



Integration through Law: The ASEAN Way in a Comparative Context

The Role of Law and the
Rule of Law in Asian Legal Integration

The ASEAN Legal Integration Policy Recommendations

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In 2009, a major research project on ASEAN legal integration, entitled **Integration through Law: The ASEAN Way in a Comparative Context – The Role of Law and Rule of Law in Asian Legal Integration** was undertaken at the Centre for International Law (CIL) of the National University of Singapore (NUS). One of the key objectives of this Project is to make a decisive and long-lasting contribution to the understanding of ASEAN and its strong commitment to the Rule of Law both within the ASEAN region and in the world, especially in light of its ASEAN Charter undertakings.

The Project is co-directed by Prof Joseph Weiler, Prof Michael Ewing-Chow and Dr Tan Hsien-Li, and features authors from ASEAN countries and experts with comparative experience from other regions of the world. The results of this Project will culminate in the ASEAN Integration Through Law Book Series numbering about twenty-five titles published by Cambridge University Press. The first eight volumes have already been published and a total of fifteen will be published by September 2015.

As part of the Project, Prof Joseph Weiler conducted interviews with senior officials, foreign ministers and former heads of government of the ASEAN Member States. Several of them opined that it would be illuminating to know more about the policy recommendations resulting from the comprehensive studies of this Project.

This booklet encloses:

1. The Executive Summary of the Project and
2. A Sample Compendium of the Policy Recommendations

Executive Summary of the ASEAN Integration Through Law Project

The Preamble to the ASEAN Charter concludes with a single decision:

We, the Peoples of the Member States of the Association of Southeast Asian Nations... [h]ereby decide to establish, through this Charter, the legal and institutional framework for ASEAN.

For the first time in its history of over four decades, the Legal and the Institutional were brought to the forefront of ASEAN discourse.

This is particularly true as regards the success of establishing ‘an ASEAN Community comprising the ASEAN Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community as provided for in the Bali Declaration of ASEAN Concord II.’¹ Article 2(2)(n) stipulates the commitment of ASEAN Member States to act in accordance with the principle of ‘adherence to multilateral trade rules and ASEAN’s rules-based regimes for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration.’

While remaining loyal to the ASEAN Way which distinguishes it from other international organisations, the ASEAN Member States envisage that rules of law and the Rule of Law will become a major feature in the future of ASEAN. Although the Charter understands itself as providing an institutional and legal framework for ASEAN, the question of the ‘role of law and the rule of law’ is not advocacy but a genuine enquiry in the various substantive areas of the Project as to:

- The substantive legal principles and substantive rules of the various ASEAN communities;
- The procedural legal principles and rules governing institutional structures and decision making processes;
- Implementation, enforcement and dispute settlement.

Our *modus operandi* in this project was to create teams of researchers from Asia and elsewhere who would contribute individual monographs within an overall framework which we had designed. The Project Framework involved six thematic clusters within which each monograph was to find a home. The six themes are:

1. The General Architecture and Aspirations of ASEAN
2. Governance and Management of ASEAN: Instruments, Institutions, Monitoring, Compliance and Dispute Resolution
3. Legal Regimes in ASEAN
4. The ASEAN Economic Community
5. ASEAN and the World
6. Some Areas of the Substantive Law of ASEAN

¹ ASEAN Charter, Preamble.

The project as a whole and each monograph within this project display several methodological sensibilities.

First, law, in our view, can only be understood and evaluated when situated in its political and economic context. Thus, the studies in the overall Project design are intended to provide the political, economic, cultural and historical context against which one must understand ASEAN.

Likewise, the Project is sensitive to 'non Law'. It variously attempts to locate the appropriate province of the law in this experience. That is, not only the role of law but also the areas which are and should remain outside the reach of legal institutionalization with due sensitivity to ASEAN and Asian particularism and political and cultural identities.

The Project and the monographs which comprise it do not advocate. They are designed, for the most part, to offer reflection, discuss the pros and cons, and in this way enrich public awareness, deepen understanding of different options and in that respect contribute indirectly to policy-making.

One principal objective of the Project and these studies will be to put in place the building blocks for an authentic body of ASEAN and Asian integration theory developed in and with sensitivity to the particularities and peculiarities of the Region and Continent. A theory and conceptual framework of Asian legal integration will signal the coming of age of research of and in the region itself.

A Compendium of the Policy Recommendations Emanating from the Project

The Preamble to the ASEAN Charter concludes with a single decision:

We, the Peoples of the Member States of the Association of Southeast Asian Nations... [h]ereby decide to establish, through this Charter, the legal and institutional framework for ASEAN.

For the first time in its history of over four decades, the Legal and the Institutional were brought to the forefront of ASEAN discourse.

Comparative experience suggests that the success of achieving some of the more ambitious objectives outlined in Article 1 of the Charter will depend in no small measure on the effectiveness of legal principles, legal rules and legal institutions. This is particularly true as regards the success of establishing ‘an ASEAN Community comprising the ASEAN Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community as provided for in the Bali Declaration of ASEAN Concord II.’² Article 2(2)(n) stipulates the commitment of ASEAN Member States to act in accordance with the principle of ‘adherence to multilateral trade rules and ASEAN’s rules-based regimes for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration.’ The ASEAN Member States therefore envisage that rules of law and the Rule of Law will become a major feature in the future of ASEAN.

In line with the ASEAN Charter framework, the ASEAN Integration Through Law Project on the ‘role of law and the rule of law’ is a comprehensive inquiry into:

- The substantive legal principles and substantive rules of the various ASEAN communities;
- The procedural legal principles and rules governing institutional structures and decision making processes;
- Implementation, enforcement and dispute settlement.

One by-product of the Project has been a series of policy recommendations designed to help the Member States and ASEAN better achieve their stated goals as expressed in the Charter.

The following is a sample compendium of policy proposals excerpted from the principal recommendations of the Project. Full in-depth analyses of each policy area can be found in the individual titles of the ASEAN Integration Through Law Book Series published by Cambridge University Press.

² ASEAN Charter, Preamble.

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Policy Area 1: Follow-up, Implementation, Enforcement

ASEAN has been extraordinarily successful, pursuant to the ASEAN Way of Governance, in reaching a wide range of Agreements, Memoranda of Understanding, Declarations and other Instruments over a wide range of policy areas, ranging from the most technical to the broadly political.

