New Zealand<sup>264</sup>. Its aim is to create a mutual beneficial, high-quality, comprehensive, and modern economic cooperation for facilitating the regional investment and trade expansion and contributing to the development of international economy as well as the growth of international economy<sup>265</sup>.

The adoption of RCEP has further assured the e-commerce legal development in ASEAN. The RCEP contains a Chapter on Electronic Commerce (e-commerce)<sup>266</sup>, aiming to boost e-commerce sector amongst the contracting countries and promote more extensive use of electronic commerce and strengthen e-commerce cooperation between the contracting countries<sup>267</sup>. It lay down provisions encouraging the contracting countries to enhance trade process and administration by using electronic means<sup>268</sup>. Under the RCEP, the contracting countries are required to adopt or maintain laws and regulations which establish environment for facilitating evolution of e-commerce sector including e-commerce users' personal data protection and protection of e-commerce consumers<sup>269</sup>. The contracting countries consented to remain the practice that does not impose customs duties for electronic transmission, in conformity with the "WTO Ministerial Decision of 13 December 2017 in relation to the Work Programme on Electronic Commerce

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<sup>262</sup> See <https://rcepsec.org/legal-text/> [25 October 2021].

<sup>263</sup> See generally the Regional Comprehensive Economic Partnership Agreement.

<sup>264</sup> Summary of the Regional Comprehensive Economic Partnership Agreement (Final), at <https://rcepsec.org/wp-content/uploads/2020/11/Summary-of-the-RCEP-Agreement.pdf> [25 October 2021].

<sup>265</sup> Art. 1.3, The Regional Comprehensive Economic Partnership Agreement.

<sup>266</sup> See <https://rcepsec.org/wp-content/uploads/2020/11/Chapter-12.pdf> [25 October 2021].

<sup>267</sup> Art. 12.2, The Regional Comprehensive Economic Partnership Agreement.

<sup>268</sup> Art. 12.5, The Regional Comprehensive Economic Partnership Agreement.

<sup>269</sup> Art. 12.7 – 12.8, The Regional Comprehensive Economic Partnership Agreement.

(WT/MIN(17)/65)”<sup>270</sup>. The RCEP also set out provisions on computing facilities location and cross-jurisdiction information transfer through electronic means<sup>271</sup>.

By this RCEP, it furtherly ensures development of e-commerce law in ASEAN, as all ten ASEAN member countries are parties to the RCEP and under the agreement, they undertake commitment to adopt or maintain their domestic law for facilitating and governing e-commerce activities. This will help establish better legal environment on e-commerce in the ASEAN.

### **3.5. The Current Status of ASEAN E-Commerce Law<sup>[272]</sup>**

By recognizing the potential of ICTs, ASEAN Member States have taken actions to move forward e-commerce legal development in order promote e-commerce growth and facilitate cross border e-commerce. They have made a great progress in introducing e-commerce legal framework and keep remain potential for the legal framework for regional integration of e-commerce sector in ASEAN.

ASEAN Member Countries have different legal background and legal system, especially when it comes to ICTs. Therefore, ASEAN has developed legal framework for integration of e-commerce sector by the way of legal harmonization.<sup>273</sup> And by adopting the ASEAN ICT Masterplan 2015 in 2011, ASEAN has clear action plans for regional economic development considering ICT sector as a key driver for social and economic growth by 2015. The Masterplan, in support of some other initiatives, envisages to establish harmonized e-commerce law in ASEAN.<sup>274</sup> It contributes to e-commerce legal development by urging Member States to set out the legal framework and policy for e-commerce and enable e-commerce in ASEAN based on common reference frameworks and through a performance of implementing the Agreement on e-ASEAN Framework.<sup>275</sup>

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<sup>270</sup> Art. 12.11, The Regional Comprehensive Economic Partnership Agreement.

<sup>271</sup> Art. 12.14, The Regional Comprehensive Economic Partnership Agreement.

<sup>272</sup> This part is a slightly modified version of the author’s published works from “Sengpunya, P. (2019). ASEAN E-Commerce Legal Framework and Alignment of Lao PDR: A Review”, published in *Lentera Hukum*, 6(3), 371-392. doi:10.19184/ejllh.v6i3.13709

<sup>273</sup> Anuragini, T.A. (2006). *E-Commerce Legal Framework For ASEAN: A Model Code*. National University of Singapore. pp. 9-10.

<sup>274</sup> *Supra Note* 201, at 1.

<sup>275</sup> Section B6, ASEAN Economic Community Blueprint, p. 23.

### 3.5.1. Legal Harmonization<sup>[276]</sup>

At the moment, ASEAN does not have a legal superstructure to establish a regional legal regime that could support regional e-commerce unlike the European Union that has its absolute community legal structure. ASEAN has developed e-commerce legal framework by harmonizing of the Member States' national laws into regional legal system that respects each individual member state's national sovereignty and cultural sensitivities.<sup>277</sup> Consequently, the e-commerce legal support of ASEAN depends upon the adoption of a common reference framework that serves as legal templates providing a guide for helping ASEAN Member States enacting their domestic laws and regulations on e-commerce in the respective ASEAN jurisdictions.<sup>278</sup>

In the respect of region's aim of economic integration, ASEAN has made progress towards legal harmonization within the region.<sup>279</sup> In the particular integration of e-commerce, ASEAN has been pioneering the preparation as well as the implementation of a harmonized legal structure over e-commerce sector in compliance with ASEAN jurisdictions and the member states must enact laws to govern e-commerce and ensure that the laws are regionally harmonized. Previously, only four ASEAN Countries – Malaysia, the Philippines, Singapore and Thailand – have law covering e-commerce, based largely on the model suggested by the UNCITRAL.<sup>280</sup> By e-ASEAN initiative together with assistance of AusAID/ASEAN project and UNCTAD during 2004 to 2009, four new electronic transactions laws – of Indonesia, Vietnam, Brunei and Myanmar – were implemented<sup>281</sup>.

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<sup>276</sup> This part is a slightly modified version of the author's published works from "Sengpunya, P. (2019). ASEAN E-Commerce Legal Framework and Alignment of Lao PDR: A Review", published in *Lentera Hukum*, 6(3), 371-392. doi:10.19184/ejlh.v6i3.13709 and "Sengpunya, P. (2020). Online Dispute Resolution Scheme for E-Commerce: The ASEAN Perspectives", published in *Pécs Journal of International and European Law - 2020/I*.

<sup>277</sup> Wong, J. (2013). *On Legal Harmonization Within ASEAN*. *Juris*, Vol. 5 (2013/14) Singapore Law Review. pp. 1-2.

<sup>278</sup> Hsieh, P., & Mercurio, B. (Eds.). (2019). *ASEAN Law in the New Regional Economic Order: Global Trends and Shifting Paradigms*. Cambridge: Cambridge University Press. p. 344; and *See also* Mik, E. (2019). Legal and Regulatory Challenges to Facilitating e-Commerce in ASEAN. p. 3.

<sup>279</sup> *Supra* Note 269, at 2.

<sup>280</sup> *Supra* Note 236, at 144.

<sup>281</sup> *Supra* Note 201, at iv.

In 2012, law on electronic transactions of The Lao PDR was also implemented.<sup>282</sup> Cambodia recently adopted its Law on E-commerce on 2 November 2019<sup>283</sup>.

Status of e-commerce law harmonization in ASEAN						
Member Country	Electronic Transactions	Privacy	Cybercrime	Consumer Protection	Content Regulation	Domain Names
Brunei Darussalam	Enacted	None	Enacted	Partial	Enacted	Enacted
Cambodia	Enacted	None	Draft	Enacted	Draft	Enacted
Indonesia	Enacted	Partial	Enacted	Partial	Enacted	Enacted
Lao People's Democratic Republic	Enacted	Enacted	Enacted	Enacted	Enacted	Partial
Malaysia	Enacted	Enacted	Enacted	Enacted	Enacted	Enacted
Myanmar	Enacted	None	Partial	Enacted	Enacted	Enacted
Philippines	Enacted	Enacted	Enacted	Enacted	None	Enacted
Singapore	Enacted	Enacted	Enacted	Enacted	Enacted	Enacted
Thailand	Enacted	Partial	Enacted	Enacted	Partial	Partial
Viet Nam	Enacted	Partial	Enacted	Enacted	Enacted	Enacted

*Source: UNCTAD 2013 & updated by Author 2022.*

By the legal harmonization, ASEAN has made a great progress in the development of e-commerce legal framework within ASEAN in order to strengthen e-commerce in ASEAN and to achieve its Roadmap for Integration of the e-Commerce Sector as part of the Agreement on e-ASEAN Framework. The e-commerce legal harmonization of ASEAN focused more on laws on electronic transactions and focus less on other cyberlaws. The e-commerce legal harmonization will drive development and further the ASEAN regional integration in the world of ICTs age and establish an enabling legal climate that will foster its development of e-commerce in ASEAN.<sup>284</sup>

### 3.5.2. ASEAN Agreement on e-Commerce<sup>[285]</sup>

For ASEAN, the e-commerce sector is considered as energetic enabler for helping companies to have access to the international marketplaces. For ASEAN, benefits of the

<sup>282</sup> Law on Electronic Transaction, Lao PDR. At <https://laoofficialgazette.gov.la/kcfinder/upload/files/Law%20on%20Electronic%20Transactions%200.pdf> [29 May 2020].

<sup>283</sup> Tilleke & Gibbins (14 November 2019). “Cambodia Enacts a New E-commerce Law and a Consumer Protection Law”, at <https://www.tilleke.com/insights/cambodia-enacts-new-e-commerce-law-and-consumer-protection-law/> [22 November 2021]

<sup>284</sup> *Supra Note 201*, at iv & 1.

<sup>285</sup> This part is a slightly modified version of the author’s published works from “Sengpunya, P. (2019). ASEAN E-Commerce Legal Framework and Alignment of Lao PDR: A Review”, published in *Lentera Hukum*, 6(3), 371-392. doi:10.19184/ejllh.v6i3.13709

e-commerce sector are more than just creating trade and business opportunities, but social cohesion and the overall regional economic development are also strongly involved, which those are significant elements for its regional integration. By this recognition, and in accordance with the AEC Blueprint 2025 and build upon Article 5 of the Agreement on e-ASEAN Framework endorsed by the leaders of ASEAN in 2002, the ASEAN Work Programme on E-commerce was launched in November 2017 which calls on the ASEAN member countries to reinforce the coordination and cooperation on e-commerce through establishing an ASEAN Agreement on e-Commerce in order to facilitate cross-jurisdiction e-commerce transactions in ASEAN.<sup>286</sup> The ASEAN Economic Ministers endorsed the Agreement at the 50th ASEAN Economic Ministers Meeting on 29 August 2018 and the Agreement was finally signed by the ASEAN Economic Ministers on 12 November 2018, on the side-lines of the thirty-third ASEAN Summit and Related Meetings.<sup>287</sup>

The ASEAN E-commerce Agreement has an aim to enhance an utility of e-commerce in order to strengthen the growth of economy and the evolution of society in ASEAN. The key objectives of the Agreement are – to facilitates cross-jurisdiction e-commerce transaction in ASEAN; to contribute in building an climate of confidence and trust for in the utility of the electronic commerce activities in ASEAN; and to strengthen the collaboration for further development and promotion of the e-commerce in ASEAN.<sup>288</sup> Under ASEAN Agreement on e-Commerce, the member states of ASEAN promise to work together to create a circumstance in facilitating cross-jurisdiction e-commerce transactions in the ASEAN region. This comprises with advancing legal and regulatory

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<sup>286</sup> See the Preamble, ASEAN Agreement on Electronic Commerce; and *See also* Towards an ASEAN Agreement on Electronic Commerce. UNCTAD, Geneva, Switzerland 018. At <https://unctad.org/en/pages/MeetingDetails.aspx?meetingid=1730> [23 May 2020].

<sup>287</sup> See Factsheet on ASEAN Agreement on Electronic Commerce. At <https://www.mti.gov.sg/-/media/MTI/Newsroom/Press-Releases/2018/11/17th-AECC/Annex-A-Factsheet-on-ASEAN-Agreement-on-e-Commerce.pdf#:~:text=The%20ASEAN%20Agreement%20on%20e%2DCommerce%20recognises%20the%20potential%20of,digital%20connectivity%20in%20the%20region.> [06 November 2020].

<sup>288</sup> Art. 2, ASEAN Agreement on Electronic Commerce.

framework in e-commerce and create a greater connectivity of digital within the ASEAN region.<sup>289</sup>

The ASEAN Agreement on e-Commerce is a further essential milestone of e-commerce law of ASEAN. By adopting the ASEAN Agreement on e-Commerce, the member states of ASEAN deposited their commitment to maintain or enact their domestic regulations and laws in governing e-commerce transactions by considering the adopted international conventions, model laws, principles or guidelines towards e-commerce activities as soon as feasible.<sup>290</sup> This will thrive the development of legal and regulatory climate for e-commerce activities in each ASEAN jurisdiction and in the ASEAN region as whole.<sup>291</sup> Depending on the enforcement of the Agreement and appropriate adherence by the member countries, it would be capable of establishing a very remarkable legal and regulatory framework for the e-commerce sector integration in ASEAN.

The ASEAN Agreement on e-Commerce consists of nineteen articles. It includes provisions for establishing environment to facilitate development of cross-border e-commerce including trade administration using electronic means, electronic authentication and electronic signature, protection of e-commerce consumers, cross-jurisdiction transfer of data by electronic methods, protection of electronic commerce users' personal data, and location of Computing Facilities<sup>292</sup>. The Agreement also address cooperation on cybersecurity, electronic payment, as well as logistics<sup>293</sup> that the member states need to work together for the best legal environment for promoting and facilitating e-commerce in the region.

### **3.6. A Gap of ASEAN E-Commerce Law**

In order comply with ASEAN e-commerce legal framework, the legislatures of member countries of ASEAN have currently enacted various regulations and laws to govern e-commerce transactions and make sure that e-commerce activities in their countries and in

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<sup>289</sup> New Agreement to Drive Cross-border E-commerce Across ASEAN, The Australian Trade and Investment Commission (Austrade), 2018. At <https://www.austrade.gov.au/news/latest-from-austrade/2018/new-agreement-to-drive-cross-border-ecommerce-across-asean> [23 May 2020].

<sup>290</sup> Art. 5 (1) and (2), ASEAN Agreement on Electronic Commerce.

<sup>291</sup> *Supra Note 279*.

<sup>292</sup> Art. 7, ASEAN Agreement on Electronic Commerce.

<sup>293</sup> Art. 8 –10, ASEAN Agreement on Electronic Commerce.

the region are carried out in a secured and safe circumstance to promote online sales of goods and services. Nevertheless, there has been no AMS include legislations to enact or develop any regulations or laws that expresses the gaps on coping with cross-jurisdiction e-commerce transactions or the issues on laws conflict in the consumer protection context in cross-borders online activities.

Laws conflict is a specific country's private law dealing with cases that have a foreign element or the cases that involve contracts with law system other than that of the forum<sup>294</sup>. An application of the foreign laws is recognized by jurisprudence of law conflict in deciding a case, where it is appropriate to do so, although such foreign laws may be differing from the law of the court of forum.<sup>295</sup> Unlike ASEAN, the European Union had conducted several efforts and discussions, in order to protect the rights of e-commerce consumers and build trust for consumers in entering into contracts for cross-border transactions. The remarkable efforts carried out by the EU to provide legal basis on laws conflict and harmonize them into its member countries consist of the enforcement of Brussels Convention<sup>296</sup>, Brussels I Regulation<sup>297</sup>, Rome Convention<sup>298</sup>, and Rome I Regulation<sup>299</sup>. Taking into account that ASEAN member countries do not have a particular law in dealing with issues on conflict of cross-border online consumers protection. This section intends to compare the methods adequacy practiced by Malaysia, Singapore, and Thailand in handling jurisdiction of court problems in cross-jurisdiction e-commerce activities.

### 3.6.1. Jurisdiction of Court in Singapore

In Singapore, legal validity and admissibility of electronic contracts, records made electronically, and electronic/digital signatures are confirmed by its 'Electronic Transactions Act (ETA)'<sup>300</sup>. In the concern of jurisdiction, Singapore courts are given civil jurisdiction regarding disputes in proceedings where such jurisdiction is submitted by the defendant (wherever defendant is situated). Also, the Singapore courts consider

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<sup>294</sup> McClean, D., and Beavers, K. (2009). *The Conflict of Laws*. Sweet Maxwell London 2009, p. 2.

<sup>295</sup> *Kuwait Airways Corp. v Iraqi Airways Co (No 4 and 5)* [2002] 2 A.C.883.

<sup>296</sup> Official Journal L 299 , 31/12/1972 P. 0032 - 0042.

<sup>297</sup> Official Journal L 012 , 16/01/2001 P. 0001 – 0023.

<sup>298</sup> Official Journal L 266, 9.10.1980, p. 1–19.

<sup>299</sup> Official Journal L 177, 4.7.2008, p. 6–16.

<sup>300</sup> The Electronic Transactions Act (Chapter 88).

jurisdiction, including with the concern of cross-jurisdiction e-commerce activities and disputes, based on relevant factors, for instance, 1) if a particular jurisdiction in the contract, which will generally be given effect by the Singapore courts, has been consented by the parties; 2) both parties include the choice of provision of law in their agreement, if any; 3) if the tort (if applicable) arises, and could consider prima facie the natural jurisdiction<sup>301</sup>. To that end, the Singapore courts have jurisdiction over the defendants who is in proceedings while presenting in Singapore, or who agree with the plaintiff to submit to the Singapore's jurisdiction or agree to take the proceeding in Singapore and the proceedings is accordingly given effect, or if the defendant demonstrates of accepting the Singapore courts' jurisdiction unambiguously<sup>302</sup>. In addition, when parties of the agreement had included choice of court in their agreement, the agreement shall have full effect, unless it is unreasonable or unjust when enter enforcement. Furthermore, an extra territorial jurisdiction is also provided under the Computer Misuse Act by extending the jurisdiction to any offender of any nationality outside Singapore if at the time of committing the offence under the Act, the offender or any of his computer, data or program was in Singapore<sup>303</sup>.

### 3.6.2. Malaysia's Jurisdiction of Court

In Malaysia, the jurisdiction of courts in dealing with cross-border contracts on e-commerce was based on the 'Order 11 rule 1(C) of Rule of Court 2012', before was known as the Rule of High Court 1980.<sup>304</sup> Pursuant to the said Order 11 rule 1 (C), the Malaysia courts enjoy the discretionary power to serve the proceeding outside its territorial jurisdiction, if the defendant is a resident or have a domicile in the jurisdiction of the Malaysia courts, or, running business in the jurisdiction of the Malaysia courts<sup>305</sup>.

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<sup>301</sup> Joyce A. Tan & Partners, Singapore, August 2006

<sup>302</sup> Min, Y. T. (2018). *The Conflict of Laws*. School of Law, Singapore Management University. At <https://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-06-the-conflict-of-laws> [3 October 2021].

<sup>303</sup> The Computer Misuse Act (Chapter 50A)

<sup>304</sup> Ding, J. (1999). E-commerce Law and Practice. Sweet & Maxwell Asia Selangor, pp 92-99; and Sheela, J. (2014). Cyber Paranormal Conflict of Law Issues in E-Commerce Consumer Contracts. Vol.11, Issue 1, 2014, Journal of Administrative Science, accessed on 1 Feb 2021. At <https://www.studocu.com/my/document/universiti-teknologi-mara/cyber-law/other/cyber-paranormal-conflict-of-law-issues-in-ecommerce-consumer-contracts/4982905/view> [4 October 2021].

<sup>305</sup> Ding, J. (1999). E-commerce Law and Practice. Sweet & Maxwell Asia Selangor, pp92-99.

The jurisdiction of the Malaysia courts is extra territorial only when a foreign national is filed a suit as a co-defendant together with domestic residents, for instance, the case of *Soo Lean Tooi & Ors vs United Malayan Banking Corporation Bhd* (1984, 1MLJ), in which the court held that,

*“there can be no doubt that Parliament intends to confer on the High Court extra-territorial jurisdiction in cases where more than one defendant is being sued, so long as one of the several defendants resides or has his place of business within Malaysia.”*

Apart from the Order 11 rule 1 (C), the amendment made to the statutes also indicates that jurisdictions must be referred to the Order 11 rule 1 (F) which conclusively give permission to the Malaysia courts enjoy jurisdiction in the case, the defendant is running business or resides in Malaysia, or the website is situated in a server within Malaysia.

### 3.6.3. Thailand’s Jurisdiction of Court

In Thailand, e-commerce activities are regulated by ‘The Electronic Transactions Act B.E. 2544 (A.D. 2001)’, as modified, and became effective on 3 April 2002<sup>306</sup>. The Thailand courts have jurisdiction against a defendant where the disputes, including with respect of electronic contract, occurred in the jurisdiction of the Thailand courts, where the defendant has a residence or who is a resident within the jurisdiction of the Thailand courts, or where the plaintiff has a domicile in Thailand or who is a Thai national. On the other hand, foreign nationals, or those who do not have a domicile in Thailand cannot submit an application to jurisdiction of the Thailand courts, unless he can prove that the dispute arose within Thailand, and the relevant contract is not in conflict with good morals and the public order of Thailand. Furthermore, foreign judgements are not allowed to be registered and enforced in the jurisdiction of the Thailand courts<sup>307</sup>. There is also no legal provision under the Thailand’s laws provide legality on the application submitted to jurisdiction of courts outside Thailand. In the Decision No. 951/2539 (A.D. 1996), the Supreme Court of Thailand held that,

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<sup>306</sup> Baker & Mckenzie, Enforceability and Admissibility into Evidence of Electronic Transactions. At <https://www.isda.org/a/c4EDE/thailand.pdf> [6 October 2021].

<sup>307</sup> Baker & Mckenzie, Dispute Resolution Around the World: Thailand. At [https://www.bakermckenzie.com/-/media/files/insight/publications/2016/10/dratw/dratw\\_thailand\\_2011.pdf?la=en](https://www.bakermckenzie.com/-/media/files/insight/publications/2016/10/dratw/dratw_thailand_2011.pdf?la=en) [6 October 2021].

*“an agreement for the submission by any person to the non-exclusive jurisdiction of foreign courts does not prevent a Thai court from having jurisdiction over the case, by the virtue of the Civil Procedure Code of Thailand”<sup>308</sup>.*

As examined above, Singapore, Malaysia, and Thailand still do not have any laws providing principles on the jurisdiction in cross-border electronic commerce activities. From this examining, it remains confused on the scope of conducting business under jurisdiction of Malaysia courts as per Rules of Court 2012 regarding its application in cross-jurisdiction e-commerce contracts, and particular laws explaining the jurisdiction in cross-jurisdiction e-commerce contracts are also absent in Singapore and Thailand. By this non-harmonization of conflict of laws, it can cause harmful effect to online consumers in ASEAN since the e-commerce contract made by them might be subjected to jurisdiction of courts of foreign countries that can cause high costs of litigation.

### **3.7. Chapter Summary and Concluding Remarks<sup>[309]</sup>**

ASEAN is now one of the most internet-used regions globally. By this potential, the utility of e-commerce transactions in ASEAN grows rapidly. Hence, to strengthen e-commerce growth, ASEAN has established the e-commerce legal and regulatory framework to govern the e-commerce activities and to facilitate the cross-jurisdiction e-commerce transactions in the region. The ASEAN e-Community was introduced after the adoption of the ASEAN Vision 2020, and this has presented numbers of plan of action introducing initiatives for e-commerce-related legal development. Although ASEAN has made a great progress of legal framework for promoting e-commerce, but so far it has not reached its goals. The e-commerce legal framework remains far behind since ASEAN does not have any supranational authority to force the relevant legal development or does not have any autonomous body for driving compliance or enforcement of the regional laws or instruments. For example, an adoption of a new Agreement on e-Commerce where the member states of ASEAN reaffirm their commitment in enacting or maintaining regulations and laws for governing the e-commerce activities in order to foster e-commerce

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<sup>308</sup> Baker & Mckenzie, Enforceability and Admissibility into Evidence of Electronic Transactions. At <https://www.isda.org/a/c4EDE/thailand.pdf> [7 October 2021].

<sup>309</sup> This part is a slightly modified version of the author’s published works from “Sengpunya, P. (2019). ASEAN E-Commerce Legal Framework and Alignment of Lao PDR: A Review”, published in *Lentera Hukum*, 6(3), 371-392. doi:10.19184/ejllh.v6i3.13709

legal environment for a better integration of e-commerce in ASEAN, but up to now the Agreement has not been fully deposited the ratification instruments by the member states.

The ASEAN Member Countries have very different legal background and system; therefore, the current system of e-commerce law of ASEAN is established by the form of legal harmonization among the ASEAN member countries. By this, the member countries have to adopt the national laws to govern e-commerce and make the laws regionally harmonized, based on common reference framework and through the operation of implementing the Agreement on e-ASEAN Framework. The e-commerce legal harmonization of ASEAN member states focusses on electronic transactions laws more than any other cyberlaws. Despite progress of the enactment of domestic law by the ASEAN member states, it remains some gaps of law amongst the member states. There has been no AMS include legislations to enact or develop any regulations or laws that expresses the issues on handling the conflicts in the consumer protection context in cross-borders online activities. Unlike the European Union that had conducted several efforts and discussions, intending to protect interests and rights of online consumers and build trust for consumers in entering into contracts for cross-border transactions and provide legal basis on laws conflict and harmonize them into its member countries. In the law gaps on cross-jurisdiction e-commerce activities in ASEAN, we can see the instance of the discussion of Singapore, Thailand and Malaysia as leading member states. These countries still lack laws providing principles on the jurisdiction in cross-border electronic commerce activities. By this non-harmonization of the laws, it can cause harmful effect to online consumers in ASEAN since the e-commerce contract made by them might be subjected to jurisdiction of courts of foreign countries that can cause high costs of litigation.

To these all, ASEAN has made a great regional legal development in regard of integration of e-commerce sector.

## Chapter 4. Compliance of ASEAN E-commerce Law – Case Study of CLMV Countries<sup>[310]</sup>

### 4.1. Introduction

This chapter will examine the compliance of ASEAN member states to regional e-commerce legal framework of ASEAN, in which the examination will focus on selected countries – the CLMV countries (Cambodia, Lao PDR, Myanmar and Viet Nam). The CLMV countries are the newest members to ASEAN with lowest income, and formerly closed-economy members. Examining the CLMV countries' compliance to ASEAN regional legal framework will help understand whether the ASEAN legal concept is effective.

It has been recognized that information and communication technology (ICT) will continue to be the key force driving nation building in all aspects in the next few decades. In the last decade, ASEAN has been brought prosperity and wealth to the region by the innovation and technology. And by this acknowledgement, ASEAN like other regions is embracing opportunities from the growth of innovation and technology.<sup>311</sup> At the moment, we can apparently see that the industrial landscape and business worldwide have been significantly changed, effecting from the ICT revolution. The ICT has changed the nature of products distribution, marketing, advertising, services, and retailing. This change has been promised to accelerate going forward by the continuous growth of ICT, e-commerce, and other digital innovation. To adapt, to embrace, and to understand ICT and digital opportunities is necessary for economic development in the ICT age.

The rapid growth of e-commerce has presented many essential benefits to consumers and businesses all around the world.<sup>312</sup> By the rapid expand of the region's digital network and increasing loads of mobile phone and internet users in the ASEAN region, as well as by digital commercial activities or businesses, ASEAN's e-commerce has grown and kept growing rapidly. The ASEAN regional cooperation on ICT is being enhanced and ASEAN

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<sup>310</sup> This Chapter is a modified version of the author's published works from "Sengpunya, P. (2019). ASEAN E-Commerce Legal Framework and Alignment of Lao PDR: A Review", published in *Lentera Hukum*, 6(3), 371-392. doi:10.19184/ejllh.v6i3.13709

<sup>311</sup> ASEAN ICT Master Plan 2015, p. 6.

<sup>312</sup> Handbook on E-Commerce and Competition in ASEAN. Competition Commission of Singapore, 15 February 2019. P. 14.

Member States have been continuing their effort to improve the ICT infrastructure.<sup>313</sup> For ASEAN, development of infrastructure is important, and for that, it has established many regional projects, agreements, and studies to foster infrastructure development, including transportation, energy, and ICT.<sup>314</sup> And in 2018 a regional agreement on e-commerce of ASEAN was signed aiming to facilitate cross border e-commerce in the region and promote its growth.<sup>315</sup>

E-commerce is a radically new way of conducting commercial activities, and it is potentially a significant driver to increase economic growth and strengthen development around the world.<sup>316</sup> It helps drive small and medium-sized enterprises (SMEs) to access global markets and compete on an international dimension. In developing economies and least developed countries, e-commerce has enhanced economic growth and created several new jobs.<sup>317</sup>

## **4.2. E-commerce Law of Cambodia**

The digital economy of Cambodia, especially the e-commerce sector, has grown rapidly in the last ten years. The affordability, uptake and access of Internet have significantly increased, and the base of consumer has become highly innovative in terms of engaging social media and social networking, local content, and services on smart-phone.

### **4.2.1. Cambodia's Policy on e-Commerce Development**

In the concern of policy on e-commerce, the Kingdom of Cambodia's government has deal with numbers of broad-based reforms in order to diversify or strengthen the base of productive sector and to accomplish the growth of trade and economic related competitiveness. These strategical aims are laid down in the agenda of national development, which is specified in the fourth Rectangular Strategy of the country's Plan

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<sup>313</sup> ASEAN Investment Report 2018 – *Foreign Direct Investment and the Digital Economy in ASEAN*. Jakarta: ASEAN Secretariat, November 2018. P. 163.

<sup>314</sup> Structural Policy Country Notes for Emerging Asia – *Economic Outlook for Southeast Asia, China and India 2014: Beyond the Middle-Income Trap*. OECD, 2013. P. 12.

<sup>315</sup> *Supra Note 279*.

<sup>316</sup> Sanderson, C. (2000). *EU Forges Ahead on E-commerce*. 11 Int'l Tax Rev. 51. p. 51.

<sup>317</sup> ESCAP (June 2018). *Embracing the E-Commerce Revolution in Asia and the Pacific – Executive Summary*. p. xii.

on National Strategic Development 2019-2023<sup>318</sup>, Policy on Industrial Development 2015-2025<sup>319</sup>, Cambodia Masterplan of National ICT 2020<sup>320</sup>, and the Cambodia Strategy of Trade Integration 2019-2023<sup>321</sup> that was adopted recently. Furthermore, the country recently enacted the e-commerce law which has directed the country to a new age of technology where the growth of e-commerce sector will be supported by the improving regulatory and institutional framework.

In the private sector in the country, there are also a booming on activity of tech start-up, along with an increasing activity of venture capital. This shows the result of the increasing confidence among investors in the country and potential of the unutilized market. E-commerce companies across country have arisen, both national and international companies. The rapid increase in the mobile-money solutions adopted by companies and consumers has reflected that electronic payment and settlement have been emerging. The social network or social media has also played an important role. The e-commerce activity on social media or social network platforms has boosted the increase of micro-businesses active on Consumer to Consumer (C2C) channels, and it has also assisted the companies with traditional retail to consider an online-presence as an essential tool in the digital age<sup>322</sup>.

To further improve the policy and the initiative in order to deal with the rapid development of e-commerce, the government of Cambodia adopted the E-Commerce Strategy<sup>323</sup>. The E-Commerce Strategy aims to encourage the sustainable development of e-commerce by an effective facilitation of the government with an aim to strengthen e-commerce activities

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<sup>318</sup> National Strategic Development Plan 2019-2023, Cambodia. Available at <https://www.mop.gov.kh/DocumentEN/NSDP%202019-2023%20in%20English.pdf>

<sup>319</sup> Cambodia Industrial Development Policy 2015-2025, Cambodia. Available at [https://www.eurocham-cambodia.org/uploads/97dae-idp\\_19may15\\_com\\_official.pdf](https://www.eurocham-cambodia.org/uploads/97dae-idp_19may15_com_official.pdf)

<sup>320</sup> Cambodia ICT Masterplan 2020, Cambodia. Available at <https://trc.gov.kh/wp-content/uploads/policy/Cambodian%20ICT%20Masterplan%202020.pdf>

<sup>321</sup> Cambodia Trade Integration Strategy 2019-2023, Cambodia. <https://cambodiancorner.files.wordpress.com/2019/12/cambodia-trade-integratio-strategy-2019-2023.pdf>

<sup>322</sup> E-commerce Strategy of Cambodia, available at: <https://www.kh.undp.org/content/cambodia/en/home/library/e-commerce-strategy.html?msckid=4c2d0ba4c60c11ec85a74542d4201e32>

<sup>323</sup> E-commerce Strategy of Cambodia, available at: <https://www.kh.undp.org/content/cambodia/en/home/library/e-commerce-strategy.html?msckid=4c2d0ba4c60c11ec85a74542d4201e32>

and through the comprehensive action plan implementation that deal with the exact requirements of the sector in country in the practice.

