Global Challenges and ASEAN: Major Politico-Legal Issues Facing East Asia*

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East Asia's remarkable development and growth has had a considerable impact on the various aspects of international relations. In particular, ASEAN has played an important role in East Asia contributing to regional peace since its inception in 1967. Most East Asian nations have concentrated their national efforts on their economic development and popular welfare instead of engaging in armed conflict with their neighbours. ASEAN has thus achieved regional resilience and political influence in East Asia and beyond.[1] Of this phenomenon, I will attempt in this article to highlight in specific terms the role ASEAN is internationally expected to play in the following four areas: 1) East Asian trade integration; 2) Prevention of global warming; 3) Trans-border movement of people including refugees; and 4) Conservation of traditional culture.

Keywords: *East Asia, global challenge, ASEAN, trade integration, global warming, traditional culture*

I. East Asian Trade Integration

While Association of South East Asian Nations (ASEAN) has played an important role in East Asia contributing to regional peace since its inception in 1967,[2] most East Asian nations have been intent on

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* This article is based on the presentation the author delivered on 21 November 2011 at the second CILS (Centre for International Law Studies, Faculty of Law, Universitas Indonesia) Conference held at the Faculty of Law, Universitas Gadjahmada in Yogyakarta, Indonesia.

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[1] ASEAN has created such fora for international consultation as ASEAN foreign ministers conference to which extra-regional countries including Japan , China, the US and Russia are invited to attend. It plays a pivotal role in the Asia-Pacific Economic cooperation (APEC, ASEAN-Plus-3 Foreign Ministers' Conference, ARF (ASEAN Regional Forum - A ministerial conference on regional security) and CSCAP (Council on Security and Cooperation in the Asia-Pacific - a second-track consultative body on Asian security) as well as ASEM (Asia-Europe Meeting).

[2] The Bandung Conference, with 29 Afro-Asian nations participating, was held in 1955 thanks to the initiative of the leaders of Indonesia, India and China. It issued the Ten Principles of Peace stressing respect for sovereignty and territorial integrity, non-interference in internal affairs and peaceful resolution of international conflicts.

concentrating their efforts on economic development and the welfare of their peoples. In an attempt to expand intraregional trade, ASEAN has promoted trade integration since the 1990s, creating AFTA and concluding Free Trade Agreements (FTAs) and Economic Partnership Agreements (EPAs) with North East Asian nations. ASEAN 6 have liberalized intraregional trade through Common Effective Preferential Tariffs (CEPT) and ASEAN Industrial Cooperation (AICO), whereas the late-coming four nations, namely, Vietnam, Cambodia, Laos and Myanmar, have been allowed a differential treatment. The second sector industries in ASEAN have not developed evenly, creating disparities among member states. Therefore, it is natural that differential treatment should be permitted according to the stage of industrial development of a member nation. The volume of trade between member nations has been smaller than that with external countries, particularly North East Asia - namely Japan, China, Korea, as well as the US and the EU, leading to a low intraregional trade dependency within ASEAN itself.[3] Intra-regional dependency is bound to rise simultaneously with the industrialization of the less industrialized members.[4] Already, in East Asia as a whole, intraregional trade dependency is considerably elevated - at 53% as against 64% in the European Union.[5]

Although certain have criticized the lack of transparency and irregularity in the actual process of ASEAN trade liberalization, it is well known that the General Agreement on Tariffs and Trade / *World Trade Organization* (GATT/WTO) regime of trade integration as provided in GATT Article XXIV has in practice been implemented with

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In 1976 the ASEAN nations concluded the Treaty of Amity and Cooperation in South East Asia to which 27 states adhered by November 2009, including Japan, China, India, US, Russia, France, Australia and New Zealand. There has been no major armed conflict in East Asia since the end of the Indo-Chinese war in 1975. (Takashi Miyazaki, "The Diversity of East Asia and the Future of Its Regional Integration: Is Integration Possible", Meikei Hogaku [Meikei Law Review], No. 29, 2011, p. 1-19; T. J. Pempel, "More Pax, Les s Americana in Asia", in International Relations of the Asia-Pacific Journal, Vol.10, No.3, p. 467-490).

[3] Regional export dependency within ASEAN was 21.3% in 1999 (Takeshi Aoki, AFTA, ASEAN Keizaitougou no Jitujou to Tenbou [AFTA-The Reality of ASEAN Economic Integration], JETRO, 2001, p. 13-14.)