1. Policy Challenge

- There is to date no systematic tracking and compendium of these Instruments – a single place where national policy makers can access authoritatively the ASEAN normative output.
- There is often ambiguity in the legal status of various instruments – which range from hortatory declarations, information items to binding commitments of various kinds. In subsequent practice different Member States understand the legal nature of the Instruments differently.

Proposed Solution

The Establishment of an ASEAN Official Journal (OJ) – common in civil law countries which would serve the following functions:

- It would, in real time, provide the official text of all ASEAN instruments, indexed and with an OJ dated document number.
- The text as produced in the Official Journal would constitute the authoritative and authentic text of the Instrument.
- At the moment of adoption the body adopting the Instrument (Heads of State/Government; Coordinating Council; Community Councils, etc.) would be required to indicate whether the Instrument creates binding obligations or otherwise. This would be coded in the Official Journal Document Number.

2. Policy Challenge

- The success of ASEAN in many areas will depend not simply on reaching agreement in adopting Instruments but in follow-through and implementation by and in the Member States. ASEAN has a healthy aversion towards heavy legalistic enforcement procedures.

Proposed Solution

- The establishment of a Self-Reporting Implementation mechanism. When an Instrument requires follow-up measures by and within the Member States, within a time to be determined by the Instrument itself, Member States would report to the Secretariat [confidentially] on the state of implementing the follow-up measures required by the ASEAN Instrument.

- Similar provisions already exist in some areas but have not been put into practice in any regular way. It is our recommendation to regularize the practice and make it a standard, automatic and non-controversial feature of the ASEAN Legal Order.
- The Secretariat could work with Member States which have encountered difficulties with follow-up measures and implementation.
- In accordance with Article 11(2)(b) of the ASEAN Charter, a confidential report may be submitted to the ASEAN Summit.

Policy Area 2: Monitoring Compliance with ASEAN Obligations

Through the years, there has been commendable regional effort to enhance monitoring and compliance. An important tension in the transformation of ASEAN to a rules-based organization is whether the “ASEAN way” is consistent with the establishment of a community governed by law. That transformation presumes an intention on the part of ASEAN members to comply with their obligations. To date, however, there has been perhaps too little systematic effort to monitor such compliance.

1. Policy Challenge

- Member states have not always been willing to be transparent about steps taken to implement ASEAN obligations. Where there has been such willingness, the degree of monitoring has varied considerably.

Proposed Solution

- Consistent language should be adopted in future ASEAN agreements on different tiers of reporting obligations. A distinction should be made between *formal implementation* reports and *substantive compliance* reports.
- Though particular regimes may require different timeframes and reporting lines, the default position should be that member states will report annually to the ASEAN Secretariat or a dedicated body thereof on (i) formal implementation and (ii) substantive compliance with ASEAN obligations.
- As ASEAN obligations become more complex, it may be appropriate to consolidate these reports on various obligations, perhaps linked to performance within the three discrete ASEAN communities.

2. Policy Challenge

- Merely sending reports in to a body like the ASEAN Secretariat without the capacity to evaluate reports on compliance and implementation is a very weak form of monitoring. It also misses out on some of the key benefits of a robust monitoring regime, such as assistance with compliance and shared knowledge in areas of common concern.

Proposed Solutions

- The ASEAN Secretariat needs greater resources to compile reports and publish them in a usable format with some form of independent analysis. Where gaps are evident in self-reporting by member states, the Secretariat should be able to make inquiries.
- The degree of confidentiality of such monitoring reports could be commensurate with due respect to the sensitivity of the issue in question.
- Effective monitoring costs money. But there are also costs associated with the failure to monitor.

- For simple obligations, an option could be that reports are made freely available on the ASEAN Web site.
- For obligations deemed especially important, the Secretariat or its Secretary-General could be tasked with presenting an annual consolidated report to the ASEAN Summit in accordance with ASEAN Charter Article 11(2)(b), with independent analysis on implementation and compliance.
- Other obligations could be the subject of annual reports by the three ASEAN Community Councils in accordance with ASEAN Charter Article 9(4)(c).

Policy Area 3: Dispute Settlement Mechanisms and Compliance Monitoring of ASEAN Instruments

In their Report to the ASEAN Summit in 2006, the ASEAN Eminent Persons Group stated that ASEAN's real problem is "ensuring compliance and effective implementation" and that ASEAN member states must establish a culture of commitment to honour and implement their decisions and instruments. To that end, ASEAN has established different dispute settlement mechanisms to enhance implementation levels of ASEAN instruments. In practice, however, dispute settlement mechanisms do not seem to facilitate adherence or promote compliance.

1. Policy Challenges: ASEAN Dispute Settlement Mechanisms

- There seems to be a consensus among legal experts that the timelines in the 2004 Protocol on Enhanced Dispute Settlement Mechanism are too short to allow this dispute settlement system to work effectively.
- The 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms does not apply to instruments that already contain settlement clauses prescribing the use of such methods as negotiations and consultations. This limitation to negotiation and consultation could mean that disputing parties might not have a modality to procure a conclusive resolution to the dispute. This may mean that disputing parties would be left without a conclusive resolution. Furthermore, it does not include any fact-finding mechanism that could be instrumental in getting the parties to resolve the dispute.

Proposed Solutions

- Establishing a group of experts to review the timelines of the 2004 Protocol and make recommendations for amendments.
- Establishing a group of experts to draft two additional annexes to the 2010 Protocol: Annex 7 on Rules of Procedure for Third Party Fact-Finding and Annex 8 – List of all ASEAN instruments which prescribe negotiations, consultations, mediation or conciliation as dispute settlement mechanisms and the applicability of the 2010 Protocol to disputes arising from these instruments.
- Including in future non-economic instruments a clause referring all disputes to the 2010 Protocol.

2. Policy Challenges: Compliance Monitoring

- Compliance monitoring of ASEAN instruments is not systematic. There are no clear structures or procedures in the monitoring system.
- In instances of overlapping authority among ASEAN organs tasked with compliance monitoring, it is difficult to locate the exact body who rightly has competence and responsibility.

