CIL

CENTRE FOR INTERNATIONAL LAW
National University of Singapore

ASEAN Law Academy Advanced Programme 2021

Annex 2

Minutes

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2 February 2021: ASEAN Law Academy Advanced Programme 2021 Opening

Welcome by CIL Director Dr Nilüfer Oral

1. The third iteration of the ASEAN Law Academy welcomed more than a hundred participants from the Southeast Asia region and beyond, with representation from both the public and private sectors. It is a particularly challenging time globally, and international cooperation and regional cohesion remain crucial for development and prosperity.

2. Since the adoption of the ASEAN Charter in 2007, member states have taken substantive steps towards integration and community-building. In light of the Coronavirus-19 (COVID-19) pandemic, there is an even greater need for regional cooperation. This is especially so as ASEAN is in a unique position to work with external partners to strengthen global supply chains.

3. The Centre for International Law (CIL) at the National University of Singapore (NUS) is a firm proponent of ASEAN integration and regional development. The ASEAN Law Academy is an extension of the ASEAN Integration Through Law project. The Academy is taught by experienced professors and practitioners and the programme comprises engaging interactive sessions.

Academy Director's Welcome by Professor Joseph Weiler

4. Professor Weiler described the two groups of participants of the Academy. The first group was the "doers", policymakers whose expertise and competence contribute to the success of ASEAN. The second group was academics, university professors, etc. engaging in research to deepen our knowledge on the challenges of ASEAN and educate the next generation.

5. The Academy brought together people who have experience in ASEAN. The objective of the Academy was for the participants to learn from both the speakers in the lectures and from one another through the discussion sessions.

ASEAN's Three Challenges by CIL Chairman Professor Tommy Koh

6. Professor Koh outlined the three challenges faced by ASEAN:

    a. Overcoming the pandemic.
    b. Making an economic recovery.
    c. Maintaining ASEAN's unity and neutrality in the face of the intense rivalry between the US and China.

<u>The First Challenge – Overcoming the COVID 19 Pandemic</u>

7. After the 2003 Severe Acute Respiratory Syndrome (SARS) pandemic, ASEAN prepared itself for the next pandemic by setting up five cooperative mechanisms:

    a. A network for public health emergencies, led by Malaysia.
    b. A BioDiaspora regional virtual centre, led by the Philippines.
    c. A regional public health laboratories network, led by Thailand.
    d. The ASEAN risk assessment and risk communication centre.
    e. A rice stockpile.

8. ASEAN reacted promptly to the threat of COVID-19 and held a Special Meeting of the ASEAN Coordinating Council on 20 February 2020 in Vientiane. ASEAN also held meetings with the WHO and external partners such as the United States, the European Union and Japan.

9. Individual ASEAN countries have assisted each other through donations of medical equipment evacuation of their citizens from foreign countries. However, ASEAN is an intergovernmental organisation, and not a transnational institution like the European Union. The response of ASEAN is primarily dependent on the individual member states and not ASEAN itself. This thus explained the differing responses and rates of infection of the ASEAN countries.

10. On vaccines, Professor Koh explained the differing responses of the European Union (EU) and ASEAN. The EU has entered into contracts with pharmaceutical companies to buy vaccines for all 27 member states, while ASEAN member states are doing so on their own. Consequently, wealthier countries have obtained the vaccines earlier. Professor Koh emphasised that no one is safe unless everyone is safe and emphasised that it is in the overall interest of every member state to assist other member states in acquiring vaccine.

<u>The Second Challenge – Economic Recovery</u>

11. According to the International Monetary Fund, the recession caused by COVID-19 is worse than the 2008 Financial Crisis. However, there was also good news in 2020.

12. First, the ten ASEAN countries, together with China, Japan, South Korea, Australia and New Zealand concluded a mega trade agreement known as the Regional Comprehensive Economic Partnership (RCEP) which would strengthen free trade and weaken protectionism. Second, the inflow of foreign direct investment into Vietnam, Singapore and Malaysia was greater in 2020 than in 2019. This signals investor confidence in those three economies, and also in ASEAN as a whole. Third, the ASEAN economy is projected to grow by 5.2% in 2021, with strong recovery by member states. Fourth, in the medium and long term, ASEAN is projected to resume its growth trajectory and is expected to out-perform other regions of the world, with the exceptions of China and India.

13. However, there were also concerns of uneven recovery, with some countries and sectors recovering more quickly than others. The recession has also destroyed economic opportunities and led to rising unemployment and an increase in poverty. Professor Koh also noted that this recession is taking place amid the Fourth Industrial Revolution which means that some of the jobs lost will not return. It is thus necessary for businesses and people to change and adapt to the digitalisation of the world. Another concern is whether ASEAN can rebuild and recover in a fairer, more resilient and more sustainable manner.

<u>The Third Challenge – ASEAN Neutrality</u>

14. The US-China competition for influence is the most intense in Southeast Asia and ASEAN unity is under threat. While some commentators argue that ASEAN is already divided, Professor Koh's response was that individual ASEAN countries may choose to be closer to one great power, but ASEAN as a whole must remain united and neutral.

Conclusion

15. Professor Koh concluded with three points. First, ASEAN has a bright economic future, but it must not be complacent. ASEAN's aspiration to build a single economy is not complete. It is imperative for individual ASEAN economies to undertake legal and regulatory reform to increase competitiveness.

16. Second, a lesson from the COVID-19 pandemic is that ASEAN should raise its game. Professor Koh called for greater cooperation and solidary in the acquisition and distribution of vaccines. No ASEAN country should be left behind because no country is safe unless all ten countries are safe.

17. Third, ASEAN unity and neutrality will be tested in the coming years. The division of ASEAN would signal the end of the ASEAN story.

Questions & Answers

18. Dr Logan Masilamani (Canada) asked Professor Koh his views on the recent events in Myanmar. Professor Koh described the events in Myanmar as a setback from the perspectives of both Myanmar and ASEAN. The former military government had initiated the Myanmar roadmap to democracy and drafted a constitution that allowed the National League for Democracy to participate in the election. Therefore, the recent events are inconsistent with Myanmar's own ambitions of democracy. However, he also noted that the rules of ASEAN prohibit interference.

19. Mr Krishnan Gopal Insan (India) asked about the supply and distribution of vaccines in ASEAN. Professor Koh listed examples of countries supplying vaccines to other countries: India has supplied vaccine to Myanmar, Russia has supplied to the Philippines and China has supplied to Indonesia and the Philippines. Professor Koh expressed the importance of ensuring that no country is deprived of the vaccine due to economic reasons and reiterated that no one is safe unless everyone is safe.

20. Professor Joseph Weiler (United States) asked about Asian views on the US attack on the Capitol and Brexit in Europe. Professor Koh described the unprecedented attack of the Capitol as a shock to Asia but noted that the process of healing has begun with the Biden administration. Recovery would take time, but Professor Koh expressed his hopes that US will return to its status of a functioning two party country where everyone is treated with civility. The Brexit Referendum was also unexpected. However, Brexit will not be fatal to either the EU or UK. The UK appears confident in its future prospects and has also concluded free trade agreements with Asian countries such as Singapore and Japan.

21. Dr Srikant Parthasarathy (India) asked Professor Koh his views about India opting out of the RCEP. Professor Koh explained that India cannot afford to not be part of the RCEP. The other ASEAN countries would also welcome India's participation which would help maintain a balance in the power dynamics of Asia.

22. Mr Duc Viet Tran (Switzerland) asked for a clarification on the ASEAN response to the pandemic. Professor Koh emphasised that ASEAN cooperates as much as possible. ASEAN member states share best practices and donate medical equipment to other member states. However, unlike the EU, ASEAN is an intergovernmental organisation and the response in ASEAN depends on the individual member states. However, there is still extensive cooperation and coordination, as evidenced by the numerous meetings among leaders of member states.

23. Ms Danielle Yeow (Singapore) asked about whether ASEAN should consider repercussions in response to the recent events in Myanmar. Professor Koh shared that when ASEAN embarked on the process of drafting the Charter, it considered the inclusion of a clause that provides for the suspension and expulsion of member states. However, this clause was eventually excluded in the final Charter. The member states have thus decided that suspension and expulsion are not appropriate responses. Additionally, there was also debate on whether "military coups" should be mentioned expressly in the ASEAN Charter. Eventually, the Charter avoided such express language and opted for the clause "adherence to the rule of law, good governance, the principles of democracy and constitutional government" in Article 2(h). Professor Koh noted that the aspirations of democracy are stated in the Charter and encouraged Myanmar to craft a new roadmap to democracy, and a formula for power sharing.

24. Mr Aloysius Selwas Taborat (Indonesia) asked whether there is a ceiling to what ASEAN can do in response to Myanmar. Professor Koh cited the example of the previous conflict between Cambodia and Thailand. At that time, the Prime Minister of Indonesia tried to negotiate a ceasefire and seek an amicable resolution between the parties. That is an example of a member state taking initiative to promote peace and stability and Professor Koh called on other member states to do the same. In particular, Professor Koh encouraged the ASEAN Secretary-General and ASEAN Chair to engage in greater discussion on this issue.

25. Mr Thanapat Chatinakrob (Thailand) asked about the availability of Dispute Settlement Mechanisms (DSM) in ASEAN. Professor Koh emphasised the need to strengthen ASEAN DSM. Compared to International DSM, ASEAN DSM are relatively newer, and more time is required to gain the confidence of member states. With sufficient time for the development of ASEAN DSM, confidence will increase and member states will eventually be more likely to refer disputes to ASEAN DSM.

26. Ms Alexandra Smith (Indonesia) asked about how ASEAN can directly support the newer members of ASEAN. Professor Koh noted that member states that joined ASEAN later are registering even higher growth than older members. For example, Vietnam has the highest growth rate in ASEAN. This indicates that it is possible for new member states to catch up and they may look to Vietnam for inspiration. Other member states are also able to help the newer members. For example, Singapore opened offices in the 4 new member states and assisted by sharing its technical expertise.

27. Ms Hananiela Domingo (the Philippines) asked the last question pertaining to the admission of Timor Leste to ASEAN. This was echoed by Dr Arron Honniball from Singapore who wondered whether Timor Leste's membership should be considered as part of ASEAN's pandemic and vaccine management. Professor Koh expressed his admiration and respect for Timor Leste. He explained that there is an orderly process of admission and it is a matter of time before Timor Leste joins as a full member. In the meantime, ASEAN would assist Timor Leste to grow in terms of capacity to prepare for the roles it must take on as a member of ASEAN.

3 February 2021: Overview of AEC Progress and Evaluating the AEC Blueprint by Dr Chia Siow Yue

Context

1. Since the WTO Doha Round, there has been a surge in Free Trade Agreements (FTA), particularly in East Asia. The most established FTA in the region has been the ASEAN Economic Community (AEC). Recently, ASEAN has also embarked on the mega-trade bloc of the Regional Comprehensive Economic Agreement (RCEP). Dr Chia explained that the Seminar will discuss how the developments of the past few years impact ASEAN and the AEC, in particular the developments of RCEP, the US-China trade and technology dispute, and COVID-19.

ASEAN Diversities

2. Diversities among ASEAN member states have positive and negative impacts on ASEAN economic, political, and social-cultural integration & cooperation. There are different types of diversities in ASEAN.

3. Firstly, population size. Population sizes can range from Indonesia to Brunei. Secondly, economic size. This is usually measured in Gross Domestic Product (GDP) or Gross National Product (GNP) and this varies from Indonesia to smaller States such as Brunei, Cambodia, Laos and Myanmar. Thirdly, there are also huge discrepancies in economic development, which is measured by per capita GDP. Singapore has the highest GDP per capita in the region, while Myanmar has the lowest GDP per capita in the region. Fourthly, in ASEAN there are very different economic systems. Some countries are more open to investments, while some countries are more inward-looking and closed. Some countries have just emerged from central-planned economies, some countries have always been market-oriented economies. Next, ASEAN has a diverse range of political systems, including communist, military, theocratic, republican and democratic systems. Another interesting variation is colonial heritage and how this has impacted legal systems, languages, religions and social-cultural practices. Lastly, geographic size and land.

Stages of Formal Economic Integration

4. Dr Chia moved on to discuss the stages of formal economic integration.

    a. The first stage is a Preferential Trading Agreement (PTA), where a country agrees to reduce or eliminate tariff barriers on selected goods from the partner country.
    b. The next stage would be a Free Trade Area (FTA), where countries agree to remove barriers to trade on all goods among themselves and also liberalise trade in services and investment.
    c. The third stage is a Customs Union (CU), where countries in addition to removing trade barriers among themselves also adopt a common external tariff (CET) against non-members.
    d. The fourth stage is the Common Market, where countries, in addition to removal of trade barriers, also have free movement of capital and labour, harmonisation of micro-economic policies, common rules, and policies on competition.
    e. The fifth stage is a Monetary Union (MU), where countries adopt a common single currency, common exchange rate, and monetary policy.
    f. Lastly, the final stage is an Economic Union, when countries harmonize tax systems and levels of public spending and borrowing, as well as jointly agree on national budget deficits and surpluses.

5. Dr Chia explained the considerations in a choice between a Customs Union and a Free Trade Area, by discussing the difficulties of both stages of formal economic integration. Difficulties of a Customs Union may include higher tariffs toward other WTO members and a need for redress. In addition, the actions of members are restricted because any proposed adjustment to the tariff schedule by any member of the Customs Union would require consent of other members because of the CET. It is also difficult to arrive at a consensus on the CET regime where members have widely differing tariff regimes.

6. On the other hand, a Free Trade Area also presents a number of challenges. Firstly, in an FTA, it is costly and time-consuming to enforce Rules of Origin. In addition, there is the challenge presented by the Spaghetti Bowl effect. This refers to a phenomenon whereby increasing numbers of FTAs between countries slows down trade relations between them. Lastly, the erosion of tariff preferences, which refers to the idea that if a country signs agreements offering special preferences to different countries, this dilutes the special treatment given to any individual country.

Free Trade Areas (FTAs)

7. Dr Chia discussed the scope and content of a standard FTA. A standard FTA has provisions on trade in goods, governing tariffs, customs procedures, trade remedies, rules of origin, technical barriers to trade and Sanitary and Phytosanitary Measures (SPS), which is a form of protectionism in terms of consumer standards. It also has provisions on trade in services, including provisions on financial matters, telecommunications and e-commerce. In addition, a standard FTA has provisions on investment, such as liberalisation to foreign investors, facilitation and protection of investment. The FTA will also include other provisions. For example, provisions on the movement of natural persons, intellectual property protection, competition policy, state-owned enterprises, government procurement, labour and environmental standards. However, government procurement, labour and environmental standards are usually absent in ASEAN's external FTAs. Other provisions in a standard FTA include dispute settlement provisions on consultation and dispute settlement mechanisms, provisions for periodic review, and provisions on transparent administration and regulation. Commitments on transparent administration and regulation may be difficult for some States, for example Indonesia, due to its large geographical size.

8. Dr Chia shared insights on the WTO rules governing FTAs. Under rules in The General Agreement on Tariffs and Trade (GATT), which preceded the WTO, Article XXIV contains rules for trade in goods, stating that there must be elimination of barriers to substantially all the trade between signatory territories on originating goods. It also states that it is necessary to identify origin of goods through Rules of Origin. Under the WTO, Article V in the General Agreement on Trade in Services (GATS) contains rules for trade in services, substantial sectoral coverage for sectors such as tourism and telecommunications, and national treatment.

ASEAN's Formal Economic Integration

9. The historic progress in ASEAN formal economic integration was explored through an overview of different periods and stages of economic integration. ASEAN began with a Preferential Trading Agreement (PTA) in 1977, which progressed into Free Trade Areas (FTAs) from 1992, including the ASEAN Free Trade Area, the ASEAN Framework Agreement on Services (AFAS) and the ASEAN Investment Area (AIA). The progress arose due to certain factors which made ASEAN think more seriously about liberalisation to compete with the rest of the world. This gave rise to a new impetus for free trade areas, in goods, which then expanded to services and investment. In 2007, the ASEAN Economic Community Blueprint 2015 was adopted, followed by the ASEAN Economic Community Blueprint 2025 in 2016.

10. The pre-AEC period was characterised by a lack of comprehensive coverage of goods, services, and investment flows, as well as too many exceptions and exclusions. There was also weak implementation due to lack of resources, training and political will. This led to the end result that trade and investment were not really liberalised. The volume of intra-ASEAN trade and investment and extra-ASEAN trade and investment grew but not to the extent as seen in NAFTA and EU. Furthermore, tariff preferences were not used by firms and traders, and ASEAN industrial cooperation failed.

ASEAN Economic Community (AEC) Blueprint 2015 and 2025

11. The AEC was adopted primarily due to external pressure. There was concern over the weakened ability of ASEAN states to attract foreign direct investment (FDI) in aftermath of the Asian Financial Crisis from 1997 to 1998. China and India had also emerged as competitors. Investment was pouring into China, while India was reforming and was also looking outward for foreign investment. In the face of these challenges, there was a need to spur continued ASEAN economic and social development. Thus, in 1997, ASEAN leaders decided on the ASEAN Vision 2020 which called for a stable, prosperous and highly competitive ASEAN with free flow of goods, services and investment, freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities by 2020. The High Level Task Force on ASEAN Economic Integration (HLTF-EI) made proposals and recommendations. During the 2003 Bali Summit, ASEAN agreed to establish the AEC by 2020 which was later moved forward to 2015 for ASEAN-6 countries, and 2018 for the CMLV countries.

12. The AEC Blueprint 2015 outlined various measures and strategic schedules for implementation, and is an "FTA Plus" with 4 pillars. The AEC is not Customs Union nor a Common Market, which entails free movement of capital and labour and some policy harmonisation. Under the first pillar, single market and production base, elements of the AEC include free flow of goods, free flow of services, investment, freer flow of capital and free flow of skilled labour. The pillar "single market and production base" may be a misnomer, as emphasis is placed on the production base. The second pillar is a "competitive economic region", and elements under this pillar include competition policy, consumer protection, intellectual property rights, infrastructure development and taxation. Under the third pillar of "equitable economic development" in the context of wide developmental gaps, the AEC provides for Small and Medium Enterprise (SME) development and initiatives for ASEAN integration. The fourth and last pillar of "integration of global economy" provides for a coherent approach to external economic relations, and enhanced participation in global supply networks.

13. There are numerous benefits of the AEC Blueprint 2015. Firstly, the removal of tariffs and non-tariff barriers (NTBs) have led to increased intra-ASEAN trade, economic growth and employment, more efficient resource allocation, productivity gains, lower consumer prices and more consumer choices. Trade facilitation in the AEC Blueprint 2015 further promotes trade and integration into Global Value Chains (GVC) and Global Production Networks (GPNs). The AEC Blueprint 2015 also provides the benefit of services efficiency, by lowering production, procurement and distribution costs. It also led to skilled labour mobility and investment inflows, which is beneficial because FDI brings financial, technological, and managerial resources, while skilled labour mobility facilitates services and FDI liberalisation with inflows of intra-corporate transferees and other skilled professionals. The inflow of skilled labour also facilitates transfer of expertise, best practice and experience. Lastly, the AEC Blueprint 2015 allows for the narrowing of the developmental gap within countries and between ASEAN members.

