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Chapter 1

Introduction: Backdrop and Overarching Perspectives

1.1 Introduction

The Association of Southeast Asian Nations (ASEAN) comprises one of the most vibrant regions in the world, in terms of stages of economic development and the diversity of its 620 million people, political structures and national legal traditions. It includes a rapidly growing middle class, expected to comprise 120 million people by 2020.[1] This makes Southeast Asia a very important consumer market in its own right.

Established in 1967 initially to bolster regional security, ASEAN has also increasingly institutionalised greater cooperation in economic affairs, partly in response to the rise of China (itself now a vast consumer market). In particular, the 2007 *ASEAN Economic Community Blueprint* (AEC Blueprint 2007) brought forward to the end of 2015 a commitment to liberalise trade in goods, services and investment among the now ten member states.[2] Less well known is that this Blueprint

[1] See e.g. Austrade and DFAT, 'Why ASEAN and Why Now', 14 August 2015, dfat.gov.au/about-us/publications/Documents/why-asean-and-why-now.pdf.

[2] See generally, e.g. T. S. Yean and S. B. Das, 'Introduction: Economic Interests and the ASEAN Economic Community' in T. S. Yean and S. B. Das (eds.), *Moving the AEC Beyond 2015: Managing Domestic Consensus for Community-Building* (ISEAS Publishing, 2016), 1–23; J. Pelkmans, *The ASEAN Economic*

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committed them to improving consumer law, particularly in developing countries with lower or patchier protections for consumers, as explained in Section 1.2 below.

It is therefore timely to investigate and assess, through this Volume, the emergence of more harmonised consumer law across Southeast Asia. The ASEAN Secretariat has been helping achieve this agenda since 2008. This has been mainly been through consensus building and information sharing, in the more traditional ('ASEAN Way') style, but against the backdrop of harder (treaty-based) commitments within ASEAN and their key trading partners to liberalise cross-border trade in goods and services. The biggest challenge remains the diversity among ASEAN member states impacting on the timing and intensity of consumer law enactments and implementation, as explained in Section 1.3 below.

Consumer law is a rich and varied field, setting substantive norms through both public and private law that are respectively enforced directly by regulators and indirectly through consumer redress mechanisms, so this book must be selective. As summarised in Section 1.4 below, Chapter 2 elaborates various useful theoretical perspectives on ASEAN itself, as well as on how best to explain developments in consumer law generally. Chapter 3 looks at consumer product safety law, as one of the first and highest priority areas of reform across all member states. It finds earlier and more extensive developments in regulation by public authorities, compared to expanding

Community: A Conceptual Approach (Cambridge University Press, 2016); ASEAN Economic Community Blueprint, Singapore, 20 November 2007, asean.org/wp-content/uploads/archive/5187–10.pdf.

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private law rights against manufacturers of unsafe products, but problems in both regulatory enforcement and access to justice for consumer redress. Chapter 4 examines consumer contract law generally, where even greater disparity is evident across Southeast Asia. Chapter 5 considers the role ASEAN can play as a regional grouping in dealing with existing and emerging challenges regarding consumer financial products and services. Chapter 6 addresses regional challenges regarding the provision of professional health services, including the qualifications and quality of health professionals and health tourism. Chapter 7 outlines points of intersection as well as some tensions between consumer law and competition law, the latter having also been subject to harmonisation initiatives across Southeast Asia. Chapter 8 ends with some key reflections and possible future directions in improving ASEAN-wide consumer law and policymaking.

1.2 Economic Integration and Legal Harmonisation of Consumer Law

The ASEAN Economic Community (AEC) concept had been set out in the Bali Accord II in 2003 as one of the three pillars of ASEAN cooperation (along with a 'security community' and a 'socio-cultural community'), to enhance economic integration beyond the loose ASEAN Free Trade Area arrangements introduced in 1992.[3] By significantly implementing the

[3] V. Aggarwal and M. G. Koo, 'Designing Trade Institutions for Asia' in S. Pekkanen (ed.), *Asian Designs: Governance in the Contemporary World Order* (Cornell University Press, 2016), 35–58, 41–2.

