

Cambridge University Press

978-1-316-50782-7 - Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments

Robert Beckman, Leonardo Bernard, Hao Duy Phan, Tan Hsien-Li and Ranyta Yusran

Excerpt

[More information](#)

Introduction: overview and research rationale

This is a special year for ASEAN. On August 8, 2007, ASEAN celebrated its 40th anniversary. In November, the ASEAN Summit will be held in Singapore. One of the key deliverables of the Summit is the adoption by the 10 ASEAN Leaders of the ASEAN Charter. It has the potential to transform ASEAN into a stronger, more united and effective organisation ... [I]t will grow a culture of taking our obligations seriously. *In the past, only about 30 percent of ASEAN's agreements were implemented. We will put in place a system of compliance monitoring and, most importantly, a system of compulsory dispute-settlement for non-compliance that will apply to all ASEAN agreements.*¹

Tommy Koh, Walter Woon, Andrew Tan and Chan
Sze Wei

Singapore Team for the drafting of the ASEAN Charter

The adoption of the ASEAN Charter on 20 November 2007 was a momentous turning point in the 40-year history of the organisation. Through this treaty, ASEAN member states inaugurated the maturation of their grouping into a formal

¹ T. Koh, W. Woon, A. Tan and Chan SW, 'Charter Makes ASEAN Stronger, More United and Effective', *Straits Times*, 8 August 2007 (emphasis added), available at <https://csis.org/files/media/csis/pubs/paco733a.pdf>, retrieved on 17 June 2014.

Cambridge University Press

978-1-316-50782-7 - Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments

Robert Beckman, Leonardo Bernard, Hao Duy Phan, Tan Hsien-Li and Ranyta Yusran

Excerpt

[More information](#)

INTRODUCTION

international organisation with legal personality, codified regional norms and set in place a firm legal and institutional framework to bring about the ASEAN Community.² Achieving this lofty ambition for the rule of law and institutions to reign meant that regional commitments required better adherence. To that end, the ASEAN Charter stipulated compliance monitoring and dispute settlement mechanisms to enhance implementation levels of ASEAN instruments.³ These changes, enunciated in the ASEAN Charter, were the culmination of ASEAN's gradual evolution, catalysed into being by the Eminent Persons Group (EPG) tasked with advising on ASEAN's new trajectory and drafted into existence by the High Level Task Force (HLTF).⁴ In particular, the EPG pushed for the institutionalisation of 'effective monitoring, compliance and dispute settlement mechanisms'.⁵ It is significant that adherence to the rule of law and institutions is deemed so crucial to ASEAN's transformation that while the HLTF did not incorporate all the EPG recommendations, those pertaining to compliance monitoring and dispute settlement were.

² 2005 Kuala Lumpur Declaration on the Establishment of the ASEAN Charter (2005 Kuala Lumpur Declaration), 11th ASEAN Summit, Kuala Lumpur, Malaysia, 12 December 2005. See also 2007 Charter of the Association of Southeast Asian Nations (ASEAN Charter), 13th ASEAN Summit, Singapore, 20 November 2007, art. 11, on legal personality of the organisation.

³ ASEAN Charter, Chapter VIII.

⁴ 2007 Report of the Eminent Persons Group on the ASEAN Charter (EPG Report), 12th ASEAN Summit, Cebu, Philippines, 13 January 2007; and 2007 Terms of Reference of the High Level Task Force on the Drafting of the ASEAN Charter, Cebu, Philippines, 13 January 2007.

⁵ EPG Report, paras. 44–5.

Cambridge University Press

978-1-316-50782-7 - Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments

Robert Beckman, Leonardo Bernard, Hao Duy Phan, Tan Hsien-Li and Ranyta Yusran

Excerpt

[More information](#)

INTRODUCTION

As the organisation's reputation and achievement of the ASEAN Community hinges on member states' adherence to commitments, the rationale behind this book is to test whether ASEAN's faith in dispute settlement and monitoring mechanisms as a means to better compliance is justified and the extent to which they can facilitate this process. Hence, our line of inquiry is simple but incisive: first, we investigate why compliance is (and will likely continue to be) weak in ASEAN; and second, we analyse the different mechanisms and modalities commonly used in the international order to improve compliance. In particular, ASEAN's slight preference for dispute settlement mechanisms over monitoring mechanisms as a means to deter non-compliance is interesting. Thus, this book inquires as to whether dispute settlement mechanisms are indeed better than monitoring mechanisms in effecting compliance. It is our further objective to systematically unpack ASEAN's complicated compliance system so that its strengths and weaknesses, as well as its overlaps and lacunae, can be more easily comprehended, systematic improvements can be made and ASEAN member states can be encouraged to use these mechanisms more effectively.