Proposed Solutions

- As it is the responsibility of the ASEAN Coordinating Council to coordinate the implementation of agreements and decisions of the ASEAN Summit, they should establish a priority list of the most important agreements and decisions that should be subjected to compliance monitoring mechanisms. For the less urgent instruments, priorities on which ASEAN agreements and decisions that are to be monitored should also be made within a certain timeframe.
- Adopting Rules of Procedure on Compliance Monitoring which clarify (i) the roles of the Secretary-General and various ASEAN bodies vis-à-vis compliance monitoring of ASEAN instruments; (ii) the reporting requirements of ASEAN member states; (iii) procedures of non-compliance. The Rules of Procedure will be applicable to existing and future ASEAN instruments.
- There should also be an overall oversight role vested in the Legal Service or in a Compliance Monitoring Unit within the ASEAN Secretariat.

Policy Area 4: The ASEAN Legal Service

One of the aims of the "Integration Through Law" Project is to make credible the ambitions of the ASEAN Charter in order to achieve them, while staying realistic and avoiding legal options which would never be implemented. If this is correct, then the present policy area can be regarded as being central.

One must realistically take into account the "ASEAN Way", which reflects the attachment of the ASEAN member States to their national sovereignty, and their reluctance to be governed by supra-national institutions, or even by legally binding procedures and a Court which would adopt judgments compulsory for them.

1. Policy Challenge

- In order to implement the Charter, ASEAN institutions need an independent legal expertise, as neutral legal advice is necessary and that legal instruments must be carefully drafted while avoiding loopholes or ambiguities. Currently there is no such neutral expertise at their disposal. Other challenges are to archive ASEAN norms and publish them, as well as trying to diffuse or settle possible disagreements about their interpretation or application, by giving non-obligatory and neutral views.

Proposed Solutions

The only light solution to this challenge would be the establishment of a professional ASEAN Legal service. This would leave open a number of options between which competent authorities would have to choose:

- **Which functions?**

These would include:

- i. Drafting of agreements, rules and regulations for internal as well as external purposes; Providing the institutional legal memory of ASEAN by maintaining records, updating agreements and other legal instruments, and ensuring that inconsistencies are resolved;
- ii. Providing impartial expert legal advice to the ASEAN Summit, the member States, the Secretary-General, the Community Councils, the ministerial bodies and the Committee of Permanent Representatives, as well as other ASEAN bodies;
- iii. Assisting the Secretary-General in monitoring the implementation of and compliance with ASEAN agreements;
- iv. Providing legal representation for ASEAN as an entity; and
- v. Assisting the ASEAN Summit, the Secretary-General and other dispute resolution bodies in the settlement of disputes.

- **At what level?**

There is the possibility to appoint the ASEAN Legal Counsel of the ranking of a Director General, but it is better to appoint him/her to the rank of a Deputy Secretary General, in

order that his/her authority be enhanced, and that he may participate to the Summit. His/her Directors would represent him/her at the level of Ministers and Ambassadors. Lawyers would attend the ASEAN working groups.

- **With what budget?**

The authors suggest recruiting at the highest possible level of expertise and professionalism, with an equivalent salary as private law firms and recruitment based solely on merit.

While it is important to have total neutrality vis-à-vis the nationality of the candidates on sensitive issues dealt within the Legal Service, strict quotas on nationality should be avoided. This is because it is important to have legal officers in ASEAN who are adept with the national legal systems of the ASEAN member states.

Seconding officers from the Member States should not be done for several reasons. Firstly, there will be a problem of national bias. The seconded officer will have to return to his home service at the end of his term. This will inevitably compromise his independence. Secondly, the disparity in pay levels between legal officers in different Member States will mean that it will not be possible to get legal officers from the more developed ones. Thirdly, no Member State will send their best officers. The result will be that only mediocre ones will staff the ASEAN legal service. This would undermine the reputation of the service.

- **With what possible evolution?**

The professional independence of the Service, under the sole responsibility of the Legal Counsel, should be guaranteed. In future it is possible that the ASEAN Summit may establish a body to consider appeals from decisions made by the various dispute settlement mechanisms. The Legal Service would play a fundamental role in staffing and advising such a body. The Secretary-General also has a role in dispute settlement. The Legal Service would be vital to provide him the necessary support in this role.

Policy Area 5: ASEAN Economic Cooperation and Integration

In the first stage of building the AEC up to 2015, ASEAN has rightly made use of a comprehensive Roadmap of some 300-plus measures or initiatives. Many of these have been followed up and/or implemented, with varying success, but altogether leading to an overall result which is quite impressive. If ASEAN genuinely wants the symbiosis between the ASEAN Single Market and ASEAN as a Production Base to stimulate growth and development in the region, strategic focus for the second stage is indispensable. Despite its utility in the first stage, the Roadmap lacks strategic focus. The focus should be on only a few cardinal issue areas, which proved to be difficult to address effectively in the first stage but are crucial to make the ASEAN Economic Community generate growth. Escaping the middle-income trap requires moving up the value chains or specialise more in high quality or advanced products, something which is notoriously difficult but not impossible. In moving up to higher value-added products, policy areas once more sensitive, need to be tackled with conviction in the ASEAN Economic Community for a shift towards such market activities in trade and investment inside and outside ASEAN to be possible.

1. Policy Challenge – Free movement of goods and services

- It will be difficult for ASEAN to have a truly single market unless there is complete movement of goods and services. There has been much progress in removing barriers but much remains to be done.
- There are still many non-tariff barriers that affect goods trade that have to be better documented and eliminated, where possible.
- Trade in services has not been liberalized to the extent that trade in goods has and much needs to be done in terms of integrating the markets for services, no mean feat as it involves behind-the-border measures.
- Trade facilitation within the ASEAN context has made progress but there is a long way to go, including in terms of the ASEAN Single Window (customs).
- Rules of origin (RoO) could be an important impediment to ASEAN integration, especially in terms of integration into value chains.

Proposed Solutions

- Complete the comprehensive database on NTBs and detail a strategy for removal of all relevant NTBs.
- Articulate a clear strategy to work out mutual recognition arrangements in key areas.
- A customs union (CU) would be ultimately needed to have a completely integrated ASEAN marketplace, but cross-country trade policy divergences are too great in order to envision one in ASEAN in the near term. All ASEAN economies have been liberalizing their respective external tariffs in order provide open markets; at present, average tariffs on manufactured imports are already among the lowest in the developing world.