14. Dr Chia then shared the limitations in the implementation of the AEC Blueprint 2015. Not all goals were met by end 2015. The most progress was made in terms of tariff elimination, but there was a lack in progress in services, trade facilitation and freer flow of labour. Many implementation problems were due to lack of political will, lack of resources and lack of time. Dr Chia discussed two quantifiable assessment indicators. Firstly, intra-ASEAN trade. This remained at 25% and was unsatisfactory compared to the growth rates of global and ASEAN economies. Furthermore, this does not contrast well with NAFTA and the EU where intra-bloc trade increased very significantly after integration. Secondly, the FTA preferential tariff utilisation rate, which has also not been very promising. This may be due to the fact that products exported within ASEAN are not subjected to tariffs

15. The AEC Blueprint 2025 is a new vision for 2025, although Dr Chia opined that it is a limited one. New issues have emerged with the Fourth Industrial Revolution, including digitalisation, rising economic and social inequalities and climate change that require regional action and cooperation. There are 5 core characteristics and elements in the AEC Blueprint 2025. It is still an FTA although it rephrased some words in the AEC Blueprint 2015. The AEC Blueprint 2025 calls for a highly cohesive and integrated economy, emphasising that ASEAN must enhance participation in global value chains. It also calls for a competitive, innovative and dynamic ASEAN, enhanced connectivity and sectoral cooperation, a resilient, inclusive, people-centred, people-oriented ASEAN with enhanced equitable economic development, and a global ASEAN. Overall, there was a slight difference in emphasis from the AEC Blueprint 2015, instead of a dramatic reform.

16. Some achievements of the AEC Blueprint 2025 include the strengthening of AEC reporting and monitoring mechanisms. The ASEAN financial system was strengthened and was able to withstand the financial impact of COVID-19. Previously, ASEAN countries were heavily dependent on IMF, but now countries had built up foreign reserves and ensured better budget positions. Most tariff liberalisation was achieved by 2015, but the process of removing NTBs, liberalising services, facilitating movement of labour and improving connectivity proved more difficult and time consuming. The ASEAN Single Window was also accelerated and implemented. Action Plans for further action include the ASEAN Declaration on Innovation, ASEAN Regional Guidelines on Food Security and Nutrition Policies, ASEAN Institutional Framework on Access to Finance for MSMEs, Vision for Resilient and Innovative ASEAN and the establishment of the ASEAN Smart Cities Network.

<u>ASEAN Integration via Global Value Chains (GVCs) and Global Production Networks (GPNs)</u>

17. The development of GVCs/GPNs is an explicit objective of AEC Blueprint 2025, as compared to the AEC Blueprint 2015, where it was only tacitly acknowledged. Free Trade Areas promote GVCs and GPNs. A GVC or GPN is the idea of fragmentation of production at different locations according to comparative advantage, which emphasises specialisation in tasks and not in products. Countries trade in value-added rather than in gross products. In the Smile Curve, both upstream and downstream segments have higher value add. The upstream segment includes research and development, branding and design. The central segment includes manufacturing, fabrication and assembly. The downstream segment includes logistics of distribution, marketing, sales and services.

18. Determinants of GVC and GPN participation include unit labour cost, cross border coordination costs and trade costs, proximity to hubs, participation in FTAs and minimal disruptions to supply chains caused by natural disasters, political-social unrest, and pandemics like COVID-19. Every country aspires to enter the low end of the GVC and then progress up to the high end of the GVC.

19. There are numerous benefits of GVC and GPN participation. Firstly, it fosters industrialisation as a country only needs capabilities in specific tasks. It also encourages trade liberalisation, trade facilitation and connectivity, and promotes the growth of intra-regional trade and FDI.

20. States also have a number of concerns in GVC and GPN participation: For excluded countries, their concern is how to participate to take advantage of China's rebalancing phase and exiting due to the US-China trade and technology conflict. For developing countries, their concern is how to upgrade upwards in the value chain to increase domestic value-added, skill content and domestic linkages. Developed countries would be concerned with how to prevent offshoring that leads to de-industrialisation and unemployment. Foreign corporates and local supplier firms would be concerned with how to minimize disruptions to supply chains and minimize coordination costs.

21. Dr Chia moved on to discuss the factors which explain why GVCs and GPNs are developing in East Asia and increasingly in ASEAN. The first factor is a global environment of multilateralism which is pro-trade and pro-FDI. Secondly, offshoring and outsourcing has increased, after it began in the region with the Plaza Accord of 1985 when Japanese manufacturers went to other Asian countries for these services. Another factor explaining the development in East Asia was the entry of China into WTO. Furthermore, the economic reforms as well as infrastructure and connectivity development in Northeast and Southeast Asia have facilitated and incentivised multinational corporation (MNC) investments. Labour cost relative to productivity is also a relevant factor. For example, rising labour costs and lack of labour mobility within China would lead to offshoring and outsourcing away from China. The US-China Trade War also encourages American firms to relocate.

ASEAN and the Regional Comprehensive Economic Partnership (RCEP)

22. The existence of many different FTAs led to the spaghetti bowl effect and erosion of tariff preferences. Thus, the case for a region-wide FTA proposes to overcome the spaghetti bowl and tariff erosion effects, provide economies of scale and scope, facilitate regional production networks, build regional resilience, and provide political benefits of an Asian community and stronger regional voice. In discussing the region-wide FTA, the existence of rival FTAs must be considered. For example, the Trans-Pacific Partnership, which includes the US but excludes China and some ASEAN countries.

23. A comparison of RCEP and the Trans-Pacific Partnership (TPP) was conducted by Dr Chia. TPP started with 4 parties, Singapore, New Zealand, Brunei, and Peru, and was expanded. Entry of the US resulted in the inclusion of rules that precluded the participation of countries such as China and Vietnam. The discussions included labour and environment, as well as government procurement. The exit of the US led to Japan's leadership in the TPP with 11 parties, which excluded some chapters that US had insisted on. TPP 11 (or Comprehensive and Progressive Agreement for Trans-Pacific Partnership, CPTPP) was a modification of the TPP with 12 parties (TPP 12). Therefore, RCEP was proposed as a counterweight to the US-dominated TPP.

24. RCEP is ASEAN-centric and includes other Asian countries, such as more low-income countries. It is noted that India backed out of the RCEP at the last minute. There is significant investment promotion in RCEP. RCEP is ASEAN-centric and seeks to reinforce ASEAN centrality in regional economic integration. However, there have been misconceptions that RCEP is China-centric.

25. The main principles of RCEP include coverage, which promotes improvement over existing ASEAN FTAs with dialogue partners, process, and open accession, which enables participation of any other ASEAN FTA partners should they not be ready to participate at the outset as any other economic partners. This means that the door is open to India as an ASEAN+1 State. The main

principles also include economic and technical cooperation, facilitation, economic integration and special and differential treatment. Economic and technical cooperation allows less developed countries to upgrade themselves and move up the value chain. Facilitation includes all measures that reduce business costs, while Economic integration compels RCEP to contribute to ASEAN economic integration. In line with the principle of special and differential treatment, the RCEP provides for special and differential treatment to ASEAN member states, especially Cambodia, Laos, Myanmar and Vietnam (CLMV) vis-à-vis the developing ASEAN countries. ASEAN cannot forsake the CLMV in order to enter a bigger agreement.

Collective ASEAN Response to COVID-19

26. Literature on the ASEAN Response to COVID-19 includes the East Asia Forum Collective ASEAN Response to COVID-19 on 16 July 2020, and the Statement by the ASEAN Chairman on ASEAN Collective Response to Outbreak of Coronavirus Disease 2019 adopted in February 2020.

27. ASEAN was ready for COVID-19 because of previous experiences with SARS, Avian and Swine Flu. ASEAN countries learnt the importance of regional cooperation from SARS, during which there was a regional public response which created regional resilience. Thus, the ASEAN Secretariat Health Division alerted ASEAN senior health officials to COVID-19 very promptly. By mid Feb 2020, ASEAN ministerial health, foreign affairs and tourism bodies intensified multi-sectoral cooperation, especially through the ASEAN+3 platform. ASEAN also activated pandemic preparedness protocols for travel, tourism and borders, sharing of information and best practices, and strengthening of response capabilities. This was further supported through the COVID-19 ASEAN Response Fund. ASEAN countries sought to ensure free flow of goods, especially medical and food supplies, and to keep critical infrastructure and trade routes open. ASEAN also supported maintenance of GVC and GVN which were heavily disrupted.

28. Dr Chia pointed out that some economists argue that openness to international trade, investment, and people should not be abandoned because of the pandemic which is a once in a lifetime event. The case for cooperation has never been stronger. Access to medical equipment, vaccines and food is strengthened by open markets, not diminished by them. Macroeconomic stimulus is also stronger when it is coordinated.

29. Dr Chia concluded with the difference between COVID-19 and previous crises. Firstly, the crisis did not originate from the financial sector. Flooding markets with liquidity may not prevent problems in the real economy from destabilising financial institutions and markets. Secondly, fiscal stimulus packages may not be the right policy focus especially when there is a supply shock. Although demand may be sustained through stimulus, supply and production cannot keep up.

Questions & Answers

30. Dr Srikant Parthasarathy (India) asked if there are issues with Rules of Origin (RoOs) in ASEAN, similar to the issues in Europe and the United Kingdom. Dr Chia answered that there have always been arguments over RoOs. ASEAN has never been transparent in that officials do not always publish disputes. Most disputes are settled internally at ministerial level, and not made transparent for the general public. Whereas in the case of the US, trade disputes are open and accessible.

31. A participant was interested in how ASEAN countries settle disputes. Dr Chia explained that when ASEAN countries cannot resolve disputes by themselves, they refer it to international organisations. For example, they may refer it to a WTO panel. However, before ASEAN countries

go to WTO, they must agree that the WTO decision will be binding. This is the same with territorial disputes.

32. Mr Chan Aye (Myanmar) asked if national treatment should always be regarded as a good thing, since there would be a challenge for domestic service providers as they may not have sufficient ability and resources to compete with investors. Dr Chia answered that it depends on the specific situation. If a country wants to participate in international investment for inflow of foreign investment, it must show investors that they will be treated predictably and fairly. For example, China's foreign investment law was opaque but tacit norms and practices provided predictability and allowed other overseas ethnic Chinese investors to enter China.

33. Mrs Rachminawati (Indonesia) asked what was needed to bring ASEAN from the FTA stage to the next level of economic integration and to improve human rights? Dr Chia responded that there were many issues that impinge on human rights, but human rights can be implicated by economic development, for instance, the right to employment and a good living environment. Economic development would raise standards of living. However, each country has its own issues that they do not allow others to intervene in. As a result, Dr Chia did not think that there was a right answer, apart from stating her opinion that human rights is part of the economic community, particularly the right of employment.

34. Mr Aloysius Selwas Taborat (Indonesia) asked how national security concerns implicate trade. Dr Chia responded that even under WTO trade rules, national security concerns are included. The issue is how one defines national security. Sometimes national security has been abused to restrict trade.

35. Mr Tie Fatt Hee (Malaysia) asked if ASEAN countries get trapped at the bottom of the smile curve. Dr Chia answered that yes, they do. Cambodia is one example. The garment industry in Cambodia has been around for a long time but it is difficult for Cambodian designers to design garments, manufacture, and export them. No one knows about the Cambodian designers. They cannot move up because fashion houses and firms monopolize the market. That is a big problem. On the other hand, some argue that with the lockdown, maybe the Cambodian domestic market will consume Cambodian designs, and Cambodian designs can be exported first to the region.

36. Mr Mohd Suhaimi Ahmad Tajuddin (Malaysia) asked if the relocation of American firms would cause the US to push prices up. Dr Chia agreed that it would. Even if American workers are productive, they are also a lot more expensive. And even if production shifts back to US, the manufacturing becomes mechanised to save costs. American workers do not benefit. The key is for the American manufacturers to reskill to become capable of providing higher value.

37. Mr Benjamin Morley (UK) raised the idea of movement due to rise in labour cost, stating that it is quite a big undertaking for firms to move. He asked what the major tipping points for shifts in GVCs from one country to another are, and what are some obstacles and motivations. Dr Chia answered that companies move because of cost. The country may be an unreliable producer or supplier in the sense that there are labour strikes all the time which disrupt production, or other factors such as natural disasters and pandemics. This is why some parts of the world are good locations and some are not. For example, Laos is a landlocked country whereas some pacific countries are surrounded by the sea. Logistics cost is a big issue. There is also coordination cost which depends on factors such as communications and networks. In technology production, intellectual property rights are also important.

38. A Malaysian participant asked if the AEC Blueprint 2025 is the last deadline that ASEAN will have for economic integration. Dr Chia noted that ASEAN has changed its deadlines before. It is highly improbable that this will be the final deadline because many countries probably cannot satisfy the demands of AEC 2025. This depends on the COVID-19 situation as well.

39. A participant asked if traditional skills and cultural expressions may be left out of trade frameworks that are being negotiated. Dr Chia explained that these come under intellectual property. There is a movement now in many developing countries to have skills and indigenous technology protected under intellectual property rights. The question now is whether ASEAN can collectively have its own intellectual property laws to document indigenous technologies, many of which are shared across national borders. Dr Chia shared her belief that ASEAN should work to collectively own these intellectual property rights.

40. Mr Jonathan Lim (Australia) asked what part COVID-19 has played in accelerating technology trade and digital transformation in ASEAN. Dr Chia shared that it has definitely accelerated digitalisation on both the consumption and production side. On the production side, workers must work at home. On the consumption side, there is an increase of digital purchases, transfer of funds and many other transactions. These developments have accelerated trends.

4 February 2021: Organising the Public Bureaucracy to Ensure Effective Implementation and Compliance with ASEAN Commitments by Professor Jon Quah

1. Professor Quah began with the preconditions for effective policy implementation. They include: (1) understanding the policy context, especially constraints; (2) identifying obstacles to implementation; (3) mobilising the necessary human and financial resources; (4) addressing the unintended consequences of policy; and (5) a strong dose of political will.

2. Professor Quah adopted Van Meter and Van Horn's definition of policy implementation which is "actions by public and private individuals (or groups) that are directed at the achievement of objectives set forth in prior policy decisions".

Conceptual Framework

3. Professor Quah moved on to the obstacles to policy implementation, referencing Gordon Chase's analysis of policy implementation in New York City. Chase identifies 44 obstacles to policy implementation which arise from 15 factors. These 15 factors can be subdivided into three broad categories: (1) Operational Demands on the Organisation; (2) Nature and Availability of Resources; and (3) Need to share authority. The higher the number of obstacles, the more difficult it is to implement a policy. Professor Quah noted that it is crucial to be aware of potential obstacles before policy implementation should proceed.

4. Professor Quah listed Van Meter and Van Horn's model of the policy implementation process. There are two dimensions which can affect implementation, namely, whether the policy calls for major or minor change and whether there is low or high goal consensus on the policy objective. Table 2 (as titled in and taken from Professor Quah's presentation) below gives an overview of the four scenarios. In the first scenario where implementation entails major change and where there is low goal consensus, policy implementation will be difficult. Secondly, it is rare to achieve high goal consensus where the policy calls for major change. Thirdly, situations entailing minor changes and low goal consensus occurs when controversial programmes are re-authorised with only minor modifications. Lastly, policies are easy to implement when they call for minor and incremental change and achieve high goal consensus.

Table 2: Policy Dimensions Affecting Implementation

Major change	**Difficult to implement** **Most policies are in this cell as programmes needing major changes usually lead to conflict**	**Rare as it is unusual to achieve goal consensus for major changes**
Minor change	**This occurs when controversial programmes are re-authorised with only minor modifications**	**Easy to implement** **Most policies are also found in this cell as goal consensus is usually highest when change is incremental**

5. Furthermore, Van Meter and Van Horn provide six variables which can influence policy implementation:

    a. Policy standards and objectives.
    b. Policy resources: availability of money, personnel, space, supplies and technical equipment.
    c. Inter-organisational communication and enforcement activities.
    d. Implementing agencies.
    e. Disposition of implementers.
    f. Economic, social and political conditions.

Policy Contexts in ASEAN countries and Implications for Implementation

6. Next he explored the policy contexts in ASEAN countries (such as the geographical size, population, gross domestic product per capita, corruption index, etc.). He notes that the policy context of the ASEAN countries have implications on the aforementioned obstacles and dimensions to implementation.

Two Case Studies of Policy Implementation in ASEAN

7. Professor Quah used two case studies of ASEAN policy implementations to illustrate the concepts covered thus far. The ASEAN Cosmetic Directive (ACD) is a case study of effective implementation whereas the ASEAN agreements on transnational crime were a case study of ineffective implementation. For example, the ACD deals with one issue/has one main objective, has few implementing agencies, and faced numerous obstacles such as the SMEs' lack of capacity, the limited budgets of implementing agencies, and corruption. On the other hand, ASEAN agreements on transnational crime faced multiple issues, had many implementing agencies and faced similar obstacles. On top of that, the effort to tackle transnational crime had to deal with a lack of goal consensus, and coordination problems due to the multiplicity of objectives and their inherent complexities.

8. ACD was more successful because its obstacles were more easily overcome and it did not face problems of coordination issues as there was only one implementing agency which was responsible for one singular objective. In contrast, the various ASEAN countries had varying conceptions of transnational crime and how best to address it.

Policy Recommendations

9. Professor Quah noted that Peter Cleaves' six dimensions can help to achieve success in implementation:

    a. Degree of complexity: the simpler the technical features, the less problematic and vice versa.
    b. Scope of change: incremental change is easier to achieve.
    c. Number of actors involved: fewer actors are usually favourable in achieving success in policy implementations.
    d. Number of goals: one-goal objective policies are usually easier to implement than multi-goal objective policies.
    e. Clarity of goals: Policies are easier to implement when objectives are clearly stated.
    f. Duration of implementation: implementation processes that span shorter durations are preferable.

10. These six dimensions help to determine the difficulty in implementation. The more difficult or 'problematic' the implementation, the greater the resources needed. To this end, Professor Quah references Cleaves' framework for the relationship (Table 7 as titled in and taken from Professor Quah's presentation, see below) between resources available for implementation and how problematic it is to implement. For example, a policy is difficult to implement if it is 'problematic' and has access to more resources. Conversely, wastage would occur if more resources are poured into less 'problematic' policies. Thirdly, 'problematic' policies which have access to fewer resources are likely to end in failure. Lastly, less 'problematic' policies are easily implemented even with fewer resources.

Table 7: Factors Affecting Policy Implementation

Policy actor	More problematic policy	Less problematic policy
More resources	**A** **Difficult**	**B** **Wastage**
Fewer resources	**C** **Failure**	**D** **Easy**

Political Will

11. Professor Quah then turned to political will, the final ingredient to successful policy implementation. Political will refers to the government's commitment to provide the public bureaucracy and implementers with the necessary legal powers, budget, personnel and equipment to implement the policy.

12. Policy will is needed for policy implementation for two reasons:

    a. Policy implementation is expensive, so sufficient resources must be provided.
    b. There is a need to overcome the resistance of individuals and groups with vested interests who may oppose reform (e.g. corrupt officials).

Public Bureaucracy

13. On top of political will, an effective public bureaucracy is necessary to achieve success in implementation. There are three ways to increase effectiveness:

    a. Proper recruitment and selection of qualified and competent personnel on the basis of merit.
    b. Reliance on e-government to reduce red tape and improve the delivery of essential services.
    c. Removal of corruption which requires the impartial enforcement of anti-corruption laws without political interference.

14. Professor Quah moved on to the link between red tape and the level of corruption. There is a high correlation between red tape and corruption. He illustrated this point by showing the number of days required to obtain construction permits in the ASEAN countries and comparing it to their corruption index score.

15. Professor Quah elaborated on how to enhance the capacity of implementing agencies.

    a. Implementing agencies should have adequate resources.
    b. Personnel should be competent and not oppose the policy.
    c. Objectives and standards must be clearly stated.
    d. There must be channels for stakeholders and NGOs to provide feedback on policy impact.
    e. Minimise number of agencies; if there are many agencies, inter-ministerial committees needed for coordination.