#### 4.2.2. Legal and Regulatory Framework on e-Commerce

Previously, the Kingdom of Cambodia held an absence of a comprehensive legal framework on e-commerce sector. However, since the e-commerce activities are increasing in Cambodia; hence, companies and consumers are in need of a comprehensive legal and regulatory framework that protect the interests and rights of all relevant parties in connection with the electronic transactions, protection of consumer, cyber crime, protection of data, competition and others.

The enactment of Law on E-Commerce in 2019<sup>324</sup> provides coverage of most significant regulatory gaps in order to govern e-commerce transactions in Cambodia. The law is an expectation to bring the country to a new digital age for the growth of e-commerce, to create the legal foundation for all present and future e-commerce activity; furthermore, to promote investments in the e-commerce sector.

The Law on E-commerce marks a significant milestone of the growth of e-commerce in Cambodia. The law sets objectives for establishing a shared vision and an official legal context for e-commerce transactions in the country. The recent achievement of the enactment of the law will provide more possibility in drafting prakas of the law and sub-decree. The Law on E-commerce of Cambodia consists of a scope<sup>325</sup> with wide range, including:

- Validity of the communication through electronic means (term of condition, agreement, signature, policy on privacy, evidence acceptability, process of communication);
- Rules on electronic signature and electronic records;
- E-commerce companies' responsibilities, codes of conduct, accreditation or license, incentive and taxes;
- Protection of online consumer (minimum-required information in activities of e-commerce, spam or unsolicited communications and data privacy);

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<sup>324</sup> Cambodia Enacts a New E-commerce Law and a Consumer Protection Law, Tillek & Gibbin 2019. See at: <https://www.tilleke.com/insights/cambodia-enacts-new-e-commerce-law-and-consumer-protection-law/>

<sup>325</sup> See general Law on E-Commerce, Cambodia. At <https://commerce-cambodia.com/wp-content/uploads/2021/06/eCommerceLawEN.pdf>

- Acceptance of communication through electronic means by governmental bodies or agencies;
- Rules on evidences from electronic transactions;
- Electronic settlements or payments and electronic transfers of fund (licensing, service providers' responsibilities, consumers' obligation);
- Authority (issuing regulation, license, certificate or accreditation);
- Procedures on fine and administration;
- Electronic data and information systems offences and penalties.

At the same time, Law on Consumer Protection<sup>326</sup> was adopted in 2019<sup>327</sup>, together with Law on E-commerce. The law regulates the protection of online consumers in its article 27. It is to introduce the minimum standard of disclosure for e-commerce activities in Cambodia that requires to be undertaken. Apart from e-commerce activities, the law requires that all businesses in Cambodia need to disclose the necessary information to consumers<sup>328</sup>. Ministry of Commerce (MOC) or Ministry of Post and Telecommunications (MPTC) have power in preparing standard of consumer information in competency of their field, where they may, as necessary, consult with the National Consumer Protection Committee (NCPC)<sup>329</sup>. The standard of consumer information adopted by MOC or MPTC or the NCPC will be legally effective as the regulation implementing the law.

The standard of consumer information as provided in article 27 of the Law on Consumer Protection will apply to e-commerce companies by series of provisions. The provision in article 33 of the law requires persons using communication with consumers for commercial activities by electronic means to conform with other applicable provisions in connection with protection of consumer. MOC and MOTC will also prepare the code of conducts and regulations for regulating e-commerce and intermediary service providers, as required by Article 27 of the Law on E-Commerce. MPTC and MOC will adopt the code of conducts by their ministerial Prakas, which need intermediaries' association, service providers of e-

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<sup>326</sup> Law on Consumer Protection, Cambodia. At [https://aseanconsumer.org/file/pdf\\_file/Law-on-Consumer-Protection.pdf](https://aseanconsumer.org/file/pdf_file/Law-on-Consumer-Protection.pdf)

<sup>327</sup> Cambodia Enacts a New E-commerce Law and a Consumer Protection Law, Tilleke & Gibbin 2019. See at: <https://www.tilleke.com/insights/cambodia-enacts-new-e-commerce-law-and-consumer-protection-law/#:~:text=The%20Consumer%20Protection%20Law%20applies,real%20rights%20over%20immoveable%20property.>

<sup>328</sup> Art. 23 and 24, Law on Consumer Protection.

<sup>329</sup> Law on Consumer Protection calls for the establishment of the NCPC chaired by Minister of Commerce.

commerce and consumers to participate. The code of conducts could contain provisions on protection of data and present obligations on security and transparency of data processors and controllers and lay down a legal foundation for processing personal information and provide certain rights to the information owner.

Earlier in 2017, the government of Cambodia also adopted Sub-Decree No. 246 on Digital Signature<sup>330</sup> with an aim for determining the digital signature principles, and to use and deal with digital signatures in an effective and safe manner. Article 4 of the Sub-Decree stipulates digital signature as data that connect to message through electronic means in order to identify signatory and to verify the status of the origin of the message to which digital signature is made. Article 9 of Sub-Decree provides that digital signature shall be possible for verifying the status of the origin of electronic message, identifying the signatory, verifying the time and date the signature. The Sub-Decree also recognizes that other conditions may be established by MPTC when necessary. It acknowledges the validity message by electronic means connected to digital signature that is verified by Certification Authority. Furthermore article 11 of Sub-Decree provides that all online financial transactions shall use digital signature in consistence with the Sub-Decree, except otherwise authorized by the competent governmental bodies.

Other laws include cybercrime law, and the competition law are under drafting<sup>331</sup>. Upon promulgation, these legislations will create a significant milestone of a comprehensive legal framework for e-commerce in Cambodia. The progression of these laws could provide provisions on electronic settlement or payments, tax obligations, and incentives for SME electronic merchants to enjoy compatibility of single legal base. This will support the e-commerce growth in the country. At regional and international level, Cambodia has actively participated in negotiation on e-commerce and the country is currently a signatory party to the ASEAN Agreement on E-commerce.

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<sup>330</sup> Cambodia Legal Update January 2018, DFDL Legal & Tax 2018. Available at: <https://www.dfdl.com/resources/legal-and-tax-updates/cambodia-legal-update-january-2018/>

<sup>331</sup> E-Commerce Strategy, Cambodia. p. 8.

### 4.3. E-commerce Law of the Lao PDR

E-commerce is growing fast in all regions all around the world. However, in Asia and the Pacific, the institutional and legal environment is key challenges for e-commerce development. Legislation on e-commerce and measures that enable a more affordable and accessible e-commerce participation are still in need of being strengthened. Enacting appropriate legislation and regulations can reduce legal obstacles to the use of e-commerce and to facilitate cross-border e-commerce transactions. An appropriate legislation is very necessary for e-commerce industry in order to promote its growth. Weak or inappropriate legal and regulatory frameworks can reduce the trust in e-commerce transactions, and therefore lower the use of e-commerce.<sup>332</sup> By recognition of this, the government of the Lao PDR is currently preparing and working on development of e-commerce legal and regulatory framework in order to catch up ASEAN and also the international level.

#### 4.3.1. The Lao PDR's e-Commerce and Policy Development

To discharge from the Least Developed Countries list, the Lao PDR is actively working to develop its economy, including digital economy. In the previous six or seven years, the Lao PDR has had a noticeable shift in its economic outlook. Becoming a member of the WTO and in its pursuit to transform its economy and trade Lao have turned to services as a driver of economic development. And being urged to participate in international negotiating fora, the ICT services are gradually recognized as a significant part of the economy of the Lao PDR due to its geographical position in ASEAN and the wish to overtake the digital economies development at its borders.

The e-commerce in the Lao PDR is still new for its people and the adoption of e-commerce by both consumers and companies remain limited. According to the most responses of the survey run by UNCTAD, e-commerce is understood as about purchasing retail products such as IT products, notably clothes, and cosmetics online.<sup>333</sup> The recent growth of e-commerce of the Lao PDR has been contributed by the improvement of logistics and payment infrastructure, as purchasing products online has been consumed more and more

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<sup>332</sup> ESCAP (June 2018). *Embracing the E-Commerce Revolution in Asia and the Pacific*. pp. 31-32, and its Executive Summary, p. xii.

<sup>333</sup> UNCTAD (2018). *Lao People's Democratic Republic: Rapid eTrade Readiness Assessment – Executive Summary*. p. viii.

by young people. Because of the underdeveloped telecommunications infrastructure and the low usage of banking and credit card, e-commerce is still not broadly used in the Lao PDR.<sup>334</sup> But it has made a remarkable progress on trade facilitation, even though it needs more efforts towards paperless trade.

Over the past ten years, access to telecommunication services has largely expanded in the Lao PDR, especially the mobile phone services. Notwithstanding, the continuation of development of the telecommunication sector still has impediment due to the lack of a licensing framework, an independent regulator and a level playing field in the market. Other than the growth of mobile connectivity in the recent years, the Lao PDR also needs to strengthen the Internet service to promote the use of digital financial services (DFS). As of 30 June 2019, the Lao PDR had 2.5 million internet users, or about 35.4% of the total population<sup>335</sup> and more than 80 per cent of the population own a mobile phone, but only 40 percent are using DFS, and the low understanding of technology in rural areas is still the significant challenges for an adoption of DFS in the Lao PDR.<sup>336</sup>

E-commerce is still a new development phase of the Lao PDR. In 2016, the Lao PDR amended Law on Investment Promotion laying down the legal basis for the development and establishment of Special Economic Zones in the Lao PDR where the Special Economic Zones comprise industrial sectors such as the ICT, trade, services, and tourism sectors. However, the country remains lack of a full set of laws to govern e-commerce activities. In order to support the growth of e-commerce, the Lao PDR is currently considering more specific laws on e-commerce.<sup>337</sup> Until now it has adopted a Law on Electronic Transactions<sup>338</sup>, Law on Electronic Signature<sup>339</sup>, Law on ICT<sup>340</sup>, Law on

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<sup>334</sup> “US Country Commercial Guides – Laos”. Department of Commerce of the US, 2017. P. 14.

<sup>335</sup> World Internet Users and 2020 Population Stats. At <https://www.internetworldstats.com/stats.htm> [30 June 2019].

<sup>336</sup> *Supra Note* 201.

<sup>337</sup> OECD & ERIA (2018). ASEAN SME Policy Index 2018 – 15. *The Lao PDR: 2018 ASPI Country Profile*. pp. 301, 304.

<sup>338</sup> See Law on Electronic Transactions, Lao Official Gazette. At <https://laoofficialgazette.gov.la/index.php?r=site/display&id=447> [05 August 2020].

<sup>339</sup> See Law on Electronic Signature, Lao Official Gazette. At <https://laoofficialgazette.gov.la/index.php?r=site/display&id=1495> [05 August 2020].

<sup>340</sup> See Law on ICT, Lao Official Gazette. At <https://laoofficialgazette.gov.la/index.php?r=site/display&id=1136> [05 August 2020].

Prevention and Combating of Cyber Crime<sup>341</sup>, and Law on Payment System<sup>342</sup>. but the certain protection of consumers online is still not covered by its Law on Consumer Protection.

However, there are many initiatives established to increase the use of e-commerce among SMEs in the Lao PDR. Plaosme is a remarkable initiative launched in August 2017. It is an e-commerce platform to foster SMEs in the country in their e-commerce and export capability by offering a digital marketplace, access to trade associations and business matching across ASEAN. The e-payment service of a state-owned commercial bank – Banque pour le Commerce Extérieur Lao (BCEL) is another initiative to support e-commerce in the country.<sup>343</sup> BCEL has provided an online payment service since 2013 which the online payments are allowed businesses to accept at anytime from anywhere around the world, in cooperation with CyberSource – a California-based e-commerce credit-card payment system. Another digital platform for e-payment service, foreign exchange and cash transfers to facilitate e-commerce in the Lao PDR may also be launched by Thailand’s currency exchange company – SuperRich soon, in which the platform is in between seeking approval from the Government of the Lao PDR.<sup>344</sup>

At the present time, ICT becomes a key driving force of socio-economic development for all nations, and regional and international integrations. By this recognition, Lao PDR includes development of ICT, e-government, and e-commerce at the core of its national development plans. It is now active in implementing its 8<sup>th</sup> National Socio-Economic Development Plan 2016-2020 (NSEDP) which targeting to discharge from LDC status.<sup>345</sup> The government of Lao PDR adopted NSEDP in April 2016, in which reflects its national Socio-economic Development Strategy until 2025 and Vision 2030 with an objective to

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<sup>341</sup> See Law on Prevention and Combating of Cyber Crime, Lao Official Gazette. At <https://laoofficialgazette.gov.la/index.php?r=site/display&id=861> [05 August 2020].

<sup>342</sup> See Law on Payment System, Lao Official Gazette. At <https://laoofficialgazette.gov.la/index.php?r=site/display&id=1298> [05 August 2020].

<sup>343</sup> *Supra Note* 308, at 301.

<sup>344</sup> “The State of Fintech in Laos”, Fintech news Singapore, June 2, 2017. At <http://fintechnews.sg/9709/laos/fintech-laos/> [07 August 2020].

<sup>345</sup> See 8<sup>th</sup> Five-year National Socio-Economic Development Plans (2016-2020), The Lao PDR – But although the 2020 discharge target is clearly mentioned in the NSEDP (2016-2020), recent Government reports moved the target to 2025. At <https://rtm.org.la/nsedp/criteria-ldc-graduation/> [26 September 2020].

discharge from LDC status by 2020 and aim at becoming an upper-middle-income country by 2030. And the result of the adoption of NSEDP, the development of a digital economy in the country is strongly promoted<sup>346</sup> and it has made a great progress on the ICT development and e-commerce growth.

The Lao PDR, seeking to drive the country to the information age, considers the ICT as a significant segment to help it achieve socio-economic development. It increases access to ICT for people countrywide; encourages both domestic and foreign investors to invest on construction and development of ICT infrastructure; promotes research and development in the ICT field; and develops human resources and institutional capacities building.<sup>347</sup> Overall, it aims to ensure the legal frameworks, sectoral conditions, and institutional and human capacity to be in place for accelerating ICT field to meet the challenges and needs of the Lao PDR.<sup>348</sup>

#### 4.3.2. Legal and Regulatory Framework

The Government of the Lao PDR endeavours to develop a comprehensive set of cyberlaws to regulate electronic activities in Lao PDR.<sup>349</sup> It has taken remarkable effort in the development of e-commerce legal and regulatory framework and has introduced provisions on electronic transactions and the recognition of electronic signatures and documents. It also introduced provisions limiting intermediary liability and provisions maintaining an open regime for the cross-border data flow and data centres localization.<sup>350</sup>

In 2012, the country adopted a new Law on Electronic Transactions, laying down the path for future growth in e-commerce.<sup>351</sup> The law provides the principles, measures and

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<sup>346</sup> *Supra Note* 201, at 5.

<sup>347</sup> Art. 4, Law on Information and Communication Technology, The Lao PDR (2016).

<sup>348</sup> Mr. Somlouay Kittignavong (Acting Director General of Department of National Authority for Science and Technology), a presentation on *ICT Development in* –at Expert Group Meeting on regional cooperation on information society in Asia and the Pacific, Bangkok (July 2009).

<sup>349</sup> ICT Policies – *Programmes and Research Priorities in the 10 ASEAN Countries*. SEACOO, June 2010. p. 12.

<sup>350</sup> John, Marcus B., Hoppe, M., Molinuevo, M., Nghardsysone, K., & Daza-Jaller, L. (4 February 2019). Taking Advantage of E-commerce: *Legal, Regulatory, and Trade Facilitation Priorities for The Lao PDR*. World Bank Group. pp. 12-13.

<sup>351</sup> US Country Commercial Guides – Laos, Department of Commerce of the US, 2017. P. 14; and *See also* Law on Electronic Transactions, Lao Official Gazette. At <https://laoofficialgazette.gov.la/index.php?r=site/display&id=447> [28 September 2020].

regulations for the formation, management, inspection, use, and acknowledgement of electronic transactions to build confidence and trust in electronic transactions. Its main objectives are to protect the lawful rights and interests of those who are doing e-commerce; and to ensure the promotion and use of electronic transactions, modernity, regional and international integration for contributing to socio-economic development while preserving social peace and decorum, justice and national stability.<sup>352</sup> The Lao PDR is aware of the importance of the use of e-transactions by promoting and supporting e-commerce and services, public administration and other e-transactions for developing the economy and serving the society. And it also promotes the development of ICT infrastructure, and capacity building to ensure that e-transactions/e-commerce are reliable, transparent and safe, and to protect consumers.<sup>353</sup> By the adoption of the law, provisions to regulate electronic transactions/electronic commerce are introduced and the law is significant development of e-commerce legal framework of the Lao PDR. The law regulates electronic transactions and to build trust and confident on usage of e-commerce. In 2017, the court decided a case *Ms. Keochai vs Lao International Auto* which held that “*the electronic communication through email is recognized by law as alteration to the contract*”. However, the law does not apply to electronic means related to: 1) the will; 2) certificates of birth or death, and certificates of marriage or divorce, births; 3) ownership title; 4) formation, implementation or certification of possessing property of another person or power of attorney; 5) contracts of a transfer, sale, or other granting of land or immovable property ownership or any relevant interest; 6) the petition as defined in the Law on Petitions; and 7) bonds, lading bills, receipts of warehouse or any documents that provide the beneficiary or bearer rights to claim the products delivery, unless other regulations or laws set out otherwise<sup>354</sup>.

Following the Law on Electronic Transactions, in 2015, the Lao PDR has enacted the Law on Prevention and Combating of Cybercrime.<sup>355</sup> The law provides the principles, regulations and measures for effectively preventing and combating cybercrimes. Its main objectives are to prevent, combat, limit and get rid of cybercrimes; to protect databases,

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<sup>352</sup> Art. 1, Law on Electronic Transactions, The Lao PDR (2012).

<sup>353</sup> Art. 4, Law on Electronic Transactions, The Lao PDR (2012).

<sup>354</sup> Art. 6, Law on Electronic Transactions, The Lao PDR (2012).

<sup>355</sup> See Law on Prevention and Combating of Cybercrime, Lao Official Gazette. At <https://laoofficialgazette.gov.la/index.php?r=site/display&id=861> [02 October 2020].

servers and electronic data in order to ensure national stability, peace and social decorum; and enable to link the region and globe for socio-economic development.<sup>356</sup> It promotes the safe, convenient, fast and righteous cyber consume, in order to protect rights and interests of both cyber service and electronic information service providers and users, and it also encourages both domestic and foreign individuals, entities or organizations to invest in construction of technique and technology and development of infrastructure for support the task on preventing and combating cybercrimes.<sup>357</sup> To that end, the achievement of the task on prevention and combating of cybercrime will also be a significant move to promote the growth of e-commerce and raise confidence and trust of the e-commerce use in the Lao PDR.

In 2016, Law on Information and Communication Technology was adopted.<sup>358</sup> The law lays down principles, regulations and measures to manage and monitor the use and development of ICT intending to promote the development of ICT and ensure its quality, modernity, speed and security, and to promote ICT for contributing to develop all sectors in order to protect rights and interests of the state, entities, individuals, and organizations; ensure national stability, social peace and decorum; and enable to link the region and globe for socio-economic development.<sup>359</sup> Its main objective is to promote invention and development of ICT infrastructure in the country; facilitate and provide budget for ICT development; develop human resources, together with promoting ICT service and the use of ICT for socio-economic development; and to encourage both domestic and foreign individuals, entities or organizations to invest in development of ICT. And it also facilitates access to ICT for all people countrywide.<sup>360</sup>

In 2017, Law on Payment System<sup>361</sup> and Law on Electronic Data Protection<sup>362</sup> were also adopted. The Law on Payment System provide DFS regulations. The regulatory framework

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<sup>356</sup> See Law on Prevention and Combating of Cybercrime, The Lao PDR (2015), Art. 1 – *Purposes*.

<sup>357</sup> Art. 4, Law on Prevention and Combating of Cybercrime, The Lao PDR (2015).

<sup>358</sup> See Law on Information and Communication Technology, Lao Official Gazette. At <https://laoofficialgazette.gov.la/index.php?r=site/display&id=1136> [02 October 2020].

<sup>359</sup> Art. 1, Law on Information and Communication Technology, The Lao PDR (2016).

<sup>360</sup> Art. 4, Law on Information and Communication Technology, The Lao PDR (2016).

<sup>361</sup> See Law on Payment System, Lao Official Gazette. At <https://laoofficialgazette.gov.la/index.php?r=site/display&id=1298> [03 October 2020].

<sup>362</sup> Law on Electronic Data Protection, Lao Official Gazette. At <https://laoofficialgazette.gov.la/index.php?r=site/display&id=1216> (14 September 2021).

enables interbank payments and enhance e-payment and reduce the use of cash in the country<sup>363</sup>, while the Electronic Data Protection Law sets rules, principles, and measures on administration, monitoring, inspection, and activation of electronic data protection for ensuring the collection, access, utility, and disclosure of data are in correctness and safety. The law also focuses on the protection of state's benefits and rights, as well as benefits and rights of individual, legal entities, or organizations. An adoption of the laws helps foster the development of e-commerce in the country<sup>364</sup>.

And in 2018, The Lao PDR enacted a Law on Electronic Signature<sup>365</sup> laying down principles, regulations, and measures to manage and monitor electronic signatures. It aims to ensure rightness, quality, modernity, security and speed in order to protect rights and interests of state, entities, individuals and organizations; and ensure national stability, social peace and decorum; and enable to link the regional and international communities socio-economic development.<sup>366</sup> The electronic signatures are recognized and equally treated as paper-based signatures<sup>367</sup> which promote the use of e-commerce and ensure the trust and confidence of both companies and consumers for the use of e-commerce in the Lao PDR. It also encourages individuals, entities or organizations of both private and public sectors to build, develop and use electronic signature for their activities, business and services and support the use of electronic signatures and electronic seal to facilitate the electronic commerce and service in order to enhance the growth of e-commerce sector.<sup>368</sup>

And recently in April 2021, the Government adopted a Decree on E-commerce aiming to ensure protection of online consumers' and traders' rights and interest. It consists of twelve parts and sixty-six articles which lay down principles, rules, and measures mainly on registration of online business, e-commerce contracts, electronic data protection in e-commerce activities, e-commerce management and monitoring, e-commerce dispute

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<sup>363</sup> Art. 4, Law on Payment System, The Lao PDR (2017).

<sup>364</sup> Art. 1, Law on Electronic Data Protection, Lao PDR (2018).

<sup>365</sup> See Law on Electronic Signature, Lao Official Gazette. At <https://laoofficialgazette.gov.la/index.php?r=site/display&id=1495> [03 October 2020].

<sup>366</sup> Art. 1, Law on Electronic Signature, The Lao PDR (2018).

<sup>367</sup> Art. 15, Law on Electronic Signature, The Lao PDR (2018).

<sup>368</sup> Art. 4, Law on Electronic Signature, The Lao PDR (2018).

resolution mechanism, rights and obligations of online business, and establishment of e-commerce association<sup>369</sup>.

Lao PDR also have law on consumer protection<sup>370</sup>. However, it is generally understood that the appropriate protection of consumers online are still missing. In fact, the law does not discriminate between online and offline consumers. Any type of consumers suffer from consumption of goods or services are protected by the law.

#### **4.4. E-commerce law of Myanmar**

##### **4.4.1. Myanmar's Policy on e-Commerce Development**

In 2016, The Union of Myanmar adopted its Economic Policy seeking for a transition of the country from a least developed country to middle-income country. Although the policy primarily aims at the transition of the country, but it plays a significant role to the digital economy of the country. It aims to accomplish continuous and inclusive development of the country and seeks to establish a people-centred nation which also includes an appropriate care of customers in e-commerce activities.<sup>371</sup> The policy provides a prioritized basis for establishing an e-government system and a strategy of digital government.<sup>372</sup> The attitude of the country for presenting and implementing procedures on electronic transactions is a progression for the Union of Myanmar and this will help the country in development in this new digital age.

Myanmar adopted the e-Governance Master Plan 2016-2020 in order to place things in the Government in consistent with the trend on e-commerce.<sup>373</sup> Placing sectors of health, mining, transportation, and agriculture into e-commerce will make sure of success of e-commerce in Myanmar. Such endeavour will ensure that the scene of e-commerce is in place for electronically trading and doing business.

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<sup>369</sup> See generally Decree on E-commerce 2021, Lao Official Gazette. At <https://laoofficialgazette.gov.la/index.php?r=site/display&id=1778> (14 September 2021).

<sup>370</sup> See Law on Consumer Protection, Lao Official Gazette. At <https://laoofficialgazette.gov.la/kcfinder/upload/files/Law%20on%20Consumer%20Protection.pdf>

<sup>371</sup> Economic Policy of the Union of Myanmar, Vision available at [https://themimu.info/sites/themimu.info/files/documents/Statement\\_Economic\\_Policy\\_Aug2016.pdf](https://themimu.info/sites/themimu.info/files/documents/Statement_Economic_Policy_Aug2016.pdf).

<sup>372</sup> Economic Policy of the Union of Myanmar, at. 4.

<sup>373</sup> Myanmar e-Governance Master Plan, available at [https://www.motc.gov.mm/sites/default/files/Myanmar%20e-Governance%20Master%20Plan%20%282016-2020%29%20English%20Version%28Draft%29\\_0.pdf](https://www.motc.gov.mm/sites/default/files/Myanmar%20e-Governance%20Master%20Plan%20%282016-2020%29%20English%20Version%28Draft%29_0.pdf).

Myanmar has also put Draft of e-Commerce Guidelines 2020 in place, which the country plans to be publish soon<sup>374</sup>. This is a very important step for Myanmar in creating the preparedness of the country for integrating into the global market. One of the outstanding and praiseworthy operation undertaken by the Government of Myanmar towards the draft of e-commerce guidelines is that it has put the Guidelines for calculation out to relevant stakeholders for comments<sup>375</sup>. The main objectives of the Guidelines are to encourage the sustainable growth of activities of the e-commerce and appropriately protect the rights and interests of consumers. The Guidelines will apply to all e-commerce activities carried out in the territory of Myanmar. The Guidelines' key features are operations of e-commerce and relevant sub-categories, procedures of licensing for activities of e-commerce, conditions for operators of e-commerce, operators of e-commerce platform, services and operations of e-commerce, disclosure of data, registration and transparency, protection of data, dispute resolution and consumer education, and existing regulations and laws.<sup>376</sup> The Guidelines try to have coverage on all features regarding e-commerce that may emerge, and it is praiseworthy to make sure that where a gap may arise, the law is comprehensive as to what should have been done. When they are enacted into law, the Guidelines will bring about a support for e-commerce activities in Myanmar.

#### 4.4.2. Legal and Regulatory Framework on e-Commerce

The legal and regulatory framework of Myanmar for development and business is bringing up to date, but supportive laws on e-commerce are still out of date for the most part. Myanmar enacted the Law on Computer Science Development in 1996 and the Law on Electronic Transactions in 2004<sup>377</sup>. Although, the country has marked a robust interest in initiatives of e-government and it is promoting electronic settlement/payments among

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<sup>374</sup> Myanmar to issue e-commerce operation guidelines, Allen & Gledhill 2020. See at <https://www.allenandgledhill.com/mm/publication/articles/16709/to-issue-e-commerce-operation-guidelines>

<sup>375</sup> Nishant Choudhary, Arijeet Nandi, Myanmar: Key Features of the E-Commerce Operation Guidelines 2020, 5 August 2020 available at <https://www.dfdl.com/resources/legal-and-tax-updates/myanmar-salient-features-of-the-e-commerce-operation-guidelines-2020/>.

<sup>376</sup> Nishant Choudhary, Arijeet Nandi, Myanmar: Key Features of the E-Commerce Operation Guidelines 2020, 5 August 2020 available at <https://www.dfdl.com/resources/legal-and-tax-updates/myanmar-salient-features-of-the-e-commerce-operation-guidelines-2020/>.

<sup>377</sup> <https://unctad.org/topic/ecommerce-and-digital-economy/ecommerce-law-reform/summary-adoption-e-commerce-legislation-worldwide>

number of government services, for example the import and export services, the country should revise and update the legal framework for e-commerce activities.

In 2013, an inter-ministerial committee of Myanmar was officially established by the Government. The inter-ministerial committee consists of some representatives from private sector, legal and IT experts from both national and international levels to draft or work on the new law on e-commerce<sup>378</sup>. However, the progress on formulation of the law on e-commerce has remained limited. The World Bank currently provides support to the Ministry of Commerce of Myanmar in restarting to draft the law on e-commerce, but as the date of this research, the draft of the law on e-commerce has not been available yet.

At the same time, the World Bank has separately provided support to the Government of Myanmar to work on a draft of a law on ICT, by the thrust of the e-Governance Master Plan. The Government recognized that, despite the existing laws lay down provisions on the ICT development and computer technology application in administrative scheme of the government, yet the principles for supporting the e-government system development are not contained in the existing laws yet. Hence, the relevant ministries of the Government vowed to undertake the revision of the laws and include the provisions on e-Government system into the revised law or to enact new legislation<sup>379</sup>.

Myanmar's Law on Electronic Transactions (2004)<sup>380</sup> regulates an approach of media-neutrality in governing electronic contracts. The law provides electronic legal equivalents for the electronic records, electronic signatures, and electronic communications. The law also includes several offences on cyber and established a number of regulatory agencies, including the Electronic Transactions Central Body<sup>381</sup> which has been assigned to implement the law, and the Electronic Transactions Control Board<sup>382</sup> which has responsibility for taking care of electronic signatures' day-to-day regulation. The law provides an institutional framework for implementing the legislation and some of the

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<sup>378</sup> Drafting of Myanmar E-Commerce Law in the works, Myanmar Times 2018. See at <https://www.mmtimes.com/news/drafting-myanmar-e-commerce-law-works.html>

<sup>379</sup> Myanmar: Rapid eTrade Readiness Assessment, UNCTAD 2018. P. 23.

<sup>380</sup> Law on Electronic Transaction (2004), Myanmar. See at [https://www.myanmartradeportal.gov.mm/uploads/legals/2018/12/Electronic%20Transactions%20Law%202004\(English\).pdf](https://www.myanmartradeportal.gov.mm/uploads/legals/2018/12/Electronic%20Transactions%20Law%202004(English).pdf)

<sup>381</sup> Chapter IV, Law on Electronic Transaction (2004), Myanmar.

<sup>382</sup> Chapter V, Law on Electronic Transaction (2004), Myanmar.

related e-commerce provisions including electronic signature. Nevertheless, the law includes with very general terms, and it is in a need of update. The amendment of the law in 2014 was only a revision on mostly penalty provisions that were previously considered as inappropriate.

In 2014, a Law on Consumer Protection<sup>383</sup> was introduced in Myanmar. The law consists of 12 chapters and lays down provisions on the rights and obligations of both consumers and goods/service providers. Nevertheless, the law does not provide provision specifically covering the online consumers. Because the e-commerce or online activities are emerging and quite specific, thus the provisions on online consumer are in need to be contained in a revision of the legislation or in other separated legal instruments.

In Myanmar, the regulation on content of Internet activities is introduced in two legislations – Law on Computer Science Development (1996) and Law on Electronic Transaction. These legislations govern the content distribution that is considered to be hazardous for other persons' or organizations' dignity and interests. Section 28 of the Law on Computer Science Development bans an individual from having access to a cyber network without being approved by the relevant competent ministries. Section 26 of the Law on Computer Science Development set limitation for having access to cyber, in which it only permits to have access to cyber by prior approval of the competent ministries, but use of cyber for conducting business and an aid for teaching are excluded from this section. At the same time, sub-section 34(d) of the Law on Electronic Transaction also recognizes an offence for electronically creating, modifying, or distributing information that is against the interest or dignity of another person or organization.

