

THE EMERGENCE OF A LEGAL FRAMEWORK FOR ECONOMIC POLICY IN ASEAN

ASEAN at present lacks a proper legal regime at the community level. However, this is to some extent compensated by similar approaches adopted by its members on certain matters. These include their outlook on free enterprise and competition, co-operation, common direction of their trade, their disposition to public control, and their attitude towards foreign investment. The prospects of an ASEAN community law depend upon whether the member countries are prepared to make the necessary adjustments to their national laws.

I. INTRODUCTION

THE Association of South East Asian Nations (i.e. ASEAN) was formed as a result of the Bangkok Declaration of 8 August 1967. The original members consisted of Malaysia, Thailand, Philippines, Indonesia and Singapore. A sixth member, Brunei Darussalam, was admitted on 1 January 1984. ASEAN has a population of about 260 million people, a size which is roughly similar to that of the European Economic Community (i.e. EEC). The relative size of the population of member countries, however, varies greatly from 0.2 million for Brunei Darussalam to 150 million for Indonesia. Malaysia accounts for 14 million; the Philippines, 49 million; Singapore, 2.5 million; and Thailand, 47 million.¹

ASEAN belongs to the 'Group of 77' less-developed countries. With the exception of Singapore, (which exception is to be presumed herein throughout, when the context requires it), the member countries of ASEAN have many characteristics common to developing countries in other parts of the world: growing populations, relatively low per capita GNP rates and a traditional pattern of foreign trade based on export of commodities in return for imports of capital goods and technology. The region is rich in natural resources and unskilled labour. It supplies over 80 per cent of the world's rubber, 70 per cent of its tin, 60 per cent of its palm oil and 50 per cent of its copra, and is rich in mineral resources.²

The GNP per capita for member countries in U.S. dollars in 1985 was: Indonesia, 535, Malaysia, 1,574; the Philippines, 540; Singapore, 5,847; and Thailand, 579.³ In relation to other members of the 'Group of 77,' the ASEAN countries rank high in GNP per capita terms. Even the poorest in the group, Indonesia, has now graduated to the middle income group by crossing the World Bank poverty line⁴ In terms of the average economic

¹ ASEAN YEAR BOOK 1980. The figures have been rounded up.

² Amado Castro, "ASEAN Economic Cooperation", in *Understanding ASEAN*, (Alison Broinowski ed. 1982), pp. 70 - 71.

³ Far Eastern Economic Review, ASIA YEARBOOK 1987. For Brunei the figure, based on GDP, is 33,931.

⁴ Mohammad Sadli, "The Indonesian Economy: Some observations", *Trends In Indonesia II*, (1981), p. 97.

growth rate, ASEAN performance has been noteworthy. While growth rates in the developed industrial countries were slowing down in the 1970s, ASEAN managed to achieve an average growth rate of nearly 8 per cent. In these terms, ASEAN is unique in the context of developing countries.

The ASEAN economies have been undergoing change. From being predominantly agricultural in the early sixties, they have moved towards industries and services. However, by the late seventies, agriculture still accounted for an average of more than 25 per cent of their GDP. In the same period, the industrial sector grew from an average of under 20 per cent of the GDP to 33 per cent, in part accounted for by the growth of agro-based industries.⁵ At present, almost all of them, (perhaps with the exception of Indonesia), are in the process of moving from the stage of import substitution to a stage of export-led growth. It is in this general context that we have to examine the subject under discussion.

The basis of ASEAN is the Bangkok Declaration.⁶ It declares that the Association represents the collective will of the nations of South East Asia to bind themselves together in friendship and co-operation, and through their joint efforts and sacrifices, secure for their peoples and for posterity, the blessings of peace, freedom and property.⁷ To this end, the Association aims at accelerating economic growth, social progress and political and cultural development through active collaboration and mutual assistance on matters of common interest in these fields. The Declaration is however a statement of intention and does not mention any specific course of action or time-frame.

The principal decision-making body of ASEAN is the ASEAN Ministerial Meeting. This is an annual meeting of the Foreign Ministers of member countries. A Standing Committee under the chairmanship of the Foreign Minister of the host country coordinates and reviews activities in between Ministerial Meetings.⁸ The 1976 Ministerial Meeting in Bali was an important milestone for several reasons. First, it witnessed the signing of the Declaration of ASEAN Concord, which stated that the elimination of poverty, hunger, disease and illiteracy was a primary concern of member states and that cooperation would be intensified in economic and social development. Secondly, an ASEAN Secretariat, based in Jakarta, was established and the existing national secretariats were subsumed under the "Office of the Director-General, ASEAN." Thirdly, the Treaty of Amity and Cooperation was signed.⁹ The object of the Treaty is the acceleration of economic growth in the region. This meeting also marked the beginning of regular meetings of the Economic Ministers. With this development, *de facto* decision-making in economic matters seems to have passed to the hands of these ministers, although formal approval still rests with the Foreign Ministers.¹⁰ There are five economic committees which are responsible to the economic ministers and these are: (1) The Committee on Trade and

⁵ *Supra*, note 2, p. 258, Table 4.3(B.).