Hence, it would behove ASEAN economies to target external tariffs in manufacturing that would converge to zero over the medium term, with some excluded sensitive items as necessary, thereby reducing problems associated with RoO and creating a market truly based on “open regionalism” (this has been an old proposal in ASEAN).

- Strong push on ASEAN connectivity (physical and IT infrastructure and logistics) post-2015 to lower the cost of integrating ASEAN markets and people-movement, narrowing the development gap within ASEAN core and peripheral areas, and integrating with global value chains.

2. Policy Challenge – Reducing the high costs of technical barriers

- Shifting from an emphasis on low or medium level intermediate goods, often with imported components and standards set by multinationals leading the value chain, to domestic or ASEAN-made components and parts, or even to (more) sophisticated final goods, it is critical to address convincingly the non-tariff barriers in ASEAN, and in particular the mass of technical barriers to trade (TBTs).
- These are caused by divergent regulation, and/or technical standards and/or conformity assessment. ASEAN’s long-standing commitment to tackle these now goes back almost three decades but very little has been accomplished.
- There are practically no detailed studies on the considerable direct costs of TBTs in ASEAN, let alone, on the negative knock-on effects. There is also no policy assessment and no strategy guiding the long and winding road to decisively lower the costs of intra-ASEAN market access in this respect.
- For the symbiosis between the ASEAN Single Market and its Production Base and its potential for growth, addressing TBTs decisively becomes ever more important.

Proposed Solutions

- Addressing the costs of TBTs or TBTs themselves convincingly is demanding for ASEAN and requires a long-term programme guided by a well-thought-out strategy. A broad qualitative (and possibly quantitative) assessment of the expected economic gains – both macro-economic and in a number of specific product sectors where TBTs are most costly (indeed, a large multiple of MFN tariffs) – and a strategy based on this analysis, should be generated by independent experts, including business.
- Subsequently, ASEAN Member States should commit to a long-term programme, proposed by the ASEAN Secretariat, with a regular and transparent roll-over of the TBTs to be addressed. The programme should be supported firmly by the ASEAN Summits, including follow-ups. Inevitably, a TBT strategy of the AEC will involve many ministries, not just the minister for ASEAN affairs. It should be a cabinet-wide priority.

Policy Challenge – Creating a post-AEC agenda

- ASEAN should consider completing the unified market by including other aspects that have hitherto been excluded from the AEC, thereby creating a post-AEC agenda.
- The AEC is best thought of as a process of integration, and much will remain to be done after 2015. For example, the AEC presently only envisions the free movement of skilled labour and the freer movement of capital. Eventually, integrating the labour and capital markets would be necessary for a true market.
- The competition policy that emerges out of the AEC process will only be partial. Given that competition policy is an important part of all “mega-regionalism” arrangements that include ASEAN economies, ASEAN could be a leader in this area.

Proposed Solutions

- Implementing free movement of unskilled labour will certainly be politically difficult, but there are ways that could improve efficiency- and welfare-enhancing labor flows. For example, unskilled and semi-skilled labour migrants might be required to have secured employment contracts before migrating and migrant workers as well as their home countries must accept that host countries’ domestic laws must prevail.
- The areas pertinent to financial cooperation and capital flows in the AEC Blueprint are very modest. To a large degree this is a result of memories from the Asian Financial Crisis. Still, a great deal could be done in integration financial markets within the ASEAN region, and this could be an important “input” to integration of the real sector.

Policy Challenge – Expanding ASEAN beyond ASEAN-10

- Timor Leste, which separated from Indonesia in 2002, is already a candidate for accession. It faces enormous challenges, including increasing employment and diversifying its economy, which is currently completely reliant on oil exports.
- Another possible candidate for accession is Papua New Guinea, which has been an ASEAN observer since 1976. It is usually referred to as a Pacific Island nation, given its history and culture and participation in various Pacific Islands fora. However, it does share an Island with Indonesia – New Guinea.
- ASEAN has ASEAN+1 FTAs with China, Japan, South Korea, India and Australia-New Zealand. These are being rationalised and integrated through current negotiations on the Regional Comprehensive Economic Partnership (RCEP).

Proposed Solutions

- ASEAN should collectively evaluate carefully the political-social-economic benefits and costs of eventual membership of Timor Leste and Papua New Guinea and whether these two countries will enhance ASEAN centrality and economic performance.

- Ensure that RCEP negotiations result in a high quality agreement with maximum liberalisation, coherent rules, and incorporation of flexibilities and technical and financial assistance for the developing ASEAN countries.

Policy Challenge: Boost services in value chains

- High value-added, the basis for higher incomes for ASEAN workers, usually results from high skills, technological contents of products and, not least, the incorporation of many services in the final goods. Whereas the first two are widely known but their successful application will take a long time, there has been too little attention or determination on the part of services in the ASEAN Economic Community.
- On the cost side of global value-chains, the most critical services are transport and logistics. The AEC has attempted to address customs-related costs but has remained reticent with respect to transport services liberalisation. A combination of dedicated new transport infrastructure and decisive transport liberalisation would drastically cut the costs of global value chains in the region, a true manifestation of the Production Base.
- On the quality side, high value-added goods often contain services which should – at least in part - be provided in ASEAN instead of developed countries. Such services include (more sophisticated) testing and certification, various technical, legal, ICT, professional and commercial advisory services, research and laboratory services. E.g. product differentiation, repair services, etc. A focus on services serves the Production Base directly whilst also helping the ASEAN Single Market to be ‘deepened’, both boosting the capacity to create higher value-added in the region.

Proposed Solution

- Rethinking the AEC services agenda with a view to boost services for additional value creation in ASEAN is the way to go. Services should not only be approached as separate activities or areas. For purposes of the ASEAN Economic Community, services together should be regarded as a critical component of goods in value-chains.
- Competitive and quality services matter in value chains and can be decisive for location and for ‘moving up’. And that is what the AEC is all about. This strategic approach to services liberalisation in the AEC’s second stage is therefore development oriented.

Policy Area 6: Strengthening the Secretariat to Achieve the ASEAN Community

1. Policy Challenge

- Implementation of the ASEAN Economic Community (AEC) is hampered by the relative weakness of the ASEAN institutions. The ASEAN Secretariat has very limited authority over AEC measures, resulting in their inconsistent implementation.

