



Soft and Hard Law Usage in Asia-Pacific Regional Organizations



Quiz



AFRICAN UNION



European Union





- Security and economics
- “Stronger together”
- Internal and External Pressures
- Geopolitics
- Very apparent how these interplay:
 - Law and Institutions
 - State Interests
 - Power

Classification	Legal and Institutional		Political and Diplomatic				
Organization	Association of Southeast Asian Nations (ASEAN)	Eurasian Economic Union (EAEU)	Shanghai Cooperation Organization (SCO)	South Asian Association for Regional Cooperation (SAARC)	Pacific Islands Forum (PIF)	Melanesian Spearhead Group (MSG)	Asia-Pacific Economic Cooperation (APEC)
Members	Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam	Belarus, Kazakhstan, Russia, Armenia, and the Kyrgyz Republic	People’s Republic of China, Kazakhstan, the Kyrgyz Republic, Russia, Tajikistan, and Uzbekistan	Afghanistan, Bangladesh, Bhutan, India, Nepal, the Maldives, Pakistan, and Sri Lanka	Australia, the Cook Islands, the Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu	Fiji, Papua New Guinea, Solomon Islands, Vanuatu and the Front de Libération Nationale Kanak et Socialiste (FLNKS)	Australia, Brunei Darussalam, Canada, Chile, China, Chinese Taipei, Hong Kong, SAR, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, Thailand, the United States, and Vietnam
Constituent Instrument(s)	Declaration of the Association of Southeast Asian Nations (1967) [Bangkok Declaration] Charter of the Association of Southeast Asian Nations (2007)	Treaty of the Eurasian Economic Union (2014)	Charter of the Shanghai Cooperation Organization (2001)	Charter of the South Asian Association for Regional Cooperation (1985)	Agreement Establishing the Pacific Islands Forum Secretariat (2000) Agreement Establishing the Pacific Islands Forum (2005)	Agreed Principles of Co-operation among Independent States of Melanesia (1988) Agreement Establishing the Melanesian Spearhead Group (2007)	N.a. (Founded as an informal Ministerial-level dialogue group) First political instrument: APEC Leaders’ Bogor Declaration (1994)
Objectives	Political-security, economic, socio-cultural cooperation and integration	Economic integration	Generally political and security cooperation; scope for broader cooperation	Economic and security cooperation	Economic and security cooperation	Economic development priorities	Economic cooperation
Key features	Intergovernmental structure, consensus decision-making, governing bodies comprising ministers of member states, possesses dispute settlement mechanisms	Customs union, intergovernmental structure, consensus decision-making, governing bodies comprising ministers of member states, possesses dispute settlement mechanisms	Intergovernmental structure, consensus decision-making, governing bodies comprising ministers of member states, specific counterterrorism body	Intergovernmental structure, consensus decision-making, governing bodies comprising ministers of member states	Intergovernmental structure, consensus decision-making, governing bodies comprising ministers of member states	Intergovernmental structure, consensus decision-making, governing bodies comprising ministers of member states	Intergovernmental dialogue group, consensus decision-making

Soft Law and Intergovernmental Modality: How does regional cooperation work then?

- Pacific Orgs.
- US Foreign Relations. e.g. Indo-Pacific Economic Framework
- Digital and Tech legal frameworks
- Environmental Law
- International and Transnational Law
- Even sensitive areas of EU cooperation (especially since the Eurocrisis)

ASEAN – Political to Legal Creature

Pre-Charter vs. Post-Charter

- **Operational Modality** – Diplomacy and Informality vs. Rule of Law and Rule of Institutions (predominantly **soft law** usage)
- **Rationale** – state and collective interests, political context, geopolitical environment, internal and external pressures, etc.
- Principles and purposes – **security and economic devt.**
- Norms – ASEAN Way
- “Stronger together” – hence the evolving additions to ASEAN the regional organization
- **New Environment of RBIO tensions**

* **Law, Institutions, State Interests, Power, Geopolitics, Internal and External Pressures**

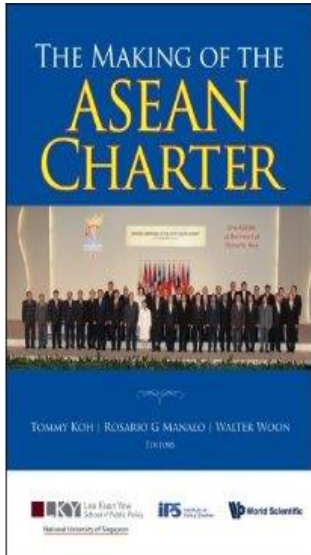
ASEAN's Rules-based Order: The Rule of Law and Rule of Institutions