⁶ For the growth of ASEAN and its legal structure, further see R.H. Folsom, "ASEAN as a regional economic group: a comparative lawyer's perspective" (1983) 25 Mal. L R 203

⁷ Art. 5.

⁸ Art. 3.

⁹ *ASEAN YEAR BOOK* (1980) pp. 15-16.

¹⁰ Arnfinn Jorgensen - Dahl, *Regional Organisation and Order in South East Asia*, (1982), p. 47.

Tourism (COTT); (2) The Committee on Industry, Energy and Minerals (COIEM); (3) The Committee on Food, Agriculture and Forestry (COFAF); (4) The Committee on Transport and Communications (COTAC); and (5) The Committee on Finance and Banking (COFAB).

II. THE ABSENCE OF A FORMAL LEGAL STRUCTURE

The question which often arises is: to what extent is ASEAN something more than the sum total of its parts? ASEAN appears in different guises when seen from the viewpoint of different member countries.¹¹ Though it has been pointed out that, in some respects (such as being held together by political considerations and economic objectives) ASEAN is similar to the EEC,¹² it is still far from being a common market, which the EEC is. The consequence is that, unlike the EEC, ASEAN in its present form cannot operate any legal controls over the regional economy. Economic integration in ASEAN would require something more than just declared intentions and general purposes. It would require a legally binding code at the community level which would determine and regulate the conduct of member countries with regard to economic matters, and a breach of which would involve legal consequences for members concerned. It would have to provide for a definite course of action and a set of procedures for the implementation of agreed policies. These are unhappily absent in ASEAN, and it is largely left to the individual member countries to decide whether and to what extent they would be prepared to go in this direction. In this matter, national considerations are bound to be the determining factor rather than the supra-national considerations of regional co-operation. It has therefore been said that the pace of economic co-operation in ASEAN would be set by the lowest common denominator, that is, how fast the most backward member (i.e. Indonesia) was prepared to go.¹³

At present, there is little that can be called "ASEAN Law," i.e. community law that is truly supra-national. Most deliberations and writings on ASEAN law, including the efforts of the ASEAN Law Association, have been limited to dealing with specific legal problems in the national context of the member countries. There is, for instance, no ASEAN law dealing with monopolies and restrictive trade practices. While one cannot overlook the need for controls in this regard, they are achieved by non-formal devices such as cooperation, commitment to free enterprise and competition. There are, however, various provisions in the national laws of the member countries, but these are limited in their operation to the particular countries concerned.

III. THE ASEAN REALITY

It would be unrealistic to claim that a law on monopolies and restrictive trade practices is one of the priorities of ASEAN. In general, law tends to develop according to trade and commercial requirements.¹⁴ However, given the political and legal diversity of the region and the different stages of

¹¹ Robyn Lim, "East-West and North-South" in *Understanding Asean* (Broinowski ed. 1982), p. 238.

¹² Lawrence B. Krause, *US. Economic Policy Toward the Association of Southeast Asian Nations*, (1982), p. 5.

¹³ *Supra*, note 10 on p. 156.

¹⁴ See generally, Suwit Suwan, "Proper Law for ASEAN Corporations", in ASEAN Law Association, 1982 General Assembly, pp. ALA/W4/T1/T19-T29.

economic growth, it would be too simplistic to assume that a common market will emerge naturally. Unfortunately, the ASEAN documents, the Declaration, the Concord, and the Treaty are all couched in generalities. For instance, Article 4 of the Treaty says that the High Contracting Parties “shall promote active cooperation in the economic, cultural, technical, scientific and administrative fields as well as in matters of common ideals and aspirations of international peace and stability in the region and all other matters of common interest”. Similarly, Article 8 urges them to “strive to achieve the closest cooperation on the widest scale and ... seek to provide assistance to one another”. These are unlikely to give rise to enforceable legal obligations, which are necessary for the development of a common market.

In terms of achievements in the field of economic cooperation, the ASEAN record is modest. In the first eight years, practically nothing was achieved on the economic front. The first few years were spent, as one writer has put it, largely in “getting to know each other”.¹⁵ It was only after the Bali summit in 1976 that economic cooperation took concrete shape. Among the various measures at different levels, four main items deserve mention. These are the ASEAN Projects, the Complementation Arrangements, the Preferential Trading Agreements and the ASEAN Industrial Joint Ventures.

