



## **The Struggle of Becoming the 11<sup>th</sup> Member State of ASEAN: Timor Leste's Case**

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**Abstract:** *In March 4, 2011, Timor Leste applied for membership in ASEAN through formal application conveying said intent. This is an intriguing case, as Timor Leste, is a Southeast Asian country that applied for ASEAN Membership after the shift of ASEAN to acknowledge ASEAN Charter as its constituent instrument. Therefore, this research paper aims to provide a descriptive overview upon the requisites of becoming ASEAN Member State under the prevailing regulations. The substantive requirements of Timor Leste to become the eleventh ASEAN Member State are also surveyed in the hopes that it will provide a comprehensive understanding as why Timor Leste has not been accepted into ASEAN. Through this, it is to be noted how the membership system in ASEAN will develop its own existence as a regional organization. This research begins with a brief introduction about ASEAN's rules on membership admission followed by the practice of ASEAN with regard to membership admission and then a discussion about the effort of Timor Leste to become one of ASEAN member states.*

**Keywords:** *membership, ASEAN charter, timor leste, law of international and regional organization*

### **I. INTRODUCTION**

The 1967 Bangkok Conference produced the Declaration of Bangkok, which led to the establishment of ASEAN in August 8, 1967. The Declaration itself does not specify the rules of admitting new member states, as it only says that, “*the Association is open for participation to all States in the South-East Asian Region subscribing to the aforementioned aims, principles and purposes.*”<sup>1</sup> Therefore, it does not limit to any

South East Asia countries outside the founding father states to join ASEAN who wish to bind to the aims, principles and purposes of ASEAN.

In 2004, Malaysia proposed the idea of introducing ASEAN Charter to which was formally adopted at the Eleventh ASEAN Summit in 2005. ASEAN Charter was formally adopted by leaders in November 20, 2007 and came into effect in December 15,

<sup>1</sup> ASEAN, “The Asean Declaration (Bangkok Declaration)”, accessed October 4, 2017, <

<http://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967>>

2008.<sup>2</sup> This adoption effectively provides the legal personality of ASEAN as well as perfecting its organs and mechanisms for operation. It is conveyed through Article 3 of ASEAN Charter explicitly that states, "ASEAN, as an intergovernmental organization, is hereby conferred legal personality".<sup>3</sup> Therefore, ASEAN effectively stipulates its legal power and binding towards its member states to ease the operation of ASEAN in conducting its functions.

In comparison to the 1967 Declaration of Bangkok, ASEAN Charter is rules-based that specifically provides provisions in matters that were not found in the Declaration. One of which is the matter of membership admission. It is stated in Article 6 (2) of ASEAN Charter that the admission shall be based on the following criteria, such as: Location in the recognized geographical region of Southeast Asia; Recognition by all ASEAN Member States; Agreement to be bound and to abide by the Charter; and Ability and willingness to carry out the obligations of Membership.

Although ASEAN is a prestige regional intergovernmental organization in Southeast Asia, it still excludes Timor Leste. The people of Timor Leste declared its restoration of independence in May 20, 2002, making its nation to be world's newest nation.<sup>4</sup> They initially rejected special autonomy from Indonesia, which led to its independence.<sup>5</sup> With all the struggling that Timor Leste had

to endure in gaining its independence, it is still not admitted as a permanent member state of ASEAN despite its formal application for ASEAN membership in 2011.<sup>6</sup> Still to this day, the admission of Timor Leste as a member state of ASEAN after six years from its formal application remains to have no solution despite its strong urge to become one due to many implications. This is a stark contrast to the no time-consuming admission of Cambodia, Laos, Myanmar, and Vietnam in the late 1990s.<sup>7</sup>

The case of Timor Leste's membership admission to ASEAN prevails the issues of ASEAN's legal framework itself to which may be in conflict with its own advocacy of determined to transform from an informal organization to a rules-based organization. This causes on-going the accession of Timor Leste that has no end until today.

This article aims to analyze the admission process of Timor Leste in becoming a member state of ASEAN through the eyes of international organizational law in regards to the ASEAN Charter and other ASEAN instruments. In emphasizing the issues of ASEAN's legal framework above, the article follows to summarize the membership system of international organization. Subsequently, it discusses the legal framework of ASEAN in regards to membership admission in a lengthy detail that distinct the ASEAN Declaration and

<sup>2</sup> L. Leviter, 'The ASEAN Charter: ASEAN Failure or Member Failure?' (2010) 43 *New York University Journal of International Law and Politics* 159.

<sup>3</sup> ASEAN, "Asean Charter", Article 3, accessed September 4, 2017, <<http://www.asean.org/archive/publications/ASEAN-Charter.pdf>>

<sup>4</sup> Macalua, "Timor Leste: Newest and Poorest of Asian Nations"

<sup>5</sup> İlker Gökhan Şen, *Sovereignty Referendums in International and Constitutional Law*, (Switzerland: Springer International Publishing, 2015), 104.

<sup>6</sup> Fina Astriana, Muhammad Arif, and Askabea Fadhillah, 'Rethinking the Process for Timor-Leste's Application for ASEAN Membership,' (March 2016) 3 4 *ASEAN Briefs* 3, no. 4 (March 2016).

<sup>7</sup> *Ibid.*

ASEAN Charter Era. Additionally, the article also discusses the membership admission case of CLMV. Afterwards, it provides examination of the Timor Leste's membership admission. To sum the main points of the article, conclusion and recommendations are provided at the end.

## II. LEGAL MATERIALS AND METHODS

This research begins with a brief introduction about ASEAN's rules on membership admission followed by the practice of ASEAN with regard to membership admission and then a discussion about the effort of Timor Leste to become one of ASEAN member state. Legal materials used in this research include:

- ASEAN Declaration. (August 8, 1967)
- Treaty of Amity and Cooperation in Southeast Asia. (1976)
- Declaration on the Admission of the Lao People's Democratic Republic into the Association of Southeast Asian Nations. (July 23, 1997).
- Declaration on the Admission of the Union of Myanmar into the Association of Southeast Asian Nations. (July 23, 1997)
- Second Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia. (July 25, 1998)
- Declaration on the Admission of the Kingdom of Cambodia into the Association of Southeast Asian Nations. (April 30, 1999)
- ASEAN Charter. (November 20, 2007)

- Third Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia. (July 23, 2010).

## III. RESULTS AND DISCUSSIONS

### Membership of International Organization

In practice, membership principles are grounded upon the purposes and aims of the international organization itself.<sup>8</sup> Generally, the principles of membership that are adopted by international organization mostly are universal principles and selective principle. International organization whom applies universality principle truly dedicate its work to global-concerning matters, whether regarding to its wide and complex range of programs or to its specialized scopes within the international organization itself.<sup>9</sup> In comparison, the selection principle establishes specific requirements concerning certain factors for its members to follow in order to gain membership.

Furthermore, another principle of membership in international organization is the principle of geographical proximity. International organizations whom adhere to said principle tend to form regional or sub-regional organizations in which the members will be limited to states located within its own territories. An example of international organization whom applied this principle is ASEAN, a regional organization in Southeast Asia with 10 members. States outside Southeast Asia region are not allowed to join, such as Sri Lanka. This is explicitly declared upon Article 6 (2) point a of ASEAN Charter to which admission of new members shall be based on the criteria of "location in the

<sup>8</sup> Sri Setianingsih Suwardi, *Pengantar Hukum Organisasi Internasional*, (Jakarta: Penerbit Universitas Indonesia, 2004), 46

<sup>9</sup> Sumaryo Suryokusumo, *Pengantar Hukum Organisasi Internasional*, (Jakarta: PT Tatanusa, 2007), 50

recognized geographical region of Southeast Asia.”<sup>10</sup>

## ASEAN’s Legal Framework of Membership Admission

### 1. Legal Personality

The legal personality of international organization can be endowed through many modes, whether it is directly from the constituent instrument, multilateral agreements, or whether any implication that may arise from such instruments. It is certain that the international legal personality is through the manifestation of the will of the founders.<sup>11</sup> In the case of ASEAN, the international legal personality arises through the constituent instrument, as it says in Article 3 in ASEAN Charter that ASEAN “as an intergovernmental organization, is hereby conferred legal personality.”<sup>12</sup> Thus, the legal personality of ASEAN is indisputable.

However, the legal personality of ASEAN prior to the establishment of ASEAN Charter shall be examined further although this claim does not mean ASEAN lacked international legal personality in the first place. The *Reparation of Injuries* case set out a theory that may be adopted for the question of international legal personality, which is known as the will theory. This

theory can be understood that the founders of international organization have the intention for the formation is underlined with legal personality; therefore, it is valid to be considered into having international legal personality. In this context, this reasoning without doubt can be extended to ASEAN with respect to the Member States, which is that ASEAN has such legal personality as the founding members have endowed it.<sup>13</sup>

### 2. Transformation from Informal to Rules-Based Organization

The transformation of ASEAN from an informal organization<sup>14</sup> to rules-based organization has been an on-going discussion with the adoption of the ASEAN Charter. Southeast Asian governments intended to do such transformation with ASEAN Charter that established a normative framework for the region through the practice of regional cooperation and integration.<sup>15</sup> Prior to the entry into force of the Charter, ASEAN was widely known as intergovernmental cooperation between the founding Member States that later expanded to other Southeast Asian States, namely: Brunei Darussalam, Vietnam, Cambodia, Myanmar and Laos. It is a conscious decision for ASEAN to be adopting informal modes of operation in which is evident from the ASEAN

<sup>10</sup> ASEAN, “Asean Charter”, Article 6, accessed November 8, 2017, <<http://www.asean.org/archive/publications/ASEAN-Charter.pdf>>

<sup>11</sup> Philippe Sands Q.C. and Pierre Klein, *Bowett’s Law of International Institutions* (London: Thomson Reuters, 2009), 479.