Up to date, Myanmar has no law on cybercrime<sup>384</sup>. However, the Law on Electronic Transaction introduces some provisions that regulate hacking, communication interception, communication access without originator's consent, and illegal use of another person's e-signature<sup>385</sup>. Also, the country does not have law on privacy and data protection

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<sup>383</sup> Law on Consumer Protection (2014), Myanmar. See at <https://myanmartradeportal.gov.mm/kcfinder/upload/files/Consumer%20Protection%20Law-%20eng.pdf>

<sup>384</sup> Myanmar Rapid eTrade Readiness Assessment, UNCTAD 2018, p. 24.

<sup>385</sup> Chapter XII, Law on Electronic Transactions Law (2004), Myanmar.

now. Nevertheless, Law on Telecommunication (2013) regulates the information and contents that are received and transferred through the telecommunication services, where the service providers must maintain the information and contents securely and keep users' personal information confidential. The law also prohibits disclosure of data that are stored in encrypted or secured systems without an order of court. Myanmar is in need to develop a comprehensive law on data privacy and data protection, although the country adopted a Law Protecting the Privacy and Security of Citizens but the law does not provide provisions on online security and online data privacy.

#### **4.5. E-commerce Law of Vietnam**

Vietnam is, unsurprisingly, the second largest digital economy in the Southeast Asia region<sup>386</sup>. In fact, Vietnam is known as the country with the most-rapid-growing economy in digital in the region, and with an enterprising market in e-commerce sector, it is offering new opportunities for businesses from both local and international investors. Vietnam is one of e-commerce markets that receive a great attention from investors, and it is one of the most promising digital economy, as driven by high number of young populations, increasing middle-class, high usage of internet, and rising usage of smartphone in the country. Moreover, Vietnam also has a remarkable legal sphere that support the e-commerce development<sup>387</sup>.

##### **4.5.1. Vietnam's Policy on e-Commerce Development**

Together with establishment of the comprehensive legislative and regulatory framework, Vietnam is closely working with and actively supporting the IT industry, the foundation that lays down e-commerce. By this enthusiasm, the country has come with a budget in amount of US\$111.6 million for an investment intending to develop the IT industry by 2020. The strategy of Vietnam to enhance e-commerce development currently focuses on four areas: (1) developing IT industry of Vietnam, (2) improving strategies of recruitment, (3) supporting IT application, and (4) developing ICT infrastructure<sup>388</sup>.

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<sup>386</sup> See Vietnam: stricter e-commerce regulations to be issued. At <https://www.allens.com.au/insights-news/insights/2020/11/vietnam-stricter-e-commerce-regulations-to-be-issued/> [14 September 2021].

<sup>387</sup> Linh, D.H. (22 January 2020). Vietnam's Booming E-commerce Market. ISSUE: 2020 No. 4, ISEAS – Yusof Ishak Institute. p. 2-4.

<sup>388</sup> Vietnam Briefing. Issue 21, March and April 2015. Asia Briefing Ltd. P. 5.

The 2011-2020 Socio- Economic Development Strategy<sup>389</sup> of the Vietnamese government recognizes the promotion of development of skills and human resources in modern or innovation and digital industry as a significant “breakthrough area”<sup>390</sup>. The country understands that it has suffered from a lack of skilled labours in e-commerce area, therefore, Vietnam’s E-Commerce and Information Technology Department (VECITA) of the Industry and Trade Ministry has carried out an active task in improving the gap of capacity. It has organized many forums on e-commerce, also provided formal training on e-commerce to colleges and universities, implemented the e-commerce 2010-2015 master bill Decision No. 1073/QD-TTg<sup>391</sup> and fulfilled its objectives, and developed the human capital in the e-commerce sector. Recently, an e-commerce website – buyvietnam.com.vn was launched by the Vietnam Trade Promotion Agency (VIETRADE) aiming to link local businesses to investors from ASEAN countries and from Japan.

The Industry and Trade Ministry takes fundamental responsibility, in collaboration with the Information and Communications Ministry, to provide guiding measures to foreign national investors conducting e-commerce activities in Vietnam<sup>392</sup>. Meanwhile, the Vietnam’s national masterplan on development of e-commerce sector in a period of the year 2021-2025<sup>393</sup> was outlined by the Industry and Trade Ministry, which lays down role of the country in developing infrastructure for e-commerce, raising awareness on e-commerce, providing training and strengthening development of human resources and products, and undertaking international and regional cooperation on e-commerce. The foresaid national masterplan on development of electronic commerce sector in a term of the year 2021 - 2025 sets five general objectives as followings:

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<sup>389</sup> See Vietnam’s Socio-Economic Development Strategy for The Period of 2011-2020. At <http://pubdocs.worldbank.org/en/347151477448693952/pdf/Vietnam-SEDS-2011-2020.pdf> [15 September 2021].

<sup>390</sup> The Vietnam’s Socio-Economic Development Strategy for The Period of 2011-2020, pp. 17-18.

<sup>391</sup> See Decision No. 1073/QD-TTg dated July 12, 2010 of the Prime Minister approving the master plan on e-commerce development during 2011-2015. At <https://luatminhkhue.vn/en/decision-no-1073-qd-ttg-dated-july-12--2010-of-the-prime-minister-approving-the-master-plan-on-e-commerce-development-during-2011-2015.aspx> [15 September 2021].

<sup>392</sup> Vietnam Briefing. Issue 21, March and April 2015. Asia Briefing Ltd. P. 5.

<sup>393</sup> See National master plan on e-commerce development in a period of 2021 – 2025. At <http://asemconnectvietnam.gov.vn/default.aspx?ID1=2&ZID1=14&ID8=97603> [16 September 2021].

“ 1) Support and promote widespread use of e-commerce in businesses and the community; 2) Narrow the gap between major cities and localities on the level of e-commerce development; 3) Building a healthy, competitive and sustainable e-commerce market; 4) Expanding consumption markets for Vietnamese goods at home and abroad through e-commerce applications; promote cross-border e-commerce and transactions; 5) Becoming a country with a developed e-commerce market among the top 3 countries in Southeast Asia”<sup>394</sup>.

Vietnam expects 55% of its population will use e-commerce by 2025 and expect of average spending by consumers rising from US\$202 in 2018 to US\$600 by 2020<sup>395</sup>. VECITA is also working closely with ASEAN countries, taking part in forum and workshops to promote cooperation of Cambodia, the Lao PDR, Myanmar and Vietnam (CMLV) in the sector of e-commerce in order to put efforts on establishing the ASEAN Economic Community<sup>396</sup>.

#### 4.5.2. Legal and Regulatory Framework on E-commerce

In 2005, Vietnam passed three major laws that provide the legal fundamentality for electronic commerce sector, including the E-transactions Law<sup>397</sup>, the Commercial Law<sup>398</sup>, and the Civil Code<sup>399</sup>. The E-transactions Law provides legality to data messages and e-signature; and lays down provisions on entry into and execution of e-contracts; security, safety, protection, confidentiality in e-transactions; and dispute settlement and violation handling<sup>400</sup>. The Commercial Law provides legal recognition for contract for purchase and sale of goods made through electronic means stating that “*a contract for purchase and sale of products shall be made in writing; telegraphs, telexes, facsimiles, E-mails and other means of electronic communication shall be considered as written form*”<sup>401</sup>. At the same time, the Civil Code provides

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<sup>394</sup> See generally National master plan on e-commerce development in a period of 2021 - 2025

<sup>395</sup> See “Master plan on national e-commerce development through 2025 approved”, Online Newspaper of the Government. At <http://news.chinhphu.vn/Home/Master-plan-on-national-ecommerce-development-through-2025-approved/20205/40160.vgp> [17 September 2021].

<sup>396</sup> Vietnam Briefing. Issue 21, March and April 2015. Asia Briefing Ltd. P. 5.

<sup>397</sup> See Law on E-Transaction, The National Assembly. At <http://vbpl.vn/TW/Pages/vbpqen-toanvan.aspx?ItemID=6121&Keyword=E-Transactions> [17 September 2021].

<sup>398</sup> See The Commercial Law, the National Assembly. At <http://vbpl.vn/TW/Pages/vbpqen-toanvan.aspx?ItemID=2483&Keyword=commercial> [17 September 2021].

<sup>399</sup> See The Civil Code of Vietnam. At <https://iulaw.files.wordpress.com/2012/09/phillipsfox-vietnam-civil-code-2005.pdf> [17 September 2021].

<sup>400</sup> See generally E-transactions Law

<sup>401</sup> Art. 49, Commercial Law.

individuals privacy right which “*the privacy right of individuals shall be respected and protected by law*” and “*the safety of the mail, telephone, electronic mail and other means of electronic data of individuals shall be met, as well as to be kept confidential*”<sup>402</sup>. It also recognizes the civil transactions by electronic communication methods in the manner of data messages as written civil transactions<sup>403</sup>.

Furthermore, e-commerce activities and the e-commerce disputes resolution are also regulated by loads of laws<sup>404</sup>, including the Information Technology Law adopted in 2006<sup>405</sup>, which it regulates provisions on the use, management, transmission, storage and monitoring of digital information<sup>406</sup>, and encourages individuals and organizations to make online payment<sup>407</sup>; the Telecommunications Law adopted in 2009<sup>408</sup> that promote infrastructure on which e-commerce lies; the Penal Code adopted 1999 and amended in 2009<sup>409</sup> that governed any crimes related to cyber; the Protection of Consumers’ Rights Law adopted in 2010<sup>410</sup> that regulates electronic transactions and contract between to online consumers and organizations/traders;<sup>411</sup> the Advertising Law adopted in 2012, governing the advertising media, websites, electronic devices, and terminal equipment<sup>412</sup>; the Investment Law adopted 2014<sup>413</sup>, promoting manufacture of electronic products and manufacture of information technology products, software and digital content<sup>414</sup>; and the

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<sup>402</sup> Art. 38, Civil Code

<sup>403</sup> Art. 124, Civil Code

<sup>404</sup> Pham Thi Hong Dao (04/10/2016). Vietnam’s legal framework on e-commerce: some inadequacies and solutions. Thanh Hung Lawyers’ Office.

<sup>405</sup> See Law on Information Technology, The National Assembly. At <http://vbpl.vn/TW/Pages/vbpgen-toanvan.aspx?ItemID=4773&Keyword=> [18 September 2021].

<sup>406</sup> Art. 15-20, Law on Information Technology.

<sup>407</sup> Art. 33, Law on Information Technology.

<sup>408</sup> See Law on Telecommunication, The National Assembly. At <http://vbpl.vn/TW/Pages/vbpgen-toanvan.aspx?ItemID=10483&Keyword=Telecommunications%20Law> [18 September 2021].

<sup>409</sup> See The Law on Amendments and Supplements to a Number of Articles of The Penal Code, the National Assembly. At <http://vbpl.vn/TW/Pages/vbpgen-toanvan.aspx?ItemID=2485&Keyword=Penal%20Code> [18 September 2021].

<sup>410</sup> See Protection of Consumers’ rights Law, the National Assembly. At <http://vbpl.vn/TW/Pages/vbpgen-toanvan.aspx?ItemID=10500&Keyword=protection> [19 September 2021].

<sup>411</sup> Art. 14 and 20, Protection of Consumers’ Rights Law.

<sup>412</sup> See Law on Advertising, the Official Gazette. At <https://vietnamlawmagazine.vn/law-on-advertising-4039.html> [19 September 2021].

<sup>413</sup> See Law on Investment, the National Assembly. At <http://vbpl.vn/TW/Pages/vbpgen-toanvan.aspx?ItemID=11032&Keyword=Law%20on%20Investment> [19 September 2021].

<sup>414</sup> Art. 16, Law on Investment.

Enterprises Law adopted in 2014 which recognizes all electronic means of communication and transactions of enterprises<sup>415</sup>.

Apart from that, the Vietnamese Government and relevant ministries have adopted various decrees and circulars aiming to guide and manage e-commerce activities and the dispute settlement in electronic commerce sector. The important Principles of the e-commerce activities in some of these decrees and circulars can be remarked as followings:

Decree No. 52/2013/ND-CP adopted by the Vietnam Government on 16 May 2013<sup>416</sup>, on e-commerce which lays down four significant doctrines for e-commerce transactions. The first doctrine is voluntary consent of parties in e-commerce activities. The relevant parties engage in any e-commerce transactions are voluntary and to freely use their consents to reach agreement that is inconsistent with law, in order to form their rights and obligations in such transaction. The agreement related to e-commerce activities made by the parties is served as a ground for resolution of the disputes those may be arising from the transaction. The second doctrine is the scope of e-commerce business determination, which the e-commerce activities of traders, entities or individuals will be considered as being conducted on national scale if they do not provide specific geographical limits of activities on their e-commerce websites. The third doctrine is the protection of consumers' interests and rights, in which e-commerce businesses are needed to conform with the Law on Protection of Consumers' Rights for goods or services that are provided on their websites. The fourth principle relevant e-commerce activities requires businesses to apply electronic commerce transactions to in-goods trade and give services narrow from trading pursuant to conditions of business to strictly observe regulations in connection with trading in those goods and services<sup>417</sup>.

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<sup>415</sup> See Law on Enterprise, the National Assembly. At <http://vbpl.vn/TW/Pages/vbpqen-toanvan.aspx?ItemID=11033&Keyword=Enterprises> [19 September 2021].

<sup>416</sup> See Vietnam Decree No. 52/2013/ND-CP On E-Commerce, the Government. At <https://vietnamlawenglish.blogspot.com/2013/05/vietnam-decree-no-522013nd-cp-on-e.html> [20 September 2021].

<sup>417</sup> See generally Decree No. 52/2013/ND-CP.

Government Decree 124 adopted in 2015 lists a set of violations related to e-commerce transactions and lays down a set of penalty for the violations<sup>418</sup>. A penalty of VND 20-30 million will be made for violations arising from e-commerce applications or websites such as: a) e-commerce websites or e-commerce service applications without licensing; b) receiving payment of the e-commerce services without procedures recognized by the relevant government agencies; c) conducting e-commerce business out of those recognized in the registration system; d) providing false information for registration of e-commerce websites or applications, or committing fraud; e) disguising data filed on e-commerce websites or mobile applications; or f) Keeping on conducting e-commerce business after termination or cancellation of the registration<sup>419</sup>. The penalty also covers violations over personal data protection in e-commerce transactions, including collecting consumers' personal data without ones' consent; setting defaults forcing consumers to accept or consent with the disclosure, sharing, or the use of ones' personal data for a purpose of advertisement or other purposes; or using consumers' personal data inconsistent with the purpose and scope notified in registration. A penalty of VND 30-40 million will be made for violations of copying other traders', entities' or individuals' e-commerce website interfaces or applications seeking for benefits, causing confusion, or causing mistrust of consumers to the traders, entities or individuals; or violation for disclosing, stealing, selling or transferring information in connection with business confidential of other entities or traders or consumers' personal data in electronic commerce without ones' consent<sup>420</sup>.

On 5 December 2014, the Industry and Trade Ministry adopted a Circular No. 47/2014/TT-BCT regarding electronic commerce websites management<sup>421</sup>, to clarify provisions under Decree 52 regarding business activities management on electronic commerce websites. The circular sets liability for websites management and it regulates

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<sup>418</sup> See Vietnam Decree No.: 185/2013/ND-CP On Providing the Penalties On Administrative Violations In Commercial Activities, Production Of, Trading In Counterfeit Or Banned Goods And Protection Of Consumer Rights, the Government. At <https://vietnamlawenglish.blogspot.com/2013/11/vietnam-decree-no-1852013nd-cp-on.html> [20 September 2021].

<sup>419</sup> Pham Thi Hong Dao (04/10/2016). Vietnam's legal framework on e-commerce: some inadequacies and solutions. Thanh Hung Lawyers' Office.

<sup>420</sup> Ibid.

<sup>421</sup> See Circular No. 47/2014/TT-BCT On Regulations on Management Of E-Commerce Websites, The Ministry Of Industry And Trade. At <https://vietnamlawenglish.blogspot.com/2014/12/circular-no-472014tt-bct-on-regulations.html> [20 September 2021].

trade in goods that are restricted for in-goods trading and services on the websites of e-commerce pursuant to business conditions, and electronic commerce transactions management in social media and networking sites. However, the circular has not covered management of websites in areas of banking, finance, insurance, credit, buying, selling, and exchanging gold, foreign currencies, money, and other interrelated payment methods, or giving service on gambling, online computer games, or other prize-winning games<sup>422</sup>.

Furthermore, the said circular also governs businesses carrying out via social networking sites, in which business activities are allowed to carry out through sub-websites or opening online stores to introduce or display their products or services<sup>423</sup>. The sub-websites or online stores for purpose of selling goods or service must be registered through the e-commerce exchange<sup>424</sup>. However, the circular prohibits traders, entities, or individuals for trading in goods that are restrict for trading on websites of e-commerce and it does not allow individuals to conduct in-goods trade and services pursuant to the adopted business conditions<sup>425</sup>. Meantime, websites of e-commerce for trading in goods and services may be established by traders and entities pursuant to business conditions and it is a must for publishing information of the license of eligibility to conduct in-good trade and services and the serial number on the websites of e-commerce. They may use the sites for selling products and services pursuant to the given business conditions. In this event, the websites' owners have to request retailers on their websites to acquire a certificate of eligibility for their business, when information about sales of goods and service are found or reported of violating law, the information shall be removed from their websites.

On 11 December 2014, Vietnam's State Bank issued a Circular No. 39/2014/TT-NHNN<sup>426</sup> providing types of intermediary payment services<sup>427</sup>. The circular regulates the intermediary payment services, including management of risk, assurance of safety and security and assurance of solvency. Under the circular, it is required create and apply risk

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<sup>422</sup> Art. 1, Circular No. 47/2014/TT-BCT

<sup>423</sup> Art. 2, Circular No. 47/2014/TT-BCT

<sup>424</sup> Art. 4, Circular No. 47/2014/TT-BCT

<sup>425</sup> Ar. 3, Circular No. 47/2014/TT-BCT

<sup>426</sup> See Circular No. 39/2014/TT-NHNN dated December 11, 2014 of the State Bank of Vietnam guiding on payment intermediary service. At <https://english.luatvietnam.vn/circular-no-39-2014-tt-nhnn-dated-december-11-2014-of-the-state-bank-of-vietnam-guiding-on-payment-intermediary-service-91444-Doc1.html> [21 September 2021].

<sup>427</sup> Art. 2, Circular No. 39/2014/TT-NHNN

management principles in e-banking transactions for providing intermediary payment services. The service providers shall make sure of safety and security of the systems in all banking transactions and the interrelated e-banking transactions. The intermediary payment services are also required to be consistent with the E-transactions Law in connection with issuance, preservation, storage, and utility of electronic documents in the relevant banking transactions<sup>428</sup>.

#### **4.6. Legal Harmonization of The CLMV countries to ASEAN e-Commerce Legal Framework<sup>[429]</sup>**

Cambodia has adopted its policy on e-commerce in order to diversify or strengthen e-commerce growth in the countries. At regional level, Cambodia has been an active participant in negotiation on activities of e-commerce and it is currently a signatory party to the ASEAN Agreement on E-commerce. Cambodia has laid down policy on e-commerce law by adoptions of country's Plan on National Strategic Development 2019-202, Policy on Industrial Development 2015-2025, Cambodia Masterplan of National ICT 2020, and the Cambodia Strategy of Trade Integration 2019-2023.

The Lao PDR has recently extended its interest in e-commerce, promoted by the country's participation in and commitment to e-ASEAN Framework that call for a strong legal and regulatory framework for e-commerce among other goals. The past few years, the Lao PDR accelerated the upgrade of its preparedness, through different inter-ministerial consultations, for enhancing e-commerce.<sup>430</sup> And as a member of ASEAN, it has also undertaken the ASEAN ICT Master Plan which expects the guarantee of electronic transactions among other goals within ASEAN partners to become a reality.<sup>431</sup>

Even though The Lao PDR is among the ASEAN countries those with underdevelopment of ICT infrastructure, but most of the strategies and recommendations set by the 2020 plan

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<sup>428</sup> See "Issue only One auto Payment for One account At one Bank". At <https://english.luatvietnam.vn/circular-no-39-2014-tt-nhnn-dated-december-11-2014-of-the-state-bank-of-vietnam-guiding-on-payment-intermediary-service-91444-Doc1.html> [21 September 2021].

<sup>429</sup> This part is a slightly modified version of the author's published works from "Sengpunya, P. (2019). ASEAN E-Commerce Legal Framework and Alignment of Lao PDR: A Review", published in *Lentera Hukum*, 6(3), 371-392. doi:10.19184/ejll.v6i3.13709

<sup>430</sup> UNCTAD (2018). *Lao People's Democratic Republic: Rapid eTrade Readiness Assessment*. p. 5.

<sup>431</sup> Balestrieri, E. (July 2011). *External Evaluation of UNCTAD's E-Commerce and Law Reform Project*. UNCTAD. p. 18.

of ASEAN have been achieved by the country, especially the regards of policy and legal framework development. The noticeable achievement of its commitments under the e-ASEAN framework has been ensured by its careful regulatory and legal framework development. However, its legal instruments are still not being used fully, especially for data privacy and protection of consumers online.<sup>432</sup>

Besides, The Lao PDR achieved those provision of e-Government plan, provision of ICT-supportive law, regulation, and provision of establishment of ICT infrastructure and online services component. To this end, these provisions serve as ICT regulation or policy of the country. It fulfilled the development of ICT infrastructure by the establishment of an e-Government centre and it also fulfilled the online services components through the two-undergoing e-Government projects, namely sectors of health and national internet centre.<sup>433</sup>

Myanmar has its Economic Policy which plays a significant role to the digital economy of the country. The Economic Policy provides policy for establishing an e-government system and a strategy of digital government, as well as seeks to establish a people-centred nation which also includes an appropriate care of customers in e-commerce activities.<sup>434</sup>

Myanmar also lay down policy on e-commerce development by an adoption of e-Governance Master Plan 2016-2020 to place things in the Government in consistent with the trend on e-commerce and currently working on drafting e-Commerce Guidelines 2020, which will be a very important step for Myanmar in creating the preparedness of the country for integrating into the global market.

On the other side, Vietnam also has continued working with IT sector closely, together with the creation of the comprehensive legal and regulatory framework over e-commerce activities. It adopted a national master plan on development of e-commerce which grant a role to the country in advancing the infrastructure for e-commerce sector, increasing

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<sup>432</sup> *Supra Note 361*, at 4.

<sup>433</sup> Fadillah, M. (2019). *E-Government in ASEAN: Case Study of Singapore, Indonesia and Laos*. Adam Mickiewicz University in Poznań. p. 6.

<sup>434</sup> Economic Policy of the Union of Myanmar, Vision available at [https://themimu.info/sites/themimu.info/files/documents/Statement\\_Economic\\_Policy\\_Aug2016.pdf](https://themimu.info/sites/themimu.info/files/documents/Statement_Economic_Policy_Aug2016.pdf).

awareness towards e-commerce transactions, granting e-commerce-related training, and tightening the development of e-commerce products as well as human resources, and engaging in the regional and international cooperation relating e-commerce. Meanwhile, it has been closely worked with other ASEAN jurisdictions, as well as participating in workshops and forums and in order to promote multilateral cooperation with the Myanmar, Lao PDR, and Cambodia in the sector of e-commerce for working towards a building of the ASEAN Economic Community<sup>435</sup>.

Under e-ASEAN Framework, Member Countries shall adopt their domestic laws and policies toward e-commerce, measures on protection of intellectual property rights arising from e-commerce and promote protection of personal data and consumer privacy; facilitate the establishment of frameworks for mutual recognition of digital signature as well as secure regional electronic transactions, payments and settlements; and encourage the use of alternative dispute resolution (ADR) schemes for electronic transactions.<sup>436</sup>

Taking account into commitments agreed under the e-ASEAN Framework above, Cambodia and Myanmar remain behindhand. Cambodia enacted Law on E-Commerce in 2019<sup>437</sup> which covered wide-ranging regulatory gaps in e-commerce transactions, and it has Law on Consumer Protection which also regulates the protection of online consumers. However, Cambodia still lacks cybercrime law and competition law which can help create a comprehensive legal framework for e-commerce in the country. On the other hand, Myanmar Law on Computer Science Development and the Law on Electronic Transactions which were adopted more than 10 years ago and outdated. These laws need to be revised and updated in order to meet the regional and international trends. Myanmar has Law on Consumer Protection, but the law does not provide provision on online consumer protection. Also, Myanmar lacks law on cybercrime and law on data protection.

On the other hand, Lao PRD and Vietnam have done better in fulfilling the provisions and commitment agreed upon in the Agreement on e-ASEAN Framework. According to the review of UNCTAD in 2013, Vietnam has already fulfilled all commitments while Lao

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<sup>435</sup> Vietnam Briefing, Issue 21, March and April 2015. Asia Briefing Ltd. P. 5.

<sup>436</sup> Art. 5, the Agreement on e-ASEAN Framework.

<sup>437</sup> Cambodia Enacts a New E-commerce Law and a Consumer Protection Law, Tillek & Gibbin 2019. See at: <https://www.tilleke.com/insights/cambodia-enacts-new-e-commerce-law-and-consumer-protection-law/>

PDR has fulfilled four out of five points<sup>438</sup>. However, the legal development in Lao PDR has been significantly changed in the past years. Currently, Lao PDR likely fulfils all provisions agreed under the e-ASEAN Framework.

The Lao PDR has law on electronic transactions providing provisions to govern electronic activities including e-commerce; law on prevention and combating of cybercrime to ensure the use of electronic information and other cyber consume; law on information and communication technology to promote ICT field and development of ICT infrastructure; law on electronic signature to promote the use of electronic signature and electronic seal and ensure its recognition; and also law on payment system to foster electronic payment, law on electronic data protection and decree on e-commerce. Now, it only lacks appropriate legal instruments on protection of consumers online. However, this does not mean that the Lao PDR does not have any law related to protection of consumers. It has a law for protection of general consumers, not providing provision for specific consumers online, but the law is construed to cover all types of consumers, including consumers online.<sup>439</sup>

Vietnam is one among other ASEAN countries that have a comprehensive regulatory infrastructure on e-commerce, and it has already achieved most electronic commerce laws set by Agreement on e-ASEAN Framework<sup>440</sup>. Vietnam has the E-transactions Law in concern of entry into and execution of e-contracts; security, safety, protection, confidentiality in e-transactions; and dispute settlement and violation handling<sup>441</sup>; the Commercial Law regarding contract for purchase and sale of goods made through electronic means<sup>442</sup>; and the Civil Code for regulating to personal privacy of an individual including all means of electronic information<sup>443</sup>. The e-commerce activities in Vietnam are also governed by other numbers of different laws, for examples the Information

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<sup>438</sup> See generally Review of E-commerce Legislation Harmonization in the Association of Southeast Asian Nations. UNCTAD, 2013.

<sup>439</sup> See Law on Consumer Protection, Lao Official Gazette. At <https://laoofficialgazette.gov.la/index.php?r=site/display&id=545> [5 October 2020].

<sup>440</sup> Review of E-commerce Legislation Harmonization in the Association of Southeast Asian Nations – *Summary Executive*. UNCTAD, 2013. p. ix

<sup>441</sup> See generally E-transactions Law

<sup>442</sup> Art. 49, Commercial Law.

<sup>443</sup> Art. 38, Civil Code

Technology Law, the Law on Telecommunications, the Penal Code, the Protection of Consumers' Rights Law, the Advertising Law, the Investment Law and the Enterprises Law. Furthermore, the country adopted numerous decrees and circulars for guiding and managing e-commerce activities and the dispute resolution in e-commerce, including Decree No. 52/2013/ND-CP that set principles for electronic commerce activities; Government Decree 124 that lay down a set of violations and a set of penalty in connection with e-commerce transactions; a Circular No. 47/2014/TT-BCT regarding electronic commerce websites management; and Circular No. 39/2014/TT-NHNN<sup>444</sup> providing types of intermediary payment services. However, Vietnam keeps facing challenges in implementing its laws and regulations in connection with e-commerce activities. Its law enforcement agencies remain a lack of skills and training, and it also faces difficulties in dealing with cross-border e-commerce issues.<sup>445</sup>

Status of e-commerce law harmonization in ASEAN						
Member Country	Electronic Transactions	Privacy	Cybercrime	Consumer Protection	Content Regulation	Domain Names
Brunei Darussalam	Enacted	None	Enacted	Partial	Enacted	Enacted
Cambodia	Enacted	None	Draft	Enacted	Draft	Enacted
Indonesia	Enacted	Partial	Enacted	Partial	Enacted	Enacted
Lao People's Democratic Republic	Enacted	Enacted	Enacted	Enacted	Enacted	Partial
Malaysia	Enacted	Enacted	Enacted	Enacted	Enacted	Enacted
Myanmar	Enacted	None	Partial	Enacted	Enacted	Enacted
Philippines	Enacted	Enacted	Enacted	Enacted	None	Enacted
Singapore	Enacted	Enacted	Enacted	Enacted	Enacted	Enacted
Thailand	Enacted	Partial	Enacted	Enacted	Partial	Partial
Viet Nam	Enacted	Partial	Enacted	Enacted	Enacted	Enacted

*Source: UNCTAD 2013 & updated by Author 2022.*

However, such laws and legislation, no matter how comprehensive, all countries require proper and serious commitment toward implementation, particularly regarding enforcement.

<sup>444</sup> See Circular No. 39/2014/TT-NHNN of the State Bank of Vietnam guiding on payment intermediary service, dated December 11, 2014. At <https://english.luatvietnam.vn/circular-no-39-2014-tt-nhnn-dated-december-11-2014-of-the-state-bank-of-vietnam-guiding-on-payment-intermediary-service-91444-Doc1.html> [01 December 2021].

<sup>445</sup> Review of E-commerce Legislation Harmonization in the Association of Southeast Asian Nations. UNCTAD, 2013. p. 44.

#### 4.7. Chapter Summary and Concluding Remarks<sup>[446]</sup>

In today ICT age, e-commerce is a new way of conducting commercial activities, and it is a key segment to increase economic growth and strengthen development around the world. In the last decade, ASEAN has been brought prosperity and wealth to the region by the innovation and technology. Notwithstanding, ASEAN still does not have an appropriate legal framework to govern and foster the trans-border e-commerce transactions which can be a key barrier to facilitate the growth of e-commerce within the region. Over the last decade, ASEAN ministers, regulators, policy makers, and industry came together and develop ICT landscape and legal framework to support the e-commerce growth within ASEAN. Its first initiative regarding e-commerce legal development is an adoption of ASEAN Vision 2020, then followed by numbers of plan of action introducing legal initiatives concerning with e-commerce. And more recently, ASEAN adopted an ASEAN Agreement on e-Commerce to facilitate cross-border e-commerce transactions in ASEAN. Despite these, ASEAN does not have any legal superstructure to adopt regional e-commerce law or mechanisms that pressure the member states to comply with the regional policy. ASEAN has developed e-commerce legal framework by harmonizing national laws of the Member States into regional legal system that respects national sovereignty and cultural sensitivities. But, without a supranational legal instrument, ASEAN can still face legal barrier related to cross-border e-commerce, in particular jurisdiction that rises questions regarding which court may hear and settle disputes between parties from two different member states, which law to be used, and whether the judgement of court decided in one jurisdiction is enforceable in another jurisdiction.

The CLMV countries are actively working to develop their economy, including digital economy, as well as the legal environment for the digital economy. CLMV countries, as members of ASEAN, have made great progress in developing legal environment for governing e-commerce activities in order to be in line with the regional commitment. Although, Cambodia and Myanmar are slow, but the governments of these countries are working closely with regional and international organizations and stakeholders. Their works on the missing laws are progressively undergoing. While Lao PDR and Vietnam

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<sup>446</sup> This part is a slightly modified version of the author's published works from "Sengpunya, P. (2019). ASEAN E-Commerce Legal Framework and Alignment of Lao PDR: A Review", published in *Lentera Hukum*, 6(3), 371-392. doi:10.19184/ejllh.v6i3.13709

fulfilled most of provisions and measures set by the e-ASEAN Framework, especially the regards of policy and legal framework development. The fulfilment of the Lao PDR under the e-ASEAN framework has been ensured by its careful regulatory and legal framework development, and also by those provision of e-Government plan, provision of ICT-supportive law, regulation and provision of establishment of ICT infrastructure and online services component. However, its legal instruments are not yet being used fully, especially for data privacy and protection of consumers online as mentioned in the previous, in which the country should adopt the legislation regarding the matter as soon as possible if it wishes to facilitate and enhance the growth of e-commerce and effectively govern the e-commerce activities. And Vietnam's fulfilment under the e-ASEAN framework has been proved that it has enacted all relevant e-commerce laws including electronic transaction, content regulation, cybercrime, privacy, consumer protection, and domain names. Nevertheless, it has remained challenges and unable to fully implement the relevant laws and regulations on e-commerce, yet it is working actively to improve the skills of labour in e-commerce activities and to strengthen the development of e-commerce and implementation of interrelated law and regulations.

