

ASEAN Law and Policy

Seminars 5 and 6

Securing Compliance with ASEAN Law via Dispute Settlement and Monitoring Mechanisms

1. Compliance [Week 5]
 - Why do states obey international law? Why would ASEAN states obey regional law?
 - ASEAN's dilemma – ensuring compliance for both hard and soft law
 - ASEAN's ideal solution – dispute settlement and monitoring mechanisms
2. Dispute settlement mechanisms [Week 5]
 - Functions of dispute settlement mechanisms – can they truly compel compliance?
 - Specific provision in instrument or general provision in ASEAN Charter
 - Activation of dispute settlement procedures and processes towards resolution (state-to-state modalities – what about private parties/individuals?)
 - How and why dispute settlement modalities tend to vary according to the Community pillar (E.g. security, economic, socio- cultural matters)
 - Effectiveness and Improvements
3. ASEAN monitoring mechanisms [Week 6]
 - Specific provision in instrument or general provision in ASEAN Charter
 - Monitoring procedures and processes, including self-monitoring (e.g. AEC Scorecard)
 - Hierarchy of powers among those who have oversight
 - Effectiveness and Improvements

Reading list:

[Week 5]

Harold Hong-ju Koh, Why Do Nations Obey International Law? 106 Yale Law Journal (1997) 2599-659. ONLY 2603-4 and 2635-58.

Robert Beckman et al., Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments (CUP, Feb 2016), Chs. 1 (ONLY 24-57).

[Week 6]

Robert Beckman et al., Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments (CUP, Feb 2016), Ch. 2.

Robert Beckman et al., Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments (CUP, Feb 2016) Ch. 3 (ONLY 101-116).

ASEAN ITL Policy Recommendations (2015), Policy Areas 1, 2, and 3 → find in 'ASEAN Instruments' folder

Towards AEC 2025: Monitoring ASEAN Economic Integration (2017) at

<http://asean.org/storage/2012/05/Towards-AEC-2025-Monitoring-ASEAN-Economic-Integration.pdf>, pp. 6—15.

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

Treaty of Amity and Cooperation (1976)

ASEAN Protocol on Enhanced Dispute Settlement Mechanism (2004)

ASEAN Charter (2007)

Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (2010)
AEC Monitoring Unit <http://aecmonitoring.asean.org/>

Further reading:

Simon Chesterman, From Community to Compliance? The Evolution of Monitoring Obligations in ASEAN (CUP, 2015).

Eric Posner, Do States Have a Moral Obligation to Obey International Law? 55(5) Stanford Law Review (2003) 1901-19.

Andrew Guzman, A Compliance-Based Theory of International Law, 90(6) California Law Review (2002) 1823-87.

Joel Trachtman, International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law, 11(1) Chicago Journal of International Law (2010)

Kal Raustiala, Compliance and Effectiveness in International Regulatory Cooperation, 32 Case Western Reserve Journal of International Law (2000) 387-440.

Jonas Tallberg, Paths to Compliance: Enforcement, Management, and the European Union, 56(3) IO (2002) 609.

Jean-Claude Piris and Walter Woon, Towards a rules-based community: an ASEAN legal service (CUP, 2015), 66-106.

Christopher Marcoux and Johannes Urpelainen, Non-compliance by design: Moribund hard law in international institutions, 8 Review of International Organisations (2013) 163-91.

George W. Downs and Michael A. Jones, Reputation, Compliance, and International Law, 31(1) Journal of Legal Studies (2002) 95-114.

Compliance [Week 5]

1. Compliance with international rules (law) is a serious issue plaguing the realm of international law and international relations for years. What do the following jurists (and at some point national legal advisers) opine as to why states obey international law? Please read Koh (1997) and (1) identify the distinguishing features of each theory, (2) differentiate between the theories, and (3) trace how each theory arises from the era, outlook, and experience each jurist holds. (This will be a long set of answers that holds the key to understanding the rest of the seminar, so be patient and work everything out.)
 - Chayes and Chayes
 - Franck
 - Koh
2. With the knowledge you have from #1 and the understanding you have of ASEAN and the rule of law and institutions, please identify all the reasons you think why ASEAN states, in an ideal world, would obey regional laws and qualify which theories/theorists each reason has been derived from.
3. Turning now to the factual situation – does ASEAN have a problem with the rule of law, i.e. the obedience to its laws? Thinking more broadly and conceptually, including what we have covered in the seminars previously, what could explain ASEAN's instances of non-compliance?