<sup>12</sup> ASEAN, “Asean Charter”, Article 3, accessed November 14, 2017, <<http://www.asean.org/archive/publications/ASEAN-Charter.pdf>>

<sup>13</sup> Henry G. Schemers and Niels M. Blokker, *International Institutional Law: Unity Within Diversity*, 4<sup>th</sup> ed., (Leiden: Martinus Nijhoff, 2003), 989-993.

<sup>14</sup> Prior to ASEAN Charter 2007, ASEAN was formed by a declaration in 1969 and did not expressly the organization was a rule-based one. See for further elaboration, Simon Chesterman, ‘Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person’, (2008) 12 *Singapore Yearbook of International Law* 12

<sup>15</sup> Prof. Jürgen Rüländ, “ASEAN’s Citizens Rights: Rule of Law, Judiciary and Law Enforcement,” *Directorate-General for External Policies of the Union Policy Department*, (Belgium: European Union, 2013): 5, <[http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433716/EXPO-AFET\\_NT\(2013\)433716\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433716/EXPO-AFET_NT(2013)433716_EN.pdf)>

Declaration that described ASEAN as an “Association for Regional Cooperation” comprising of “the collective will of the nations of Southeast Asia to bind themselves together in friendship and cooperation.”<sup>16</sup>

The shift to a more rules-based organization acquires Member States to oblige themselves to “take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter, and to comply with all obligations of membership,” which indicates that compliance becomes an obligation for all Member States. Furthermore, the Charter to which endows the legality of ASEAN an international organization is essentially impacted by the constitutive and authoritative decision of ASEAN’s governing institutions.

### 3. Membership System and Requirements

ASEAN as an intergovernmental organization adheres to the principle of selective for its membership system with the focus of geographical proximity as its selection requirement. There are changes of requirements for one in admitting to be a Member State of ASEAN due to the shift of constituent instrument from ASEAN Declaration to ASEAN Charter. Such differences will be elaborated respective to the two ASEAN eras below.

#### a. ASEAN Declaration (Pre-Charter) Era

Prior to the ASEAN Charter, the only conditions for gaining membership and participating in ASEAN were location in “the Southeast Asian Region” and with the capacity to adhere to the “aforementioned aims, principles and purposes” according to the ASEAN Declaration.<sup>17</sup> Another requirement for joining ASEAN is that Member States must ratify the Treaty of Amity and Cooperation of Southeast Asia (TAC).<sup>18</sup> The treaty stipulates fundamental principles: mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations; the right of every State to lead its national existence free from interference, subversion or coercion; non-interference in the internal affairs of one another; settlement of differences of disputes by peaceful means; renunciation of the threat or use of force; effective cooperation among themselves.<sup>19</sup> It is to be understood that acceding TAC conveys subscription to the aims, purpose and principles of ASEAN itself, which becomes as an inevitable requirement of gaining membership. However, there are no substantive internal requirements set out under the ASEAN Declaration nor the TAC.<sup>20</sup>

In addition to such aforementioned conditions, an observer status may be assigned as a step to be taken for potential candidates of Member States to ASEAN. It

<sup>16</sup> ASEAN, “ASEAN Declaration,” accessed November 14, 2017, <<http://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967/>>

<sup>17</sup> Rodolfo C. Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General*, (Pasir Panjang: ISEAS Publishing, 2006), 50

<sup>18</sup> Alison Duxbury, *The Participation of States in International Organisations: the Role of Human Rights and Democracy*, (Cambridge: Cambridge University Press, 2011), 170

<sup>19</sup> ASEAN, “1976 Treaty of Amity and Cooperation in Southeast Asia,” Article 2, accessed December 16, 2017, <<http://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976/>>

<sup>20</sup> *Ibid.*

shall be noted that this is not regulated under the ASEAN Declaration. However, Rodolfo C. Severino stated that the observer status “should be granted only to potential members of ASEAN who satisfy the criteria set for ASEAN membership.”<sup>21</sup> This status was granted to CLMV countries during their “candidacy-in-waiting” period after bidding to join ASEAN. However, it must be noted that said status does not endow automatic admission into ASEAN and vice versa.<sup>22</sup>

### **CLMV (Cambodia-Laos-Myanmar-Vietnam) Membership Admission to ASEAN**

CMLV as Southeast Asian countries joined ASEAN as Member States in the period of 1990s to which the ASEAN instrument that applies to such admission was the ASEAN Declaration. The only requisite for membership under the Declaration was one’s region to be located within Southeast Asia and its adherence to the principles and purposes set out under the Declaration.<sup>23</sup> The enlargement of Member States of ASEAN is, without a doubt, through consensus by the current Member States.<sup>24</sup> Vietnam joined ASEAN in July 1995, Laos and Myanmar in July 1997, and Cambodia in April 1999.<sup>25</sup>

It is to be noted that many “informal” requisites or political considerations were taken into account. One of the things is to develop steady and strong state relations with the founding Member States of ASEAN. Vietnam could have been considered as an enemy due to the fact that it adheres to a different political system: communism.<sup>26</sup> Despite such disparity, it was believed that Vietnam’s entrance to ASEAN would create a stronger regional cooperation, as it was set out as one of the purposes and aims of ASEAN’s establishment.<sup>27</sup> The most remarkable step of Vietnam progressing towards such formal association was acceding the ASEAN Treaty of Amity and Cooperation in July 1992, which had been drafted in 1976 Bali Summit.<sup>28</sup> Such intention was officially notified to Philippines.<sup>29</sup> It was considered as the gesture of Vietnam in accepting ASEAN concept of regional cooperation in Southeast Asia, as the Treaty fully governs the principles that ASEAN binds to.<sup>30</sup> Therefore, this may be viewed as fulfilling the requisite of Vietnam adhering to the “aforementioned aims, principles and purposes” according to

<sup>21</sup> Rodolfo C. Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General*, 77

<sup>22</sup> Moe Thuzar, “What does it Take to Join ASEAN?” *ISEAS-YUSOF ISHAK Institute Analyse Current Events* No. 36, (Singapore: ISEAS-YUSOF ISHAK Institute, 2017): 6, <[https://www.iseas.edu.sg/images/pdf/ISEAS\\_Pe\\_respective\\_2017\\_36.pdf](https://www.iseas.edu.sg/images/pdf/ISEAS_Pe_respective_2017_36.pdf)>

<sup>23</sup> ASEAN Declaration

<sup>24</sup> Joshua Kurlantzick, “ASEAN’s Future and Asian Integration,” *Institutions and Global Governance* (New York: Council on Foreign Relations, 2012): 15, <[https://www.cfr.org/sites/default/files/pdf/2012/10/IIGG\\_WorkingPaper10\\_Kurlantzick.pdf](https://www.cfr.org/sites/default/files/pdf/2012/10/IIGG_WorkingPaper10_Kurlantzick.pdf)>

<sup>25</sup> Pou Sovachana, “The Challenges of the CLMV Countries and the Role of Development Partner,” (ASEAN Center), 25

<sup>26</sup> Dr. Frank Frost, “Vietnam’s Membership to ASEAN: Issues and Implications,” *Current Issues Brief* No. 3, (Australia: Parliamentary Research Service, 1995): 3, <<http://www.aph.gov.au/binaries/library/pubs/cib/1995-96/96cib03.pdf>>

<sup>27</sup> ASEAN Declaration

<sup>28</sup> Dr. Frank Frost, “Vietnam’s Membership to ASEAN: Issues and Implications,” 3

<sup>29</sup> Carlyle A. Thayer, “Vietnam and ASEAN,” *Vietnamese Foreign Policy*, (Washington, D.C.: 2000): 3, <<http://www.vpa-inc.org/conference/pdf/thayer2.pdf>>

<sup>30</sup> *Ibid*

the ASEAN Declaration.<sup>31</sup> It was also acknowledged that such accession of the Treaty was viewed as Vietnam's step into becoming a Member State of ASEAN, which was clarified by the Deputy Foreign Minister Vu Khoan that said, "Vietnam wishes to become an ASEAN Member. Following the accession to the Bali Treaty, Vietnam hopes to take part in the annual ASEAN AMM [...]"<sup>32</sup>

The following year after Vietnam has signed the Treaty, which comprises of ASEAN fundamental principles, it gained its observer status in ASEAN in 1993.<sup>33</sup> As it has been discussed previously, the status of Special Observer is governed under Article 44 to which is considered as status of external parties.<sup>34</sup> It is to be noted that such status given to Vietnam is perceived as another phase in order to gain full membership of ASEAN, regardless it is not mentioned in any of the ASEAN instruments. However, observer status is commonly known as a starting point in gaining full membership, with partial rights. Ordinarily observers cannot vote, however, allows to be participating in discussion.<sup>35</sup> In the case of ASEAN, observers States "may be invited to meetings or cooperative activities."<sup>36</sup> However, such regulation did not exist prior the establishment of ASEAN Charter in which was unclear. Eventually, Vietnam showed its determination of joining ASEAN

through its formal application in 1994.<sup>37</sup> It is not stated specifically anywhere in what kind of formal application is being referred to here. Considering other international organizations, the formal application here refers to the statement conveying one's wish to join said international organizations.

