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ABSTRACT

This research project is an investigation of the regional legal regime in the ASEAN Community. The dissertation has adopted a functional, rather than conceptual, approach to understand the regional legalism of ASEAN. The study also provides a contemporary topic related to highlights of the ASEAN's recent engagement in the regional economic integration to help understand the historic background of its community-building. The main question in this research is what law regime of ASEAN Community without supranational structures is, in which the dissertation narrows the case study on development of e-commerce law of ASEAN under economic community-building. To answer this question, the dissertation firstly investigates the ground of regional integration and legalization in the Community-building, where ASEAN has adopted an instrumentalist conception of the legalism and one based on 'thin' constitutionalism. The features of the legal regime in the ASEAN Community are – state-controlled, limited, evolutionary and resting on soft legal regime unlike the European Union that depends more on hard law regime. Despite this, it is argued that even though the European Union model is often utilized as a mother of inspiration, each regional integration bears different model constituent in order to make the best adapt to their regional or local contexts.

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

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1. Introduction – the ASEAN Economic Community

ASEAN, officially the Association of Southeast Asian Nations, is a regional organization of the South East Asian countries formed on August 8th, 1967 with the endorsement of the ASEAN Declaration in the city of Bangkok, Thailand (also known as Bangkok Declaration)¹. ASEAN was found by its five Father States – namely Thailand, Singapore, Indonesia, Malaysia, and the Philippines. After that, Brunei Darussalam participated the bloc on January 7th, 1984 and followed by Viet Nam on July 28th, 1995, Lao PDR and Myanmar on July 23rd, 1997, and Cambodia on April 30th, 1999, and today ASEAN consists with ten Member States.²

Like the European Union (EU), ASEAN was established to boost regional collaboration amongst its member states with aims and purpose for regional peace and stability, and social-economic development. However, the EU was established with the aim for ending the frequent wars within Europe, while ASEAN was established aiming for resolving a territorial dispute within ASEAN where each member had such dispute with at least one of their neighbouring countries, yet it kept those issues aside and focused on economic cooperation.³ ASEAN is an inter-governmental institution, and it cannot be a party to an international treaty. It largely depends on its constituent instruments to limit its legal personality and powers.⁴

In 1997, the thirtieth anniversary of ASEAN, the organization declared its ASEAN Vision 2020 which desired the creation of an ASEAN Economic Community (AEC) as an integral part of the vision for a product base and single market. They endeavored to establish a stable and peaceful region and seek a closer economic integration within ASEAN⁵, and to transform the ASEAN's security and political intergovernmental origin and began to steer it in a new direction.

The official formation of the ASEAN Community, including of the three pillars: the ASEAN Political and Security Community (APSC), the ASEAN Economic Community (AEC), and the ASEAN Socio and Cultural Community (ASCC), was declared on 31

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

² Seah, D. (2009). The ASEAN Charter. *The International and Comparative Law Quarterly*. ICLQ, Vol. 58, No. 1. Pp. 197-198; and *See also* About ASEAN: Establishment. Retrieved from <https://asean.org/asean/about-asean/#> [23 May 2019]

³ Tripathi, M. (2015). *European Union and ASEAN: A Comparison*. IJR Vol-2, Issue-1. P. 376.

⁴ Wang, J. (2006). International Legal Personality of ASEAN and the Legal Nature of the China-ASEAN Free Trade Agreement. In *China-ASEAN Relations: Economic and Legal Dimensions*, John Wong, Zou Keyuan, Zeng Huaquan, eds., Singapore: World Scientific, 2006. P. 14; and *See also* Supra Note 10, at 16.

⁵ See ASEAN Vision 2020.

December 2015 in Kuala Lumpur, Malaysia.⁶ Among the others, the economic development is a priority objective of Community-building, and the AEC is to be the flagship of regional integration. The AEC is regarded as the deepened framework of AFTA for competing with other regional integration. As in the early 1990s, there was a trend on establishing regional integration worldwide, for instance the EU and the NAFTA. Consequently, the Southeast Asian States felt an urgent need of their regional bloc, and an integration of economy in South East Asia was greatly necessary.

