

International Law and ASEAN Integration: Outcomes and Costs Towards A Just Peace

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Just Peace

1967 to ...

“ ASEAN’s cooperation in political development aims to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN. ”

ASEAN Political-Security Community Blueprint

“ The AEC Blueprint will transform ASEAN into a single market and production base, a highly competitive economic region, a region of equitable economic development, and a region fully integrated into the global economy. ”

ASEAN Economic Community Blueprint

“ ASEAN is committed to enhancing the well-being and the livelihood of the peoples of ASEAN through alleviating poverty, ensuring social welfare and protection, building a safe, secure and drug free environment, enhancing disaster resilience and addressing health development concerns. ”

ASEAN Socio-Cultural Community Blueprint



The diagram illustrates the structure of the ASEAN Community. At the top is a yellow triangle containing the text 'ASEAN Community'. Below this triangle are three blue rounded rectangular boxes, each representing a pillar of the community: 'ASEAN Political-Security Community (APSC)', 'ASEAN Economic Community (AEC)', and 'ASEAN Socio-Cultural Community (ASCC)'. At the bottom is a red rectangular box containing the text 'ASEAN Institutional and Legal Frameworks, including Dispute Settlement Mechanisms'.

ASEAN Community

**ASEAN
Political-
Security
Community
(APSC)**

**ASEAN
Economic
Community
(AEC)**

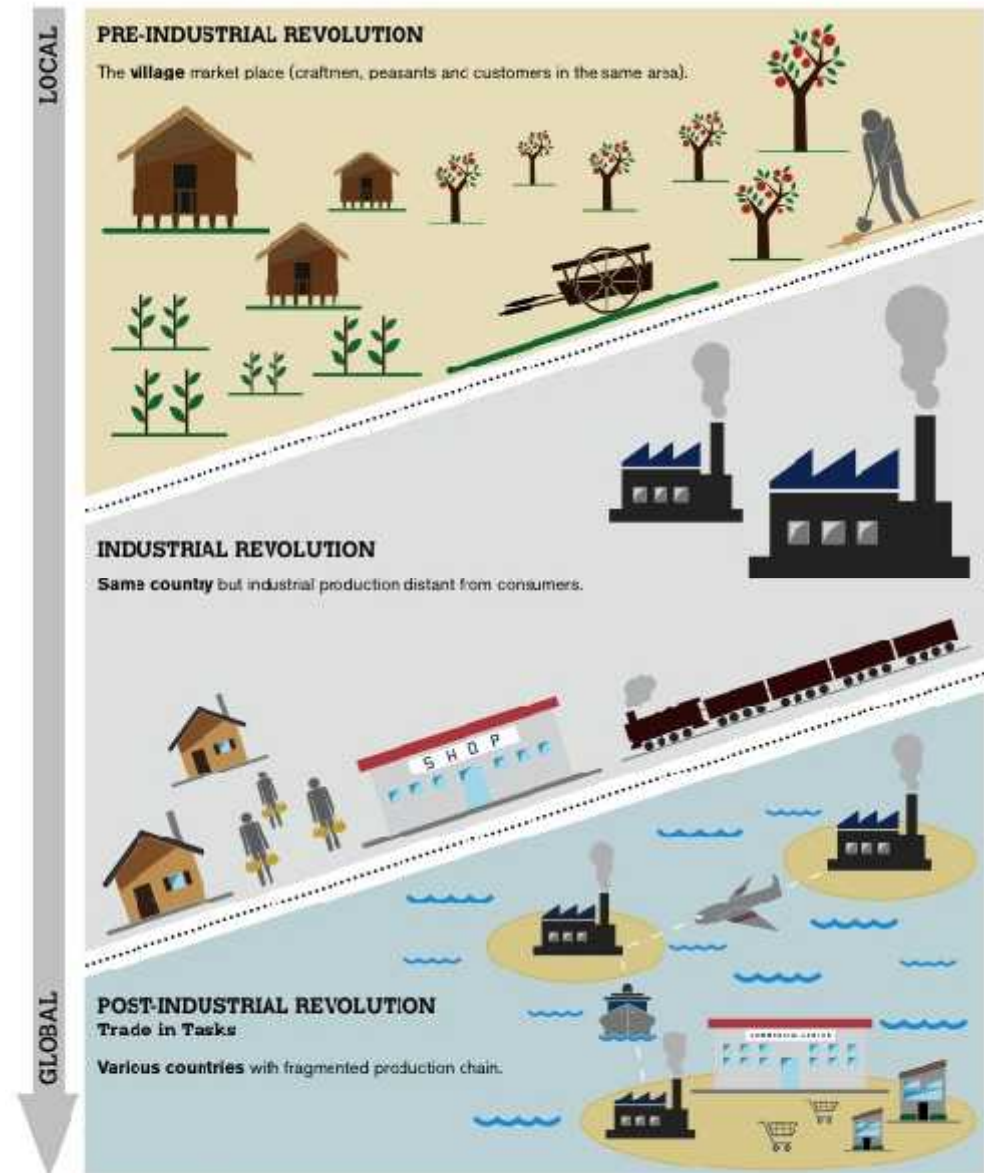
**ASEAN Socio-
Cultural
Community
(ASCC)**