(1) *The ASEAN Projects*

It was decided in 1976 to establish five ASEAN industrial plants, one in each member country, to manufacture urea, superphosphates, diesel engines and soda ash. Of these, only one has so far materialised, the establishment of a urea plant in Indonesia. Of the others, Singapore was obliged to give up the diesel engine project due to the market considerations of the other members. Thailand has decided to abandon the soda ash project. It was reported that the three existing projects were still at the stage of feasibility studies after eight years.¹⁶

(2) *The ASEAN Complementation Arrangements*

This aims to establish complementation schemes among private firms in the same industry in all member countries. This would enable the existing enterprises to become more efficient by specialising in particular items, by giving up others, and thereby gaining economies of scale. This would apply to projects where facilities existed in at least four of the five countries. An agreement for automobile components was signed in 1982.

(3) *The ASEAN Preferential Trading Agreements*

The Agreement on ASEAN Preferential Trading Arrangements was signed in February 1977. Although this provides for different kinds of preferences, the principal one is the preferential reduction of tariffs. The approach to this measure highlights the conflict of national interests. While Singapore, as the most developed member, would have preferred the “across-the-board” approach adopted by the EEC, Indonesia, as the least developed member, was reluctant to accept this approach. Since Indonesia was at an early stage of industrialisation, this approach would have meant opening its markets to external competition. Hence, a “product-by-product” approach was

¹⁵ Amado Castro, “Economic Cooperation and the Development of an ASEAN Culture” in *ASEAN, Identity Development and Culture*, (Anand and P.V. Quisumbing ed. 1981) p. 228

¹⁶ The Straits Times, Singapore, September 7, 1985.

adopted instead. Each member selects its own products for which preferential tariffs are intended and members jointly decide the number of such items. Since April 1980, the "product-by-product" approach was complemented by "across-the-board" tariff reductions on items below a certain import value ceiling with provision for exclusion lists. As at July 1985, 18,000 such items were granted tariff preferences.^{16A}

(4) *The ASEAN Industrial Joint Ventures*

The Agreement in respect of the ASEAN Industrial Joint Ventures was signed in 1983. This was the outcome of a U.N. study of regional cooperation in the private sector in the field of industry.¹⁷ The need for this agreement arose from the realisation that there was only modest cooperation in the private sector of the economy in spite of the great potential in the area. The investment laws in the respective member countries were too diverse to encourage joint ventures among them.¹⁸ It is too early to form an opinion as to its success at this stage.

The four areas mentioned above are considered 'showcase' areas. It would therefore be unwise to judge ASEAN economic cooperation on the basis of these areas alone. Various levels of cooperation have also been achieved in other areas such as banking and finance, energy, transport, shipping, agriculture, food and trade exchanges. The purpose of citing the 'showcase' areas is to highlight the problems which stand in the path of cooperation. The point is that, if economic integration is the goal, ASEAN will have to grow out of the stage of infancy in economic cooperation. However, many obstacles stand in the way of such legal integration *viz.* differences in colonial backgrounds, languages, cultures, religions, political systems, economic development and priorities, and legal traditions. Singapore, Malaysia and Brunei are generally classified as common law countries, Indonesia and Thailand as civil law ones, and the Philippines as a hybrid common law — civil law system. All these factors make it especially difficult to create an ASEAN community law, integration will ultimately have to be attained on the basis of free enterprise and an internationally competitive environment. This would mean that monopolies and the restrictive trade practices, which distort or destroy such competition need to be eliminated. In this regard, the present position of ASEAN is far from adequate. Economic integration would require the creation of a community legal order conducive to free enterprise and competition.

With particular reference to the law relating to monopolies and restrictive trade practices in ASEAN countries, certain general observations can be made. First, it should be noted that, generally, there is no specific legislation on monopolies and restrictive trade practices in ASEAN countries. Secondly, their economic laws are dictated by their respective national goals and not by the wider considerations of the community. Thirdly, in all these economies, the government plays an active role by intervening directly in the economy and regulating investment. Fourthly, specific legislation on monopolies and restrictive trade practices may be redundant where other forms of control exist under the general laws of a member country that promotes free market competition.

^{16A} *An Overview of ASEAN*, No. 1, ASEAN Information Series, ASEAN Secretariate, July 1985, p. 14.

¹⁷ UNIDO, *ASEAN Industrial Joint Ventures in the Private Sector*, by UNIDO consultant Lee Sheng-Yi, (UNIDO/IS.310 - 21.4.1982).

¹⁸ Werner Pfennig, in *Aspects of ASEAN* (Prening and Mark ed. 1984), p. 27.

