

ASEAN Law and Policy

Seminar 3

This lesson focuses on:

(1) the Rule of Law in ASEAN

(2) the Making of Hard and Soft Law through ASEAN Instruments

(3) how ASEAN law-making can be refined

(1) Brief discussion on the definitions and components of the Rule of Law and how ASEAN measures up

- **Chesterman's** analysis of the international rule of law
- **Fuller's** 8 principles on the rule of law (generally domestic law):
 - (P1) the rules must be expressed in general terms;
 - (P2) the rules must be publicly promulgated;
 - (P3) the rules must be prospective in effect;
 - (P4) the rules must be expressed in understandable terms;
 - (P5) the rules must be consistent with one another;
 - (P6) the rules must not require conduct beyond the powers of the affected parties;
 - (P7) the rules must not be changed so frequently that the subject cannot rely on them; and
 - (P8) the rules must be administered in a manner consistent with their wording.

(2) Issues in ASEAN Law and how it is made

- Hard law, soft law, rules of an indeterminate nature, purely political documents
- Nomenclature vs. text, language, and content
- Sources and influences in ASEAN law-making
- Status of ASEAN instruments pre- and post- 2007 (Does the Charter codify everything?)
- Constituent instruments and their corresponding action plans
- Instrumental differentiation according to community/sectoral area. Why?
- External agreements (to be studied in later seminar)

(3) Improving law-making in ASEAN

- Best treaty-making practices (Realistic targets, timelines, classification, post-accession procedures, coming into effect, etc.)

Reading list:

Simon Chesterman, *An International Rule of Law*, 56(2) *AJCL* (2008) 331. Only pp. 340-2 and 355-61.

Kenneth Abbott and Duncan Snidal, *Hard and Soft Law in International Governance*, 54(3) *IO* (2000) 421-56.

Christine Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38(4) *ICLQ* (1989) 850-66, esp. 850-3, 855-6, 859-62.

Anthony Aust, *Modern Treaty Law and Practice* (3rd ed.), skim Chs. 2 and 9, but pay attention to pp.16-29, 162-3, 168-9.

Relevant ASEAN instruments and documents (from CIL treaties database or www.asean.org):

Bangkok Declaration (1967)

ASEAN Charter (2007)

Roadmap (2009) comprising Political-Security, Economic, and Socio-Cultural Community Blueprints

IAI Framework (2009)

ASEAN 2025: Forging Ahead Together (2015) comprising multiple documents

(1) Rule of Law

1. ASEAN aspires to be a rules-based community, thereby instituting the rule of law throughout its operations. What is the rule of law as you understand it? What makes a good law and legal system?
2. To what extent is there a rule of law in ASEAN? To what extent are ASEAN laws good laws? Has the degree of the regional rule of law changed through the years?
3. There are many conceptions of the rule of law (Hart, Raz, Dworkin, Fuller, etc.) In particular, Fuller and Chesterman lay out some components of legality. What are they and how are they important to making good laws and ensuring that the rule of law is good?
4. With respect to the Bangkok Declaration (1967) and the ASEAN Charter (2007), how would ASEAN law and the ASEAN rule of law measure up against these criteria? Please briefly explain each in turn.

(2) Hard and Soft Law

5. Read Abbott and Snidal (2000) closely, esp. 421-3. How do these 2 political scientists view international actors in their use of law in the world order? What is the difference between hard and soft law?
6. How do international actors decide when and why to use hard law and soft law? I.e. (1) What are the reasons for using hard law? (2) What are the reasons for using soft law?
7. Now read Chinkin (1989). How does she differentiate hard and soft law? What does Chinkin say about the variety and spectrum in the respective realms of hard and soft law? What is the likelihood of soft law transforming into hard law in the future?
8. According to Chinkin, what are the reasons for states preferring to use soft law?
9. Are there similarities between Chinkin's views and Abbott and Snidal's views?

(3) Improving ASEAN law-making

10. Aust systematically analyses the definition of a treaty, elaborating on its important features and components as well as its ambiguous and potentially contentious areas. What are these features and what are the tricky issues within these features?
11. What is the usual nomenclature for treaty names? What are the less usual ones? What kind of treaty-type terminology is there? How is it used to create legal obligations?
12. What does 'a treaty entering into force' mean? When can a treaty enter into force? What are the modalities by which a treaty can enter into force?
13. Based on Aust's analysis of treaties, how can ASEAN law-making be improved?

Note: The exercise below will be done together in the classroom. Please just read through the exercise to familiarise yourself with the issues.

Time for some legal fun... putting the concepts laid out above into practice ☺ We shall pretend we are lawyers at the Legal Services Division of the ASEAN Secretariat OR at the Treaties and International Law Department in the ASEAN member states.

1. Take a look at the PDF 'Table of ASEAN Treaties/Agreements and Ratification (October 2012)' [Table (Oct 2012)] and mark out what you think are hard laws, soft laws, and 'hybrid' laws or those which have an indeterminate nature. You should come prepared to justify your decisions.

[Each student will be assigned about 20 treaties to GLANCE over. You will not be drafting a legal brief but just be giving a quick preliminary legal opinion.]

2. Compare the pre- and post-2007 ASEAN instruments listed in the Table (Oct 2012). The ASEAN Charter is supposed to be an overarching legal framework for ASEAN instruments. Does the Charter then ostensibly purport to codify all the ASEAN norms, principles, and instruments into 'treaty law'?
3. What are the weaknesses of ASEAN law-making? How do you propose to improve the standards?
4. Take a look at the ASEAN Matrix <http://agreement.asean.org/> – how does it differ from the Table (Oct 2012)?
5. Read the ASEAN Matrix explanatory note <http://agreement.asean.org/explanatory/show.html>. Why do you think that this disclaimer/caveat has been inserted?
6. Moving on to more substantive aspects of law-making in ASEAN, scan (cursorily) the ASEAN Matrix and Table (Oct 2012), is there a differentiation in how instruments are made across the political-security, economic, and socio-cultural spheres of ASEAN action? Why do you think this is so?
7. Review some of the constituent instruments of ASEAN as listed below:
 - 1997 ASEAN Vision 2020 + 1998 Hanoi Plan of Action
 - 2003 Bali Concord II + 2004 Vientiane Action Programme
 - 2007 ASEAN Charter + Political-Security, Economic, and Socio-Cultural Community Blueprints + 2009 IAI Framework

Do you see a gradual strengthening of the rule of law in ASEAN? Has there been a difference to how law has been created over the years and according to community or sectoral areas? Are the Blueprints and Framework hard law or soft law?