The process of accepting the application and the membership gain itself was very short, considered that by July 28, 1995, Vietnam officially became a Member State of ASEAN. This denotes through Declaration on the Admission of the Socialist Republic of Vietnam into the Association of Southeast Asian Nations with certain regards and considerations upon several aspects. The first aspect is obviously in which ASEAN is open for all States within the region of Southeast Asia highlighting the aims, principles and purposes of ASEAN itself.<sup>38</sup> It is inevitable that Vietnam is within Southeast Asia, bordering with Laos, Thailand, and Cambodia. The second aspect is Vietnam's accession to the Treaty of Amity and Cooperation in Southeast Asia, which has been explained beforehand. Not only this Treaty, Vietnam also agreed to:

*Subscribe or accede, as the case may be, to all ASEAN's Declarations, Treaties and Agreements, including all ASEAN's Agreements with Dialogue Partners, Sectoral Dialogue Partners and Consultative Partners, the*

<sup>31</sup> Rodolfo C. Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General*, 50

<sup>32</sup> Stephanie Balme and Mark Sidel, *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam*, (New York: Palgrave Macmillan, 2007), 54

<sup>33</sup> Dr. Frank Frost, "Vietnam's Membership to ASEAN: Issues and Implications," 3

<sup>34</sup> The actual formulation of Article 44 is: "1. In conducting ASEAN's external relations, the ASEAN Foreign Ministers Meeting may confer on an external party the formal status of Dialogue

Partner, Sectoral Dialogue Partner, Development Partner, Special Observer, Guest, or other status that may be established henceforth; 2. External parties may be invited to ASEAN meetings or cooperative activities without being conferred any formal status, in accordance with the rules of procedure," (Article 44, ASEAN Charter)

<sup>35</sup> Jan Klabbers, *An Introduction to International Institutional Law*, (New York: Cambridge University Press, 2002), 113

<sup>36</sup> Article 44, ASEAN Charter

<sup>37</sup> Dr. Frank Frost, "Vietnam's Membership to ASEAN: Issues and Implications," 5.

<sup>38</sup> ASEAN Declaration

*Framework Agreement on Enhancing ASEAN Economic Cooperation and the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area.*<sup>39</sup>

Henceforth, it displays the fulfillment of Vietnam in integrating ASEAN's aims, purposes and principles by agreeing to accept said regulations to be enforced in the scope of its domestic legislations. This ensures the condition of membership that Vietnam must oblige to, which consequently under the ASEAN Declaration, Vietnam is accepted as the seventh Member state of ASEAN.<sup>40</sup>

Subsequently, Laos and Myanmar also gained membership in 1997.<sup>41</sup> Laos, similar to Vietnam, gained the Special Observer status during the 25<sup>th</sup> AMM In Manila in July 1992, as its application was approved. After attending the AMM as an Observer for three consecutive years, Laos eventually applies for membership through a letter of application dated March 15, 1996, which was also announced by its Foreign Minister at the 28<sup>th</sup> AMM in Bandar Seri Begawan.<sup>42</sup> Cambodia followed this step, also applied for membership in March 23, 1996.<sup>43</sup> Reviewing the applications of both candidates, the ASEAN Security Committee (ASC) formed a Working Group on the Membership of Cambodia and Laos in assessing all issues in regards to the preparations. This was in response to the invitation from the Lao Foreign Minister to which the ASC established a fact-finding team to conduct an

urgent study for membership requirements to join ASEAN. All of these steps also performed in assessing Cambodia's membership application. During this time, Myanmar officially gained an Observer status underlying its application dated July 22, 1995.<sup>44</sup> Thus, the ASC Working Group extended its mandate for Myanmar's membership admission as well. Eventually, Laos and Myanmar gained their membership in 1997 and Cambodia in 1999.

Laos' admission to ASEAN was marked with the Declaration on the Admission of the Lao People's Democratic Republic into the Association of Southeast Asian Nations. The content of the Declaration is similar to the ones that have been set out in Vietnam's Declaration, however, there was one additional consideration that shall be pointed out as a requirement for Laos to become a Member State of ASEAN. The consideration is to be said that:

*Noting further that the Lao People's Democratic Republic will, from the date of its membership in ASEAN, extend on a reciprocal basis Most Favoured Nation Treatment to ASEAN Member States; National Treatment on products of the territory of any ASEAN Member State imported into the territory of the Lao People's Democratic Republic vis-à-vis like products of national origin in respect of all laws, regulations and requirements (including sales tax,*

<sup>39</sup> ASEAN, "Declaration on the Admission of the Socialist Republic of Vietnam into the Association of Southeast Asian Nations," accessed December 12, 2017, < <http://arc-agreement.asean.org/file/doc/2015/01/declaration-on-the-admission-of-the-socialist-republic-of-vietnam-into-the-association-of-southeast-asian-nations.pdf>>

<sup>40</sup> *Ibid*

<sup>41</sup> Thuzar, "What does it Take to Join ASEAN?" 2

<sup>42</sup> Amitav Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order*, (London: Routledge, 2001)

<sup>43</sup> *Ibid*.

<sup>44</sup> *Ibid*

*exchange rate determination and foreign exchange control) affecting their internal sale, offering for sale, purchase, transportation, distribution or use; and ensure transparency in its trade regime on goods and services by keeping ASEAN Member States informed of all its laws, regulations and requirements and subsequent changes thereto which affect its trade in goods and services with ASEAN Member States [...]*<sup>45</sup>

This shows that the acceptance of one to be transparent in conducting its trade regime for the purpose of economic cooperation is also another requisite that shall be fulfilled by a SEA country to become a Member State of ASEAN. It is unclear that why such consideration is not listed in the Vietnam's Declaration. It may likely due to the disparity economic condition of Vietnam and Laos. However, it is to be noted, based upon Laos' Declaration, that economic condition, especially in trade sector, is to be acquired as a Member State in order to "strengthen[ing] the economic and social stability of the [Southeast Asian] region," as set out in the ASEAN Declaration.<sup>46</sup> Such consideration is also evident in Myanmar's

Declaration as well as Cambodia's Declaration.<sup>47</sup>

The reason to which Cambodia was admitted later although it was initially agreed to be admitted in 1997, due to political consideration. The Cambodian Premier Hun Sen at the time ousted his co-premier Prince Norodom Ranariddh in July 1995 coup; thus, the invitation to be admitted into ASEAN was withdrawn, as political stability became a condition that shall be fulfilled for bidding membership.<sup>48</sup> This is due to the consensus that was not achieved with objection from Singapore, which it acquired Cambodia to authorize a constitutional amendment for a new upper house or senate.<sup>49</sup> However, after contemplating, all Member States of ASEAN agreed to admit Cambodia as the tenth Member State.<sup>50</sup> Evidently, one's political condition is also another factor to be taken into account for gaining full membership of ASEAN, as it is clearly depicted in the case of Cambodia's admission. Although it is not governed anywhere under the ASEAN instruments due to the principle of non-interference that ASEAN adheres to; thus, it is considered to be rather controversial if there is a regulation indicating such.

After examining the case of accession of CLMV to ASEAN, it is to be concluded

<sup>45</sup> ASEAN, "Declaration on the Admission of the Lao People's Democratic Republic into the Association of Southeast Asian Nations," accessed December 12, 2017, < <http://arc-agreement.asean.org/file/doc/2015/01/declaration-on-the-admission-of-the-lao-people-s-democratic-republic-into-the-asean.pdf>>

<sup>46</sup> ASEAN Declaration

<sup>47</sup> ASEAN, "Declaration on the Admission of the Union of Myanmar into the Association of Southeast Asian Nations" and "Declaration on the Admission of the Kingdom of Cambodia into the Association of Southeast Asian Nations," accessed December 12, 2017, < <http://arc-agreement.asean.org/file/doc/2015/01/declaration-on-the-admission-of-the-union-of-myanmar-into-asean.pdf> > and < [https://cil.nus.edu.sg/wp-](https://cil.nus.edu.sg/wp-content/uploads/formidable/18/1999-Declaration-on-the-Admission-of-the-Kingdom-of-Cambodia-into-ASEAN.pdf)

[content/uploads/formidable/18/1999-Declaration-on-the-Admission-of-the-Kingdom-of-Cambodia-into-ASEAN.pdf](https://cil.nus.edu.sg/wp-content/uploads/formidable/18/1999-Declaration-on-the-Admission-of-the-Kingdom-of-Cambodia-into-ASEAN.pdf) >

<sup>48</sup> CNN, "ASEAN Nations Disagree on Admitting Cambodia," *CNN* (CNN, 1998), accessed December 12, 2017, < <http://edition.cnn.com/WORLD/asiapcf/9812/15/asean.03/index.html>>

<sup>49</sup> *Ibid*

<sup>50</sup> Agence France-Presse, "Asian Group Says It Will Admit Cambodia, Despite Instability," *New York Times* (New York: New York Times, 1998), accessed December 12, 2017 < <http://www.nytimes.com/1998/12/17/world/asian-group-says-it-will-admit-cambodia-despite-instability.html>>

that the requirements of membership admission is not only restricted to what has been regulated under the ASEAN Declaration, which is the regional aspect and the integration of aims, principles and purposes. Political and economic factors are also highly considered to ensure the longevity of ASEAN itself, though it may vary to one country to another.

#### b. ASEAN Charter Era

The previously mentioned conditions still apply under the ASEAN Charter, however, with certain additional requirements, as stated in Article 6 (2) of ASEAN Charter in the concern of admission of new members. The Article specifically regulates the criteria for admission, which are namely:

- (a) Location in the recognized geographical region of Southeast Asia;
- (b) Recognition by all ASEAN Member States;
- (c) Agreement to be bound and to abide by the Charter; and
- (d) Ability and willingness to carry out the obligations of Membership.<sup>51</sup>

Location, as one of the requirements, irrefutably demonstrates the selective principle that ASEAN follows, which conveys that ASEAN is a regional organization. Therefore, all current Member States have, without doubt, fulfilled this condition. Furthermore, Member States must acknowledge one in order to gain membership in ASEAN. It is not stated under

the ASEAN Charter to what constitutes as one's recognition. However, it is believed that recognition is in the context of acknowledgement of one holding a status as a State or also understood as recognition of statehood. The application of recognition of statehood under the ASEAN Charter depicts the constitutive theory of said recognition in which "a State is, and becomes an International Person through the recognition only and exclusively."<sup>52</sup> Therefore, in brief, all Member States must recognize one to be in the condition of possessing statehood for this requirement to be realized.