Dispute Settlement Mechanisms [Week 5]

4. Refer to Beckman, Bernard, Phan, Tan, Yusran (2016): Ch.1, esp. 31-57 to answer the following questions. (Pretty easy relative to the above, don't worry!)
 - What does the Eminent Persons Group (EPG) say about ASEAN's non-compliance?
 - Why did the EPG – and ASEAN more broadly – come to this realisation?
 - What are the consequences to ASEAN if it does not comply with its laws?
 - What was the EPG's dual-pronged solution to ASEAN's non-compliance? (There are 2 mechanisms.)

5. Please apply the theories and concepts in the above questions to explain how they could improve the rule of law in ASEAN.
 - In particular, you should identify which theory/theories would provide the best solution to ASEAN's compliance problem and which you think would not work.
 - Are you convinced by the efficacy of the above theories if applied to ASEAN? Why or why not?
 - What combination of tools and theories do you think would improve ASEAN's compliance? Do dispute settlement mechanisms work well? Do monitoring mechanisms work? Can these two mechanisms work in ASEAN? What do you think of the overall ASEAN legal framework and the part it has to play in promoting regional compliance? What about non-legal factors like capacity, financial resources, human resources, and civil institutions?

Dispute Settlement Mechanisms [Week 6]

6. Read Beckman, Bernard, Phan, Tan, Yusran (2016): Ch.2. The ASEAN Charter heeded the EPG recommendations very closely and established an all-encompassing dispute settlement system in ASEAN. Please identify the individual dispute settlement mechanisms (DSMs) in ASEAN from the time of its establishment and the specific areas/issues these DSMs pertain to.
7. Explain the uses and procedures of the DSM in the Treaty of Amity and Cooperation. What disputes can the TAC be used for? Can the TAC be used for economic disputes?
8. Why was there the ascendancy of the the ASEAN Economic DSMs? When did this occur? Please explain the economic DSM's evolution and the how the economic DSM is activated and used.
9. What was the ASEAN Charter's contribution to the regional DSM framework? What are the laws that pertain to this mechanism? Please explain how this mechanism works.
10. How successful have the ASEAN DSMs been so far? How have they been used? What do you believe their potential to be?

Monitoring Mechanisms [Week 6]

11. Turning now to ASEAN monitoring mechanisms in Beckman, Bernard, Phan, Tan, Yusran (2016): Ch.3 (ONLY 101-116). What has ASEAN done about its monitoring duties over the years? In which organ of ASEAN is monitoring powers invested? Why is it so difficult to get real action from this office? Are ASEAN member states deliberately undermining the office which will help them achieve their Charter goals? Why is this so?

12. (Read pp. 105-112) The presence of ASEAN monitoring mechanisms have ebbed and resurged through the years.
- One such period where monitoring mechanisms were overlooked in ASEAN's development was 1976-1992 – what were some examples of this 'forgetfulness'?
 - Where monitoring powers were established, which organs or agencies were assigned and wielded such power?
 - What were the discrepancies between the 'rightful' powers of the Secretary-General as compared to the other bodies?
 - How did the monitoring functions of the Secretary-General and Secretariat fare in the 1992-2006 period?
13. (Read pp. 112-16) Besides the Secretary-General and Secretariat, what other bodies in ASEAN were assigned monitoring tasks? In which area of ASEAN work did monitoring take place more often?
14. [Read the Monitoring Economic Integration (2017)] Since 2016, ASEAN has replaced the ASEAN Economic Scorecard with the new Monitoring and Evaluation Mechanism. Explain how this mechanism works.
Note: This mechanism will be revisited in the AEC Seminars.
15. [Read the policy recommendations] How can compliance be improved?
16. Which one do you believe has greater potential to effectively enforce ASEAN compliance, monitoring mechanisms or dispute settlement mechanisms? Why? What would need to be put in place to improve each of these mechanisms to achieve this?
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