The AEC is not recognized only as an initiative of regional integration, but it is also recognized as a significant driver of a new model for regional integration and development in the East Asia in which ASEAN has been performing an important role⁷. The AEC presents a product base and single market with a free movement of investments, goods and services, skilled labour, and capital⁸. It sets competition policies and consumer protection in the region, promotes e-commerce development, enhances a better intellectual property protection and development of infrastructure, supports small and medium enterprises, strengthen development cooperation within the geographical region and a coherent approach to external economic relations. The AEC provides an open and integrated market to ASEAN people with more product choices and competitive costs, and it also supports businesses to experience markets and extend their market reach at reduced costs through improved investment environment and simplified cross-border trading processes. Furthermore, the AEC has also laid down frameworks and regional legal structures contributing to an improved environment for business.⁹

The ASEAN Economic Community represents a significant development especially when considered from its highly political past. The adoption of the ASEAN Community, though not a radical break from its past, represents a milestone for ASEAN. Notwithstanding, to be a real Community, ASEAN needs to bring about substantive changes that address institutional and legal reforms but also tackle vital political and economic issues by member states.

2. Legal Regime of ASEAN Economic Community

In ASEAN Community-building, a legal regime is evolving the “ASEAN Way” and it is possible for the development of a “rule through law” regime. In this type of legal regime,

⁶ Kuala Lumpur Declaration on the Establishment of the ASEAN Community (2015).

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

⁸ ASEAN Economic Community. ASEAN Secretariat. Retrieved from <https://asean.org/asean-economic-community/> [09 June 2020].

⁹ See ASEAN Community. Retrieved from <https://asean.org/storage/2012/05/7.-Fact-Sheet-on-ASEAN-Community.pdf> [30 September 2020].

regional authority dimension may be regulated by and acted through regional institutions and specific regulatory mechanisms.

ASEAN legal regime has been underpinned by soft regulation in order to balance member states' discretion of sovereignty. ASEAN soft regulation is a regulatory mechanism using persuasive, flexible, and non-binding coercions, in which 'non-binding coercions' refers to mechanisms directed at eliciting compliance but are not necessarily judicially enforceable.¹⁰ Soft regulations, *per se*, are not non-coercive but they can direct compliance through methods such as persuasion, pressure, fear, shaming, self-interest, or opportunity that is possible to be as effective as hard law.¹¹ These soft legal mechanisms are also not bound to firm into hard law; however they are a possibility to deepen institutionalization, harmonization, and legalization in ASEAN or in themselves they could be an end upon how both individual and collective purposes are perceived by member states.

The legal regime in the ASEAN Economic Community governance is divided into three phases: rulemaking, implementation or compliance, and enforcement. Rulemaking is the phase where processes of establishment, adoption, and revision of norms and rules on trade and business between the member states and rules on disputes resolution in connection with regional trade have been taken. Both compliance and enforcement similarly aim at implementing the commitments and responsibilities of the member countries under the ASEAN Charter and other ASEAN agreements. Compliance refers to voluntary actions and initiatives of the member states to comply with the agreed commitments or agreements, just like self-enforcement, while enforcement goes to a degree of compulsion, through pressure of sanctions. Thus, both phases are exercised upon the member states' discretion and a regional mechanism for supporting these processes and mechanisms remains sparse.

As the nature of most soft legal regimes, the legal regime of ASEAN is not a systematic or coherent legal system, but a fragmented and uneven system. The AEC strives to operate on the framework of soft legal regime, although on its initial and limited phase. It is leaning towards de-politicization of dispute mechanism but still works through the political framework in terms of rulemaking and implementation. However, there is an evolutionary tendency towards delegation of rulemaking in technical matters and development of uniform rules through voluntary reception into the domestic legal system through the method of harmonization. The development of 'rules-based systems for effective implementation and conformity of economic commitments' declared in the ASEAN

¹⁰ Zerilli, F.M. (2010). The Rule of Soft Law: An Introduction. *Focaal—Journal of Global and Historical Anthropology* 56 (2010). Pp. 5–6.

¹¹ *Ibid.*

Economic Community Blueprint depends on gradual and step-by-step process based on voluntary adoption of member states.¹²

3. ASEAN E-commerce Law – the Legalization

ASEAN has no supranational elements; hence, it does not legislate secondary law that directly apply to member states. ASEAN has the ASEAN Summit as supreme policy-making body.¹³ Its common way of conducting policy is by an adoption of an ASEAN Summit declaration. Nevertheless, the ASEAN Summit has also adopted several agreements in the legal nature of international treaty and usually need to be deposited ratification by the member states and soft instruments also play an important role for conducting policy in ASEAN.

3.1. Legalization of the E-commerce Law^[14]

E-commerce sector in ASEAN is growing fast. ASEAN considers e-commerce as a significant contributor to an economic growth and regional integration. By this recognition, ASEAN has endeavoured in developing legal framework to support the e-commerce growth in the region. Its first initiative regarding e-commerce legal development is by adopting ASEAN Vision 2020 in 1997, then followed by number of plans of action introducing legal initiatives concerning with e-commerce.