**ASEAN Institutional and Legal Frameworks,
including Dispute Settlement Mechanisms**

THE ECONOMIC OUTCOMES

From Single Producer to Global Value Chains

- Globalization, Technology and MNCs have changed trade patterns.
- Behind the border measures (including investment ones) are now more important to trade flows.
- Traders and Investors want Certainty and Predictability particular for JIT GVCs.



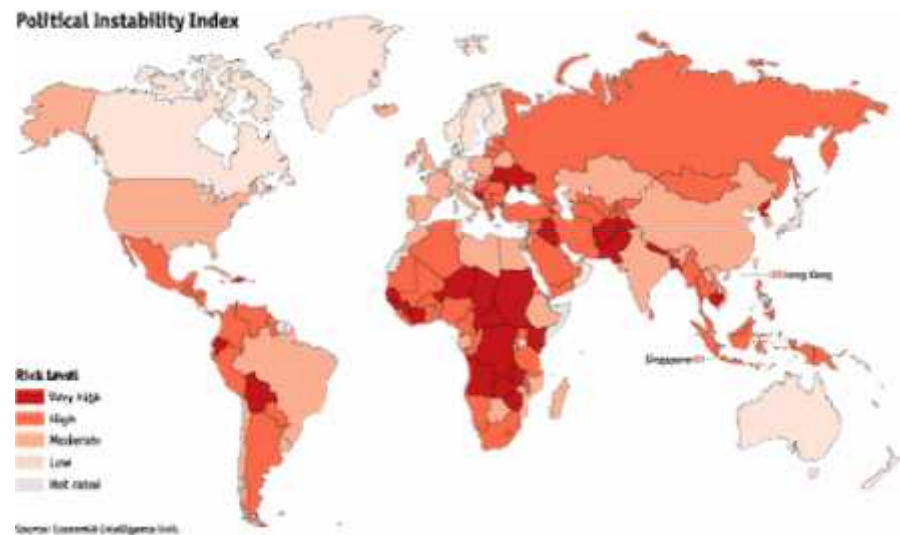
Source: WTO Secretariat.

“May you live in interesting times...”