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AEC by 2016,[4] despite ASEAN's inbuilt institutional limitations compared to the European Union (EU) and even North American regional economic integration mechanisms,[5] Southeast Asia is better positioned as an integrated regional production base for the global value chains that have expanded dramatically since the 1980s.

Such value chains have been underpinned by major advances in information technology and cross-border investment, generating rapid industrialisation of developing countries particularly in Asia, and a second major wave of economic globalisation – dubbed 'the next convergence'.[6] This process has been facilitated by the implementation of World Trade Organization (WTO) agreements from 1995,

[4] S. Tangkitvanich and S. Rattanakhamfu, 'Assessing the ASEAN Economic Community', *East Asia Forum*, 21 March 2017, www.eastasiaforum.org/2017/03/21/assessing-the-asean-economic-community/ and J. Chinyong Liow, 'Southeast Asia in 2017: Grappling with Uncertainty' in M. Cook and D. Singh (eds.), *Southeast Asia Affairs 2018* (ISEAS Publishing, 2018), 59, 67 (noting however that 105 of 506 AEC integration measures were still deferred as of end-2015).

[5] See generally I. Stefano and S. Edmunch, *The Foundation of the ASEAN Economic Community: An Institutional and Legal Profile* (Cambridge University Press, 2015).

[6] See generally R. Baldwin, *The Next Convergence: Information Technology and the New Globalization* (Harvard University Press, 2016). The first wave or 'old globalisation' was triggered instead by technological innovations in the nineteenth century that dramatically reduced the costs of moving goods across borders, unleashing industrialisation and comparative advantage but primarily for the benefit of some Western powers – dubbed 'the great divergence'. Baldwin also argues that impending improvements in cross-border labour mobility (including virtually) may trigger a third wave of globalisation, underpinned by a new generation of treaties.

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opening up export markets for end products particularly in developed countries. When it became apparent around 2000 that WTO negotiations for further trade and investment liberalisation would be protracted and difficult, many states instead began negotiating 'WTO-plus' agreements bilaterally and sometimes regionally.

Since 2009, ASEAN has signed comprehensive free trade agreements (FTAs) and/or investment agreements with Australia plus New Zealand, China, Korea, Japan and (most recently, in 2014) India.[7] ASEAN now proposes to link up these FTAs and develop them by concluding a Regional Comprehensive Economic Partnership (RCEP) with those six partners.[8] Several ASEAN states also signed the Trans-Pacific Partnership (TPP) Agreement in 2016, with others also expressing interest in acceding to this FTA that joined the United States, Japan and ten other economies encompassing over a third of world GDP. Even if this Agreement never comes into force in its original form, given the Trump administration's volte-face and withdrawal of US signature from January 2017, the treaty's drafting and its underlying economic

[7] The ASEAN-Japan FTA lacks an investment chapter but Japan has concluded stand-alone bilateral investment treaties and/or FTAs anyway with all ASEAN member states, both to liberalise market access and protect investments once made. See generally also V. Bath and L. Nottage, 'The ASEAN Comprehensive Investment Agreement and "ASEAN Plus" – the Australia–New Zealand Free Trade Area (AANZFTA) and the PRC–ASEAN Investment Agreement' in M. Bungenberg, J. Griebel, S. Hobe and A. Reinisch (eds.), *International Investment Law* (Hart, 2015), 283–303.

[8] See e.g. R. Scollay, 'APEC, TPP and RCEP: Towards an FTAAP' in S. B. Das and M. Kawai (eds.), *Trade Regionalism in the Asia-Pacific: Developments and Future Challenges* (ISEAS Publishing, 2016), 297–322.