As discussed in the above sections, ASEAN has no supranational elements to legislate secondary law that directly apply to member states, thus, ASEAN has developed e-commerce law through forms of soft legal mechanisms by harmonizing of the Member States' national laws into regional legal system that respects each individual member state's national sovereignty and cultural sensitivities.¹⁵ ASEAN's e-commerce law has been developed mainly through soft instruments and trade agreements. However, the e-commerce legal support of ASEAN depends upon the adoption of a common reference framework by the member states and enact their domestic laws and regulations on e-commerce in the respective ASEAN jurisdictions.¹⁶

The newly adopted ASEAN Agreement on E-commerce 2019 is an important development of regional legal framework on e-commerce for ASEAN in order to increase

¹² See generally AEC Blueprint.

¹³ ASEAN Charter, art. 7.

¹⁴ This part is a modified version of the author's published works from "Sengpunya, P. (2019). ASEAN E-Commerce Legal Framework and Alignment of Lao PDR: A Review", published in *Lentera Hukum*, 6(3), 371-392. doi:10.19184/ejlh.v6i3.13709

¹⁵ Wong, J. (2013). *On Legal Harmonization Within ASEAN*. *Juris*, Vol. 5 (2013/14) Singapore Law Review. pp. 1-2.

¹⁶ Hsieh, P., & Mercurio, B. (Eds.). (2019). *ASEAN Law in the New Regional Economic Order: Global Trends and Shifting Paradigms*. Cambridge: Cambridge University Press. p. 344; and *See also* Mik, E. (2019). Legal and Regulatory Challenges to Facilitating e-Commerce in ASEAN. p. 3.

the use of e-commerce and to enhance economic growth and social development in ASEAN. The main aims of the Agreement are to: facilitate cross border e-commerce transaction in ASEAN; contribute to establishing a confidence and trust environment in the use of e-commerce in ASEAN; and tighten cooperation to further develop and enhance the e-commerce in ASEAN.¹⁷ Under ASEAN Agreement on e-Commerce, ASEAN Member Countries undertake to work together to establish an appropriate climate for facilitating cross border e-commerce transactions in the region. This includes advancing legal framework on e-commerce and establish greater connectivity of digital across the ASEAN region.¹⁸ ASEAN Member States also undertake to maintain or adopt their national regulations and laws governing electronic commerce taking into account adopted international model laws, conventions, principles or guidelines relating to e-Commerce as soon as practicable.¹⁹ This will flourish the development of a legal environment for e-Commerce in each Member State and in the ASEAN as whole.²⁰

3.2. Gap on ASEAN E-commerce Law

In order comply with ASEAN e-commerce legal infrastructure, the legislatures of ASEAN member countries have currently enacted various regulations and laws to govern e-commerce activities and make sure that e-commerce activities in their countries and in the region are carried out in a secured and safe circumstance to promote online sales of goods and services. Nevertheless, there has been no AMS include legislations to enact or develop any regulations or laws that expresses the issues or legal gap on conflict in cross-borders online activities.

Unlike the European Union that had conducted several efforts and discussions, aiming to protect the rights of online consumers and build trust for consumers in entering into contracts for cross-border transactions. The remarkable efforts carried out by the EU to provide legal basis on laws conflict and harmonize them into its member countries consist of the enforcement of Brussels Convention²¹, Brussels I Regulation²², the Rome Convention²³, and the Rome I Regulation²⁴. Considering that ASEAN member countries do not have a particular law in dealing with issues of law conflict on online transactions.

¹⁷ Art. 2, ASEAN Agreement on Electronic Commerce.

¹⁸ “New Agreement to Drive Cross-border E-commerce Across ASEAN”. The Australian Trade and Investment Commission (Austrade), 2018. Retrieved from <https://www.austrade.gov.au/news/latest-from-austrade/2018/new-agreement-to-drive-cross-border-ecommerce-across-asean> [25 September 2020].

¹⁹ Art. 5 (1) and (2), ASEAN Agreement on Electronic Commerce.

²⁰ See *generally* Factsheet on ASEAN Agreement on e-Commerce.

²¹ Official Journal L 299 , 31/12/1972 P. 0032 - 0042.

²² Official Journal L 012 , 16/01/2001 P. 0001 – 0023.

²³ Official Journal L 266, 9.10.1980, p. 1–19.

²⁴ Official Journal L 177, 4.7.2008, p. 6–16.

By examining legislatures of chosen states (Singapore, Malaysia, and Thailand), the research shows that none of the states have laws providing principles on the jurisdiction in cross-border electronic commerce activities. This issue of law gap can cause harmful effect to e-commerce and online consumers in ASEAN since the e-commerce contract made by them might be subjected to jurisdiction of courts of foreign countries that can cause high costs of litigation.