- Risks for Traders and Investors

- Political
- Economic Crisis
- Policy Changes

- Corruption
- Protectionism
- Public Policy (accepted as business risk)



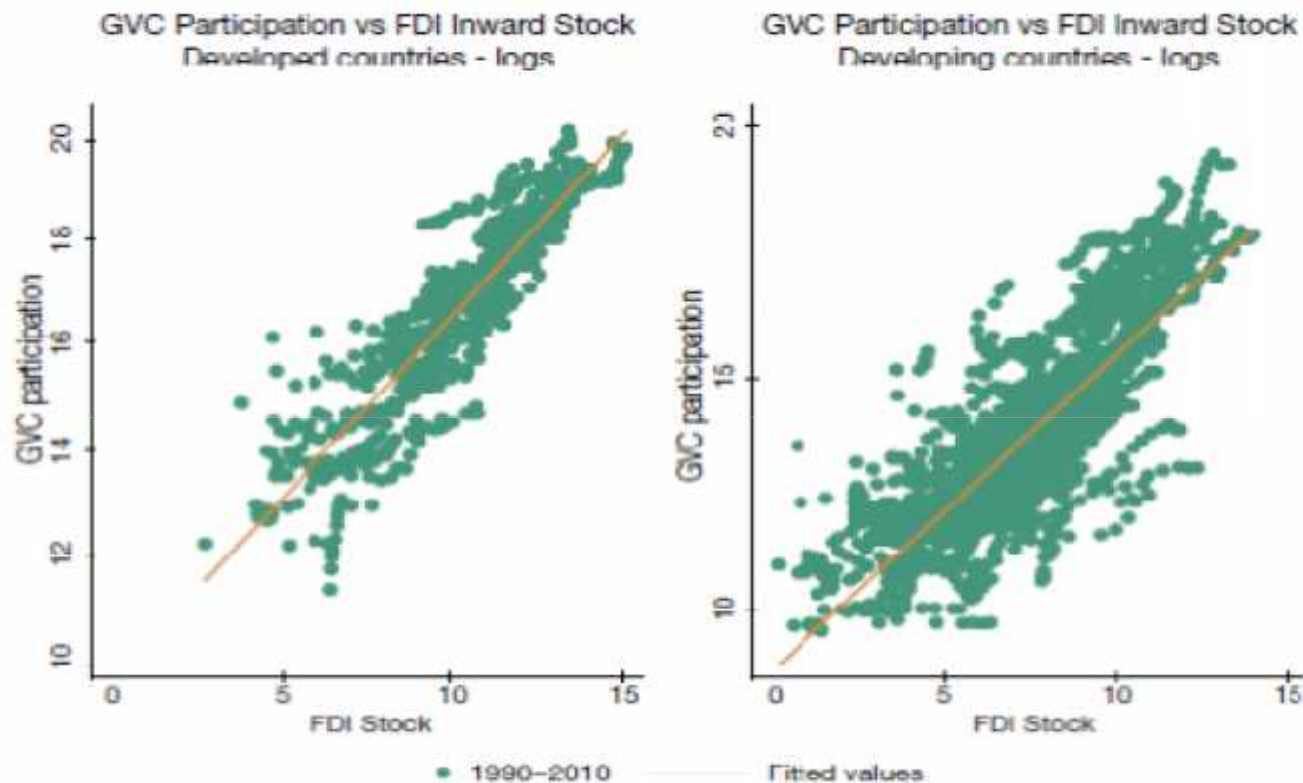
ASEAN Population and Economy 2012

| Country | Total land area (sq km) | Total Population (thousand) | Gross Domestic Product (GDP) | | | |
|-----------------------|-------------------------|-----------------------------|------------------------------|--------------------------|-------------------|---------|
| | | | at current prices (US\$ Mn) | (PPP\$ Mn) ^{2/} | per capita (US\$) | (PPP\$) |
| Brunei Darussalam | 5,769 | 400 | 16,970 | 22,151 | 42,445 | 55,405 |
| Cambodia | 181,035 | 14,741 | 14,411 | 37,083 | 978 | 2,516 |
| Indonesia | 1,860,360 | 244,776 | 878,223 | 1,216,868 | 3,588 | 4,971 |
| Lao PDR | 236,800 | 6,514 | 9,083 | 18,921 | 1,394 | 2,904 |
| Malaysia | 330,290 | 29,337 | 305,154 | 501,079 | 10,338 | 16,975 |
| Myanmar ^{1/} | 676,577 | 60,976 | 52,525 | 90,907 | 861 | 1,490 |
| Philippines | 300,000 | 97,691 | 250,543 | 423,925 | 2,565 | 4,339 |
| Singapore | 716 | 5,312 | 276,610 | 326,506 | 52,069 | 61,461 |
| Thailand | 513,120 | 67,912 | 366,127 | 652,598 | 5,391 | 9,609 |
| Viet Nam | 330,958 | 88,773 | 141,669 | 329,034 | 1,596 | 3,706 |
| ASEAN | 4,435,624 | 616,614 | 2,311,315 | 3,619,072 | 3,748 | 5,869 |
| CLMV ^{3/} | 1,425,370 | 171,005 | 217,688 | 475,944 | 1,273 | 2,783 |
| ASEAN6 ^{4/} | 3,010,254 | 445,609 | 2,093,626 | 3,143,127 | 4,698 | 7,054 |

Yaung Chi Ooi v Myanmar

- Woman from Singapore invested in a small Myanmar beer factory.
- She worked hard and made the factory profitable.
- Myanmar Army took over the factory by armed seizure in late 1997.
- Myanmar Government froze her bank accounts – no way to transfer funds out of Myanmar.
- How may this woman get justice?
- How do we encourage others to invest in ASEAN?