Proposed Solutions

There are additional powers, which if assigned to the ASEAN Secretariat, would give the Secretariat more effective means of administering the AEC yet fall short of creating an authority that would have the full gamut of powers of the European Commission:

- **Oversight** – The ASEAN Secretariat would be obligated to comment in writing on all national and multinational measures affecting implementation of AEC goals and principles.
- **Powers of inquiry** – The ASEAN Secretariat would have the right to inquire with ASEAN members on their implementation and administration of measures affecting the AEC.
- **Right of proposal** – The ASEAN Secretariat would have the right to propose measures, on its own initiative, which would advance AEC goals and principles.
- **Right to initiate action** – the ASEAN Secretariat could work with Member States which have encountered difficulties with follow-up measures and implementation. Otherwise it could be empowered to initiate actions against ASEAN member states for failure to fulfil their obligations for the commitments undertaken under the ASEAN Charter.
- **Right of sanction** – The ASEAN Secretariat would have the right to impose sanctions on member states not in compliance with AEC goals and principles.
- **Monitoring powers for enhanced compliance** – The establishment of a Self-Reporting Implementation mechanism. When an Instrument requires follow-up measures by and within the Member States, within a time to be determined by the Instrument itself, Member States would report to the Secretariat [confidentially] on the state of implementing the follow-up measures required by the ASEAN Instrument.

Though particular regimes may require different timeframes and reporting lines, the default position should be that member states will report annually to the ASEAN Secretariat or a dedicated body thereof on (i) formal implementation and (ii) substantive compliance with ASEAN obligations.

The ASEAN Secretariat needs greater resources to compile reports and publish them in a usable format with some form of independent analysis. Where gaps are evident in self-reporting by member states, the Secretariat should be able to make inquiries.

For obligations deemed especially important, the Secretariat or its Secretary-General could be tasked with presenting an annual consolidated report to the ASEAN Summit in accordance with ASEAN Charter Article 11(2)(b), with independent analysis on implementation and compliance.

There should also be an overall oversight role vested in the Legal Service or in a Compliance Monitoring Unit within the ASEAN Secretariat.

- **Management of ASEAN instruments** – Better use could be made of the ASEAN Secretariat as a treaty depositary and ‘clearing house’ for notifications among ASEAN member states as parties to treaties concluded under the ‘collectively ASEAN’ formula.

The creation of an on-line public treaty database administered by the ASEAN Secretariat for external as well as internal ASEAN agreements would facilitate the work of both governments and scholars in identifying treaties in force and definitive texts.

ASEAN needs to utilize the Secretariat for more coordination and commonality of presence in managing the regulatory subjects that will certainly remain within the national sphere of treaty obligations.

- **Knowledge management and sharing of best practices** – Only if all ASEAN members fully comprehend the issues involved in highly complex technical policy matters will it be possible to improve the outcome of negotiations for ASEAN as a collective entity. A major role in the management of knowledge is to be accorded to an empowered ASEAN Secretariat, which can competently act as a liaison institution referring member governments to institutions and persons that can provide the expertise in demand. Surin Pitsuwan’s vision of a “networked secretariat” should be interpreted precisely in this way, not only creating awareness of ASEAN in the wider public. An urgent precondition to achieve this is a marked expansion of the secretariat’s staff and a much higher budget.

In the short term, the ASEAN Secretariat in Jakarta could facilitate this process of policy learning and transfer by organizing an annual regional workshop on best practices in policy implementation for senior civil servants in the ASEAN countries to learn from the successful experiences of the more effective public bureaucracies.

In the long term, the ASEAN Secretariat should encourage the public bureaucracies in the ASEAN countries to benchmark their performance in policy implementation once every two years to identify their weaknesses and to learn from the best practices of the more effective public bureaucracies.

Policy Area 7: General External Agreements

ASEAN and its Member States have been remarkably successful and active in concluding a wide range of international agreements and instruments in the fields of economic, security, political and socio-cultural co-operation. Despite the rather limited use of the international legal personality and treaty-making power granted to ASEAN in its Charter, the use of the 'collectively ASEAN' mechanism – the conclusion of international agreements by the Member States identifying themselves as ASEAN – has enabled the promotion of an ASEAN identity and external presence characterised by the externalization of ASEAN internal economic integration and the promotion of an open regional architecture in which ASEAN operates alongside its Member States. The following recommendations are aimed at improving the functioning of this innovative approach to ASEAN external agreements.

1. Policy Challenge: Systematizing Treaty Practice

- In part as a result of the flexible approach to treaty participation it is not always easy to identify 'ASEAN external agreements' or their definitive text. In addition, treaty practice within ASEAN varies considerably across and within sectors, creating sometimes unnecessary disparities and complexity.

Proposed Solutions

- Better use could be made of the ASEAN Secretariat as a treaty depositary and 'clearing house' for notifications among ASEAN member states as parties to treaties concluded under the 'collectively ASEAN' formula.
- The creation of an on-line public treaty database administered by the ASEAN Secretariat for external as well as internal ASEAN agreements would facilitate the work of both governments and scholars in identifying treaties in force and definitive texts.
- Treaty practice, including the use of specific phrasing, could be considered with a view to standardizing drafting practice. Sometimes different formulations are required by the subject matter but unnecessary differences could be avoided.

2. Policy Challenge: Clarifying Contracting Parties

- The ASEAN Charter explicitly confers legal personality on ASEAN and stresses its proactive and central role in ASEAN external relations; however in most cases it is the member states which are the contracting and the responsible parties. This can create legal uncertainty where it is not clear from the drafting of the agreement which is the contracting party.

Proposed Solution

- Clarity as to the contracting party in each case should be achieved through careful, unambiguous and standardized drafting.

3. Policy Challenge: Fragmented and Multi-Speed External Economic Integration Through Law

ASEAN's external economic instruments often never go beyond the degree of substantive legal integration reached internally within ASEAN – a reflection of the highly diverse levels of economic and institutional development within the region. Instead, individual member state instruments – often concluded with the same external partner countries – have been used as a speedier and more effective alternative to ASEAN plurilateral agreements.