The third condition stipulated as shown above is in regards to the agreement to declare one's consent in binding and abiding itself to the ASEAN Charter. Previously, such condition did not exist, as there has not been any countries joined ASEAN in the era of ASEAN Charter. Therefore, the instruments that one must abide to were ASEAN Declaration and TAC as it governs the aims, purposes, and principles of ASEAN. This also occurred during Vietnam in gaining membership in ASEAN that in 1992, Vietnam signed the TAC.<sup>53</sup>

Another condition that is set out in this Article is the capacity of one to carry out obligations of being a Member State of ASEAN. The obligations of Member States are stipulated in Article 5 that includes all Member States to have equal rights and obligations and enacting appropriate domestic legislation to in implementing provisions within the ASEAN Charter.<sup>54</sup> For instance, the Member States have the right to

<sup>51</sup> Article 6 (2), ASEAN Charter

<sup>52</sup> James Crawford, "The Criteria for Statehood in International Law," *British Yearbook of International Law*, (1977): 95, <<https://www.ilsa.org/jessup/jessup13/British%20Yearbook%20of%20International%20Law-1977-Crawford-93-182.pdf>>

<sup>53</sup> Dr. Frank Frost, "Vietnam's Membership to ASEAN: Issues and Implications," 3, <<http://www.aph.gov.au/binaries/library/pubs/cib/1995-96/96cib03.pdf>>

<sup>54</sup> The actual formulation of Article 5 of ASEAN Charter stipulates "1. Member States shall have equal rights and obligations under this Charter. 2.

immunities and privileges for its Permanent Representatives and Officials under ASEAN duties. However, the immunities and privileges shall be further governed under national law of the ASEAN Member State concerned.<sup>55</sup> In carrying out the obligations, there are various conducts that should be performed by the Member States. One of the obligations is to comply to all “findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism” in the case of there is a dispute occurred among Member States.<sup>56</sup> This obligation illustrates that compliance is a key component under the ASEAN Charter, which is an effort in transforming ASEAN from an informal institution to a rules-based organization.

Aside from aforementioned obligations, ASEAN now also applies a more “institutional assessment process” in undertaking one to be a Member State. The institutional assessment process essentially involves a senior-official level-working group that evaluates one’s national capacities by examining its political, economic and socio-cultural implications.<sup>57</sup> Such assessment is performed upon Timor Leste’s application for admission in which will be discussed in depth in the next chapter. It is further governed under Article 6 (3) of the ASEAN Charter that the admission of new members to ASEAN will be decided by consensus within the ASEAN Summit upon

the recommendation of the ASEAN Coordinating Council.<sup>58</sup>

#### 4. Decision-Making Process of ASEAN

ASEAN regulates and contained its decision-making process within the Charter to which is clearly stated in Article 20 that, “As a basic principle, decision-making in ASEAN shall be based on consultation and consensus.”<sup>59</sup> Such principle has been derived by the Indonesian-Malay practice known as *musyawarah* and *mufakat*.<sup>60</sup> The consensus-based decision-making in ASEAN does not necessarily imply unanimity or it involves voting since there is no requirement of explicit agreement to be said towards any proposal. In other words, a unanimous agreement is not acquired, as long as no Member State openly voices an objection. Yet, there is a requirement for endorsing proposal with certain number of supports for adoption even though there is no specific number mentioned in neither ASEAN documents nor instruments.<sup>61</sup> Such mechanism also facilitates Member States to veto any proposal with the consideration that it might jeopardize the national interests of said Member State. This is because the decision will only be binding if the Member State agrees to sign and ratify. Therefore, there is no pressure to comply and implement.<sup>62</sup> Essentially, this tool allows Member State agree to disagree with the underlying ground of maintaining solidarity.

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*Member States shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of Membership. 3. In the case of a serious breach of the Charter or non-compliance, the matter shall be referred to Article 20,”* (ASEAN Charter)

<sup>55</sup> Article 19, ASEAN Charter.

<sup>56</sup> Article 27, ASEAN Charter

<sup>57</sup> *Ibid*

<sup>58</sup> Article 6, ASEAN Charter

<sup>59</sup> Article 20, ASEAN Charter

<sup>60</sup> Kim, “The changing role of dialogue in the international relations of Southeast Asia.”

<sup>61</sup> Atena S. Feraru, ‘ASEAN Decision-Making Process: Before and After the ASEAN Charter,’ (2015) 4 1 *Asian Development Policy Review* 29

<sup>62</sup> T. Kawasaki, ‘Neither Skepticism nor Romanticism: the ASEAN Regional Forum as a Solution for the Asia-Pacific Assurance Game,’ (2006) 19 2 *The Pacific Review* 223

This conveys the “flexible consensus” that ASEAN employs that mostly applies to economic decisions or sensitive political issues, which becomes a polemic debate that ASEAN still institutes as an informal organization.

#### **a. Decision-Making Scheme in ASEAN Declaration (Pre-Charter) Era**

Prior to ASEAN Charter, there were no documents indicating a machinery as such to conclude a decision. However, a forum of discussions among the five Southeast Asian foreign ministers was convened. This was also known as the Annual Meeting of Foreign Ministers (“AMM”), yet the powers and functions of the AMM were not further elaborated. In making the decisions, cooperation between an ad-hoc and Permanent Committees, Standing Committee, and Annual Meeting of Foreign Ministers were significant. AMM was similar to today’s ASEAN Summit, which basically comprised of leaders of the Member States discussing certain matters. Meanwhile, a Standing Committee was chaired by the foreign minister of the host country that consisted of the ambassadors of the Member states in the hosting country.<sup>63</sup> The next important organ prior the ASEAN Charter in the process of decision-making was the ad-hoc and Permanent Committees to which comprised of experts and government officials reviewing certain matters. Therefore, ad-hoc and Permanent Committees would be the front-runner organ that reviewed many aspects of specific issues in which would be addressed to the Standing

Committee. The Standing Committee clearly would deliver the specific issues into their own respective ministers with the hope bringing contribution in the AMM.

#### **b. Decision-Making Scheme in ASEAN Charter Era**

In comparison to the scheme illustrated previously in regards to the scheme of decision-making in the Pre-Charter era, the shift of ASEAN in adopting the ASEAN Charter consequently resulted in the change of character of the decision-making process itself. It enforces the governmental character of decision-making, which translates that focuses upon the prevailing codified regional values as well as incorporated principles and ideas into ASEAN agreements.<sup>64</sup> ASEAN’s today’s decision-making converge upon five organs, namely: ASEAN Summit, ASEAN Coordinating Council (ACC), ASEAN Community Councils, ASEAN Sectoral Ministerial Bodies, and the Committee of Permanent Representatives to ASEAN (CPR). The functions of these five organs have been discussed previously. These organs essentially collaborated of intergovernmental consultations to reach the aim of seeking consensus. It is to be noted that the Summit is still the organ with the authority to “provide policy guidance and take decisions” under the Charter.<sup>65</sup> However, the other four organs have the task to coordinate and supervise the implementation of the Summit’s decisions by intergovernmental meetings under their purview with reporting back to the Summit.<sup>66</sup> Furthermore, it is to be emphasized that the

<sup>63</sup> Atena S. Feraru, “ASEAN Decision-Making Process: Before and After the ASEAN Charter,” 30

<sup>64</sup> T. Koh, R. Gonzales Manolo and W. Woon, *The Making of the ASEAN Charter*, (Singapore: World Scientific Publishing Co. Pte. Ltd, 2009)

<sup>65</sup> Article 7 (a), ASEAN Charter

<sup>66</sup> Atena S. Feraru, “ASEAN Decision-Making Process: Before and After the ASEAN Charter,” 32

nature of the relationship between the organs is subordination in the process of decision-making, as the organs under the Summit have the obligation to report back to their leaders. Even, for the supervision of implementation goes to the extent of requesting the Secretary-General of ASEAN to “monitor” implementation of agreements by Member States and to report to the Summit annually.<sup>67</sup>

Notice, the Charter states, “when consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made.”<sup>68</sup> This is, by many, considered as a step backward by ASEAN as, there is a lack of clear reference to the mechanism of concluding such a decision, either by majority vote or other formulas.<sup>69</sup> Therefore, this negates the aim and purpose of ASEAN Charter in the first place in providing clear procedure of decision-making process. Within ASEAN, one’s admission membership will be decided through the mechanism of consultation and consensus as its decision-making tool. It is governed under Article 6 (3) of ASEAN Charter that: “Admission shall be decided by the consensus by the ASEAN Summit, upon the recommendation of the ASEAN Coordinating Council.”<sup>70</sup> As has been explained previously, consensus is, in reference to Article 20 of the ASEAN Charter, the decision-making tool of ASEAN. Therefore, in the process of admitting a new Member State, the scheme of decision-making that has been explained previously.

<sup>67</sup> *Ibid*, 33

<sup>68</sup> Article 20, ASEAN Charter

<sup>69</sup> ASEAN Studies Centre, *The ASEAN Community: Unblocking the Roadblocks*, (Institute of Southeast Asian Studies, 2008), 88

<sup>70</sup> Article 6, ASEAN Charter.