To conclude, the ASEAN legal concept or approach can facilitate the legal development within the region. However, it still falls behind. The compliance of the member states can be slow because it still lacks the mechanism for pressuring the member states to comply with the regional framework or commitment. ASEAN over-dependes on voluntary willingness and commitments of the member states, therefore, the legal development or the compliance with regional agreed commitments can delay and take longer time.

## Chapter 5. ASEAN's Legal Protection and Future Dispute Resolution for Online Consumers<sup>[447]</sup>

### 5.1. Introduction

This chapter will introduce legal protection or dispute resolution mechanisms of ASEAN, both its traditional mechanisms and the future mechanism for the emerging e-commerce activities.

ASEAN's legal protection remains inconsistent with standards of modern rule of law. The ASEAN Charter has not provided cross-border legal protection or remedies for ASEAN citizens, especially regarding the single market. ASEAN only provide legal remedies mechanism for difficulties concerning states, and disputes regarding economic agreements.

While the technology is evolving, the new markets in ASEAN are emerging. One of the markets that is growing regionally and globally is an e-commerce market. The electronic commerce is a new form of carrying out commercial transactions, and potentially the e-commerce is an essential force to support the growth of economy and strengthen development all over the world. ASEAN recognizes both the significance of the e-commerce sector in supporting the regional integration of economy and the threats that consumers have faced.

However, the increasing development of the e-commerce activities and the rise of usage of e-commerce around the world look like to raise e-commerce-related disputes too, particularly those disputes occurring from cross-jurisdiction e-commerce and those concerns to the consumers' rights and the consumer protection. As we can see an example that occurred in the EU, which indicated by the Digital Single Market consumer survey (DSM survey) that most disputes in connection with purchase online could not been remedied, and even though the disputes were dealt with, but often the concerned parties would not get an appropriate solution to their problem. Actually, when any dispute arises from e-commerce transactions, proceedings concerning cross-jurisdiction can be apparently expensive and consume long time, and even when a judgment was attained in a

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<sup>447</sup> This Chapter is a slightly modified version of the author's published works from from "Sengpunya, P. (2020). Online Dispute Resolution Scheme for E-Commerce: The ASEAN Perspectives", published in Pécs Journal of International and European Law - 2020/I.

favor of the consumers, but they need costs and effort in order to enforce the judgement against the suppliers or traders. Furthermore, the possibility of litigation in courts of foreign jurisdictions and dissimilarities in the interrelated laws and regulations governing the consumer contract can also facilitate companies in refraining from the disputes in connection with cross-jurisdiction e-commerce transactions.<sup>448</sup> These problems could be an obstacle to legal remedy for e-commerce consumers. Hence, it is imperative that policymaker and businesses must make available a proper redress mechanism for coping with disputes arising from e-commerce activities. To date, it looks like the ‘online dispute resolution’ or ODR to be one among those most appropriate dispute resolution mechanisms for coping with the disputes in connection with e-commerce activities. ODR is possible to assist concerned parties resolve their problems in a low-cost, flexible, fast, and easy method with requiring no presence at a court room or at a meeting.<sup>449</sup>

ASEAN, like other regions, is embracing opportunities from the growth of innovation and technology. ASEAN member states acknowledge the ICTs as an essential driving force for their economic development and the regional integration.<sup>450</sup> In the last decade, ASEAN has been brought prosperity and wealth to the region through innovation and technology.<sup>451</sup> Despite ASEAN has made remarkable development through the said technology and innovation, but it would not be capable, as a strategy among other things set by the ASEAN Economic Community (AEC) 2025, of achieving a evolution of dynamic economy, a development of people-oriented and people-centered region if the bloc does not tighten the consumer protection framework. Hence, the protection of consumers, as an essential segment of the AEC 2025, has an essential role in improving the marketplace of effectiveness, efficiency, modernity, and fairness in the Community.<sup>452</sup> By this recognition, ASEAN is working on developing its dispute settlement mechanism

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<sup>448</sup> COM 2015) 192 Final, Brussels, 6.5.2015. pp. 16-17.

<sup>449</sup> Sengpunya, P. (November 2019). *Regional Online Dispute Resolution Mechanism: the EU Perspective*. Arsboni. At <https://arsboni.hu/regional-online-dispute-resolution-mechanism-the-eu-perspective/> [24 May 2020]; and *See also* UNCITRAL Technical Notes on Online Dispute Resolution, United Nations, 2017, para 2.

<sup>450</sup> *See* Review of E-commerce Legislation Harmonization in the Association of Southeast Asian Nations, UNCTAD, 2013. p. iii.

<sup>451</sup> *See* ASEAN ICT Master Plan 2015. p. 6.

<sup>452</sup> Handbook on ASEAN Consumer Protection Laws and Regulations, ASEAN Secretariat, June 2018. p. vii.

to build confidence and trust for ASEAN citizens in both domestic and cross-jurisdiction transactions intending to boost e-commerce development and enable the consumer protection within the region.

## 5.2. ASEAN Legal Protection

Instead of a Regional Court of Justice, ASEAN established its dispute settlement mechanisms<sup>453</sup> in the norm of the ASEAN Way, aiming to peacefully settle all conflicts. Each instrument determines which disputes shall use which mechanism<sup>454</sup> and all mechanisms is often a consultation. ASEAN settles disputes concerning the states through dialogue, negotiation, or consultation.<sup>455</sup> And if those disputes are still unresolved, they shall be forwarded to the ASEAN Summit for further decision.<sup>456</sup>

Also, a serious breach of ASEAN Charter<sup>457</sup> or non-compliance of dispute settlement results<sup>458</sup> shall be sent to the ASEAN Summit for making further decision. This role of the ASEAN Summit as last arbitrator and body of enforcement refuses any power separation and is inconsistent with the tradition of a politically neutral settlement of disputes. Nevertheless, this significantly suits with the ASEAN's strict character of intergovernmental organization that desire to remain their independence and sovereignty.

In the concern of economic agreements, disputes are resolved in consistence with the Protocol on Enhanced DSM of ASEAN.<sup>459</sup> The disputed parties shall consider an adequate opportunity for consultations seeking amicable settlement between them.<sup>460</sup> Nevertheless, if the consultation cannot reach an agreement, the unhappy party can submit a request to Senior Economic Official Meeting (SEOM) for establishing a panel.<sup>461</sup> An objective

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<sup>453</sup> Art. 22(2), ASEAN Charter.

<sup>454</sup> A general Protocol to the ASEAN Charter on Dispute Settlement Mechanisms of 08/04/2010. At <https://cil.nus.edu.sg/wp-content/uploads/2019/02/2010-Protocol-to-the-ASEAN-Charter-on-Dispute-Settlement-Mechanisms-1.pdf> [29 May 2020].

<sup>455</sup> Art. 22(1), ASEAN Charter.

<sup>456</sup> Ewing-Chow, M., & Hsien-Li, T. (March 2013). *The Role of the Rule of Law in ASEAN Integration*. EUI Working Paper RSCAS 2013/16, European University Institute, Italy. p. 25; and *See also* Art. 26, ASEAN Charter.

<sup>457</sup> Art. 20(4), ASEAN Charter.

<sup>458</sup> Art. 27(2), ASEAN Charter.

<sup>459</sup> ASEAN Charter, art. 24(3).

<sup>460</sup> Art. 3, ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

<sup>461</sup> Art. 5, ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

evaluation of the settlement will be made by the established panel, and findings and recommendations will be submitted in a report in writing in order to open for an appellate review.<sup>462</sup> Upon receipt of report from the panel, ASEAN Economic Ministers shall establish a Body of Appellate and hear the relevant appeals from cases of the panel.<sup>463</sup> And where the Body of Appellate considers that a measure concerning the cases does not comply with the covered agreement, the Body of Appellate shall make a recommendation to the relevant party to comply with the measure into accordance with the relevant agreement.<sup>464</sup> From the rule of law perspective, this ASEAN's way of setting up a panel rather than a composition of arbitration cannot have access to a supremely qualified judge of lawfulness and independence. Furthermore, it does not have capability of producing jurisprudence, that is a key evolution of law. In the practice, the disputed member states often use the dispute resolution mechanism of the WTO rather than using the panel mechanism of ASEAN.

#### 5.2.1. ASEAN Dispute Settlement Mechanisms

In international relation, a dispute resolution mechanism has significantly become an institutional development intending to ensure the rule of law for relation among countries. The WTO Dispute Settlement Body (DSB) has revealed substantial contribution to improving compliance of commitments of member countries.<sup>465</sup> Meanwhile, the EU has secured the development of a huge body of regional law that is enforceable in member countries through the European Court of Justice (ECJ).

In ASEAN, an establishment of dispute settlement mechanisms have been provided by The Charter in all cooperation areas of ASEAN.<sup>466</sup> At the present, there are at least three dispute settlement methods in ASEAN – 1) through good offices, 2) mediation or conciliation through the Chair of ASEAN or ASEAN Secretary-General<sup>467</sup>, and 3) through the ASEAN Summit, and an instrument-specific method of dispute settlement. Among

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<sup>462</sup> Art. 7-8, ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

<sup>463</sup> Art. 12(1), ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

<sup>464</sup> Art. 14(1), ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

<sup>465</sup> Fukunaga, Y. (2006). *Securing Compliance through the WTO Dispute Settlement System: Implementation of DSB Recommendations*. Journal of International Economic Law, Vol. 9, No. 2. p. 384.

<sup>466</sup> Art. 22(2), The Charter.

<sup>467</sup> Art. 23, The Charter.

other disputes settlement methods, all unresolved disputes and issues of non-compliance of the dispute resolution result by the relevant member countries must refer to the ASEAN Summit for making further decision.

An instrument-specific method of dispute settlement in ASEAN is provided by the Article 24 of The Charter. This method means issues or disputes in connection with specific instrument of ASEAN shall be resolved under the procedures or mechanisms given for in that instrument. For instance, the ASEAN Agreement on Investment 2009 grants two distinct mechanisms of dispute settlement. One involves disputes between the member states for which the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (ASEAN Enhanced DSM)<sup>468</sup> is applicable, and the other involves conflicts between a member country and the investor. In the latter instance, an investor can opt either to file a claim with the domestic court or administrative tribunal of a disputing member state or submit the claim to international or regional arbitral bodies.<sup>469</sup>

A rule, disputes in connection with economic cooperation are now to be settled pursuant to the ASEAN Enhanced DSM, unless the relevant economic agreement provides a specific mechanism of dispute settlement. In the case of disputes that do not fall under coverage of the application or interpretation of any instruments of ASEAN, the conflicts shall be resolved by mechanisms provided within the Amity and Cooperation Treaty (TAC). The disputes to be resolved by the mechanisms under TAC are usually those highly sensitive security and political issues among ASEAN member states or those that are likely to bother the harmony and peace in the region. Despite the TAC provided the mechanisms of dispute settlement, the High Council as a regional mechanism to act as good offices or act as a committee for the conciliation and mediation, as well as to recommend proper measures to prevent the worsening of a dispute or situation has never been established.<sup>470</sup>

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<sup>468</sup> ASEAN Protocol on Enhanced Dispute Settlement, 29 November 2004, Vientiane, Lao PDR. At [https://asean.org/?static\\_post=asean-protocol-on-enhanced-dispute-settlement-mechanism](https://asean.org/?static_post=asean-protocol-on-enhanced-dispute-settlement-mechanism) [21 July 2020].

<sup>469</sup> Art. 33, Submission of a Claim, ASEAN Investment Agreement, such as International Convention on the Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL), and the Regional Centre for Arbitration in Kuala Lumpur.

<sup>470</sup> Arts. 13-17, Treaty of Amity and Cooperation (TAC), Indonesia, 24 February 1976. At <https://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976/> [21 July 2020].

However, ASEAN adopted the APSC Blueprint aiming to enhance cooperation under the TAC through convening parties' high conference to the TAC to go over its implementing mechanisms.<sup>471</sup>

Up to date, the ASEAN Enhanced DSM is considered as the most radical attempt, through dispute resolution and rule interpretation, to establish 'hard law' in ASEAN. It is designed in most respects to the WTO Dispute Settlement Understanding and is expected to address criticisms of its earlier mechanism – the 1996 Dispute Settlement Mechanism that lacked specific complaint procedure and concrete mechanism for compensation. The ASEAN Enhanced DSM is administered and provided for three stages or processes to settle disputes by the Senior Economic Officers Meeting (SEOM)<sup>472</sup> like the WTO Dispute Settlement Body that is composed of an intergovernmental body.

Under ASEAN Enhanced DSM, the first stage for dispute resolution is a first request for consultation where a party may submit a dispute for settlement. If the consultation fails to reach a settlement, the unhappy party can request for the creation of a panel and thereafter an appeal may be made to the Body of Appellate. ASEAN has likewise adopted a reverse consensus practiced in the WTO DSB in the establishment of a panel and in adopting a report of the panel or Body of Appellate. Thus, the SEOM shall adopt a report of the panel or report of the Body of Appellate, unless the SEOM decided not to affirm the report by consensus.<sup>473</sup> The SEOM must also remain under supervision for the findings implementation, and recommendation of the Body of Appellate or panel can also authorize, upon request of a party, to suspend concession enjoyed by the other party under the covered agreement.<sup>474</sup>

Since establishment of ASEAN Enhanced DSM in 2004, the ASEAN member countries have never used it for economic dispute settlement, but they prefer to use other international forums for dispute settlement instead. However, ASEAN reported that it has continued efforts to make concrete and make the mechanism accessible to users such as

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<sup>471</sup> Par. A.2.2., APSC Blueprint.

<sup>472</sup> Arts. 3, 5, 12, Protocol on ASEAN Enhanced DSM.

<sup>473</sup> Arts. 9(1), 12(13), Protocol on ASEAN Enhanced DSM.

<sup>474</sup> Arts. 15 & 16, Protocol on ASEAN Enhanced DSM.

the completion of the Special Service Agreement for the establishment of the panels and Body of Appellate, the ASEAN General Conditions Applicable to Panel and Appellate Body members under the Special Service Agreement, the ancillary ASEAN Administrative Guidelines for requesting the Establishment of the Special Service Agreement, and the Working Procedures for the ASEAN Compliance Body.<sup>475</sup> Furthermore, a program to promote the use of the ASEAN Enhanced DSM has been launched through the ASEAN-EU Programme for Regional Integration and Support phase II (APRIS II) project, Promotion of the Visibility and Use of the ASEAN Enhanced DSM Protocol.

Since its foundation, ASEAN has relied on consultation and consensus approach for making decision and resolving disputes between the member states. However, this approach has not been used since their establishment and in the few occasions where member states decided to submit disputes to international dispute resolution mechanism such as the disputes involving Singapore and Malaysia and between Thailand and Cambodia. In these two examples, the member states resorted to International Court of Justice rather than their regional dispute resolution scheme such as those provided in the TAC.

In the regards of economic disputes, the member countries have continuously submitted complaints to the WTO DSB for resolving the disputes, which not only to against non-members but also against each other. However, the establishment of dispute resolution mechanisms at all levels of economic and political matters mentioned above has promised some institutionalization of dispute resolution in ASEAN. Yet, the use of those mechanisms remains limited and have continued unused, although those in the economic field, points to the constraints imposed by other substantive factors within ASEAN. In the few examples where disputes were brought for international adjudication, the member states however clearly did not feel averse to formal adjudication and merely shows that such decisions do not depend as much on the consideration of the prevailing norm in ASEAN as their economic and strategic interests. At any rate, the weaknesses of formal

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<sup>475</sup> ASEAN Annual Report 2006-2007. p. 20. At [https://asean.org/?static\\_post=annual-report-2006-2007](https://asean.org/?static_post=annual-report-2006-2007) [21 July 2020].

adjudicative mechanisms for enforcement are sought to be supplemented by softer methods like monitoring and creation of inter-agency cooperation.

### 5.2.2. Dispute Resolution Enforcement

The enforcement with the coercive measures in the ASEAN Community only exists on paper. Its regional judicial mechanism is absent; thus the legal enforcement is upon national administrative and national judicial procedures of the member states<sup>476</sup>, or for cases in connection with investment disputes, the legal enforcement uses commercial arbitral procedures under the ASEAN Enhanced DSM or other recognized arbitral tribunals.<sup>477</sup> However, the ASEAN Enhanced DSM has remained unused, instead the ASEAN member states prefer the WTO DSB for bringing complaints in matters of economic disputes, not only against non-ASEAN member states but also against one another among the member states themselves. In 1995, Singapore submitted a requested the WTO DSB for a consultation against Malaysia in the matter of prohibition of polyethylene and polypropylene imports, which later could reach a settlement<sup>478</sup>. In 2008, another case was brought before WTO DSB requesting for a consultation by the Philippines against Thailand concerning Thailand's fiscal measures and customs on cigarettes from the Philippines.<sup>479</sup> The conflict could have been settled under ASEAN economic agreements or submitted before the ASEAN Enhanced DSM because those measures are considered to be non-tariff barriers, but the ASEAN member states prefer resolving problems through bilateral negotiations or through international mechanisms rather than submitting issues among themselves for adjudication.<sup>480</sup> In the current legal regime, no private entities

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<sup>476</sup> As is the case under Section B, arts. 28–41, ASEAN Comprehensive Investment Agreement 2009 for investment disputes.

<sup>477</sup> Apart from the ad hoc arbitration proceedings in the ASEAN Enhanced DSM, regional and international arbitration, for example the International Centre for Settlement of Investment Disputes, New York Convention and UNCITRAL Arbitration Rules can be elected to handle arbitral disputes. See Section B, art. 28, ASEAN Comprehensive Investment Agreement 2009.

<sup>478</sup> WTO Doc WT/DS1/1 (10 January 1995) (Request for Consultation by Singapore).

<sup>479</sup> WTO Doc WT/DS371/1, G/L/847, G/VAL/11 (7 February 2008) (Request for Consultation by the Philippines).

<sup>480</sup> Moses, A. (2004). Institutional Framework: Recommendations for Change. In *ASEAN Reader*. Singapore, Institute of Southeast Asian Studies. p. 65-66.

or individuals are granted rights to file suits on matters in connection with ASEAN processes, unless they are investor issues as defined in the ACIA.<sup>481</sup>

As mentioned above that ASEAN does not have any Judicial System nor enforcement power. To resolve disputes between Member States, ASEAN thus established its dispute settlement mechanisms<sup>482</sup> in the norm of the ASEAN Way expecting to resolve all disputes peacefully. ASEAN established the mechanism in each specific instrument as an example “ASEAN Enhanced DSM”, and all resolution mechanisms in each instrument are often a consultation and negotiation<sup>483</sup>. This means that the disputed parties must try to settle their conflicts in peaceful way through good offices, mediation/conciliation, or arbitration<sup>484</sup>. A result of the resolution by good offices, mediation/conciliation is a mutual agreement of settlement between the parties and a result of resolution by arbitration is an arbitral award, which the results of both resolutions are binding.<sup>485</sup>

In the case of any non-conformity with the agreement of settlement or the arbitral award occurs, the matter may be forwarded to the ASEAN Summit for its further decision.<sup>486</sup> Notwithstanding, the ASEAN Summit will not serve as the “ASEAN Supreme Court” to decide disputes for its Member States. It is necessary to keep in mind that the ASEAN Summit is a policy-making body. It would thus likely encourage the disputed parties to comply with the result of the agreement of settlement or the arbitral award or only express their concerns or recommendation to the disputes parties<sup>487</sup>.

### 5.2.3. ASEAN Peaceful Resolution Process: Cambodia vs Vietnam

Since no economic disputes in ASEAN have been resolved by ASEAN’s mechanisms, therefore, in this section the author will present the ASEAN Way in resolving dispute in

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<sup>481</sup> ASEAN Comprehensive Investment Agreement 2009, arts. 4 and 19.

<sup>482</sup> Art. 22(2), ASEAN Charter

<sup>483</sup> Art. 22(1), ASEAN Charter.

<sup>484</sup> Hao Duy Phan (2013), *Towards a Rules-Based ASEAN: The Protocol to the ASEAN Charter on Dispute Settlement Mechanisms*. Volume 5 Yearbook on Arbitration and Mediation, Arbitration Law Review, 2013, p. 270.

<sup>485</sup> *Ibid*, p. 271.

<sup>486</sup> ASEAN Charter, at art 26 (2); and ASEAN Protocol on Enhanced Dispute Settlement Mechanisms, Nov. 29, 2008, at art. 20, annex 6, r. 1(b)

<sup>487</sup> Hao Duy Phan (2013), *Towards a Rules-Based ASEAN: The Protocol to the ASEAN Charter on Dispute Settlement Mechanisms*. Volume 5 Yearbook on Arbitration and Mediation, Arbitration Law Review, 2013, p. 270-272.

the region by peace process in the security field instead. This intends to examine the ASEAN's role in handling the dispute between Vietnam and Cambodia, in order to ascertain the extent to which it brought in consolidation of the norms of ASEAN and was in line with its proclaimed objective of providing a regional dispute resolution to conflicts of the region.

From December 1978, Vietnamese force invaded and occupied Cambodia and this was considered as ASEAN's most serious security challenge since its foundation. ASEAN did not only consider the action of Vietnam as a violation to ASEAN's norms, but the conflict was also a significant test for intra-ASEAN relations and its regional dispute resolution. The conflict threatened ASEAN's emerging tradition of unity and consensus. ASEAN members' differences in dealing with the conflict also challenged proclaimed role of ASEAN in peacefully settling regional disputes.

Since ASEAN does not have regional judicial system, therefore, it established ASEAN Way dispute resolution mechanism seeking to solve problems or disputes between member states in peaceful way. The following is to demonstrate the peaceful resolution process of ASEAN in solving conflict between Vietnam and Cambodia during 1987-1991<sup>488</sup>:

In April 1987: The Foreign Minister of Indonesian, Mochtar Kusumaatmadja, for the first time in two years, made his journey to Vietnam hoping for peace process in settling the decade-long conflict between Vietnam and Cambodia.

In July 1987: The discussions between Mochtar Kusumaatmadja, the Foreign Minister of Indonesia and Nguyen Co Thach, the Foreign Minister of Vietnam on 27-29 July 1987 in the city of Ho Chi Minh brought in the joint statement that called for the unofficial meeting on Cambodia to be participated by both parties on an equal ground with no labels or pre-conditions. At the first move of the process, it

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<sup>488</sup> Nair, K.K. (1984). ASEAN-Indochina relations since 1975: The Politics of Accommodation, Canberra papers on strategy and defence; Peou, S. (1994). The UN Conflict Resolution in the Cambodian War: An Analysis of the Permanent Five's Role and Its Impact on the Cambodian Peace Process, Ph.D. Thesis, York University; Acharya, A., Lizée, P. & Peou, P. (eds 1991). Cambodia – The 1989 Paris Peace Conference: Background Analysis and Documents, Millwood, NY: Kraus, xxv–xlv; and also Thayer, C. A (1990). ASEAN and Indochina: The Dialogue., in Broinowski, A. (ed. 1990), ASEAN into the 1990s, Basingstoke: Macmillan, pp. 138–61.

was restrictive to the Cambodian groups themselves. At the second move, it invited regional powers those who were interested in, such as Vietnam.

In August 1987: The accord of Mochtar Kusumaatmadja and Nguyen Co Thach was discussed at the meeting of Foreign Ministers of ASEAN on August 16<sup>th</sup>, 1987, in Bangkok. As of result, the ASEAN Foreign Ministers Meeting made a decision that such a procedure might only get taken place if Vietnam started to suddenly take part after Cambodian factions' initial unofficial discussions.

In mid-1988: The first Jakarta Informal Meeting was held on 24–28 July in Bogor, Indonesia. The meeting involved the four Cambodian groups and gave particular attention to the internal perspectives of the conflict. However, it did not make any progress. The People's Republic of Kampuchea (PRK) deserted attempts to bar the Vietnamese and DK (Khmer Rouge) from a scene of political matter of post-conflict and Prince Norodom Sihanouk discarded one's desire for an international force of peacekeeping, minimized one self's desire that the management of PRK to get demolished prior to organizing elections, and Prince Norodom Sihanouk implied that the UN seat of Cambodia might be vacant. This first Jakarta Informal Meeting formed a procedural norm, where firstly in the morning the Cambodian factions met, and later in the afternoon were participated by ASEAN, Vietnam, and Lao PDR. As of result, it created an informal working group in order to keep on discussing and seeking solution for the issues.

In January 1989: Vietnam did offer on 6 January that by September it would withdraw all forces from Cambodia depending on an agreement of a political solution by then. In the same month, Prime Hun Sen of the PRK paid his visit to Thailand in order to strengthen dialogue towards the Cambodia conflict.

In February 1989: On 16–21 February, the second Jakarta Informal Meeting were placed, but it did not achieve any breakthrough because of the wide extend over the power sharing question. This brought in an announcement of an end of regional attempts to form a peaceful process for resolving a regional conflict. Nevertheless,

France, as a former empire of Vietnam and Cambodia, agreed to initiate an international conference to find solution on Cambodia conflict.

In mid-1989: The Paris Conference on Cambodia was organized for the first-time during July to August. The conference did not made any resolution to the issue, but it identified several primary issues such as: the withdrawal of Vietnamese forces affirmation; ceasing of military support to the four Cambodian groups; the need for Cambodia reconstruction; the prevention of Khmer Rouge's return to power; the matter of Vietnamese who settled in Cambodia; acknowledgement of the significance of refugee issues and other relevant humanitarian problems; the requirement to create an International Control Mechanism; and the share of power, establishment of the temporary government and general elections proceeding.

In early 1990: On 26–28 February, the 1<sup>st</sup> Unofficial Meeting on Cambodia was taken place in the city of Jakarta, Indonesia among the four Cambodian groups. At the meeting, they released a joint communiqué that called for adhering the temporary period: a presence of UN at proper stages; and the formation of a highest national authority.

In September 1990: The 2<sup>nd</sup> Unofficial Meeting on Cambodia took place again in Jakarta, on 9 September 1990. The meeting was participated by all four Cambodian groups and conciliatory speeches of them were made. They reached an agreement on establishment of a Highest National Council to serve as Cambodia's sovereign delegate, where the Highest National Council was officially created the next day. This Supreme National Council comprised with representatives from all four groups.

At the end of 1990: On 21-22 December, a meeting was held in Paris, where the two factions of non-communist opposition expressed willingness of them to accept a role of the UN in Cambodia, a demobilization of whole troops, and foresaid elections proceeding on a proportionality fundamentality. However, the so-called PRK remained the opposition on these matters, but both sides gave consent that they would continue further talks on these matters.

In mid-1991: On 24–26 June, another meeting was held in Pattaya, Thailand, where both PRK and Khmer Rouge agreed to support the plan of Prince Sihanouk for the Supreme National Council. The plan for Supreme National Council was to act as a collegiate presidency. It was conducted by a Secretary-General with comparatively weak power, and it was to keep the status quo up, without forming any interim coalition government, and remaining autonomous zones of the four groups. The opposition groups required an observed armistice with the demobilization of troops. They also required a UN peacekeeping force, as well as the UN to govern the country until completion of elections, but the PRK denied these desires of the opposition groups.

In August 1991: On 26-29 August, another meeting between the four Cambodian groups was held in Pattaya, where they reached an agreement to demobilize 70 percent of forces of each faction and relocate the remainder to cantonment areas supervised by the UN. The UN also received a request to set up a mission for peacekeeping and peacebuilding to make sure of an implementation of the agreement in the period of the changeover.

In September 1991: The Paris Conference on Cambodia was reconvened, where an agreement of peace to end the conflict in Cambodia was finally adopted.

### **5.3. ASEAN’s Policy on E-commerce Consumer Protection<sup>[489]</sup>**

ASEAN has placed a sector of consumer protection as one of its priority tasks in its agenda on policymaking for the regional level. ASEAN acknowledges the protection of consumers as one amongst the most important portions of the practice for socio-economic integration of ASEAN. The protection of consumers is considered as an essential contributor in supporting economic development and boosting a competitive marketplace and usually, the suitable protection of consumers is capable of increasing demand, trust and confidence of consumers, so that it will possibly result in the cycle of business.<sup>490</sup>

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<sup>489</sup> This section is a slightly modified version of the author’s published works from from “Sengpunya, P. (2020). Online Dispute Resolution Scheme for E-Commerce: The ASEAN Perspectives”, published in Pécis Journal of International and European Law - 2020/I.

<sup>490</sup> Handbook on ASEAN Consumer Protection Laws and Regulations. ASEAN Secretariat, June 2018. p. 12-13.

However, the complex institutional and legal regimes of ASEAN, as the organization pursues an informal legalism without any legal supranational structures, can obstruct the effectiveness of laws on protection of consumer, and it is possible of bringing challenges for consumer protection activities in ASEAN region. Hence, depending upon the commitment of the member states of ASEAN under the Community-building, the member countries' leaders of ASEAN has strategically placed the consumer protection in their AEC Blueprint and affirmed their commitments during the 39th Meeting of ASEAN Economic Ministers in 2007, stating, *inter alia*, that:

*“Given the significant progress achieved in the integration of ASEAN toward a “people-centered” community, the Ministers agreed that it is time to promote regional cooperation initiatives that would provide ASEAN consumers with a high level of protection. As such, the Ministers endorsed the establishment of the ASEAN Coordinating Committee on Consumer Protection.”*<sup>491</sup>

By the foresaid affirmation, the ASEAN Committee on Consumer Protection (ACCP) was established. The ACCP has been granted a role to make sure that all ASEAN member states enact their domestic laws, regulations, policies and measures on consumer protection; and to make sure of improvement of information access by consumers, the establishment of product recalls and consumer dispute settlement mechanisms, and the tightening of institutional-capacity.<sup>492</sup> Up to date, ten of the member states of ASEAN have their domestic laws on consumer protection<sup>493</sup>, in which Cambodia is the last member state to adopt its Law on Consumer Protection on 2<sup>nd</sup> November 2019<sup>494</sup>. The ACCP includes delegates of agencies of consumer protection from all member countries of

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<sup>491</sup> The Thirty-Ninth ASEAN Economic Ministers' (AEM) Meeting, Makati City, the Philippines, 24 August 2007. At [https://asean.org/?static\\_post=the-thirty-ninth-asean-economic-ministers-aem-meeting-makati-city-philippines-24-august-2007](https://asean.org/?static_post=the-thirty-ninth-asean-economic-ministers-aem-meeting-makati-city-philippines-24-august-2007) [5 November 2020]; *See also* Brief Policy “ASEAN Consumer Protection: Essential actions towards a single market”. ACCP, 15 June 2011. p. 2.

<sup>492</sup> *See* ASEAN Committee on Consumer Protection (ACCP), at <https://www.aseanconsumer.org/cterm-terms-regional-cooperation-in-asean/asean-committee-on-consumer-protection-accp> [25 October 2020]; and *See also*, Handbook on ASEAN Consumer Protection Laws and Regulations. the ASEAN Secretariat June 2018. p. 13.

<sup>493</sup> *Supra* Note 442, at 19-55.

<sup>494</sup> Tilleke & Gibbins (14 November 2019). “Cambodia Enacts a New E-commerce Law and a Consumer Protection Law”, at <https://www.tilleke.com/insights/cambodia-enacts-new-e-commerce-law-and-consumer-protection-law/> [22 November 2021].

ASEAN.<sup>495</sup> It serves as ASEAN’s central point for implementing and monitoring regional mechanisms and arrangements to enhance the protection of consumers in the ASEAN region.