16. Professor Quah concluded with three ingredients for effective policy implementation. The first is political will, comprised of sufficient legal powers, adequate budget, and adequate personnel. Second, there needs to be an effective public bureaucracy. Civil servants must be promoted on merit and not by patronage. Training must be provided to enhance competence and capacity, and civil servants ought to be remunerated sufficiently. Lastly, zero tolerance for, or minimal corruption is necessary. This includes being able to investigate corrupt officials impartially without political interference. To this end, Professor Quah stressed the importance of an independent watch-dog to investigate corruption. Corruption must be dealt with according to the law

Questions and Answers

17. Ms Chan Sze-Wei (Singapore) asked how one should look at corruption in this situation of transition, especially in this pandemic. Professor Quah's response was as follows. Whenever there are periods of emergencies, be it pandemic or disasters, the opportunities for corruption increase. For example, in a pandemic, the procurement of masks is subject to opportunities for corruption. Or when aid flows in from other countries. The key is to make sure that the money or resources are delivered to the proper channels. Even times of crises and emergencies, it is important to be vigilant. Accountability is also difficult to achieve because in times of emergency, people are focused on solving problems and saving lives.

18. Dr Srikant Parthasarathy (India) asked whether there was a link between corruption and diplomacy, and how corruption as a factor might affect the diplomatic relationship between countries. How would corruption affect global policy making? Was corruption a talking point at diplomatic meetings? Professor Quah answered that corruption is usually seen as an internal problem. It also depends on the international body in question. For example, in India there is the Central Bureau of Investigation (CBI). This was similar to Hong Kong and Singapore in terms of colonial background. Corruption used to fall under the ambit of the police. In Hong Kong and Singapore, independent bodies were set up to tackle corruption but in India, the CBI is still a police outfit. As corruption is a sensitive issue for countries, it is difficult for other countries to broach the subject of corruption. The fight against corruption must be homegrown. Countries do not expect other countries to tell them how to deal with corruption as an internal issue. It is possible to learn from other countries but corruption must be tackled internally.

19. Mr Giovani Concepcion (Philippines) asked about safeguards to minimise corruption – was it possible to give some examples of safeguards to prevent corruption in times of crises like in the pandemic? In the context of corruption, Professor Quah pointed out that masks are an important resource/commodity. For example, in manufacturing, quality control must be ensured. In terms of distribution, citizens must be able to obtain masks. It is crucial to identify points of scarcity and see where there are opportunities for corruption to divert such resources for their own gain instead of for the public good.

20. Dr Arron Nicholas Honniball (Singapore) prefaced his question by discussing how transnational crime is a difficult area to address as compared to cosmetics. He asked if it made a difference if a binding treaty is used instead of soft law instruments, and if this would affect implementation. Generally, Professor Quah said yes, but different countries have different views and have different approaches even when hard law is used. The difficulty is in enforcement. For example, in Professor Quah's book, in the chapter on the Philippines, there is a lack of consistency in enforcing the law. In the context of transnational crime, there are many agencies involved, so it boils down to coordination and enforcement on the ground for these agencies. The more pertinent issue is how the ten ASEAN countries can work together on complicated issues.

21. Mrs Rachminawati (Indonesia) asked if ASEAN could have a different form of decision making besides consensus to achieve better implementation. For example, in the case of the ASEAN Intergovernmental Commission on Human Rights, the terms of reference had to be reviewed for the second time because there is no consensus. Professor Quah responded first with a question: What is the alternative to consensus? A lot depends on the problem being talked about. Human rights as a whole is a sensitive issue, and therefore it is very difficult to get consensus. It all boils down to the issue. In comparison, there is probably greater ASEAN consensus on responses to the COVID-19 crisis, since everyone is equally affected by it.

22. Dr Jia Wang (China) asked for elaboration on the methodology behind the ACD and Transnational Crime Agreement study. Professor Quah invited participants to read the study in greater detail, specifically the two chapters summarising how the five countries (Singapore, Malaysia, the Philippines, Vietnam, Indonesia) tackled implementation. The ACD was highlighted by the ASEAN Secretariat as successful because the five countries already have their own domestic regulation on the health effects on cosmetics. For transnational crime, there are seven categories of transnational crime, and each country has different approach to implementation. Different countries have different views on how to tackle such transnational crimes whereas for ACD, the countries all agree on the cosmetic standards. Dr Tan Hsien-Li chimed in to add that the ACD was so standardised was because of the multinational giants in the cosmetic industries. EU companies like L'Oreal set certain standards to be met if such products are to be traded. Combating transnational crime, she agreed, is much more complex than standard setting for cosmetics.

23. Ms Angeline Ang (Singapore) wanted to know how to compare the ACD and transnational crime, seeing as one is a private good and the other is a public good. If we apply this reasoning to other industries, would this also mean that policy implementation is easier to similar industries? Professor Quah's response was to consider why governments regulate and push for policy. In the context of ACD, the governments must consider traditional medicine and indigenous products. There are incentives in different policy context. One must examine each issue and examine the policy context.

24. A participant asked what must be considered in anti-corruption best practices. Professor Quah responded by providing an example. The Philippines has five anti-corruption agencies because every new president which came to power introduced their own agency. The key difference between two countries is that Corrupt Practices Investigation Bureau in Singapore is given enough power and resources (per capita). To fight corruption effectively, sufficient resources need to be allocated. In the Philippines' anti-corruption agencies, there are many vacancies and the agencies are heavily understaffed. The government must provide the agency with enough resources. Next would be to reduce the number of agencies to one singe body. The law then must be enforced impartially.

25. Mrs Winsherly Tan (Indonesia) asked about money laundering: whether ASEAN efforts to combat money laundering had any impact on national anti-money laundering efforts. Professor Quah acknowledged that money laundering is a serious problem because of the globalisation of corruption which makes it easy to transfer money. An example is the 1MDB scandal. In the UN Convention against Corruption, there are two stages. The first stage is signing. The second stage is ratifying. For the second stage, it is difficult because many laws must be amended. Japan signed the UNCAC but till today has not ratified it. Why? Because ratification requires establishment of an anti-corruption agency to fight crime. But Japan does not have one since its government is reluctant to fight corruption. There is structural corruption within the civil service and government. Currently, the police is relied on to tackle corruption and this approach is reactive. It comes down to political will, whether government is serious about fighting corruption.

26. A participant built upon Mrs Tan's question by asking about corruption in the private sector (individuals, corporates) and what could be done if many of the actors were not part of government. Professor Quah noted the recent trend is increasing private sector corruption. 80% of corruption was from private sector while only 20% was from public sector. However the corruption perception index only focuses on public sector. It is important to take a total approach and focus on both sectors. It is necessary for the private sector to have codes of conduct to fight corruption but ultimately it depends on political will in government to fight corruption in both public and private sectors since only honest individuals abide by the codes of conduct. Another important aspect is reporting procedures and whistle-blower protection.

27. Captain Ye Naing (Myanmar) asked Professor Quah for his opinion on the best way from a legal perspective to address corruption? Quite simply, his answer was to empower anti-corruption agencies.

28. Mr Vincent Lim (Singapore) noted the difficulties behind implementing major changes and wanted to know whether it was correct to say that the solution would be to break changes down into changes that are smaller and easier to implement. For instance, in terms of transnational crime, he suggested that ASEAN could focus on one specific type of crime where there is higher consensus between ASEAN countries. Professor Quah agreed; the difficulty is the diversity between ASEAN countries and the complexity of the issues being tackled. The issue however is for ASEAN countries to collectively focus on one issue. Do they focus on the top priority issues? Unfortunately, these are usually the hardest to tackle. Conversely, the low hanging fruits are usually also low impact. Maybe the ASEAN countries could start with cyber-crime. The diversity between ASEAN countries can be a challenge and opportunity at the same time - a challenge because the countries may have different priorities, and an opportunity because well-developed countries can offer aid. Professor Quah thought that cyber-crime could be a good place to start.

29. Mr Cesar Ong (the Philippines) wanted to know how to balance the increase in anti-corruption policy and an increase in inefficiency. Professor Quah reminded participants to ask what is driving the corruption. A driver could be the low salaries of civil servants. Another factor is red tape. When civil servants are poorly paid, they are incentivised to take advantage of regulation and use 'roadblocks' for monetary gain. The solution is therefore to pay them better and also rely on e-governance which is more transparent. But e-governance presents significant costs. Another way is to reduce red tape. The more red tape, the more opportunities there are for corruption, so an efficient bureaucracy is important.

30. Ms Dita Liliansa (Singapore) asked if it mattered that one policy was within the ASEAN economic pillar whereas transnational crime was under the political-security pillar. Professor Quah said that it did matter and sovereignty is a key factor. In the economic sphere and with the ACD, it is a less sensitive issue, whereas transnational crime is a political issue.

31. Mr Duc Viet Tran (Switzerland) asked another question on state capture. As most anti-corruption bodies in ASEAN lack legislative authority, resources and independence, he wanted to know what steps ASEAN countries could take together to address such obstacles. Professor Quah's answer was that there are three levels to combatting corruption. At the lowest level is corruption of civil servants, then politicians, and finally at the highest level is state capture. Why are Denmark and New Zealand effective at fighting corruption if they don't have anti-corruption bodies? They have other institutions like the ombudsmen. The key is to have strong institutions that can perform policing functions, it is also important not to have too many institutions. Having an anti-corruption body is insufficient – such institutions must also be well-funded, independent, and free from political interference.

8-10 February 2021: ASEAN Free Trade Area and Rules of Origin by Mr Stefano Inama

Introduction

1. The Rules of Origin (RoO) determine the nationality of the goods. Depending on the nationality of the goods, duty-free entry may be granted or duties may be levied. Every member of the WTO is free to design its RoO. RoO are powerful trade policy instruments as they are used to implement a state's trade policies. Often, products are made from multiple components sourced from different countries before assembly. A notable example is the iPhone which is designed in the US, and sources parts from Japan, Korea, and Germany before assembly in China. In such cases, the US customs determine the RoO based on the last place in which the product was substantially transformed into a new and distinct article of commerce based on a change in name, character, or use.

2. Mr Inama drew a distinction between preferential and non-preferential RoO. Preferential RoO refer to duty free or reduced rates applicable to "Most Favoured Nations" (MFN). On the other hand, non-preferential RoO apply in the absence of trade preferences.

Basic Concepts

3. While each trade agreement may stipulate its own RoO, there is a basic set of concepts that underlie the different rules. At the core of RoO are the following concepts: wholly obtained products, substantial transformation, cumulation and certificate of origin.

Wholly obtained Products

4. By definition, wholly obtained products do not contain non-originating inputs. Examples include mineral products extracted from the soil or seabed, vegetable products harvested on their soil and animals born and raised in the originating country.

Substantial transformation

5. Substantial transformation refers to a fundamental change in a product's form, appearance, nature or character and it has transformed into a distinct and new product. Mr Inama noted that there remains ambiguity on the concept of substantial transformation. For it to be effective, it must provide precise guidelines, but there is no clear consensus on the method of determining substantial transformation. There are three methods of calculation:

    a. Ad valorem percentage based on:
        i. Value added calculation.
        ii. Maximum amount of non-originating materials.
        iii. Value of materials either originating or non-originating based on ex-works.

    b. Change of tariff classification (CTH)
        i. CTH, CTH with exceptions.
        ii. Tariff shift at CTSH with exceptions and regional value content.

    c. Specific working or processing

Cumulation

6. Cumulation is a measure that permits countries to use non-originating inputs while counting it as an originating input for the purposes of determining the origin of the product. The different types of cumulation differ qualitatively and quantitatively. Quantitatively, the cumulation may occur in a bilateral, regional or worldwide context. Qualitatively, there is a distinction between full cumulation and diagonal cumulation.

7. Bilateral cumulation takes place between two FTA partners. They are permitted to use products that originate in the other FTA partner and count it as their own when seeking to qualify for preferential treatment. Diagonal cumulation operates when a group of countries adopt the same set of preferential origin rules. These countries are permitted to use products that originate in any part of the area as if they originated in the exporting country. Full cumulation is similar to diagonal cumulation, but the countries with the same set of preferential origin rules are permitted to use the goods even if they are not originating products.

8. To further illustrate the distinction between diagonal and full cumulation, Mr Inama gave an example of a rule of origin of 40% value added. Under diagonal cumulation, both Countries A and B must individually satisfy the requirement of 40% value added before it qualifies as an originating product. Under full cumulation, the sum total of value added in countries A and B must reach 40%, this means that it is possible for Country A and Country B to individually contribute 20% value added, which results in a sum total of 40% value added.

Intermediate materials

9. Mr Inama used the examples of engines and pistons to illustrate the concept of intermediate materials. In the hypothetical, the RoO for an engine stipulates that the value of the non-originating materials may not exceed 40% of the ex-works price. The engine is assembled using pistons and the pistons are manufactured from non-originating ingots. If the RoO for pistons stipulate that forging pistons from non-originating ingots is origin conferring, the piston would qualify as originating in the calculation of value of the engine. Therefore, the value of the non-originating ingot is excluded from the calculation of non-originating materials in the engine.

Certificate of origin (CO)

10. The Certificate of Origin is evidence of originating status. It is issued by the Certifying Authorities and includes the exporter declaration on the invoice, exporter declaration by a registered exporter and the importer declaration.

ASEAN Rules of Origin: A way forward

Background

11. The original ASEAN RoO were ambiguous and provided limited guidance on the calculation and definition of the numerator and denominator. There were 2 methods of calculation: the direct and indirect method. Under the direct method, a good is deemed to have originated from ASEAN Member States if at least 40% of its content originates from any Member State. Under the indirect method, the Value of Non-ASEAN Materials/FOB Price x 100% must be less than or equal to 60%. ASEAN Member States were free to choose between the direct or indirect methods of calculation. However, as emphasised by Mr Inama, both methods did not provide any guidelines on the definition of the numerator and denominator of the respective formulas.

Substantial Transformation Test

12. In the period from 1995 to 2005, the original ASEAN RoO were reviewed and Product Specific Rules of Origin (PSRO) in the textile and clothing sector were added. The primary addition was the substantial transformation criterion. However, this raised a series of issues as substantial transformation *per se* is not an origin criterion in the rest of the world. Additionally, the substantial transformation criteria were not codified and not incorporated in the Common Effective Preferential Tariff (CEPT) RoO.

Product Specific Rules of Origin

13. In the period from 2000 to 2007, complaints by various industries once again prompted ASEAN to review the RoO. Notably, in 2004, ASEAN agreed on a standardised calculation for the percentage criteria *direct* calculation. The Task Force also further elaborated on the PSRO that could be an alternative to the percentage criterion. However, the PSRO was also not incorporated in the main rules of the CEPT.

Development of RoO post-2005

14. On the present development of ASEAN RoO, Mr Inama explained that ASEAN has not adequately modernised its RoO. Additionally, individual ASEAN dialogue partners have relied on their respective views and experiences in interpreting RoO, and there has been no attempt by ASEAN to collectively standardise and consolidate a list of best practices.

Future Development of RoO

15. Moving forward, Mr Inama recommended a review of the ASEAN RoO. The current requirement of 40% does not sufficiently reflect the fragmentation of production. He explained that consultation with industry experts and prospective investors ought to be conducted, and the threshold of 40% ought to be lowered. Additionally, the drafting of the ASEAN Trade in Goods Agreement (ATIGA) should be in line with best practices and correspond with the tested methodologies stipulated in the Free Trade Agreements with ASEAN dialogue partners.

16. Mr Inama also emphasised that single transformation ought to be the rule of thumb applied in drafting Rules of Origin. Such a method takes into account the Global Value Chain and also considers sensitive sectors. New PSRO should be developed based on past experiences and lessons learnt from the acquisition of international expertise.

17. The administrative aspects of the RoO should also be simplified, namely in the area of export declaration. Mr Inama also recommended that ASEAN adopt a uniform code of practice for consistency. The results of the proposed reviews could be put to test through workshops with policymakers and private businesses.

Practicum

18. For the practicum on the last day of the specialisation, participants completed their presentations in groups. They took on the role of a Senior ASEAN official representing a government at an ASEAN senior official meeting where issues pertaining to the utilisation of ATIGA and ASEAN FTA were raised. They were divided into three groups: high income ASEAN member states, middle-income ASEAN member states and low-income ASEAN member states. Based on the group division, the

participants' presentations had to reflect the different trade interests and attitudes of the respective ASEAN member states.

19. Participants were tasked to analyse and examine the low utilisation rates of ATIGA and to review the operational certification procedures. In addition to identifying the national and regional trade interests, they had to make constructive proposals to resolve the identified issues and achieve consensus with other delegates.

20. In his concluding remarks, Mr Inama emphasised the importance of taking advantage of all the mechanisms and institutions of ASEAN. Notably, participants could have called upon the secretariat to play a greater role in tackling the issue of low utilisation rate of ATIGA. He recommended that the secretariat be notified of the low utilisation rate and prompted to conduct more in-depth research and assessment of the situation on the ground. The collected data should also be published in an annual report.

Questions & Answers

21. Ms Alexandra Smith (Indonesia) asked how RoO are determined when a country has multiple trade agreements. Mr Inama acknowledged that it would indeed be simpler and more straightforward to have a single agreement, but that is unlikely to happen. In cases where a country has different trade agreements with its trade partners, the applicable rule would be dependent on the specifications of the agreement in question. If it is unspecified, it is likely that parties intended to follow the general RoO prescribed by ASEAN.

22. Mrs Tresnawati (Indonesia) asked why ASEAN did not involve their custom institutions in negotiations for RoO and only included the ministry of trade. Mr Inama agreed that the relevant customs should have been included in the negotiations and they would be able to offer specialised expertise and knowledge that would help to better clarify the regulations.

23. Mr Md Nooruzzaman (Bangladesh) asked whether it is possible for the WTO to standardise the RoO. Mr Inama explained that there are currently no multilateral RoO in the WTO. There were attempts to create a set of rules in the past, but the negotiations lasted for over a decade with no consensus. Based on the history of past negotiations, it is unlikely that there would be a standard set of rules in the future.

8-10 February 2021: ASEAN Investment Law by Professor Cho Sungjoon

1. Professor Cho Sungjoon led participants of the Academy on a three-day course on ASEAN Investment Law, revisiting the history of trade liberalisation in the region and exploring the evolution of ASEAN Member States' practice in foreign direct investments.

Global Investment Law

2. Professor Cho began by providing an overview of global investment law — that is, the body of law dealing with trade and foreign investments, and which largely concerns bilateral investment treaties (BITs). States' entering into BITs are a fairly recent phenomenon, but one that is continuously on the rise. International investment law initially came about as an alternative to gunboat diplomacy, with individuals or entities holding overseas investments seeking assurances that they will have sufficient remedies in case of expropriation by host States. Generally, investors have two means of protecting their investment: through diplomacy and legal means. However, the exercise of diplomatic protection requires that the investor be able to wield a lot of power to get the State to advance its interests. Thus, Professor Cho emphasised, it is better to rely on legal remedies than on naked power. In fact, the existence of treaties goes to show that diplomacy does not work all the time.

3. International investment law does not exactly find its origins in treaty law, but rather in customary international law (CIL). Norms that have emerged under CIL have been codified in turn into BITs. These norms emerged throughout the course of the following historical developments: the post-World War II decolonisation process which necessitated a review/revision of state-to-state relations owing to the emergence of a new political environment that was not amenable to investment protection; the era of import substitution, a particular development strategy observed by Latin American and Southeast Asian countries; and eventually the shifting of gears towards globalisation and the Washington consensus, which spoke to the fact that import substitution did not work.

4. Today, there is a considerable rise in Investor-State Dispute Settlement (ISDS) cases as reflected in the UNCTAD ISDS database. Such cases appear to be rising in relation to the existence of the BITs themselves, the contracting of which skyrocketed in the 1990s. Presently, there are over 3,000 BITs all over the world. The unique feature of this regime is that individual foreign investors can directly sue foreign States, which is not the norm elsewhere in international law. In terms of substantive law, these BITs have provided a means for investors to seek from host States: national treatment (similar treatment with domestic entities); fair and equitable treatment; and compensation in accordance with international standards in case of expropriation/ nationalisation).