- ASEAN's Post-2007 Order of Regional Laws and Institutions
- Characteristics
 1. Constituent Treaty
 2. **Intergovernmental** Character and Hierarchy
 3. System of primary and secondary laws to set economic, security, and socio-cultural agendas (predominantly **soft law** usage)
 4. Unique modalities for Compliance (Monitoring + Dispute Settlement)

RATIONALE: Report of the Eminent Persons Group (2007)

- Rule of law and rule of institutions
- Compliance – adherence to obligations – therefore dispute settlement and monitoring mechanisms
- Legal personality
- Decision-making, ASEAN Minus X (to a lesser extent – 2 Plus X)
- Human rights and democracy
- China, India, external shocks
- ASEAN Centrality
- International standing

In sum: reputational, procedural, and substantive changes were advocated



(1) Constituent Treaty ASEAN Charter (2007)

<http://asean.org/asean/asean-charter/>

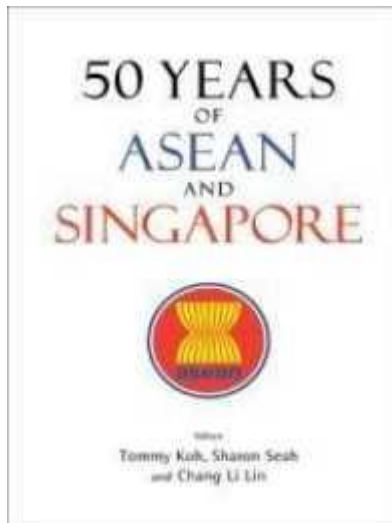
The ASEAN Charter entered into force on 15 December 2008.
The ASEAN Community was established on 31 December 2015.

In effect, the **ASEAN Charter has become a legally-binding agreement** among the 10 ASEAN Member States. It is **registered with the Secretariat of the United Nations**, pursuant to Article 102, Paragraph 1 of the Charter of the United Nations.

The ASEAN Charter serves as a firm foundation in achieving the ASEAN Community by providing **a legal status and institutional framework for ASEAN**.

It also **codifies ASEAN norms, rules and values [cf. A.2(1) Charter]**; sets clear targets for ASEAN; and presents accountability and compliance.

With the entry into force of the ASEAN Charter, ASEAN will henceforth operate under a **new legal framework** and establish a number of **new organs** to boost its **community-building** process.



Enunciating the New 'Legal ASEAN' ASEAN Charter (2007)

- Preamble
- Purposes and principles (Arts. 1-2)
 - *inter alia*, encapsulates the ASEAN Way
 - Human rights and democracy
 - Rule of law
 - Respect for international law and its various regimes
- Legal personality (Art. 3)
- Rights and obligations (Art. 5)

- Organs (Ch. IV: Arts. 7-15)
- Decision-making (Ch. VII: Arts. 20-1)
- Dispute Settlement (Ch. VIII: Arts. 22-8)

- Details for the **3 substantive pillars** were enunciated in the separate Blueprints...

UNITED by a common desire and collective will to live in a region of lasting peace, security and stability, sustained economic growth, shared prosperity and social progress, and to promote our vital interests, ideals and aspirations;

RESPECTING the fundamental importance of amity and cooperation, and the principles of sovereignty, equality, territorial integrity, non-interference, consensus and unity in diversity;

ADHERING to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms;

RESOLVED to ensure sustainable development for the benefit of present and future generations and to place the well-being, livelihood and welfare of the peoples at the centre of the ASEAN community building process;

CONVINCED of the need to strengthen existing bonds of regional solidarity to realise an ASEAN Community that is politically cohesive, economically integrated and socially responsible in order to effectively respond to current and future challenges and opportunities;

COMMITTED to intensifying community building through enhanced regional cooperation and integration, in particular by establishing an ASEAN Community comprising the ASEAN Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community, as provided for in the Bali Declaration of ASEAN Concord II;

HEREBY DECIDE to establish, through this Charter, the legal and institutional framework for ASEAN;

CHAPTER I. PURPOSES AND PRINCIPLES

ARTICLE 1. PURPOSES

The Purposes of ASEAN are:

1. To maintain and enhance **peace, security** and stability and further strengthen peace-oriented values in the region;
2. To enhance regional resilience by promoting **greater political, security, economic and socio-cultural cooperation**;
3. To preserve Southeast Asia as a Nuclear Weapon-Free Zone and free of all other weapons of mass destruction;
4. To ensure that the peoples and Member States of ASEAN live in peace with the world at large in a just, democratic and harmonious environment;
5. To create a **single market and production base** which is stable, prosperous, **highly competitive and economically integrated** with effective facilitation for **trade and investment** in which there is free flow of goods, services and investment; facilitated movement of businesspersons, professionals, talents and labour; and freer flow of capital;
6. To **alleviate poverty and narrow the development gap** within ASEAN through mutual assistance and cooperation;
7. 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;
8. To respond effectively, in accordance with the principle of comprehensive security, to all forms of threats, transnational crimes and transboundary challenges;
9. To promote **sustainable development** so as to ensure the protection of the region's **environment**, the sustainability of its natural resources, the preservation of its cultural heritage and the high quality of life of its peoples;
- ...
15. To maintain the **centrality** and proactive role of **ASEAN as the primary driving force** in its relations and cooperation with its **external partners** in a regional architecture that is open, transparent and inclusive.

ARTICLE 2. PRINCIPLES

1. In pursuit of the Purposes stated in Article 1, ASEAN and its Member States **reaffirm and adhere to the fundamental principles contained in the declarations, agreements, conventions, concords, treaties and other instruments of ASEAN.**

2. ASEAN and its Member States shall act in accordance with the following Principles:

(a) respect for the independence, **sovereignty, equality, territorial integrity** and national identity of all ASEAN Member States;

...

(c) renunciation of aggression and of the threat or use of force or other actions in any manner inconsistent with international law;

(d) reliance on **peaceful settlement of disputes**;

(e) **non-interference** in the internal affairs of ASEAN Member States;

...

(h) adherence to the **rule of law**, good governance, the principles of democracy and constitutional government;

(i) respect for fundamental freedoms, the promotion and protection of **human rights**, and the promotion of social justice;

(j) upholding the United Nations Charter and **international law**, including international humanitarian law, subscribed to by ASEAN Member States;

(k) abstention from participation in any policy or activity, including the use of its territory, pursued by any ASEAN Member State or non-ASEAN State or any non-State actor, which threatens the sovereignty, territorial integrity or political and economic stability of ASEAN Member States;

...

(m) the **centrality of ASEAN** in external political, economic, social and cultural relations while remaining actively engaged, outward-looking, inclusive and non-discriminatory; and

(n) **adherence to multilateral trade rules and ASEAN's rules-based regimes for effective implementation of economic commitments** and progressive reduction towards elimination of all barriers to regional economic integration, in a market-driven economy.

Intergovernmental Character and Hierarchy

ARTICLE 3. LEGAL PERSONALITY OF ASEAN

ASEAN, as an inter-governmental organisation, is hereby conferred legal personality.

CHAPTER III. MEMBERSHIP

ARTICLE 4. MEMBER STATES

The Member States of ASEAN are Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam.

ARTICLE 5. RIGHTS AND OBLIGATIONS

1. Member States shall have equal rights and obligations under this Charter.
2. Member States shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of membership.
3. In the case of a serious breach of the Charter or noncompliance, the matter shall be referred to Article 20.

(2) Intergovernmental Hierarchy Instituted

- New political commitment at the top level
- New and enhanced commitments
- New legal framework, legal personality
- New ASEAN bodies
- More roles for ASEAN Foreign Ministers
- New and enhanced role of the Secretary-General of ASEAN + 4 DSGs
- More ASEAN meetings
- Dispute settlement and monitoring mechanisms
- Other new initiatives and changes

ASEAN organs (note the differences in names/structures)

Pre-2007 Charter (non-exhaustive)	Post-2007 Charter
ASEAN Summit (Heads of State/Govt)	ASEAN Summit (Heads of State/Govt)
ASEAN Ministerial Meeting (Foreign Ministers)	ASEAN Coordinating Council
	ASEAN Community Councils
Also: Other Ministerial Meetings such as the ASEAN Economic Ministers Meeting ASEAN Defence Ministers Meeting etc.	ASEAN Sectoral Ministerial Bodies
And Committees	
National Secretariats	National Secretariats
Secretary-General and Secretariat	Secretary-General and Secretariat
	Committee of Permanent Representatives

The Leaders...