And with an acknowledgement of the significance of consumer protection in promoting the marketplaces of efficiency, effectiveness, modernity, and fairness, ASEAN has continued its effort in framing consumer protection with high effectiveness in its AEC Blueprint 2025. The Blueprint 2025 includes strategic measures including:

*“a) Establish a common ASEAN consumer protection framework through higher levels of consumer protection legislation, improve enforcement and monitoring of consumer protection legislation, and make available redress mechanisms, including alternative dispute resolution mechanisms;”*

*“b) Promote a higher level of consumer empowerment and knowledge by addressing consumer concerns as well as enhancing consumer knowledge and advocacy;”*

*“c) Build higher consumer confidence and cross-border commercial transactions by strengthening product safety enforcement, stronger participation of consumer representatives, and promotion of sustainable consumption;”*

*“d) Encourage consumer-related matters in ASEAN policies through impact assessment of consumer protection policies and development of knowledge-based policies;” and*

*“e) Promote consumer protection measures in products and services sectors such as finance, e-Commerce, air transport, energy, and telecommunications.”<sup>496</sup>*

In order to accomplish the above strategic measures, the ASEAN Strategic Action Plan on Consumer Protection 2025 (ASAPCP) was adopted on 14 October 2016.<sup>497</sup> The aims of the ASAPCP are to establish a common framework for protection of consumers in ASEAN through modernization of legislation, promotion of higher levels of confidence,

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<sup>495</sup> See List of ACCP Leads. At

[https://www.aseanconsumer.org/file/pdf\\_file/List%20of%20ACCP%20Leads%20\(ACCP%20Website\)%20-%204May18.pdf](https://www.aseanconsumer.org/file/pdf_file/List%20of%20ACCP%20Leads%20(ACCP%20Website)%20-%204May18.pdf) [12 October 2020].

<sup>496</sup> ASEAN Economic Community Blueprint 2025. Jakarta: ASEAN Secretariat, November 2015, Section B.2. pp. 13-14.

<sup>497</sup> See ASEAN Strategic Action Plan for Consumer Protection (ASAPCP) 2025, ASEAN, 14 October 2016. At <https://aseanconsumer.org/read-publication-asean-strategic-action-plan-for-consumer-protection-asapcp-2025> [18 October 2020].

trust, and empowerment of consumers, as well as considering the trends of e-commerce.<sup>498</sup> In the consequence, the ASAPCP lays down a policy strategy for consumer protection in ASEAN for the years 2016-2025. The implementation of the ASAPCP is supervised by the ACCP by collaborating with other ASEAN's sectoral bodies and interrelated stakeholders.<sup>499</sup> This initiative has aimed at providing fair treatment and necessary protection to consumers in the region, decreasing gaps in the implementation of consumer protection within ASEAN, improving the ASEAN officials' technical capacities, and enabling ASEAN to incorporate consumer concerns into all of ASEAN's other policies and meanwhile, it has aimed at accomplishing the greatest benefits for both companies and consumers in the AEC.

#### **5.4. Protection of E-commerce Consumer Framework in AMS**

Without strengthening the protection of consumer framework of AMS, ASEAN will not be able develop a dynamic economy and a people-centred, people-oriented community. Hence, the ACCP was established with initial focus of making sure that legislation on consumer protection in all AMS is in place, and the consumer redress and recalls mechanisms are established and effective.

##### **5.4.1. Brunei Darussalam**

The principal law for consumer protection of Brunei Darussalam was introduced in 2011 when the country passed a Consumer Protection (Fair Trading) Order (CPFTO), and it was entered into force on 1<sup>st</sup> January 2012.<sup>500</sup> CPFTO ensures consumers who experience unfair practice in consumer transactions that they can file a suit in a court against the seller when the claim amount is of B\$10,000 or less.<sup>501</sup>

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<sup>498</sup> *Supra Note 442*, at v.

<sup>499</sup> *See generally* the ASEAN Strategic Action Plan for Consumer Protection (ASAPCP) 2016- 2025: Meeting the Challenges of a People-Centered ASEAN Beyond 2015. At [https://www.aseanconsumer.org/file/post\\_image/The%20ASEAN%20Strategic%20Action%20Plan%20For%20Consumer%20Protection%202016\\_2025%20Meeting%20The%20Challenges%20of%20A%20People%20%20Centered%20ASEAN%20Beyond%202015.pdf](https://www.aseanconsumer.org/file/post_image/The%20ASEAN%20Strategic%20Action%20Plan%20For%20Consumer%20Protection%202016_2025%20Meeting%20The%20Challenges%20of%20A%20People%20%20Centered%20ASEAN%20Beyond%202015.pdf) [24 October 2020].

<sup>500</sup> Asher, A., Dee, W., & Wood, John T D. (6 December 2013). *Development of Complaint and Redress Mechanism Models in ASEAN*, Foundation for Effective Markets and Governance, p. 32; and *See also* the ASEAN Secretariat, *Handbook on ASEAN Consumer Protection Laws and Regulations*, June 2018, p. 19.

<sup>501</sup> Art. 6, Consumer Protection (Fair Trading) Order 2011, Brunei Darussalam.

In Brunei Darussalam, an unhappy consumer must firstly try to explain and negotiate with the seller concerning unfair practices. In case the negotiation fails, the consumer can then submit a complaint for claiming compensations via the CCAD or the Tribunal of Small Claims, where such a CCAD is responsible for common complaints of consumer concerning civil resolution and interrelated B2C claims/complaints, and the Tribunal of Small Claims has the power to hear cases filed by the consumers beneath the CPFTC and an unfair practice engaged by manufacturers or sellers will be decided. And the complaint of parties who do not reside in Brunei will be proceeded under the Brunei courts' jurisdiction if the breach occurred in Brunei or the sale contract was practiced in Brunei.<sup>502</sup>

#### 5.4.2. Cambodia

As the last member state of ASEAN for enacting consumer protection law, the Cambodia finally adopted its Law on Consumer Protection on 2<sup>nd</sup> October 2019<sup>503</sup>. The law applies to consumers and all forms of businesses, whether a profitable business or a non-profitable business, including selling of products or services or selling of ownership over immovable estate in the country, unless otherwise regulated by other laws or regulations. Meanwhile, the country has also been drafting numbers of relevant implementing regulations or prakas in order to support enforcement of the law, including the implementing regulations or prakas on penalties, dispute settlements, misleading representation, inspection, and notification procedures<sup>504</sup>.

However, currently, there is no ADR mechanism in Cambodia.<sup>505</sup> Consumers can take legal action or file a claim for tort or other actions only in courts, in which a consumer who claims to have loss or damage from a product must take a legal action in a court of law for seeking compensation.<sup>506</sup> Even though the Directorate General of Consumer Protection,

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<sup>502</sup> The ASEAN Secretariat, *Handbook on ASEAN Consumer Protection Laws and Regulations*, June 2018, p. 21.

<sup>503</sup> International Trademark Association (15 February 2020). "Cambodia: Government Enacts Consumer Protection Law". At <https://www.inta.org/perspectives/cambodia-government-enacts-consumer-protection-law/> [23 November 2021]

<sup>504</sup> The ASEAN Secretariat, *2<sup>nd</sup> Handbook on ASEAN Consumer Protection Laws and Regulations*, 2021, p. 33.

<sup>505</sup> Asher, A., Dee, W., & Wood, John T D. (6 December 2013). *Development of Complaint and Redress Mechanism Models in ASEAN*, Foundation for Effective Markets and Governance, p. 34.

<sup>506</sup> The ASEAN Secretariat, *Handbook on ASEAN Consumer Protection Laws and Regulations*, June 2018, p. 22.

Competition and Fraud Repression (CCF) of Cambodia offers a mechanism that consumer may make complaints to the organization<sup>507</sup>, but in the practice this mechanism has not been reached by consumers in general. However, the country is tackling these challenges, together with dissemination and promotion of the newly adopted consumer protection law, to raise the awareness of the foresaid consumer mechanism<sup>508</sup>.

#### 5.4.3. Indonesia

The principal law for consumer protection of Indonesia was presented since 1999 when the country adopted the Law on Consumer Protection No. 8 of 1999 and it was entered into force in on 20<sup>th</sup> April 2000.<sup>509</sup> The law provides that the consumers have rights including: right to choose, right to safety, right to correct information, right to be heard, right to education, right to representation, right to redress, right to receive honest and proper and nondiscriminatory service or treatment, and other rights as provided by other provisions of the law.<sup>510</sup>

In Indonesia, consumers who have faced with damages or a consumers group with common interest may file complaints against the traders through the competent agencies handling redress between consumers and traders, or submit a complaint to a court within the general court's jurisdiction.<sup>511</sup> However, the disputed parties can choose ADR for settling the consumer dispute based on their voluntary choice, but if the agreement cannot be reached by the ADR, the unhappy party can file a suit in the court.<sup>512</sup> And the government of Indonesia also established Consumer Dispute Settlement Bodies (CDBS) at district levels aiming at dealing with consumer dispute outside of the court. The decisions

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<sup>507</sup> "About CCF". At <https://www.ccfkg.gov.kh/en/about-ccf/> [24 November 2021]

<sup>508</sup> The ASEAN Secretariat, *2<sup>nd</sup> Handbook on ASEAN Consumer Protection Laws and Regulations*, 2021, p. 36.

<sup>509</sup> The ASEAN Secretariat, *Handbook on ASEAN Consumer Protection Laws and Regulations*, June 2018, p. 25.

<sup>510</sup> Art. 4, Law No. 8 on Consumer Protection of 1999, Indonesia.

<sup>511</sup> Art. 45(1), Law No. 8 on Consumer Protection of 1999, Indonesia.

<sup>512</sup> Asher, A., Dee, W., & Wood, John T D. (6 December 2013). *Development of Complaint and Redress Mechanism Models in ASEAN*, Foundation for Effective Markets and Governance, pp. 34-35; and *See also* Art. 45(2)-(3), Law No. 8 on Consumer Protection of 1999, Indonesia.

made by the CDBS is enforceable. Yet, the unhappy party can of course appeal the decision of the CDBS to the relevant courts at district level and then to the Supreme Court.<sup>513</sup>

#### 5.4.4. The Lao PDR

The Lao PDR adopted a Consumer Protection Law in 2010<sup>514</sup> providing five out of the eight internationally recognized rights of consumer including: right to correct information, right to option, right to safety, right to be heard, and right to redress or remedy.<sup>515</sup>

In Lao PDR, there are four mechanisms for handling conflicts between the consumers and traders including: reconciliation/negotiation, mediation, administrative remedy by the Protection of Consumer Implementing Organization, and Settlement by the Organization of Economic Dispute Resolution or by the People's Courts.<sup>516</sup> When a consumer have suffered from damage due to consumption of goods and services, he shall try to negotiate with the supplier and directly request for compensation.<sup>517</sup> The consumer can also use other dispute settlement methods, in which the disputed parties may choose an individual or legal entity accepted by both parties to conduct the mediation,<sup>518</sup> or the disputed parties may request the Consumer Protection Implementing Organization or relevant sectors to consider dispute settlement through the administrative remedy.<sup>519</sup> If the negotiation or mediation fails, The disputed parties may request to the Organization of Economic Disputes Settlement for settling the dispute, or take a legal action in People's Courts for considering the disputes.<sup>520</sup>

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<sup>513</sup> The ASEAN Secretariat, *Handbook on ASEAN Consumer Protection Laws and Regulations*, June 2018, p. 29.

<sup>514</sup> Country Report – Lao PDR, Road-mapping Capacity Building Needs in Consumer Protection in ASEAN, p. 40.

<sup>515</sup> Art. 32, Law on Consumer Protection 2010, Lao PDR.

<sup>516</sup> Art. 37, Law on Consumer Protection 2010, Lao PDR; Asher, A., Dee, W., & Wood, John T D. (6 December 2013). *Development of Complaint and Redress Mechanism Models in ASEAN*, Foundation for Effective Markets and Governance, p. 39; and *See also* The ASEAN Secretariat, *Handbook on ASEAN Consumer Protection Laws and Regulations*, June 2018, p. 32.

<sup>517</sup> Art. 38, Law on Consumer Protection 2010, Lao PDR.

<sup>518</sup> Art. 42, Law on Consumer Protection 2010, Lao PDR.

<sup>519</sup> Art. 48, Law on Consumer Protection 2010, Lao PDR.

<sup>520</sup> Art. 53 and Art. 54, Law on Consumer Protection 2010, Lao PDR.

#### 5.4.5. Malaysia

Malaysia has the principal law for consumer protection since 1999 when it adopted the Consumer Protection Act 1999 (CPA) aiming to boost the formation of mechanisms for protection of consumers within the country.<sup>521</sup> The CPA does not clearly provide the consumer protection rights; however, it recognizes four fundamental consumer rights under different provisions including: right to safety, right to correct information, right to choose, and the right to redress.<sup>522</sup>

In Malaysia, there are three main institutions<sup>523</sup> handling consumer dispute settlement. First institution is the Tribunal for Consumer Claims (TCC). Consumers who have suffered from damages due to consumption of goods or services and are seeking dispute settlement for compensation may file charges against suppliers to the TCC where the tribunal has jurisdiction of hearing and determining claims for an amount not exceeding twenty-five thousand Ringgit.<sup>524</sup> Unhappy consumers can also file a complaint to Consumer Complaint Management Centre (CCMC) of the MDTCC through telephone, website, letters or walk-in. And another institution where consumers can file a complaint is the National Centre for Consumers Complaints. It is an autonomous ADR body that deals with domestic and trans-jurisdiction complaints/claims without any charge. It primarily serves as a mediator between consumers and traders in handling complaints with claims of amount not exceeding 15,000 Ringgit.<sup>525</sup>

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<sup>521</sup> Country Report – Malaysia, Roadmapping Capacity Building Needs in Consumer Protection in ASEAN, p. 32.

<sup>522</sup> The ASEAN Secretariat, *Handbook on ASEAN Consumer Protection Laws and Regulations*, June 2018, p. 33.

<sup>523</sup> The ASEAN Secretariat, *Handbook on ASEAN Consumer Protection Laws and Regulations*, June 2018, p. 36.

<sup>524</sup> Section 98, Consumer Protection Act 1999, Malaysia.

<sup>525</sup> Asher, A., Dee, W., & Wood, John T D. (6 December 2013). *Development of Complaint and Redress Mechanism Models in ASEAN*, Foundation for Effective Markets and Governance, p. 42.

#### 5.4.6. Myanmar

Myanmar enacted the Law on Consumer Protection on 14 March 2014 which is a very first comprehensive legislation addressing consumer protection affairs.<sup>526</sup> And most recently on 15<sup>th</sup> March 2019, the country adopted the new Consumer Protection Law 2019 (CPL) which supersedes the Law on Consumer Protection 2014, aiming to strengthen and protect benefits and interests of consumers over all products and services. The CPL provides nine rights for consumers in Myanmar including: the right to safety, the right to option, the right to correct information, the right to fair treatment, and the right to remedy or redress.<sup>527</sup>

In Myanmar, when consumers suffer from the loss due to the products and services consumption, they should file a complaint/claim with the Consumer Information and Compliant Center for examining and sending the complaint to the relevant Consumer Dispute Settlement Bodies (CDSB) or they can directly file a complaint the relevant CDSB for examining and passing appropriate decisions. The CDSB primarily acts as mediator for the disputed parties, and if an agreement between the disputed parties cannot be achieved, the CDSB will report to the authorities at higher level or pass the case to the Consumer Protection Central Committee for further consideration.

#### 5.4.7. The Philippines

The Republic Act No. 7394, also known as the Consumer Act 1992 is the primary law for protection of consumers in the Philippines. The Act was enacted on April 13<sup>th</sup>, 1992 and was entered into force on July 15<sup>th</sup>, 1992<sup>528</sup>, aiming at protecting the interests of consumers, promoting general consumers' welfare, and building conduct standards for industry and business<sup>529</sup>. The consumer protection rights are not clearly mentioned in the Act, but consumers in the Philippines enjoy five fundamental rights from the specific objective of

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<sup>526</sup> The ASEAN Secretariat, *Handbook on ASEAN Consumer Protection Laws and Regulations*, June 2018, p. 37.

<sup>527</sup> Zico Law, "Myanmar | Consumer Protection Law 2019". At <http://zico.group/blog/myanmar-consumer-protection-law-2019/#> [24 September 2021].

<sup>528</sup> Country Report – Philippines, by Assistant Director Jaime Lasaro L. Olmos, at Impiana Hotel KLCC, Kuala Lumpur, Malaysia, 24-25 June 2008.

<sup>529</sup> Art. 2, Republic Act No. 7394, The Philippines.

the Act including: right to correct information, right to education, right to safety, right to redress, and right to representation.<sup>530</sup>

In the Philippines, consumers who suffer damage or loss from consumption of goods or service can seek for redress by lodging a charge against the supplier with the relevant department or government agency such as: DOH, the DA, and the DTI. And upon the complaint receipt from a consumer, the relevant department or government agency will, under their jurisdiction, commence investigation within their own area of competence.<sup>531</sup> Among the others, the DTI is the largest network providing consumer redress scheme in all levels i.e., local and regional levels, to national level. The consumer can lodge a complaint with the DTI provincial offices or with the regional offices in area where there are no provincial offices. And the DTI at the national level deals with a consumer landline namely DTI Direct<sup>532</sup>. The DTI Direct receives, reviews, and handling complaints and queries of consumers.

Furthermore, the Gold Bagwis Program of the DTI provides industries national presence to establish Consumer Welfare Desks (CWDs) or an equivalent office of customer relations that is a so-called self-policing scheme in a private sector for providing information to consumers and resolving consumer's complaints.<sup>533</sup> If the satisfaction cannot be reached at the CWDs in business establishments, consumers can always enter to DTI services for settling the disputes. And for any consumer complaints involving financial institutions, consumers may firstly negotiate with the bank, and if the negotiation with the bank fails, consumer may file a complaint to the Bangko Sentral ng Pilipinas (BSP).<sup>534</sup>

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<sup>530</sup> The ASEAN Secretariat, *Handbook on ASEAN Consumer Protection Laws and Regulations*, June 2018, p. 42.

<sup>531</sup> Art. 159, Republic Act No. 7394, The Philippines.

<sup>532</sup> See the DTI Direct. At <https://www.dti.gov.ph/DTIDirect> [26 September 2021].

<sup>533</sup> See <https://www.oocities.org/dtiilo/cwa3.html> [27 September 2021].

<sup>534</sup> The ASEAN Secretariat, *Handbook on ASEAN Consumer Protection Laws and Regulations*, June 2018, p. 45.

#### 5.4.8. Singapore

Singapore enacted its Consumer Protection Act (CPFTA) for the first time in 2003<sup>535</sup> and presented the revised edition in 2009. Since then, the CPFTA has been modified for several times, and its final amendment was in 2016. The CPFTA is implemented by series of relevant legislations including: the Consumer Protection (Regulated Financial Products and Services) Regulations 2009; the Consumer Protection (Motor Vehicle Dealer Deposits) Regulations 2009; the Consumer Protection (Cancellation of Contracts) Regulations 2009; Consumer Protection (Opt-Out Practices) Regulations 2009; and Consumer Protection (Notifiable Events) Regulations 2016.<sup>536</sup> Under the CPFTA, consumers have rights including: right to seek and obtain resolution from the traders for an unfair practice; right to terminate certain contracts within a period of termination; and other rights such as: to have the products repaired or to have the products changed, to have an appropriate decrease in the amount which the payment will be made, or to revoke such relevant contract for the non-conforming products.

In Singapore, consumers who are not happy due to consumption of goods or services should firstly seek for redress out of court, where the consumers can file a complaint to Consumers Association of Singapore (CASE).<sup>537</sup> The CASE gives consumers assistance, advice, mediation, and consumer rights education.<sup>538</sup> When the complaint is received by the CASE, the relevant parties may be invited for mediation of the disputes. And if the mediation by CASE fails, consumers may lodge a claim in court seeking for compensation from sellers, especially in the Small Claim Tribunals where it provides a rapid and cheap mechanism for the settlement of low-value claims between sellers and consumers for sum

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<sup>535</sup> Chandran, Ravi. "Consumer Protection (Fair Trading) Act." Singapore Journal of Legal Studies, National University of Singapore (Faculty of Law) 2004, p. 192.

<sup>536</sup> See Consumers Association of Singapore, "CPFTA & LEMON LAW". At [https://www.case.org.sg/consumer\\_guides\\_cpfta.aspx](https://www.case.org.sg/consumer_guides_cpfta.aspx) [27September 2021].

<sup>537</sup> Asher, A., Dee, W., & Wood, John T D. (6 December 2013). *Development of Complaint and Redress Mechanism Models in ASEAN*, Foundation for Effective Markets and Governance, p. 52, and *see also* The ASEAN Secretariat, *Handbook on ASEAN Consumer Protection Laws and Regulations*, June 2018, p. 49.

<sup>538</sup> *See* Country Report 2008, Singapore Report For ACCCP, at <http://202.75.6.79/accp/index.php?r=portal/article&id=48> [28 September 2021], and *see also* ACCP, "Singapore". At <https://aseanconsumer.org/selectcountry=Singapore> [28 September 2021].

of S\$10,000 or below.<sup>539</sup> For claim sum of more than S\$10,000 and not more than S\$30,000, the consumers may only seek for dispute settlement in court of competent jurisdiction. And the consumers can also file a complaint to the Financial Industries Disputes Resolution Centre Ltd as an affordable alternative for the dispute related to financial products or services.<sup>540</sup>

#### 5.4.9. Thailand

The principal law for consumer protection of Thailand was adopted in 1979 namely Consumer Protection Act, B.E. 2522 (CPA) and it has been through many amendments, latest one was in 2013.<sup>541</sup> The consumers in Thailand have five protection rights such as: right to correct and sufficient description and information; right to option; right to safety; right to a fair treatment; and right to remedy.<sup>542</sup>

Consumers in Thailand who have suffered lose or damage from consumption of goods or services may file a complaint to the OCPB where it acts as a negotiator and mediator for the disputed parties which the OCPB will commence the preliminary mediation by calling the consumer and business operator for mediation. And if the dispute cannot be settled, the OCPB will bring the case to court on behalf of the consumer.<sup>543</sup> The consumers can now also file a complaint to a Complaints and Legal Assistance Center of the Foundation for Consumers (FFC), in which it receives consumer complaint and provide consumer settlement regarding the followings: finance-banking, general goods and services, real estate, telecommunication, public service, food and medicine products, and healthcare service.<sup>544</sup> Apart from that, the consumers may directly file a claim in the court of justice

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<sup>539</sup> See State Court, “About the Small Claims Tribunals”, Singapore. At <https://www.statecourts.gov.sg/cws/SmallClaims/Pages/GeneralInformation.aspx> [1 October 2021].

<sup>540</sup> See “Mission”. At <https://www.fidrec.com.sg/website/mission.html> [1 October 2021].

<sup>541</sup> Country Report – Thailand, Roadmapping Capacity Building Needs in Consumer protection in ASEAN (Revised 3 June 2011), p. 33; see also Asher, A., Dee, W., & Wood, John T D. (6 December 2013). *Development of Complaint and Redress Mechanism Models in ASEAN*, Foundation for Effective Markets and Governance, p. 55.

<sup>542</sup> Sect. 4, Consumer Protection Act, B.E. 2522, Thailand.

<sup>543</sup> Country Report – Thailand, Roadmapping Capacity Building Needs in Consumer protection in ASEAN (Revised 3 June 2011), p. 58; At [http://www.ocpb.go.th/ewtadmin/ewt/ocpb\\_en/ewt\\_news.php?nid=4](http://www.ocpb.go.th/ewtadmin/ewt/ocpb_en/ewt_news.php?nid=4) [2 October 2021]; and see also the ASEAN Secretariat, *Handbook on ASEAN Consumer Protection Laws and Regulations*, June 2018, p. 53.

<sup>544</sup> See <https://www.consumerthai.org/> [20 December 2020].

in compliance with the principles of a Act on procedures of consumer case adopted in August 2008.<sup>545</sup>

#### 5.4.10. Vietnam

The policies on consumer protection of Vietnamese government were presented since 1999 when the Protection of Interest of Consumer Ordinance was approved by the Vietnamese National Assembly's permanent committee, and the consumer protection in Vietnam is now regulated by Protection of Consumer Rights Law No. 59/2010/QH12 enacted on 15 November 2010.<sup>546</sup> Under the Protection of Consumer Rights Law No. 59/2010/QH12, consumers in Vietnam have eight basic rights such as: right to correct information, right to safety, right to choose, right to be heard, right to consumer education, right to redress, and right to representation.<sup>547</sup>

Redress mechanism in Vietnam comprises with four methods including: negotiation, mediation, arbitration, and court.<sup>548</sup> Consumers who are not happy due to consumption of goods or services may make a complaint to the supplier directly where the parties shall put their effort for resolving the dispute. The consumers may also file a complaint to the VCCA that serve as a mediator for consumers and suppliers, where it receives and mediates complaints from consumers in the country. And if the negotiation or mediation fails, the consumers may go to arbitration, or if there is only one a consumer filing a complaint, the transaction has amount up to hundred millions Dong, the trader supplies the consumer products and services directly, and there is clear proof and not so difficult case, consumers may directly file a claim in court.<sup>549</sup> Under the Protection of Consumer Rights Law No. 59/2010/QH12, it also establishes another channel for protection of interests of

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<sup>545</sup> See Consumer Protection, Bangkok International Associates. At <http://www.bia.co.th/thailand-legal-guide-2016-update/chapter-24-consumer-protection/> [2 October 2021].

<sup>546</sup> Country Report – Vietnam (Final), Roadmapping Capacity Building Needs in Consumer Protection in ASEAN, p. 28.

<sup>547</sup> Art. 8, Law on Protection of Consumer Rights No. 59/2010/QH12, Vietnam.

<sup>548</sup> Art. 30, Law on Protection of Consumer Rights No. 59/2010/QH12, Vietnam; and see also Country Report – Vietnam (Final), Roadmapping Capacity Building Needs in Consumer Protection in ASEAN, p. 36.

<sup>549</sup> Art. 41, Law on Protection of Consumer Rights No. 59/2010/QH12, Vietnam; and see also the ASEAN Secretariat, *Handbook on ASEAN Consumer Protection Laws and Regulations*, June 2018, p. 58.

consumers through administrative remedies in the Provincial Departments of Industry and Trade (DOITs).

### 5.5. Online Dispute Resolution for E-Commerce<sup>[550]</sup>

In this digital age, the Internet has become a new channel for meeting and social interplay of people all around this globe<sup>551</sup>, and it has also become an important platform for commercial activities which has introduced an e-commerce in both business-to-business (B2B) and business-to-consumer (B2C). E-commerce has become an essential driving force for cross-border trade in all regions around the world since it removes geographical barriers to international trade and opens new marketplaces.<sup>552</sup>

With the increasing electronic activities and interaction online, the number of disputes between people is rising at the same time both domestically and across borders. These disputes arising from the online sphere are usually a concern of the use of e-commerce, the business-to-consumer (B2C) in particular.<sup>553</sup> And the disputes arising from e-commerce can be difficult for courts to deal with because of several reasons such as questions as to the applicable law; the high volume of claims; differences between the litigation for high cost transactions and he claims for low value transaction; and the difficulty of enforcing foreign judgments.<sup>554</sup> For this reason, the demand for ADR is increasing exponentially around the world, especially ODR, which is a flexible, fast, efficient, and inexpensive redress mechanism for handling e-commerce, both the domestic level and cross borders.

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<sup>550</sup> This section is a slightly modified version of the author's published works from from "Sengpunya, P. (2020). Online Dispute Resolution Scheme for E-Commerce: The ASEAN Perspectives", published in *Pécs Journal of International and European Law - 2020/I*.

<sup>551</sup> Mustafa, S.E., & Hamzah, A. (July 2011). *Online Social Networking: A New Form of Social Interaction*, *International Journal of Social Science and Humanity*, Vol. 1, No. 2. p. 67.

<sup>552</sup> Chen, L., & Kimura, F. (Eds. 2019). *Regional Online Dispute Resolution System ASEAN*. Routledge, New York. p.4.

<sup>553</sup> Cupido, R. (2016). The Growth of E-Commerce and Online Dispute Resolution in Developing Nations: An Analysis. *World Academy of Science, Engineering and Technology, Open Science Index 118, International Journal of Economics and Management Engineering*, 10(10). pp. 3371-3374.

<sup>554</sup> Duca, L.D., Rule, C., & Loebel, Z. (2012). Facilitating Expansion of Cross-Border E-Commerce – Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems – Work of the United Nations Commission on International Trade Law), *Penn State Journal of Law and International Affairs*, Vol. 1, No. 1. p. 62-63.

### 5.5.1. United Nations

By recognizing the increase of cross-border e-commerce worldwide and noting the need for appropriate mechanisms for coping with disputes arising from the e-commerce transactions, the United Nations Commission on International Trade Law (UNCITRAL) decided to undertake work on Online Dispute Resolution (ODR) at its forty-third session took place on 21 June 9 July 2010 in New York. It established a Working Group III to embark on developing online dispute resolution mechanisms concerning cross-jurisdiction e-commerce transactions, including B2B and B2C.<sup>555</sup>

#### *5.5.1.1. UNCITRAL Technical Notes on Online Dispute Resolution*

In 2016, the UNCITRAL adopted a non-binding document at its forty-ninth session called the UNCITRAL Technical Notes on Online Dispute Resolution (hereinafter: Technical Notes)<sup>556</sup> aiming to enhance ODR development; and to support ODR platforms, ODR administrators, neutrals, and the parties of the relevant ODR proceedings.<sup>557</sup> The Technical Notes embodies and ODR processes model, in which it encourages the ODR system to represent the following principles:

- 1) Impartiality;
- 2) Independence;
- 3) Efficiency;
- 4) Effectiveness;
- 5) Due process;
- 6) Fairness; and
- 7) Accountability and transparency.<sup>558</sup>

The Technical Notes intend to assist the structure and framework of an ODR system for resolving the disputes arising from online cross-border purchase of low-value products, and they do not intend to promote any ODR practice as the best practice.<sup>559</sup> The Technical

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<sup>555</sup> Para. 257, Official records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17).

<sup>556</sup> UNCITRAL Technical Notes on Online Dispute Resolution, United Nations, 2017. pp. iii – vii.

<sup>557</sup> Para. 3, Technical Notes.

<sup>558</sup> Para. 4, Technical Notes.

<sup>559</sup> Para. 5, Technical Notes.

Notes consist of 12 sections and 53 articles, and their characteristic features<sup>560</sup> can be clarified as followings:

- 1) They reflect approaches to ODR systems that embody fundamental principles for ODR;
- 2) They are designed for use in disputes arising from trans-border, low-value electronic transactions concerning B2B or B2C;
- 3) They are a non-binding instrument; they are a descriptive document. They do not intend to be exclusive or exhaustive, nor to be used as rules for any ODR proceeding.

#### *5.5.1.2. UNCITRAL ODR Package Model*

The package model for ODR considered by the UNCITRAL consists of three stages: negotiation, facilitated settlement, and arbitration.<sup>561</sup> According to the package model under the Technical Notes, the ODR process takes part when an unhappy party submits a claim through the ODR platform to the ODR administrator, and the ODR administrator notifies the respondent of the existence of the claim and the claimant of the response.

Under the UNCITRAL ODR system, in the negotiation stage, the disputed parties directly negotiate with each other through the platform operated by the ODR provider using electronic communication without any interference of a third party as a neutral person.<sup>562</sup>

If that negotiation process fails, the parties may move to a second stage – a facilitated settlement. In the facilitated settlement stage, an intervention of a neutral third party takes place as the ODR administrator appoints a neutral adjudicator for communicating with the parties and effort to support the parties to reach a mutually acceptable settlement.<sup>563</sup>

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<sup>560</sup> Para. 4-6, Technical Notes.

