

ASEAN Legal Service

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ASEAN was conceived in 1967 as a confidence-building measure to foster trust among the five original members of the association. The organisation has gradually expanded to cover all the states of Southeast Asia (with the exception of Timor Leste) and now extends to cooperation in practically all areas of the economy, foreign policy and government. The goal of ASEAN is to create a community by 2015, comprising three pillars: the ASEAN Economic Community (AEC), the ASEAN Political-Security Community (APSC) and the ASEAN Socio-Cultural Community (ASCC). The primary framework document for this purpose is the ASEAN Charter. It is clearly stated in the Charter, and repeatedly re-emphasised subsequently, that the ASEAN Community will be rules-based and underpinned by the rule of law.

It is impossible to create a rules-based ASEAN Community without some means of drafting, interpreting and enforcing rules. The major shortcoming of ASEAN as an organisation is the inability to follow through on the many agreements, declarations, road-maps and instruments that have proliferated over the years. The proliferation of such ASEAN documents creates a need for a centralized authority to ensure coherence and legal efficacy. An ASEAN Legal Service is necessary to ensure that the vital legal infrastructure of the ASEAN Community is properly developed. Without such a centralized service, the legal development of the ASEAN Community will continue to be ad hoc. There will be an increasing risk of incoherence, inconsistencies and even outright contradictions in the noodle-bowl of obligations entered into by ASEAN Member States in the creation of the ASEAN Community.

Functions of the ASEAN Legal Service

An ASEAN Legal Service would have a significant role to play in the development of ASEAN as a rules-based, law-abiding organisation, in the following areas:

- (a) Drafting of agreements, rules and regulations both for internal as well as external purposes;
- (b) Providing the institutional legal memory of ASEAN by maintaining records, updating agreements and other legal instruments and ensuring that inconsistencies are resolved;
- (c) 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;

- (d) Assisting the Secretary-General in monitoring the implementation of and compliance with ASEAN agreements;
- (e) Providing legal representation for ASEAN as an entity;
- (f) Assisting the ASEAN Summit, the Secretary-General and other dispute resolution bodies in the settlement of disputes.

(a) Drafting of agreements

ASEAN aims to be a rules-based organisation. Such an organisation needs clear rules. There are four aspects to this: firstly, the internal agreements that bind ASEAN member states and create the infrastructure of the organisation; secondly, the agreements between ASEAN and outside parties; thirdly, the internal rules and regulations necessary to realise the ASEAN single market and production base; and fourthly, the harmonization of the domestic laws of ASEAN member states. A rules-based organisation whose working language is English must have a core of competent legal draughtsmen. Apart from the issue of linguistic and legal competence, there is also the matter of political neutrality. An ASEAN Legal Service will be able to provide dedicated and continuous attention to the drafting of agreements. Experience in ASEAN affairs is essential for good drafting. This experience can only be accumulated if there is a proper legal service.

(b) Institutional memory and avoidance of inconsistencies

The ASEAN Summit, ASEAN Coordinating Committee, Community Councils, Sectoral Ministerial Bodies and other organs of ASEAN will issue an increasing volume of documents as the ASEAN Community develops. The necessary expertise for drafting these documents and ensuring consistency and coherence can only be provided by a proper professional legal service that deals exclusively with ASEAN matters. The Legal Service should be responsible for monitoring the many agreements that emanate from the various meetings. The task of keeping track of these agreements and updating them as they are amended is also crucial. A rules-based organisation can only thrive if the rules can be found. There has to be an authoritative source for ASEAN agreements, rules and regulations.

(c) Giving legal advice

If ASEAN is to be taken seriously as a rules-based organisation, there must be an independent legal service uninfluenced by national agendas to render impartial legal advice to the ASEAN Summit and other organs of ASEAN. This is particularly the case where the ASEAN Economic Community is concerned, since economic integration requires the existence of a coherent and enforceable set of rules and regulations. Bodies like the ASEAN Economic Ministers' Meeting (AEM), the ASEAN Investment Area Council (AIA Council) and the Senior Economic Officials' Meeting (SEOM) are the

key to the creation of a viable single market and production base. These bodies need to be able to have access to impartial and credible legal advice in the discharge of their functions. The Secretary-General also requires strong legal back-up to discharge the many tasks that he is entrusted with. The ASEAN Secretariat will also need legal advice in order to function efficiently, as does the Committee of Permanent Representatives. The legal services of the member states cannot fulfill the need for legal advice even if officers could be assigned on a long-term basis. There will always be the suspicion of national bias, whether conscious or unconscious. An independent ASEAN service is required if legal advice is to be credible and authoritative.