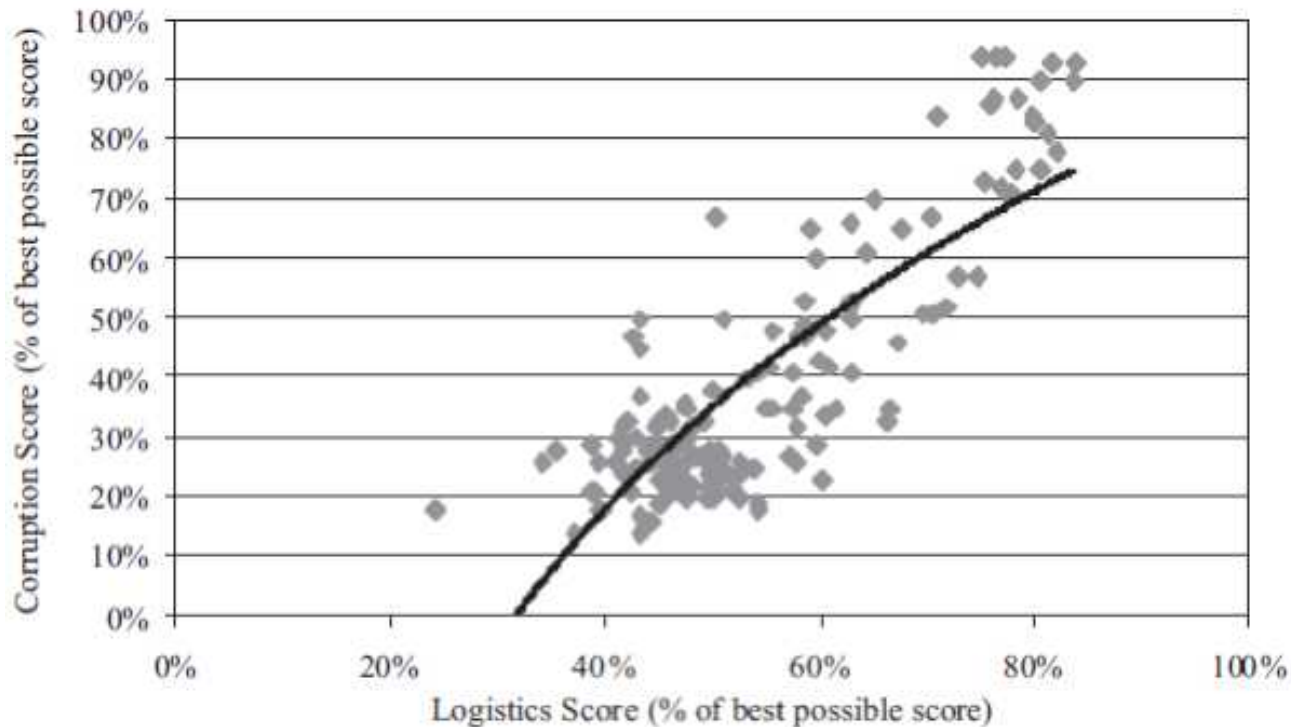
FDI and GVC Participation



Source: UNCTAD-Eora GVC Database, UNCTAD FDI Database, UNCTAD analysis.

Note: Data for 187 countries over 20 years. The regression of the annual GVC participation growth on the annual FDI inward (stock) growth yields a positive and significant correlation (at the 5 per cent level) both for developed and developing countries ($R^2 = 0.77$ and 0.44 , respectively). The correlation remains significant considering the two time periods 1990 - 2000 and 2001 - 2010 separately. Regressions use lagged (one year) inward FDI (stock) growth rates and include year fixed effects to account for unobserved heterogeneity.

Relationship between Logistic Performance and Corruption



Source: World Bank and Turku School of Economics (Finland), Logistics Performance Index, <http://info.worldbank.org/etools/tradesurvey/modelb.asp>, and Transparency International, Corruption Perceptions Index, <http://www.transparency.org/>.

Note: Each point is a country's set of scores for both indices.

Corruption Perception Index

| Ranking in ASEAN (2013) | Country | Corruption Perception Index Score | |
|-------------------------------|-------------|-----------------------------------|---------------------------------|
| | | 2012 ranking (176 countries) | 2013 ranking (177 countries) |
| 1 | Singapore | 5 | 5 |
| 2 | Brunei | 46 | 38 |
| 3 | Malaysia | 54 | 53 |
| 4 | Philippines | 105 | 94 |
| 5 | Thailand | 88 | 102 |
| 6 | Indonesia | 118 | 114 |
| 7 | Vietnam | 123 | 116 |
| 8 | Laos | 160 | 140 |
| 9 | Cambodia | 157 | 160 |
| 10 | Myanmar | 172 | 157 |

