The Instruments of Governance of ASEAN: An Inventory and Critical Analysis

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1. The Global Picture

According to a dominant view, the ASEAN model is different from other experiences of regional integration. Sovereignty concerns and the refusal to accept interference in domestic affairs are said to have contributed to a pattern of cooperation based on consultation and consensus, and in which legalization is generally avoided. This 'ASEAN way' contrasts with the more legalistic approach followed by other regional organizations.

Our contribution challenges this view. We argue that over the last two decades a gradual movement towards more institutionalized forms of cooperation has resulted in a growth of the body of law and to firmer commitments – in other words, to a legalization process.

1.1 Legalization — The ASEAN Way

This conclusion is based on a systematic examination of all agreements concluded amongst ASEAN Member States. Treaty law principles were applied to identify 141 instruments as *legal* instruments, in the sense of instruments creating rights and obligations under international law. We then coded these 141 legal instruments on the basis of a 'legalization index' measuring three dimensions of legalization, adapted from earlier work by Abbott *et al* (2000) to reflect the specific features of the ASEAN governance framework. These three dimensions were: *obligation* (parties' willingness to be legally bound), *precision* (regarding what is expected from them) and *delegation* (of implementing powers to third parties such as courts or arbitration bodies).

This has enabled us to show a legalization dynamic taking off in the late 1980s, and gaining strength subsequently. Our analysis suggests that this phenomenon cannot regarded as an effect of the ASEAN Charter, nor even of the 1997-98 financial crisis, widely regarded as important milestones on the way towards more institutionalized forms of cooperation, since it has started before these two events. It also shows that this trend is not unequivocal. First, in *quantitative* terms, it is not as developed as within other regional organizations. Secondly, on a more *qualitative* level, one can detect very clearly a fear of being carried too far by this logic of legalization, the most blatant indicator being of course the continuous reluctance to envisage judicial dispute settlement mechanisms at the regional level. Developments in the protection of human rights or in relation to the haze problem well illustrate the willingness of ASEAN Member States to accept a degree of legalization, provided this does not drag them too far. In other words, although we maintain that there has been a shift towards legalization, it remains informed by the 'ASEAN way'.

1.2 Possible Explanatory Factors

Several factors may explain this evolution. Given the balance of power within ASEAN, it seems clear that it owes more to the will of the Member States' governments than to some form of

leadership emanating from the ASEAN institutions. However, this largely begs the question: what are the factors that have caused governments to change their attitude *vis-à-vis* regional integration?

Clearly, this has been more than a response to functional needs, such as the (limited) growth of regional trade or the emergence of transnational environmental problems. Systemic factors, such as the end of the Cold War and the emergence of China on the world scene, have been pointed out. But lessons from other experiences of regional integration suggest that one should explore the impact of processes of socialization among national experts. Clearly, this is an area in which further research is necessary.

2. ASEAN Instruments of Governance

2.1 An Uncertain Practice

The term 'ASEAN instrument' is found only in the ASEAN Charter and the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms. However, neither the Charter nor the Protocol sets out a comprehensive definition of that term, nor do they set out a comprehensive typology of the various instruments we identified. The Charter gives a partial list of treaties, conventions, agreements, concords, declarations, protocols, as well as a catch-all category of 'other instruments'. Although the Charter usage embraces what we found to be political instruments, the Protocol only refers to legal instruments, defined as 'any instrument which is concluded by Member States, as ASEAN Member States, in written form, that gives rise to their respective rights and obligations in accordance with international law'.

Based on available information, ASEAN Member States have adopted almost 700 instruments since ASEAN was established in 1967. Of these, approximately 300 are internal instruments (that is, instruments to which no external entity is party). These internal instruments have a diverse nomenclature, bearing more than 30 different titles, shown below:

Action Plan	Declaration	Programme
Action Programme	Declaration of Objectives	Protocol
Agenda	Declaration of Principles	Resolution
Agenda of Action	Framework	Roadmap
Agreement	Guidelines	Strategic Plan
Blueprint	Memo of Understanding	Strategy
Code of Conduct	Ministerial Declaration	Terms of Understanding
Concept Paper	Ministerial Understanding	Treaty
Consensus	Plan of Action	Understanding
Convention	Policy Guideline	Work Plan
Criteria	Political Declaration	Work Programme