The lack of a proper legal regime in ASEAN at the community level and the significant differences in the economic laws of member countries are thus readily apparent. However, despite these impediments, certain common approaches have enabled ASEAN to function as a community, thereby rendering the prospects of developing a legal regime at the community level viable. The fact is that, not only has ASEAN existed for over nineteen years, but it has also reaffirmed its identity time and again through regular contacts and activities at different levels, both among its members and *vis-a-vis* the outside world.

Today, the question is no longer whether ASEAN can continue to exist, but how far it can succeed. In this matter, ASEAN emerges in a better position than many other regional organisations. It is said that, next to the EEC, ASEAN has the greatest chance of success among all other regional organisations.¹⁹

For a proper evaluation of the measure of its success as a economic community, it is necessary to view ASEAN in the total context of its existence. For a proper understanding of ASEAN's economic role, two particular points should be borne in mind. First, although the economic aspect has a predominant role in the ASEAN, it is not its only *raison d'être*. Secondly, a proper understanding of Asean is possible only when it is viewed in a global context.

The basis for the first point will be apparent if one were to examine the circumstances surrounding the creation of ASEAN. The factors responsible for the creation of ASEAN, and other such regional organisations, have been essentially political and strategic in nature.²⁰ This is so even with the European Community. It is said that the European Common Market is in politics, not in business; that is, the common market was primarily formed not to gain the considerable economic advantages envisioned but to meet the political challenges of postwar Europe.²¹ ASEAN countries are similarly placed with regard to their fear of internal disorder, external threats and economic domination. These dangers are likely to continue and ASEAN countries can better face these and other dangers by uniting their efforts. Hence, despite their diversity and conflicting national interests, all of them need to belong to ASEAN.

The main difference between the European Community and ASEAN is that, in the former, whatever the compulsions for its existence, the achievement of its economic objectives is ensured by providing for a proper machinery. In the case of ASEAN, though economic gain is a major goal, it is not the driving force of the community. ASEAN economic cooperation is geared towards assisting domestic efforts at development, and its role at the community level appears to be secondary. It is not surprising, therefore, if, at the present stage at least, ASEAN economic achievements remain modest. The following extract sums up the situation neatly:

What forms the economic foundation of ASEAN's unity? Frankly the foundations are not economic. Only about 15 percent of the total trade of ASEAN is with other ASEAN members, and this has grown rather

¹⁹ *Supra*, note 12 on p. 3.

²⁰ *Supra*, note 10 on p. 134; *Supra*, note 12 on p. 3; Karl D. Jackson in *ASEAN Security and Economic Development*, (Jackson, Hadi and Soesastro ed. 1984), p. xiii.

²¹ *Supra*, note 12 on p. 5.

slowly since 1976. This contrasts markedly with the European Economic Community (EEC) where trade among member nations accounts for 60 percent of total trade. The markets within ASEAN remain underdeveloped. Natural exports such as coconut oil and rubber are produced in great quantity by more than one of the ASEAN states and are marketed outside of ASEAN. Intra-ASEAN trade is small, and intra-ASEAN investment remains little more than a talking point at ASEAN meetings. Furthermore, the bureaucracies of the individual states are in some cases just emerging from the era of import substitution, and leaders are, quite rightly, reluctant to force the degree of economic rationalization (and unemployment) that would be required to change ASEAN into a fully integrated, regional economic entity. Finally, planners in each nation are scrambling to be first in the field of technological transfer, a motivation that leads to the opposite of economic integration, namely, bilateral links with the advanced nations to transfer technology by building particular industries.²²

It is therefore argued that the “glue” holding ASEAN together is actually political, and not economic, and that this will continue to be so for quite some time. This is because, unlike the EEC, the economies of the ASEAN countries have much less complementariness; remain much less developed because they are primary producers of commodities and raw materials; and have chosen interdependence over dependence, development through trade rather than reliance on purely domestic markets, and openness to the outside world rather than compulsive self-reliance. They have adopted export-oriented growth strategies because each national market at this stage in development simply lacks the economic scale to support industrialisation.²³

When political and strategic imperatives are the binding force of the community, the attainment of its economic goals would necessarily have to be considered in a longer time-frame than would be the case if economic issues had been the deciding factor. In such a situation, in the initial stages at least, regional cooperation, organisation and integration tend to be just extensions of the relations existing between member states.²⁴ There is a need to create common ground among the member countries, and to promote mutual understanding and cooperation. At such a stage of development, the laying down of a set of economic laws for the community is not likely to be a priority.