Intra-ASEAN Investment Regimes and Extra-ASEAN Investment Regimes

5. ASEAN Member States have entered into numerous such BITs, both with other ASEAN Member States and non-ASEAN States. Similarly, the intra-ASEAN investment regime plays an important role in the ASEAN integration process. ASEAN BITs have special/unique elements differentiating it from the greater body of BITs entered into by non-ASEAN States — that is, the existence of a pattern of fully preserving the right of host States to regulate the question of *admission* of foreign investments.

6. Professor Cho believed that this unique feature is a paradox: on one hand, a State signing a BIT would naturally want to welcome investments from foreign States. In their BIT practice, however, ASEAN States have a lot of discretion and set high thresholds for the admission of investments. Examples of these are stipulations in the Indonesia-Belgium BIT (1970) requiring approval of investments pursuant to Indonesia's Foreign Investment Law and other regulations; and "acceptance in accordance with" relevant laws under the Philippines-Germany BIT (1997). Both States have likewise placed restrictions on specific investment/industry sectors imbued with national interest.

7. Several students shared their thoughts on the development of the legal regime for investments, especially in the ASEAN: Professor Pooja Sharma (India) inquired about how to balance a State's agenda for liberalisation and its need for protectionism. Ms Karen Tan Chai Mei (Brunei) pointed out that the approach of ASEAN States in their BIT-making does show an ability to strike a balance between protectionism and development. Professor Cho agreed that achieving such a balance would indeed be a dilemma from the standpoint of government and would necessitate a long-term policy planning. Still, history shows that countries that eventually shied away from import substitution and opened their economies had huge successes in their development, as seen in the examples of the four Asian Tigers: Singapore, Hong Kong, Taiwan and South Korea. For other developing countries difficulties in borrowing funds from investment banks likewise gave rise to the need to find new sources of foreign capital.

8. The next question therefore was why investor States would still find it attractive to do business with ASEAN States despite the restrictions. Mr Robert Fernandez (the Philippines) shared that this may be because the global positioning of ASEAN countries is important to investor States. Mr Andre Palacios (the Philippines) added that in contrast to Latin American States where historically the popular opinion would sometimes be to nationalise foreign investments, the investment environment in ASEAN is comparably low risk. Professor Cho agreed and noted that indeed, Asia in general and ASEAN in particular showed resilience despite global FDI inflows drying up during the COVID-19 pandemic. Moreover, he opined that there could also be a non-economic explanation—what the scholar Amitav Acharya calls "cognitive prior": the cultural associations that could influence conduct towards ASEAN countries, including ASEAN States' adherence to the ASEAN Way.

Regulating Intra-ASEAN Investment

9. There are different periods of interest when looking at the development of intra-ASEAN investments and regulation. The starting point would be the entry into force of the 1987 ASEAN Agreement for the Promotion and Protection of Investments (the 1987 Agreement), signaling ASEAN Governments' decision to open up to foreign countries and among themselves. In charting rules for the entry of investments, the 1987 Agreement uses language requiring that they be "specifically approved in writing" or "registered". There is likewise no national treatment obligation under this agreement.

10. Next was the 1998 Framework Agreement on the ASEAN Investment Area, which marked the period of globalisation gaining momentum, and a shift from protectionism to deep liberalisation of intra-ASEAN capital flows. Professor Cho opined that this was the result of the Asian Financial Crisis rekindling a spirit of collectivism among the ASEAN States who have suffered together and now desired to prosper together. ASEAN States were likewise worried about losing their competitiveness to China, which was then emerging and competing with ASEAN as an investment destination. Notably, the 1998 Framework Agreement provides for emergency safeguard measures, reflecting States' desire for a mechanism by which government can control the inflow

and outflow of investments when any Member State "suffers or is threatened with any serious injury and threat".

11. The latest phase in the development of intra-ASEAN investment regulation was ushered in by the signing of the ASEAN Comprehensive Investment Agreement (ACIA) in 2009, which terminated the 1997 and 1998 Agreements. The ACIA flows from the 2007 ASEAN Economic Community (AEC) Blueprint, which refers to an "integrated investment area and production network". These likewise reflect the normalisation of global value chains, which are characterised by: the sourcing of products (and their components) from multiple sources/States, a division of labor among them, and the sharing of economic benefits. However, the ACIA only applies to limited sectors such as manufacturing, agriculture, and service incidental thereto, among others. It also does not have an umbrella clause.

12. Examined another way, Professor Cho outlined the evolutionary pathway of the ASEAN Investment Regime as follows: (a) the Hobbesian period (1950s–70s) where States generally took a neorealist stance, employed import substitution strategies and viewed foreign investors as threats to the domestic economy; (b) the Lockean period (1980s–90s) which saw States shifting to neoliberal institutionalism and while still competitive, were more willing to cooperate economically; (c) a period of an "identity crisis" in the late 1990s, resulting from the East Asian Financial Crisis and the rise of China as an economic power; and (d) the Kantian period (Late 1990s–Present) during which the ASEAN States have adopted a constructivist approach to creating an economic identity.

13. Another observable trend is the emergence of reverse open regionalism in the practice of the intra-ASEAN investment regime. Whereas "regionalism" sees an economic region discriminating against actors external to that region by way of trade preferences, among others, (for example, the North American Free Trade Agreement, European Union (EU)). "Open regionalism" on the other hand, as observed by Mr Duc Viet Tran (Switzerland), sees regional economic integration without discrimination against economies outside the region. This corresponds to the culture and spirit within Asia-Pacific Economic Cooperation (APEC), where ASEAN is also a main driver. In the intra-ASEAN investment regime, however, ASEAN Member States appear to have reserved higher levels of protection for extra-ASEAN investment treaties (BITs), than are provided for under the ACIA. This is evident in the fact that there is no umbrella clause and a lot of reservations in the ACIA, among others. Professor Cho suggested that this phenomenon might after all still be rooted in the ASEAN Way of non-interference.

14. Increasing liberalisation in the ASEAN is arguably met with criticism as well, with respect to resulting negative consequences. First is that the setup breeds embedded mercantilism that sees foreign direct investments as negatively impacting small and medium size enterprises, which are at risk of not innovating nor being exposed to competition when protectionist policies are in place. Second is the possibility of States being drawn to the "hub and spokes" trap, where one big economy — the "hub" (for example China, Japan or the EU), reaps the most benefits, while the "spokes" (like the individual ASEAN members) derive lesser economic benefits. ASEAN members have effectively failed to come up with an investment rim among themselves. This is further seen in the absence of umbrella clauses within the intra-ASEAN investment regime.

15. Professor Cho then discussed future prospects for ASEAN centrality. ASEAN States should strive to combine intra-ASEAN integration with extra-ASEAN integration, and form a concrete investment regime among themselves. Otherwise they will remain in a hub-and-spokes paradigm. However, there are certain welcome developments in the region such as in the creation of the Regional Comprehensive Economic Partnership (RCEP), one of the big achievements of which is

the introduction of cumulative rules of origin. This is good for investors, for whom opportunities now abound insofar as the emergence of a regional value chain — a combination of intra- and extra-ASEAN investment flows. This is not to say, however, that the ASEAN must strive to emulate the European Economic Community where there are better legal tools and a high level of legalisation. In contrast, the economic volume of the ASEAN is very diverse: from big to small and from highly developed to the least developed economies. In addition to the management of international relations via the ASEAN Way, there is likewise a very unique administrative culture in the region capitalising on human agency: important regulatory issues are periodically examined in the relevant Senior Officials Meeting(s). This is also evident in the APEC Way, where rather than typical legalisation, soft law instruments are also relied on to drive discussions and state relations.

Practicum

16. On 10 February, participants, divided into 6 groups, defended positions of a fictional investor (Steelco) and a fictional ASEAN Member Host State (Annap). In this case, Steelco, which incorporated in another ASEAN Member State, had been slapped with onerous measures and modifications to its investment agreements as a result of the accidental release of toxic chemicals from its steel plant, leading to disastrous environmental damage. Three groups thus argued that Steelco's investment in Annap was or could be a covered investment under Article 4 of the ACIA, while the last three groups sought to exclude it from jurisdiction under the Agreement, arguing that there are irregularities in the acceptance of the investment, given the noncompliance of Steelco with Annap's laws and regulations relating to the procurement of a provincial environmental permit, among others. Next, the groups explored whether Annap has not observed proper standards of treatment towards Steelco, and conversely, whether the adverse acts it took (including acts amounting to expropriation) towards the latter were justified under the doctrine of necessity. Finally, the groups explored possibilities for bringing the dispute before the International Centre for Settlement of Investment Disputes (ICSID), or should this not be available, incentives for Annap to join the ICSID Convention.

17. Professor Cho concluded the course by noting that the mixture of advanced and developing/transitioning economies in ASEAN render developments in the region subject to a lot of political changes, likely to occur at the instance of new administrations rising into power. Most investors' concern is how to maximise their developmental gains in developing countries, as well as managing spillovers. The undertaking of BITs, as well as increasing participation in the ICSID Convention and other legal tools, are good ways to signal that States are welcoming foreign investments. Conversely, Governments must consider what the implications are when their economies are dependent on foreign investments.

8 February 2021: ASEAN Foreign Relations and Regional Trade Arrangements by Professor Paruedee Nguitragool, Professor Jürgen Rüland (Day 1)

Breakout Room Discussion 1: Which capacities should ASEAN possess to be an effective collective actor at the United Nations/World Trade Organisation?

The Prerequisites of Regional Actorness

1. Three developments gave rise to a need for regional organisations to develop external relations. First, there was a proliferation of regional organisations in the 1990s, known as the second wave of regionalism. Next, there was the intensification of globalisation and attendant problems, such as environmental degradation. Finally, there was the rise of global governance: the architecture in which regional organisations play a major role.

2. In the same way, ASEAN's member states created and signed several declarations, such as the Bali Concord III, that called for developing a more cohesive appearance in global fora. This leads to three questions, (1) how does ASEAN operate in global fora?; (2) how cohesive is ASEAN in global fora?; and (3) what factors shape ASEAN's behaviour in global fora? These were the questions that Professor Rüland and Professor Nguitragool sought to address in the study.

A Model for Different Levels of Cohesion in Regional Organisations

3. There are essentially five factors that affect a regional organisation's cohesiveness.

    a. World View: This is based on the historical experiences of countries within a region. Countries with a relaxed, peaceful relationship would consider each other as friends, while periods of hostility would result in countries having less trust with each other. The world view of ASEAN members is strongly shaped by their turbulent histories. ASEAN members favour autonomy and state centrality, and EU-type cooperation is at odds with such Southeast Asian cooperation values. Power distribution is the key paradigm and cooperation is regarded cautiously; it is only pursued insofar as it benefits the state itself.

    b. Trust: With trust, members would not act opportunistically against partners they believe to be reliable, and in turn, not acting opportunistically fosters trust.

    c. Regional Identity: Sharing a common world view, norms, beliefs.

    d. Defection from Collective Action. Defections occur when members act in a selfish manner, i.e. opportunistic behaviour, which negatively affects cohesion.

    e. Power Sensitivity. Power sensitivity concerns how states respond to changes in power equations. If countries tend to respond to shifts in power, it will affect how willing they would be to cooperate for the region's benefit.

4. Professor Rüland stressed that this does not mean that regional organisations with weak cohesiveness will never act cohesively. If the context requires, weak organisations can unite on specific issues.

Capacity

5. National negotiation capacities: One important capacity relates to a country's mission in New York with the United Nations (UN), and Geneva with the World Trade Organisation (WTO). ASEAN members generally have limited capacity as evinced by the lack of expert staff, consultants and civil society in the missions of ASEAN members in both New York and Geneva.

6. Regional capacities: Negotiation capacities of the ASEAN Secretariat, ASEAN Committees in Third Countries, preparatory meetings for international negotiations. ASEAN-Institutes of Strategic and International Studies, regional business groups, and NGO networks could also contribute, but each have their limitations.

7. Decision making capacities of the ASEAN Summit, Community Councils and Ministerial meetings: ASEAN has a well-functioning structure save for the fact that it is still based on soft law and informal processes and less on binding decisions and hard law.

Breakout Room Discussion 2 – What Can ASEAN Do in the UN to Support the International Fight Against COVID-19?

ASEAN as an Actor in Global Fora

Stages of Negotiation in Global Fora

8. There are three stages of negotiation in global fora, which were discussed in turn with reference to ASEAN's level of cohesion:

    a. Identifying problems, defining issues and agenda-setting. ASEAN is an agenda setter in the Asia-Pacific Region, but rarely in international negotiations. ASEAN members are generally active at the UN, although there are relatively few ASEAN joint statements and resolutions in the General Assembly.

    b. Setting principles, norms, rules and procedures of negotiation and international cooperation. The ASEAN Way has been exported to regional bodies including the ASEAN Regional Forum and East Asia Summit. However, at the UN, ASEAN members are generally status-quo oriented with regards to UN institutional architecture, even though they are critical of power distribution in the UN Security Council.

    a. Concluding the negotiations: voting and compliance. Contrary to assumptions that ASEAN unity would lead to patterns of bloc voting in the UN General Assembly, the study found that ASEAN members' voting behaviour fluctuated over the years between joint and split voting. Absence from voting could be construed as a deliberate, non-confrontational strategy to avoid joining an ASEAN position. ASEAN votes were clearly split only on a few issues, mainly normative and human rights issues. It was also observed that new ASEAN members had a greater tendency to vote apart from the rest of the bloc. On compliance, ASEAN's WTO compliance record is mixed. But it has had a low rate of being made defendant in WTO trade disputes.

Breakout Room Discussion 3: Which are the main strategies a regional organisation such as ASEAN could pursue in order to operate effectively as a collective actor in the United Nations?

Negotiation strategies pursued by ASEAN

9. Professor Rüland examined five major negotiation strategies used by regional organisations and ASEAN's cohesiveness in them. As a preliminary point, Professor Rüland drew a distinction between formal leadership like a seat on the UN Security Council and entrepreneurial leadership such as setting norms.

    a. Leadership. The attempts of regional organisations to occupy key leadership positions in international organisations. ASEAN has not always been cohesive. In general, ASEAN countries rely on their own resources to have their candidates elected for leadership positions. ASEAN countries rarely endorse other states' candidacies in their general assembly statements.

    b. Framing. The discursive construction of meaning to influence perception and outcome in negotiation. ASEAN members' statements at the UN showed a high degree of cohesion in their references to Third-Worldist developmentalist rhetoric, rhetoric about a peaceful culture and unity in Southeast Asia.

    c. Coalition building. Pooling of power by smaller states to increase their influence at an international level. ASEAN members are often members of coalitions with competing agendas. Question of competing group loyalty between ASEAN and other international coalitions. ASEAN cohesion is relatively weak.

    d. Forum shopping. Picking of international institutions to suit a member state's purpose. ASEAN cohesion is relatively weak. Overlapping ASEAN members are sometimes in overlapping regional organisations but not the same ones.

    e. Soft power. Strategy to be recognised positively in the world, through positive role conceptions (good global citizen, knowledgeable and professional negotiator, bridge builder, mediator etc.). ASEAN members are active in image projection and are relatively coherent, but at the UN tend to highlight their own country's achievements rather than that of ASEAN. Hosting meetings is a popular strategy to convey a role of deal-maker and honest broker.

    Breakout Room Discussion 4 – ASEAN's Role Conception in the UN and Multilateralism
    1. *Which role conception should ASEAN pursue in the UN?*
    2. *What does multilateralism mean for ASEAN members?*

Questions & Answers

10. Ms Angeline Ang (Singapore) asked why European countries appear to lack the same cognitive factors as Southeast Asia, and whether Europe was now breaking apart. Professor Rüland replied that the outbreak of World War II was a critical juncture that made Europe aware of how nationalism could be a driving factor for government behaviour and paved the way for a new approach. However, this does not mean that cognitive factors no longer applied to European countries. He does not think that Europe is breaking apart. There is significant common ground among the European nations – for example, agreement on political systems, and shared culture and religion. For ASEAN, it is much more difficult to find a common identity and thus many countries are focussed on their own national interest.

11. Mrs Rachminawati (Indonesia) asked if ASEAN should attempt to find a common enemy to unite against to move away from the cognitive factors weighing it down. She also asked about the strengths and weaknesses of the "ASEAN Way". Professor Rüland responded that he believes that warfare is a thing of the past, and also, he does not think that ASEAN members could agree upon

such a common enemy. For example, some ASEAN states are close to China, while others have a difficult relationship. Professor Rüland believes that ASEAN could instead benefit through a hedging policy against the major powers of the world. Professor Nguitragool added that a potential “common enemy” could be an economic challenge or a global health crisis, giving the Asian Financial Crisis and COVID-19 as examples. For the former, it is a threat to the entire region and led to dramatic change. On the “ASEAN Way”, Professor Rüland answered that its strength lies in the flexibility it gives ASEAN to integrate countries that might not agree with them on all issues. However, one key weakness as identified by academics is the lack of binding solutions.

9 February 2021: ASEAN Foreign Relations and Regional Trade Arrangements by Professor Paruedee Nguitragool, Professor Jürgen Rüland
(Day 2)

Case studies of ASEAN Collective Action

Agriculture negotiations

1. ASEAN's "quasi-bloc" status could be seen in the GATT Uruguay Round in the 1980s. The founding ASEAN members were liberalising their economies and saw the need for greater trade policy coordination. They identified a few areas of common interest and agreed on a division of labour: Malaysia and the Philippines – tropical products negotiation; Thailand – agriculture; Singapore – trade rules; Indonesia - textiles. Malaysia became the chairman of the tropical products negotiating group in 1987. Thailand, as ASEAN representative in the Cairns Group, was invited to the WTO Green Room. ASEAN also tried to speak with one voice with ASEAN proposals calling for market access among other things. While there were diverging positions among ASEAN members, ASEAN used its "developing" identity to serve as a basis for "quasi-bloc" cohesion.

2. The cohesion was unravelled at the Doha Round. For Indonesia and the Philippines, there was increasing frustration at the influx of agricultural imports that were a consequence of the Uruguay round. After the Asian Financial Crisis, there was increasing mutual distrust as some ASEAN countries pursued bilateral agreements with non-ASEAN members. Eventually, Indonesia and the Philippines became active members of the G33 and G20. Singapore turned to focus on trade rules and facilitation. Malaysia's interest in agricultural products was limited. In 2013, Thailand opposed Indonesia and the Philippines on proposed food security measures.

Negotiation for forced labour

3. A 1996 complaint to the International Labour Conference accused the Myanmar government of violating the 1930 Forced Labour Convention. The International Labour Organisation (ILO)'s Commission of Inquiry concluded that forced labour was widespread in Myanmar. As Myanmar had joined ASEAN in 1997, ASEAN members sought non-sanction measures. For example, they acted as unofficial brokers between Myanmar and the ILO. They also provided technical assistance to Myanmar and invited the ILO to ASEAN meetings. ASEAN focussed on dialogue rather than punishment.

4. Though ASEAN cohesion suffered following the Saffron Revolution in 2007 (Singapore had invited the UN Special Envoy to give a briefing at the East Asian Summit but this was opposed by the CLMV countries), this was restored in the wake of Cyclone Nargis where, through the provision of non-political humanitarian assistance, ASEAN brought Myanmar back to dialogue. This led to Myanmar taking positive steps including the banning of forced labour and releasing Ang Sung Suu Kyi. In 2010, ASEAN members did not support a UN General Assembly draft resolution on the Human Rights situation in Myanmar. ASEAN also pushed for more dialogue with the EU, US and ILO on Myanmar and the EU lifted sanctions in 2013. Meanwhile, Myanmar ratified the ILO Worst Forms of Child Labour Convention in 2013. There was further progress, such as the ILO establishing offices in Myanmar and the inking of the Decent Work Country Programme with Myanmar in 2018 to strengthen fundamental rights.