Table. *ASEAN nomenclature*

Our study revealed the following points about the existing practice relating to ASEAN instruments:

1. *Agreements*, *framework agreements*, *arrangements*, *conventions*, *protocols* and *treaties* usually indicate legal instruments. However, the terms *memorandum of understanding* and *ministerial understanding* have been used for instruments that are both legal as well

as not legal in character. We found *memoranda of understanding* to which only some ASEAN Member States were party, and one which explicitly stated its non-binding character. We also detected an evolution in practice with regard to *ministerial understandings*, which tended to be political in character before 1998, but legal in character after that time.

2. Although the Charter language appears to suggest that *concords* and *declarations* carry the same legal weight as *agreements*, *conventions*, *protocols*, and *treaties*, the existing practice reveals that this is not so. *Concords* and certain *declarations* are *politically* significant, and may be classified as 'soft law' at best, in that they make critical, high-level and sometimes very detailed policy directions intended to further the Charter objectives. *Blueprints* also fall in this category: the term has been used four times, for the three Community Blueprints, and the 2007 Cebu Declaration on the Blueprint of an ASEAN Charter.

3. *Resolutions* are not normally legal in character, and tend to be used only in the ASEAN Socio-Cultural Community on matters relating to the environment, sustainable development, and children.

4. Within the category of legal instruments, final clauses, particularly entry into force clauses, were varied, and some did not track the standard clauses generally recognized in treaty law. Some notable entry into force clauses we encountered included:

   — signature, with a specified waiting period before entry into force

   — signature, with a 'domestic ratification' or notification requirement

   — ratification within a specified period

   — entry into force on a date specified in the text of the legal instrument

2.2 The Hazy Border between Hard and Soft Law

We found evidence of practice that breaks down the traditional distinction between 'hard law' and 'soft law'.

1. There were notable interactions between legal instruments and 'soft law' instruments, in which 'soft law' instruments appear to be used to drive hard legalization. One significant example is that of *Roadmaps*. These are adopted as political instruments at the outset, but are later given legal quality by wholesale incorporation into a legal instrument.

2. 'Soft law' instruments may carry high political significance, as explained above, and may have more *institutional* significance than some legal instruments, in that they add to the institutionalization of ASEAN by establishing new ASEAN organs or standing monitoring bodies.

3. About 40 per cent of the legal instruments we identified had the formal hallmarks of legality, but rated low on the obligation dimension of the legalization index. In other words, although these instruments formally classified as 'hard law', there was little in substance to separate them from political instruments. Despite this, some of these

instruments were made subject to third party dispute settlement, even though the obligations they set out were broad in nature. One example is the 1982 Ministerial Understanding on Plant Quarantine Ring, which was made a 'covered agreement' in the 1996 Protocol on Dispute Settlement Mechanism. We also noted that ASEAN Member States undertook more detailed commitments in certain types of political instruments, such as *blueprints*, *master plans*, *action programmes* and *roadmaps*.

2.3 *Problems and Recommendations*

ASEAN law is not easy to find. A significant number of instruments could not be located. In other cases, it was not clear whether the text available on the ASEAN website was the authoritative version of the instrument. Many legal instruments have been amended or superseded by later instruments. There was no straightforward way to tell if a given instrument had been amended or superseded, and if amended, what the extent of the amendment was. It was also often difficult to tell if a given instrument was in force, if a specific ASEAN Member State had ratified the instrument, or—as in the case of some Mutual Recognition Arrangements that permit this—which ASEAN Member States had opted to defer domestic implementation.

Such a situation is clearly not satisfactory. From a general standpoint, it seems hard to believe in the rule of law if the rules are not made clear (and easily available) to all. From a functional standpoint, to achieve an economic community, legal certainty and predictability are indispensable. Otherwise, how can firms and other economic actors be expected to believe in the existence of a regional market, and to adapt their behaviour consequently?