The second point is that ASEAN needs to be viewed in a larger context than its immediate regional surroundings. Though the member countries may have formed ASEAN due to regional imperatives, yet their perceptions are not limited by it. Thus, all of them are concerned, not only as members of ASEAN, but as individual countries, with third world issues, the non-aligned movement, the North-South dialogue and the New International Economic Order. As individual members, they are concerned about their exports to the developed world and their share of its markets. In fact, ASEAN as an organisation has had greater success on the economic front in relation to the external world than among its members. This factor is bound to influence the direction of ASEAN economic laws.

²² Jackson, Hadi and Soesastro eds., *ASEAN Security and Economic Development* (1984) p. xii.

²³ *Ibid.*, pp. xii-xiii.

²⁴ See Jorgensen-Dahl, *Supra*, note 10 on p. xv.

ASEAN has a direct interest in a number of areas of the New International Economic Order including commodities, international transfer of technology and finance. It thus has a big stake in the international economy. This means that sustained economic growth at the national level is dependent on the global economy, and is possible only when similar growth is assured at the global level as well.²⁵ The national and regional economic objectives will have to take this into account.

IV. COMMON ECONOMIC APPROACHES IN THE COMMUNITY

The absence of a formal legal regime is, to some extent, compensated by certain common economic approaches to which the members of ASEAN are committed. Some of these common approaches are their outlook on free enterprise and competition, cooperation, common direction of their trade, government intervention in the economy and their attitude to foreign investment and MNCs. These areas are not always independent issues nor do they make up a comprehensive list. A brief reference is made to each of these issues herein for the purpose of illustrating the workings of ASEAN.

(1) *ASEAN's Outlook On Free Enterprise And Competition:*

ASEAN's attitude to free enterprise and competition was clearly stated by the former Foreign Minister of Malaysia, Tan Sri Ghazali Shafie, while speaking at a conference. He said that in establishing ASEAN, the five founding members agreed that the firmest foundation for a peaceful and prosperous South East Asia was the free enterprise system. It was a system responsive to their rising capabilities and expectations. The appreciation of this fact was vital in the understanding of ASEAN and in its sense of direction. He called it a:

commitment by our leaders to jointly strengthen and promote that system of free enterprise in their respective countries with a firm conviction that the system will bring out the kind of national and regional resilience that would serve against any kind of negative elements. In its efforts to reach out to third countries, ASEAN is motivated by a serious intent to assist in the promotion of the free enterprise system which was a most viable choice for developing countries to pursue.²⁶

These sentiments were shared by Mr Carlos P. Romulo, the former Foreign Minister of the Philippines. He underscored the issue once again when he said, "ASEAN remains the bulwark of the free enterprise system by conviction and by practice We shall remain faithful to our belief in open societies as the clear path to development in justice and freedom."²⁷

In a sense, the commitment to this principle was imperative as any other solution could lead to imbalances. The fundamental concern in ASEAN countries was to meet the basic needs of their populace. It was necessary to create wealth and to distribute it equitably. For this purpose, it was necessary for ASEAN to move from supporting positions of economic monopolies to providing an excellent base for competition internationally.²⁸

²⁵ *Supra*, note 22 on p. 15.

²⁶ Conference Report, *ASEAN Today and Tomorrow*, The Fletcher School of Law and Diplomacy, Tufts University, (1982), pp. 5-6.

²⁷ *Ibid.*

²⁸ *Ibid.*, p. 13.

However, it is an open question as to how far ASEAN countries are able to hold their own in such a system. To say that they are committed to free enterprise and international competition is not to admit that they can plug into the system in the same way as the developed countries. While a clear policy of commitment to the principle in the long term makes for certainty as to direction, in the short run, it is imperative that the strengths and weaknesses of the parties are taken into account. There can be free competition only between equals. So long as the member countries of ASEAN do not attain some kind of parity of economic strength whether among themselves or internationally, the weaker members should legitimately be entitled to safeguards. If justice and fairplay are allowed to operate this principle affords the parties the best chance to attain their objectives.

For countries such as in ASEAN, which possess diverse and complex legal systems and are at different stages of development, the system of free enterprise and international competition together with the safeguards worked out by the UN., offers a common basis on which to operate. Insofar as their links with the international economy are concerned, they have no choice but to be a part of that system. Where their internal relations are concerned, it holds out the best hope as it calls for a minimum of intervention by the states concerned.

