

ASEAN INTEGRATION THROUGH LAW

CONCLUDING PLENARY

25 August 2013

Keynote Address by Chief Justice Sundaresh Menon

I. ASEAN: GEOGRAPHICALLY BOUND TO A COMMON DESTINY

1 In 2012, the 21st ASEAN Summit and 45th Annual Ministerial Meeting was held with the chosen theme of “ASEAN : One Community, One Destiny”. This was a fitting theme because indeed, we are bound, geographically, to a common destiny. Whereas, for a large part of our collective modern history, the countries in Southeast Asia were fragmented, the wave of decolonisation and the post-war realisation of the right of self-determination has meant that the strategic view of our future is one we have formed ourselves; and that view is undoubtedly one that recognises the commonality of the challenges we face, the opportunities we must take advantage of and the strength that avails us if we are united in facing the future.

2 In 46 years, ASEAN has grown and it has assumed a position of importance on the international stage. With 10 members¹, a combined population of 600 million and nominal GDP of more than USD 2 trillion, it is taken very seriously by the world, including by the United States, China and the EU, each of which has entered into a series of agreements and declarations of cooperation in various fields with ASEAN and whose highest

¹ Indonesia, Malaysia, Philippines, Singapore, Thailand, Vietnam, Laos, Myanmar, Cambodia and Brunei. There are two observers, Timor-Leste and Papua New Guinea.

representatives meet with their counterparts from ASEAN regularly.² ASEAN's voice today is heard at international and regional fora.³ ASEAN has also taken significant strides towards the ASEAN 2020 vision of integration. It is on track to realise its plans for the ASEAN Economic Community to be established in 2015, with more than 80% of the measures in blueprint already implemented.⁴

II. THE ROLE OF RULE OF LAW IN ASEAN'S ASPIRATIONS

3 As the list of ASEAN's achievements continues to grow, it is timely to pause and consider the role that the Rule of Law has played in the pursuit of ASEAN's aspirations. Respect for justice and the Rule of Law is expressly mentioned in the ASEAN 2020 vision as a precondition for a peaceful and stable Southeast Asia.⁵ Traditionally, Rule of Law discourse speaks to the *restraint* of power *within* a body politic – namely, the state. It is a concept conceived in the domestic context to restrain the sovereign's exercise of power in its relationship with its subjects through legal rules. It usually requires equality before the law and an independent judiciary.⁶

4 The rule of Law as originally conceived thus contemplates a legal superior to administer the law. You will not find this in international relations. The reality of

² China, along with Japan and the Republic of Korea meet with ASEAN at the ASEAN Plus Three (APT) meeting. The APT countries, together with Australia, India, New Zealand, Russia and the US, also attend the East Asia Summit. The EU and ASEAN likewise have a series of agreements and declarations including the Bandar Seri Begawan Plan of Action to Strengthen the ASEAN-EU Enhanced Partnership (2013-2017).

³ For instance, the ASEAN Plus Three meetings.

⁴ See the remarks of the ASEAN Secretary-General Le Luong Minh reported in "ASEAN region on track for 2015 integration" (7 July 2013) *Inquirer Business* (available online: <http://business.inquirer.net/130941/asean-region-on-track-for-2015-integration> (last accessed 9 July 2013)).

⁵ See ASEAN 2020 vision (available online: <http://www.asean.org/news/item/asean-vision-2020> (last accessed 9 July 2013)).

⁶ See A V Dicey, *Introduction to the Study of the Law of Constitution*, 3rd Ed (London: Macmillan, 1889) at 175, 181-183.

international relations is that the size of a state, its economy, its military, its status amongst other states, all matter. While there is in some sense a legal superior in the form of the United Nations Security Council which may pass binding resolutions, the decisions of the permanent members which have veto powers are not restrained by law. The International Court of Justice likewise does not exercise jurisdiction over all states unless they choose to subscribe to the jurisdiction of that court whether on a permanent or ad-hoc basis. So what does it mean to speak of the Rule of Law amongst states? To put it another way, while we might speak of the Rule of Law *within* states, what Rule of Law is there *between* ASEAN member states?

5 The puzzle over whether the Rule of Law can exist in the international legal order persists because that order is horizontal in nature. As there is no supra-national authority to impose rules, jurists rely on the concept of consent by states to explain the binding nature of international law. The confusion arises because consent, in turn, is the result of an unlimited discretionary exercise of power by the sovereign. This appears antithetical to the Rule of Law which, when conceived in the domestic context, is a constraint on the exercise of power by legal rules.

6 I would suggest that in fact, the Rule of Law is both a constraint on power as well as the bedrock of power. This is because *power undermines itself when it is exercised without restraint*. In the domestic context, within states, it is not hard to find examples of revolutions founded on the resentment stemming from the unbridled exercise of power. Power, unrestrained, is self-defeating. Where it is abused, power will be taken away from the abuser. If there is a political process, such as in a democracy, power may be taken

away peacefully by the vote. Where there is no such political process, it may be taken away violently.