<sup>71</sup> Ben Kiernan, “War, Genocide, and Resistance in East Timor, 1975-99: Comparative Reflections on Cambodia,” (2003): 200 and 204, <

## Analysis of Timor Leste’s On-going Membership Admission to ASEAN

### 1. History of State Formation

Independent sovereignty is a struggled achievement for Timor Leste, with after a long period of time through colonization era of Portuguese and Indonesia’s occupation. Timor Leste declared independence from Portugal on November 28, 1975, however, it was effectively occupied by Indonesia hereafter. The occupation of Indonesia was motivated by the political aspect to ensure that Timor Leste, after decolonized by the Portuguese, would not follow the concept of communism as its political system, similar to Vietnam at the time. Such motivation declared by Indonesia’s President Soeharto was supported by the United States of America, as The Revolutionary Front for an Independent East Timor (Fretilin) was perceived as a “Communist wing.”<sup>71</sup> However, to hide such motivation in avoiding any controversies, President Suharto declared on July 8, 1975, that there was a lack of economic basis for viable independence of Timor Leste.<sup>72</sup>

Timor Leste was integrated as a region of the Republic of Indonesia based upon the Balibo Declaration, signed in November 30, 1975.<sup>73</sup> This was a resistance to the unilateral declaration of Timor Leste’s independence made by the Fretilin although the international community did not acknowledge such declaration.<sup>74</sup> In exercising said ‘integration’, Indonesian

[https://gsp.yale.edu/sites/default/files/03-263\\_ch\\_09.pdf](https://gsp.yale.edu/sites/default/files/03-263_ch_09.pdf)

<sup>72</sup> *Ibid*, 204

<sup>73</sup> Hendro Subroto, *Saksi Mata Perjuangan Integrasi TimorTimur*, (Jakarta: Pustaka Sinar Harapan, 1996), 113

<sup>74</sup> Robert Dubler SC, “The International Law Aspects of the Case of the Balibo Five,” *Melbourne Journal of International Law* 11 (2010): 9,

armed forces arrived and invaded the territory of Timor Leste on December 7, 1975 that led to a full-scale war raged until 1980.<sup>75</sup> Said integration by the government of Indonesia was a *de facto* legitimation to which was also noted in Indonesian national legislation in Law No. 7 Year 1976, which integrated Timor Leste as the 27<sup>th</sup> province of Indonesia.<sup>76</sup> As a contrast, from the *de jure* perspective, there was no authority for Indonesia to perform said integration upon Timor Leste, as Timor Leste was included in the United Nations Agenda.

In addition, the UN Resolution 1246 in 1999 by the UN Security Council had decided to form UN Mission in East Timor (UNAMET) to hold a referendum. The referendum was eventually held in August 30, 1999, with the result of rejecting the special autonomy from Indonesia by 79% of Timorese wished for independence.<sup>77</sup> The result ultimately led Timor Leste to its independence.<sup>78</sup> Timor Leste, eventually attained its full statehood, and commemorate May 20, 2002 as its Restoration of Independence day to which it is viewed its true independence was 'taken' away by the Indonesian government.<sup>79</sup>

## 2. Timor Leste and ASEAN

### a. Involvement in AMM and ASEAN Summit as a Guest

After ASEAN settling with the accession of Cambodia in 1999 as its tenth Member State, the rebirth of a new nation in Southeast Asia was rather unexpected, which presented the issue of another membership decision. The pursuit of membership by Timor Leste is visible through the speech delivered by President Ramos-Horta in 2000, accepting its Nobel Prize award, announcing that, "We are conscious of our geography, which compels us to coexist with our neighbors in that part of the world. We will seek membership in ASEAN and APEC."<sup>80</sup> ASEAN did not respond to such claim until 2002, which ASEAN informed Timor Leste of a continuous discussion upon Timor Leste's obtainment of an observer status and accession to the Treaty of Amity and Cooperation (TAC).

Consequently, the involvement of Timor Leste began at this point of time, as it was invited to attend the Annual Ministerial Meeting (AMM) in July 2002 by Brunei Foreign Minister, Prince Mohamed Bolkiah, on behalf of ASEAN Standing Committee. From that point, Timor Leste has been invited to AMM, In the Joint Communiqué of the 38<sup>th</sup> AMM in Vientiane, Timor Leste was addressed as a Guest to the Chairman of the Standing Committee, as conveyed above. Such status was maintained by Timor Leste

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accessed September 4, 2017, <[http://law.unimelb.edu.au/data/assets/pdf\\_file/0008/1686275/Dubler.pdf](http://law.unimelb.edu.au/data/assets/pdf_file/0008/1686275/Dubler.pdf)>

<sup>75</sup> Kiernan, "War, Genocide, and Resistance in East Timor, 1975-99: Comparative Reflections on Cambodia," 203

<sup>76</sup> Perserikatan Bangsa-Bangsa, "Perserikatan Bangsa-Bangsa dan Timor Lorosae" (2000),4

<sup>77</sup> *Ibid*

<sup>78</sup> İlker Gökhan Şen, *Sovereignty Referendums in International and Constitutional Law*,

(Switzerland: Springer International Publishing, 2015), 104

<sup>79</sup> Abraham Joseph and Takako Hamaguchi, *The History and Development of Asia's Newest Nation*, (Maryland: Lexington Books, 2014), 1

<sup>80</sup> APEC stands for the Asia-Pacific Economic Cooperation, which is a forum established in 1989 to promote sustainable economic growth as well as prosperity in the region of Asia-Pacific. Today, Timor Leste is not a member of APEC nor has an observer status with the forum (Joseph, *The History and Development of Asia's Newest Nation*, 143)

until the Joint Communiqué of the 40<sup>th</sup> AMM in Manila. With the shift of ASEAN Declaration to ASEAN Charter, AMM was altered to ASEAN Summit. Such alteration did not affect any status of Timor Leste gained in ASEAN. Until today, Timor Leste is still considered as a Guest, as it was addressed in 31<sup>st</sup> ASEAN Summit by 2017.<sup>81</sup> Therefore, this is a contrast to the CLMV countries in which they were accorded observer status during their “candidacy-in-waiting,” meanwhile, Timor Leste has not only the status of a Guest in attending open sessions of AMM and ASEAN Summits.<sup>82</sup>

## **b. Participant Country of ASEAN Regional Forum**

Timor Leste placed its position to move forward in intensifying its relationship with ASEAN, to gain endorsement of full membership in the Association. Therefore, Timor Leste embarked upon a campaign for such purpose. The first step that it was determine to take was the possibility of becoming a participating country in the ASEAN Regional Forum (ARF).<sup>83</sup> At the AMM in Phnom Penh in June 2003, the expectation of Timor Leste of being accepted, as a participant in the ARF was not fulfilled, instead Pakistan was accepted as the 24<sup>th</sup> participant in ARF to which had been requesting as such for years. Timor Leste represented by Ramos-Horta attended the

AMM as a guest. However, eventually, ASEAN agreed to invite Timor Leste as the 25<sup>th</sup> participating country in ARF by July 2005 with the belief that such participation would contribute to the enhancement of political and security dialogue as well as cooperation within the region.<sup>84</sup> After joining the forum since 2005, Timor Leste took its turn in hosting the 5<sup>th</sup> Meeting of the ASEAN Regional Forum Experts and Eminent Persons from January 27 to 28, 2011.

This truly marks the hard-won achievement of Timor Leste in grabbing the attention of the international community, especially ASEAN, to show its determination of showcasing its capability as a sovereign state. Additionally, it also improves the relationship that Timor Leste has with ASEAN, with the main goal of accession into the Association. It is to be noted; nonetheless, that membership of ARF does not prelude ASEAN membership, as there are no prevailing ASEAN instruments containing such suggestion.

## **c. Non-regional Signatory of the Treaty of Amity and Cooperation in Southeast Asia**

Another milestone step that Timor Leste conducted in improving its relationship with ASEAN is the signing of the TAC. TAC is fundamental treaty that sets out principles in which ASEAN adheres to; thus, the

<sup>81</sup> Rosemarie A. Zamora, “Gov’t bares preparations for 31<sup>st</sup> ASEAN Summit,” *BusinessWorld*, (Business World Publishing: October 25, 2017) < <http://bworldonline.com/govt-bares-preparations-31st-asean-summit/> >

<sup>82</sup> Moe Thuzar, “What does it Take to Join ASEAN?” *ISEAS-YUSOF ISHAK Institute Analyse Current Events* No. 36, (Singapore: ISEAS-YUSOF ISHAK Institute, 2017): 6, <[https://www.iseas.edu.sg/images/pdf/ISEAS\\_Perspective\\_2017\\_36.pdf](https://www.iseas.edu.sg/images/pdf/ISEAS_Perspective_2017_36.pdf)>

<sup>83</sup> ASEAN Regional Forum, or abbreviated to ARF, is an annual forum established in the year of 1994,

with the aim to foster constructive dialogue and consultation on political and security issues of common interest and concern; and to make significant contributions to efforts towards confidence-building and preventive diplomacy in the Asia-Pacific region (ASEAN, “ASEAN Regional Forum (ARF), ASEAN, accessed in December 17, 2017, < <http://asean.org/asean-political-security-community/asean-regional-forum-arf/> >

<sup>84</sup> Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General*, 79.

signing of TAC of one may exemplify its acceptance as well as integration of ASEAN principles. The treaty is not exclusive only for ASEAN Member States, as there has been many non-ASEAN Member States signed said treaty. Thus, the question that was addressed towards ASEAN was whether such accession by Timor Leste would be conveyed as a regional or non-regional signatory.<sup>85</sup> There is a distinctive consequence of regional and non-regional signatories upon TAC. The accession of Timor Leste for TAC as a regional signatory would have an effect of acknowledging Timor Leste as a Southeast Asian country to which acquire a lengthy amendment process of TAC, as well as ratification process by the regional signatory state. Article 1 of the Second Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia clearly amended Article 18 (3) to be revised as:

*States outside Southeast Asia may also accede to this Treaty with the consent of all the States in Southeast Asia, namely, Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Vietnam.*<sup>86</sup>

With such amendment, it is to be highlighted that if ASEAN decided to view Timor Leste as a regional signatory then there shall be another amendment, adding Timor Leste in said Article above. The amendment process may not be as lengthy, however, the ratification process by all the Southeast Asian signatories was the issue, as well as delaying other signatures of non-regional states that ASEAN looked forward to.<sup>87</sup> Finally, Timor Leste acceded TAC by January 13, 2007 during the ASEAN Summit in Cebu, Philippines.<sup>88</sup> The Third Protocol of Amending the Treaty of Amity and Cooperation in Southeast Asia particularly also amended Article 18 (3) to which does not include Timor Leste in its new formulation of Article as the:

*Sovereign States subject to the consent of all the States in Southeast Asia, namely, Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam.*<sup>89</sup>

Therefore, from such formulation of said Article, it is, without doubt, placed Timor Leste as a non-regional signatory of TAC to which not resulting in consequences, as it has been explained previously.