4. Compliance of ASEAN E-commerce Legal Framework – Case of Lao PDR and Vietnam

4.1. Lao PDR’s Policy and Legal Framework on E-commerce^[25]

The Lao PDR has recently extended its interest in e-commerce, promoted by the country’s participation in and commitment to e-ASEAN Framework that call for a strong legal and regulatory framework for e-commerce among other goals. The past few years, Lao PDR accelerated the upgrade of its preparedness, through different inter-ministerial consultations, for enhancing e-commerce.²⁶ The noticeable achievement of its commitments under the e-ASEAN framework has been ensured by its careful regulatory and legal framework development. However, its legal instruments are still not being used fully, especially for data privacy and protection of consumers online.²⁷

The Lao PDR has taken remarkable effort in the development of e-commerce legal and regulatory framework and has introduced provisions on electronic transactions and the recognition of electronic signatures and documents. It has adopted a set of laws relevant to e-commerce activities, including Law on Electronic Transactions, Law on Electronic Signature, Law on ICT, Law on Prevention and Combating of Cyber Crime, and Law on Payment System, Law on Consumer Protection, Law on Electronic Data Protection, and Decree on E-commerce.

4.2. Vietnam’s Policy and Legal Framework on e-Commerce

Together with establishment of the comprehensive legislative and regulatory framework, Vietnam is closely working with and actively supporting the IT industry, the foundation that lays down e-commerce. By this enthusiasm, the country has come with a budget of US\$111.6 million for an investment aiming to develop the IT industry by 2020. The strategy of Vietnam to enhance e-commerce development currently focuses on four areas: (1) developing IT industry of Vietnam, (2) improving strategies of recruitment, (3) supporting IT application, and (4) developing ICT infrastructure²⁸.

²⁵ This part is a modified version of the author’s published works from “Sengpunya, P. (2019). ASEAN E-Commerce Legal Framework and Alignment of Lao PDR: A Review”, published in *Lentera Hukum*, 6(3), 371-392. doi:10.19184/ejlh.v6i3.13709

²⁶ Lao People’s Democratic Republic: *Rapid eTrade Readiness Assessment*, UNCTAD, 2018. P. 5.

²⁷ Lao People’s Democratic Republic: *Rapid eTrade Readiness Assessment*, UNCTAD, 2018, at 4.

²⁸ Vietnam Briefing. Issue 21, March and April 2015. Asia Briefing Ltd. P. 5.

In 2005, Vietnam passed three laws that provide the legal basis for electronic commerce, including the E-transactions Law, the Commercial Law, and the Civil Code. Furthermore, e-commerce activities and the settlement of disputes in the e-commerce activities are also regulated by loads of laws, including the Information Technology Law, the Telecommunications Law, the Penal Code, the Protection of Consumers' Rights Law, the Advertising Law, the Investment Law, and the Enterprises Law²⁹.

Apart from that, the Vietnamese Government and relevant ministries have adopted various decrees and circulars aiming to guide and manage e-commerce activities and the settlement of dispute in the e-commerce, including Decree No. 52/2013/ND-CP on electronic commerce which sets four significant principles for e-commerce transactions, Government Decree 124 on lists of a set of violations related to e-commerce transactions and lays down a set of penalty for the violations, a Circular No. 47/2014/TT-BCT regarding e-commerce websites management, a Circular No. 39/2014/TT-NHNN on types of intermediary payment services³⁰.

4.3. Compliance of ASEAN E-commerce Legal Framework by Lao PDR and Vietnam^[31]

Under e-ASEAN Framework, Member Countries shall adopt their domestic laws and policies toward e-commerce, measures on protection of intellectual property rights arising from e-commerce and promote protection of personal data and consumer privacy; facilitate the establishment of frameworks for mutual recognition of digital signature as well as secure regional electronic transactions, payments and settlements; and encourage the use of alternative dispute resolution (ADR) schemes for electronic transactions.³² And Lao PDR have fulfilled almost all commitments under the framework, to be exact, four out of five points³³, while Vietnam has already met all of the commitments under the framework as of the review by UNCTAD in 2013³⁴.

The above account proves that Lao PRD and Vietnam have fulfilled the provisions and commitment agreed upon in the e-ASEAN Framework Agreement. However, such laws and legislation, no matter how comprehensive, require proper and serious commitment toward implementation, particularly regarding enforcement.