Practicum: Organising an ASEAN Bid for a Non-Permanent Seat in the Security Council

5. Participants were assigned to 5 groups each representing a fictional Southeast Asian country, to discuss the following scenario.

6. In this session, the task for participants is to simulate an ASEAN strategy for a campaign that ends in a successful election by the UNGA as one of two of Asia's representatives. As a successful campaign strategy must consider current geopolitical circumstances, participants of the role game should have in mind the present (volatile) global order and the dynamics of change that go with it. This includes a mercurial president in the White House, a declining cohesion of the West including a weakened EU, the dynamic rise of newly emerging global powers such as China and India, a resurgent Russia, the worldwide rise of populist political forces, the decay of the global and regional multilateral political culture and the outbreak of a disastrous pandemic.

First Practicum Discussion

Groups discussed among themselves, whether their country should launch a candidacy as a non-permanent member of the UN Security Council or not; If a group decided that the country they represent should notify other ASEAN countries of its interest to run, it should compile arguments why its candidacy is beneficial for ASEAN as a group and why it believes that its candidacy may be successful.

7. Representatives from each of the 5 groups were called upon to state their country's position. Countries B, C, E made the case for their candidacies, while countries A and D decided to support the candidacies of other ASEAN countries. Professor Rüland invited the spokespersons for the three countries that intended to run for the UNSC seat to argue why they should be selected over the other two countries. Following their statements, he invited the spokespersons to consider if they would like to withdraw having regard to the further arguments.

8. Professor Rüland provided new information in the scenario regarding vulnerabilities and strengths of Countries B, C and E. At this point, Country C indicated that it was willing to withdraw in exchange for Country E's support in his country's future bid for the UNSC. As there was no comment from either country, Professor Rüland put the final candidacies of countries B and E up to a vote via Zoom poll. Country E won 75% - 25%.

Second Practicum Discussion

The country fielding its candidacy had to develop a national strategy to win the support of two thirds of the UNGA's members. The four other groups developed a strategy for ASEAN as a regional organisation supporting the candidacy of its member state.

9. Professor Rüland invited Country E to start the discussion by presenting its plan to be elected to the UNSC, and the remaining groups to elaborate their strategy to support the ASEAN candidate.

10. Country E proposed that the plan should start with an ASEAN a statement in support of Country E's bid. Then, they proposed that the countries in the UNGA should be assessed and split into whether there are supportive, neutral or negative. The most effort should be spent on neutral countries. Further, they suggested that it may be possible for ASEAN to seek support of other countries at ASEAN dialogues. Such as ASEAN meetings with P5 countries. On the other hand, the Muslim countries in ASEAN should also be activated to lobby for OIC support as Country E is not a member of the OIC.

11. Following the presentations by the remaining groups, Professor Rüland added that for Country E (modelled on Singapore), two helpful groups would be the Forum of Small States (FOSS) grouping and the 3G (Global Governance Group) group which has in mind the interests of smaller countries. Another point to consider would be the ASEAN-EU meetings where EU nations could be asked to show support.

12. On Jordan (another country running for the Asia-Pacific grouping in this scenario), Professor Rüland noted that it would be important to mobilise Malaysia and Indonesia to lobby the OIC against Jordan who is also an Islamic country. To that end, Professor Rüland agreed with the suggestion of a pre-meeting to develop a common ASEAN strategy and allocate responsibilities to each ASEAN member to lobby their peer states. A real-life example of such distributive work was done when ASEAN mobilised UN support to call on Vietnam to withdraw its troops when the former occupied Cambodia. In that case, Malaysia and Indonesia approached Muslim countries while Singapore, Thailand and the Philippines approached western countries. Professor Rüland also agreed with relying on ASEAN and Country E as being multicultural and multireligious to convince other UN members to support the UNSC bid. ASEAN could consider utilising the institutional apparatus such as its committees in places such as New York and Geneva. Further, ASEAN countries could also agree to endorse each other during General Assembly debates. Finally, Country E and the rest of ASEAN countries could consider making courtesy calls on countries closer to the date of the vote to rally support.

Questions & Answers

13. Bringing up the WTO Green Room, Professor Rüland noted that the informal meetings were very controversial because only a small number of countries were invited. Most non-developed countries did not have access to the Green Room and struggled with the resulting agreements. However, Thai WTO Director-General Supachai Panichpakdi (2002-2005) worked to bring in developing countries and now ASEAN members have been asked to join the Green Room more often.

14. Professor Oh Yoon Ah (South Korea) asked about Singapore's motivations in collaborating with ASEAN states in the Uruguay Round despite not having an agricultural sector and being pro-free trade. Professor Nguitragool pointed out that as a small country, Singapore needs to act with neighbouring countries to be able to negotiate in the international trade regime. Professor Rüland highlighted Singapore's influence at the WTO, notably when then-Minister for Trade and Industry George Yeo was frequently invited as moderator and bridge builder. Singapore was appreciated for the competence it brought to negotiations. He added that Singapore always tries to maintain ASEAN solidarity, but its international trade interests are different from ASEAN countries and sometimes make it difficult to hold a common position with other ASEAN states.

15. Professor Robert Real (Philippines) asked if ASEAN members would share resources so that countries with less experience and resources could mount a serious campaign for UN leadership positions. Professor Rüland did not see ASEAN sharing resources to support a candidacy. Based on his interviews of diplomats and documentary research, the current approach is one of every country for itself. Not even information is shared between countries. On this point Professor Rüland invited the participants to consider if the ASEAN secretariat should play a role in the process.

16. Mr Cesar Ong (Philippines) wondered if it would be advantageous for a country to be neutral between P5 countries or if it would be better for them to be allied with some of the P5 nations who might help them lobby. Professor Rüland replied that in general, ASEAN countries hedge for P5 countries and try to keep friendly relationships with both. When it came to UN Security Council

votes, the relations with the P5 members could be managed so long as they were not outright hostile against the ASEAN country in question.

17. Professor Monika Negi (India) asked about the primary practical considerations for a country considering running for a seat in the UNSC. Professor Rüland listed several factors: who the country's competitors are, what support the country has, what resources the country has, the country's ability to mobilise close peers to support. Overall, it is very context dependent.

Conclusion

18. Professor Rüland hoped that through the module, participants had come to understand how ASEAN could serve as an asset to South East Asia and how it might be used for everyone's benefit. ASEAN could help to increase the influence of South East Asian countries in international organisations and at global negotiations provided that they could act as a bloc and speak with one coherent voice. Professor Nguitragool added that since ASEAN works through consensus, leadership within the grouping is very important and that going forward, a leader that can build ASEAN consensus is necessary. Such a leader should possess diplomatic skill and other necessary qualities.

10 February 2021: ASEAN Foreign Relations and Regional Trade Arrangements by Ms Natalie Morris-Sharma and Guest Lecturers

Professor Salvatore Zappala, Ms Arancha Hinojal-Oyarbide, Ms Ng Kexian and Ms Carene Poh (Day 3)

1. Ms Morris-Sharma introduced the themes of the guest lecture series in this session.

    a. ASEAN centrality. There are two dimensions of ASEAN centrality by this account: an internal and external dimension. The external aspect is when non-ASEAN members come to negotiate with ASEAN and accept the ASEAN way. The internal aspect is when ASEAN members give importance to ASEAN because they want to rely on ASEAN for negotiations among other things. She called upon participants to think about the extent ASEAN centrality can be observed in the structure of ASEAN external trade agreements.

    b. Flexibility in ASEAN's processes for external engagement and treaty making. While the ASEAN Charter conferred legal personality to ASEAN and power to conclude agreements, how treaties should be agreed is not proscribed in detail. How ASEAN chooses to structure its engagements reflects ASEAN members' values and priorities.

    c. To what extent is the ASEAN approach better or worse at achieving ASEAN centrality as opposed to those adopted by the EU?

    d. The ASEAN-X formula. How might this formula serve or undermine ASEAN centrality?

Professor Salvatore Zappala: The European Union (EU) and ASEAN

2. Professor Zappala's lecture touched on how the EU engages with external actors, particularly the United Nations. Providing a background of the evolution of the EU's institutional structure, he noted that after the first 25 years of the European Communities/European Union's focus on a single market and common institutions, the EU deepened its internal integration in many aspects, and also established a common foreign policy on trade as well as political affairs. The Treaty of Lisbon (2007) established the EU Representative and for example, transferred representation of the EU in the United Nations General Assembly to the diplomatic service of the EU and the EU Commission President, instead of the EU member state holding the Presidency.

3. Ms Morris-Sharma asked how one would know if a current question was one the EU would intervene in, or something in which the EU members themselves would intervene? Professor Zappala answered that it is a matter of competency as allocated by the treaties; areas of exclusive competencies of the EU and areas of mixed competency between EU and the states.

4. Ms Angeline Ang (Singapore) asked to what extent EU member states have autonomy to make decisions related to international laws, for example, on whether to sign and ratify a UN convention? Professor Zappala noted that in general, EU members tend to enter treaties together even if there is no requirement, because it is productive to do so. While an EU member acting alone is an abstract possibility, it is not something that the EU strives for.

5. Mr Aloysius Selwas Taborat (Indonesia) asked about the underlying factors or forces that support the legal mechanics of EU integration, apart from the strong political will of EU leaders. Professor Zappala opined that so long as integration creates prosperity, wealth and better living conditions everywhere, there will be support for integration.

6. Mr Chan Aye (Myanmar) asked about the split mandate for law making between the European Parliament and the Council, and if it could be a reference point for ASEAN. Professor Zappala answered that the split was from the outset. Initially, when EU was an internal project, all treaties had to be implemented at a domestic level. This created the routine for working together and the establishment of strong permanent structures. Though this is now criticised as Brussels bureaucracy, it creates confidence and a habit of working together.

7. Ms Morris-Sharma commented while ASEAN also aspires to improve the lives of people across the region, the growth of ASEAN was quite organic, with no divisions of competencies between ASEAN and its member states, and a very different level of coordination from to the EU.

Ms Arancha Hinojal-Oyarbide: The Treaty Practices of Regional Integration Organisations

8. Ms Hinojal-Oyarbide focused on two points. The first was the definition of the Regional Integration Organisations (RIO) and how RIOs participate in multilateral treaties. The transfer of competency and integration differentiates a RIO from other International Organisations. RIO have the power to legislate when such power is clearly conferred upon it by its establishing treaty. In contrast a non-RIO cooperates and coordinates the activities of its member states for the realisation of common purposes. The obligations of non-RIOs are not directly applicable to member states and require additional implementation at a domestic level.

9. While some treaties are open to all International Organisations, others restrict the participation to some International Organisations. Unless otherwise provided, an International Organisation participating in a treaty does so in its own capacity and not on behalf of its member states. Only the EU has become a party to treaties open to RIO, and treaties establishing International Organisations. The competence of the RIO may be shared with its members or it might be exclusive. This determines how a RIO would participate in a treaty. To avoid overlap, the treaty could specify the responsibilities of the RIO and its members.

10. RIO cannot rely on dispute settlement resolutions in multilateral treaties because only a state can be a party before the ICJ. Further, only the UN and its specialised agencies can request an advisory opinion from the ICJ. However, the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations provides that if an international organisation is a party to the dispute, it may request an advisory opinion through a UN member state.

11. Mr Aloysius Selwas Taborat (Indonesia) asked about cases where international organisations were sued for financial compensation. How will financial diligence be proportioned between member states and the organisation? Ms Hinojal-Oyarbide noted that the enforcement of ICJ judgements is “the million-dollar question” Ultimately, it is a matter of enforcement and whether states will take responsibility.

12. Mr Aloysius Selwas Taborat (Indonesia) also asked about the status of treaty obligations entered into by the European Economic Commission. Ms Hinojal-Oyarbide observed that in this case, the UN Treaty databases simply changed the name of the party to the European Union. Externally there is no implication other than a name change, even as the European Union develops new areas of integration and expands its membership.

13. A number of participants raised questions regarding how Brexit would affect the treaty obligations of the UK and EU. Ms Hinojal-Oyarbide pointed out that the UK’s obligations will be regulated by its agreement with the EU on Brexit. She also distinguished between treaties between the EU and its member states and treaties between the EU and other parties. The latter arrangements have

not contemplated the possibility of removing a member state and would need to be reconsidered by the EU.

Ms Ng Kexian and Ms Carene Poh: Presentation on The Regional Comprehensive Economic Partnership (RCEP)

14. Ms Ng provided a brief introduction to RCEP, noting that it is the broadest and most comprehensive ASEAN+ FTA. It includes seven chapters new to ASEAN Free Trade Area (FTA), including Intellectual Property and Government Procurement chapters. Comparing RCEP and CPTPP, she noted that RCEP covers a larger amount of global GDP (30% to 14%) and is the first FTA between China, Japan and Korea. While the CPTPP is more ambitious in terms of commitments, RCEP is hamstrung by differing levels of development among ASEAN member states.

15. ASEAN Centrality played an important role in RCEP negotiations. In negotiations, ASEAN member states would negotiate a common ASEAN position before meeting other partners. ASEAN centrality contributed to depoliticising bilateral issues between other parties. She observed that in instances of competing proposals from non-ASEAN parties, there was a tendency for other partners to reach a consensus based on an ASEAN proposal. For example, Rule 17 of the Rules of Procedure for Panel Proceedings. Negotiators adopted the ASEAN proposal to have the panel proceedings open by default, with the possibility to close them upon request of a party to the proceedings. Additionally, ASEAN centrality provided a fall-back to ASEAN texts and procedures. The negotiating principles for RCEP also referenced ASEAN centrality.

16. Ms Poh then touched upon the ASEAN-X formula in RCEP. ASEAN-X is found in Article 21(2) of the ASEAN Charter which allows only some ASEAN countries to proceed with economic commitments ahead of others, showing sensitivity to the needs of each party. This formula had made possible the conclusion of RCEP chapters on IP and Government Procurement. In the IP chapter, Section M provides transition periods for certain parties to ratify the list of IP treaties required for RCEP parties. Article 11.79 provides a ratchet mechanism where parties may not decrease their level of IP protection. The Government Procurement chapter is a new area of cooperation not found in any pre-existing ASEAN agreements. In Article 16.2, the ASEAN-X formula is applied to allow Least Developed Countries to opt-out of transparency and cooperation requirements, while specifying that they can still benefit from the cooperation amongst the parties. The Investment chapter of RCEP is the first ASEAN+ FTA with a ratchet mechanism applying to existing non-conforming measures.

17. Ms Poh noted that the default dispute settlement mechanism is a panel proceeding, largely similar to WTO panel proceedings, but without right of appeal, and with the panel determination binding on the parties. The dispute settlement mechanism is however not applicable to several RCEP chapters. RCEP does not provide for Investor-State Dispute Settlement, which has been placed on the RCEP working programme. Ms Poh also highlighted clauses for special and differential treatment involving LDCs, which can be understood as a formulation of ASEAN-X, providing incentive for LDCs to agree to RCEP.

<u>Final provisions</u>

18. Ms Poh noted that RCEP enters into force upon ratification by six ASEAN members and 3 out of 5 of non-ASEAN parties. Ms Poh estimated that this might take 2 years. Upon entry into force, India would be able to immediately join RCEP while other countries must wait 18 months.

19. Ms Hananiela Domingo (the Philippines) asked what happens when ASEAN is not able to come up with a position during a caucus, and what decisions are usually made at the Ministers level. Ms Ng stated that if there is no ASEAN position, the ball will be placed into the non-ASEAN members' court. If, among the non-ASEAN members there is agreement, ASEAN will likely agree with the non-ASEAN members. If there is no clear position, it must be discussed further. Ms Ng stressed that she was not at liberty to comment on what has been raised to ministers, although it should be safe to say that, where an agreement has not been reached (such as for ISDS), it has been raised to the ministers but they could not ultimately agree.

20. Mrs Rachminawati (Indonesia) pointed to the lack of human rights considerations in RCEP, and asked about the applicability of the ASEAN-X formula to non-economic matters including human rights. Ms Ng answered that she did not recall human rights being raised. However, some discussions on environmental matters resulted in a reference in the preamble. Ms Morris-Sharma noted that the main hurdle to extending the ASEAN-X formula to non-economic matters is the ASEAN Charter itself, which specifies that the use of the formula is for economic matters. Further, application of ASEAN-X still required a degree of consensus. That said, if the ASEAN-X formula could be amended, it could also apply to matters such as security.

Conclusion

21. Ms Morris-Sharma hoped that participants had been able to appreciate the importance of ASEAN centrality guiding the conduct of ASEAN, especially in the economic context. While the EU experience is most often referred to and is the most developed, it merely illustrates a possibility that ASEAN does not have to follow. Regarding flexibility in ASEAN's treaty making powers, the ASEAN experience shows an established practice of forming a common position before engaging external parties, even though this practice is not officially documented.

22. ASEAN economic agreements are a key part of advancing ASEAN centrality because they have both internal and external effect. Upon concluding an external agreement, ASEAN's regional integration is advanced as well. While this is the external driving the internal, it cannot be denied that this ultimately benefits the lives of the people in ASEAN.

16 February 2021: Compliance Monitoring and Dispute Settlement by Professor Simon Chesterman

1. Professor Simon Chesterman began his seminar with two background considerations: What was ASEAN's current relationship with the rule of law, and was the ASEAN Way is consistent with the goal of making ASEAN a community governed by law? To test these questions, he called on participants to assess for themselves whether ASEAN is governed by law, and the role that monitoring and measuring compliance has on this determination.

The 'ASEAN Way' and its Relationship with the Rule of Law

2. International organisations approach the rule of law with flexibility, choosing in terms of breadth and depth. One could have a narrow agreement with deep obligations, or a broad agreement with shallow obligations. For ASEAN, the tendency is the latter, although progressively there is greater interest in more intrusive and/or narrower agreements.

3. This change was curious, given that Asia lacks an Asia-wide regional organisation due to a wariness for political groupings and a lack of consensus and disinclination towards international treaties and representation in international legal institutions. To illustrate, despite its large population, the Asia-Pacific has the same, if not fewer, seats on the United Nations Security Council. Indeed, ASEAN itself used to be barely more than a 'place' as opposed to a formal organisation; ASEAN started off as a conference for member states to meet, and the lack of an organisation meant other arrangements had to be made to fill the gap.

4. ASEAN was also weaker because of practical concerns, such as its annual budget of US$20,000,000. The budget is by design: ASEAN was intended from the start to be small, weak, and not have the capacity to dictate terms to its member states. This would also place constraints on ASEAN's ability to monitor effectively. ASEAN further lacks political independence. The chair rotates between the member states every few years, as opposed to appointment by election through an independent political campaign. Weak obligations are born from the lack of political will for stronger alternatives. Together, this could mean that ASEAN was never intended to be powerful, either in its financial or political capacity, to challenge the member states. It was intended to serve and support.

5. A final barrier that was discussed was the 'ASEAN Way', which he invited participants to define and discuss in terms of its relationship with the rule of law. Professor Chesterman provided a loose definition on the two main ideas that are often associated with the 'ASEAN Way', *musjawarah* (consultation) and *mufukat* (consensus) as opposed to enforceable obligations. The rule of law was likewise susceptible to many different definitions with receiving and enforcing countries likely having different views on it. These differing views, its vagueness and informality, lend flexibility to international law. ASEAN member states appreciate this flexibility to ensure that they are not locking themselves in with binding obligations in the long term.