(d) Monitoring implementation of and compliance with ASEAN agreements

One major criticism of ASEAN is that implementation of agreements has not been consistent or effective. The Secretary-General is now entrusted with the function of monitoring compliance by member states with the obligations they have undertaken. He requires the assistance of legally-trained officers in this task. This monitoring function is complementary to the task of maintaining the Table of Ratifications.

(e) Legal Representation

ASEAN now has a legal personality separate from the member states. The intent of the Charter is to create a juridical person that can own property and enforce rights independently of the member states. Inevitably, ASEAN will become embroiled in legal disputes, whether involving commercial contracts, tenancies or employment matters. Representing ASEAN before legal tribunals would be a natural role for an ASEAN Legal Service.

(f) Settlement of Disputes

The dispute settlement mechanisms established by the ASEAN Charter and other ASEAN instruments envisage a key role to be played by the ASEAN Summit, the Secretary-General, the Chairman of ASEAN and the ASEAN Coordinating Council. In discharging the vital function of ensuring the peaceful and legally-binding settlement of disputes, especially in the economic sphere, it is essential that these organs be supported by competent and experienced legal officers. Only a proper Legal Service can develop the necessary experience and expertise in ASEAN dispute settlement. Crucially, only an ASEAN Legal Service can be counted on to be impartial and politically neutral in settling disputes amongst member states. An effective means of settling disputes is absolutely vital to the success of the ASEAN Community, particularly the ASEAN Economic Community.

Structure of the Legal Service

The Legal Service should have a very senior member of the ASEAN Secretariat as its Head (viz, the Legal Counsel of ASEAN). The Legal Counsel of ASEAN should be openly recruited (ie, not politically appointed by the member states) and have the rank of Deputy Secretary General in order to ensure that he has sufficient status and seniority to effectively fulfil his crucial functions. The Legal Counsel should normally serve for two three-year terms; a shorter term of office will not allow the Legal Counsel adequate time to do the job, nor will it be attractive to candidates with the desired skills and experience.

There should be three deputies with the rank of Director. Their appointment should be based exclusively on merit and not to fill a national quota. Each should be responsible for one ASEAN Community Council, supported by a team of competent and able lawyers. Given the complex legal work to be accomplished in an international community dealing with delicate matters, these lawyers should constitute an elite. They should be openly recruited based on experience and competence.

While there will be a strong preference for ASEAN nationals to fill these positions, it might be necessary to admit a few non-ASEAN nationals as legal officers. A professional Legal Service needs the best people it can get; it may not be possible to find the necessary talent within ASEAN for some time to come. It should be made absolutely clear that it would not be possible to give any guarantee of an equal representation of ASEAN nationalities in the Legal Service. Admission of candidates of unsatisfactory quality merely to satisfy a national quota would be a recipe for disaster. It would be fatal for the *esprit de corps* of the Legal Service if incompetent persons were recruited purely on the grounds of their nationality.

In addition, there may be a list of consultants who would be able to work when needed, either part-time or for ad hoc projects. The list should be drawn from law firms, and/or from universities or from former lawyers in an ASEAN Member State or in another intergovernmental international organisation.

Recruitment should be by open application rather than nomination by member states. An independent panel comprising judges or senior lawyers of any nationality should be constituted to select suitable candidates. The level of salary and perks must be competitive with that of competent international lawyers. It will not be easy to attract candidates of sufficient calibre if salaries are pegged at an unrealistically low level.

It is of vital importance that the Legal Counsel and members of the Legal Service be insulated from political pressure from member states. The value of having an independent Legal Service is precisely that: it is independent of the member states and therefore can be counted on to act

impartially. Moreover, deficiencies in pay and terms of service compared to the private sector can be compensated for if the members of the Legal Service feel that they are performing a valuable task, carrying with it professional satisfaction. This can only be fostered by ensuring that the Service is not buffeted by political winds.