Source: Transparency International, Corruption Perception Index,
<http://www.transparency.org/research/cpi/overview>

THE RULE OF LAW

Sources of International Disputes

Failures of:

1. Compliance
2. Cooperation
3. Clarity of the Law (or no Law) or Facts

World Justice Project 4 Principles of the Rule of Law

1. The government and its officials and agents as well as individuals and private entities are **accountable** under the law.
2. The **laws are clear, publicized, stable and just**, are applied evenly, and protect fundamental rights, including the security of persons and property.
3. The process by which the laws are enacted, administered and enforced is accessible, **fair and efficient**.
4. Justice is **delivered timely by competent, ethical, and independent representatives and neutrals** who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

Legalization

- Abbot, Keohane, Moravcsik, Slaughter & Snidal:
 1. Obligation
 2. Precision
 3. Delegation (Third Party Adjudication)
- Most conflicts are resolved without litigation e.g. Administration (Monitoring & Reporting) and by Consultations and Compromise.
- But under the shadow of Adjudication people are more reasonable.

Methods for Compliance

Capacity

Sticks

Sunshine

Carrots

Sunshine
and Carrots

Jacobson & Brown Weiss


Intention

A THEORY OF INTERNATIONAL LAW AND DISPUTE SETTLEMENT DESIGN

Dimension 1: Outcomes Desired

1. Cessation of Conflict
2. De-escalation of Tensions
3. Final Legally Binding Award
4. Damages or Compliance
5. Mutually Agreed Solution
6. Clarification of Norms
7. Technical Cooperation
8. Common Epistemic Understanding