[4] Takashi Miyazaki, supra note 2, p. 14-15.

[5] Takashi Miyazaki, supra note 2, p. 6, n.13.

great flexibility throughout the world.[6] The real difficulty has been in the actual application of import tariffs and other border measures and the lack of administrative transparency which could be further improved to the benefit of interested businesses and increased trade intra-regionally as well as extra-regionally with a view to further intraregional economic development.

As for wider regional trade integration - in East Asia or the Asia-Pacific - which is envisaged within the framework of the East Asian Community, *Asia-Pacific Economic Cooperation* (*APEC*) or *Trans-Pacific Partnership* (TPP) - it is not likely to come to fruition any time soon because of the high degree of diversity manifest in the region, even higher than in Europe for instance, as well as by reason of disparity in the level of industrialization and agricultural productivity in the region under review.[7] ASEAN may succeed in taking initiative in this area too. On November 17, 2011, the Bali ASEAN ministerial conference reportedly decided to launch a new East Asian FTA involving a larger range of nations than TPP.[8]

II. The Prevention of Global Warming

It is true that the developed world is responsible for the current state of global warming, on the assumption that the global warming has been caused by human actions, notably industrialization. This is why the Kyoto Protocol imposes on developed states, and not on developing states, the obligation to mitigate Green House Gas (GHG) emissions.

However, the international fora, particularly the *United Nations*

[6] Throughout the history of GATT and WTO, none of the regional integration schemes has been found to be inconsistent with pertinent legal requirements, notably those of Article XXIV GATT, by the Contracting Parties. Article XXIV: 8 requires elimination of all customs duties and other restrictive regulations of commerce on "substantially all the intra-regional trade" which has been thought to be at least 90 % of intra-regional trade. Japan's FTAs and EPAs with ASEAN nations contain exceptions to tariff abolition especially in farm and fishery products such as rice, starch, chicken, etc.

[7] Takashi Miyazaki, supra note 3.

[8] Asahi Newspaper of 18 November 2011 reported that the Bali conference decided to invite to an enlarged FTA, in addition to the ASEAN members, Japan, China, Korea, India, Australia and New Zealand and not the US and Canada that has shown interest in negotiating with a view to setting up the TPP. Japan, after Australia, New Zealand, Vietnam, Singapore, Brunei, Chile and Peru, joined the TPP negotiation in late 2011.

Framework Convention on Climate Change (UNFCCC) conferences of contracting parties (COPs) discussing the post-Kyoto regime of emission control, have accepted in recent years that developing nations join the common efforts to reduce GHG emission[9] without making legally binding commitments. While it is both necessary and possible to reduce GHG emission, the fact of humanity's continued dependence on coal, petroleum, natural gas and other fossil fuels[10] and the high costs and lack of reliability of renewable energies such as wind and solar power leave no room for optimism. To boot, the March 11, 2011 nuclear power accident in Japan caused by earthquake and tsunami proved convincingly that nuclear power cannot be a trump option. It is evident that we must urgently increase absorption of GHG, above all absorption of carbon dioxide already existent in the earth's atmosphere through natural carbon fixation or photosynthesis in vegetation in general on the surface of the globe. The Kyoto Protocol provides that carbon sinks such as reforestation may be counted as emission mitigation in the achievement of national reduction targets.[11] It is time to create a new regime favoring all forms of sink or carbon fixation. Not only forest conservation and large-scale reforestation but also marine and on-land cultures of algae, green planktons, corals and shellfish must be encouraged.[12] Sophisticated technical/legal devices must be developed

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[9] See COP 13 decisions: FCCC1/CP.13 and 2/CP.13 and the results of Copenhagen COP 15 including the Copenhagen Accord in 2009 and Cancun COP 16 CP/2010/7/ Add.1 in 2010 ,III. Enhanced action on mitigation B. Nationally appropriate mitigation actions by developing countries Parties, particularly para. 48 and 49 as well as C. on REDD, for instance para.69 and 70 to be implemented in conformity with Appendix 1 guidelines. .

[10] In 2007 China surpassed the US in CO2 emissions to rank first in the world and continued ranking No.1 in 2009 at 6.8 billion tons while India placed third after the US in the same year surpassing Russia. The world total was 29 billion tons (Asahi Newspaper of 5 October 2011). China and India, in spite of their efforts to construct nuclear power plants, are expected to depend on coal that abounds in their territories, and other fossil fuels, while improving fuel efficiency which will have a per unit GDP emission mitigation effect but will not reduce their total CO2 emissions.