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rationale remain important for Southeast Asia in many ways. The original signatories other than the USA, including the four ASEAN member states, also re-signed a similar treaty on 8 March 2018: the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).[9]

Such commitments to liberalise trade in goods and services, initially through the WTO agreements, and to promote cross-border investment particularly through FTAs impact on consumers in several ways.[10] Agreed tariff reductions and restrictions on 'non-tariff barriers' for goods that unjustifiably protect domestic producers promise reduced prices and expanded choice for consumers. So do commitments around services liberalisation, which may even allow establishment of a 'commercial presence' and therefore foreign investment, although commitments under the WTO regime were quite limited. More recent FTAs generally therefore add more extensive commitments, not limited to specified services sectors, as well as protections for investments

[9] See *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/; and generally L. Nottage, 'The Investment Chapter and ISDS in TPP: Lessons from Southeast Asia', ISEAS Economics Working Paper, 2017–2 (2017), www.iseas.edu.sg/articles-commentaries/iseas-economics-working-papers, updated in C. Lee (ed.), *The Impact of the Transpacific Partnership on Southeast Asia* (ISEAS Publishing, 2019), in press; J. Chaisse, H. Gao and C. Lo (eds.), *Paradigm Shift in International Economic Law-Making: TPP as a New Model for Trade Agreements?* (Springer, 2018).

[10] For broader repercussions, see P. Hsieh and B. Mercurio (eds.) *ASEAN Law in the New Regional Economic Order: Global Trends and Shifting Paradigms* (Cambridge University Press, 2019).

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once made. Foreign direct investment has consequently grown dramatically across Asia since the 1990s,[11] often adding major new suppliers for consumers in fields such as telecommunications and financial services.

The most recent FTAs, especially those based on contemporary US treaty practice (such as the TPP) that has spread around much of the Asia-Pacific region,[12] even add chapters that directly address impediments to trade and investment resulting from state-owned enterprises (SOEs, still prevalent across Southeast Asia),[13] as well as competition law reform and enforcement. The latter provisions (found in TPP Chapter 16, entitled 'Competition Policy', unchanged in the CPTPP), although not subject to the inter-state dispute settlement Chapter generally applicable to violation of (CP)TPP commitments, extend beyond requirements to enact and enforce comprehensive competition laws per se. They include Article 16.6 (headed 'Consumer Protection'), obliging (CP)TPP member states to 'adopt or maintain consumer protection laws or other laws or regulations that proscribe fraudulent and deceptive

[11] See generally V. Bath and L. Nottage, 'Asian Investment and the Growth of Regional Investment Agreements' in C. Antons (ed.), *Routledge Handbook of Asian Law* (Routledge, 2017), 182–99; J. Chaisse and L. Nottage (eds.), *International Investment Treaties and Arbitration Across Asia* (Brill, 2018).

[12] See e.g. A. Kawharu and L. Nottage, 'Models for Investment Treaties in the Asian Region: An Underview', *Arizona Journal of International and Comparative Law*, 34 (2016), 462–528, available at ssrn.com /abstract=2845088.

[13] W. K. Nawawi, 'The TPPA SOE Chapter: New Rules for State-Owned Enterprises' in C. Lee (ed.), *The Impact of the Transpacific Partnership on Southeast Asia* (ISEAS Publishing, 2019), forthcoming.

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commercial activities' (Article 16.6.3), including practices such as (Article 16.6.2):

(a) a practice of making misrepresentations of material fact, including implied factual misrepresentations, that cause significant detriment to the economic interests of misled consumers;
(b) a practice of failing to deliver products or provide services to consumers after the consumers are charged; or
(c) a practice of charging or debiting consumers' financial, telephone or other accounts without authorisation.