Dimension 2: Political Costs of Disputes and Adjudication

1. Regime Change
 2. Regime Legitimacy Challenged
 3. Conflict
 4. Loss of Territory
 5. Sanctions
 6. Tensions
 7. Damages
 8. Declaration
- + Counterfactual Costs
- 

DS Management Methods

1. Compulsory Adjudication
2. Non-Compulsory Adjudication
3. Consultation
4. Monitoring
5. Technical Coordination
6. Clarification

International Law & ASEAN DSMs

1. 1976 TAC (general principles – mainly no use of force, no interference and peaceful settlement)
 2. 2004 Enhanced DSM (economic disputes – compulsory and negative consensus)
 3. 2007 ASEAN Charter (general obligations)
 4. 2010 Protocol to the ASEAN Charter DSM (all other disputes that do not have specific DSM)
- Plus option for recourse to international infrastructure of ICJ, WTO, ITLOS

1. Intra-ASEAN Trade Disputes

- Malaysia – Polyethylene and Polypropylene [WTO DS1] (Singapore) (1995)
- Thailand – Cigarettes from the Philippines [WTO DS371] (Philippines) (2008)
- Note: Common Enhanced Preferential Tariffs (CEPT) non-compliance during Asian Financial Crisis settled without reference to ASEAN DSM

1. Intra-ASEAN Trade Disputes

- Source: Lack of Compliance (clear(er) rules)
- Actor: State to State (but also private parties)
- At Stake: Compliance or Damages (Retaliation)
- Outcome: MAS or Compliance/Damages
- DS Method: Adjudication (under the shadow)
- Result: WTO Reports (EDSM – possible but limited institutional capacity and track record at ASEC meant that WTO was preferred)

**WHY IS IT SO HARD TO GET
AGREEMENT AND ADJUDICATION
FOR NON-ECONOMIC DISPUTES?**

2. Pedra Branca

- Source: Clarity of Facts
- Actors: State to State (Malaysia v Singapore)
- Costs: Loss of Territory v Escalating Conflict
- Outcome: De-escalation of Tensions (Counterfactual costs outweighed Costs)
- Result: ICJ for finality of award
- DS Methods: Consultation (failed) resulting in submission to Final Adjudication (ICJ) (ASEAN TAC or 2010 DSM – no finality in result)

3. ASEAN and Human Rights

- Source: No Clarity (hence no clear rules)
- Actors: Domestic v State (plus int'l concern)
- At Stake: Legitimacy of Regime v Tensions
- Possible Outcome Desired: Communal Epistemic Understanding of Norms
- DS Method: Reporting and Monitoring
- Result: No DSM – desensitization and constructivist norm building by institutional development through ACWC, AICHR