[11] Art. 3, para. 3, 4, and 7, Kyoto Protocol to the United Nations Framework Convention on Climate Change, opened for signature 16 March 1998, 2303 UNTS 148 (entered into force 16 February 2005).

[12] Not only photo-synthesis via chlorophyll in trees, grass, algae, planktons and other flora but also the formation of CaCo x in corals and shellfish contribute to CO_2 absorption/carbon fixation.

to measure carbon fixation so that sinks can be accurately evaluated in national target achievement in addition to emission mitigation.

ASEAN is blessed with vast sylvan resources and extensive sea areas under its jurisdiction. Putting emphasis on the importance of CO_2 absorption by reforestation and marine cultivation with reference to REDD-plus[13] and the post-Kyoto Protocol agreement on the prevention of global warming would benefit ASEAN nations, especially those with tropical rain forests and expansive shallow seas placed under the United Nations Convention on the Law of the Sea (UNCLOS) archipelago sea regime.[14] Reforestation and marine cultivation will contribute to the preservation of biodiversity as well, if properly managed.

III. Trans-border Movement of People

Hundreds of thousands of migrant workers are employed in ASEAN nations[15] particularly in Thailand and Malaysia. East Asia has also been called upon to deal with the serious problems caused by people that emigrate fleeing war or seeking better life or human security in other countries - from Myanmar, Vietnam, Sri Lanka, even China, Iran, Iraq, Afghanistan, Pakistan, Bangladesh, Nepal. Most of these people are so-called 'economic refugees' and do not fit the definition of the Refugee Convention[16] Although the root cause of this movement can only be

[13] REDD or reducing emissions from deforestation and forest degradation is a movement initiated in 2008 in which Nepal, Sri Lanka, Cambodia, Vietnam, the Philippines, Indonesia, PNG, Solomon Islands and Japan participate with the collaboration of UNEP. For information on REDD, refer to the ASEAN Common Position Paper released as a result of the Inaugural Workshop of the ASEAN Regional Knowledge Network on Forest and Climate Change, held in Jakarta in October 2008 that mapped out ASEAN's position in quest of flexibility in the definition of reference emission levels, national policy approaches, as well as enlarged climate investment funds and support for capacity building.

[14] Art. 46-54, United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 February 1994).

[15] Japan's Ministry of Welfare and Labour statistics show the following figures (in thousand persons-estimates for 2000): Expatriated workers-Korea 251, Indonesia 435, Philippines 867, Vietnam 32. Immigrant workers accepted-Japan 710, Korea 285, Hong Kong 217,Taiwan 307, Singapore 612, Malaysia 800, Thailand 1102, Indonesia 33.

[16] The Convention defines the term "refugee" as a person who "...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a

eradicated through economic development of their countries of origin, in the absence of adequate international legal frameworks providing protection for them, their predicament has to be addressed politically through conclusion of bilateral and regional accords of cooperation, even more so at a time most ASEAN members are not parties to the 1951 Geneva Refugee Convention (except the Philippines, Vietnam, Cambodia and Brunei).

The WTO General Agreement on Trade in Services (GATS) makes it clear that export of labour or "measures regarding citizenship, residence or employment on a permanent basis" are not part of the GATS regime aiming at freer services trade[17]. While it is undeniable that immigrant foreign workers contribute in large measure to the industrialization of ASEAN nations that receive them, all the same immigrant workers are often mistreated or discriminated against in their daily life, as in some developed nations.

On the other hand, after the wave of Indo-Chinese fleeing unified Vietnam subsided as the nation developed with the help of foreign direct investment mainly from North East Asia, people born in the border areas between Bangladesh, Burma and Thailand, mostly minorities such as Arakans or Rohingyas as they are commonly called, try to emigrate beyond state boundaries due to the instability of their legal status and mistreatment they are subjected to. Japan annually receives about thirty Burmese minority immigrants, mostly Karens, as a humanitarian gesture in spite of her traditional policy of not accepting immigrants. However, the Arakan people at issue are likely to qualify as refugees as defined by the 1951 Convention Relating to the Status of Refugees and the 1976 Protocol to the convention. The reader is invited to take a look at the 1951 Convention Article 1(2) refugee definition that refers to well-founded fear of "persecution for reasons of race, religion, nationality and membership of a particular social group."[18]

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particular social group or of political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country or who, not having a nationality and being outside the country of his former habitual residence..., is unable or, owing to such fear, is unwilling to return to it (Article 1. A (1) of the Convention as amended by the 1967 Protocol relating to the Status of Refugees).

