

# The Application of Extraterritorial in ASEAN Economic Community Era: Challenge and Feasibility

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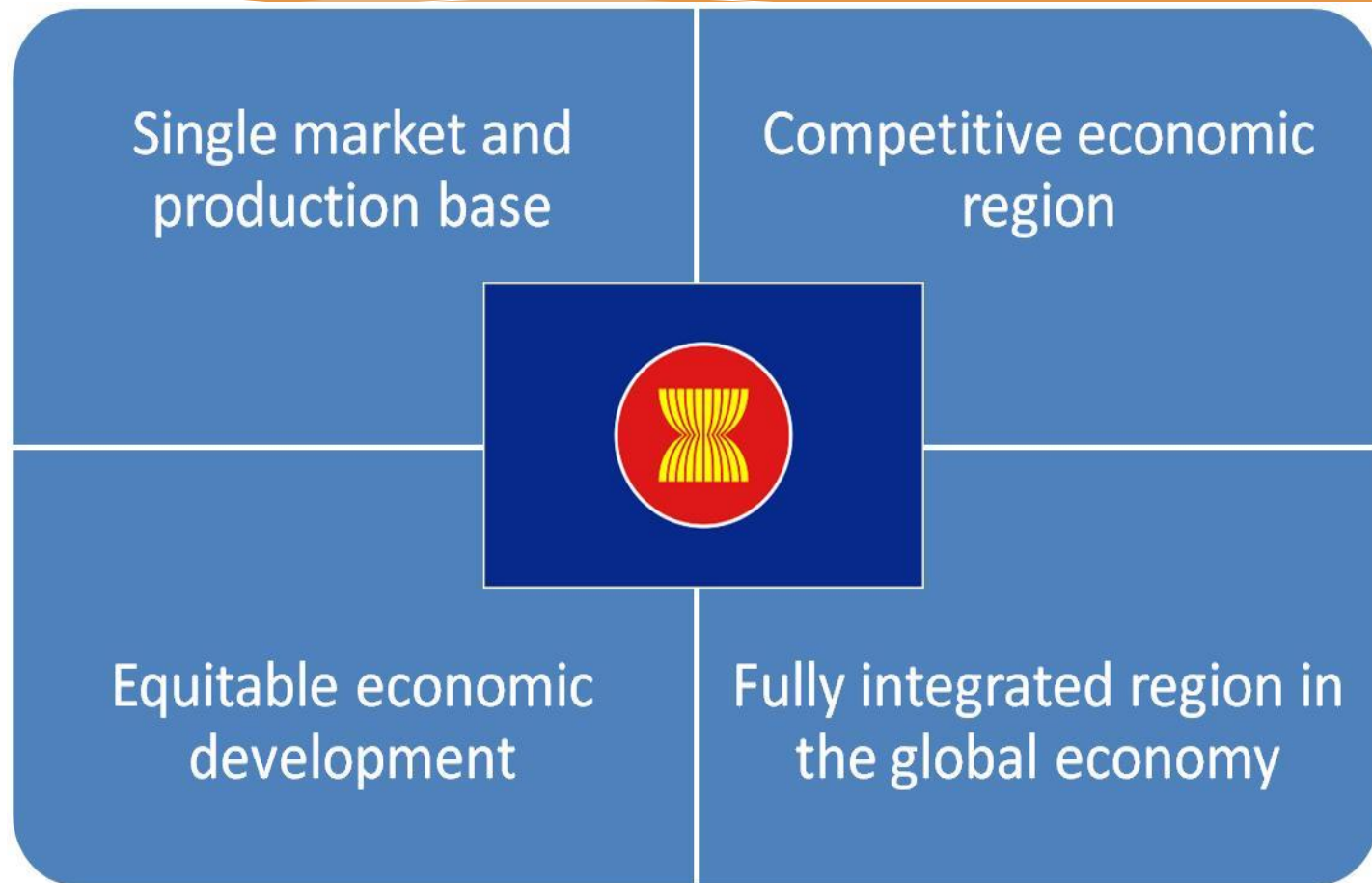
By the end of December 2015 AEC came into effect



# Introduction

- \* ASEAN Economic Community (AEC) is already implemented since by the end of December 2015.
- \* All the ASEAN Member States (AMSs) has been agreed that the economy among AMSs is integrated as single market.
- \* AEC is collectively the third largest market in ASIA.