²⁹ Find all relevant laws at website of Viet Nam's National Assembly at <http://vbpl.vn/TW/Pages/vanbanTA.aspx?idLoaiVanBan=17&dvid=13#>

³⁰ Ibid

³¹ This part is a modified version of the author's published works from "Sengpunya, P. (2019). ASEAN E-Commerce Legal Framework and Alignment of Lao PDR: A Review", published in *Lentera Hukum*, 6(3), 371-392. doi:10.19184/ejrh.v6i3.13709

³² Art. 5, the e-ASEAN Framework Agreement.

³³ *Supra Note* 364, at 6.

³⁴ See generally Review of E-commerce Legislation Harmonization in the Association of Southeast Asian Nations. UNCTAD, 2013.

Although Lao PDR and Vietnam or other member states have committed to comply with the regional legal framework, but without a supranational structures, ASEAN can still face legal barrier related to cross border e-commerce, in particular jurisdiction that rises questions regarding which court may hear and settle disputes between parties from two different member states, which law to be used, and whether the judgement of court decided in one jurisdiction is enforceable in another jurisdiction.

5. ASEAN Legal Protection and Future Dispute Resolution for E-commerce

5.1. ASEAN's Dispute Resolution Mechanism

ASEAN's legal protection remains inconsistent with modern rule of law standards. The ASEAN Charter does not provide cross-border legal remedies for ASEAN citizens. It only provides legal remedies mechanism for difficulties concerning states, and disputes regarding economic agreements. ASEAN does not have a Regional Court of Justice, instead it established its dispute settlement mechanisms³⁵ in the tradition of the ASEAN Way in order to peacefully settle all disputes. The legal enforcement is upon national administrative and national judicial procedures of the member states³⁶, or for cases in connection with investment disputes, the legal enforcement uses commercial arbitral procedures under the ASEAN Enhanced DSM or other recognized arbitral tribunals³⁷.

At the present, there are at least three dispute settlement methods in ASEAN – 1) through good offices, 2) mediation or conciliation through the Chair of ASEAN or ASEAN Secretary-General³⁸, and 3) through the ASEAN Summit, and an instrument-specific method of dispute settlement. The instrument-specific method of dispute settlement shall be settled through the schemes or processes given for in that specific instrument. All resolution mechanisms in each instrument are often a consultation and negotiation³⁹, where the disputed parties must try to resolve their dispute in peaceful way through good offices, mediation, or arbitration⁴⁰.

Currently, the ASEAN Enhanced DSM is considered as the most radical attempt, through dispute resolution and rule interpretation, to establish 'hard law' in ASEAN. Under

³⁵ Art. 22(2), ASEAN Charter.

³⁶ As is the case under Section B, arts. 28–41, ASEAN Comprehensive Investment Agreement 2009 for investment disputes.

³⁷ Apart from the ad hoc arbitration proceedings in the ASEAN Enhanced DSM, regional and international arbitration such as the International Centre for Settlement of Investment Disputes, New York Convention and UNCITRAL Arbitration Rules can be elected to handle arbitral disputes. See Section B, art. 28, ASEAN Comprehensive Investment Agreement 2009.

³⁸ Art. 23, The Charter.

³⁹ Art. 22(1), ASEAN Charter.

⁴⁰ Hao Duy Phan (2013), Towards a Rules-Based ASEAN: The Protocol to the ASEAN Charter on Dispute Settlement Mechanisms. Volume 5 Yearbook on Arbitration and Mediation, Arbitration Law Review, 2013, p. 270.

ASEAN Enhanced DSM, the first stage for dispute settlement is a request for consultation where a party may submit a dispute for settlement. If the consultation fails to reach a settlement, the unhappy party can request for formation of a panel and thereafter an appeal may be made to the Appellate Body. Finally, the SEOM shall adopt report of the panel or report of the Appellate Body unless the SEOM decided not to adopt the report by consensus⁴¹. Despite, the member states have never used the ASEAN Enhanced DSM since established in 2004, but they prefer to use other international forums for dispute settlement instead.

However, the establishment of dispute resolution mechanisms at all levels of economic and political matters has promised some institutionalization of dispute resolution in ASEAN. At any rate, the weaknesses of formal adjudicative mechanisms for enforcement are sought to be supplemented by softer methods like monitoring and creation of inter-agency cooperation.

5.2. E-commerce Consumer Protection and Future Dispute Resolution Scheme for E-commerce^[42]

ASEAN considers consumer protection as one of the most significant segments of the ASEAN economic and social integration process. It is essential in enhancing economic growth and promoting a competitive market and the appropriate consumer protection can increase consumer demand and confidence so that it will bring possible implications to the business cycle.⁴³

By this recognition, ASEAN has strategically positioned the protection of the consumer in the AEC Blueprint and established the ASEAN Committee on Consumer Protection (ACCP) aiming to ensure all AMS adopt their consumer protection measures, policies, laws, and regulations; and to ensure the enhancement of formation access by consumers, mechanisms establishment for consumer dispute resolution and product recalls, and the strengthening of institutional capacity.⁴⁴

ASEAN would not be able to achieve a dynamic economy development, a people-oriented and people-centered ASEAN if not strengthen the framework of the consumer protection.