<sup>85</sup> Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General*, 77

<sup>86</sup> ASEAN, "Second Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia," ASEAN, accessed in December 17, 2017, <<http://agreement.asean.org/media/download/20140117142023.pdf>>

<sup>87</sup> Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General*, 77

<sup>88</sup> Lex Rieffel, *Myanmar/Burma: Inside Challenges, Outside Interests*, (Washington, D.C.: Brookings Institution Press, 2010), 163

<sup>89</sup> ASEAN, "Third Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia," ASEAN, accessed in December 17, 2017, <<http://agreement.asean.org/media/download/20140117144104.pdf>>

### 3. Membership Application of Timor Leste based upon ASEAN Charter

#### a. Location in the Recognized Geographical Region of Southeast Asia

The Democratic Republic of Timor Leste was previously called as East Timor, is a country located in Southeast Asia. The island of Timor is part of the Maritime Southeast Asia and is the largest as well as

the most-eastern part of the Lesser Sunda Islands.<sup>90</sup> It is bordered with Australia and Indonesia to which it occupies an area of 14,874 km<sup>2</sup>. It is inevitable that Timor Leste lies upon the region of Southeast Asia, which indefinitely fulfills the first requisite of joining ASEAN under the Charter. Figure 1 below displays the location of Timor Leste in the region of Southeast Asia:

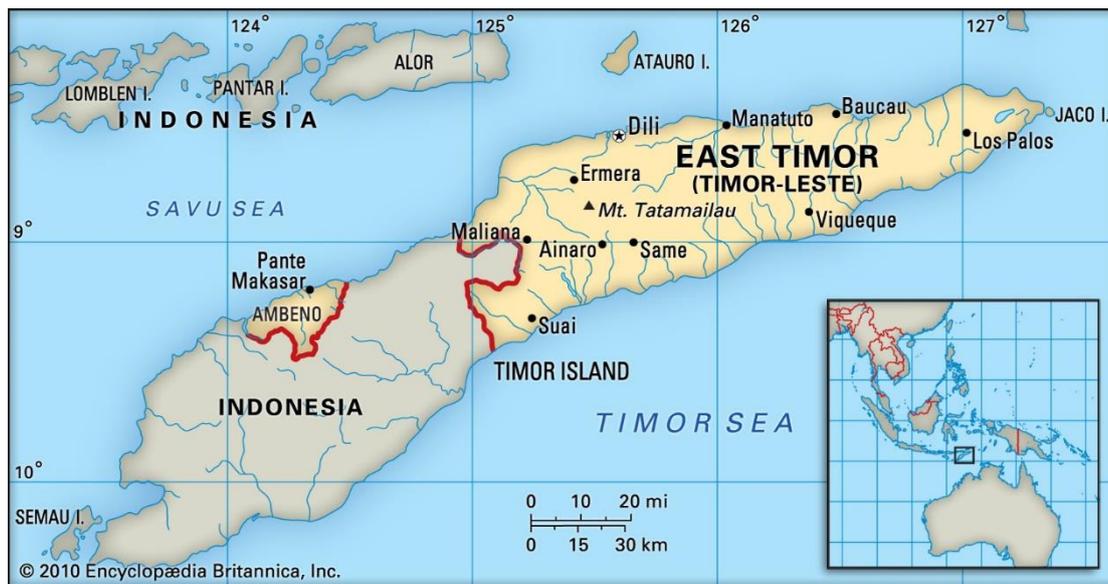


Figure 1: Map of Timor Leste (source: [www.theasian.asia](http://www.theasian.asia))

#### b. Recognition by all ASEAN Member States

In the context of ASEAN's legal framework, it is not explicitly stated to which is considered as recognition. However, it may come into conclusion that the applied theory in the concept of recognition under the ASEAN Charter is the constitutive theory, as it acquires acknowledgment of the ASEAN Member States towards the statehood of Timor Leste. This can be seen through the capacity of ASEAN, all Member states agreed to invite Timor Leste as Guest in

ASEAN meetings, such as AMM and ASEAN Summit.<sup>91</sup> Such gesture may be acknowledged as Timor Leste having the capacity to enter into relations with ASEAN as a platform comprising of sovereign Member States. Therefore, the criterion of "recognition by all ASEAN Member States" has been met.

#### c. Agreement to be Bound and to be Abide by the Charter

There have not been any comprehensive rules of procedures in

<sup>90</sup> Embassy of the Democratic Republic of Timor-Leste, "Country Profile," *Embassy of the Democratic Republic of Timor-Leste in Washington D.C.*, accessed December 17, 2017,

<<http://www.timorlesteembassy.org/index.php?page=country-profile>>

displaying this step, as Timor Leste is the first case applying for membership during the Charter era. It is rather vague that said agreement should be done after one is officially admitted to as a Member State of ASEAN, or rather before in expressing such acceptance to accede and ratify the Charter, as the Charter is “subject to ratification by all Member States.”<sup>92</sup> However, it is certain that after gaining consensus by all Member States, Timor Leste will have to sign the Instrument of Accession to the Charter, as explained in Article 6.

#### **d. Ability and Willingness to Carry out the obligations of Membership**

The criterion of having the “ability” to carry out membership obligations is the obstacle that Timor Leste struggles with in gaining its full membership in ASEAN. The obligations of Member States, as set out under Article 5 of ASEAN Charter, include the enactment of appropriate domestic legislation to effectively implement the Charter as well as to comply with all obligations of membership.<sup>93</sup>

The ASEAN Coordinating Council, with the authority to assess the readiness for one to become a Member State, formed ASEAN Coordinating Council Working Group (ACCWG) on Timor Leste’s ASEAN Membership Application in the March 4, 2011 following the submission of formal application.<sup>94</sup> This is similar to ASEAN Security Committee Working Group on the Membership of Cambodia, Laos, Myanmar.

Essentially, the ACCWG also has similar function with the underlying consideration of the three pillars of ASEAN, deciding whether Timor Leste has the capacity to carry out obligations of being a Member State by making recommendations. The ACCWG started very slow as by the time of the 20<sup>th</sup> ASEAN Summit in April 2012, there had not been any meetings discussing matters to be taken into account for Timor Leste’s admission.<sup>95</sup>

The discussion of ACCWG was first performed in Joint Meeting of ASEAN Senior Officials Meeting (SOM), Senior Economic Officials Meeting (SEOM) and ASEAN Socio-Cultural Council (SOCA) that comprised of ASEAN senior officials. The Joint Meeting was convened twice in March 2012 in Phnom Penh, Cambodia and Singapore. The result of the meeting was the completion of Terms of Reference (ToR) of the ACCWG in regards to the application of Timor Leste to become a Member State of ASEAN as well as its implications to ASEAN, by “harmonize[ing] the views of relevant ToR ACCWG in all three pillars of the ASEAN Community.” The ToR ACCWG includes the points of the scope of the ToR itself in the context of ASEAN membership application, the mandate and modalities of the ACCWG, and other technical issues related to the application of new membership in ASEAN.<sup>96</sup> It is not to be regarded that ToR is not publically published to which the working mechanism of the

<sup>92</sup> ASEAN Charter, Article 47

<sup>93</sup> *Ibid*, Article 5

<sup>94</sup> Woon, *The ASEAN Charter: A Commentary*, 83

<sup>95</sup> *Ibid*

<sup>96</sup> The Joint Meeting essentially was preparations of ASEAN Coordinating Council for the upcoming ASEAN Summit; thus, it consists of many sub-organs of ASEAN itself. (Ministry of Foreign

Affairs of Republic of Indonesia, “Joint Preparatory Meeting for the Preparations of the 20<sup>th</sup> ASEAN Summit in Phnom Penh, Cambodia, 5 March 2012,” accessed in December 17, 2017) <<https://www.kemlu.go.id/en/berita/siaran-pers/Pages/Joint-Preparatory-Meeting-for-the-Preparations-of-the-20th-ASEAN-Summit-in-Phnom-Penh-Cambodia-5-Mar.aspx>>

independent studies is unclear, at least to public.

Following such emergence of working group, a study was commenced by Prof. Dr. Richard Pomfret from the University of Adelaide, Australia in early 2013 to conduct a research in assessing the economic implications of acceding Timor Leste into ASEAN. The study was funded from the Asia Development Bank.<sup>97</sup> A study on political and security implications was also implemented by joining the Singapore-based Institute of Southeast Asian Studies (ISEAS) and the S. Rajaratnam School of International Studies (RSIS) in early 2015.<sup>98</sup> Moreover, a study upon the socio-cultural implications was also performed by Malaysia's Institute of Strategic and International Studies.<sup>99</sup> As it is shown, the studies conducted upon Timor Leste under the mandate of ACCWG are respectively to three pillars of ASEAN. Underlining this, the studies conducted upon Timor Leste to assess its capacity in joining ASEAN were independently commissioned by ACCWG, meaning that the researchers were experts outside ASEAN-related. This may bring unbiased opinion. However, there are no publications available in depicting the results of said studies, perhaps due to the intellectual property rights of the document from the studies belong to ASEAN.<sup>100</sup> Moreover, Timor Leste apparently has never received as well the final reports conducted by those studies, despite it is the applicant

country in which shall be informed the lack of capacity it may have to improve. The reports are still confidential that supposedly will be disclosed to Timor Leste at the time ACCWG will visit Timor Leste personally. Also, the meetings of ACCWG on Timor Leste's Membership Application never involved officials of Timor Leste.<sup>101</sup> The confidentiality nature of the results of the studies is also reaffirmed by ASEAN Secretariat staffs, which cannot be disclosed to public, even Timor Leste.<sup>102</sup> Such lack of transparency in the work of independent studies commissioned by the ACCWG is the issue of legal framework that ASEAN faces.