# ASEAN Economic Community



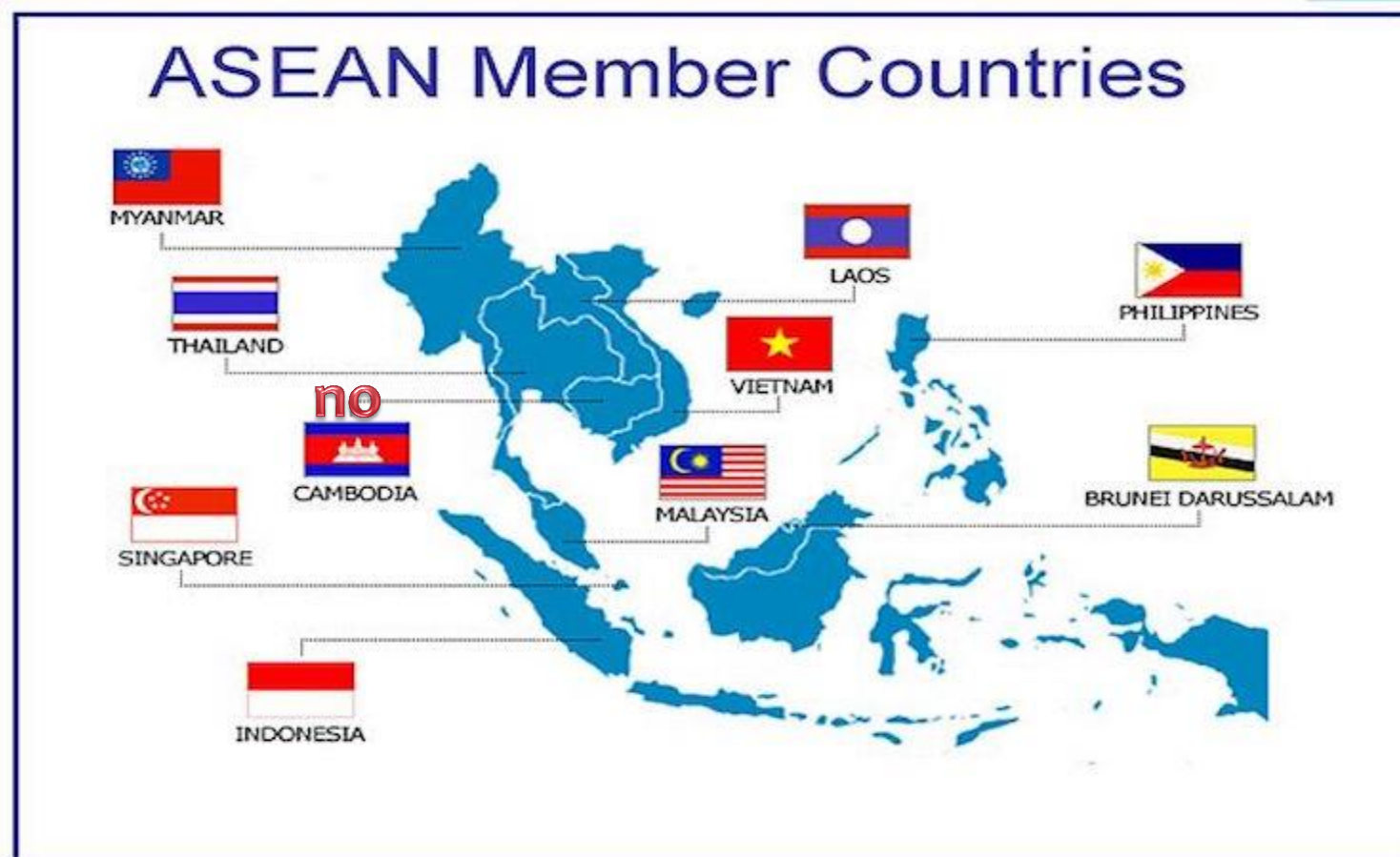
# Introduction

- \* In term of competition law the implementation of the ASEAN single market should be under the culture of a fair business competition.
- \* A fair competition in the ASEAN region must be provided.
- \* But ASEAN self has no ASEAN competition law yet.
- \* There is only ASEAN Regional Guidelines on Competition Policy (ARGCP)
- \* It serves generally as a general framework guide for the ASEAN countries to establish their own competition law.

# Introduction

- \* Almost all AMSs have their own competition law except Cambodia.
- \* It is just to protect and sustain a fair competition in their own domestic market.
- \* It can't protect an unfair business competition among AMSs.
- \* The question is if there is an unfair business competition among AMSs that done by undertakings which competition law will be applied?
- \* While national competition law is to promote and to foster a fair business competition in the respective domestic market, not in ASEAN region.
- \* That is why **how important** is the extraterritorial jurisdiction in ASEAN region.

# AMSs Competition Law





# The Extraterritoriality Principle in Competition Law

- \* What is extraterritorial jurisdiction?
- \* “competence of a State to make, apply and enforce rules of conduct in respect of persons, property or events beyond its territory. Such competence may be exercised by way of prescription, adjudication or enforcement” (Kamminga: 2012)
- \* The objective extraterritoriality has a profound importance in the implementation of Competition laws (Martyniszyn: 2017)
- \* This objective jurisdiction covers a competition violation, which occurs abroad, but causes anticompetitive effects to the domestic market of a Country, exerting the jurisdiction.

# The Extraterritoriality Principle in Competition Law

- \* The application extraterritorial in USA based on “effect doctrine”
- \* While in EU based on from the “Single Economic Entity (SEE)” doctrine, to the “implementation” doctrine and lately to “immediate, substantial and foreseeable effect” doctrine.