6. To end his first section, he raised the question of whether ASEAN has been a success and will continue to be a success. One argument is that "if you cannot measure something, you cannot improve it", which brings the discussion to monitoring and how to determine whether ASEAN is successful or not.

The Evolution of Monitoring in ASEAN

7. Professor Chesterman first defined monitoring in this context as any institutional practice or process (including informal ones) involving the gathering or sharing of information to determine whether ASEAN obligations have been complied with or implemented – this latter point bearing a distinction between substance and force. Using the example of trafficking-in-persons (TIP), compliance meant that trafficking was stopped completely, while implementation could be the adoption of laws prohibiting trafficking.

8. Different organisations and countries monitor for different reasons, but those reasons can be divided into two main camps: to punish non-compliance, such as through publishing a name-and-shame list or using diplomatic sanctions; or to encourage compliance. ASEAN is more aligned with using monitoring to encourage compliance by raising standards generally.

9. The discussion was contrasted with reasons why organisations and countries choose not to monitor. Why would a member state want to expose itself to criticism, much less empower other bodies to do so? If all agreements had a punitive regime for non-compliance, few agreements would be completed. Historically, ASEAN was weak and was meant to raise confidence among its member states to encourage peaceful relations and encourage trade. There was deference given to the principles of non-interference; ASEAN was not established to punish.

10. Why did ASEAN move towards narrower and deeper obligations? To explain this change, ASEAN's economic interests came into the picture. As ASEAN's economy became more integrated, the member states were quickly realising that few agreements saw any action. In 2008, ASEAN estimated that only 30% of the agreements signed in its first four decades saw meaningful developments. The economic community saw a manifesting tension between the existing way to draft agreements in ASEAN and the need to comply with the rule of law; there needed to be greater attention given towards some form of follow-through.

<u>Purposes of Monitoring</u>

11. Elaborating on the above, there are five main purposes to monitoring, which were explained with reference to a hypothetical example of monitoring ASEAN member states' efforts to meet an obligation to curb TIP:

    a. *Compliance stricto sensu (i.e. compliance to the sense of the word).*
    Monitoring in this sense would be tied to hard numbers; how many victims are there per report and is this number going down?

    b. *Implementation (formal compliance);*
    Monitoring would test whether the member state has formally complied; has the member state enacted laws concerning TIP?

    c. *Interpretation (providing an authoritative interpretation of the content of an obligation without pronouncing on the dispute at hand);*
    Monitoring can be used to lead discourse and discuss TIP to encourage similar standards among member countries.

    d. *Facilitation (providing services/goods that assist implementation);*
    Monitoring can be used to help a member state raise its capacity/resources to comply with their TIP obligations,

e. *Symbolism (mechanisms that serve a symbolic or political purpose).*
Monitoring is only used to recognise the importance of curbing TIP.

Evolution of ASEAN Practice

12. There are three main trends when assessing ASEAN's attitudes towards compliance:

a. Firstly, monitoring in general is becoming more common.
b. Secondly, ASEAN is warming up to formal and compliance-focused monitoring.
c. Thirdly, this is particularly true for obligations under ASEAN's economic or political-security pillars. As the economic sphere deals in hard numbers and is more objective, formal and external monitoring for money laundering/financial regulations/tax compliance/trade/tariffs and financial regulations is possible. With its political-security pillar, ASEAN found value in monitoring as it meant legitimacy in the sense of monitoring that member states are willing to accept as opposed to sanctions. To contrast, for the socio-cultural pillar, ASEAN is more reserved and monitoring in this field remains purely symbolic in nature.

Monitoring Toolkit

13. Professor Chesterman proposed the following monitoring toolkit and the accompanying questions to broaden one's considerations in terms of how monitoring can/should be implemented for ASEAN.

a. Who should do it?
Examples included the ASEAN Secretariat, independent regional mechanisms, self-monitoring, peer monitoring, other international organisations, civil societies, private enterprises, and individuals.

b. *How should data be collected? When?*
Vertically (hierarchical) vs horizontally (self-reporting); active vs passive, formal vs informal. Data could be collected in "police patrol"/periodic conditions, meaning regular feedback with an established presence, or based on "fire alarm"/initiated conditions, where data is only collected, and investigations only begin after a problem occurs.

c. *What powers should monitors be given?*
Capacity in terms of financial and coercive power.

d. *How important is transparency?*
Transparency will create a tradeoff between legitimacy and confidence.

e. *Will more effective monitoring strengthen ASEAN as a rules-based organisation?*

f. *Will it be consistent with the 'ASEAN way'?*

Practicum

14. The practicum hypothetical proposed an amendment to Article 24 of the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP). This amendment sought to provide for active monitoring of state compliance by requiring the ASEAN Senior Officials Meeting on Transnational Crime to 'promote, monitor, review and report periodically' to the ASEAN Ministerial Meeting on Transnational Crime on implementation of ACTIP. Participants were divided into 14 groups to discuss the amendment and present their position; these 14 groups

represented the 10 ASEAN Member States, the ASEAN Secretary-General, the United Nations High Commissioner for Human Rights, the US Ambassador, and non-governmental organisation "Hagar International".

15. Some delegates were agreeable to the amendment and supported the use of a self-reporting mechanism. A balance was struck between voluntary reporting and required regular and structured reporting, with the possibility of capacity building workshops or sharing best practices to assure even-handed monitoring across ASEAN [Thailand, represented by Ms Dita Liliansa (Singapore) and Singapore, represented by Mr Mark Herrin (the Philippines)]. Most of these groups named the ASEAN Secretariat as an appropriate body [Philippines, represented by Ms Lee YingHui (Singapore), with Indonesia (represented by Ms Sita Zimpel (Germany)) volunteering to provide support to the Secretariat as larger ASEAN member states. Others were concerned about the Secretariat's neutrality and preferred allowing an independent organisation to take this role [Viet Nam, represented by Mr Mohd Suhaimi Ahmad Tajuddin (Malaysia)]. Malaysia [represented by Mrs Rachminawati (Indonesia)] thought to give the monitoring role to the ASEAN Intergovernmental Commission on Human Rights (AICHR) due to there being many cross-cutting issues in TIP and human rights. Brunei [represented by Ms Patcha Sriyabhandha (Thailand)] even suggested taking the role of monitoring upon itself.

16. Certain delegates, one of which was of course Hagar International [represented by Ms Poppy Sitompul (Indonesia)] wanted NGOs and CSOs to play a greater role in the monitoring process, through providing these groups with reports for additional scrutiny. Similarly, the UNHCHR [represented by Professor Robert Real (the Philippines)] raised the possibility of collaborating with the Senior Officials Meeting on Transnational Crime by having access to these reports. The delegate for the US Ambassador [Professor Monika Negi (India)] took this one step further by proposing active monitoring and public reporting.

17. Other delegates opposed the amendment and their counterparts' proposals for greater monitoring. Some were only comfortable with voluntarily reporting brief statements as opposed to hard numbers [Myanmar, represented by Mr Lee Candelaria (Japan)]. Others shared concerns about resources and the lack of political will to produce informative reports [Laos, represented by Mr Abraham Guiyab (the Philippines)]. Cambodia [represented by Ms Lauren Toledo (the Philippines)] questioned the need to amend Article 24 and proposed instead to focus on supporting the ASEAN Secretariat in implementation and operationalisation efforts under ACTIP.

18. To respond to some of the delegate's proposals, the ASEAN Secretary-General [represented by Mr Vincent Lim (Singapore)] was insistent that their office should not be given the responsibility of monitoring compliance as they believed the Secretary-General should distance himself from the affairs of ASEAN member states. They were more comfortable with a methodological role such as providing financial intelligence units and technical support but were wary of their limited resources.

19. To conclude the practicum, Professor Chesterman echoed some concerns for self-reporting, emphasising that there is little incentive for a member state to report its own shortcomings or subject themselves to criticism through public reports. He agreed with the delegates' concerns of the ASEAN Secretariat's political independence and lack of resources. All in all, he complimented the delegates' realistic and thoughtful proposals on amending Article 24 of ACTIP.

Conclusion

20. Monitoring in ASEAN may look very different in the future. By using the monitoring toolkit, greater exploration of the possible forms of, reasons for, and tradeoffs of monitoring is imperative. ASEAN currently does not exist in independence from its ten member states, but it is actively growing in terms of its credibility and ability to conclude agreements as an intergovernmental organisation. Compliance has been changing due to the members' desires to follow through on arrangements.

Questions & Answers

21. Professor Monika Negi (India) referred to a paper written by Professor Chesterman for the European Journal of International Law about Asia's ambivalence towards international law and institutions and asked for him to elaborate his point of view. Professor Chesterman noted the interesting dynamic where Asian states are both the most populous and increasingly powerful, but also not the writers of founding rules or order, which begs the question, why should Asian states sign on to agreements or submit themselves to international organisations? The rise of Asia may create an entirely different approach, albeit one not radically different to international law – it may just be a more conservative approach with more deference to sovereignty.

22. Professor Pooja Sharma (India) asked whether the rule of law could be used as a litmus test for ASEAN, or any other form of, cooperation. Professor Chesterman's answer was that the rule of law can be a litmus test for cooperation – but one must ask if the cooperation is equitable /consensus-based or hegemonic? One example is the South China Sea conflict where China reacted negatively to what it perceived to be a third-party dispute resolution being imposed upon it. Why should they submit to a tribunal and not use diplomatic and bilateral negotiations? International law regimes can both limit and facilitate hegemony. On the one hand, the rule of law is meant to apply to everyone equally. However, it can also protect property rights of the rich against the poor. There is the ironic situation where the rule of law is compared to use of force, and yet the rule of law is rejected by some because it was the foundation for present-day inequality.

23. On the topic of who should be given the role of monitoring, Professor Robert Real (the Philippines) raised the possibility of monitoring by national courts. Professor Chesterman agreed that national courts can be a monitoring body. It may even be the first point of call because there is no way for an individual to submit a dispute to ASEAN. Agreeing with Mr Mohd Suhaimi Ahmad Tajuddin (Malaysia), who referenced AICHR having a greater role in monitoring compliance, Professor Chesterman said that AICHR's capacities are the closest example of an individual reaching out to ASEAN personally to hold member states accountable for alleged breaches of international obligations, but even then, this is not a formalised process (the AICHR may receive and read complaints but might not be able to act upon them). There is the inherent difficulty in making an international obligation a requirement at the national/domestic level. The complainant may not even have a formal basis to bring an action.

17-18 February 2021 Dispute Settlement and Compliance by Professor Joseph Weiler

1. Professor Joseph Weiler commenced the seminar with an overview of what would be covered over the next two days. He explained that he would conduct a general analysis on Dispute Settlement and Compliance, examining four different models of how States can deal with Dispute Settlement and Compliance.

First Model of Dispute Settlement

2. The first model involves two states who are bound by obligations owed to each other under the rules of public international law, and both states accept this. If one of them violates international law in a manner that causes harm or damage to the other, there will be a dispute in the terrain of dispute settlement and compliance.

Hainan Island Incident

3. Discussion of the first model centered around an example of a dispute that occurred 20 years ago in April 2001, the "Hainan Island" incident. The facts of the incident are briefly summarised below:

4. Hainan Island is situated in the South China Sea and is part of Chinese territory. China claims a 200-mile Exclusive Economic Zone (EEZ) around the island. The United States of America (US) periodically sent surveillance airplanes through the EEZ in the South China Sea. The purpose of these planes was to (1) obtain intelligence and (2) assert their right to be able to navigate where international law allows them to navigate. Whenever the US sent surveillance airplanes, China sent fighter planes to shadow the American airplanes and harass them, sometimes flying as close as five metres to them. In April 2001, when the US sent surveillance planes to fly through China's EEZ, a Chinese fighter plane and US surveillance plane crashed mid-air, destroying the Chinese fighter plane and killing its pilot. The US surveillance plane was severely damaged, and dove 8000 feet until the pilot was able to make an emergency landing on Hainan Island, Chinese territory. The US crew started destroying secret equipment in the plane as per standard protocol, to prevent it from falling into enemy hands, but some of the most secret equipment remained intact. The Chinese authorities arrested the crew of 24 people for illegal entry into Chinese territory, and also confiscated the plane.

5. The US blamed the Chinese fighter plane for the crash, claiming that the surveillance plane was actually on automatic pilot and would not have hit the fighter plane. The Chinese denied responsibility and blamed the US for the plane crash.

6. The arguments between the parties are summarised as follows:

    a. The US argued they had the right to send the surveillance plane because the rules of EEZ do not prohibit military flights. The US also claimed that the factual responsibility of the accident lies with the fighter plane. It further argued that under public international law and the doctrine of necessity, a plane facing an accident can enter the territory of another state in order to land and save the lives of the crew.

    b. China argued that the US was violating international law by even executing the flight because military flights are not permitted in the EEZ. They also argued that the Americans were factually responsible for the accident. As a result, the entry of the airplane into territory was

illegal, and they would confiscate the airplane and put the crew on trial for entry into their territory.

7. An important issue to note is that it is unresolved in public international law whether military vessels, ships or airplanes may traverse the EEZ of another State. The US supports the view that this is allowed, while China disputes this view.

8. The first model is still the most prevalent model of dispute in the world, because although many instruments in ASEAN and the WTO have dispute settlement mechanisms, in most cases there are no compulsory dispute settlement rules, and thus the parties must rely on public international law.

Roleplaying Possible US Arguments under International Law

9. Professor Weiler posed a question to the participants: What should the US do in this situation?

10. Mr Jonathan Lim (Australia) asked whether the US apologised. Professor replied that States usually issue an apology letter to say they are sorry for the loss of life but asked the participants what else America should do before even issuing this.

11. Mr Aloysius Selwas Taborat (Indonesia) suggested that the US could express displeasure and file a protest with the Chinese authority to make it known in writing. Professor Weiler added on by explaining that the first thing to do would be to contact the Chinese and in the appropriate diplomatic language, demand the release of the crew and make arrangements to recover the plane.

12. Professor Weiler then asked how the US should respond if China does not agree to release the crew and the plane.

13. Mr Md Nooruzzaman (Bangladesh) said that the US should confess that it was a mistake for crossing into territory since it was a surveillance plane, but Professor Weiler stated that the US did not agree that it had violated international law and the emergency landing was under the doctrine of necessity. The US asserted that the factual responsibility of the crash lies with China.

14. Dr Jia Wang (China) proposed that after exhausting the direct diplomatic conversation, the US could bring in a trusted third country to mediate the situation. Professor Weiler agreed that it was a very good suggestion, as mediation is a good way to solve a dispute. If different diplomatic methods had been tried (mediation, conciliation, etc.) and all these diplomatic methods had failed, what could America do? Jia Wang answered that the US could exert pressure through sanctions. Professor Weiler affirmed this suggestion and explained that an important thing to learn is that there should be a distinction between two types of pressure. One type of pressure involves actions that would not be violating obligations under public international law, for example cancelling a visit from a Chinese trade delegation to the US. The second type of pressure would be actions such as a tariff on Chinese goods which is in violation of public international law since the WTO does not allow such tariffs.

15. The legal term for the first type of pressure is retortion. Retortion does not usually work and is unlikely to work for the US and China because they are both the most powerful states, and sometimes retortion will have the opposite effect for these powerful states. In international law, pride and national prestige play an important role. Professor Weiler asked the participants if

diplomatic measures and retortion are both tried, and they both do not work, what did they think the US should do?

16. Mr Mohd Suhaimi Ahmad Tajuddin (Malaysia) said that states could bring this up to the Security Council and also get the advisory opinion of the International Court of Justice (ICJ). Professor Weiler clarified that this would not be possible. States cannot get the advisory opinion of the ICJ because this can only be initiated by the United Nations itself, and there is no agreement of US and China to resolve its disputes via the ICJ, especially since this is a security matter. Moreover, in the Security Council, US and China both have a veto so even if the US convinces other members of the Security Council, the Chinese could just veto the decision and it would have absolutely no legal effect.

17. Adding on to his previous question, Professor Weiler prompted participants by asking if the US would be allowed to impose a trade sanction if the other measures failed. For example, if the US imposed a trade sanction which would block imports of Chinese products. This would be in itself a violation of public international law, but the US argues that this action is due to the Chinese violation of public international law. The laws that govern these situations are the laws of State Responsibility, and these laws are designed with such disputes in mind. When one country violates its legal obligations towards another country, there should be a mechanism to ensure compliance, but to avoid escalation to war. It is a controlled process, and the next step the US must take under public international law should not be to immediately impose a counter measure.

18. Professor Weiler's explained the terminology under the laws of State Responsibility:

    a. Retortion is an act of pressure that you can take which does not violate your legal obligations.

    b. A counter measure is a measure taken which would normally be illegal but it becomes legal because it is used to bring a violation of international law by the other party to an end. The rules of State Responsibility hold that states cannot immediately impose a counter measure; thus the US would first tell China that they have violated their obligation towards the US, demand the release of the crew and the airplane, and if China fails to do so within a reasonable time, the US will impose a counter measure on China.

19. Professor Weiler then asked participants if they think the US would be able to impose any counter measure they want, or what kind of counter measure the US would be able to take?

20. Professor Monika Negi (India) shared that the US's counter measure must be necessary and proportionate. Professor Weiler agreed that was absolutely right, and there must be some measure of proportionality between the counter measure and the alleged violation. If the counter measure is in force and the Chinese still do not release the crew and the plane, the counter measure will continue. The Chinese will be suffering damage they would not usually suffer because the countermeasure is an action that would be in violation of international law but for the fact that it is a counter measure and a response to a violation of international law by China.

Roleplaying Possible Chinese Arguments

21. Professor Weiler recapped the Chinese point of view. China argues that firstly, the US violated their EEZ by having a military flight pass through. Secondly, they caused the crash, and lastly, they illegally landed in Chinese territory and therefore China is allowed under international law to put the crew on trial and to confiscate the airplane. After the US uses appropriate diplomatic language

to demand the release of the airplane and the crew, Professor Weiler asks how the Chinese would respond.

22. Mr Koh Mun Keong (Singapore) answered that since the facts are stronger in China's favour, the Chinese should tell the US that they are just enforcing their law by confiscating the plane and arresting the crew. Professor Weiler agreed with this suggestion. The Chinese response will state that they dispute the Americans' interpretation of the law, they do not think that the US has a right to have surveillance intelligence gathering aerial missions in their EEZ, the US is responsible for the crash and the Americans landed illegally. Thus, China would assert that they have the right to trial the crew and confiscate the airplane. The Security Council would not be helpful here because although there may be a diplomatic victory, any resolution that is against the US will be vetoed by the US.

23. Professor Weiler then asked how China should respond if the US issued a warning under the laws of state responsibility and state that if the Chinese do not release the crew and airplane they will take a counter measure and block all Chinese exports to the US.

24. Ms Karen Tan Chai Mei (Brunei) proposed that China could negate everything that the US has said. They could maintain the position that there was no violation of public international law in the first place, therefore the unilateral countermeasure by the US will not stand. If the US insists on a counter measure, the Chinese will retaliate with the same stating that they have every right to do so because they are now retaliating to a counter measure which they perceive to be illegal in the hope of bringing that violation to an end. Professor Weiler affirmed this answer. The Chinese will say that they have not violated international law, and therefore US is not entitled to take a counter measure against them, and if they take a counter measure in the face of Chinese innocence, the US will be violating international law because the counter measure is a violation of international law unless it is in response to a violation of international law, which China denies. Thus, China will ask the US to stop their illegal counter measure and if not, they will take a counter measure against them.

25. Professor Weiler asked how the US would respond to these actions from China. Mr Vann Piseth (Cambodia) shared that the US will state that there has been a violation of international law by arresting the crew and confiscating the plane, and if China imposes a counter measure against their counter measure, China will be violating international law by imposing an illegal counter measure. Professor Weiler affirmed this suggestion and added on that the US would now accuse China of two violations of international law, firstly arresting the crew and confiscating the plane, and secondly the illegal countermeasure.