⁴¹ Arts. 9(1), 12(13), Protocol on ASEAN Enhanced DSM.

⁴² This part is a slightly modified version of the author's published works from from "Sengpunya, P. (2020). Online Dispute Resolution Scheme for E-Commerce: The ASEAN Perspectives", published in Pécs Journal of International and European Law - 2020/I.

⁴³ ASEAN Secretariat (June 2018). Handbook on ASEAN Consumer Protection Laws and Regulations. p. 12-13.

⁴⁴ ASEAN Committee on Consumer Protection (ACCP), at <https://www.aseanconsumer.org/cterms-regional-cooperation-in-asean/asean-committee-on-consumer-protection-accp> [25 October 2020]; and *See also*, ASEAN Secretariat (June 2018). Handbook on ASEAN Consumer Protection Laws and Regulations. p. 13.

The protection of consumers, as an essential part of the AEC 2025, has thus a significant role in enhancing an effective, efficient, modern, and fair marketplace in the Community.⁴⁵

Therefore, ASEAN has set aims at developing a consumer dispute resolution mechanism, particularly an online dispute resolution system, in order to increase online consumer confidence and facilitate e-commerce growth in the region. The ASEAN policymakers and regulators address consumer dispute resolution through non-binding standards requiring AMS to encourage or ensure access to out-of-court redress mechanisms. The AEC Blueprint 2025 recognizes e-commerce growth as a significant segment in supporting regional economic integration. It highlights the development of a regional legal framework for online dispute resolution (ODR) for facilitating e-commerce transactions in ASEAN.⁴⁶ And the ASEAN Strategic Action Plan for Consumer Protection (ASAPCP) 2025 upon work on consumer protection of the ASEAN Committee on Consumer Protection (ACCP)⁴⁷ was adopted to implement the strategies related to online dispute resolution under the AEC Blueprint 2025. The ASAPCP provides that an ASEAN Regional Online Dispute Resolution (ODR) Network shall be established, including National ODR systems; ASEAN ODR network; and ASEAN mechanism for cross-border complaints and investigations.⁴⁸

According to the ASAPCP, each ASEAN Member State shall create its national Online Dispute Resolution System in order to serve as the platform providing mediation service for e-commerce transactions by 2025. The ASAPCP lays down reference material for AMS to develop their own action plan and establish an online dispute resolution system in line with ASAPCP recommendations.⁴⁹ Similar to the EU ODR system, the ODR body of each AMS may have its own rules and procedures.

To support and facilitate further development of the ODR system, ASEAN has already put the ASEAN ODR network as the second element of the ASEAN ODR Scheme underway. The ASEAN ODR network should compose authorities from all AMS, and upon the completion of the network establishment by 2025, the network may include the following strategies: a) to co-ordinate and co-operate on ODR procedure and enforcement

⁴⁵ ASEAN Secretariat (June 2018). Handbook on ASEAN Consumer Protection Laws and Regulations. p. vii.

⁴⁶ Chen, V., Godwin, A., & Ramsay, I. (July 2017). *ASEAN Framework for Cross-Border Cooperation in Financial Consumer Dispute Resolution*. Asian Journal of Comparative Law, Vol. 12, No. 1. pp. 167-196 and pp. 22-23; see more ASEAN Economic Community Blueprint 2025, paras. 52-53.

⁴⁷ ASEAN Strategic Action Plan for Consumer Protection (ASAPCP) 2025, ASEAN, 14 October 2016. Retrieved from <https://aseanconsumer.org/read-publication-asean-strategic-action-plan-for-consumer-protection-asapcp-2025> [3 January 2020]

⁴⁸ *Ibid.*

⁴⁹ ASEAN – Australia Development Cooperation Program – Phase II, Study on AADCP II Influence on Consumer Protection Policy in Select ASEAN Member States, The ASEAN Secretariat, May 2018. p. 14.

matters; b) To share information and intelligence on ODR trends and challenges; and c) to share best practice information about key relevant laws, enforcement powers, and regulatory approaches to ODR. Members may meet annually to discuss key ODR issues from a global perspective, exchanging their experience regarding enforcement and relevant challenges. The member may present different projects and take decisions for new initiatives and follow-up action. The meeting would also serve to strengthen cohesiveness of the network and foster better contacts between members.