Nonetheless, Timor Leste has taken initiatives to prepare for its accession into ASEAN, particularly in the economic aspect. Asian Development Bank, which funded the ACCWG-commissioned study upon Timor Leste as an assessment of membership application, has provided technical assistance (TA) for the preparation of regional economic integration since 2013 and is ongoing. The TA essentially works in aligning Timor Leste's current legal frameworks with the requirements under the ASEAN Community Blueprints and ASEAN legal instruments.<sup>103</sup> It is targeted that the proportion of binding ASEAN legal agreements that Timor Leste should be in compliance with should increase to 50% by June 2018, which by 2015, there has been only 1.6%.<sup>104</sup> Such low rate of compliance

<sup>97</sup> Termsak Chalermpananupap, "Timor Leste's Quest to Join ASEAN: The Process and the Pace," *ASEAN Focus* 1, (2015): 9, <[https://www.iseas.edu.sg/images/pdf/ASEAN\\_FOCUS\\_Issue1-2015.pdf](https://www.iseas.edu.sg/images/pdf/ASEAN_FOCUS_Issue1-2015.pdf)>

<sup>98</sup> *Ibid*

<sup>99</sup> *Ibid*

<sup>100</sup> Astriana, "Rethinking the Process for Timor-Leste's Application for ASEAN Membership," 3-4

<sup>101</sup> The results of the interview of the Author with Marcos da Costa, the Counselor of the Embassy of

the Democratic Republic of Timor Leste in December 22, 2017 at 16.00 WIB

<sup>102</sup> The results of the e-mail by the Author to the ASEAN Secretariat staffs in the Political and Security Directorate in December 22, 2017.

<sup>103</sup> Asian Development Bank, "Democratic Republic of Timor Leste: Capacity for Regional Economic Integration," *Technical Assistance Report*, (January 2016): 3, accessed in December 17, 2017, <<https://www.adb.org/sites/default/files/project-document/184281/49002-001-tar.pdf>>

<sup>104</sup> *Ibid*, 6

becomes a strong point for ASEAN to hold the accession of Timor Leste into ASEAN, as this shows the lack of capacity for Timor Leste in carrying out the obligations of membership, in accordance to Article 6 of the ASEAN Charter.

Another factor to be looked at is the political stability of one. Although, it is not governed under ASEAN Declaration with great details, political cohesion is one of the aims of ASEAN to realize. Thus, implicitly, political stability is acquired. For comparison, the case of Cambodia's admission into ASEAN truly depicts such requisite. At the time, Cambodia suffered from political instability due to the coup in 1997, which resulting in the halt of Cambodia's accession into ASEAN, as it was stressed by the Singaporean Prime Minister Goh Chok that political stability is linked to increased foreign investment.<sup>105</sup> Hence, resulting in the delay of Cambodia's entry. Despite such instability occurring, ASEAN still wanted to include Cambodia as its tenth Member State, with certain criteria that Cambodia had to fulfill, namely: the internal political stability, respectful human rights and democracy, the free and fair election on July 26, 1998, and the government formation through the genuine election. Even to assist Cambodia in meeting these requisites, ASEAN established the so-called ASEAN Troika, consists of the former chair, the current chair and the incoming chair of the ASEAN Standing Committee, to cope with Cambodia's political crisis. Although, the

ASEAN Troika was unsuccessful, ASEAN eventually agreed to admit Cambodia as its tenth Member State by viewing the July 1998 election, as enough for Cambodia gaining its membership.<sup>106</sup> Without explicit connotation, political stability is weighed in for one to become ASEAN Member State. This also applies to the case of Timor Leste.

The political journey of Timor Leste had been very turmoil, considering the history of Timor Leste itself. However, the first independent election in 2017 exemplifies an emergence of internal political stability. Despite only gaining independence 15 years ago, the presidential as well as parliamentary elections were "organized in a peaceful manner" to which many Timorese were eager to gain its hard-won democratic rights.<sup>107</sup> This should be taken into consideration for ASEAN Member States that Timor Leste, despite its young age of independence and turmoil history, is capable to maintain a stable condition in regards to its political views. In a contrast to Cambodia, Timor Leste, since submitting its formal application to ASEAN, has not suffered from a political instability as worse as Cambodia at the time of its application. Thence, Timor Leste should have more stance in gaining its membership underlying said situation, as Timor Leste may be deemed as capable in making political cohesion with other Member States, considering its own political condition is stable currently.

Despite all the considerations above that shall be taken into account by ASEAN in

<sup>105</sup> "ASEAN and History of Cambodia's Membership International Law Essay," *LawTeacher.net*, (All Answers Ltd, November 2013), accessed in December 18, 2017

<sup>106</sup> Julio S. Amador and Joyce A. Tedoro, *The Role of the Association of Southeast Asian Nations in Post-Conflict Reconstruction and Democracy Support*, (Stockholm: International Institute for Democracy and Electoral Assistance, 2016): 12,

<https://www.idea.int/sites/default/files/publications/the-role-of-asean-in-post-conflict-reconstruction-and-democracy-support.pdf>

<sup>107</sup> Khoo Ying Hooi, "After Timor-Leste's Election, a Young Democracy Looks Forward," *The Diplomat*, (2017), accessed in December 18, 2017, <<https://thediplomat.com/2017/07/after-timor-lestes-election-a-young-democracy-looks-forward/>>

admitting Timor Leste, it is evident that there are no substantive requirements set out under the ASEAN Charter. This becomes a huge issue in stipulating to what constitutes as ‘ability’ of one to become a Member State, as each Member State shall have its own definition or understanding. Such lack of substantive requirements become the obstacle for ASEAN Charter in becoming more of a rules-based organization – under the ASEAN Charter – due to vagueness of what is considered as being able to carry out obligations of ASEAN membership. Furthermore, the function of ACCWG is also undetermined to which only drafts recommendations to ASEAN Summit upon the independent studies that are performed to the candidate countries, such as Timor Leste, or whether it is to set out the parameter that shall be met by Timor Leste in order to gain membership. This is due to the unclear regulations or legal framework that stipulate the functions and mandate of ACCWG in which is inaccessible to public. However, the application of Timor Leste is still being further assessed, as stated by ASEAN Secretariat staff:

*The study on Timor-Leste’s application for ASEAN membership is ongoing. The members of ACC Working Group (ACCWG) met and discussed on this matter in early of December this year. ASEAN Sectoral Bodies and Organs continue exploring relevant capacity-building activities for Timor-Leste’s participation, in accordance with the elements and procedures outlined by ASEAN Member States.*<sup>108</sup>

It is indicated that “the elements and procedures outlined by ASEAN Member States” in regards to the application of Timor Leste. Therefore, perhaps, this causes the strict confidentiality of the procedures, as there may have political drive underlying such policy. This, without a doubt, causes the legal framework of ASEAN to become not transparent and efficient.

#### **4. Consensus Towards Timor Leste’s Membership Application**

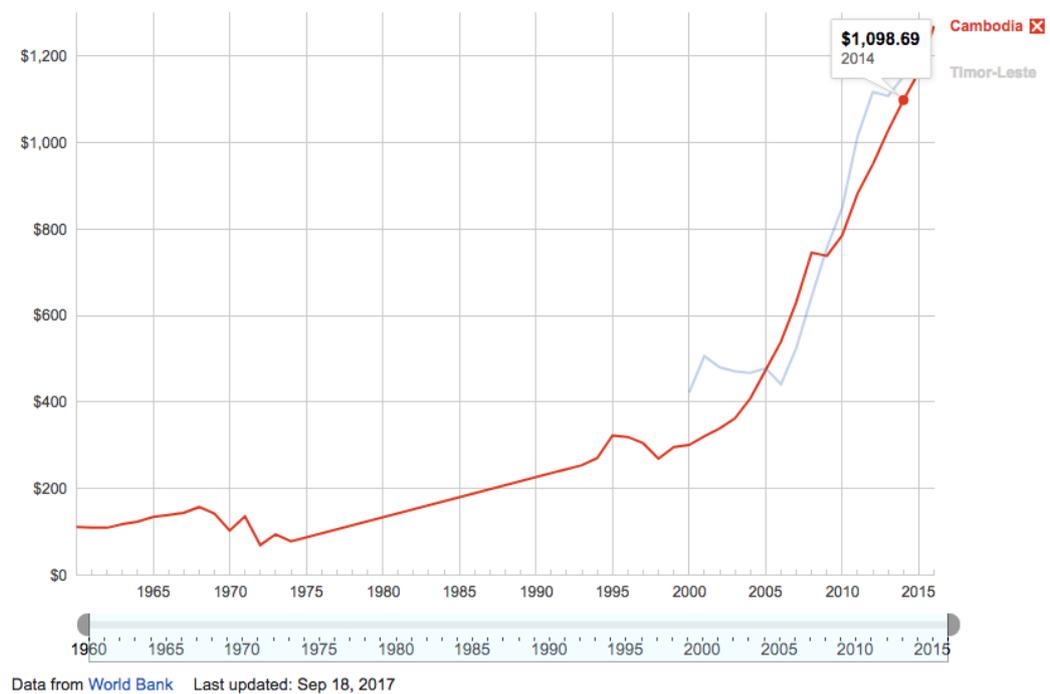
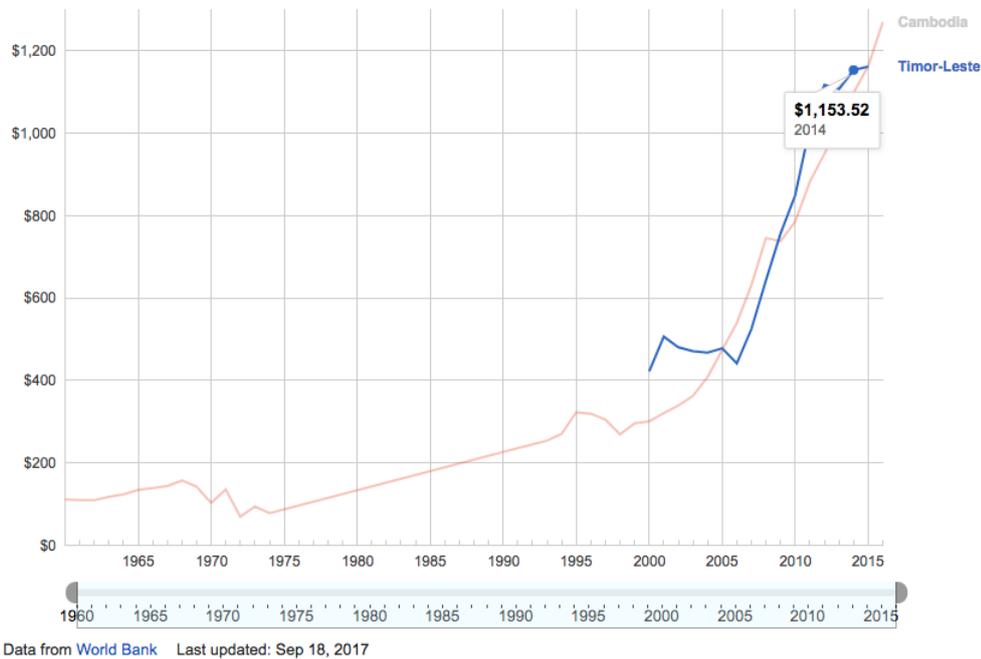
Although, the requisites of membership application has been described under the ASEAN Charter, the role of political consideration is inevitable to be weighed in upon the case of one’s accession into ASEAN. This goes to Timor Leste as well to which affect the consensus in admitting the new member. In this context, consensus is unable to be achieved due to objections of several Member States expressing concerns for the capacity of Timor Leste in carrying out obligations of membership. Singapore has been the most reluctant to endorse Timor Leste’s admission with the basis of economic reasoning to which it views Timor Leste as having the possibility to burden ASEAN. However, it is to be noted that the economic condition of Timor Leste does not have very much disparities in comparison with CLMV countries, particularly Cambodia. For instance, the GDP rate of Timor Leste, by 2014, was higher than Cambodia, which indicates the financial ability that Timor Leste has, can be considered as more or equal to ASEAN Member State.<sup>109</sup> This is conveyed by Figure 2 below, yet it is to be