Such individual integration initiatives do not and should not fall victim to the slower pace of ASEAN internal integration: they generate additional commercial opportunities, establish new legal institutions that secure and facilitate existing cross-border trade and spur economic development in the region. Moreover, individual ASEAN member states' preferential trade agreements with external partners also result in a 'competitive liberalization' dynamic which increases the incentives for and propels the willingness of other ASEAN members to enter into similar commitments, which often require desirable domestic reforms of institutions and regulatory systems.

However, the increasing complexity and fragmentation of legal obligations governing cross-border commerce with ASEAN member states can undermine the value of the ASEAN Economic Community for third country businesses and further diminish the role that ASEAN member states' collective efforts play in promoting regional external trade governance in Southeast Asia. Both ASEAN external plurilateral agreements and individual member state external agreements can contribute to the promotion of ASEAN internal economic integration and speedier collective integration with third countries.

Proposed solutions

- Consideration might be given to whether ASEAN external plurilateral agreements, through a combination of hard and soft legal provisions and complementary cooperation mechanisms, could be used as a driver to reinforce and promote existing internal and future ASEAN Economic Community objectives and commitments.

This may be particularly useful with regard to policy areas of the 2nd generation trade agenda, such as regional approaches to technical and food safety regulations and enforcement; intellectual property protection; minimum standards and common institutions governing competition as well as government procurement regulation and market access.

In areas where ASEAN external partners have a strong interest in speedier implementation of the AEC commitments or more ambitious and specific AEC commitments, ASEAN member states could enter into time-bound external preferential trade agreement (PTA) commitments that are connected to targeted technical assistance and capacity building provided by the third party in support of intra-regional efforts, with a specific focus on the newer ASEAN member states. The EU – CARIFORUM and, albeit to a lesser extent, the ASEAN – Australia / New Zealand PTAs provide for good examples of such practice that ASEAN member states can build on.

- Individual ASEAN member state agreements with third parties can promote ASEAN regional integration and ASEAN external integration through the use of limited MFN clauses, which would extend to all ASEAN members (or, alternatively, newer ASEAN members only) the benefits that accrue under the individual external agreement.

Such 'ASEAN-only' MFN clauses could be applied selectively with varying scope depending on the policy area (e.g. tariffs, services, technical and food safety regulation and enforcement, investment protection and liberalisation, services, or government procurement) or rendered contingent on the economic and institutional development level of ASEAN members.

With regard to the latter, such clauses could be limited to Cambodia, Laos, Vietnam, and Myanmar (CLVM) with a view to bridging the development gap between newer and the original and developed ASEAN members, in coherence with the objectives of the 2000 'Initiative for ASEAN Integration' (IAI) programme objectives.

Whatever the political decision of ASEAN members on the voluntary vs. obligatory application or the exact scope of such clauses, 'ASEAN-only' MFN clauses can provide the legal instrument to advance ASEAN-internal integration as a side benefit of ASEAN member states' bilateral initiatives with external partners and thereby showcase ASEAN members' commitment to ASEAN internal integration while at the same time pursuing deeper and faster economic integration with third country partners.

Policy Area 8: External Trade Agreements

1. Policy Challenge: Procedural and Dispute Settlement Issues

A stronger external presence for ASEAN is a stated objective of the current blueprint for the organization. However, under ASEAN's current approach of concluding external trade agreements:

- ASEAN member states may litigate against each other to secure those rights and obligations. This is potentially contrary to the principle of the centrality of ASEAN in the relations of ASEAN member states with third states.
- ASEAN, a separate international legal person, is not a party even where ASEAN's Secretariat has been conferred responsibilities in some of the agreements.

Proposed Solutions

- Present ASEAN as a single actor in external trade agreements, including the framework of the dispute settlement procedure. Options include:
 - i. Add the external agreements of ASEAN to Annex I to the Protocol on the Enhanced Dispute Settlement System, so that any dispute between ASEAN countries flowing from an agreement with a third state would be decided by the ASEAN internal dispute settlement mechanism.
 - ii. Conclude agreements as combined ASEAN member state agreements or make a unilateral declaration on behalf of all ASEAN member states, so that it is clear that the external agreement is not intended to create rights and obligations between the ASEAN member states.
 - iii. Conclude agreements as common ASEAN member state agreements; make clear in the text of an agreement that the members of ASEAN conclude the agreement as one party, so that the agreement creates rights and obligations between the ASEAN member states, on the one hand, and the non-ASEAN parties, on the other.
- Engage ASEAN as an international legal person in its own right in external trade agreements. Options include:
 - i. Conclude agreements as mixed ASEAN agreements, where ASEAN as an organisation and its member states together would conclude the agreement. For this, there would need to be some kind of competence transferred to ASEAN.
 - ii. Conclude an explicit written agreement with ASEAN, so that ASEAN can take on its own rights and responsibilities under an external trade agreement even if it is not a party to the agreement.

2. Policy Challenge: ASEAN minus X formula

- Over-dependence on the ASEAN minus X formula in external trade agreements could make it increasingly difficult to integrate the region. The problem could become more acute if it is the same ASEAN member states that are ratifying the external trade agreements, and the same member states that are not.

Proposed Solution

- Moderate the use of the ASEAN minus X formula. Ways to do this include:
 - i. Exceptional use of the formula: introduce guidelines to ensure that the ASEAN minus X formula is only exceptionally adopted. For example, procedures could be introduced so that the ASEAN minus X formula is applied only as a last resort and/or following a decision taken at an appropriate level.
 - ii. Threshold use of the formula: identify a threshold minimum number or proportion of member states to which ASEAN's external agreements must apply in determining what number 'X' should take.
 - iii. Partial use of the formula: apply the ASEAN minus X formula to a part of a treaty instead of the whole. Parties could identify the "must have" aspects of the agreement, which would not be subject to the ASEAN minus X formula; and the "good to have" elements, which would enter into force on an ASEAN minus X basis.
- There are also ways to address the potential concerns that some member states may have over the substantive commitments envisioned for external agreements. These are further explored in the monograph written by Pieter Jan Kuijper, James H. Mathis and Natalie Y. Morris-Sharma, *From Treaty-Making to Treaty-Breaking: Models for ASEAN External Trade Agreements* (Cambridge: Cambridge University Press, April 2015).

3. Policy Challenge: Substantive Issues

- The ASEAN Agreement calls for the possibility of a common ASEAN external presence in negotiating and implementing future trade agreements with non-ASEAN territories, but newer trade agreements continue to focus upon regulatory subjects will remain inherently within the domestic governance of individual ASEAN Member States.