The ASEAN Cross-border Complaints and Investigations is the third element of the ASEAN ODR Scheme. The objective is to provide a channel or facility for ASEAN consumers to claim for or complain any loss over a purchase of any goods or services in a less cumbersome, speed manner, and at a minimal cost.⁵⁰ In 2012, ASEAN launched the ASEAN Consumer Protection website (www.aseanconsumer.org), which serves as the major reference point for consumer protection in ASEAN.⁵¹ The website has become operational for cross-border consumer complaints⁵² and currently plays an important role for cross-border consumer complaints in ASEAN.

Nevertheless, the ASEAN should further consider an effective body, as it still lacks an appropriate implementation mechanism and remains long process for cross-border complains through this operational website. Hence, ASEAN may also provide training and research support in very practical areas of consumer agency design, operations and governance, and ensure user-friendly and effective process and strengthen implementation of ASEAN Cross-border Complaints and Investigations in order to promotes the website and facilitate cross-border consumer dispute resolution with a low-cost, simple, and fast method.

6. Legal and Regulatory Challenges – the e-commerce law

Despite the ASEAN accelerated development of law aiming at governing and facilitating e-commerce development in the region and has made a great progress in the development of the e-commerce law through its soft legal method, that require the member states to enact or develop their national laws and relevant regulations to govern e-commerce transactions in their countries as well as the region. However, it has come up with challenges for the legal framework of ASEAN for e-commerce transactions and relevant matters.

⁵⁰ Consumer Protection in ASEAN, ACCP. Retrieved from <https://aseanconsumer.org/> [2 April 2020].

⁵¹ The ASEAN Committee on Consumer Protection (ACCP). Retrieved from <https://asean.org/archive/the-asean-committee-on-consumer-protection-accp/> [2 April 2020].

⁵² Asher, A., Dee, W., & Wood, John T D. (6 December 2013). Models for Internal Complaint Systems and External Consumer Redress Schemes in ASEAN “*ASEAN Complaint and Redress Mechanism Models*”. Australian Aids – ASEAN. pp. 53-54.

The legal and regulatory challenges for ASEAN in concerning with the development of e-commerce laws are involved by many factors, from having no supranational structures to various differences such as differences in political and economic background, legal culture, legal development and legal system⁵³. These challenges lead to complexity in developing regional legal framework. The example of this can be the e-commerce laws of ASEAN where the difference of legal system of ASEAN member states affect how they adopt their domestic e-commerce laws and govern electronic transactions in their countries and the different legal cultures bring each member state to adopts their own set of rules towards the e-commerce activities, in accordance with the shape of their legal culture, in order to serve the best of their national interests while goes along well with local traditions⁵⁴, and that is a reason why each member state has their own legal system with their own way of regulating e-commerce laws.

In particular, the e-commerce laws of ASEAN remain challenges in specific e-commerce-related areas including digital and electronic signatures, consumers protection, and data protection and privacy. Regional legal framework on digital and electronic signature is not in place. In some of ASEAN jurisdictions such as Malaysia and Singapore that have digital signature laws, modern internet infrastructures, and market economies, but in practice they do not use the digital signatures in the electronic transactions and although, ASEAN has continued promoting development and enactment of digital signature laws within its bloc, yet the laws have still been unsuccessful. With consumers protection, due of differences in legal culture, legal system, as well as difference in political and economic background, different ASEAN member states adopt different institutional models and regulatory frameworks in attempting to protect consumers in their countries. Several laws, decrees, statues, and ordinances have been adopted among the member states in order to deal with consumer protection including consumer safety, unfair trade practices, warranties, dispute resolution and enforcement. Hence, this can challenge ASEAN legal regime of harmonization. In fact, all ASEAN member states should have adhered to similar principles of consumer protection, with uniform frameworks. This would relieve a number of problems that consumers in the region are facing, especially the problems in connection with cross-jurisdiction e-commerce transactions. On the other side, laws on data protection have been increasingly adopted by number of ASEAN jurisdictions, but frequently there are limited tools, funds, resources, and abilities to implement and enforce those legal and regulatory frameworks. Furthermore, the high-level principles and concepts transposition in the domestic jurisdictions of ASEAN member states has not accomplished the expected target of the regional uniformity. In the practice, when countries transpose from the newly enacted laws and instruments on data protection to the functionality of enforcement and

⁵³ Singapore Economic Development Board (EDB), (2018). "E-Commerce in ASEAN: Seizing Opportunities and Navigating Challenges". At. <https://www.edb.gov.sg/en/business-insights/insights/e-commerce-in-asean-seizing-opportunities-and-navigating-challenges.html> [13 November 2021]

⁵⁴ Friedman, L. M. (1975). *The Legal System: A Social Science Perspective*. Russel Sage Foundation. p. 16.

compliance, the difference increases among their national laws and regulations since the countries lay down more specific requirements in their national laws. In this concern, both national and regional efforts should pay attention in promoting the harmonization of existing laws on protection of data⁵⁵.