Escalation and Criticisms of First Model

26. Professor Weiler shared that this example shows that such disputes under public international law can easily lead to escalation. It is a very primitive, non-functional way of resolving disputes.

27. Professor Weiler shared his opinion on the root of the problem of escalation, and how escalation can be prevented. The cause of the escalation is the dispute about the content of the law. The Chinese say it is not allowed to send military flights through the EEZ, while the USA says this is allowed. The root of the escalation is that in the general system of public international law without a treaty or party dispute settlement, each side is left to interpret public international law to interpret their legal obligations as they decide, and since both parties believe the law is the way they each see it, this leads to escalation. The source of the legal conflict is differing interpretations of what the legal obligations are.

28. Thus, the remedy is that there must be a mechanism where an objective, authoritative third party will decide what is the law. The solution of a third-party dispute resolution mechanism is inevitable, it could be a tribunal or arbitration, or it could be the ICJ. These third parties must be authoritative and countries must trust their interpretation of the law. They must also be disinterested in the dispute. This brings the discussion into the second model, and the discussion on the first model illustrates the necessity of the second model.

Second Model of Dispute Settlement

29. The second model is third-party dispute settlement by an authoritative body, such as arbitration or the International Court of Justice. Both parties agree that if there is a dispute over the interpretation of legal obligations, they will go to a third-party disinterested authoritative body which will grant a decision which both parties accept in advance.

30. For the second model, there are two basic forms.

    a. Permanent institutions through which you can resolve your disputes, for example, the International Court of Justice (ICJ) in Hague, or the Permanent Court of Arbitration (PCA) in the Hague.

    b. Ad-hoc third-party dispute settlement e.g. If two states such as US and China agree that they will go to arbitration when they face a dispute.

31. Professor Weiler asked participants to reflect on why these mechanisms are rarely used when it seems to be common sense that to avoid escalation of disputes, States should go to third party dispute resolution. For example, the ICJ and PCA are woefully underused. States do not like going to the ICJ or the PCA, and do not like ad-hoc third-party dispute settlement.

32. Mr Aloysius Selwas Taborat (Indonesia) suggested that firstly, States could be reluctant because they are benefiting from the ambiguity in the law and using it to their interest with the hope of meeting their objectives. Secondly, they could be reluctant because of the anticipated perception of losing. Professor Weiler agreed that those are very good reasons. States like the ambiguity of international law so that they can bend the ambiguity to suit their interests. The second reason is very powerful because the judicial nature of third-party dispute settlement is that one party wins and one party loses. The losing party faces humiliation not only in the international community but also within its own population. Thus, third party dispute settlement usually only happens for cases which are low-key and technical in nature, where both parties are able to accept both a win or a loss because no national prestige is involved.

33. Among the different modalities of third-party dispute settlement, the most common is arbitration. Typically, an arbitration panel will be three people, but there has been an interesting divergence in practice. For example, in international trade, the WTO panels are a form of arbitration although they are not called arbitration because that word has a different significance in the WTO. The rule in WTO arbitrations is that the arbitrators cannot be from the countries that are party to the dispute.

Discussion – Selecting Arbitrators and Models of Dispute Settlement

34. Participants were split into Breakout Room groups to discuss:

    a. How countries decide between the aforementioned models.
    b. How arbitrators should be selected so that the countries will be confident the model will work.
    c. The advantages of an arbitration panel with arbitrators from different parties.

35. After participants reconvened from the Breakout Rooms, Ms Danae Wheeler (New Zealand) shared that the first model her group discussed was the WTO model, where the three arbitrators are not chosen by the parties but are selected by a committee. Some of the benefits include that it is not as susceptible to domestic or political bias, but the negative is that the parties do not feel like they have their own say, whereas by selecting their own arbitrator their voice is heard, and the third arbitrator helps to achieve balance.

36. In response to this, Professor Weiler explained that it is true that the WTO selects the arbitrators and the arbitrators cannot be selected by the countries to the dispute, but the WTO proposes arbitrators and continues to propose arbitrators until both parties state they are comfortable with those arbitrators, the countries can object to the arbitrators proposed. If parties select their own arbitrator, this does not mean that the arbitrators will always side with the countries they are from. Panel selection is often a unanimous decision. Thus, Professor Weiler asked the participants why States would want to appoint their own arbitrator.

37. Ms Danae Wheeler answered that perhaps arbitrators appointed by the State would be able to fully understand the cultural background and the context of the issue. Professor Weiler agreed with this response. He recounted his first international arbitration, where it was made clear to him that he did not have to vote for the country that appointed him. Instead, it was his duty to make sure the members of the arbitration panel fully understood the position of his country. The parties want to have an arbitrator from their country because there might be specifics of the country that are hard to understand, and countries want to make sure that the arguments of the country are fully understood. However, in most cases arbitration decisions are unanimous, and not split according to countries.

38. If the arbitrators are chosen by the parties, there is a risk that the two arbitrators chosen by the countries might come to a decision that both parties will be able to accept. However, when a general treaty such as an ASEAN agreement or WTO treaty is being interpreted, the rule is valid for everybody and other states are affected.

39. There are advantages to both models. One model gives the advantage of having an objective interpretation that will benefit everybody which will not be swayed by the interests of the parties to the dispute, the other model instils more confidence and in most cases it is a unanimous decision thus it makes it easier for the decision to be accepted.

40. Professor Weiler posed a further question to participants on how the neutral arbitrator or independent chairman should be selected so that both countries will be confident and happy with the selection. Mr Shamsul Arefin (Bangladesh) suggested that both parties could propose some names and there will be a vote between the two parties. Professor Weiler shared that this answer is close, what happens in practice is that each party makes a list of 50 names, and the first name that appears on both lists will be chosen. Organisations like ASEAN and WTO already have a list of names that countries are comfortable with, so they can send in these lists.

41. Professor Weiler asked participants what countries can do if after a decision is issued, one of the countries is not happy with it and does not comply. Mr Shamsul Arefin answered that countries could impose an international sanction upon the non-complying country. Professor Weiler agreed that this could be a response taken. When non-compliance occurs, countries are back to model one of dispute settlement. Ultimately whether they comply cannot be helped because the structural weakness of the dispute resolution system is that there is no means to enforce compliance.

Third and Fourth Model of Dispute Settlement

42. To discuss the third and fourth model of dispute settlement, Professor Weiler posed a further question. In practice, the party that suffers from violations under international law and is interested in compliance is a private individual. For example, a trader interested in compliance with ASEAN rules of origin. What can an individual do in such a situation?

43. Mr Aloysius Selwas Taborat proposed that individuals who suffer can file a complaint with their own government or file a lawsuit in the other country for injuring their rights. However, Professor Weiler clarified that as a private individual, there is no standing to bring a case in international dispute resolution and go to arbitration. Thus, individuals can only go to the government and ask the government to take action, and governments can settle it with the dispute settlement mechanism. Despite this possibility, ASEAN states have rarely used third party dispute settlement mechanisms. If the governments do not take action, the individual is left without a remedy. Professor Weiler asked participants why governments so rarely take action.

44. Mrs Rachminawati (Indonesia) shared that governments want their relations to remain good, and these are small matters not worth going to dispute resolution. Professor Weiler agreed with this answer. An example would be an exporter who instead of exporting 1 million dollars a year, can only export 800,000 dollars a year due to the violation of international law. For the exporters, this is a lot of money but for States it is not. From a State's point of view, it is not worth going to dispute resolution for a negligible amount of money. There is a discrepancy because the issue is very meaningful for the trader, but it is trivial to the country and it would be costly for them to engage in dispute resolution over this, both in monetary terms and international relations.

45. Thus, there is a tension between dispute resolution and compliance. Dispute resolution tries to resolve disputes between states and prevent disputes from escalating. Disputes can often be resolved diplomatically with compromise, which is good for friendly relations but this is often at the expense of compliance with the law. Often, victims of non-compliance are individual human beings and individual traders who rely on the goodwill of their own government, but the stakes need to be high for the governments to act. Professor Weiler asked participants how states should solve this issue and lacuna.

46. Mr Cesar Ong (the Philippines) suggested the adoption of the model in the human rights court where individuals are granted legal personality or direct access to the courts for them to make a claim on their own against another State. This is possible in the European Court of Human Rights or African Court of Human Rights. Professor Weiler agreed that this is absolutely right, and the solution would be to give individuals the ability to initiate an action. This is seen most ubiquitously in the field of investment arbitration. There is a bilateral investment treatment between two countries that allows the investor to bring the case against the State. Thus, a mechanism to solve this problem would be a mechanism that allows the individual who is suffering to take an action.

ASEAN and WTO Dispute Resolution Structure

47. The ASEAN dispute resolution structure replicates the dispute settlement structure of the WTO. However, the ASEAN dispute settlement mechanism is not used. Although the dispute settlement process, procedure and rationale are more or less similar to that of the WTO, the member states of ASEAN have used the WTO dispute settlement process and have not used the ASEAN dispute settlement process. In line with the ASEAN Way, ASEAN states do not like to resolve disputes through a formal litigation process. Thus, there is no flaw with the form of ASEAN's dispute settlement mechanism. ASEAN Law is just a different philosophy that spills over into international relations.

48. Professor Weiler described the WTO system step by step in practice, to show the life of the system.

49. Before the WTO provisions for dispute settlement in 1995, if there was a trade dispute there was a panel system, and this depended on the agreement of the other party to accept the decision of the panel. When the panel gave its decision, it would go to a dispute settlement body in order to formalise it and make it binding. However, if the other party did not agree to the recommendation of the panel they could just block the adoption of the panel recommendation.

50. With the advent of the WTO in 1995, they wanted to tighten the rule of law in international trade, so when there is an alleged violation of a WTO obligation, a panel can be convened to decide the dispute. However, there is a period of compulsory consultation where parties must consult with each other. This is pro forma because usually if parties decide to convene a panel, compulsory consultation has failed.

51. The panelists include former delegates of the WTO, and the rationale is that they have experience and know the subject matter and understand the spirit of the WTO. Most panelists accept the invitation to be on the panel due to the extensive benefits and prestige. They receive the two briefs from the complainant party and the reply brief from the defendant party, and there is a bench brief from the Secretariat of the WTO legal affairs division or rules division.

52. Each dispute has different panelists, so it is unlike a court where judges gain experience over the course of many cases, and panelists do not have as much experience. Thus, the legal secretariat of the WTO has incredible authority because they summarise the problem for the panelists and can tell the panelists what the desired solution for such a problem is, and this has weight with the panelists due to the experience and expertise of the legal secretariat.

53. Almost every panel decision goes to appeal, if countries see a weakness in the panel report, they will strategically choose to keep quiet to avoid the panel strengthening their report which would make it hard to file for appeal.

54. The appellate body is a permanent body, and it is a complex political process to appoint the members of the panel. The members are appointed on a regional basis, for example members come different regions including Asia, Africa, and North America. The report of the appellate body also goes to the dispute settlement body. To block the report of the panel or appellate body, unanimity is required.

55. Regarding implementation of the decision, sometimes States do not change their law at all, for example the US Gambling case. Most of the time, States do change their law but not to an extent that is satisfactory. This will be referred to a compliance panel to determine if the changes implemented are satisfactory to comply with the decision. If the compliance panel decides that the party is not in compliance, the other party will be entitled to introduce proportionate counter

measures. The non-complying party might then state that the counter measures are disproportionate, leading to another arbitration proceeding on the counter measures.

56. This procedure is replicated by ASEAN.

57. The main advantage of the WTO system is that it multilateralises the procedure of dispute settlement. The dispute settlement agreement holds that States are not allowed to take any counter measures until WTO dispute settlement has decided and confirmed that there is a violation of international law. Many think this is positive, that it is decided by right and not by might. Small countries especially like this, because otherwise negotiations will be very unequal for small countries against the US and Europe, who trade with many countries.

58. An important disadvantage is the lack of reparations. The basic rule of public international law is that if one country violates its international legal obligations against another country and causes damage, they must pay reparations, especially for economic damage. This is a fundamental principle. There must be reparation paid. In disputes, the damage often falls on individuals.

59. However, under the WTO, the only reparations that must be made are changes to the domestic law. There is no compensation for the damage created. Thus, it is not just that it is slow justice, there is no justice done for the individuals that suffer a lot. Any sanctions are not a compensation for the damage done, they are an enforcement measure, to put pressure on the country to bring its laws into conformity with the WTO decision. These sanctions take the form of a withdrawal of concessions.

60. Moreover, if trade sanctions are imposed, individual traders often suffer instead of governments, both exporters from the non-complying state and importers from the state imposing the counter measure. It is also noteworthy that WTO is meant to bring about more trade, but trade sanctions lead to less trade. Thus, it is a deeply flawed system. ASEAN improved this system slightly, by providing for either withdrawal of concessions or compensation. Professor Weiler believes that this is a very good and rational improvement to the system.

61. One last anomaly of the WTO system is that it suddenly brings into play the varying economic might of different countries. For example, in the Gambling case between US and Antigua, a micro-state: although Antigua won the decision, the US did not comply, and Antigua was not able to impose counter measures because counter measures only work when States have economic power.

Model in Human Rights and Investment Protection

62. Returning to the models of dispute settlement, Professor Weiler introduced an intermediary model which is the model used in human rights and investment protection. In the bilateral investment treaty, the legal action for enforcement is taken by an individual who suffers from the violation. It is hybrid because the individual has standing to sue the State. Many states sign bilateral investment treaties because many investors will only invest if they see there is a bilateral investment treaty. Usually, many of the investors that file an investment complaint are big corporations, as the cost can more than a million dollars.

63. The main advantage of this system is that from an international relations perspective, countries are reluctant to sue other countries because it affects relations between them. Thus, it is helpful to allow individuals to take action independently.

64. The main disadvantage is that the substantive rules do not provide adequate protection to the public interest of the country in which the investment takes place. These treaties are mostly written by capital exporting countries. Nevertheless, this gap has been improving and there has been more progress balancing the interest of the state in which the investment takes place and not just the investor. This is because foreign investment has developed and now big States have become the defendants in some cases, and they have realised that the laws are unequal.

65. The real challenge for ASEAN is not dispute resolution, because ASEAN works through diplomacy. The real challenge is compliance because the international legal world has changed and increasingly treaties among states do not deal with high politics, boundaries, use of force, or territorial waters, but affect the lives of individuals directly and indirectly. The issue of compliance may have trivial impacts on States, but significant impacts on the lives of individuals.

66. Most of the violations occur by administrators and not high government officials, who are not familiar with the law and their non-compliance occurs in tiny actions. For example, tiny violations by administrators at the border. There should be efforts for coordination to ensure consistency, but there are still violations that do not get to the threshold that leads to big-time dispute settlement.

67. The compliance pull of a single court in a country is typically higher than the compliance pull of the most robust international tribunal. It differs from country to country but in almost every country, the compliance to domestic courts is much higher than compliance to an international court. Governments listen to their own judges and it is much more difficult for a government to disobey their own court than the international courts. The most impactful and effective way to ensure compliance is to have these obligations adopted into national law and enforced by domestic courts. This can ensure compliance with international legal obligations and it gives relief and remedy to the individuals who are harmed. This covers day-to-day violations.

68. However, this is not so simple because certain legal conditions must prevail for a domestic court to be able to apply an international legal obligation. The easiest way would be if a country formally adopts international legal obligations into domestic law so that they can be applied by the courts. In practice, this rarely happens. Thus, in court there will be a constitutional matter of whether courts are able to enforce an international legal obligation if it has not been adopted into domestic law. In Singapore, the rule is that the treaty does not have direct effect and cannot be enforced by courts unless the treaty has been adopted into domestic law by legislature.

69. The participants were split into Breakout Rooms to produce an argument on how you can rely on the ASEAN legal obligation even if it has not been adopted into domestic law. Professor Weiler gave the example of the obligations on how to classify ASEAN rules of origin in ASEAN trade agreements.

70. After both Mr Shamsul Arefin and Mr Koh Mun Keong argued that the international legal obligations in ASEAN trade agreements fall under customary international law, Professor Weiler disagreed with this point. He stated that ASEAN law is not customary law, it is treaty law. Moreover, nobody can argue that laws such as classification of rules of origin can be customary international law as there is no state practice and no *opinio juris*.

71. Professor Robert Real (the Philippines) proposed that parties could trace a local law or an older local law to an ASEAN treaty or legal instrument. The basic idea is to consider this old or present local law and to interpret this with the ASEAN instrument. Professor Weiler agreed that this is a good suggestion and could work in some instances, where parties can find an appropriate local

law that is ambiguous and that can be interpreted to be in compliance with international law. However, such cases are rare.

72. Professor Weiler proposed a better solution. Parties could apply for judicial review of administrative decisions of administrators. Firstly, this is a standard procedure because administrators make mistakes. Secondly, most of the infractions are by administrators writing or applying administrative rules.

73. Based on the standard for judicial review of administrative action, deference will be given to the administrator unless the decision is unreasonable, in which case the decision will be struck down. Parties could argue that it is not reasonable for an administrator to administer the rules in a way that would put the State in violation of international law. No reasonable administrator of ASEAN would decide in an area governed by ASEAN law without considering compliance with ASEAN law. 80% of infractions fall under this category. This was argued in 2018 at a moot court with the Chief Justice of Singapore, Acting Chief Justice from Philippines and a top judge from the Intellectual Property Court of Thailand. All of them accepted these arguments.

74. Professor Weiler shared that he feels that this is the future of ASEAN, for lawyers to inculcate this culture by making these arguments in court. He argues that courts would implement this because in ASEAN, the rules are good, the ministers agree, and it is in the interest of the country, but all of this means nothing if there is no compliance in the effective day-to-day implementation. Thus, ASEAN laws should be adopted into domestic law, and if they is not, arguments should be made that it would be unreasonable to make administrative decisions without any thought of ASEAN legal obligations and compliance with these obligations.

75. Therefore, Professor Weiler made two propositions:

    a. Proposition (1): Domestic courts are the most effective way to enforce international law.
    b. Proposition (2): Although domestic law may not include these international legal obligations, parties can insist on the reasonableness of administrative decisions. An administrative decision that would bring a country into violation of its international legal obligations is not reasonable.

Human Rights Dispute Settlement and Compliance in ASEAN

76. After making these points on international trade, Professor Weiler invited Dr Tan Hsien-Li to share the situation of human rights in ASEAN and the compliance to these obligations, as well as whether individuals who feel their human rights have been violated under ASEAN law have any relief.

77. Dr Tan Hsien-Li first clarified that getting relief could mean getting relief in a court or in a national system, because the human rights obligations for ASEAN are in the ASEAN Charter. Other human rights obligations are in firm soft law instruments, such as the ASEAN Blueprints and the ASEAN Human Rights Declaration. Since the human rights institutions are continually being built up, relief and accountability are in the reporting and monitoring mechanisms. Recently, ASEAN has also been looking at individual relief. These mechanisms have been built up over the years and in 2020 the ASEAN petitionary mechanism was formalised and that mechanism will be coming into play in the future.

78. In the petitionary mechanism, an individual or a group will submit a petition to the ASEAN Secretariat in a formalised procedure. After it is cleared and approved, the next steps are confidential. Once the results have been submitted, there will be a confidential resolution or

confidential investigation. Most of the data is confidential. There are many people who do not like the confidentiality, but there has been undeniable progress.

79. Professor Weiler shared that he dislikes the claim of confidentiality, and believes it comes from the fear of losing face. He opined that States need to overcome the fear of losing face because all countries violate human rights. For example, in the European Court of Human Rights, every country regularly is told they have violated human rights. In ASEAN, States need a cultural shift to move away from this fear of shame and accept that human rights violations do happen and should just be corrected.