4. ASEAN and Transnational Crime

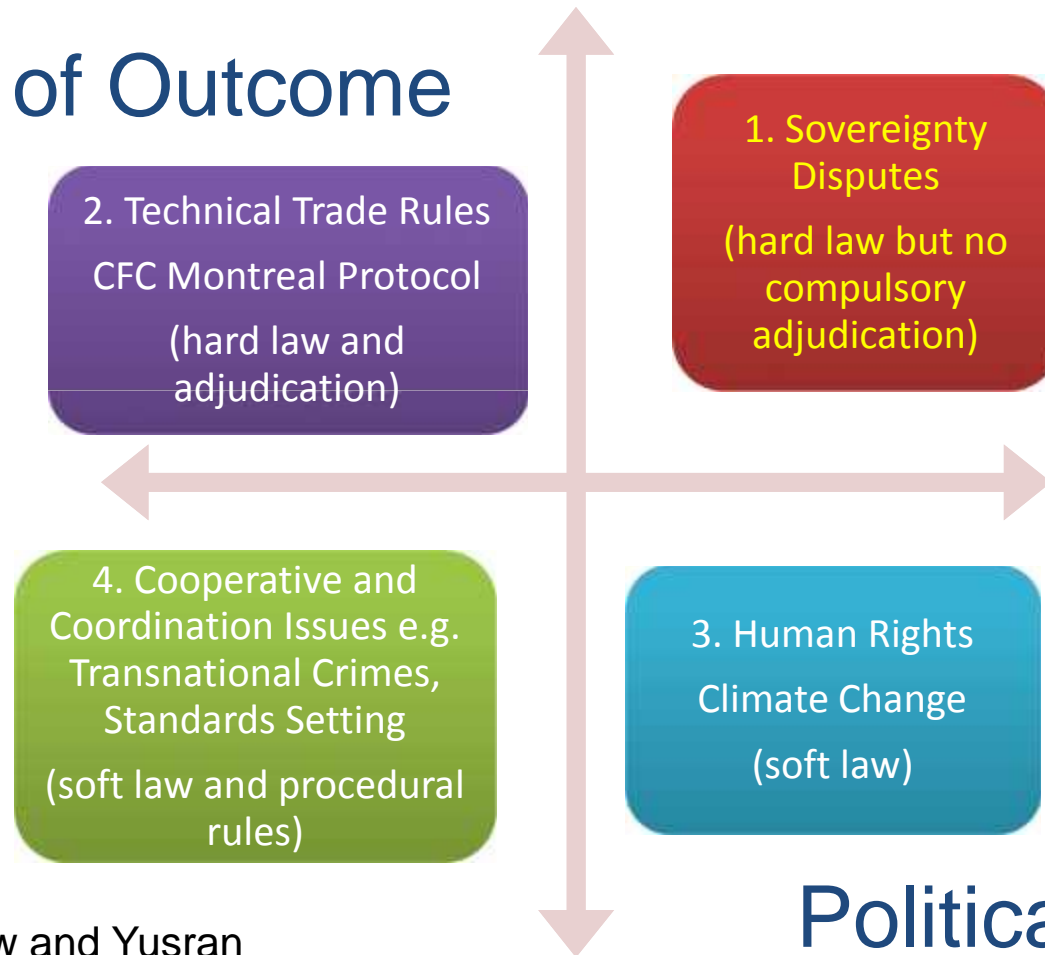
- Source: Cooperation Problems
- Actors: State v State (domestic police and citizens)
- At Stake: Proliferation of Transnational Crime
- Outcome: Cooperation (How?) (1997 Declaration, 1999 Plan of Action, 2002 Work Programme, 2004 Treaty on Mutual Legal Assistance, 2009 APSC Blueprint provisions on TC)
- DS Method: Encourage Cooperation and Exchange of Information (soft law with some procedural structures particularly in 2004 Treaty on MLA)

Law & DS Design Checklist

1. Do you know what outcome you don't want?
2. Do you know what outcome you want?
3. What are the political costs of adjudication?
4. What are the counterfactual (non-resolution of dispute/conflict) costs of not adjudicating?
5. Have the actors been culturalized to accept the obligations and process? (*e.g.* democracy, aware of the counterfactual costs etc.)
6. What are the institutional capacities for administration, monitoring or adjudication?

An Outcome/Cost Theory of International Law and DS

Clarity of Outcome



Ewing-Chow and Yusran

Political Costs

Environmental Law as a Case Study

| Problem | Hole in Ozone Layer | Global Warming |
|----------------------|---|--|
| Clarity of Outcome | Stop Using CFCs | Reduce Greenhouse Gases in atmosphere (How?) |
| Political Costs | Low – Some Economic | Medium/High – Economic |
| Counterfactual Costs | High – Solar Radiation Clear Int'l Recognition | High – Climate Change Counterfactual Cost Accepted? |
| International Law | Montreal Protocol (Hard Law with Some Enforcement Mechanisms) | <ul style="list-style-type: none"> • Kyoto Protocol (Hard Law with Adjudication – but no buy-in from US plus China and India not capped) • UNFCCC? |
| Time Frame | Fast (18 months) | Slow (20 years and counting) |
| Result | Stabilized Use of CFCs | ? |

