

Integration Through Law

The Role of Law and the Rule of Law in ASEAN Integration

Policy Recommendations

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Policy Area 1: Follow-up, Implementation, Enforcement

ASEAN has been extraordinarily successful in reaching a wide range of Agreements, Declarations and other Instruments, from the most technical to the broadly political.

Policy Challenge

- There is to date no compendium of these Instruments to access authoritatively the ASEAN normative output.
- There is often ambiguity in the legal status of various instruments. Subsequently different Member States could understand the legal nature of the Instruments differently.

Proposed Solution

- The Establishment of an ASEAN Official Journal (OJ) that would constitute the authoritative and authentic text of the instrument with an official document number.

Policy Area 2: Monitoring Compliance with ASEAN Obligations

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 vary, the default position should be that member states will report annually to the ASEAN Secretariat or a dedicated body 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.

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

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 for full effectiveness.
- 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 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. Also, it does not include any fact-finding mechanism that could help the parties resolve the dispute.

Proposed Solutions

- Establishing a group of experts to review the timelines of the 2004 Protocol and recommend 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.

Policy Area 4: The ASEAN Legal Service

Policy Challenges

- To implement the Charter, ASEAN institutions need independent legal expertise – neutral legal advice is necessary and legal instruments must be carefully drafted to avoid 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 Solution

- The establishment of a professional ASEAN Legal service.

Policy Area 5: ASEAN Economic Cooperation and Integration

Policy Challenge – Free movement of goods and services

It will be difficult to have a truly single market unless there is complete movement of goods and services. There is much progress but much remains to be done in areas regarding: (1) non-tariff barriers; (2) trade liberalization in services; (3) trade facilitation – especially the ASEAN Single Window (customs); (4) the Rules of Origin (ROO) – especially for integration into value chains.

Proposed Solutions

- Complete the database on NTBs and detail a strategy to remove all relevant NTBs.
- A clear strategy to work out mutual recognition arrangements in key areas.
- A customs union is needed for an integrated ASEAN marketplace and ‘open regionalism’ (an existing ASEAN proposal) would be helpful.
- ASEAN connectivity (physical and IT infrastructure and logistics) post-2015 is needed 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.

Policy Area 6: Strengthening the Secretariat to Achieve the ASEAN Community (I)

Policy Challenge

Implementation of the ASEAN Economic Community (AEC) is hampered by the relative weakness of the ASEAN institutions.

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.
- **Right of proposal** – The ASEAN Secretariat would have the right to propose measures, on its own initiative, which would advance AEC goals and principles.

Policy Area 6: Strengthening the Secretariat to Achieve the ASEAN Community (II)

- **Management of ASEAN instruments** – the ASEAN Secretariat should act as a treaty depositary and ‘clearing house’ for notifications among member states to ‘collectively ASEAN’ treaties.

An on-line public treaty database administered by the Secretariat would identify 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** – Negotiations with external entities will improve if all ASEAN members fully comprehend the complex technical issues. An empowered Secretariat can be an effective liaison referring member governments to institutions and persons that can provide the expertise.

Short term: the Secretariat could facilitate this knowledge sharing through an annual workshop on best practices for senior civil servants to learn from the experiences of the more effective public bureaucracies.

Long term: the Secretariat should encourage the public bureaucracies to benchmark their performance in policy implementation once every two years to identify their weaknesses and 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 in concluding a wide range of international instruments in economic, security, political and socio-cultural co-operation. The 'collectively ASEAN' mechanism has enabled the promotion of an ASEAN identity and external presence by the externalization of ASEAN internal economic integration and the promotion of an open regional architecture where ASEAN operates alongside its Member States.

Policy Challenge: Clarifying Contracting Parties

The ASEAN Charter explicitly confers legal personality on ASEAN; 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.

Policy Area 8: External Trade Agreements

Policy Challenge: Procedural and Dispute Settlement Issues

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

- ASEAN states may litigate against each other to secure those rights and obligations. This is potentially contrary to ASEAN centrality.
- 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
- Engage ASEAN as an international legal person in its own right in external trade agreements.

Policy Area 9: Investment Regime

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

One of the declared objectives of ASEAN is speaking with one voice in international fora. Apart from the Senior Officials Meetings, Ministerial Meetings and Summits, ASEAN has institutional channels such as the ASEAN New York and the ASEAN Brussels Committees.

Policy challenges

- **Voice Opportunity** – Greater “voice opportunity” is imperative for small and middle powers to influence the outcome of international negotiations
- **Knowledge and technical expertise** – Good coordination often depends on those in charge of the missions and how they mobilize expert knowledge. The increasingly technical and complex policy matters in international fora necessitate a good understanding of the issues by all ASEAN members for more effective collective action.
- **Fragile cohesion** – ASEAN cohesion could be stronger in positioning ASEAN representatives in leadership positions at international fora and membership in formal or informal coalitions in international organizations.
- **Improved management of knowledge through empowerment of the ASEAN Secretariat** – Negotiations with external entities will improve if all ASEAN members fully comprehend the complex technical issues. An empowered Secretariat can be an effective liaison referring member governments to institutions and persons that can provide the expertise.
- **Resource augmentation** – More resources are needed by all members, not only the country from which the candidate originates to improve ASEAN’s chances in the appointment of leadership positions in international organizations.

Policy Area 11: Rules of Origin

Policy Challenge

- The current rules of origin in the ASEAN Trade in Goods Agreement (ATIGA) are inconsistent with ASEAN's FTAs with its trading partners. In addition, the rules of origin are not applied consistently by ASEAN 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.

Policy Area 12: Enhancing Efficacy in Policy Implementation by Public Bureaucracies (I)

1. 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 depends 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 the sabotaging of policy implementation.

Proposed Solutions

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

Policy Area 12: Enhancing Efficacy in Policy Implementation by Public Bureaucracies (II)

2. 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 dependent on the public bureaucracy's capacity.

Proposed Solutions

- **Short term:** the Secretariat could facilitate this knowledge sharing through an annual workshop on best practices for senior civil servants to learn from the experiences of the more effective public bureaucracies.
- **Long term:** the Secretariat should encourage the public bureaucracies to benchmark their performance in policy implementation once every two years to identify their weaknesses and learn from the best practices of the more effective public bureaucracies.

Policy Area 13: Environmental Protection

Policy challenge

Ensuring the protection of endangered species

Proposed Solution

- All states should 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 be reviewed and amended to ensure that protection for these species is considerably enhanced to the same level as the 'species' in Appendix I of CITES.
- This is also a step towards the implementation of section D.6 of the ASEAN Socio-Cultural Community Blueprint (ASCC 2009-2015) – "Harmonizing environmental policies and databases".

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.

Policy challenges

- There is an urgent need to build capacity in the civil service of ASEAN 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 focus on political, economic, security and strategic studies. The lack of a holistic curriculum on the legal and policy aspects across the three pillars of the ASEAN Community must be addressed.
- There is a need to disseminate at all education levels a greater understanding of ASEAN, its successes, and its challenges.

Proposed Solutions

- The ASEAN Integration Through Law book series is an important educational resource. The Centre for International Law will be gifting sets of these books to various ministries of the ASEAN states and the Secretariat.
- The next phase is 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 would be most helpful if the ASEAN Secretariat could assist in the translation of these courses to the different languages of the region.