(2) *Reliance on Cooperation*

An examination of the ASEAN documents would show that the Association is founded on the basis of cooperation. The stated purpose of its existence is "the establishment of an Association for Regional Cooperation among the countries of South East Asia."²⁹ The founding members desired "to establish a firm foundation for common action to promote regional cooperation in South East Asia in the spirit of equality and partnership and thereby contribute towards peace and progress and prosperity in the region."³⁰

Similarly, the stated purpose of the Treaty is to promote peace, everlasting amity and cooperation among the people of ASEAN which would contribute to their strength, solidarity and closer relationship.³¹ In this, they would be guided by, among other things, "effective cooperation among themselves."³² In the Declaration of ASEAN Concord, they reaffirmed their commitment and undertook to consolidate the achievements of ASEAN and expand ASEAN cooperation in the economic, social, cultural and political fields.³³ According to its provisions, the cooperation in the economic sphere would cover basic commodities, industrial cooperations, cooperation in trade and a joint approach to world economic problems. It provided for a machinery for economic cooperation whereby Ministerial meetings would be held regularly in order to:

- (i) formulate recommendations for the consideration of Governments of member states for strengthening of ASEAN economic cooperation;
- (ii) review the coordination and implementation of agreed ASEAN

³¹ ASEAN Declaration (1967), Article 1.

³⁰ *Ibid.*, Preamble.

³¹ Treaty of Amity and Cooperation in South East Asia (1976), Art. I.

³² *Ibid.*, Art. 2.

³³ Declaration of ASEAN Concord (1976), Preamble.

- programmes and projects on economic cooperation;
- (iii) exchange views and consult on national development plans and policies as a step towards harmonising regional development; and
- (iv) perform such other relevant functions as agreed upon by the member Governments.³⁴

The Preferential Trading Agreement of 1977, again, derives from the desire for cooperative action in the national regional development programmes for utilising the regional resources to broaden the complementarity of their respective economies.³⁵

Thus, it may be seen that many provisions in ASEAN documents emphasise one point: that the basis of ASEAN is cooperation. Mr. Ghazali Shafie, once again, has put it effectively:

The true success of ASEAN thus far has not been based on treaties or contractual obligation... There is no grand design for ASEAN, no elaborate structures, nor military pact, nor economic blueprint. All there ever has been is a declaration, a declaration with a single objective: to establish a firm foundation for common action to promote regional cooperation.³⁶

The theme of cooperation finds a ready reference at every level of contact in ASEAN. The proceedings of the ASEAN Ministerial Meetings give an indication of the commitment of the members to this cause, and their awareness of the need to promote it further. Thus, at the 17th ASEAN Ministerial Meeting held in Jakarta in 1984, the members indicated their commitment when one of them stated:

For while our national effort must now be concentrated in resolving critical domestic economic issues, we find it equally self-evident that any progress on our domestic front must be achieved in the context of continued interaction and cooperation on a regional basis with our ASEAN neighbours.³⁷

Cooperation is thus a recurring theme in ASEAN. It is both a means and an end, as it is the most important factor which makes the existence of the community possible and enables its growth. However, growth of cooperation among members would depend upon the extent to which the different stages of their development and differences in their outlooks can be reconciled. It has been pointed out that, presently, economic cooperation is at a level of low intensity where the impact of differences in economic outlook and development is not felt. But these could be important factors to reckon with at increased levels of cooperation, though the problem is not insurmountable.³⁸

(3) *A Common Direction Towards Export-Led Growth*

A notable feature of ASEAN has been that while intra-ASEAN economic cooperation has remained at low levels, it has achieved considerable

³⁴ *Ibid.*, Art. B.1.

³⁵ The Agreement on ASEAN Preferential Trading Arrangements (1977), Preamble.

³⁶ *Supra*, note 28 on p. 4.

³⁷ Mr Arturo Tolentino, *Report of the ASEAN Ministerial Meeting*, (1984), p. 21.

³⁸ *Supra*, note 10 on p. 139.

success in its dealings with the outside world. This is due, on one hand, to the process of economic growth in individual countries, and on the other, to the collective action by ASEAN to tap opportunities in the context of growing world trade and efforts by international bodies, notably the U.N., to obtain a fair deal for developing countries.

There are two main stages of economic growth in less developed countries. The first is the stage of import substitution which looks to the utilisation of national resources and to the building of industries to supply the domestic market. But this policy is essentially 'inward looking' and is less hospitable to the development of skill, experience, and above all, outlook and attitudes required for successful economic cooperation with other countries.³⁹ The other is the stage of export-oriented growth. This not only overcomes the shortcomings of the earlier stage, but, as the experience of the Newly Industrialised Countries (NICS) has shown, makes for rapid economic growth. Hence, the sooner a NIC moves into the stage of export-orientation, the greater the possibilities of accelerated economic growth. It is possible to move into the second stage directly, or with a minimum of operating at the first stage.