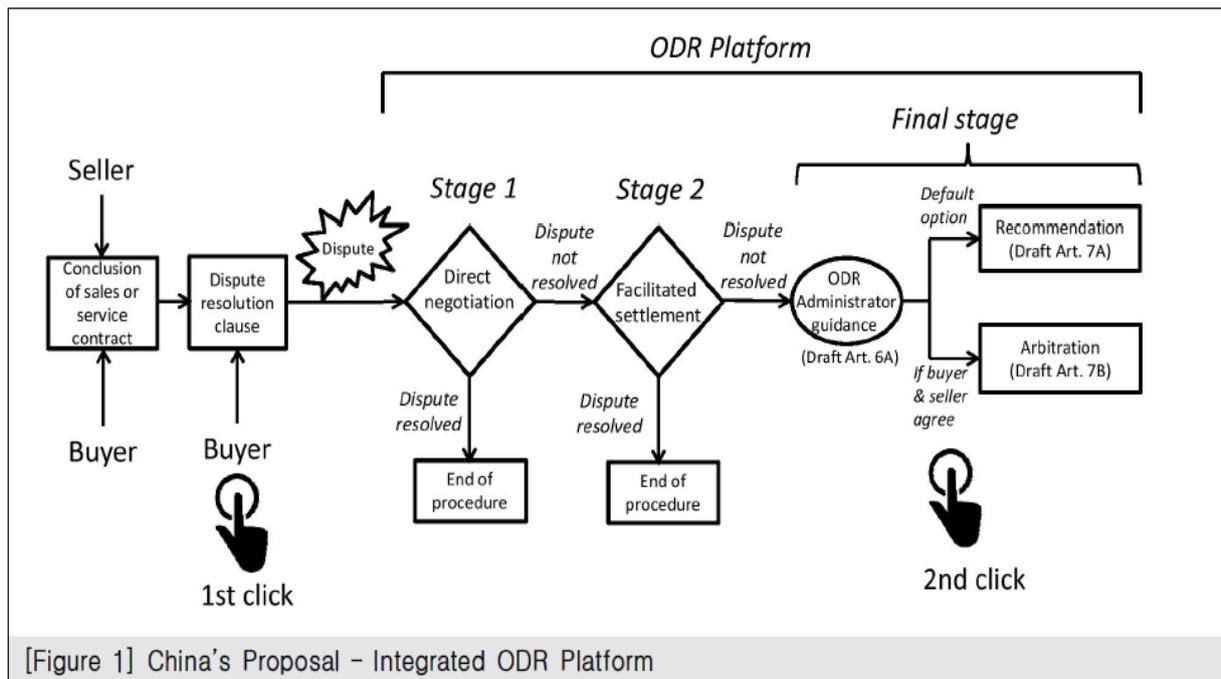
<sup>561</sup> Para. 18, Technical Notes.

<sup>562</sup> Para. 19, Technical Notes.

<sup>563</sup> Para. 20, Technical Notes.

If the dispute remains unresolved, the process may move to the third and final stage – arbitration. In this final stage, the case is decided by an impartial neutral person, and the decision of this award is enforceable.<sup>564</sup>

The following figure shows the three stages of the ODR process proposed by China and promoted by UNCITRAL:



[Figure 1] China's Proposal - Integrated ODR Platform

(Source: A/CN.9/827, p. 14)

The UNCITRAL ODR package is expected to be a significant model which can assist national legislators to adopt their ODR platform. It is deemed to significantly contribute to the ODR systems development to enable online settlement for disputes arising from cross-border low-value electronic transactions, which will significantly help all countries, especially developing countries and countries in transition of economies, to ODR proceedings in developing and using ODR systems<sup>565</sup>

<sup>564</sup> Bae, S. (30 October 2016). A Study on ODR Enforcement for Disputes Arising from Cross-border E-Commerce: *Focusing on the UNCITRAL and EU*. The e-Business Studies, Vol. k17, No. 5. p. 173; and see also Para. 21, Technical Notes.

<sup>565</sup> Paras. 7-8, Resolution adopted by the General Assembly on 13 December 2016 (A/RES/71/138).

### 5.5.2. European Union

To facilitate cross-border e-commerce and to strengthen consumers' trust when shopping online is one of the political priorities of the European Commission in the framework of the EU internal market.<sup>566</sup> The EU considers cross-border e-commerce and consumers' trust in online transactions a vital part of the Commission's Digital Single Market strategy. Hence, the EU considers promoting access to efficient and effective redress mechanisms through ADR/ODR procedures as one of the key segments to achieve the Digital Single Market strategy.

#### *5.5.2.1. Policy Background and Legal Framework*

At first, the EU consumer ADR policy was addressed through non-binding standards and sector-specific legislation, where the Member States were required to encourage or ensure access to out-of-court redress.<sup>567</sup> In May 2010, the EU announced a strategy to improve the ADR system, including ODR, in its flagship initiative "Digital Agenda for Europe." It intended to launch an EU-wide strategy to strengthen ADR/ODR systems and propose an EU-wide online redress tool for e-commerce and improve access to justice online.<sup>568</sup>

In April 2011, the Commission adopted the communication "Single Market Act on Twelve Levers to Boost Growth and Strengthen Confidence", The purpose of the initiative was to establish affordable out-of-court settlement procedures that were simple, flexible, and fast for consumers and protect relations between businesses and their customers including an e-commerce dimension.<sup>569</sup>

In 2013, the EU adopted Regulation (EU) No 524/2013 (ODR Regulation)<sup>570</sup> and Directive 2013/11/EU (ADR Directive)<sup>571</sup>, aiming to strengthen the ADR/ODR system and to enable accessible and efficient out-of-court redress mechanisms for consumer disputes in the EU, including in disputes arising from cross-border e-commerce. The ADR Directive and the ODR Regulation together provide a legal framework to ensure that

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<sup>566</sup> COM (2017) 744 Final, Brussels, 13.12.2017. p. 1.

<sup>567</sup> COM (2019) 425 final, Brussels, 25.9.2019. p. 1.

<sup>568</sup> COM (2010) 245 Final, Brussels, 19.5.2010. p. 13.

<sup>569</sup> COM (2011) 206, Brussels, 13.4.2011. p. 9.

<sup>570</sup> OJ L 165, 18.6.2013. p. 1-12.

<sup>571</sup> OJ L 165, 18.6.2013. p. 63-79.

consumers have access to high-quality ADR mechanisms for resolving their disputes with traders, including through an ODR platform.<sup>572</sup>

The ODR Regulation and the ADR Directive are both interlinked and complementary.<sup>573</sup> The ADR Directive builds trust in EU consumers regards certified ADR bodies for resolving any disputes arising from both domestically and cross-border shopping made online or offline<sup>574</sup>, and the ODR Regulation ensures ODR contact points to be designated by Member States to provide users of the ODR platform one-to-one support.<sup>575</sup>

The ODR Regulation and ADR Directive applies disputes arising from the purchase of goods or services made online or offline in both domestic and across borders in the EU and EEA countries.<sup>576</sup> However, they do not address disputes arising from any consumer-to-consumer (C2C) or business-to-business (B2B)<sup>577</sup> relations; they only address disputes stemming from the purchase of goods and services in business-to-consumer (B2C) context.<sup>578</sup> Furthermore, the ODR Regulation and the ADR Directive do not apply to disputes concerning public providers of higher education or health care services, nor do they lay down a framework for direct negotiation made by the parties, or settlement attempts made by a judge in the course of judicial proceedings.<sup>579</sup>

#### *5.5.2.2. EU ODR Scheme*

To facilitate cross-border e-commerce and build trust for consumers online within the EU, the EU launched the ODR platform in January 2016, and the platform was officially opened to the public on 15 February 2016.<sup>580</sup> The launch of the ODR platform aims to facilitate the online resolution of disputes arising from the purchase of goods or services between consumers and traders that made online or offline nationally and across jurisdictions.

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<sup>572</sup> COM (2019) 425 final, Brussels, 25.9.2019. pp. 2-3.

<sup>573</sup> *Supra Note* 371.

<sup>574</sup> Recital 4, ADR Directive.

<sup>575</sup> Recital 25, ODR Regulation.

<sup>576</sup> Recital 16, ADR Directive.

<sup>577</sup> COM (2017) 744 final. p. 3.

<sup>578</sup> Art. 2, ODR Regulation; and *See also* Art. 2, ADR Directive.

<sup>579</sup> Art. 2 para. 2, ADR Directive; and *See also* Recital 14 and Recital 23, ADR Directive.

<sup>580</sup> COM (2019) 425 final. p. 13.

The EU ODR platform provides a single point of entry to traders and consumers seeking a dispute resolution mechanism to resolve disputes arising from both domestic and cross-border e-commerce transactions<sup>581</sup> through an interactive web-interface without being together at a meeting room or going to court. The EU ODR platform was established with functions based on paragraph 4 of Article 5 of the ODR Regulation,<sup>582</sup> in which the parties can conduct the dispute resolution procedure online through electronic case management. Consumers may initiate a procedure by submitting a complaint electronically to a trader, and the trader can identify the competent ADR entity. When the ADR body is mutually chosen, the parties transmit the complaint to that body. The platform also provides free translation of information necessary to all relevant actors for the dispute resolution.<sup>583</sup>

According to the ODR Regulation and ADR Directive, the ODR process takes part when the consumer complainant submits a fully completed complaint to the ODR platform, and the trader responds and agrees to go to the ODR process for resolving the dispute under mutually agreed dispute resolution body.<sup>584</sup> Each dispute resolution body under the ODR Regulation and the ADR Directive has its own rules and procedures. The Directive establishes a minimum harmonization approach. It does not prescribe a specific model nor a specific type of ADR procedure.

In general, the ODR process under the EU ODR platform consists of four steps:<sup>585</sup>

- 1) Consumer complainant submits a complaint to the ODR platform, and ODR platform notifies the trader.
- 2) The parties agree on a dispute resolution body.
- 3) The dispute resolution body handles the complaint.
- 4) The dispute resolution body announces the outcome and closes the complaint.

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<sup>581</sup> European Commission – Press release, “*Solving disputes online: New platform for consumers and traders*”, Brussels, 15 February 2016.

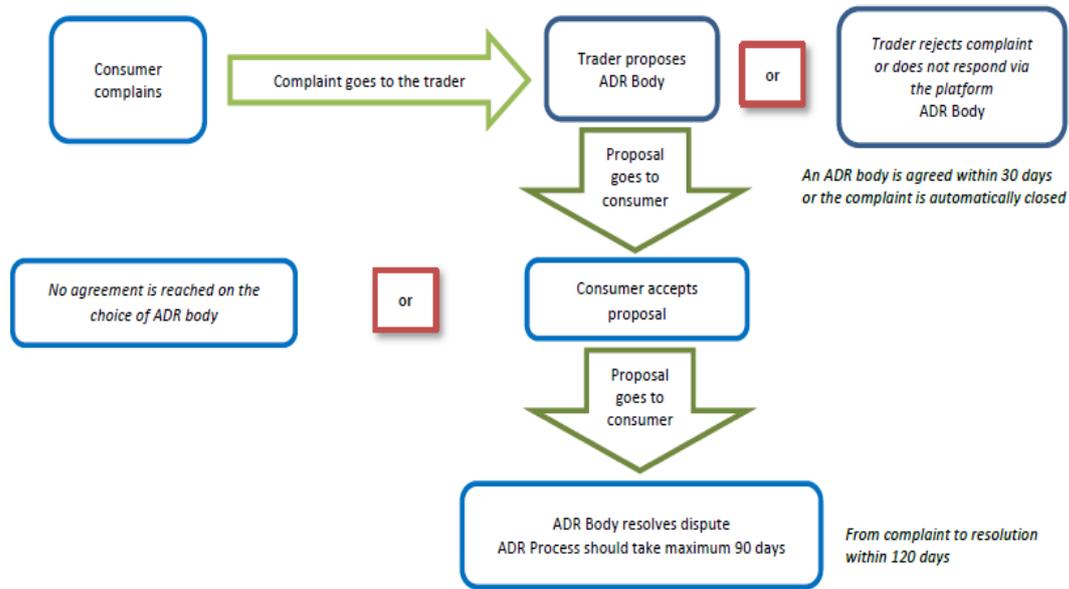
<sup>582</sup> COM (2017) 744 final. p. 2.

<sup>583</sup> Art. 5 para. 4, ODR Regulation.

<sup>584</sup> Art. 9, ODR Regulation.

<sup>585</sup> About the ODR platform, European Commission. At <https://ec.europa.eu/consumers/odr/main/?event=main.home.howitworks> [03 November 2020].

The following flow chart shows the ODR process under the EU ODR platform:



(Source: European Commission, 2017)

ODR platform of the EU provides consumers a user-friendly platform to file complaints online, consists of a multilingual register of ADR entities, and provides information on consumer redress. The ODR platform of the EU has the following key characteristics:

*“Consumers and traders can choose any of the EU official languages for their interaction with the platform (e.g. submitting their complaints, receiving notifications). An automatic translation tool is available for free text communication; The platform identifies which notified ADR bodies are competent to handle the case and refers the dispute the ADR body on which the parties agree; ADR bodies can use the platform’s case management system to conduct the ADR procedure entirely online; The parties can request that the outcome of the ADR procedure is translated by a professional translator; and Clear deadlines are built into the platform to ensure a fast process.”<sup>586</sup>*

The EU ODR platform has functioned properly and has overall impressed consumers in the EU. The response of a survey conducted in 2017 indicated that 71% of the ODR platform visitors were satisfied and found it useful.<sup>587</sup> The ODR platform contributes to increasing consumers’ and traders’ confidence in online transactions both in domestic and

<sup>586</sup> COM (2017) 744 final, p. 2.

<sup>587</sup> *Supra* Note 437. pp. 7-8.

cross-border, in which consumer disputes arising from online transactions can be settled in a simple, fast, and inexpensive way.<sup>588</sup> However, in the EU ODR platform the question remains whether participation in the procedure is voluntary or mandatory or whether the procedure's outcome is binding or not.<sup>589</sup> Furthermore, not all ADR bodies from all Member States are connected to the existing ODR platform, and participation of traders in the platform still remains low, which only 2% of disputes submitted to the platform could be transmitted the dispute to an ADR entity and about 80% of disputes was closed automatically after 30 days because traders had not responded the platform to the notification of the dispute.<sup>590</sup> To conclude, these are still key challenges for EU ODR system.

### **5.6. Online Dispute Resolution System in ASEAN<sup>[591]</sup>**

ASEAN considers consumer protection as an important driving force for the smooth functioning of an integrated market. With the growth of e-commerce, there are likely increasing online consumer transactions in ASEAN, especially cross-border transactions. Consumers and sellers would be able to enjoy substantial benefit if cross-border transactions within the ASEAN were facilitated by harmonized laws and regulations, and where online disputes can be settled by simple, fast, and low-cost methods.<sup>592</sup> Based on this recognition, ASEAN established a working group for ensuring that legislation on consumer protection of AMS is in place. It furtherly developed a dispute resolution mechanism, particularly an online dispute resolution system, in order to increase online consumer confidence and facilitate e-commerce growth in the region.

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<sup>588</sup> Jeretina, U. (2018). Consumer Online Dispute Resolution (ODR) – *As a key cultural change – Mechanism For Innovative Public Administration in EU*. Central European Public Administration Review (CEPAR). p.6.

<sup>589</sup> COM (2019) 425 final, Brussels, 25.9.2019. p. 3.

<sup>590</sup> *Supra Note 432*, at 14.

<sup>591</sup> This section is a slightly modified version of the author's published works from from "Sengpunya, P. (2020). Online Dispute Resolution Scheme for E-Commerce: The ASEAN Perspectives", published in *Pécs Journal of International and European Law - 2020/I*.

<sup>592</sup> Consumer Protection Digests and Case Studies: A Policy Guide (Volume 1), The ASEAN Secretariat, November 2014. p. 140.

### 5.6.1. ASEAN Online Dispute Resolution Framework

Similar to the start of the EU consumer ADR policy, the ASEAN policymakers and regulators currently address consumer dispute resolution through non-binding standards requiring AMS to encourage or ensure access to out-of-court redress mechanisms.

In 2015, ASEAN launched the ASEAN Economic Community (AEC), which became a major milestone in regional economic integration. The AEC has been guided by the AEC Blueprint 2025 adopted by ASEAN Leaders on 22 November 2015 at their 27th ASEAN Summit.<sup>593</sup> The AEC Blueprint 2025 recognizes e-commerce growth as a significant segment in supporting regional economic integration. It highlights the development of a regional legal framework for online dispute resolution (ODR) for facilitating e-commerce transactions in ASEAN.<sup>594</sup> The AEC Blueprint 2025 thus calls for action to adopt an agreement on e-commerce, including strategic measures as follows:

*“Harmonised consumer rights and protection laws; Harmonised legal framework for online dispute resolution, taking into account available international standards; Inter-operable, mutually recognised, secure, reliable and user-friendly e-identification and authorisation (electronic signature) schemes; and Coherent and comprehensive framework for personal data protection.”<sup>595</sup>*

To implement the strategies related to online dispute resolution under the AEC Blueprint 2025, the ASEAN Strategic Action Plan for Consumer Protection (ASAPCP) 2025 was adopted upon work on consumer protection of the ASEAN Committee on Consumer Protection (ACCP).<sup>596</sup> The ASAPCP has set the Online Dispute Resolution mechanism of ASEAN in its Strategic Goal 3, where the cross-jurisdiction commercial activities and high consumer confidence shall be instituted, and an appropriate regulatory framework and

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<sup>593</sup> ASEAN Economic Community, Jakarta: ASEAN Secretariat. At <https://asean.org/asean-economic-community/> [3 January 2020].

<sup>594</sup> Chen, V., Godwin, A., & Ramsay, I. (July 2017). *ASEAN Framework for Cross-Border Cooperation in Financial Consumer Dispute Resolution*. Asian Journal of Comparative Law, Vol. 12, No. 1. pp. 167-196 and pp. 22-23; *see more* ASEAN Economic Community Blueprint 2025, paras. 52-53.

<sup>595</sup> *Supra Note* 448, at para. 53.

<sup>596</sup> ASEAN Strategic Action Plan for Consumer Protection (ASAPCP) 2025, ASEAN, 14 October 2016. At <https://aseanconsumer.org/read-publication-asean-strategic-action-plan-for-consumer-protection-asapcp-2025> [3 January 2020]

enforcement measures shall be ensured. The goal provides that an ASEAN Regional Online Dispute Resolution (ODR) Network shall be established, including:

- 1) National ODR systems;
- 2) ASEAN ODR network; and
- 3) ASEAN mechanism for cross-border complaints and investigations.<sup>597</sup>

This initiative is an important performance of ASEAN for identifying regulatory gaps for the responsive and effective framework of consumer protection in the region and enhance consumer confidence and trust within the ASEAN markets. It would help ASEAN to have appropriate and effective dispute resolution mechanisms in place taking into account technology developments and in accordance with international norms and standards for facilitating e-commerce and protecting online consumers in the region.

#### 5.6.2. ASEAN Online Dispute Resolution System and Way Forward

ASEAN aims to become a people-oriented and people-centred community and to develop a dynamic economy. As such, it recognizes the importance of consumer protection for increasing confidence for consumers in order to support the development of its single market. Hence, ASEAN included ADR and ODR mechanism as one of the important elements of the ASEAN Work Programme on e-Commerce 2017-2025,<sup>598</sup> which was further supported by the ASAPCP into specific initiatives and activities in consistence with the AEC Blueprint 2025.

Based on goal 3 of the ASAPCP, the ASEAN Online Dispute Resolution scheme would have a structure consisting of three elements: National ODR systems, ASEAN ODR network, and ASEAN mechanism for cross-border complaints and investigations.<sup>599</sup>

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<sup>597</sup> *Ibid.*

<sup>598</sup> See ASEAN Work Programme on Electronic Commerce 2017 – 2025. Jakarta: ASEAN Secretariat. At <https://asean.org/asean-economic-community/sectoral-bodies-under-the-purview-of-aem/e-commerce/> [5 January 2020].

<sup>599</sup> *Ibid.*

### 5.6.2.1. National ODR Systems

In order to have a regional ODR network functioning properly, it is necessary to firstly put national ODR systems in place<sup>600</sup>. According to the ASAPCP, by the year 2020, each ASEAN Member State shall create its domestic Online Dispute Resolution System in order to serve as the platform providing mediation service for e-commerce transactions. The objectives of the national ODR system are to strengthen accessibility to consumer redress; provide a low cost, simple, and fast method for the dispute resolution; and increase confidence and trust for consumer in e-commerce transactions.<sup>601</sup> The national ODR system should at least comprise the following elements for an effective consumer redress:

*“It must be applicable for all types of transactions, be it done online or offline. An OADR system may be web-based but it should not discriminate on B2C transactions with a brick and mortar business, or online business; It should enable a three-way communication between the consumer complainant, business establishment, and mediator since OADR involves the conduct of mediation conferences via online; It must be user-friendly. Common understanding of its use, purpose, processes, and terminologies must be ensured among the consumers, businesses, and government; and It must be accessible, fair, independent, transparent, effective, and timely in facilitating redress for consume.”<sup>602</sup>*

However, the progress and development of domestic ODR systems could vary from member states to member states, based on levels of capacity of consumer protection systems of each member countries and their economic development, as well as political aspect<sup>603</sup>.

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<sup>600</sup> Feasibility Study: ASEAN Online Dispute Resolution (ODR) Network. GIZ, 2020, p.4.

<sup>601</sup> IGE Consumer, Establishment of the National Online Alternative Dispute Resolution System in the Philippines – 2017-2020 Work Plan, 3<sup>rd</sup> SESSION, 9-10 July 2018. Room XVII, Palais des Nations, Geneva, 10 July 2018. p. 3. At [https://unctad.org/meetings/en/Contribution/cicplp3rd\\_c\\_dti\\_drr\\_en.pdf](https://unctad.org/meetings/en/Contribution/cicplp3rd_c_dti_drr_en.pdf) [2 April 2020].

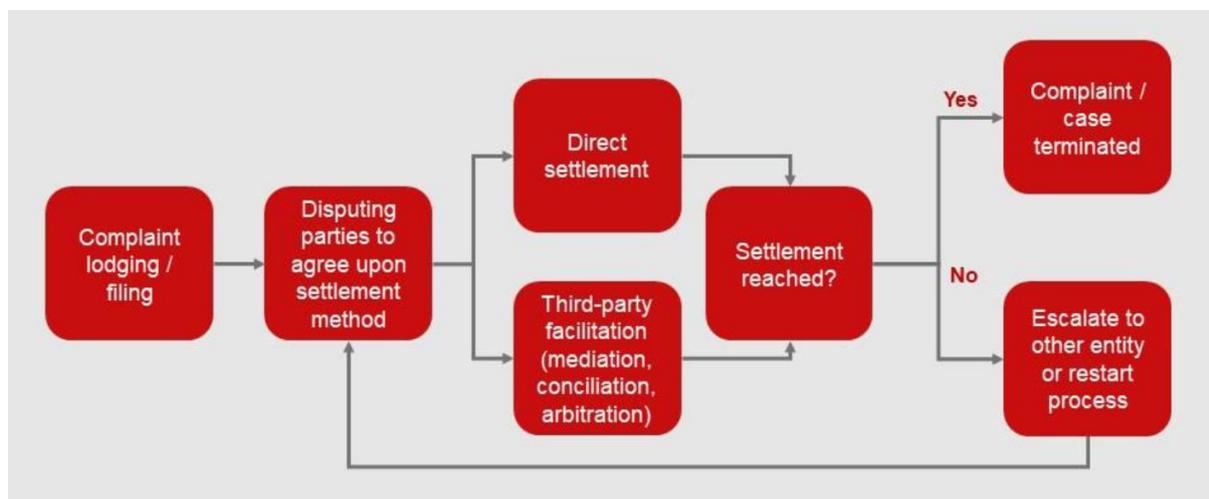
<sup>602</sup> *Supra Note 460*, at 6-7.

<sup>603</sup> Feasibility Study: ASEAN Online Dispute Resolution (ODR) Network. GIZ, 2020, p. 32.

The ASAPCP lays down reference material for AMS to develop their own action plan and establish an online dispute resolution system in line with ASAPCP recommendations.<sup>604</sup> Similar to the EU ODR system, the ODR body of each AMS may have its own rules and procedures. However, the national ODR system of ASEAN could consist of fundamental procedures as followings:

- 1) Consumer files a complaint.
- 2) The disputing parties agree upon settlement method.
- 3) The parties may directly negotiate between them or appoint third-party facilitation as mediator, conciliator or arbitrator.
- 4) If the parties can reach the settlement, the complaint will be terminated. If the they fail to reach the settlement, the ODR body generates a recommendation for the parties.

The following infographic shows the overview of the possible procedures for national ODR systems of ASEAN:



*(Source: GIZ, March 2020)*

<sup>604</sup> ASEAN – Australia Development Cooperation Program – Phase II, Study on AADCP II Influence on Consumer Protection Policy in Select ASEAN Member States, The ASEAN Secretariat, May 2018. p. 14.

#### *5.6.2.2. ASEAN ODR Network*

To support and facilitate further development of the ODR system, ASEAN has already put the ASEAN ODR network as the second element of the ASEAN ODR Scheme underway. The ASEAN ODR network should compose authorities from all AMS, and upon the completion of the network establishment by 2025, the network may include the following strategies:

- (1) To co-ordinate and co-operate on ODR procedure and enforcement matters.
- (2) To share information and intelligence on ODR trends and challenges.
- (3) To share best practice information about key relevant laws, enforcement powers, and regulatory approaches to ODR.

Members may meet annually to discuss key ODR issues from a global perspective, exchanging their experience regarding enforcement and relevant challenges. The member may present different projects and take decisions for new initiatives and follow-up action. The meeting would also serve to strengthen cohesiveness of the network and foster better contacts between members.

The ASAPCP 2025 only outline a significance of putting national ODR system in place, yet it does not provide specific steps for the ASEAN ODR Network establishment and operation<sup>605</sup>. This comes up with an observation<sup>605</sup> that ASEAN may envisage the network with a phased and decentralized approach, where the network allows separate emergence of national ODR systems and interlink these different national ODR systems as a next step. Also, the ASAPCP 2025 does not imply whether the ASEAN ODR Network will create one ODR platform for all member states, but rather to interconnect national ODR systems across jurisdictions<sup>606</sup>.

#### *5.6.2.3. ASEAN Cross-border Complaints and Investigations*

The ASEAN Cross-border Complaints and Investigations is the third element of the ASEAN ODR Scheme. The objective is to provide a channel or facility for ASEAN

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<sup>605</sup> Feasibility Study: ASEAN Online Dispute Resolution (ODR) Network. GIZ, 2020, p. 32.

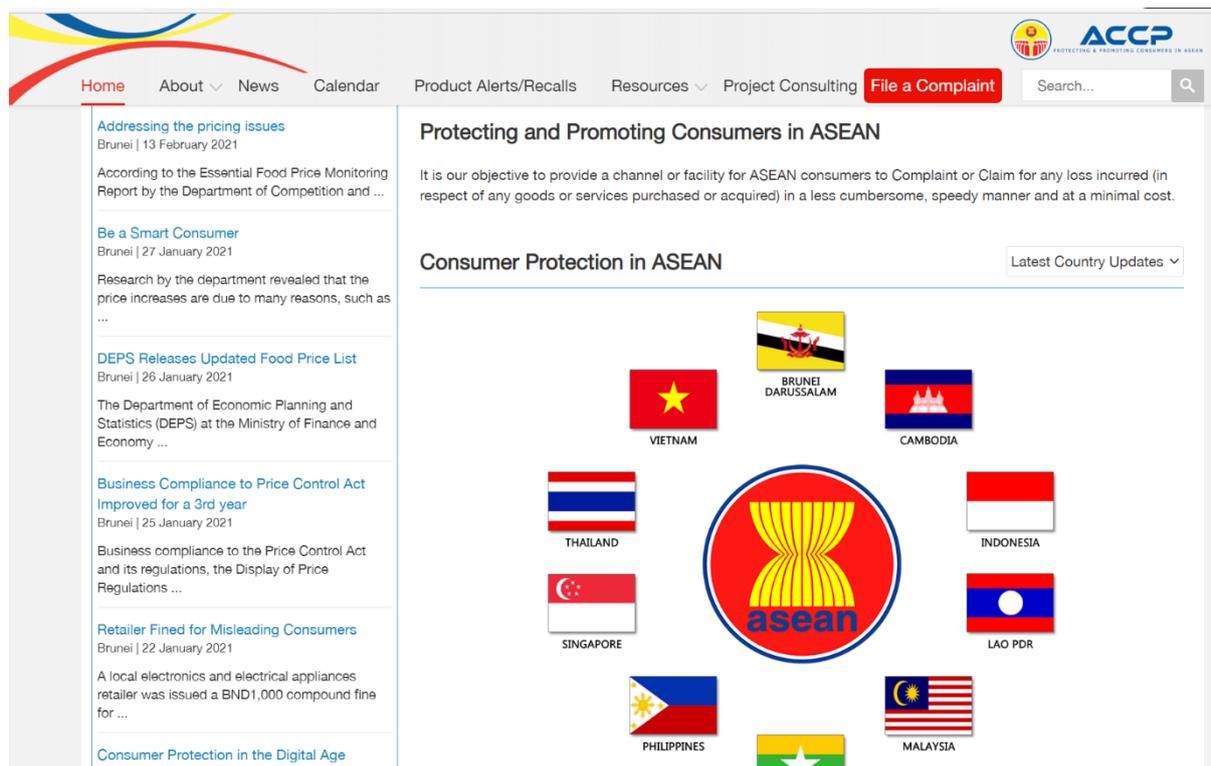
<sup>606</sup> Feasibility Study: ASEAN Online Dispute Resolution (ODR) Network. GIZ, 2020, p. 32.

consumers to claim for or complain any loss over a purchase of any goods or services in a less cumbersome, speed manner, and at a minimal cost.<sup>607</sup>

In 2012, ASEAN launched the ASEAN Consumer Protection website ([www.aseanconsumer.org](http://www.aseanconsumer.org)), which serves as the major reference point for consumer protection in ASEAN including the information provision on:

*“AMS focal points for handling cross-border complaints; notifications on recalled/banned products; consumer protection legislation of AMS; and d) other information such as publications and workshop materials.”<sup>608</sup>*

The following picture shows the channel for cross-border consumer complaints in ASEAN, where consumers file a complaint through the focal point of relevant country.



(Source: ACCP, 2021)

<sup>607</sup> Consumer Protection in ASEAN, ACCP. At <https://aseanconsumer.org/> [2 April 2020].

<sup>608</sup> The ASEAN Committee on Consumer Protection (ACCP). At <https://asean.org/archive/the-asean-committee-on-consumer-protection-accp/> [2 April 2020].

The website has become operational for cross-border consumer complaints<sup>609</sup> and currently plays an important role for cross-border consumer complaints in ASEAN. This composite complaint feature is aimed at facilitating the communication regarding complaints of consumers across jurisdictions. ASEAN may consider on expanding this complaint feature of the ACCP website in the future. It can either establish an ODR platform as part of the ACCP website, or to serve the website as the homepage to interlink different national ODR systems. This would provide a choice and flexibility for all parties – the national ODR systems of the ASEAN member countries can be interlinked to the platform, while consumers and businesses have better option to pick which jurisdiction or national ODR system to use for the dispute resolution<sup>610</sup>, like the EU ODR system where it interfaces different ODR system from the EU member states into the platform and consumer and business can agree upon the ODR body for their dispute resolution<sup>611</sup>.

The present major effort at the regional level to address the consumer protection is the ASAPCP. The ASAPCP is an implementation of ASEAN policy regarding consumer protection which has emphasized information-sharing between regulators. Nevertheless, it includes more ambitious aims such as establishing a cross-border dispute resolution system, particularly the online dispute resolution mechanism, and a quick alert system on product safety.<sup>612</sup>

However, in order to further consider an effective ODR system, ASEAN may also provide training and research support in very practical areas of consumer agency design, operations and governance, and ensure user-friendly and effective process and strengthen implementation of ASEAN Cross-border Complaints and Investigations in order to

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<sup>609</sup> Asher, A., Dee, W., & Wood, John T D. (6 December 2013). Models for Internal Complaint Systems and External Consumer Redress Schemes in ASEAN “*ASEAN Complaint and Redress Mechanism Models*”. Australian Aids – ASEAN. pp. 53-54.

<sup>610</sup> Feasibility Study: ASEAN Online Dispute Resolution (ODR) Network. GIZ, 2020, p. 32.

<sup>611</sup> See Dispute resolution bodies. At <https://ec.europa.eu/consumers/odr/main/?event=main.adr.show2> [9 October 2021].

<sup>612</sup> Beschorner, N., Bartley Johns, M., Guermazi, B., Treadwell, Jane L., Prakosa, Petra W. B., Abdul Karim, Nur A.B., Van Tuijll, Daniel A., Bennis, L., Nicoli, M., Van Rees, J., & Giroto, Clarisse Anne H.M. (2019). *The Digital Economy in Southeast Asia: Strengthening the Foundations for Future Growth*. Washington, D.C. : World Bank Group. p. 96.

promotes the website and facilitate cross-border consumer dispute resolution with a low-cost, simple, and fast method.