Based on these findings, ASEAN Member States may wish to consider the following recommendations:

1. *Adopt a consistent, streamlined typology for instruments intended to create rights and obligations under international law*. Based on existing practice, we suggest that this typology of *legal* instruments should be limited to *agreements*, *framework agreements*, *arrangements*, *conventions*, *protocols* and *treaties*. Apart from *framework agreements*, which tend to be deployed in a 'nested' fashion (a framework agreement with more detailed protocols) in the ASEAN Economic Community, it appeared that there was not much difference in substance between instruments that were called *agreements*, *conventions* and *treaties.* ASEAN Member States may therefore wish to use just one term, such as *agreements*. ASEAN Member States will have to decide how they wish to use *memoranda of understanding* and *ministerial understandings*, as the existing practice with regard to these types of instrument is not consistent.

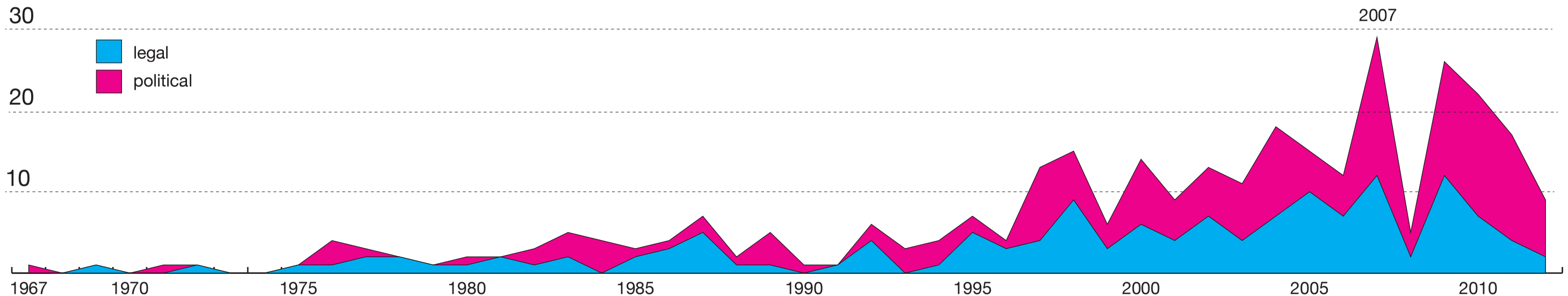
2. *Within the category of political instruments, adopt a streamlined typology that distinguishes between instruments that set out a significant macro-level integration agenda, and instruments that express commitment to broader principles.* Based on existing practice, we suggest that the latter category should be limited to *action programmes*, *concords*, *master plans* and *roadmaps*. The former category should be limited to *declarations*.

3. *Establish clear, standardized ASEAN treaty practice so that the ASEAN Secretariat can perform its assigned depositary function effectively.* We suggest rationalizing the final clauses used in ASEAN legal instruments, particularly the clauses providing for entry into force, so that they track the standard treaty law modalities for entry into force. Save for the very limited number of legal instruments concluded before the ASEAN Secretariat was established in 1976, all of the legal instruments we encountered designate the ASEAN Secretary-General as treaty depositary. This is a critical function if these legal instruments are to be accessible, and in some legal instruments, the ASEAN Secretariat is tasked with additional duties as to monitoring and compliance. One example is the 2010 Memorandum of Understanding on the Association of Southeast Asian Nations' Air Services Engagement with Dialogue Partners, which relies on the Secretariat to 'maintain an accurate and updated register' of ASEAN Member State ratifications of ASEAN air services instruments for the remedy in its paragraph 4 to work. For the pre-1976 legal instruments, ASEAN Member States may wish to consider transferring the depositary functions for these from Singapore, Indonesia and Malaysia to the ASEAN Secretariat, if this has not already been done.

   Implementing this recommendation will, of course, require that sufficient resources be allocated to the ASEAN Secretariat.

The Instruments of Governance of ASEAN

This stacked area graph shows the number of internal legal instruments in proportion to the number of internal political instruments concluded annually from 1967 to 2012.



Legalization in the Association of Southeast Asian Nations

This line graph presents a dynamic picture of legalization in the Association of Southeast Asian Nations between 1967 and 2012.