In the early stages of ASEAN, all its members except Singapore were in the import-substitution stage. In the course of the 70's, all of them adopted export-oriented industries and policies. It has been pointed out that the ASEAN members embarked upon really significant policies on intra-organisational economic cooperation only after a switch to export-oriented policies. Economic cooperation in its external aspect can develop sooner because it does not run counter to a policy of import substitution. By collectively seeking to increase income from exports, cooperation in the external field aims at providing capital needed for development. Hence external cooperation has a tendency to grow earlier than internal cooperation.⁴⁰

ASEAN's external economic cooperation has had greater success than economic cooperation at the intra-ASEAN level. ASEAN signed its first agreement as an international entity with the EEC on 7 March 1980. Since then, it has begun to deal on a group basis with a number of countries including Australia, New Zealand, U.S.A., Canada and Japan. Meetings of ASEAN with the dialogue partners are now a regular feature and are held immediately after the ASEAN Ministerial Meetings.

Export-orientation of individual members, and the development of a collective outlook with regard to the rest of the world have enabled the ASEAN countries to harmonise their efforts. In this sense, regional cooperation has made a good beginning in an area of minimum conflict where conditions conducive to greater cooperation at the intra-ASEAN level are yet to emerge.

(4) *Common Disposition To Public Control Economics*

One notable feature of all ASEAN economies is the strong government presence in their economies. Governments not only act as regulatory agencies but also intervene directly in the economy. They make the National Plans, lay down policies, control investments, regulate industry, given incentives,

³⁹ *Ibid.*, p. 155.

⁴⁰ *Ibid.*, 156.

administer monetary regulations and do a host of other things. As such, they influence the economic environment to a great extent.

The main avenue for the government presence is through its role in the creation of infrastructural facilities. Either because of inadequate returns or the high risks involved, private capital is usually shy to enter these fields. This necessitates the government stepping in, resulting in the creation of a large public sector involving utilities, transport, communications, housing and other activities. The presence of a large government sector has a bearing on various aspects of the economy, as the government very often happens to be the biggest contractor, biggest employer or the biggest buyer or supplier.

Apart from the above, the governments intervene commercially in the economies either through state corporations or through government — controlled companies.

It is said that in developing economies it is necessary to have a strong government presence because free market conditions often do not exist. Hence, just as it is necessary to suppress private monopolies, it has been suggested that it is necessary to create government monopolies.⁴¹ This presupposes, of course, that in the circumstances of the particular economy, it is imperative that the government should intervene, that such intervention will be efficient and be used for the benefit of the people.

The general effect of government intervention is that there is already an effective degree of control of the economy at its disposal. In the absence of specific provisions to meet the particular needs, the general legal regime can, to some extent, make up for this want.

(5) Similar Approaches To The Role Of Foreign Investment And MNCs

A common factor in the economies of all the member countries of ASEAN is their reliance on foreign investment for economic growth. A corollary to this is the presence of a large number of multinational corporations in each of these countries.

The outcome of such a situation is that it is bound to bring about some similarity in approach among the countries concerned. This is due to the fact that foreign capital operates in a competitive environment. To be able to attract it, the investment climate in a given country has to be at least as competitive as that of its neighbours. As seen earlier, this process has been taking place in ASEAN for some time and internationalisation is already underway.

One aspect of this development is the major role which multinational corporations have come to play in the economies of each of the ASEAN countries. The role of MNCs in developing countries is viewed with mixed feelings. On the one hand, they are seen as effective vehicles of foreign capital, technology and know-how to the developing countries. By taking advantage of the subsidiaries or branches of MNCs, even a backward country would be able to establish a modern industry in a relatively short time. On

⁴¹ Seminar on 'NICs Model' by Edward Chen at the National University of Singapore, 23 August 1985, unpublished.

the other hand, MNCs have come under close scrutiny for their misdeeds, especially in the context of developing countries. Much has been written on the subject of the control of unfair practices of MNCs.⁴² However, it is not proposed to enter into that area here.

The point here is that, in the context of ASEAN, the presence of MNCs in a big way is bound to influence the member countries to adopt a common outlook with regard to them. This is because the same MNCs may be operating in different countries and are thus able to make comparative judgments about the investment climate in those countries. Thus, for instance, a MNC may decide to switch its operations from one country to another by downgrading its activity in one and by upgrading it in another to take advantage of a better investment climate. This could have serious consequences for the country where the operations are downgraded, in terms of loss of investment, loss of new technology, employment opportunities and exports. In these circumstances, a host country in the implementation of its National Plan would be compelled to adopt realistic policies which would attract and retain foreign investment in an international environment.