The first example prohibits misleading conduct, which (as mentioned below in Chapter 4) forms a key tenet of most consumer contract protection regimes in the region, although in some jurisdictions (such as the USA) misleading conduct prohibitions may also fall within the purview of an independent competition law regulator (as discussed generally in Chapter 7). The second example (of non-delivered goods) is primarily an issue of enforcing contract performance, or its monetary equivalent, which is dealt with mostly by sale of goods law (also mentioned in Chapter 4 on consumer contracts). The third example may be a manifestation of fraud in the financial services sector (examined generally in Chapter 5).

Against the backdrop of the recent CPTPP Chapter on Competition, which already includes some commitments to introduce consumer protection measures, work commenced in 2019 to update the ASEAN-Australia-New Zealand FTA (AANZFTA), signed in 2009 but with a much briefer Competition Law Chapter. In Stage Two of the AANZFTA General Review, the FTA Joint Committee recommended to

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Economic Ministers that the text of its Competition Chapter text be reviewed and that new provisions on consumer protection be discussed. At their 23rd AEM-CER Consultations on 1 September 2018, Ministers endorsed this recommendation and 'tasked officials to commence implementation of the recommendations at the 11th [FTA Joint Committee] Meeting and Related Meetings in Australia in the first half of 2019 with a view to concluding text of a second protocol to amend AANZFTA within an expeditious timeframe'.[14] The initiative under AANZFTA is also underpinned by the active Competition Law Implementation Program (CLIP) led by the Australian Competition and Consumer Commission since 2014.[15]

This growing focus on promoting competition through FTA provisions and related capacity building, and more recently consumer protection, partly dates back to the Singapore-USA FTA signed in 2003. It required those states to

[14] See, also for updates on progress, https://dfat.gov.au/trade/agreements/in-force/aanzfta/Pages/general-review-of-the-asean-australia-new-zealand-fta.aspx.

[15] See generally Chapter 7 below, and www.accc.gov.au/about-us/international-relations/competition-law-implementation-program-clip:

'CLIP supports ASEAN's regional goal of building a globally integrated, highly competitive economic region through effective competition laws, enforcement agencies, and enhanced regional cooperation mechanisms.

Under CLIP, ASEAN Member States receive tailored training, mentoring and other support from the [Australian Competition and Consumer Commission] and other international experts to introduce and implement national competition laws to meet commitments under the ASEAN Economic Community Blueprint, . . . AANZFTA . . . and the ASEAN Competition Action Plan 2025.'

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maintain 'measures to proscribe anticompetitive business conduct' (Article 12.2.1), with a footnote adding that:

> Singapore shall enact general competition legislation by January 2005, and shall not exclude enterprises from that legislation on the basis of their status as government enterprises.

Interestingly, however, Singapore not only enacted its Competition Act 2004 to regulate problems such as cartels or monopolies,[16] but also added prohibitions on misleading and other unfair practices through its Consumer Protection (Fair Trading) Act 2003. Such prohibitions form a major part of consumer law, the remit of which extends beyond fraudulent or deceptive activities and related anti-competitive forces. As discussed in Chapter 4, for example, regulation of consumer contracts in the region generally reflects a broader set of social values beyond promoting competition, although clearly this remains important. The consumer law applying to contracts in the ASEAN region consistently shows a concern with contract *negotiation processes* that trick, pressure or coerce consumers to enter into contracts.[17] Yet, in some states, it also reflects *substantive* concerns about inherent fairness of consumer contract terms.[18]

[16] B. Ong, 'The Origins, Objectives and Structure of Competition Law in Singapore', *World Competition*, 29 (2) (2006), 269–84.

[17] See e.g. G. Low, 'Singaporean Consumer Law' and N. V. Cong, 'Consumer Sales Law in Vietnam' in G. Howells, C. Twigg-Flesner, H.-W. Micklitz and C. Lei (eds.), *Comparative Consumer Sales Law* (Routledge, 2018), 113–27 and 165–82, respectively.

[18] On this core distinction, in comparative perspective, see J. M. Paterson, 'The Australian Unfair Terms Law: The Rise of Substantive Unfairness as

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