7 This is not too different in the international legal order. Rogue states that rely on the concept of unbridled sovereignty to justify actions repugnant to the rest of the nations are, over time, alienated. While they generally retain their domestic sovereignty, the *sphere* within which they may exercise their power on the international plane is greatly diminished by the collective rejection of their actions by other states. Indeed, even their exercise of power within their boundaries may be curtailed by other indirect countermeasures such as trade embargoes which put pressure on their domestic economy, thus isolating them further.

8 Therefore, in the international sphere, adherence to the Rule of Law exists because despite it being a constraint on power, states see such adherence as being in their enlightened self-interest as it furnishes international *legitimacy*. The ASEAN experience confirms this and ASEAN states have acquitted themselves well in adhering to the Rule of Law. The Preah Vihear Temple dispute between Thailand and Cambodia is an example of this. The Preah Vihear Temple is a 900 year old temple situated along the Thai-Cambodian border. A dispute between the two states over its ownership was resolved by the International Court of Justice (“ICJ”) which awarded the temple to Cambodia in 1962.⁷

⁷ See the 15 June 1962 judgment of the court (available online: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=46&case=45&code=ct&p3=4> (last accessed 9 July 2013)).

9 However, the ICJ did not make a pronouncement on the ownership of the area around the temple. This led to further tensions, but the parties have decided to refer the matter to the ICJ again by an application for an interpretation of the 1962 judgment.⁸ It is hoped that a pronouncement by the court will end this dispute.

10 Two other examples of disputes being resolved before the ICJ include (1) the dispute between Indonesia and Malaysia over the sovereignty of Pulau Ligitan and Pulau Sipadan and (2) that between Singapore and Malaysia over the sovereignty of Pedra Branca and its neighbouring geographical features.⁹ These are good precedents for the peaceful resolution of disputes in accordance with law. But a compulsory dispute resolution mechanism need not be the only way to address such issues. The goodwill that has built up amongst ASEAN states allows for many other issues to be resolved in a lawful way acceptable to all parties without submitting them to a mandatory third party dispute resolution mechanism.

11 Presently, the biggest potential for conflict in the region lies in the disputed islands in the South China Sea. In 2002, China and ASEAN signed a “Declaration on the Conduct of Parties in the South China Sea”¹⁰ and reaffirmed “that the adoption of a code of

⁸ See summary of developments in *Request for interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (available online: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=46&case=151> (last accessed 9 July 2013)).

⁹ See *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (available online: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=2b&case=130&code=masi&p3=4> (last accessed 9 July 2013)).

¹⁰ Available online:

<http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea> (last accessed 9 July 2013).

conduct ... would further promote peace and stability in the region.”¹¹ Some commentators have suggested that ASEAN needs a more effective code with “concrete conflict prevention measures” and “a military tight agreement” instead of such declarations which constitute non-binding “soft law”.¹² While an agreement consisting of clear legally binding rules might be laudable, one must not underestimate the power of soft law to promote a solution by providing sufficient breathing room to the parties with nuanced albeit non-binding language which at the same time nudges them along a particular direction.

III. RULE OF LAW AND ECONOMIC INTEGRATION

12 Apart from political and security cooperation, one of the other key pillars of ASEAN is economic cooperation.¹³ ASEAN is taking significant strides towards its goal of an Economic Community in 2015. Already, agreements entered into amongst member states such as the 1992 ASEAN Free Trade Area agreement have promoted greater cross-border trade by cutting down tariffs for intra-ASEAN trade.¹⁴ As a regional bloc, ASEAN has also entered into other wide-ranging Free Trade Agreements (“FTAs”) with states such as China and India.¹⁵ These agreements have greatly accelerated

¹¹ *Id.*

¹² “ASEAN needs ‘more effective’ code with China on sea row” (10 July 2013) Kyodo News (available online: <http://www.abs-cbnnews.com/focus/07/10/13/asean-needs-more-effective-code-china-sea-row> (last accessed 9 July 2013)).

¹³ As declared at the ASEAN Summit 2013. The third pillar is socio-cultural cooperation. See “Declaration on ASEAN Concord II (Bali Concord II)” 7 October 2003.

¹⁴ See AFTA Council’s summary of developments (available online: <http://www.asean.org/communities/asean-economic-community/category/asean-free-trade-area-afta-council> (last accessed 9 July 2013)).