Given the dearth of qualitative and quantitative studies on ASEAN dispute settlement and compliance monitoring, we rely on theories of international law and international relations to help us understand and predict – but not guarantee – ASEAN member states' behaviour. Therefore, instead of sticking to a particular school of thought, we find that ASEAN (as do other subjects in international law and international relations) corresponds to different theories in different eras; there simply is neither a one-size-fits-all immutable

Cambridge University Press

978-1-316-50782-7 - Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments

Robert Beckman, Leonardo Bernard, Hao Duy Phan, Tan Hsien-Li and Ranyta Yusran

Excerpt

[More information](#)

INTRODUCTION

super-theory nor a new one we wish to propound. Sorpong Peou correctly notes that realism and constructivism are the key ‘intellectual competitors’ in Southeast Asian security studies, with Leifer advocating the realist school of thought and Acharya championing constructivism.⁶ Furthermore, despite the proliferation of theories in these fields, some theories have not been analysed with respect to ASEAN – in particular, International Relations rather than International Law theory has been applied to Southeast Asian studies; hence, there is obviously some degree of uncertainty in our contextually transposed evaluation.⁷

Nonetheless, there are certain markers of how ASEAN member states behave in regional situations and with regard to regional law. Strongly influenced by their historical concerns, ASEAN member states are motivated to act in response to the strategic and economic exigencies that are particular to the different developmental phases of ASEAN. Unsurprisingly, ASEAN’s attitude towards dispute settlement, monitoring and compliance changes during these phases. During the ‘peace and security’ phase of 1967 to 1990, ASEAN was established amid great regional instability and the initial regional institutions were erected at the First ASEAN Summit. Unsurprisingly, peaceful dispute settlement

⁶ See S. Peou, ‘Realism and Constructivism in Southeast Asian Security Studies Today: A Review Essay’, *The Pacific Review* 15 (2002), 119, at 120.

⁷ Acharya and Stubbs present a good overview of the evolving theories and the dominance of realism and constructivism in A. Acharya and R. Stubbs, ‘Theorizing Southeast Asian Relations: An Introduction’, *The Pacific Review* 19 (2) (2006), 125.

Cambridge University Press

978-1-316-50782-7 - Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments

Robert Beckman, Leonardo Bernard, Hao Duy Phan, Tan Hsien-Li and Ranyta Yusran

Excerpt

[More information](#)

INTRODUCTION

mechanisms for military insecurities were of topmost priority. Subsequently, from 1976 to 2006, ASEAN gradually shifted its focus to include economic cooperation. It was during this phase that ASEAN began to realise the importance of monitoring and economic dispute settlement mechanisms. This 'economic development' phase continued to strengthen until the EPG unveiled its recommendations in 2007 for the ASEAN Charter. In light of the Charter avowals, presently and for the foreseeable future, the organisation is taking steps to ensure that its twin priorities of political and economic security are shaped by the rule of law and institutions. What this means is that, especially in the area of economic integration, ASEAN member states should consider actively using the regional mechanisms for dispute settlement and monitoring that they have already established to improve compliance with ASEAN instruments.

We would like to explain briefly the terminology and data we rely on in this book. We qualify that by 'ASEAN instruments' this book refers to: (1) ASEAN treaties and non-binding documents that have been collectively concluded by ASEAN member states; (2) agreements concluded by all ten ASEAN member states with an external party; and (3) agreements signed by ASEAN as an intergovernmental organisation in the conduct of its external relations pursuant to Article 41(7) of the ASEAN Charter. For the purpose of this book, 'implementation' means the rendering of a commitment into national law and action, and 'compliance monitoring mechanisms' means mechanisms established to keep track of and evaluate whether member states conform to the commitments provided in ASEAN instruments.