### **5.7. Chapter Summary and Concluding Remarks**

ASEAN does not have a Regional Court of Justice, instead it established its dispute resolution schemes in the norm of the ASEAN Way in order to peacefully settle all conflicts. The legal enforcement is upon national administrative and national judicial procedures of the member states, or for cases in connection with investment disputes, the legal enforcement uses commercial arbitral procedures under the ASEAN Enhanced DSM or other recognized arbitral tribunals. In the case of any non-conformity with the agreement of settlement or the arbitral award occurs, the matter may be forwarded to the ASEAN Summit for its further decision. Notwithstanding, the ASEAN Summit will not serve as the “ASEAN Supreme Court” to decide disputes for its Member States. It would thus likely encourage the disputed parties to comply with the result of the agreement of settlement or the arbitral award or only express their concerns or recommendation to the disputes parties. Currently, the ASEAN Enhanced DSM is considered as the most radical attempt, through dispute resolution and rule interpretation, to establish ‘hard law’ in ASEAN. Despite, the member states have never used the ASEAN Enhanced DSM since established in 2004, but they prefer to use other international forums for dispute settlement instead. However, the establishment of dispute resolution mechanisms at all levels of economic and political matters has promised some institutionalization of dispute resolution in ASEAN.

With the transformation of digital in the world, disputes from e-commerce are increasing and these disputes are usually difficult to deal with, especially disputes arising from cross-border and low-value e-commerce transactions. Therefore, ASEAN is developing an online dispute resolution mechanism to build ASEAN citizens' confidence in domestic and cross-border transactions. ASEAN address the online dispute resolution through non-binding standards. The ASEAN ODR Scheme consists of three elements: the National ODR system, the ASEAN ODR Network, and ASEAN Cross-border Complaints and Investigations. Since ASEAN does not have any legal superstructure to establish a regional legal system that could support its ODR initiatives. ASEAN legal regime depends upon harmonizing the Member Countries’ national laws into the regional legal system. This

complex institutional and regulatory regime can undermine ASEAN's regional ODR implementation and enforcement matters. Hence, in order to establish and implement an effective ODR system in ASEAN, ASEAN will require a clear and comprehensive legal and regulatory framework, including in the areas of consumer protection laws and ADR laws.

To this end, upon the completion of the initiatives on online dispute resolution system of ASEAN, the results will allow access for a broader consumer base, offer a low cost, fast and simple method for resolving consumer disputes, and increase consumer confidence and trust in online transactions in the region. ASEAN's ODR initiatives would only be able to advance as soon as all AMS themselves establish their own national online dispute resolution systems, which would be of utmost importance.

## Chapter 6. ASEAN's Legal and Regulatory Challenges – the e-Commerce Law

### 6.1. Introduction

This chapter aims to present the key challenges on legal development under ASEAN legal approach. It will help readers consider whether ASEAN's approach can really make forays in facilitating or developing e-commerce laws in the region.

It is quite apparent that the founders of ASEAN had intention to commit themselves together in cooperation and friendship and, under sacrifices and joint efforts, secure for their citizens and for posterity, freedom and peace. ASEAN was not envisaged to become a supranational establishment like the EU. It was established with its own legal system and institutions with capability of enforcing legal norms against and for its member countries as well as citizens<sup>613</sup>. ASEAN has achieved great steps in becoming a strong regional organization. Notwithstanding, it is experiencing challenges on thorough new and emerging economy and security. ASEAN has been in a clear and timely place to competently guide the member countries for better prosperity and peace in the years ahead, and to encourage the member countries to develop a uniquely ASEAN jurisprudence<sup>614</sup>.

The continuing development of Asian economies in the twenty-first century has brought the concurrent changes of economy, society and politic in ASEAN region. These changes and revolution are presenting ASEAN Community both opportunities and challenges. By the acknowledgement of the changes as well as challenges, in December 1997 the ASEAN member countries affirmed the ASEAN Vision 2020 at their Summit in Malaysia, which aims at turning ASEAN Community into a highly competitive, prosperous, and stable region with shrinking disparities of socio-economy, reduced poverty, and equitable development of economy<sup>615</sup>.

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<sup>613</sup> Tan, Kevin Y.L. (2020). ASEAN Law: Concept, applicability, ad challenges. In ASEAN Law and Regional Integration: Governance and the Rule of Law in ASEAN edited by Diane A Desierto, David J Cohen. Routledge. P. 2-3.

<sup>614</sup> Chatterjee, S. (17 May 2017). ASEAN's Legal Architecture Critical to Addressing Transboundary Challenges. At <https://asiafoundation.org/2017/05/17/aseans-legal-architecture-critical-addressing-transboundary-challenges/>

<sup>615</sup> Road-mapping Capacity Building Needs In Consumer Protection In ASEAN – Regional Report (Final), the Consumers International Kuala Lumpur Office, 2011, p. 92.

With the rapid development of digital economy, ASEAN recognizes the significance of the electronic commerce sector in supporting the economic integration of the region. The E-commerce sector has offered various opportunities for businesses, including SMEs. It has significantly reduced barriers of the cost of entry and operation for businesses. Meanwhile, the e-commerce has introduced a powerful channel to consumers for online shopping with more options of goods and services in lower prices.<sup>616</sup> In consequence, the ASEAN accelerated development of law aiming at governing and facilitating e-commerce development in the region. ASEAN developed e-commerce law through soft legal method, which require the member states to enact or develop their national laws and relevant regulations to govern e-commerce transactions in their countries as well as the region. However, it has come up with challenges for the legal framework of ASEAN for e-commerce transactions and relevant matters. This chapter will examine the gaps remain challenging to ASEAN law, in particular the laws on e-commerce, to help understand as well as predict the future of ASEAN e-commerce law.

## 6.2. Legal Challenges in General

### 6.2.1. Difference in Politic and Economy

ASEAN is known as the regional body of diversity. I has a variety of fundamental differences amongst the ASEAN member countries. With the economic diversity among the member states, Singapore will have been known as one of the financial and commercial cities of Asia, with a GDP per capita of \$ 59,797.8, while Lao PDR has GDP per capita of only \$ 2,630.2 and Cambodia with GDP per capita of \$ 1,512.7<sup>617</sup>. The political system of the governments of each of member states are also another difference within the bloc, for instance, Thailand and Indonesia have democracy systems, while Vietnam and Lao PDR have communist states, and Myanmar has been long history under military rule.

With the differences in political and economic backgrounds, it is possible that each member state may come with different conception towards the ASEAN Way. In this concern, the newer members, for example the Lao PDR, Cambodia, and Myanmar have preference

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<sup>616</sup> ASEAN (02 May 2018). *Enhancing Consumer Protection in E-Commerce through the Online Dispute Resolution Mechanism*. At <https://aseanconsumer.org/read-news-enhancing-consumer-protection-in-e-commerce-through-the-online-dispute-resolution-mechanism> [11 November 2021].

<sup>617</sup> GDP per capita (current US\$), the World Bank. At <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD> [17 November 2021]

more on non-interference, while other member states have considered that it is more important to emphasize points of cooperation and coordination.<sup>618</sup> An instance for this concern can be seen through speech of ASEAN leaders the Opening Remarks at the 6th ASEAN Summit 1998, held at Hanoi. The then Myanmar's Prime Minister, Chief General Than Shwe, and the then Lao PDR's Prime Minister, Mr. Sisavath Keobounphanh remarked that the solidarity of ASEAN should maintain through the respect of sovereignty and non-interference principles, while the then Vietnam's Prime Minister, Mr. Phan Van Khai; the then Malaysia's Prime Minister, Dr. Mahathir Bin Mohamad; and the then Prime Minister of Thailand, Chuan Leekpai respectively addressed the principles that promote positive relations of member countries, and explaining that ASEAN member countries have responsibility to sacrifice and contribute to missions of ASEAN.

ASEAN adopted and has pursued the consensus-based ASEAN Way for making decision within the bloc. This decision-making process and the foresaid inborn differences retard the member states from reaching a common solution in order to appropriately cope with specific issues. The solution that has been utilized by ASEAN in trying to cope with those differences has brought about extensively phrased and ambiguous terminology in order to satisfy the interests of them.

#### 6.2.2. Difference in legal system

As mentioned above that ASEAN consists of diversity among its Member States including difference in politic, economies, and cultures. And one of key diversities among ASEAN member states is their legal systems. For instance, Indonesia, the Lao PDR, and Vietnam adopt the civil law system; Singapore, Malaysia, Myanmar, and Brunei Darussalam adopt the common law system<sup>619</sup>, while the Philippines adopts a mixture of both civil law and common law systems<sup>620</sup>.

It will not be able to understand any legal behavior without relevant circumstance, including cultural circumstance. A legal system is in fact a complex organism, where the structure,

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<sup>618</sup> Leviter, L. (2010). *The ASEAN Charter: ASEAN Failure or Member Failure*. New York University Journal of International Law and Politics, vol. 43, p. 159.

<sup>619</sup> e.g, Singapore, Malaysia, Myanmar, and Brunei Darussalam.

<sup>620</sup> e.g, the Philippines

culture, and legal substance interface with one another.<sup>621</sup> Therefore, any changes to and any workings of a definite element affect the two other elements and vice versa. For instance, the difference of viewpoint on contracts in which some states negotiate, with strictness, the terms of a contract and adhere to the terms strictly, while some states perform a contract in a norm of collaboration after the execution of the contract. The difference of this legal culture thus can reflect the substance of laws of a country.<sup>622</sup>

### 6.2.3. Different levels of legal development

Many ASEAN member countries lack clarity and comprehensiveness in their laws, as well as lack of certainty, while legal systems of jurisdictions are also very different in overall levels of their development. Many of member states are battling with emergence of new commerce, yet many of them are not experienced or equipped to prepare or draft the relevant laws<sup>623</sup>. Hence, when a jurisdiction does not have skilled legislators and bureaucrats, the laws adopted can be ambiguous, and can be limited in application of the laws, and often the laws can conflict with other laws that have been being enacted. For an example of this, we can see the Foreign Investment Law of Myanmar, in which includes only five pages, while the foreign investment laws of other jurisdictions often consist of many hundred pages. This conciseness of Foreign Investment Law of Myanmar leaves the mandate ad hoc and depends upon the interpretation, which can significantly reduce confidence of businesses, particularly the confidence of foreign investors. On the other hand, Singapore has had a legal system that is well-established for over fifty years. The laws of Singapore are also documented well, and court cases are too transcribed well. With this well-established legal system, Singapore has become an attractive country for foreign business people since they are more confident in transparency and any certainty<sup>624</sup>.

By this difference in legal development among the ASEAN member states, it has come with challenges in regional legal development and cooperation. When member states have

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<sup>621</sup> Lawrence M. Friedman, L. M. (1975). *The Legal System: A Social Science Perspective*. Russel Sage Foundation. p. 16.

<sup>622</sup> Low, K. Y. & Zerrillo, Ph. C. (2018). *Negotiating the legal systems in ASEAN*. Asian Management Insights. 5, (1). Asian Management Insights. p. 70.

<sup>623</sup> Low, K. Y. & Zerrillo, Ph. C. (2018). *Negotiating the legal systems in ASEAN*. Asian Management Insights. 5, (1). Asian Management Insights. pp. 70-71.

<sup>624</sup> Low, K. Y. & Zerrillo, Ph. C. (2018). *Negotiating the legal systems in ASEAN*. Asian Management Insights. 5, (1). Asian Management Insights. pp.70-71.

different stages of legal development, as well as legal system, it can be difficult for those jurisdictions that have a lower level of legal experience or expertise to develop and enact their domestic laws in order to be harmonized with regional legal frameworks or commitments. In the past decade, ASEAN has worked on many different programmes in order to establish a rule-based region by presenting many instruments and encouraging its member states to enact their national laws. To this end, ASEAN has made some progress in the regional legal regime.

### 6.3. Challenge in e-Commerce Law

#### 6.3.1. Difference in Legal Cultures

The difference of legal system of ASEAN member states affect how they adopt their domestic e-commerce laws and govern electronic transactions in their countries. Due to the different legal cultures, each member state likely adopts their own set of rules towards the e-commerce activities, in which the e-commerce laws must be satisfying and be acceptable for people in their countries, and that is a reason why each member state has their own legal system with their own way of regulating e-commerce laws.

Legislators those who are circumspect to the legal culture often develop and enact laws in accordance with the shape of their legal culture, in order to serve the best of their national interests while goes along well with local traditions. According to the theory of Friedman, such development or enactment of laws are an element of legal substance in a legal system<sup>625</sup>. The element of legal substance in this way can be seen through the development or enactment of laws and regulations on e-commerce in ASEAN, where there are some different contents of the laws from the several legal cultures of ASEAN member states, in which affects the legal substance of their e-commerce laws.

The implementing bodies of the e-commerce law in ASEAN member states is also another difference. Some member states have devoted bodies and agencies of e-commerce activities that provide trust marks to make sure of a website security, while some member states don't have such initiatives. Some member states experience complexity on enforcement of the e-commerce law, while some member states have adopted go-ahead laws and

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<sup>625</sup> Friedman, L. M. (1975). *The Legal System: A Social Science Perspective*. Russel Sage Foundation. p. 16.

regulations relating e-commerce transactions.<sup>626</sup> Without doubt, these issues have brought complication in trans-border electronic commerce activities in the ASEAN region. For example, some ASEAN jurisdictions are likely more ready for trans-border e-commerce transactions, and they have promoted the trans-border ecommerce activities, as well as facilitate e-contracts arising from the cross-border electronic commerce activities.

Consequently, the establishment of ASEAN legal regime for electronic commerce activities also come along with a broad definition of the term among the member states. This may cause difficulty in ensuring a separate co-existence of e-commerce-specific and traditional rules. This broad definition of e-commerce is explained by the Law on Electronic Transactions of Lao PDR, where it defines that e-commerce transaction is “the sale, buy, and exchange of products or services between individuals, legal entities or organizations by utilizing electronic methods.”<sup>627</sup> This has come up with a question on legal interpretation if a transaction made over the phone call is considered as an e-commerce, since phone is also one of electronic means. This concern, it does not seem that the intention of the law aimed to present specific rules governing transactions made over the phone. Debatably, the electronic commerce is ‘just commerce’ and such separations thus are not guaranteed. Therefore, all legal initiatives should have considered: an accurate explanation of legal terms; an investigation if the existing rules need any supplementation; and a question if the existence of two possibly duplicated regimes promotes a legal certainty<sup>628</sup>.

### 6.3.2. Challenges in the legal framework Development

One of major legal challenges in e-commerce that ASEAN is facing e-readiness because it remains the different levels of readiness in digital economy among ASEAN jurisdictions. As of result, ASEAN is facing challenges in establishing a common framework for

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<sup>626</sup> Singapore Economic Development Board (EDB), (2018). “*E-Commerce in ASEAN: Seizing Opportunities and Navigating Challenges*”. At. <https://www.edb.gov.sg/en/business-insights/insights/e-commerce-in-asean-seizing-opportunities-and-navigating-challenges.html> [13 November 2021]

<sup>627</sup> Lao Law on Electronic Transactions, No 20/NA, Dec. 7, 2012, art. 3

<sup>628</sup> Mik, E. (2019). *Legal and Regulatory Challenges to Facilitating e-Commerce in ASEAN*. In P. Hsieh & B. Mercurio (Eds.), *ASEAN Law in the New Regional Economic Order: Global Trends and Shifting Paradigms*. Cambridge: Cambridge University Press. p. 346.

electronic commerce laws. ASEAN defined ‘e-readiness’ as the capacity of the bloc which is prepared for the participation in the emerging digital economy<sup>629</sup>.

Based on the goals of the e-ASEAN framework, the e-readiness is measured by numbers of factors, for examples: 1) information infrastructure, where ASEAN member states must facilitate inter-connection and ensure inter-operability among them<sup>630</sup>; 2) the growth of e-commerce, which includes legal framework, payments, taxation, and others<sup>631</sup>; 3) e-society, consisting of education, workforce, business users and home<sup>632</sup>; and 4) the e-government, where the member states must provide government services and transactions online<sup>633</sup>. However, it seems the said e-readiness of many ASEAN member states jurisdictions remain underdeveloped, in which it has led to difficulty in developing common legal framework and in complying with their commitment under any adopted framework and instruments.

### 6.3.3. Challenges in Digital and Electronic Signatures

Numbers of e-commerce project initiatives of ASEAN have acknowledged the demand to enact laws and regulations that govern digital and electronic signatures in the region. It is purported that the achievement of e-commerce sector depends upon the prevalent adoption digital and/or electronic signatures and cross-jurisdiction recognition of such signatures. The digital and electronic signatures are normally acknowledged as the identity confirmation method (authentication) of the relevant parties, and it has been promoted as a traditional-signature equivalent. Notwithstanding, unexpected confusion arises from the inconsistent terminology use. “Electronic signatures” involves any electronic name representations, such as the names on the email bottom, on the other hand “digital signatures” presents a limited technical definition of the term and depend upon asymmetric cryptosystems.<sup>634</sup> The initiatives of ASEAN cover both terms “digital” and “electronic” signatures interchangeably, establishing a circumstance where legal proposals and current

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<sup>629</sup> Rodolfo Noel S. Quimbo (2018). *The e-ASEAN legal framework and its challenges*. P. 88-89. At [https://static.aminer.org/pdf/PDF/000/259/131/e technology v e law legal challenges to the information.pdf](https://static.aminer.org/pdf/PDF/000/259/131/e%20technology%20v%20e%20law%20legal%20challenges%20to%20the%20inf%20ormation.pdf) [17 November 2021]

<sup>630</sup> Agreement on e-ASEAN Framework, art. 4.

<sup>631</sup> Agreement on e-ASEAN Framework, art. 5.

<sup>632</sup> Agreement on e-ASEAN Framework, art. 8.

<sup>633</sup> Agreement on e-ASEAN Framework, art. 9.

<sup>634</sup> Schneier, B. (1996). *Applied Cryptography*. Wiley. p. 34.

regulatory instruments<sup>635</sup> are in need of careful analysis to build the fundamental intention. To exemplify: the AEC Blueprint 2025 guides ASEAN member states to create “mutually recognized, inter-operable, reliable, secure, and user-friendly electronic identification and authorization (electronic signature) frameworks.”<sup>636</sup> Nevertheless, such frameworks are complicated to foresee the relation to digital and electronic signatures, in which they are only words on the computer screen and can not be assessed in terms of security or reliability. It is also complicated to foresee how the names on the computer screen could be mutually interoperable or recognized.

However, the AEC Blueprint 2025 attempted to keep technological neutrality of the terms, meanwhile it assumed that only digital signatures may be able to facilitate electronic commerce transactions. Only the digital signatures improve mutual recognition issues in the cross-border e-commerce transactions context. This summing-up can also be found in other legal proposals of ASEAN.<sup>637</sup> Up to date, several jurisdictions of ASEAN have developed and enacted laws and regulations covering digital and electronic signatures, either separated instruments<sup>638</sup> or as part of their electronic transaction laws.<sup>639</sup> Nevertheless, the legal issues on digital and electronic signatures seems still complex and remain challenging.

It remains complicated to be sure that a Certification Authorities (CAs) in cross-border jurisdictions are equivalently assiduous in the process, especially in the lack of common procedures and standards. As presented in previous section above, each ASEAN member state’s jurisdiction lie in a different regulatory regime that govern the CAs establishment and the way the member states issue Digital Certificates (DCs).<sup>640</sup> For instance, CAs in Lao PDR and Myanmar are registered entities,<sup>641</sup> meanwhile CAs in Singapore<sup>642</sup> are generously

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<sup>635</sup> See e.g., the Vietnamese Law on E-Transactions (51/2005/QH11); Indonesian Law Concerning Electronic Information and Transactions, arts. 11–16.

<sup>636</sup> AEC Blueprint 2025, at 24.

<sup>637</sup> See e.g., Reference Framework, paras. 14 and 15.

<sup>638</sup> See e.g., Malaysia, Digital Signature Act 1997, Lao Electronic Signature Law (2016).

<sup>639</sup> See e.g., Singapore Electronic Transactions Act (2010).

<sup>640</sup> C.f. see e.g., Singapore, which does not prescribe a licensing regime for CAs with Lao PDR, which requires that CAs be licensed and registered with the relevant ministry; see Lao Law on Electronic Transactions, No. 20/NA, Dec. 7, 2012, 26–9; see also Reference Framework, paras. 28–31, 54–7.

<sup>641</sup> Lao Law on Electronic Transactions, art. 28; Myanmar Electronic Transactions Law. (The State Peace and Development Council Law No. 5/2004) at 12–8.

<sup>642</sup> Singapore Electronic Transactions Act 2010.

not governed. This concern lifts problems when it relates to the cross-jurisdiction recognition of digital signatures and mutual CAs certification. This can be found in the Vietnamese Law on Electronic Transactions, in which addresses that Vietnam acknowledges the validity or legitimacy of foreign digital and electronic signatures if the signatures are equivalently trustworthy as the signatures issued in compliance with laws of Vietnam.<sup>643</sup> In consequence, parties from different jurisdictions of ASEAN would have to make sure that their digital signatures are in compliance with their national laws and with the domestic laws of their counterparty's jurisdiction.

There would not be any guarantee whether digital signatures of the relevant parties will be acknowledged in jurisdiction of the counterparty, although the parties reached their highest technological denominator. The technical and administrative expense of trans-border e-commerce transactions relating digital and electronic signatures issued in accordance with different procedures are also complicated for both online consumers and businesses to bear. Therefore, the cross-jurisdiction recognition of digital signatures in the region are often underestimated, due to the complications of cross-border certification. The legal framework on cooperation of CAs and comprehensive regional agreements that regulates the technical standard of CAs are still lagged or even overlooked.

The private key is also another challenge. With digital signatures, they only certify that a message was signed by a private key but cannot certify whether the subscriber himself used the key. The private key could face the issue of security, in which the private keys can be in high risk of being employed by unlicensed persons. Hence, any legal and regulatory framework relating digital signatures must include responsibility for reconciled private keys.<sup>644</sup> The concern of the subscriber, there is the problem in safeguarding private keys and evading responsibility for its unlicensed usage of the digital signatures, while the concern of relevant party that depends upon a digital signature, they experience the problem of unable to reveal the user of the private key despite of detailed examination of a DC. For instance, the Law on Electronic Transactions of Vietnam provide that the

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<sup>643</sup> Vietnam, Law on E-Transactions 51/2001/QH10 of 25/12/2001 of the 10 Legislature, Session No. 10; art. 27.

<sup>644</sup> Winn, J. K. (1999). *The Hedgehog and the Fox: Distinguishing Public and Private Sector Approaches to Managing Risk for Internet Transactions*, 51 Admin. L. Rev. p. 955; see also Digital Signature Act 1997 (Malaysia) and ETA Singapore 2010, neither of which addresses liability allocation comprehensively.

subscribers have an obligation, *inter alia*, to have methods in evading the unlicensed usage of his private key and to make sure of the information integrity of a DC.<sup>645</sup> This obligation seems difficult to accomplish from a technical point of view, since it requires subscribers to keep private keys offline, have excellent skill of network security, and use controls of complex biometric access. Another obligation widely relies on the responsiveness and trustworthiness of the CA. The law regulates the DC and provides updates to its contents like revocations or suspensions. The law also includes obligation of relevant party that depends upon the electronic signatures to confirm its trustworthiness and the validity of the DC.<sup>646</sup> Nevertheless, parties that depend upon electronic signatures always experience the risk that subscribers claim their private key is used unauthorizedly. Consequently, the existence of a CA cannot help anything with this concern, since the CA cannot manage the private key security. In this concern, the CA can only verifies that the DC (as well as the key pair) was issued in conformity with the relevant laws and instruments and verifies that the DC consists of proper contents relating the subscribers.<sup>647</sup> Practically, digital signature usage need technological complexity, in particular with the concern of the capacity in safeguarding the passcodes or PINs that protect the private keys.<sup>648</sup> Notwithstanding, such complexity is not able to be enjoyed in jurisdictions where online consumers do not have basic knowledge how to use credit cards and make payments online.

Although, ASEAN has continued promoting development and enactment of digital signature laws within its bloc, yet the laws have still been unsuccessful. This failure is not new. The other jurisdictions than ASEAN also experienced this unsuccessful attempt before. For instance, the Utah Digital Signature Act, which known as the first digital signature law, was revoked in 2007.<sup>649</sup> In the similar situation, the EU Digital Signatures

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<sup>645</sup> Vietnam Law on E-Transactions, art. 25; c.f. sec. 43 of the Malaysian Digital Signature Act 1997, which provides that “the subscriber whose name in the DC assumes a duty to perform reasonable care to maintain the private key control and prevent its disclosure to any unauthorized person to establish the digital signature of subscriber.”

<sup>646</sup> Vietnam Law on E-Transactions, art. 26.

<sup>647</sup> This is exemplified by secs. 34 and 36 of the Malaysian Digital Signature Act 1997.

<sup>648</sup> An effective digital signature scheme would require that each utilization of the private key depended upon biometric access controls.

<sup>649</sup> Utah Code. Ann. 46–3-101 (1999); the bill canceling the Utah Digital Signature Act that was signed into law in 2006. S.B. 20, 2006 Leg., Gen. Sess. (Utah 2006).

Directive<sup>650</sup> that aimed at promoting digital signatures, was replaced by a Regulation that has a limit scope and only focuses more on the interoperability and cross-border recognition of electronic identification frameworks, eminently in public service context.<sup>651</sup> The reason of this replacement of the Directive is that the European Commission realized that private businesses had not used digital signatures in electronic commerce activities, due to availability of electronic signature applications that are much simpler.<sup>652</sup> In fact, up to date there is not any record that digital signatures has contributed to the success of electronic commerce.<sup>653</sup> Although, in some of ASEAN jurisdictions such as Malaysia and Singapore that have digital signature laws, modern internet infrastructures, and market economies, but in practice they do not use the digital signatures in the electronic transactions.

#### 6.3.4. Challenges in Consumer Protection

It was declared by the leaders of ASEAN that the AEC should have achieved the target for the integration of regional economy by 2015, in which the consumer protection enhancement is one of the strategic fields set out under the ASEAN Economic Community Blueprint. The AEC intends to be a dynamic and competitive region with free movement of investments, goods and services, freer flow of skilled labours, and capital. The ASEAN leaders aim to eliminate barriers of tariff and non-tariff in the region gradually. Therefore, protection of consumers is the AEC's priority agenda for equitable development and is committed to a single market in an atmosphere of competitive business. Nevertheless, the socio-economic and political development amongst the ASEAN jurisdictions is in different levels which causes some key obstacles in accomplishing uniform stages of the protection of consumers. A globalization and liberalization of economy also posture numbers of challenges for regulators, policymakers, consumers, as well as businesses, in handling with the emerging environments like digitalized activities, newly emerging market trends, changing consumer demographics, the climate change impact, and growing trans-border

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<sup>650</sup> Directive 1999/93/EC on a Community framework for electronic signatures O.J. 2000, No. L013, Jan. 19, 2000.

<sup>651</sup> Regulation No 910/2014 on electronic identification and trust services for electronic transactions in the internal market replacing Directive 1999/93/EC.

<sup>652</sup> See Report on the Operation of Directive 1999/93/EC on a Community Framework for Electronic Signatures, 5.2, COM (2006) 120 final.

<sup>653</sup> Aside from being part of the https protocol, which creates secure connections between web servers and clients.

transactions. To reach an impartial stage of consumer protection in ASEAN region, the ASEAN member countries need an extend of measures on building of strategic capacity. The major elements of this strategy of consumer protection consist of legislation, enforcement mechanisms, policies, institutional structures, development of human resource, qualified skills acquisition in connection with consumer products, as well as regional planning for legal harmonization in a single market in order to provide protection of consumers within the ASEAN region<sup>654</sup>.

The promotion of e-commerce sector development is indeed involved with the consumer protection.<sup>655</sup> However, even ASEAN has been continuing its effort on development of consumer protection legal infrastructure,<sup>656</sup> but it remains challenges in consumer protection in e-commerce. The way consumers use for protecting themselves and the way governments use for adapting their policies and laws on protection of consumer to e-commerce still come with a series of challenges. In some jurisdictions of ASEAN, governments at provincial level have adopted their laws on protection of consumer to e-commerce activities where the location of the seller and the purchaser only in the same province are recognized. Notwithstanding, this way of laws would not be effective for e-commerce transactions associated by parties from other different province or country<sup>657</sup>.

#### *6.3.4.1. Regional Consumer Policy*

Consumer policy makers and consumers themselves face numbers of challenges in an open market in the region since products and services have been significantly changed in the past two decades. The transformations of goods and services have arisen due to the growth online consumer, the new technologies development, and complex products and these have been in a need of legal and regulatory reform. The new technologies development and complex product have introduced consumers essential benefits; however, it comes with key differentiation amongst relevant goods and services and cause more complicated for consumers to evaluate and compare value of products and services in open

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<sup>654</sup> Road-mapping Capacity Building Needs In Consumer Protection In ASEAN – Regional Report (Final), the Consumers International Kuala Lumpur Office, 2011, p. 3

<sup>655</sup> AEC Blueprint 2025, at 13.

<sup>656</sup> See e.g., ASEAN Strategic Action Plan for Consumer Protection (ASCAP) was developed to elaborate on the consumer protection measures under the AEC Blueprint 2025.

<sup>657</sup> Road-mapping Capacity Building Needs In Consumer Protection In ASEAN – Regional Report (Final), the Consumers International Kuala Lumpur Office, 2011, p. 136.

marketplaces. While increasing development of technologies or internet and global trade present consumers new opportunities, but at the same time, new kinds of fraud and spam have come to light which need authorities of consumer protection to be more cautious and more enthusiastic in cooperating across-border jurisdictions.

Consumer policy of ASEAN is a general term of action aiming to ensure consumers' fundamental rights including safety, education, redress, representation, basic needs, healthy environment, choice and information. This will, in terms in the practice, include the laws enactment, ordinances, the guidelines implementation, the institutions establishment, the information provision and the skills sharing which are significant in improving the consumers' life quality. In consumer policy scheme, ASEAN should thus signify the acknowledgement of the fundamental rights of consumers. The consumers' fundamental rights have been introduced by the UN in 1999 under its Guidelines for Consumer Protection which consist of right to safety, right to consumer education, right to basic needs, right to representation, right to information, right to redress, right to choose, and right to a healthy environment.

In ASEAN, protection rights of consumer, and consumer issues and areas conflict with many jurisdictions within the region causing from huge overlaps between public policy areas. However, the ASEAN member states have indicated that the consumer protection policy development is one of the prioritized fields for action, meanwhile the member states that have already adopted the policies on consumer protection are required to review their national policies, intending to cope with the change of goods and services in the open market<sup>658</sup>.

#### *6.3.4.2. Principal Consumer Protection Laws of ASEAN Member States*

While markets are evolving and changing, it is necessary develop and adopt new laws and instruments, because the laws and instruments adopted before the presence of new markets are often out-of-date, unsuitable with the new markets and can sometimes even be burdensome. Therefore, the ASEAN member states should not leave the existing laws and regulation without regular review since those law and regulations sometimes hold huge

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<sup>658</sup> Road-mapping Capacity Building Needs In Consumer Protection In ASEAN – Regional Report (Final), the Consumers International Kuala Lumpur Office, 2011, pp. 99-100.

costs in enforcement and administration. In order to catch up with the change and evolution of the markets and new challenges, it is necessary to establish new legal and regulatory framework. A comprehensive legal framework is a legal safeguard given by governments of ASEAN member states aiming to protect consumers within the region.

ASEAN recognized the importance of the protection of consumer in order to achieve its integration. As of result, the ASEAN Committee on Consumer Protection (ACCP) was formed to act as the focal point for implementing and monitoring the consumer protection in ASEAN<sup>659</sup>. The ACCP has been given a role to make sure all ASEAN jurisdictions enact their national laws, policies, regulations and measures on consumer protection; and to make sure of enhancing an access by consumers, establishing product recalls and dispute resolution mechanisms for consumer, and strengthening institutional capacity.<sup>660</sup> However, different member states adopt different institutional models and regulatory frameworks in attempting to protect consumers in their countries. Several laws, decrees, statues, and ordinances have been adopted amongst the member countries in order to deal with consumer protection including consumer safety, unfair trade practices, warranties, dispute resolution and enforcement. Hence, this can challenge ASEAN legal regime of harmonization.