ARTICLE 7. ASEAN SUMMIT

1. The ASEAN Summit shall comprise the Heads of State or Government of the Member States.
2. The ASEAN Summit shall:
 - (a) be the supreme policy-making body of ASEAN;
 - (b) deliberate, provide policy guidance and take decisions on key issues pertaining to the realisation of the objectives of ASEAN, important matters of interest to Member States and all issues referred to it by the ASEAN Coordinating Council, the ASEAN Community Councils and ASEAN Sectoral Ministerial Bodies; ...
 - (g) appoint the Secretary-General of ASEAN, with the rank and status of Minister, who will serve with the confidence and at the pleasure of the Heads of State or Government upon the recommendation of the ASEAN Foreign Ministers Meeting.

The lead workhorse...

ARTICLE 8. ASEAN COORDINATING COUNCIL

1. The ASEAN Coordinating Council shall comprise the *ASEAN Foreign Ministers* and meet at least twice a year.
2. The ASEAN Coordinating Council shall:
 - (a) prepare the meetings of the ASEAN Summit;
 - (b) coordinate the implementation of agreements and decisions of the ASEAN Summit;
 - (c) coordinate with the ASEAN Community Councils to enhance policy coherence, efficiency and cooperation among them;
 - (d) coordinate the reports of the ASEAN Community Councils to the ASEAN Summit;
 - (e) consider the annual report of the Secretary-General on the work of ASEAN;
 - (f) consider the report of the Secretary-General on the functions and operations of the ASEAN Secretariat and other relevant bodies;
 - (g) approve the appointment and termination of the Deputy Secretaries-General upon the recommendation of the Secretary-General; and
 - (h) undertake other tasks provided for in this Charter or such other functions as may be assigned by the ASEAN Summit.
3. The ASEAN Coordinating Council shall be supported by the *relevant senior officials*.

ARTICLE 9. ASEAN COMMUNITY COUNCILS

1. The ASEAN Community Councils shall comprise the ASEAN Political-Security Community Council, ASEAN Economic Community Council, and ASEAN Socio-Cultural Community Council.
2. Each ASEAN Community Council shall have under its purview the relevant ASEAN Sectoral Ministerial Bodies...
4. In order to realise the objectives of each of the three pillars of the ASEAN Community, each ASEAN Community Council shall:
 - (a) ensure the implementation of the relevant decisions of the ASEAN Summit;...
6. Each ASEAN Community Council shall be supported by the relevant senior officials.

ARTICLE 10. ASEAN SECTORAL MINISTERIAL BODIES

1. ASEAN Sectoral Ministerial Bodies shall:
 - (a) function in accordance with their respective established mandates;
 - (b) implement the agreements and decisions of the ASEAN Summit under their respective purview;
 - (c) strengthen cooperation in their respective fields in support of ASEAN integration and community building;and
 - (d) submit reports and recommendations to their respective Community Councils.
2. Each ASEAN Sectoral Ministerial Body may have under its purview the relevant senior officials and subsidiary bodies to undertake its functions as contained in Annex 1. *The Annex may be updated by the Secretary-General of ASEAN upon the recommendation of the Committee of Permanent Representatives* without recourse to the provision on Amendments under this Charter.

ARTICLE 13. ASEAN NATIONAL SECRETARIATS

Each ASEAN Member State shall establish an ASEAN National Secretariat which shall:

- (a) serve as the national focal point;
- (b) be the repository of information on all ASEAN matters at the national level;
- (c) coordinate the implementation of ASEAN decisions at the national level;
- (d) coordinate and support the national preparations of ASEAN meetings;
- (e) promote ASEAN identity and awareness at the national level; and (f) contribute to ASEAN community building.

CHAPTER VII. DECISION-MAKING

ARTICLE 20. CONSULTATION AND CONSENSUS

1. As a basic principle, decision-making in ASEAN shall be based on *consultation and consensus*.
2. Where consensus cannot be achieved, the *ASEAN Summit* may decide how a specific decision can be made.
3. Nothing in paragraphs 1 and 2 of this Article shall affect the modes of decision-making as contained in the relevant ASEAN legal instruments.
4. In the case of a serious breach of the Charter or noncompliance, the matter shall be referred to the *ASEAN Summit* for decision.