V. CONCLUSION

The question is whether an ASEAN legal regime of the type found in the EEC would eventually develop. The previously mentioned differences between the two organisations may perhaps provide the answer. While the EEC may have a wider political purpose, its immediate goals of economic growth are clearly defined and the relationship among its members is properly structured. There is a communal legal regime. The ASEAN situation on the other hand is in clear contrast to this. The reason is that, though economic growth is cited as a goal of the community, in the minds of its members it certainly is not the most important one. As a number of commentators have pointed out, their considerations are clearly political. The objective of economic growth is subsidiary to this. In the result, members are not prepared to concede even a small part of their sovereignty. Until there is a change in this regard, the prospects of a supra-national community law of ASEAN are remote.

This is not to say of course that, if the members do decide to set up such a law, it is going to be easy. Reference has been made herein earlier to the diversity and differences which exist in ASEAN. Perhaps nowhere are these differences as acute as in relation to the legal systems of ASEAN member countries. As one writer has pointed out, the development of ASEAN law is bound to be a complex and difficult task, as there are but few predisposing factors to building community law.⁴³ Since the domestic laws of individual countries derive from a variety of sources and are very intricate, any kind of superimposition is viewed as potentially harmful. Much basic work must precede in anticipating problems in resolving antinomies between the national law and the regional law and the divergent legal systems of the region. For this reason, it has been suggested that, at this stage, there

⁴² See among others, Frank Long, *Restrictive Business Practices, Transnational Corporation and Development* (1981); Cynthia Day Wallace, *Legal Control of the Multinational Enterprise* (1982); Corazon M. Siddayao ed., *ASEAN and the Multinational Corporations* (1978); Augusto Caesar Espiritu and others ed., *Philippine Perspectives on Multinational Corporations* (1978).

⁴³ Purification V. Quisumbing, "Problems and Prospects of ASEAN Law" in *ASEAN, Identity Development & Culture*, (Anand and Quisumbing ed. 1981), p. 301.

cannot even be any valid comparison of ASEAN with any other international organisation.⁴⁴

On the other hand, ASEAN law has been gradually growing. The ASEAN documents, the multi-national treaties and the agreements subscribed to by the ASEAN member states have *de facto* produced a direct effect on the private citizens of those countries. Examples cited in this regard include the Basic Agreement which recognises the role of ASEAN Chambers of Commerce and Industry in identifying products for Preferential Trade Agreement; the signing of the joint-venture agreements by shareholder entities under the ASEAN Industrial Projects (AIP); and the formation of AIP Companies in member countries. It has been opined that the existence of the AIP Companies in various host countries of ASEAN has signified a merger between public international law and private national law, and that this has not created legal difficulties in implementing these schemes.⁴⁵

In the context of corporate laws, it has been pointed out that there does not exist a case for legal harmonisation or standardisation as this is unnecessary and could be counter-productive. One of the reasons cited in support is as follows:

ASEAN as an international regional body has been established with a view to ensure the least interference in the internal affairs of each Member Country and did not anticipate extensive and direct interaction between the peoples of the Member Countries outside the treaties. Any legislative effort towards the unification or standardisation of the corporate laws prevailing in the Member Countries would not be productive in terms of the attainment of Asean objectives.⁴⁶

The argument in general appears to be that ASEAN has been created on a cooperative basis to augment domestic efforts at development and there ought not to be anything that might interfere with this arrangement. It has been suggested that ASEAN has adopted the present structures not because it had no other models to choose from but because in their particular circumstances they deliberately chose to do so.⁴⁷

Thus, in the legal context, ASEAN presents a paradox. It is apparent that for accelerated growth as a community there is a clear need for a proper legal regime. On the other hand, because of various difficulties and compulsions of their national interests, the member countries are reluctant to create such a legal regime. It is for ASEAN and its members to make a choice. If a rapid growth of the regional economy is perceived as being in the larger interests of them all, then they would have to work out a viable legal regime by making necessary adjustments to their national laws. However, if pursuit of national goals is the primary consideration, then regional cooperation and economic growth would have to proceed at the rate which their common initiative would allow. Any study which is envisaged in the ASEAN Concord on the desirability of a new constitutional framework for ASEAN⁴⁸ will first have to come to terms with this choice. Whether or not

⁴⁴ *Ibid.*, pp. 307 – 308.

⁴⁵ Suwit Suwan, “*Proper Law of ASEAN Corporations*,” ASEAN Law Association 1982 General Assembly, Workshop No. 4, at p. ALA/W4/T1/T22.

⁴⁶ *Ibid.*, p. ALA/W4/T1/T23.

⁴⁷ *Supra*, note 45 on pp. 306 — 307.

⁴⁸ Declaration of ASEAN Concord, Article F.3.

there will be a set of community laws would primarily depend upon which of these choices the member countries make for the future of ASEAN.

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