In fact, all ASEAN member states should have adhered to similar principles of consumer protection, with uniform frameworks. This would relieve a number of problems that consumers in the region are facing, especially the problems in connection with cross-jurisdiction e-commerce transactions. Furthermore, the consumers protection needs a careful balancing practice, meaning that online consumers' interest and online businesses' interest have to be in balanced weight, because the SMEs in particular may not be able to cope with strict compliance of the regulations.

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<sup>659</sup> See ASEAN Committee on Consumer Protection (ACCP). At <https://aseanconsumer.org/cterm-regional-cooperation-in-asean/asean-committee-on-consumer-protection-accp> [15 November 2021].

<sup>660</sup> See ASEAN Committee on Consumer Protection (ACCP), at <https://www.aseanconsumer.org/cterm-regional-cooperation-in-asean/asean-committee-on-consumer-protection-accp> [25 October 2021]; and *See also*, Handbook on ASEAN Consumer Protection Laws and Regulations. the ASEAN Secretariat, June 2018. p. 13.

#### 6.3.4.3. *Enforcement Of Laws on Protection of Consumer*

ASEAN member states have acknowledged that laws and regulations on consumer protection requires to be regularly modified, for governing new changes in the marketplace. As the economy of ASEAN is developing and becoming more globalized, the member states of ASEAN have been attempting to make sure that laws and regulations on consumer protection catch up with the latest and regularly changing challenges experienced by consumers in their countries. For instance, the ASEAN member states have put relevant laws and instruments in place, aiming to deal with new forms of products and services, also new kinds of threats that affect consumers – for example, consumer personal data violation, and unsolicited and aggressive credit marketing<sup>661</sup>.

Consequently, when consumers face damages arising from consumption of bad quality products, poor services, or suffer from treatment of unfairness, often they would expect to be compensated or receive their money back. Especially, the poor consumers and the consumers with low income can lose their saving money on poor services or fake goods. Enforcement of law on protection of consumers of ASEAN jurisdictions has targeted at preventing unfair conducts of business by orders of enforcement and prosecuting transgressors, which is significant in strengthening the protection of consumer in the region. Yet, this is not helpful enough for protection of consumers since the law enforcement of many jurisdictions do not include proper redress mechanisms for protection of consumers. Enforcement of law on consumer protection is usually performed by more than one government agencies from the different sectors and this overlapping cross-sectoral involvement can sometimes cause the law enforcement difficult and weak, because of this the inter-agency coordination is often absent.

Moreover, the enforcement of law on protection of consumer is confronting numbers of new challenges in the era of digitalization. At present, the development of internet has introduced online shopping to consumers, and it is changing the way consumers in ASEAN purchase products and services, and cross-jurisdiction e-commerce activities are increasing day by day. By this, both consumers and traders usually involve with many different sets of laws and regulations in their countries, as well as in other ASEAN

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<sup>661</sup> Road-mapping Capacity Building Needs In Consumer Protection In ASEAN – Regional Report (Final), the Consumers International Kuala Lumpur Office, 2011, p. 31.

jurisdictions for cross-border transactions. Therefore, the internet and e-commerce have come with both opportunities and challenges for protection of consumers<sup>662</sup>.

#### *6.3.4.4. Addressing Complaints and Disputes Resolution*

To ensure justice for consumers who suffer from fake goods, poor services or unfair treatment is the aim of a consumer dispute resolution system. Notwithstanding, the existence of dispute resolution mechanisms of ASEAN does not guarantee that consumers who face loss or damage will be able to have access to dispute resolution or redress and get compensated. There seem to be several barriers for online consumers to enjoy dispute resolution mechanisms and it likely remains a number of challenges for implementing consumer dispute resolution mechanisms in ASEAN, including: 1) consumers lack awareness on laws that provide dispute resolution for them; 2) consumers find it difficult to access dispute resolution agencies or organizations, because many consumers live rural areas while most of the consumer dispute resolution agencies or organizations are located in urban areas; 3) the procedures of the resolution are technically complex and time-consuming; 4) consumers can not easily have access to help from voluntary organizations; and 5) Digital Inequality: while online consumer dispute resolution are promoted in ASEAN, yet, there is digital inequality among the middle class, young and urban consumers and illiterate, poor and rural consumers.

In the regard of the cross-jurisdiction e-commerce activities, there is a number of challenges related dispute resolution. At the moment, cross-jurisdiction e-commerce seems to facilitate the increase of fraud or otherwise there is a gap for traders to enjoy violation of consumer protection and avoid their responsibility, because of the fact that there are likely very less suits by suffering consumers from different countries. The online traders shall at least conform with the laws and instruments of those countries where their goods and services are sold. It is also significant to make sure that consumers can choose or have an access to dispute resolution in their home countries and can resolve their problems with effective redress schemes. However, it is not easy for consumers to engage with arbitration or suit in remote tribunals, for example the case in the USA,<sup>663</sup> it is therefore important to

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<sup>662</sup> Road-mapping Capacity Building Needs In Consumer Protection In ASEAN – Regional Report (Final), the Consumers International Kuala Lumpur Office, 2011, p. 46.

<sup>663</sup> See the Federal Arbitration Act 9 U.S.C. 2; AT&T Mobility LLC v. Concepcion 131 S. Ct. 1740 (2011).

establish low-cost and efficient dispute resolution mechanisms and/or online complaint/handling mechanisms.<sup>664</sup> Possibly, the introduction of online dispute resolution schemes with low price, flexible and fast method may lessen several barriers of cross-border law enforcement.<sup>665</sup> Currently, ASEAN's development of online dispute resolution mechanisms is undergoing, yet it is still long way to go to achieve the goal<sup>666</sup>.

#### 6.3.4.5. *Other Consumer Protection Challenges*

The liberalization of market has come with the presence of new products and services. Meanwhile, the presence of the new products and services are posturing various challenges for online consumers and regulators in ASEAN<sup>667</sup>. Currently, there seem to be a more need for consumer protection in electronic commerce transactions than in traditional transactions, since fraud and scam online are regarded as new and strange forms. One of the challenges is provision of information, especially in the e-commerce activities, since consumer protection is usually involved with information before making decision for purchasing products and services. When consumers are well informed about the products, they can make a better decision, and this could protect interests of the consumers. Notwithstanding, legal development or efforts should keep in mind that laws and regulations established exclusively upon the information provision have not often been successful<sup>668</sup>. The effective protection of consumers should, more commonly, ensure that consumers have options to purchase products and services and protect themselves from misleading information. Especially, instruments concerning e-commerce activities should enable information of the specific characteristics of the e-commerce surroundings.<sup>669</sup>

In ASEAN, the online consumers do often not receive sufficient information before making decisions. This brings with challenge on product safety. The capacity of online consumer protection and human resources, and enforcement and regulatory authorities are

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<sup>664</sup> United Nations Guidelines for Consumer Protection (2016), at 9.

<sup>665</sup> Schmitz, Amy J. (2015). *Building Trust in E-commerce Through Online Dispute Resolution*. John A. Rothchild (ed. 2016), Research Handbook on Electronic Commerce Law, Edward Elgar, Forthcoming, U of Colorado Law Legal Studies Research Paper No. 15-15

<sup>666</sup> ACCP achieved the Feasibility Study on the ASEAN ODR Network. ASEAN, 30 December 2020. At <https://aseanconsumer.org/read-news-accp-completes-the-feasibility-study-on-the-asean-online-dispute-resolution-odr-network>

<sup>667</sup> Road-mapping Capacity Building Needs In Consumer Protection In ASEAN – Regional Report (Final), the Consumers International Kuala Lumpur Office, 2011, p. 32.

<sup>668</sup> Bainbridge, St. (2000). *Mandatory Disclosure: A Behavioral Analysis*, 68 Univ. Cin. L. Rev. 1023.

<sup>669</sup> United Nations Guidelines for Consumer Protection (2016), at 15, 20.

also excessively stretched. Product labels are some of the common challenges towards product safety experienced by online consumers, which in some cases, the product labels and advertisements even provide misleading information. Consequently, the consumers in the ASEAN must face with unsafe products such as electrical appliances, toys, and products those are expired<sup>670</sup>.

Developments of ICT and e-commerce that have come with new goods and services in the marketplace also inevitably introduce various new challenges to consumers. This development of e-commerce and internet and phone services, along with new systems development such as mobile money, where money is electronically transferred through phone accounts with lenders of high interest, has significantly challenged consumers, regulators, and policymakers<sup>671</sup>. Some challenges relating ICT experienced by online consumers in ASEAN are often high service charges, interruption in connection of internet, issues of unsafe internet connection, poor IT system particularly in remote areas, false advertisements, poor-standard phones and inefficient internet and phone services. It is significant to be sure that the internet and phone services have fair prices and high quality since the access to those services are important for online consumer and electronic commerce activity<sup>672</sup>.

Some other challenges faced by the consumers in ASEAN are those related to credit and banking. Those challenges are often related to loan and credit with high rate of interest, unfair terms and conditions of contracts, unethical practices of debt collection or method of repossession methods, threats and harassment, aggressive credit-facility marketing and insufficient financial education and knowledge among consumers in ASEAN<sup>673</sup>.

In a circumstance where consumers are facing with new challenges, it is significant that the consumers are well empowered. Therefore, it is important to build basic consumer skills such as numeracy and literacy. The consumer education helps consumers to understand

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<sup>670</sup> Road-mapping Capacity Building Needs in Consumer Protection in ASEAN – Regional Report (Final), the Consumers International Kuala Lumpur Office, 2011, p. 81.

<sup>671</sup> World Bank Institution – Regional Report (FINAL)

<sup>672</sup> Road-mapping Capacity Building Needs in Consumer Protection in ASEAN – Regional Report (Final), the Consumers International Kuala Lumpur Office, 2011, p. 135.

<sup>673</sup> Road-mapping Capacity Building Needs in Consumer Protection in ASEAN – Regional Report (Final), the Consumers International Kuala Lumpur Office, 2011, p. 132.

information on products and advertisements, make right choices on their purchase, as well as help them file complaints and seek consumer redress. It can make great contribution to better consumer legislation since the consumers those who are well-empowered with knowledge on their rights and responsibilities can provide important feedback on the legislative effectiveness. The consumer education also allows consumers to decide their purchase based on their own values, not the marketing forces influence. Consumer education hence is an essential component in improving the consumers' life quality, the national economy as well as regional economy, and the well-being of individuals in general<sup>674</sup>. After all, to facilitate the development of e-commerce is not associated only with empowering consumers but it is important to empower online businesses, too.

However, the member states of ASEAN are not in same levels of socio-economic and political development, while consumers in ASEAN are facing with globalization and liberalization in marketplace. The digitalized markets, new trends of marketplace, cross-border e-commerce transactions, and new products and services in marketplace all bring with challenges to regulators, policy makers, businesses, and consumers. The developments information and communication technologies also come up with difficulties towards protection of consumer. It has increased spams and fraud, violation of privacy, as well as risks of behaviours of anti-competitiveness<sup>675</sup>.

#### 6.3.5. Challenges in Data Protection and Privacy

The developments of ICT and electronic commerce sector involve more and more in establishing the regimes of privacy protection.<sup>676</sup> However, this field is still underdeveloped in various ASEAN member states. Only a few ASEAN jurisdictions have created mechanisms stimulating cross-jurisdiction flow of data with the purpose of promoting the growth of economy and innovation. This underdeveloped may be resulted from the challenges being faced by some ASEAN member states such as limited digital literacy or data that suppress the innovation, problems of basic digital infrastructure, lower levels of connectivity of data, weaker processes and abilities of data collection, and limited access to

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<sup>674</sup> Road-mapping Capacity Building Needs in Consumer Protection in ASEAN – Regional Report (Final), the Consumers International Kuala Lumpur Office, 2011, pp.154-155.

<sup>675</sup> Road-mapping Capacity Building Needs in Consumer Protection in ASEAN – Regional Report (Final), the Consumers International Kuala Lumpur Office, 2011, p. 161.

<sup>676</sup> AEC Blueprint 2025, at 13.

large or high-quality datasets. These challenges can also stifle participation in the emerging innovation and technology such as data analytics and Artificial Intelligence<sup>677</sup>.

Despite of an increasing number of ASEAN jurisdictions have adopted laws on personal data protection, but frequently there are limited tools, funds, resources, and abilities to implement and enforce those legal and regulatory frameworks. In addition, sometimes a zero-sum approach can affect international data exploration or collaborations to geopolitics. As of result, some countries believe that to treasure data support in building opportunities for economic development in their countries based on digitalization, in which protectionist approaches to management of data, as well as localization of data, may be adopted by these countries. Therefore, these factors can intensify existing inequities of digital between countries. There is also a risk that may lock countries out from benefiting the emerging technologies, as well as from cross-jurisdiction flows of data<sup>678</sup>.

Privacy and data protection efforts in ASEAN are still developing in the environment of trans-border flows of data, meanwhile it has brought with many challenges, as followings:

- *Preventing extraction of data, or inequality of data relationships*: Citizens of jurisdictions that have underdeveloped data protection infrastructures can have found their data disclosed more than the citizens of jurisdictions that have stronger frameworks for protection of data. When laws on data protection are adopted, governments and also private sectors have obligations towards privacy and protection of data in accordance with the laws and avoid exposing personal data, except for exposal under the purposes that are authorized by relevant laws. However, the privacy and protection of data are practicable only if enforcement of law is effective. In some ASEAN jurisdictions, enforcement of the laws on data protection could not put in effect<sup>679</sup>.
- *Difference in Laws on data privacy*: The high-level principles and concepts of privacy and data protection provided by international instruments, guidelines, or frameworks have been effectively applied by majority of ASEAN jurisdictions. In consequence, the national legal and regulatory framework on protections of data of ASEAN member are

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<sup>677</sup> UNDP (2021). *Enabling Cross-Border Data Flow: ASEAN and Beyond*, p.10.

<sup>678</sup> UNDP (2021). *Enabling Cross-Border Data Flow: ASEAN and Beyond*, p.10.

<sup>679</sup> UNDP (2021). *Enabling Cross-Border Data Flow: ASEAN and Beyond*, p. 21.

primarily harmonized within the region<sup>680</sup>. Nevertheless, the high-level principles and concepts transposition in the domestic jurisdictions of ASEAN member countries has not accomplished the expected target of the regional uniformity. In the practice, when countries transpose from the newly enacted laws and instruments on data protection to the functionality of enforcement and conformity, the difference rises among their national laws and regulations since the countries lay down more specific requirements in their national laws. In this concern, both national and regional efforts should pay attention in promoting the harmonization of existing laws on protection of data<sup>681</sup>. Several ASEAN jurisdictions are reviewing and considering their own laws on protection of data, in which they often consider broader legal methods<sup>682</sup>.

- *Risks of extraction of data*: Some ASEAN jurisdictions do not have any laws on privacy and protection of data, for instance, Brunei and Myanmar. In this context, private sector organizations or other governments may perform any activities without considering privacy right of the people in the jurisdictions that do not have the necessary laws or even those have the laws, but they are weak. The personal data of people could be extracted by those companies or organizations or governments, meanwhile put the communities at risk of violation of privacy.

For the specific privacy and data protections concerning e-commerce, it is necessary to be seen against an extensive context. The e-commerce primarily depends upon advertisements and teems in trade transactions that associate with the personal data exchange in order to have access to online sites.<sup>683</sup> Numbers of e-commerce businesses collect personal data of consumers that are generated during online activities or transactions and use the personal data for their commercial activities. It is true that if the e-commerce businesses can use new technologies to process personal data, it gives unprecedented advantages to those e-commerce businesses, as well as the businesses can to manipulate behaviour of consumers.

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<sup>680</sup> The World Bank (2019). *The Digital Economy in Southeast Asia Strengthening the Foundations for Future Growth*. Available at <https://documents1.worldbank.org/curated/en/328941558708267736/pdf/The-Digital-Economy-in-Southeast-Asia-Strengthening-the-Foundations-for-Future-Growth.pdf>

<sup>681</sup> The World Bank (2019). *The Digital Economy in Southeast Asia Strengthening the Foundations for Future Growth*. At <https://documents1.worldbank.org/curated/en/328941558708267736/pdf/The-Digital-Economy-in-Southeast-Asia-Strengthening-the-Foundations-for-Future-Growth.pdf> [19 November 2021]

<sup>682</sup> UNDP (2021). *Enabling Cross-Border Data Flow: ASEAN and Beyond*, p. 21.

<sup>683</sup> Whittington, J. & Hoofnagle, Ch. J. (2012). *Unpacking Privacy's Price*, 90 NC. L. Rev. 1328, 1331.

An example for this is that the e-commerce business can collect personalization and the online content or data on display, in which the businesses can use those personal data to set the price of their goods and services.<sup>684</sup> Modern law and regulations on privacy and data protection have to recognize the commercial benefits from personal data and the risks of collecting, processing and using the personal data. The provisions of law in connection with the e-commerce activities must determine the restrictions which personal data are allowed to collect, processed and used by the e-commerce businesses, as well as which personal data are allowed shared by the e-commerce business with third parties and companies or organizations in foreign countries. All laws and instruments on data protection and privacy are often featured by a question between the interest of consumers and the interest of online businesses, in which the personal data of consumers may have been collected and used by online businesses for purposes of profiling or direct marketing. After all, privacy and protection of data in e-commerce should be in strength by means of complication in acquiring permission for collecting and using personal data for secondary or commercial purposes.

#### **6.4. Chapter summary and Concluding Remarks**

Although there are likely numbers of legal challenges towards e-commerce sector in both national and regional environments in ASEAN, there are still great opportunities and potential for ASEAN to exploit while it is moving forward. There is an only question if the ASEAN member states will be capable of making good on the frameworks, policies, and agreements that ASEAN has adopted in the previous decade or so. ASEAN does not only require making sure that the bloc keep moving on relevant emerging activities in the twenty-first century, but it also need to make sure that the bloc can be a stimulus for continuing development within the region<sup>685</sup>.

Considering the ASEAN Community-building, ASEAN has been quite successful in economic cooperation. The AEC has deepened regional cooperation by promoting e-commerce and innovation, enhancing facilitation of trade, deepening integration of

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<sup>684</sup> Zarsky, T. Z. (2002-2003). "Mine your own Business!" *Making the Case for the Implications of the Data Mining of Personal Information in the Forum of Public Opinion*, 2 Yale J. L. & Tech. 55, 19–22.

<sup>685</sup> Idris, A. & Kamaruddin, N. (2019). *ASEAN Post-50 Emerging Issues and Challenges*, Nature Singapore Pte Ltd. pp. 241-242.

investment and services, establishing a legal and regulatory environment, as well as developing external relations with other jurisdictions and regions<sup>686</sup>. As of result, ASEAN has continued working with external partners through free trade agreements, for instance, the Regional Comprehensive Economic Partnership (RCEP). This can be a fruitful opportunity for ASEAN to boost the development of e-commerce sector, as well as to strengthen the legal environment in governing the e-commerce activities in the region.

To effectively deal with the foresaid intimidated challenges, ASEAN should consider new as well as innovative cross-jurisdiction solutions, as well as working more intentionally across jurisdictions in implementing the existing instruments and improving regional collaboration. ASEAN should also reconsider its institutional capacity and the role of ASEAN Secretariat in order to sustain an organizational coherence and a common identity of the region. At this stage, it is necessary for ASEAN to support in strengthening legal norms and building effective system of rulemaking in all ASEAN jurisdictions, therefore the region will be able to deal with the challenges it is currently experiencing.

There are not only differences in perspectives amongst the ASEAN member countries, but there are also differences in their respective abilities in implementing the ASEAN's existing or new regional laws or obligations. These disparities in laws, different levels of income, and different stages and capacity in politic among ASEAN jurisdictions threaten to retard development on jurisprudence cooperation and compliance, and furthermore, threaten the effectiveness of ASEAN itself. To this all, to achieve the regional integration, ASEAN needs more coordinated efforts by its member states to make sure of the harmonization, monitoring, revision, and enforcement of national and regional laws and instruments, judicial institutions and jurisprudence, and domestic and regional administrative rules and procedures.

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<sup>686</sup> ASEAN (2018). *ASEAN Economic Integration Brief*, No. 3. Jakarta: ASEAN Secretariat.

## **Chapter 7. Conclusion – Toward ASEAN Soft Law Regime and E-commerce Legal Modernization**

This chapter concludes the main issues that are significantly in need of close attention. This chapter may repeat some issues or challenges from different chapters into conclusion, so that the author can recommend or provide noticeable remarks accordingly.

Regional integration in ASEAN is a reaction to combined economic and political processes in the member countries and the region. The political repercussion of the economic crises, during the recession in mid-80s and the financial crisis in 1997, drew attention of the member states to pioneer a deeper regional economic cooperation and started to discuss about institutional reforms in ASEAN. However, ASEAN regional integration as a strategy to improve economic growth of the member states has remained indirect and limited.

Economic relation within ASEAN has been developed quite slow due the dominance of national interest of the member states. However, the evolution of legal framework for governing economic relation in ASEAN has been progressing. The framework evolution has been envisaged through the moves towards the establishment of AFTA. The ASEAN Charter is a historic step for a regional organization for ASEAN in which it aimed at giving ASEAN a legal personality and a more rules-based regime, better known for its informal and flexible manner of cooperation and a form of decision-making approach dependent on ‘ASEAN Way’ – consultation and consensus. The ASEAN Way not only describes the conduct of member states’ relations but concludes the core principles and values of the organization which are based on the rigorous adherence to the principles of non-interference and national sovereignty. The Charter represents an evolution of new framework for regional cooperation in ASEAN. It came out with initiatives of ASEAN in promoting regional integration.

At the beginning, ASEAN had an extremely loose regulatory framework for their economic relation and meanwhile the member countries were unwilling to be too legalistic for their cooperation. At the present, the ASEAN members states still desire to carry out their economic relations through the ASEAN way; however, there has been a legal infrastructure development for governing economic relations amongst the member states. ASEAN regional integration initiative started in 1992 that brought an affirmation of the AEC.

ASEAN has accomplished modest gains, nevertheless it suffocates the realization of its far-reaching goals and the effective functioning of the AEC.

The establishment of ASEAN Community led to an evolution of a legal regime in the “ASEAN Way” and it is possible for the development of a “rule through law” regime. In this type of legal regime, regional authority dimension may be regulated by and acted through regional institutions and specific regulatory mechanisms. Among other pillars of the ASEAN Community, the AEC is considered to be the most possible. The AEC provides an open and integrated market to ASEAN people with more product choices and competitive costs, and it also supports businesses to experience markets and extend their market reach at reduced costs through improved investment environment and simplified cross-border trading processes. Furthermore, the AEC has also established frameworks and regional legal structures contributing to an improved environment for business. The legal regime of the AEC or ASEAN is a complex combination of formal but less rigid laws, forms of soft legal mechanisms and decentralized policymaking in order to balance member states’ discretion of sovereignty. As the nature of most soft law regimes, the legal regime is not a systematic or coherent legal system, but a fragmented and uneven system. These soft legal mechanisms are also not bound to firm into hard law; however they are a possibility to deepen institutionalization, harmonization, and legalization in ASEAN or in themselves they could be an end upon how both individual and collective purposes are perceived by member states.

The Chapter 2 shows that the nature of law regime of AEC has been underpinned by soft legal system which is in line with its preference for regional integration. This soft law regime comprises of non-binding soft coercions, it depends on voluntary commitments and self-compliance of the member states. In the AEC, the key mechanisms in rulemaking as well as the mechanisms in implementation of economic activities are the member states themselves and national government bodies. An absence of a regional autonomous body for driving the compliance and enforcement might be a key flaw in the governance framework of the AEC.

The main regional mechanism to facilitate the compliance of commitments or obligations by the member states is the ASEAN Secretariat. ASEAN has only ASEAN Secretariat as

the main regional body that is responsible to oversee the AEC's governance functions. Enforcement is exercised through pressure of sanctions. The enforcement with the coercive measures in the AEC only exists on paper. Its regional judicial mechanism is absent; thus, the legal enforcement is upon national administrative and national judicial procedures of the member states, or for cases in connection with investment disputes, the legal enforcement uses commercial arbitral procedures under the ASEAN Enhanced DSM or other recognized arbitral tribunals. However, the ASEAN Enhanced DSM that provides WTO-like enforcement procedures has remained unused. This weak enforcement is a key barrier in developing a more consistent and comprehensive legal regime in ASEAN. The so-called voluntary commitments and self-enforcement under the soft legal regime of ASEAN is the default method in implementing ASEAN agreements. In fact, ASEAN has no body that have enforcement power. It has the ASEAN Secretariat as a monitoring body, not an enforcement body. Furthermore, ASEAN does not have systematic and influential non-binding coercion mechanism that could put pressure on the member states in order to persuade them to take their responsibilities in regional integration. This provision of weak enforcement shows the uncertain and unstable path of the soft law regime in ASEAN.

In the respect of e-commerce, ASEAN has continued its effort on legal development in order to govern the e-commerce activities in the region. The ASEAN Member Countries have started to work together for establishing legal environment to promote e-commerce growth for years. Its first initiative regarding e-commerce legal development is by adopting ASEAN Vision 2020 in 1997, then followed by numbers of plan of action introducing legal initiatives concerning with e-commerce. However, ASEAN Member Countries have different legal background and legal system, especially when it comes to ICTs. Therefore, ASEAN has developed e-commerce legal framework by harmonizing of the Member States' national laws into regional legal system that respects each individual member state's national sovereignty and cultural sensitivities. Its legal harmonization consists of the common objective and principles for e-commerce laws. Consequently, the e-commerce legal support of ASEAN depends upon the adoption of a common reference framework that serves as legal templates providing a guide for helping ASEAN Member States enacting their domestic laws and regulations on e-commerce in the respective ASEAN

jurisdictions. ASEAN has been pioneering the preparation as well as the implementation of a harmonized legal framework for e-commerce to be complied across jurisdictions and ensure that the e-commerce laws are regionally harmonized.

Through the enactment of domestic law by the ASEAN member countries remains some legal gaps among the member countries. The chapter 3 examines that there has been no AMS include legislations to enact or develop any regulations or laws that expresses the issues on handling conflict in the consumer protection context in cross-borders online activities. Unlike the European Union that had conducted several efforts and discussions, for protecting the rights of online consumers and build trust for consumers in entering into contracts for cross-border transactions and provide legal basis on laws conflict and harmonize them into its member countries. By this gap of laws, it can cause harmful effect to online consumers in ASEAN since the e-commerce contract made by them might be subjected to jurisdiction of courts of foreign countries that can cause high costs of litigation.

However, ASEAN soft legal mechanism is an evolutionary tendency towards delegation of rulemaking in technical matters and development of uniform rules through voluntary reception into the domestic legal system through the method of harmonization. The development of 'rules-based systems for effective implementation and compliance of economic commitments' declared in the ASEAN Economic Community Blueprint would depend on gradual and step-by-step process based on voluntary adoption of member states. For example, the Chapter 3 shows that ASEAN employs a soft legal regime through approach of harmonisation for developing e-commerce law. The harmonization is a non-binding multilateral approach rather than the binding commitments. This approach offers more practicality and flexibility than binding coercive. Legal development through soft harmonization approach in the soft law regime apparently comes up with some weakness. The key weakness of the soft legal harmonisation approach of ASEAN is its over-dependence on voluntary willingness and commitment of the member countries to conform with the regional framework. Most of contributions of ASEAN on e-commerce policy are leaned on the enactment of the member states' domestic e-commerce law statutes. However, the member states are independent and could even omit the assembled attempts of ASEAN in favours of their own internal specific interest. By this large

boundary of flexibility, it could lead ASEAN to a tool for social, political, and economic divergency on many issues instead of pressing the member states to step forward the regional economic integration. Nevertheless, the soft legal regime has significantly made forays in facilitating regional integration and legal development in the AEC. As it shows in Chapter 4 that the legal environment in some ASEAN member states have gradually changed as effecting by the soft legal regime, for instance, the development of electronic commerce law in the CLMV countries. As outcome, Lao PDR and Vietnam have most of laws relevant to e-commerce activities and although Cambodia and Myanmar are a bit slow, but they have made a great progress in alignment with regional commitments.

ASEAN's legal protection remains inconsistent with standards of modern rule of law. The ASEAN Charter has not provided cross-border legal protection remedies for ASEAN citizens, especially in the ASEAN Economic Community. ASEAN only provide legal remedies mechanism for difficulties concerning states, and disputes regarding economic agreements in the norm of the ASEAN Way in order to peacefully settle all conflicts. Each instrument determines which disputes shall use which mechanism and all mechanisms is often a consultation. ASEAN settles disputes concerning the states through dialogue, consultation, and negotiation. From the rule of law perspective, this ASEAN's way of setting up a panel for dialogue, consultation, and negotiation rather than a composition of arbitration cannot have access to a highly qualified judge of lawfulness and independence. Furthermore, it is not capable of producing jurisprudence, that is key evolution of law. In the practice, the disputed states often use the WTO dispute settlement mechanism rather than using the panel mechanism. In specific sector of electronic commerce, ASEAN, like other regions, has developed ODR scheme to facilitate the electronic transactions to build trust and confidence for online consumers in the region. ASEAN considers consumer protection as an important driving force for the smooth functioning of an integrated market. The Chapter 5 clarifies that ASEAN does not have any supranational elements, thus ASEAN policymakers and regulators currently address consumer dispute resolution through non-binding standards requiring AMS to encourage or ensure access to out-of-court redress mechanisms. ASEAN legal regime depends upon harmonizing the Member Countries' national laws into the regional legal system by respecting cultural sensitivities and national sovereignty. The complex institutional and regulatory regimes can undermine

regional ODR implementation and enforcement matters. Hence, in order to establish and implement an effective ODR system in ASEAN, ASEAN will require a clear and comprehensive regulatory framework, including in the areas of consumer protection laws and ADR laws.

To conclude, ASEAN is an intergovernmental organization, not supranational organization. Hence, it cannot legislate applicable secondary law that directly apply to member states. ASEAN has soft law regime in supporting its regional integration through approach of harmonizing national laws of the member countries. The soft legal regime of ASEAN comprises of non-binding soft coercions, it depends on voluntary commitments and self-conformity of the member states. For the instance, the study of this thesis shows that the e-commerce law of ASEAN has been developed through legal harmonization and depends on commitments of the member states to adopt and enact their domestic law in governing e-commerce. ASEAN lacks regional autonomous body for driving the compliance and enforcement and it might be a key flaw in the governance framework of the AEC. Its legal enforcement is upon national administrative and national judicial procedures of the member states, or for cases in connection with investment disputes, the legal enforcement uses commercial arbitral procedures under the ASEAN Enhanced DSM or other recognized arbitral tribunals. This complex institutional and regulatory regime can undermine regional law implementation and enforcement matters of ASEAN. In particular, with the legal development in e-commerce laws by ASEAN Way in the still significantly faces with some challenges. The Chapter 6 indicates numbers of challenges in both national and regional environments due of various factors and differences among the member states. There are not only differences in perspectives among them, but there are also differences in their respective abilities in implementing the ASEAN's existing or new regional laws or obligations. These disparities in laws, different levels of income, and different stages and capacity in politic among ASEAN jurisdictions can threaten to retard development on jurisprudence cooperation and compliance, and furthermore, threaten the effectiveness of ASEAN itself. To effectively deal with the foresaid intimidated challenges, ASEAN should consider new as well as innovative cross-jurisdiction solutions, as well as working more intentionally across jurisdictions in implementing the existing instruments and improving regional collaboration. ASEAN should also reconsider its institutional

capacity and the role of ASEAN Secretariat in order to sustain an organizational coherence and a common identity of the region. At this stage, it is necessary for ASEAN to support in strengthening legal norms and building effective system of rulemaking in all ASEAN jurisdictions, therefore the region will be able to deal with the challenges it is currently experiencing. ASEAN also needs more coordinated efforts by its member states to make sure of the harmonization, monitoring, revision, and enforcement of national and regional laws and instruments, judicial institutions and jurisprudence, as well as domestic and regional administrative rules and procedures. After all, there are still great opportunities and potential for ASEAN to exploit while it is moving forward. There is an only question if the ASEAN member states will be capable of making good on the frameworks, policies, and agreements that ASEAN has adopted in the previous decade or so. ASEAN does not only require making sure that the bloc keep moving on relevant emerging activities in the twenty-first century, but it also need to make sure that the bloc can be a stimulus for continuing development within the region<sup>687</sup>.

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<sup>687</sup> Idris, A. & Kamaruddin, N. (2019). ASEAN Post-50 Emerging Issues and Challenges, Nature Singapore Pte Ltd. pp. 241-242.

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