Proposed Solution

- There needs to be a role outlined for ASEAN in the negotiation and implementation of new ASEAN external agreements to realize the benefits of trade agreement obligations for ASEAN Member States.
- ASEAN needs to utilize the Secretariat for more coordination and commonality of presence in managing the regulatory subjects that will certainly remain within the national sphere of treaty obligations.

Policy Area 9: Investment Regime

1. Policy Challenge

Compared to most investment treaties, ASEAN has developed one of the most advanced models of investment agreement for intra-ASEAN investment among the Member States, achieving a better balance between the interests of the investor on one hand, and the State in which the investment takes place on the other. By contrast, the bilateral investment treaties the various ASEAN countries have with third parties are overly skewed in favour of the foreign investor.

Proposed Solution

- Either using its collective leverage, or on a State by State basis, ASEAN moves to have its internal model of an Investment agreement as a template for investment treaties with third countries.
- Partner countries of the ASEAN, notably the EU and its Member States, would be willing to conclude adapted BITs and ISDS provisions, witness the investment and dispute settlement provisions of Chapter 9 on Investment of the Singapore-EU FTA.

Policy Area 10: ASEAN as a Political Actor in International Fora

For a long time one of the declared objectives of ASEAN was speaking with one voice in international fora. Apart from using existing regional consultation formats such as the regular Senior Officials Meetings (SOM), Ministerial Meetings and Summits, ASEAN has established various institutional channels to coordinate its policies such as the ASEAN New York, the ASEAN Geneva and the ASEAN Brussels Committees. This structure is complemented by informal ad hoc consultations among its missions.

1. Policy challenges

- **Voice Opportunity** – Greater “voice opportunity” is imperative for small and middle powers to influence the outcome of international negotiations. This not only concerns policies to solve global problems (such as trade issues, the financial architecture, climate change and nuclear non-proliferation), but – perhaps even more importantly – the structure of international regimes itself: membership, decision-making rules, guiding norms, and political mandates. Although ASEAN has made deliberate attempts to coordinate its policies and strategies in bodies of the UN or the WTO, the efficacy of policy coordination has remained ambiguous. In some organizations such as the WTO ASEAN cohesion is even declining since the early 2000s.
- **Knowledge and technical expertise** – Success of coordination thus often depends on the personalities in charge of the missions and their ability to mobilize expert knowledge. Knowledge resources among ASEAN governments are highly diverse. The increasingly technical and complex policy matters in international forums necessitate a good understanding of the issues at stake by all ASEAN members, if more effective collective action is to be achieved.
- **Fragile cohesion** – ASEAN cohesion is particularly fragile in positioning ASEAN representatives in leadership positions of international forums and membership in formal or informal coalitions in international organizations.

Proposed Solutions

There is no quick fix for solutions to the problem at hand. Sustained efforts to increase ASEAN cohesion in international fora are dependent on a number of initiatives and changes:

- **A common Southeast Asian history** – In order to reduce persisting mutual distrust among ASEAN member governments, there should be an increased emphasis and promotion of a common Southeast Asian history to balance the predominant national histories, which are laden with inter-state wars and conflicts. A common version of Southeast Asian history should be created and the ASEAN Socio-Cultural Community, which has the mandate to forge a common identity, should prioritize this issue as a long term solution.
- **Improved management of knowledge through empowerment of the ASEAN Secretariat** – Only if all ASEAN members fully comprehend the issues involved in highly

complex technical policy matters will be it be possible to improve the outcome of negotiations for ASEAN as a collective entity. A major role in the management of knowledge is to be accorded to an empowered ASEAN Secretariat, which can competently act as a liaison institution referring member governments to institutions and persons that can provide the expertise in demand. Surin Pitsuwan's vision of a "networked secretariat" should be interpreted precisely in this way, not only creating awareness of ASEAN in the wider public. An urgent precondition to achieve this is a marked expansion of the secretariat's staff and a much higher budget.

- **Resource augmentation** – To improve ASEAN's performance in the appointment of leadership positions in international organizations, much more engagement – also in terms of resources – is needed by all members, not only the country from which the candidate originates.
- **Role of the AEC in harmonizing diverse interests** – ASEAN members must do more to mitigate the effects of belonging to different coalitions in international forums (such as the WTO). The AEC should be regarded as a chance to promote the convergence of the region's economies so that national interests will be more compatible in international forums.

Policy Area 11: Rules of Origin

1. Policy Challenge

- The current rules of origin in the ATIGA are inconsistent with ASEAN's FTAs with its trading partners. In addition, the rules of origin are not applied consistently by ASEAN member states, and documentation of origin remains problematic.

Proposed Solutions

- Harmonize the self-certification pilot programs and implement self-certification of origin throughout ASEAN.
- Progressively adopt a value of material calculation of regional value content across all FTAs with similar numerators and denominators.
- Lower the thresholds of value of materials calculations from the current 40 per cent to 30 per cent or even less and avoid restrictive product specific rules of origin using the change of tariff classifications criteria combined with exceptions to facilitate compliance by firms.
- Adopt clear, transparent and predictable rules for cumulation, *de minimis* and roll-up (absorption) rules in all FTAs.

Policy Area 12: Enhancing Efficacy in Policy Implementation by Public Bureaucracies

1. Policy Challenge: Allocation of adequate budget and personnel for implementing “contentious” policies.

- The governments of the ASEAN countries must allocate sufficient budget and personnel to the public bureaucracies to ensure the effective implementation of “contentious” policies like drug-trafficking and human-trafficking. The implementation of the ASEAN Cosmetic Directive (ACD) has been more effective than the implementation of the recommendations of the ASEAN Ministerial Meeting on Transnational Crime and the Senior Officials Meeting on Transnational Crime because of the allocation of adequate financial and human resources required for the ACD’s implementation. By contrast, the inadequate budget and personnel devoted to the policies combating drug and human trafficking constitutes an important reason for their less effective implementation.

Proposed Solutions

- There must be consensus among the policy-makers in the ASEAN countries to implement “contentious” policies.
- Having agreed to implement a “contentious” policy, the policy-makers must allocate the required budget and personnel for its implementation for a specified number of years.