7. Conclusion – Toward ASEAN Soft Law Regime and Its Way of E-commerce Law Development

At the beginning, ASEAN had an extremely loose regulatory framework for their economic relation; however, in ASEAN Community building, a legal regime of ASEAN is evolving. Its legal regime has been underpinned by soft regulation in order to balance member states' discretion of sovereignty. These soft legal mechanisms are not bound to firm into hard law. Notwithstanding, the soft legal mechanisms are a possibility to deepen institutionalization, harmonization, and legalization in ASEAN.

ASEAN soft legal mechanism is an evolutionary tendency towards delegation of rulemaking in technical matters and development of uniform rules through voluntary reception into the domestic legal system through the method of harmonization. For example, ASEAN employs a soft legal regime through harmonisation approach in developing e-commerce law. Most of contributions of ASEAN on e-commerce policy are leaned on the enactment of the member states' domestic e-commerce law statutes. However, the member states are independent and could even omit the assembled attempts of ASEAN in favour of their own internal particular interest. However, legal development through soft harmonization approach in the soft law regime apparently comes up with some weakness. The key weakness of the soft legal harmonisation approach of ASEAN is its over-dependence on voluntary willingness and commitment of the member states to comply with the regional framework. Despite, the soft legal regime has definitely made forays in facilitating regional integration and legal development in the AEC, as revealed by the research that the legal environment in some ASEAN member states have gradually changed as effecting by the soft legal regime, for instance, the development of e-commerce law in the Lao PDR and Vietnam.

Under the soft legal regime of ASEAN, the so-called voluntary commitments and self-enforcement is the default method in enforcing and implementing ASEAN laws. ASEAN does not have regional judicial mechanism, instead it established its dispute resolution mechanism to resolve disputes in peaceful methods. The legal enforcement is thus upon national administrative and national judicial procedures of the member states, or for cases in connection with investment disputes, the legal enforcement uses commercial arbitral

⁵⁵ The World Bank (2019). The Digital Economy in Southeast Asia Strengthening the Foundations for Future Growth. At <https://documents1.worldbank.org/curated/en/328941558708267736/pdf/The-Digital-Economy-in-Southeast-Asia-Strengthening-the-Foundations-for-Future-Growth.pdf> [19 November 2021]

procedures under the ASEAN Enhanced DSM or other recognized arbitral tribunals. An absence of a regional autonomous body for driving the compliance and enforcement might be a key flaw in the governance framework of the AEC and this provision of weak enforcement can be the uncertain and unstable path of the soft law regime in ASEAN.

For the concern of enforcement of e-commerce activities, ASEAN has initiated in developing ODR scheme to facilitate the electronic transactions to build trust and confidence for online consumers in the region. ASEAN policymakers and regulators address consumer dispute resolution through non-binding standards requiring AMS to encourage or ensure access to out-of-court redress mechanisms. However, to establish and implement an effective ODR system in ASEAN, ASEAN will require a clear and comprehensive regulatory framework, including in the areas of consumer protection laws and ADR laws^[56].

To conclude, ASEAN has soft law regime in supporting its regional integration through harmonization of domestic laws of the member states. By soft legal regime, ASEAN has made an evolutionary tendency towards development of uniform rules through voluntary reception into the domestic legal system. However, this complex institutional and regulatory regime can undermine regional law implementation and enforcement matters of ASEAN. The soft legal harmonisation approach is also weak due to its over-dependence on voluntary willingness and commitment of the member states to comply with the regional framework. And the provision of weak enforcement could be the uncertain and unstable path of the soft law regime. As result, there are numbers of legal challenges in both national and regional environments due of various factors and differences among the member states. There are differences in the member states' respective abilities in implementing the ASEAN's existing or new regional laws or obligations. These disparities in laws, different levels of income, and different stages and capacity in politic among ASEAN jurisdictions can threaten to retard development on jurisprudence cooperation and compliance, and furthermore, threaten the effectiveness of ASEAN itself. After all, there are still great opportunities and potential for ASEAN to exploit while it is moving forward.

⁵⁶ This part is a slightly modified version of the author's published works from from "Sengpunya, P. (2020). Online Dispute Resolution Scheme for E-Commerce: The ASEAN Perspectives", published in Pécs Journal of International and European Law - 2020/I.