Cambridge University Press

978-1-316-50782-7 - Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments

Robert Beckman, Leonardo Bernard, Hao Duy Phan, Tan Hsien-Li and Ranyta Yusran

Excerpt

[More information](#)

INTRODUCTION

In examining the mechanisms that have been adopted to promote compliance with ASEAN instruments, this book relies on the *Table of ASEAN Treaties/Agreements and Ratification* prepared by the ASEAN Secretariat and a *Compilation of ASEAN Instruments* produced by the Centre for International Law, National University of Singapore (CIL). Between July and August 2012, we conducted an observation on selected ASEAN instruments concluded among ASEAN member states, focusing on their dispute settlement and compliance monitoring clauses (including implementation, review and supervision). The observation aimed to classify the types of dispute settlement clauses that ASEAN has used since it was established in 1967 until the ASEAN Charter entered into force in 2008. The entry into force of the ASEAN Charter finally resolved the uncertainties concerning settlement of disputes arising from the interpretation and implementation of ASEAN instruments. The ASEAN Charter firmly stipulates modes of disputes settlement to be used to address disputes arising from the interpretation and implementation of ASEAN instruments as well as intra-ASEAN disputes in general. It also aimed to identify if a form of standard clause was applied to each type of dispute settlement clause (see Appendix 1). Moreover, the classification of the different types of ASEAN dispute settlement clauses in the observation also includes brief analyses of ASEAN's preference for using certain types of dispute settlement clauses in economic, socio-cultural and political-security instruments, according to the requirements demanded by the respective ASEAN communities.

This observation, however, was not without its challenges. The main obstacle that we faced was the lack of

Cambridge University Press

978-1-316-50782-7 - Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments

Robert Beckman, Leonardo Bernard, Hao Duy Phan, Tan Hsien-Li and Ranyta Yusran

Excerpt

[More information](#)

INTRODUCTION

information available. The ASEAN Secretariat does not maintain an exhaustive list that comprehensively tracks all the instruments ever produced by ASEAN. This lack of official record makes it impossible to conduct an exhaustive study on the various ASEAN instruments, and this book does not aim to do so. Analysing the instruments is also no easy task, since ASEAN member states are generally not in the habit of keeping negotiation records of the various instruments they have agreed to. The few who are, do not make such historical records available to the public. There is also a lack of empirical studies on the region, especially on the issue of compliance with ASEAN instruments. Thus, this observation uses empirical data and case studies whenever available in order to analyse the behaviour of ASEAN member states towards certain instruments.

We intentionally limited our observation to seventy-eight ASEAN instruments – both main and stand-alone – adopted prior to the entry into force of the Charter in 2008. The observation did not include other instruments of amendment or implementing protocols – unless those instruments contained dispute settlement clauses different than those established under the mother instruments or unless such protocols or instruments were listed under the Appendices of the 1996 ASEAN Protocol on Dispute Settlement Mechanism (1996 Protocol) and the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism (2004 Protocol). Through this observation, we identified six types of dispute settlement clauses that ASEAN has used. The first type highlights the absence of dispute settlement clauses in some ASEAN instruments. The second type relates to dispute settlement clauses

Cambridge University Press

978-1-316-50782-7 - Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments

Robert Beckman, Leonardo Bernard, Hao Duy Phan, Tan Hsien-Li and Ranyta Yusran

Excerpt

[More information](#)

INTRODUCTION

that refer disputes to consultation or negotiation (or amicable solution). The third type refers to dispute settlement mechanisms (DSM) outside of the ASEAN framework. The fourth type applies solely to ASEAN economic instruments, which refer disputes to the 1996 DSM or the 2004 Protocol (superseding the 1996 Protocol). The fifth type relates to clauses that refer disputes between parties to instrument-based DSMs. Finally, the sixth type reflects clauses that use layered dispute resolutions.