¹⁵ ASEAN–Australia–New Zealand Free Trade Area came into effect on 1 January 2010. ASEAN–China Free Trade Area, in effect as of 1 January 2010. ASEAN–India Free Trade Area (AIFTA), in effect as of 1 January 2010. ASEAN–Japan Comprehensive Economic Partnership was signed on 14 April 2008. ASEAN–Korea Free Trade Area, in effect as of 1 January 2010.

intra-ASEAN trade as well as external ASEAN trade. ASEAN-China trade, for instance, reached a record high in 2012.¹⁶

13 The proliferation of cross-border trade as well as ASEAN's goals for economic integration are factors that push us towards the harmonisation of our commercial law. Yet, despite the existing levels of ASEAN economic integration and the progress that has been made thus far, it is still not possible to speak of a "Southeast Asian" commercial law in the way one might speak of European commercial law. The heterogeneity of ASEAN commercial law will likely impact cross-border businesses with national bases in ASEAN countries. Multinational companies organise their operations on a global, or at least, regional basis with national subsidiaries operating as part of a unified system across jurisdictions.¹⁷ Where the commercial laws of the states in this region *diverge*, this will impact businesses with transnational operations.

14 At the inaugural plenary of the ASEAN Integration Through Law Project, Singapore's Minister for Foreign Affairs and for Law, Mr K Shanmugam, observed that the harmonisation of legal rules "can help to remove uncertainty, reduce cost, generate greater business confidence, and ultimately advance ASEAN community-building goals."¹⁸

¹⁶ See "ASEAN-China trade reaches record high" (7 February 2013) The Brunei Times (available online: <http://www.bt.com.bn/business-national/2013/02/07/asean-china-trade-reaches-record-high> (last accessed 9 July 2013)).

¹⁷ See Silvia Fazio, *The Harmonization of International Law*, (Kluwer Law International, 2007) at p 2.

¹⁸ See "Rule of law key for ASEAN's progress, says Shanmugam" (20 June 2012) Today (available online: <http://www.singaporelawwatch.sg/slw/headlinesnews/27325-rule-of-law-key-for-aseans-progress-says-shanmugam.html> (last accessed 8 July 2013)).

15 There is one area with significant potential for harmonisation and which would not require sieving through the web of the different substantive laws; and it holds the promise of considerably strengthening our regional infrastructure. This is the enforcement regime for judgments. The Hague Convention on Choice of Court Agreements,¹⁹ has the promotion of international trade and investment through enhanced judicial co-operation as one of its stated goals.²⁰ It seeks to realise that goal through the harmonisation of rules on the recognition and enforcement of foreign judgments in civil matters. One of the major features of the convention is its provision that where the disputing parties have chosen a particular court of another state to resolve their dispute, state parties are to recognise and enforce a judgment given by that court, save in limited exceptional circumstances.²¹ Those of us familiar with arbitration will recognise the parallels with the New York Convention. Already, two major jurisdictions, the US and the EU, have signed the convention, pending ratification.²² The Hague convention might present a ready platform for ASEAN to harmonise a key area of law namely the enforcement of judgments, amongst its member states as well as with two major trading partners of ASEAN, if it were adopted by the member states of ASEAN.

IV. CONCLUSION

16 Finally, I come to the good work of the ASEAN Integration Through Law Project. Although the issue of the harmonisation of ASEAN commercial law has been previously

¹⁹ Full text available online: http://www.hcch.net/index_en.php?act=conventions.text&cid=98 (last accessed 17 July 2013).

²⁰ See [2] of the preamble.

²¹ See Articles 8 and 9.

²² Another jurisdiction is Mexico.

examined by various scholars,²³ in terms of its breadth and depth, the ASEAN Integration Through Law Project is a true pioneer in this field. Employing a comparative approach, the Project will examine substantive as well as procedural legal principles of the various ASEAN countries to develop an authentic body of scholarship on ASEAN integration.²⁴ The Project will be particularly useful to policymakers as it will provide a rich set of resources, whether in terms of analyses or models, which will enhance their decision making processes.²⁵ Where appropriate, authoritative texts authored by leading scholars will be prepared on the various ASEAN “rules based regimes”.²⁶ These resources will prove to be a treasure trove for ASEAN policymakers, civil servants, scholars, lawyers and students. The National University of Singapore intends to devote considerable resources to this Project and has declared that it will be the marquee activity of the Centre for International Law. I am confident that the work of this Project will enjoy continued and increasing relevance in this region and internationally. Where ultimately the aims of the Project are to promote ASEAN integration through the strengthening of legal institutions and the Rule of Law, it is a project in the service of the national interests of all ASEAN states and the collective interest of the regional bloc as a whole. Indeed, it is an extremely worthwhile initiative.

17 I commend all involved for their hard work to date and wish them the success that they truly deserve.

²³ See for example, Colin Ong, *Cross-border Litigation within ASEAN* (The Hague, London, Boston: Kluwer Law International, 1997).

²⁴ See Mission Statement of the Integration Through Law initiative at pp 2-3.

²⁵ *Id* at p 4.

²⁶ *Id.*