ARTICLE 21. IMPLEMENTATION AND PROCEDURE

1. Each ASEAN Community Council shall prescribe its own rules of procedure.
2. In the implementation of economic commitments, a formula for flexible participation, including the *ASEAN Minus X formula*, may be applied *where there is a consensus* to do so.

ARTICLE 11. SECRETARY-GENERAL OF ASEAN AND ASEAN SECRETARIAT

1. The Secretary-General of ASEAN shall be *appointed by the ASEAN Summit...* selected from among nationals of the ASEAN Member States... with due consideration to integrity, capability and professional experience, and gender equality.

2. The Secretary-General shall:

(a) carry out the duties and responsibilities of this high office...;

(b) facilitate and monitor progress in the implementation of ASEAN agreements and decisions, and submit an annual report on the work of ASEAN to the ASEAN Summit;

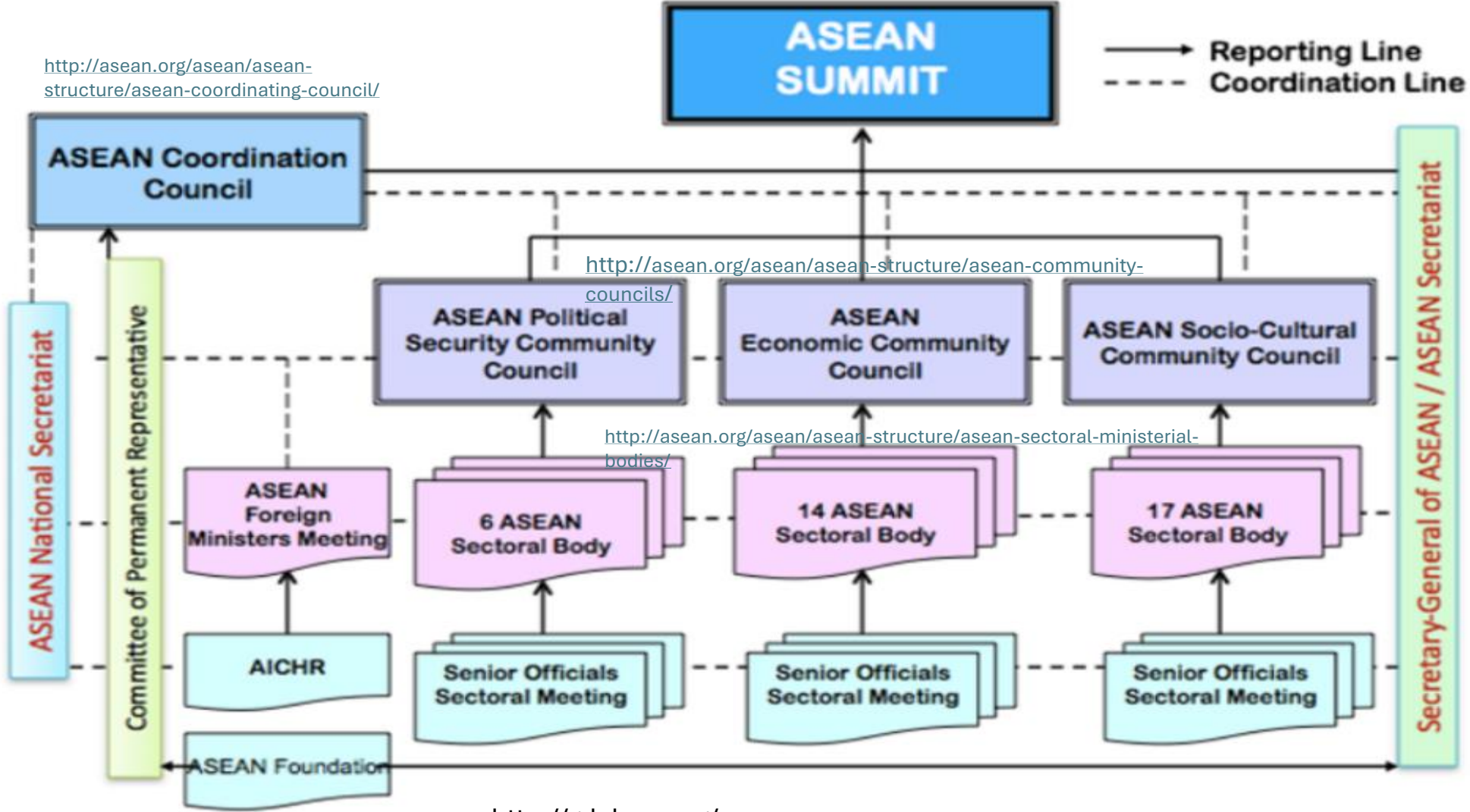
(c) participate in meetings of the ASEAN Summit, the ASEAN Community Councils, the ASEAN Coordinating Council, and ASEAN Sectoral Ministerial Bodies and other relevant ASEAN meetings;