The second observation focused on compliance monitoring (including implementation, review and supervision) clauses in ASEAN instruments (see Appendix 2). The observation aimed to: (1) confirm whether ASEAN had a standard practice of including compliance monitoring clauses in its instruments between 1967 and 2012; (2) confirm the role of the ASEAN Secretariat in compliance monitoring as mandated in the 1976 ASEAN Agreement on the Establishment of the ASEAN Secretariat (and later under the ASEAN Charter); (3) identify which other ASEAN organs were responsible for compliance monitoring where the ASEAN Secretariat was not acting as the compliance monitoring authority; and (4) identify issues *vis-à-vis* ASEAN practice in prescribing compliance monitoring clauses in its instruments.

The observation on ASEAN compliance monitoring clauses was limited to 148 ASEAN instruments adopted between the time of the establishment of ASEAN in August 1967 and the time of the observation in August 2012. Unlike ASEAN dispute settlement clauses, ASEAN's compliance monitoring clauses are diverse in practice, even after the entry into force of the ASEAN Charter. This is despite the Charter's provisions

Cambridge University Press

978-1-316-50782-7 - Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments

Robert Beckman, Leonardo Bernard, Hao Duy Phan, Tan Hsien-Li and Ranyta Yusran

Excerpt

[More information](#)

INTRODUCTION

pertaining to compliance monitoring. The observation did not include other instruments of amendment or implementing protocols – unless those instruments contained different compliance monitoring clauses.

The studied instruments were very diverse in scope and importance. We included in our observations various instruments from every aspect of ASEAN's field of cooperation: from the administrative 1969 Agreement for the Establishment of a Fund for ASEAN Rules Governing the Control, Disbursement and Accounting of the Fund for the ASEAN to the crucial 2007 ASEAN Convention on Counter Terrorism; from the groundbreaking 1992 Framework Agreement on Enhancing ASEAN Economic Cooperation to the very specific 2006 ASEAN Mutual Recognition Arrangement on Nursing Services. We took a balanced approach in selecting the instruments for our observations, and this diversity is reflected in the instruments listed in Appendices 1 and 2.

Our observation covered both ASEAN instruments that are legally binding and those that do not have binding obligations. Instruments such as the 2011 Declaration on ASEAN Unity in Cultural Diversity: Towards Strengthening ASEAN in Community and the 2011 Bali Declaration on ASEAN Community in a Global Community of Nations are not instruments that give rise to legal obligations for ASEAN member states. It is, however, not the purpose of this book to categorise ASEAN instruments in Appendix 2 or to draw a line between ASEAN treaties and treaty-like documents.⁸ Rather,

⁸ See J. Barrett and R. Beckman, *Best Treaty Practice* (Cambridge University Press, forthcoming).

Cambridge University Press

978-1-316-50782-7 - Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments

Robert Beckman, Leonardo Bernard, Hao Duy Phan, Tan Hsien-Li and Ranyta Yusran

Excerpt

[More information](#)

INTRODUCTION

the book considers all ASEAN instruments listed in Appendix 2 as commitments made by ASEAN member states that need to be implemented. This approach is in line with the EPG's recommendation that, when emphasising the need to actuate ASEAN commitments, did not distinguish between ASEAN treaties and instruments that were non-binding. This is perhaps because of the amorphous line between the two types of documents. Furthermore, with regard to ASEAN instruments, while binding documents do not always include compliance monitoring provisions, a number of non-legally binding documents do include monitoring mechanisms. For instance the 2007 Declaration on the ASEAN Economic Community Blueprint, which technically is not a binding instrument, prescribes a compliance monitoring mechanism in its paragraph 11, while the 2005 ASEAN Framework Agreement on Multimodal Transport does not prescribe any compliance monitoring mechanism.⁹

In light of this research question and the investigative rationale that we have undertaken, this book begins in Chapter 1 by contextualising the rise of dispute settlement and monitoring mechanisms in ASEAN's evolution. It then explores various theories that might elucidate ASEAN member states' behaviour regarding compliance. Chapter 2 examines ASEAN's established dispute settlement mechanisms. Chapter 3 analyses the regional mechanisms available to monitor implementation and ensure compliance with ASEAN instruments. Finally, Chapter 4 draws some

⁹ See Appendix 2.