<sup>108</sup> The results of the e-mail by the Author to the ASEAN Secretariat staffs in the Political and Security Directorate in December 22, 2017.

<sup>109</sup> GDP, an abbreviation of Gross Domestic Product, is a primary indicator to illustrate the health of a

country’s economy in which representing the total dollar value of all goods and services produced over a specific time period (“What is GDP and why is it so important to economists and investors?” *Investopedia* (2017))

noted GDP is not the only indicator of one's economy:



**Figure 2: GDP Rate of Timor Leste v. Cambodia (source: World Bank)**

It may be deemed as illogical for Singapore to claim such opinion towards Timor Leste for the reason of not admitting

it. Therefore, independent studies under the mandate of ACCWG on Timor Leste's Membership Application are conducted, as

<<https://www.investopedia.com/ask/answers/199.asp>>

there are Member States needed convincing that Timor Leste is able and willing to carry out the obligations of membership, which includes regional economic integration. However, despite rejections, there are other ASEAN Member states that deliver their strong support for Timor Leste's accession into ASEAN, especially Indonesia. Timor Leste's formal application that was submitted during Indonesia's chairmanship in 2011 is viewed as no coincidence. This depicts the political strategy that Timor Leste attempts to make in order to gain support hoping that consequently leads to consensus of ASEAN Member States, as it acquires for all Member States agree or at least no objection is forwarded.

As for the consensus-making in admitting Timor Leste as the eleventh Member State, it has not been conducted properly due to the view that Timor Leste must meet certain requisites to ensure its capacity in conducting the obligations of membership. This is because the ACCWG on Timor Leste's Membership Application still prevails, meaning that the recommendations that the ASEAN Coordinating Council must draft has not been completed yet, as independent studies needed to be analyzed, presumably.<sup>110</sup> Thus, the consensus towards Timor Leste's admission to ASEAN is the final step that must be taken to decide whether it shall be done or not.

### 5. The Influence of ASEAN's Membership System for its Development

The transformation of ASEAN from an informal to a rules-based organization with

the establishment of ASEAN Charter influences its membership system. Nonetheless, it is still to be noted that the principles of ASEAN remain the same with enhancement on the aspects of political-security, economic, and socio-cultural, as it states in Article 2 (2) of the ASEAN Charter.<sup>111</sup> The case of membership application by CLMV countries as well as Timor Leste truly signifies the changes that the membership system of ASEAN. During the era of the ASEAN Declaration, as the constituent instrument, the membership system was informal to which the conditions of membership only acquired two factors, namely: geographical location and subscription to aims, purposes and principles.<sup>112</sup> Evidently, the ASEAN Charter prescribes additional requirements, such as one's capacity in carrying out obligations of membership. Said condition becomes a huge obstacle for a Southeast Asian country to enter into ASEAN, as illustrated by the case of Timor Leste. However, this causes ASEAN to be more structural with its rules-based transformation.

The comprehensive requisites that are applied for Timor Leste's application, regarding to the studies and the strategic development in order to gain full membership in ASEAN, almost mirror the membership requirements of European Union. The European Union acquires the negotiation process in which essentially comprises of negotiations between the Member States and the candidate country to which discuss the alignment of the *acquis* or EU's body of law.<sup>113</sup> This requisite is similar

<sup>110</sup> ASEAN Charter, Article 6

<sup>111</sup> ASEAN Charter, Article 2 (2)

<sup>112</sup> ASEAN Declaration

<sup>113</sup> Paulina Rezler, "The Copenhagen Criteria: Are They Helping or Hurting the European Union?"

*Touro International Law Review* 14, No. 2, (2011): 390,

<[https://www.tourolaw.edu/ILR/uploads/articles/V14\\_2/5.pdf](https://www.tourolaw.edu/ILR/uploads/articles/V14_2/5.pdf)>

to the case of Timor Leste's accession into ASEAN that also acquire alignment of Timor Leste to its legal instruments, with approximately 64 substantive legal instruments to accede and also make the necessary changes to domestic legislation for implementation.<sup>114</sup> Therefore, such alterations of membership requirements may predict ASEAN's development into being a more institutional organization, similar to the EU.

Regardless, notice that there are no criteria set out of what constitutes as ability and willingness of one to become an ASEAN Member State. The vagueness of said stipulation invites various interpretations. This essentially leads to the failure of consensus-making towards the membership application of Timor Leste. Hence, one Member State may deem as Timor Leste being able and willing to join ASEAN, others may disagree, as each sovereign has different outlook to what constitutes such. In considering the transformation of ASEAN to become a rules-based organization, this is an obstacle.

#### IV. CONCLUSIONS AND SUGGESTIONS

A case that excellently portrays issue of membership is ASEAN that experienced two eras because of its shift from ASEAN Declaration to ASEAN Charter as its constituent instrument. Therefore, this indefinitely caused changes in stipulations regulating membership admission in ASEAN itself. The case of Timor Leste's membership application to ASEAN is rather a unique one due to being the first Southeast Asian country that applies for said membership during the ASEAN Charter era, specifically applied in

March 4, 2011. The requisites of geographical location and willingness to subscribe to aims, purposes and principles of ASEAN become insufficient as there are other additional requirements that must be fulfilled under the ASEAN Charter, namely: (a) location in the recognized geographical region of Southeast Asia; (b) recognition by all ASEAN Member States; (c) agreement to be bound and to be abide by the Charter; (d) ability and willingness to carry out the obligations of membership. Timor Leste has met the first three requisites, yet it is the capacity of Timor Leste in carrying out its obligations as Member State that is still questioned, even until recently. However, the vagueness and lack of transparency of the procedures in assessing said capacity as well as lack of substantive requirements become the obstacles of ASEAN's legal framework to be effective. This is undoubtedly exemplified by the case of Timor Leste's membership application that has been ongoing since 2011-2017, and still not resolved. Therefore, the goal of ASEAN in transforming into a more rules-based organization is still not shown, despite its adaptation of ASEAN Charter as its new constituent instrument since 2008 being entered into force.

The diversity of ASEAN Member States is the heterogeneity that ASEAN embraces. This is portrayed through its regulations that do not include political orientation as one of the requisites in becoming a Member State, although political stability is acquired in a very flexible manner. The case of Timor Leste's membership application essentially shows that transformation into a rules-based

<sup>114</sup> Asian Development Bank, "Democratic Republic of Timor Leste: Capacity for Regional Economic Integration," 2

organization with the establishment of ASEAN Charter does not necessarily make its legal framework to be effective, perhaps even more problematic. The time-consuming of determining Timor Leste as eligible to become a Member State truly exemplifies such claim. Therefore, the transformation of ASEAN in becoming more institutional has not been successful if viewing such from the viewpoint of its membership admission.

ASEAN, as a regional organization, has its own ways in dealing with issues, specifically membership issues. It utilizes certain ways that may not be similar to other organizations to align with its own aims and

purposes. However, based on the analysis of the Author, it is suggested for ASEAN to elaborate more for the requisites of its new members, especially in the sense of substantive requirements to set out objective parameters. This refers to the 'ability' of one in carrying out the obligations of membership. Also, it is suggested for ASEAN to be more transparent to candidate countries that wish to join the Association for certainty of obtaining full membership. In addition, Timor Leste shall keep its efforts being involved in ASEAN with its current status, as well as to gain its ASEAN full membership.

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