(d) present the views of ASEAN and participate in meetings with external parties in accordance with approved policy guidelines and mandate given to the Secretary-General; and

(e) recommend the *appointment and termination of the Deputy Secretaries-General* to the ASEAN Coordinating Council for approval.

3. The Secretary-General shall also be the *Chief Administrative Officer of ASEAN*.

ASEAN organs: Post-2007 Charter



http://gdalaos.org/wp-content/uploads/2014/07/asean_charter.png

(3) System of primary and secondary laws – economic, security, and socio-cultural agendas (mostly **soft law**)

Primary instrument	Secondary instruments
1997 ASEAN Vision 2020	1998 Hanoi Plan of Action (1999-2004)
2003 Declaration of ASEAN Concord II (Bali Concord II)	2004 Vientiane Action Programme (2004-2010)
ASEAN Charter (2007)	Roadmap for an ASEAN Community (2009-2015): <ul style="list-style-type: none">• ASEAN Political-Security Community Blueprint (2009),• ASEAN Economic Community Blueprint (2007),• ASEAN Socio-Cultural Community Blueprint (2009),• Initiative for ASEAN Integration (IAI) Work Plan 2 (2009-2015)
2012 Bali Declaration on ASEAN Community in a Global Community of Nations (Bali Concord III)	Bali Concord III Plan of Action (2013-2017)
Kuala Lumpur Declaration on ASEAN 2025: Forging Ahead Together (2015)	<ul style="list-style-type: none">• ASEAN Community Vision 2025,• ASEAN Political-Security Community Blueprint 2025,• ASEAN Economic Community Blueprint 2025,• ASEAN Socio-Cultural Community Blueprint 2025 <p>Note: There is an IAI Work Plan 3 (2016-2020) but is not part of the ASEAN 2025 formal package of instruments, whereas the IAI Work Plan 2 was part of the instruments that accompanied the ASEAN Charter.</p>

The ASEAN Integration Monitoring Directorate (AIMD) administers the new ASEAN Economic Community 2025 Monitoring and Evaluation Framework (M&E Framework) in three ways:

- (1) Compliance monitoring** – quantitative and qualitative data are collected from member states and sectoral bodies, implementation action must be evidenced (enacting national legislation or policy is insufficient), and country visits are part of the new protocol;
 - (2) Outcomes monitoring** – practical results and economic indicators arising from integration are measured; and
 - (3) Impact evaluation** – positive and negative integration effects and equitable development in ASEAN societies are examined.
- aecmonitoring.asean.org/m-eframework/

Dispute Settlement in ASEAN (ASEAN Charter, Chapter VIII)

- **ARTICLE 22. GENERAL PRINCIPLES**
- 1. Member States shall endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation.
- 2. ASEAN shall maintain and establish dispute settlement mechanisms in all fields of ASEAN cooperation.
- Connect Chapter VIII to **2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (2010)**

Dispute Settlement in ASEAN

(ASEAN Charter, Chapter VIII)

- 1. Alternative Dispute Resolution:** Dialogue, consultation and negotiation AND/OR Good offices, conciliation or mediation (A.23 ASEAN Charter)
- 2. Instrument-specific Mechanism** [A.24(1) ASEAN Charter] – e.g. exists in certain ASEAN economic agreements
- 3. 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism** [A.24(3) ASEAN Charter] – generally for economic agreements
- 4. Treaty of Amity and Cooperation (1976)** [A.24(2) ASEAN Charter] – generally for Peace and Security disputes, e.g. territorial conflicts or ambiguities
- 5. Dispute Settlement Mechanisms for all other disputes** [A.25 ASEAN Charter] – ‘catch-all’ for all other disputes that do not fall within above ambit
- 6. ASEAN Summit** [A.26 ASEAN Charter] – disputing parties may refer any unresolved dispute to the ASEAN leaders (heads of state or government)



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