80. Dr Tan Hsien-Li further shared that the human rights reporting has had more transparency and many of the technocratic reports are transparent and very illuminating.

Questions & Answers

81. Mrs Rachminawati asked about the enforcement of human rights through a possible ASEAN Court of Human Rights and other dispute settlement mechanisms. She further asked if under the 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms, if the ASEAN Coordinating Council is unable to reach a decision then the dispute can be an unresolved dispute. She also wanted to know if this idea of an unresolved dispute is in other jurisdictions as well. In response to this question, Professor Weiler shared that it is always a political body that makes the final decision and there needs to be negative consensus of unanimity not to go ahead, rather than unanimity to go ahead. This is the basic standard in international economic law. When it fails and only after it fails, parties can turn to law. Dr Tan Hsien-Li referred Mrs Rachminawati to Professor Walter Woon's book on the ASEAN Charter to understand the concerns better.

23-24 February 2021: Teaching/Research/Writing/Conference Methodologies by Professor Joseph Weiler

General Introduction – Being an Academic

1. Professor Weiler started the session with briefly sharing about his career. He noted that the career of an academic in the pre-internet era was easier because there were less published materials, fewer journals and expectations were different. He went on to explain how the quantitative revolution, in the form of quantitative evaluations, exercises and rankings of both individuals and institutions has resulted in an explosion of literature, where quality is not necessarily always guaranteed. The importance and reverence that comes with citations and being cited, according to Professor Weiler, has diminished with excessive citations.

Presenting a Paper at a Conference

2. Professor Weiler shared that attending a conference is not just to listen to others, but more importantly to present your own paper. He sees it as a way of familiarising an audience with the paper that a scholar has written, though now conferences tend to become packed with so many presentations that presentations often appear rather rushed.

3. Professor Weiler also illustrated techniques to present a paper effectively at a conference:

    a. Prepare for the conference as you would prepare to present your written argument in court: One would never walk into court and actually read their written arguments to the court. What you would have instead is a short oral presentation. An oral presentation is a very different document from a brief submitted to court, because there needs to be persuasion and a time limit. You will likely only submit on the three most important points of your brief. Likewise, a conference presentation is very different from the paper written. Assume people have not read the paper, and you want them to be familiar with the most important points you are making in the paper.

    b. Start with an intriguing puzzle (for example, “someone is dead, who is the killer?”), which you will then work your way through. The presentation is not just about the points being made, but also about the communicative aspect of the presentation.

    c. Practice. Discipline is important. Write out the oral presentation, which is a different intellectual exercise from the paper that is written. Practice speaking it in the same manner in which you would present at the conference itself. Repetition is a presentation technique. It is imperative to practice in order to get better at it. PowerPoint is counter-productive and distracting from the actual intellectual content; you only have 15 minutes. Your PowerPoint draws people’s attention away from you. Effective speaking is eye contact with your audience. You need to see how you are doing by looking at your audience’s face, whether it be captivating or puzzling. Speak to the last row, to pace effectively and for volume control. This is destroyed by PowerPoint. You will end up walking people through a PowerPoint, rather than having a conversation with your audience.

Publications

4. Professor Weiler shared that there are advantages to publishing in a tier-one journal, which he humorously equated to brownie points for one’s career. He noted that publishing in such journals

would generate higher chances that more people will read one's article, and may also be an indication of quality.

5. Professor Weiler provided some insight into the process of publication:

    a. The article comes in and is read by editorial team (tends to be the editor-in-chief and usually two associate editors).
    b. Editorial board hold a meeting and classifies articles as "admit", "clear reject", "hard cases".
    c. There is a screening process to decide which articles to send to peer-review.
    d. Articles are sent for peer-review. Rarely will there be a case of clear reject. Most of the time, the author is asked to revise and resubmit.

6. There is usually never a direct acceptance as articles can always be made better. Rejection, if any, is usually made on curatorial grounds. Usually only around 1 out of 4 articles are sent to peer review.

7. Professor Weiler also gave tips on how authors can do better in the screening process:

    a. The article's contribution to the field should be transparent in the abstract and introduction. It's not about what you did not know, but what the field does not know. Build this into the abstract but not in a boastful way – authors should find an elegant way of stating upfront the contribution to the field. This could be to identify gaps or lacunae in the field or proposing an alternate theory or explanation for what is already known.

    b. The article must have engagement with existing literature. It is nonsense if you write an article in two months as you would not have been able to engage with the literature. This is a scholarly apparatus for the author to lay out what the field is for the reader. Failure to engage with literature can defeat you at screening stage.

    c. Choice of topic. As a yardstick, publishers want to publish articles which have a shelf-life of at least 5 years. This contributes to the gravitas of the issue, which publishers hope will not go obsolete in 12 months. Acceptance for publication carries the same weight as being published. Sometimes getting immediately published is not necessarily a good thing because something 'big' may happen which may drum up interest in the subject area.

    d. Write a thin "skeleton" version of the article (just for yourself), tracking the sequence of ideas. The author can then evaluate how effective the sequencing is – whether the paper starts with a problem, whether it is solved as the article progresses. The author can then flesh out this version, putting "muscles" on the "skeleton". This communicative aspect of article is very important and the author needs to be consciously thinking about this.

    e. Authors should never send in an article without workshopping it. People do not see weaknesses in their own work; a workshop will mean getting colleagues and students to read the article and give feedback. It is like a personal peer-review process.

    f. The last stage is to hope that the article gets through screening. This usually takes 6 weeks. Once an author clears the screening, there is an 8 out of 10 chance that the paper will go to the peer-review process.

8. Language limitation is not a big problem, as a non-native English-speaking author can get a native speaking writer to edit the work.

9. Edited books are graveyards. He noted that edited books are results of conferences, and initial papers submitted to conferences are rarely any different from the final published material, suggesting that barely any editing or review work was done. He noted however that there are exceptions, such as very focused edited books in very specific areas. These are likely to be read by experts in the field. He also pointed out edited books could be textbooks containing different topics in a particular field of law.

How to Write A Book, and Types of Books to Write

10. Professor Weiler spoke about the pressure that comes from quantitative evaluation when writing books. He advised scholars that at any given time, they could be working on one ambitious project while juggling several other academic and professional commitments.

11. He then shared his three criteria for choosing topics to write about:

    a. The field should not know it – the book is filling a gap in the knowledge of the field.
    b. The field wants to know it – there are people must be interested to read about the topic.
    c. There must be enough resources and data to execute the book.

12. Writing a good book should take years, not months. He explained that 80-90% of books are result of projects that last between three to four years.

13. Law books vs books about the Law

    a. Law books are meant for the reader to learn what the law is regarding a specific body of law or area of law. For example, a cyberattack is more much complicated to analyse when compared to armed attack, with a host of legal problems. On this point Professor Weiler noted that writers sometimes assume their readers' basic understanding of the subject area; but what is important is that the book contributes to the existing body of literature.

    b. A book about the law, offers different interpretations of the law and explains how these interpretations apply to the circumstances. It is no longer about stating what the law is but taking what the law is as a departure.

<u>Hybrid Book: Evolutionary Approach</u>

14. Professor Weiler noted that there can be a combination of the two – a law book that is about the law. Such a hybrid could be a contextual or evolutionary approach to the law, explaining why laws are adopted or drafted the way they are, by providing economic, social and other context. Metaphorically, a law book would be a photograph, while a hybrid would be a video. The hybrid book would state what the law is, how it came to be like this, and what it may have evolved into. This evolutionary approach enables the reader to go into predictive mode, as the law is never static and courts must interpret new situations all the time. There is an evaluative aspect in writing these types of books. In his opinion, it would be useful to write in this evolutionary way about ASEAN.

15. Western jurisdictions usually prefer articles which are about the law or which are based on the hybrid model. In Asian legal literature, he found that it was more common to have law books. He opined that as Asia and notably ASEAN are contextually different from the West, scholars may consider using conventional Western ideologies, principles and perspectives to examine Asia and discuss whether and how applicable these Western concepts are in Asia.

Updating Your Methodological Toolkit

16. Scholars need to consider updating their methodological toolkit. He advised that scholars should take time to read and research with the desire to update one's methodology toolkit. New methodological tools learnt will be useful for subsequent articles and books.

Impact Studies

17. A good research question is paramount for long-term research projects. For example, an impact study of a law to clean up the beaches may not in itself be useful or interesting. Such a research area might be useful if it found that the beaches really were not clean even with the new law in place, since this would likely call for a legal reform agenda.

Process of Writing

18. Professor Weiler concluded by speaking briefly on how to get over writer's block. There is no need to start writing from the beginning when writing a book or an article. He used a jigsaw puzzle analogy to explain that it is perfectly reasonable to start with the centre of a jigsaw puzzle after laying out the outline or framework of the puzzle, just as it is reasonable to start from the crux of the legal issue itself.

Questions & Answers

19. Dr Srikant Parthasarathy (India) asked how academics should navigate an oral presentation that is shared on platforms like Youtube. Professor Weiler's response was to adopt his tips for presentation of conference papers. Presentations are rarely made for Youtube, as people usually stop watching after the 30-minute mark. Boiling down one's arguments to the 2 to 3 most important points remains relevant.

20. Dr Parthasarathy asked about Professor Weiler's first experience writing a book, and how his work had changed over the years. Professor Weiler shared that he had wanted first book to be on the Arab-Israeli conflict as he was passionate about the topic. His supervisor disagreed because it was too political, polarised and any conclusion would be both loved and hated. Instead, it was recommended for his first book to cover something that was interesting for as many people as possible. He ended up writing about the European Community System and Integration. His second book was then about Israel and the creation of the Palestinian State; the reviews were divisive, and he admitted that this would have been bad for a first book and his foray into academia. He was glad that his academic credentials had been established with his first book.

21. Dr Parthasarathy sought advice on how government officials should work with academics. Professor Weiler noted that academics are not policy-makers and are not meant to be thinking along policy lines. Academics are useful in providing context and explaining societal conditions as well as in conceptual terms what the pros and cons of each policy are. As an academic, Professor Weiler was therefore not going to write the policy proposal, but he could provide the context for the actual policymaker. He would provide options and their pros and cons, which would be useful for policymakers.

22. Professor Monika Negi (India) asked how academics should approach online conferences and online presentations. Professor Weiler said that there would still be conferences and workshops online even after COVID-19 – as it is cheaper and participation rates would be higher because people do not lose time to traveling. The number of people participating matters. He advised to set up the conference to be able to see everyone in a single screen, as this helps an online presentation to be more like a live presentation. He discouraged screen sharing. In his opinion it was best to have participants have their videos turned on as this encouraged greater audience discipline. Time management was also important because the limited attention span of an online audience. Professor Weiler also recommended frequent Zoom breaks.

23. Professor Negi then asked about the role that a *curriculum vitae* (CV) played in the odds of getting published. Dr Tan took this question: upstanding journals do not focus on the CV. The abstract, title, and contents are the main focus and help determine whether an article warrants a reading of the entire paper. She could not say that CVs did not count for all journals, but generally, everyone is acknowledged first and foremost as a fellow scholar.

24. Professor Pooja Sharma (India) asked about whether papers covering a specific case study would fare well in the screening process. Professor Weiler replied that firstly there had to be added value. If there was, somebody would read the case. If reading the case study put the reader in the same place as reading the original case note, the case study would be unlikely to be published. Secondly, adding value may not be sufficient for audiences from another region. The article must be written in a way that it is of general interest; journals do not want to just be region-centric as there are readership considerations. Therefore, the case study should have engagement with the subject area.

25. Professor Oh Yoon Ah (South Korea) asked for Professor Weiler's thoughts on co-authorship. From a career point of view, he felt that it is not great to always have co-authorships because it is unclear who contributed what. One's portfolio should therefore not be dominated by co-authored pieces. The worst case is where all of a scholar's works are co-authored with senior professors. Generally, he advised to only co-author if it makes the piece better, for example due to different areas of expertise. There must be added value rather than just a division of labour.

26. Professor Oh also asked about the difference between publishing an article and book in terms of the process behind it. Professor Weiler's answer, succinctly put, was "scope". A book is more extensive. A 4-5 chapter book is equivalent to 4-5 articles of 30,000 words. A law book has fixed chapters, such as a book on contract law; there are chapters that people need to and want to read as a fixed flow or set of topics. An article about the law, however, must grab attention of reader immediately. A book must have that ability overall, and for each of its chapters. This, according to Professor Weiler, was an important dynamic to maintain consistently throughout the book and throughout each chapter.

27. Mrs Rachminawati (Indonesia) asked two questions, sharing her hesitation with methodological updates, and seeking tips on writing good introductions. On the first question, Professor Weiler used vaccine production as a metaphor: doing vaccine trials is useful even if they do not succeed, because these failed vaccines may result in a vaccine for another strand of influenza. It was the case for COVID-19, even though it was intended for a different context, and was trialled for a while before the onset of COVID-19. Methodological upgrades are never a waste of time. He advised her to workshop her work if she was unsure. On introductions, he advised to start with the parts she was most convinced about, and then do the rest.

28. Dr Tan Hsien-Li added that Asian literature is on the ascendance and the world is now paying attention to Asian scholars now more than ever. She opined that case description or analysis of a string of cases could be published as blog posts as that was a more current format. She encouraged scholars to look beyond leading European and American journals while reviewing literature, and to look at journals within different regions that may have audiences that are interested or engaged with that area of scholarly work. She further stressed the importance of good data from different jurisdictions, and highlighted that this would inevitably be a problem in some.

29. Professor Wan Mohd Zulhafiz bin Wan Zahari (Malaysia) asked whether it was possible and ethical to convert one's journal into a book. Professor Weiler's said that there would be little chance of plagiarism when converting an article into a book. He also said that it was possible to downsize a book into a journal article, which was done quite often, but it must not look too similar. Due to the digitalisation of works online, scholars have been found to plagiarise their own work. Even if not called out academically, one could be called out online.

30. Ms Dita Liliansa (Singapore) shared her issues with finding reliable data about ASEAN, particularly on its marine environment. Dr Tan shared that her own initial PhD hypothesis failed, not because it was bad, but because the data gathered was not enough. She proceeded to change track. Her advice was to find an approximation of data from elsewhere in the world, such as the UN, World Bank, IMF, US State Department, etc. There are data pitfalls, however, in areas such as marine environment because not enough public resources are funnelled into these areas. Dead ends could sometimes be solved by tweaking the question instead. Another way to go about this would be to caveat and to use assumptions, and to flag out the issue of not being able to gather enough data. To conclude, Dr Tan noted that this is a very real problem in Asia that is not as present in the northern hemisphere.

25 February 2021: Teaching/Research/Writing/Conference Methodologies by Dr Tan Hsien-Li

Teaching ASEAN Law & Policy at a University Level

1. In this session, Dr Tan Hsien-Li shared her experiences in teaching ASEAN law at NUS where she teaches ASEAN law for undergraduate (LLB) and graduate (LLM) students, including policymakers. The interest in ASEAN law appears to be growing as the enrolment rate at NUS has more than doubled, from 19 students at the beginning to about 50 students in the recent years. Her students come not only from ASEAN member states, but also from dialogue partners, such as from the United States, China and Japan.

2. From the poll held during the course, it was found that 53% of the Academy's Educator programme participants do not teach ASEAN law. However, those who do mostly teach ASEAN law as part of another module. 60% of the participants indicated that they teach ASEAN law only for undergraduate students. Most participants also indicated that their class typically consists of a 3-hour session (47%) in the form of lectures with subsequent tutorials (67%), in 12 or more sessions in one semester (80%).

3. Dr Tan explained that she normally teaches ASEAN law over 12 teaching weeks, with the option of having the last week as a revision class or teaching all through the 12 weeks. Some participants actively shared their experiences in structuring their syllabus to fit ASEAN into their modules. For example, Dr Logan Masilamani (Canada) teaches a standalone course on regionalism with ASEAN as an example. He uses the South China Sea dispute for class discussion on colonialism, independence, creation of ASEAN, ASEAN Charter, ASEAN way, etc. Similar to Dr Masilamani, Dr Srikant Parthasarathy (India) uses ASEAN as a case study from a diplomacy angle. Another example is Mrs Rachminawati (Indonesia) and her colleagues who teach ASEAN law using lectures, semi-problem-based learning and seminars. Due to limited number of lecturers, her class focuses on certain topics related to ASEAN, such as human rights, regional security or maritime, and economic trade law.

4. One participant asked about the relationship between ASEAN law and policy and public international law. Dr Tan responded that ASEAN law and policy is a subset of public international law because it is the law emanating from an international organisation. When states adopted the ASEAN Charter, they lodged the treaty to the United Nations Secretary-General.

5. Dr Tan then shared her syllabus on ASEAN law. The first half of the semester would cover how ASEAN law and policy operates within the dynamics and rules of public international law. In the second half of the semester, students are expected to apply the laws and institutional aspects of ASEAN to topics and legal issues under the three community-pillars and ASEAN external relations. Here, the class looks at selected case studies to analyse how ASEAN as an organisation resolves a crisis in the region.

6. Reading is kept at 90 pages per week or 30 pages per classroom hour. Some of the literature was not only ASEAN-law based, but also covers general public international law and the European Union (EU). Students are also expected to read the required primary instruments, which are not counted within the 30-page per class-hour limit. Students are expected to do their reading before class and be able to spot the legal issues and answer seminar questions.

7. During the pandemic, class consisted of a 1-hour video lecture followed by a 2-hour Zoom seminar. In the 2-hour seminar, students were assigned a specific question for them to answer and debate in class. As in a normal semester, all students are encouraged to speak as class participation worth 20% of the final grade. The rest of the class assessment is based on a mid-term essay and a 6-hour take-home exam.

Questions & Answers

8. Professor Wan Mohd Zulhafiz bin Wan Zahari (Malaysia) asked for suggestions on introducing an energy law course with ASEAN as one of its modules. Dr Tan suggested that he could concentrate on ASEAN economic cooperation first, before focusing on energy cooperation. Students should also understand whether there is a difference between cooperation founded on soft laws vs treaties.

9. Mrs Rachminawati (Indonesia) asked how to explain that ASEAN is not going towards a supranational direction. Dr Tan responded that ASEAN policymakers have been going on study trips to the EU for the past 20 years and are now more confident to say that ASEAN is never going to be like the EU. The EU experiment shows that overriding supranationalism has its own problems and may not work for ASEAN. As of 2016, ASEAN wants to improve itself by creating monitoring and compliance mechanisms in all three pillars, without asking for punishment, and without naming and shaming so that ASEAN member states can catch up.

10. Mrs Rachminawati also asked whether teaching only an introduction to ASEAN organisation and integration, and other related topics, are sufficient, and whether there should be an introduction to ASEAN dispute settlement mechanisms as well. Dr Tan answered that if there are four sessions for ASEAN, one session should be focused on diplomatic ties and characteristics of ASEAN and the three other sessions should concentrate on the law. Alternatively, one session may be dedicated to tackling problems in ASEAN. Although ASEAN dispute settlement mechanisms are not being used currently, it is still necessary to equip students with this knowledge.

11. Another participant asked about how to teach ASEAN and security issues. Dr Tan suggested teaching according to the ASEAN Community pillars. ASEAN looks at security as hard and soft security. It is important to understand the difference between non-interference and non-intervention. Then, look at some case studies to see how law, power, institutions and diplomacy work in different cases because application differs on a case-by-case basis. For instance, human rights straddle between socio-cultural and political-security pillars, and the course could look at the applicable law and how the institution works.

12. Another participant asked how to teach ASEAN economic cooperation. Dr Tan responded that the class should narrate the story of ASEAN Economic Community from 1970s to 2007 and what type of economic model ASEAN wants to be. Some students may find this topic very technical, so it is necessary to give them some context of ASEAN economic integration.