# Extraterritorial Provision in ASEAN Competition Law



# Extraterritorial Provision in Indonesia Competition Law

- \* Indonesia regulates extraterritorial jurisdiction implicitly.
- \* Indonesia regulates implicitly through Article 16 ICL Number 5 of 1999 is saying: “Business actors shall be prohibited from entering into agreements with other parties overseas setting forth conditions which may cause monopolistic practices and or unfair business competition.”

# Extraterritorial Provision in Singapore Competition Act

- \* While in Singapore the extraterritoriality principle explicitly regulate in Section 33 (1) Singapore Competition Act, as follows:
- \* “Notwithstanding that
- \* (a) an agreement referred to in Section 34 has been entered into outside Singapore;
- \* (b) any party to such agreement is outside Singapore; ....or
- \* (g) any other matter, practice or action arising out of such agreement, ... is outside Singapore, this Part shall apply to such party, agreement, abuse of dominant position, anticipated merger or merger if-..
- \* (i) such agreement infringes or has infringed the Section 34 prohibition;...”

# Extraterritorial Application in Indonesia

- \* KPPU, as the Indonesian Cartel Office, has employed this principle in two landmark cases, namely Temasek Telecom and Astro Television cases.
- \* In the Temasek Telecom case, the KPPU's indictment had been based, primarily, on the violation against Article 27 (a) ICL Number 5/1999 concerning cross-ownership.
- \* KPPU invokes Article 27 (a) against Temasek Holdings (Pte) Ltd., a Singapore based State Owned Enterprise (SOE), because its cross-ownership both in Indosat (Tbk.) and Telkomsel (Tbk.).
- \* KPPU was of opinion that Temasek (Pte.) Ltd, together with Indosat and Telkomsel are subject to the "SEE Doctrine".

# Extraterritorial Application in Indonesia

- \* KPPU convincingly argued that Temasek (Pte.) Ltd., had exerted “material influences” over Indosat and Telkomsel, that led to price cartels in the Indonesian telecommunication (cellular) market.
- \* Consequently, KPPU could invoke the provisions of ICL Number 5/1999 due to the price cartels against Temasek (Pte.) Ltd based on the extraterritoriality principle.
- \* In the Astro Television case, KPPU asserted the violation of Article 16 ICL Number 5/1999 against Astro All Asia Networks, Plc (AAAN) because of the agreement between AAAN and ESPN Star Sports (ESS).

# Extraterritorial Application in Indonesia

- \* This agreement stipulated the exclusivity as to control and placement of broadcasting right for the Barclays Premiere League 2007-2010 to PT. Direct Vision (PTDV), a subsidiary company of AAAN. All Asia Multimedia Networks (AAMN) together with AAAN (“Astro Group”), not only substantially supported PTDV, but also had “decisive influence” over PTDV.



# Extraterritorial Application in Singapore

- \* The Singapore Competition Commission has applied the extraterritoriality in the cartels of air freight forwarding services from Japan to Singapore.
- \* In this case, the Competition Authority imposed violation against Section 34 Singapore Competition Act.
- \* The Singapore Competition Commission imposed penalties against the Singaporean and Japanese companies due to involvement in the international cartel on ball bearings manufacturers.

# Feasibility for Implementing the Extraterritoriality in ASEAN

- \* The feasibility of extraterritoriality principle in the ASEAN encompasses the material (substantive) and formal (procedural) aspects.
- \* AMSs shall harmonize their respective provision on extraterritoriality.
- \* The formal (procedural) aspects for the extraterritorial implementation, the ASEAN could keenly consider the following practices, which are:  
First, the comity principle and Second, the bilateral agreement.

# Feasibility for Implementing the Extraterritoriality in ASEAN

- \* The comity manifests into two types, which are:
- \* **First, positive comity. This refers to a situation:**
- \* “where one state actively requests the other state take necessary measures to protect the interests of the former state.
- \* **Second, passive comity, whereby this type of comity exists, if:**
- \* “a more common and traditional in exercise of judicial jurisdiction where courts of one state are required to restrain their jurisdiction in certain cases considering the important interests of other states.
- \* On the other hand, in order to strengthen an antitrust enforcement, the Competition Authorities (Cartel Office) could make bilateral agreements with other respective countries.

# Conclusion

- \* As regards the increasing importance of extraterritoriality principle in the ASEAN Competition provisions is an undenied factual condition.
- \* Eventhough the increasing importance of extraterritorial jurisdiction is undenied, but the implementation of its in AEC is still imposible, because there is no legal instrument to enforce it in the AEC that must be followed by every AMSs.
- \* The possibility of the application of exaterritorial in the ASEAN Economic Community is just if there is a proper justification among ASEAN Member States, because a state can not take measure to enforce its own national laws on the territory another states without the consent of them.
- \* It could be possible through comity principle and the bilateral agreement.



\* Thank you for your attention