[17] Para. 2, General Agreement on Trade in Services, Annex on Movement of Natural Persons Supplying Services under the Agreement.

[18] Ibid.

As the Refugee Convention does not impose on states parties a duty to recognize a refugee or to give residence to a person that they recognize as such, the acceptance of refugees by states parties is completely discretionary from the legal point of view.[19] Nevertheless, it is evident that in the absence of adequate legal frameworks providing protection for them, the predicament of some of these people who are obliged to leave their country of origin has to be addressed politically, either by individual nations, neighbours or far away, or through conclusion of international arrangements between interested states. Some ASEAN nations in great need of manpower have accepted them, often in a politically ambiguous manner,[20] but others, along with major North Eastern Asian nations have been reluctant to do so. The best solution would be conclusion of bilateral or multilateral intraregional arrangements whereby manpower importing countries receive these refugees and provide them with work. It goes without saying that United Nations High Commissioners on Refugees (UNHCR) can help to solve this problem, by giving advice to governments concerned and assisting in relocating would-be refugees. It is hoped that regional efforts such as ASEAN Bali Process[21] will bear fruit but other Asian nations including Japan, China and the Republic of Korea should also participate in these efforts from the humanitarian as well as legal point of view.

IV. Conservation of Traditional Culture

Traditional culture of various peoples of the world including intangible assets as well as traditional products needs to be conserved. The value of culture for mankind is obvious and cannot be compromised

[19] There is no provision in the Convention that lays down such obligation. However, when municipal law authorizes a foreigner seeking asylum as a 'Convention refugee' and fitting the definition prescribed by the Refugee Convention, municipal law may permit this person to obtain permanent resident status (see Articles 18 bis, 61bis and 61bis-bis of the Immigration and Refugee Recognition Law of Japan).

[20] Lee Jones, "Beyond Securitization: Explaining the Scope of Security Policy in South East Asia", in International Relations of the Asia-Pacific, Vol.11, No.3, 2011, p. 415-418.

[21] The Bali Process started in 2002 with the first Bali Regional Ministerial Conference on People Smuggling, Trafficking in People and Related Transnational Crime, whose 4th conference took place in April 2011. The Rohingya problem has also been discussed in this forum.

by greed for pecuniary gains of international trade. Whereas free trade is conducive to an enhancement of general welfare, the rule of the strongest or absolute liberalism cannot be tolerated even in the national economy, as evidenced by the presence of anti-trust law originating in the United States (US). Much less it cannot be condoned in the international community. However, already since 1987 in the GATT/WTO dispute settlement procedure, protective taxation of some traditional Asian liquors has been found, through a misinterpretation committed in the trade dispute settlement mechanism, to be inconsistent with WTO trade rules.

It all started in 1987 when a GATT panel found that Japan's lower liquor taxes that favoured traditional domestic alcoholic beverages such as shochu, a traditional distilled liquor,[22] were inconsistent with the national treatment requirements as provided in Article III:2 of the GATT. However, GATT III:2 prescribes in its first sentence that "(products imported from other contracting parties) shall not be subject ...to internal taxes...in excess of those applied to like domestic products"(underline added). It is quite clear from this language that the ban of differential tax rates does not apply to 'directly competitive/substitutable products' (DCSs) but only to like products (LPs) either domestic or imported. On the other hand, the panel report determined that Japan's traditional liquor shochu was not a LP in relation to imported whisky and other distilled liquors but a DCS product[23]. Therefore, obviously shochu was not targeted by the ban. Yet, the panel report applied to the Japanese tax differentials the second sentence of III:2 that banned other forms of tax discrimination than tax rate differentials. The panel founded itself on the interpretative note to GATT III:2 that specifies that a tax conformant to the requirements of the first sentence (i.e. a tax non-discriminatory in tax rates that applies to 'like products') would be inconsistent with provisions of the second sentence only in cases where competition