2. Policy Challenge: Competence and commitment of the personnel responsible for implementing “contentious” policies.

- The ability and willingness of the officials responsible for implementing a “contentious” policy also depend on their understanding of the policy, and whether they accept, reject or are neutral towards the policy. Implementers would refuse to execute policies if they reject those policy objectives, which offend their personal values or undermine their self-interest. The worst case scenario occurs when the implementers’ negative preferences and self-interest lead to rejection of the policy objectives and their initiation of measures to sabotage policy implementation.

Proposed Solutions

- The policy-makers in the ASEAN countries must ensure that those officials selected for implementing “contentious” policies must have the necessary expertise and skills.
- As far as possible, those officials who have reservations about the policy or are opposed to the policy should not be involved in its implementation.

3. Policy Challenge: Learning the best practices in policy implementation.

- The success or failure of policy implementation is determined by the level of effectiveness of the public bureaucracies in the ASEAN countries. Effective policy implementation is a function of the public bureaucracy’s capacity, which may be hindered by such factors as overworked and poorly trained personnel, insufficient

information and financial resources, or impossible time constraints. In short, the public bureaucracy will be ineffective in policy implementation if it is afflicted by capability problems.

Proposed Solutions

- In the short term, the ASEAN Secretariat in Jakarta could facilitate this process of policy learning and transfer by organizing an annual regional workshop on best practices in policy implementation for senior civil servants in the ASEAN countries to learn from the successful experiences of the more effective public bureaucracies.
- In the long term, the ASEAN Secretariat should encourage the public bureaucracies in the ASEAN countries to benchmark their performance in policy implementation once every two years to identify their weaknesses and to learn from the best practices of the more effective public bureaucracies.

Policy Area 13: Environmental Protection

1. Policy challenge

The norms in Article 1 of the ASEAN Charter on the rule of law, human rights and protection of human security ('3 notions') could be used as an integrative approach in the context of the ASEAN Environment.

Proposed Solutions

- The ASEAN Coordinating Council under Article 8 of the Charter should establish a subcommittee to enhance policy coherence and efficiency, taking into consideration the '3 notions'. The subcommittee should include relevant stakeholders and experts in the '3 notions'.
- ASEAN would need to improve on the 'ASEAN Way' although it has worked well in the past. This will require ASEAN Member States through consensus to calibrate their traditional approach on non-interference in areas where the common interest dictates closer cooperation. More effective decision – making processes are also necessary to deal with less sensitive issues as well as to respond to urgent crises.”
- There should be greater capacity building for ASEAN policymakers, administrators, judges, academics, NGOs, CSOs, youths, and other stakeholders on ASEAN environmental law, policy and governance. This can be facilitated through Workshops, seminars and conferences as well as research activities.
- Publication of ASEAN instruments on environment.
- Regular publication of ASEAN Policy Briefs on Environment
- Establishment of environmental networks of ASEAN policymakers, administrators, etc. to discuss and exchange experiences

2. Policy challenge

Ensuring the protection of endangered species

Proposed Solution

- That all states work on a list of wild flora and fauna that are especially endangered in the region and which warrants especial protection. The laws of all 10 states should then be reviewed and amended to ensure that protection for these species is considerably enhanced and elevated to the same importance and concern as species in Appendix I of CITES. This is also a step towards implementation of section D.6 of the ASEAN Socio-Cultural Community Blueprint (ASCC 2009-2015) – "Harmonizing environmental policies and databases".

3. Policy challenge

Ensuring the protection of ASEAN's coastal and marine environment

Proposed Solution

That all states work towards building greater capacity to protect and enhance its marine and coastal resources; to ensure sustainable fisheries management particularly of fish that straddle national and international borders. New systems of collaborative engagement need to be adopted, making better use of scientific information, reporting, financial incentives and legal instruments. In particular, all states should strengthen and support financially and administratively, the 4 technical departments of SEAFDEC (Training Department; Marine Fisheries Research Department; Aquaculture Department; and Marine Fishery Resources Development and Management Division).

4. Policy challenge

Lack of a cohesive framework of environmental laws and policies to view ASEAN as one ecosystem

Proposed Solution

- ASEAN should create a set of hyperlinks to the environmental laws of the Member States, and provide the focal point links to each national office that is responsible for each of the six ASEAN environmental working groups. This would facilitate communication and cooperation within the region in the implementation of environmental policies and the enforcement of environmental laws.

Policy Area 14: Education on ASEAN Law and Policy

Member states have made considerable efforts towards building the ASEAN Community and regional identity, as well as promoting ASEAN in the national and international orders. It is timely to take substantive steps towards formalising ASEAN Law and Policy education.

1. Policy challenges

- There is an urgent need to build capacity in the civil service of ASEAN member states so that they are capable of taking full advantage of the laws and other tools to make the ASEAN Community function.
- Existing courses on ASEAN are largely focused on political, economic, security and strategic studies. In light of the transformation undertaken through the 2007 Charter, the lack of a holistic curriculum on ASEAN as a regional organisation that studies the legal and policy aspects across the political-security, economic and socio-cultural pillars of the ASEAN Community should be addressed.
- There is a need to disseminate at all education levels a greater understanding of ASEAN, its successes, and its challenges. This should be reflected in greater detail in tertiary education as it trains teachers of the future.

Proposed Solutions

- The ASEAN Integration Through Law book series is an important educational resource. The Centre for International Law (CIL) will be gifting sets of these books to various ministries and institutions of the ASEAN member states and also to the ASEAN Secretariat.
- Following on from the publication of the book series, the next phase is focused on the creation of the ASEAN Law and Policy Course. This Course will offer teaching models in the disciplines of Economics, Law, and Political Science. It includes not only curriculum formation based on these texts but also pedagogical guides and reading materials to enable effective teaching of ASEAN Law and Policy. It would be very helpful if the ASEAN Secretariat could assist in the translation of these courses to the different languages of the region.

CIL will offer to teach this course in the National University of Singapore. In response to the growing interest in ASEAN Law and Policy within and without the region, CIL would also be able to guest-teach this course at other universities interested in offering this subject. There also will be 'Training the Trainers' courses to enable the faculty members of other universities to teach this course.

- As part of capacity building, this Course could also be modified to train the legal officers of ASEAN and its Member States, as well as private sector institutions.