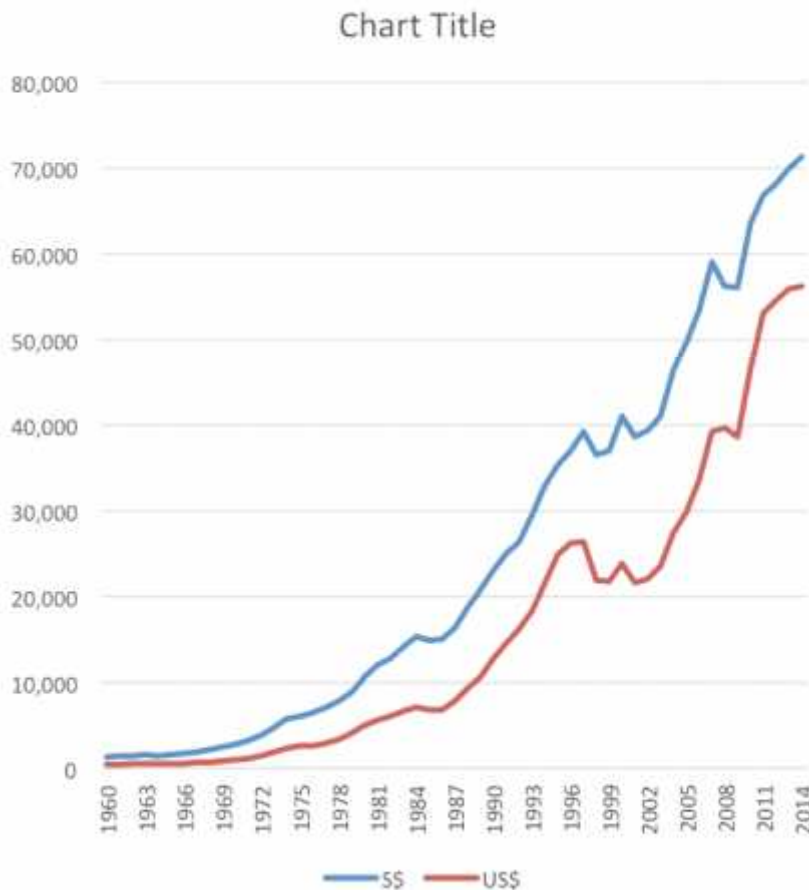
Cass Sunstein (2008) – Cost/Benefit

ASEAN INTEGRATION: A NEW HOPE

History & Geography can be Unkind

- Independence in 1960s
- A population of 1.6 million
- A literacy rate of 53%
- An unemployment rate of 13.5% and
- GDP per capita of US\$511 p.a.
- Very limited land, labour and capital.
- Did not produce enough food or water for the population much less for export.

But History & Geography is not Destiny...



- In 2015, GDP per capita of US\$56,284 p.a.
- A population of 5.4 million
- A literacy rate of 96%
- An unemployment rate of less than 2%
- Singapore focused on trade and investment facilitation by the rule of law.
- Ewing-Chow, Losari and Villarasau Slade (2013)

ASEAN Integration and International Law

- **Economic Integration** – generally hard law with compulsory Adjudication (EDSM – negative consensus)
- **Political Security Integration** – depends on outcomes – coordination or codes of conduct but no compulsory adjudication (ASEAN Summit final decider under 2010 DSM)
- **Socio-Cultural Integration** – no clarity about outcomes so generally soft law to create community understanding

Conclusion

- Clarity about the outcomes.
- Build institutional capacity and cognitive acceptance of international law.
- Provide traders and investors with confidence that domestic policy making is not corrupt or interest captured.
- Ensure that policy space for public policy regulation is guaranteed.
- But also ensure that our laws and procedures encourage good policies to fill that policy space.

Only then can we move from an ASEAN focused on **Just Peace** to achieving **A Just Peace**.