[22] Panel report adopted on 10 November 1987, BIISD 34S/83

[23] The panel determined that among Western distilled liquors vodka was the only'like product' of shochu, which determination, however, does not conform to the perception in the Japanese market that vodka is a distinct liquor quite different from shochu. See for the details of this issue Takashi Miyazaki, "Alcoholic Beverages Case Revisited: A Case of Treaty Interpretation or Formation of International Law?", in B. S. Chinmi, Miyoshi Masahiro, Li-ann Thio, Asian Yearbook of International Law, Vol. 14, 2008, p. 3-26.

is involved between the products which are "not similarly taxed".[24] It is evident that this targets a tax non-discriminatory in tax rates but levied in a discriminatory fashion. The panel report clearly erred in its interpretation but the same misinterpretation has been upheld in the ensuing WTO dispute settlement decisions vis-a-vis Japan (for the second time in 1996), Korea and Chile and has been claimed to be established jurisprudence at the time of the accession to the WTO of Taiwan and Vietnam.[25]

In 2005, after acrimonious discussions between pro-culture and pro-trade camps, the *United Nations Educational, Scientific and Cultural Organization* (UNESCO) adopted a Convention on the Protection of the Diversity of Cultural Expressions. This Convention, while extolling the value of diverse cultural expressions as part of fundamental human

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[24] Article III, para. 1 and 2, General Agreement on Tariffs and Trade, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 148).

The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specific amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

The products of the territory of any contracting party imported to the territory of any other contracting party shall not be subject... to internal taxes or other internal charges of any kind in excess of those applied...to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

Interpretative note to GATT III: 2:

A tax conforming to the requirements of the first sentence of paragraph 2 would be inconsistent with the provisions of the second sentence only in cases where competition is involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which is not similarly taxed.

[25] Japan, WT/DS8/R of 21 November 1996 and WT/DS8/AB/R of 4 October 1996; Korea, WT/DS75, 84/R of 17 September 1998 and WT/DS75, 84 AB/R of 18 January 1999; Chile, WT/DS/87/R of 15 June 1999 and WT/DS/87/AB/R of 13. Also see the respective WP reports on the accession of Taiwan(2002) and Vietnam(2007) to the WTO. In recent years India has been sued twice for its liquor taxes within the WTO but the dispute procedure seems to have stopped for unknown reasons. As for the Philippines, the WTO panel found in its 15 August 2011 report that the Philippine claim that its domestic whisky was not a competitive product of imported whisky that should be subject to the same tax was not tenable, by ruling that it was a like product of whisky and should be subject to the same tax as whisky (See DS396).

rights and setting forth the parties' rights and obligations of cultural protection, makes it clear in its Article 20: 2 that "nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties". This does not resolve the conflict between trade law and cultural protection which is increasingly conceived throughout the world to be an essential part of fundamental human rights. The so-called fragmentation of international law in cultural protection continues.[26]

While the 2005 UNESCO convention itself does not provide relief, ways must be found to resolve the legal issues that relate to cultural protection in ASEAN and in East Asia at large. In order to correct the misinterpretation committed in the GATT/WTO dispute settlement mechanism, several paths are available. The easiest and perhaps most practical may be to have the so-called WTO precedent or WTO jurisprudence corrected in future WTO dispute settlement proceedings, for instance in the imminent Appellate Body discussion of the most recent Philippines case.[27]

The misinterpretation within the trade judiciary, in this author's opinion, must be first addressed politically by nations aspiring for the protection of cultural heritages including traditional products. Procedurally it may not yet be easy to muster a three-quarter majority support within the WTO required to pass an authoritative interpretation of GATT Article III and other pertinent provisions or obtain a waiver.[28] However, the forces favouring protection of culture, by means of differential taxation of traditional goods, now are likely to be united in the WTO.[29] It seems to be imperative that sufficient political support

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[26] Refer to the report of the study group on the fragmentation of international law, finalized by Marti Koskenniemi and presented at the 58th session of the International Law Commission (2008), notably paragraph 28 for the possibility of solution through conclusion of inter se agreements providing for cultural protection among parties to the UNESCO Convention.

[27] Although the panel found in its report of 15 August 2011 that the Philippine whisky is a like product of the imported whiskies and is actually so called in the Philippine market, the Appellate Body can state in obiter dictum that Article III:2 GATT applies to like products only and not to competitive traditional products.

[28] Art. 9, para. 2 and 3, Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 144 (entered into force 1 January 1995).

[29] The 1995 Convention on the Protection and Promotion of Cultural Expressions was

be secured in East Asia including the ASEAN nations, Japan, China, Korea, India and other nations with traditional products that need to be protected.

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