UNDERSTANDING THE DIFFERENT THINKERS AND THE ISSUE OF COMPLIANCE IN ASEAN

Over the years the issue of compliance has been seen through various lenses with its role and function in international law evolving. There has been a transformation in the characterization of compliance with international law which has restructured the maturities and complexities of it. International Law is seen as [legitimate](https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2897&context=fss_papers) due to its clarity, its validation by formal processes, it’s conceptual coherence, and conformity to normative hierarchy of the International rule system. This article draws on the theory of Managerial approach espoused by Abram Chayes and Antonia Chayes and the Legitimacy theory given by Thomas Franck to understand why the ASEAN states have some of the lowest levels of compliance with international law and the possible policy changes to rectify the same.

There are several reasons for why States obey international law: it is in their best interests, they believe in the system, to improve reputation or credibility, for recognition as an international legal person, pressure from the international community, fear of repercussions or retaliation, or to maintain peace and security.

The approach adopted by Abram Chayes and Antonia Chayes, termed as the [managerial approach](https://www.law.berkeley.edu/files/guzmanComplianceandIL.doc), relies on a cooperative approach to compliance and states that while substantive legal norms and lawyers are important, the law is rarely determinative in international affairs. They see international law as a system to manage international affairs. This legal process will allocate the competence for decision-making between several national and international actors and also restrain and organize the behavior and its interactions with the political, economic, and cultural setting. States, under this theory, obey international law not because of punitive sanctions but because of three factors- (a) compliance reduces transaction costs and increases efficiency, since the need to recalculate the costs and benefits of a decision is eliminated; (b) they are persuaded to comply by the treaty regimes themselves, since they are consent based instruments and therefore intended to serve the need of the participating states; and (c) a general norm of compliance in treaty regimes, furthers compliance. They espouse coordination building efforts such as transparency and clarity in the terms of the treaties as a way to improve compliance, rather than punishment or sanctions. Dispute resolution under this model is only a forum for communication and for expectations to be cleared.

Thomas Franck’s work emphasizes on the transformation of international law post-World War II which has accompanied the transformation of sovereignty. His work is not limited to treaty-based law, like Chayes and Chayes, but also extends to the power of customary rules. He observed that the international system has an [abundance of specialized law](https://www.jstor.org/stable/3518832?seq=1" \l "metadata_info_tab_contents) with very little to do with the law of international organizations or the constitutional law of the global system. He acknowledges that nations obey rules when the benefits of complying exceed the costs; however, he bases this on communitarian peer pressure rather than a multitude of cost-benefit calculations regarding particular rules. His theory, popularly known as the [legitimacy theory](http://www.ejil.org/pdfs/13/4/1569.pdf) provides four factors that determine whether a State will comply with international law- coherence, adherence, determinacy and symbolic validation. Franck in his work had emphasized on a lexical priority of legitimacy over justice which should be the prime goal of an international rule system. According to Franck a moral order is manifested in the belief of the right process rather than the substantive outcomes. However, Franck does not delve more into the various modes of institutional interaction that lead to interpretation of norms, nor does he delve into the mode by which international norms are internalized into domestic legal systems.

Franck and Chayes and Chayes understand international law more as a process rather than as a system of rules. Though through different methodologies, Franck and Chayes and Chayes reach the same intuitive answer on why nations obey. They recognize transnational actors to be more likely to comply with international law when it is accepted through some legitimate internal process. Franck says that if nations perceive a rule to be fair then they will obey it, while Chayes and Chayes say that nations will voluntarily comply with norms that regularly justify their actions to treaty partners in terms of treaty norms.

According to Chayes and Chayes there is an issue with compliance due to lack of clarity of rules and capacity. ASEAN has several [treaties and agreements](https://asean.org/wp-content/uploads/images/2012/resources/TABLE%20OF%20AGREEMENT%20%20RATIFICATION-SORT%20BY%20DATE-Web-October2012.pdf), all of which can be found on the ASEAN website, however, most of them are non-binding agreements which were entered into just for the satisfaction of the Member States. The countries making up the ASEAN is an area of [extreme diversity](https://www.dw.com/en/the-asean-way-where-is-it-leading/a-39998187). The region has representation from all three of the world’s largest religions- Christianity, Buddhism and Islam. There are countries like Singapore, with a per capita income of around USD 82,000 and frequently counted as among the richest countries in the world, and those like Cambodia, with a per-capita income of USD 3,300. Due to the [ASEAN Way](https://asean.org/?static_post=asean-and-the-3-l-s-leaders-laymen-and-lawyers-by-he-ong-keng-yong-secretary-general-of-asean) several affairs were conducted in a loose and informal way, unclear with their nomenclature with few legally-binding arrangements and weak institutions.

Franck links compliance with the legitimacy of the rules. This theory lines with the non-compliance of Singapore, Malaysia and Brunei with the [International Covenant on Civil and Political Rights](https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx) as they still have the use of corporal punishment. These countries do not believe in the legitimacy of the Covenant with respect to caning and death penalty and thus did not sign or ratify the same.

Harold Koh talks about norm internalization and how a transnational legal process is required. Compliance comes about when the particular International Law is internalized within the normative structure of the state. The three phases for the same are interaction, interpretation and internalization. The lack of internalization is one of the issues that leads to the low level of compliance among ASEAN states face, their [reluctance to internalize international law](https://oxfordre.com/internationalstudies/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-225) because of the very less importance given to the written law in such states, as compared to those in the West.

ASEAN has an issue with compliance. In the past only about [30 percent](https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/media/csis/pubs/pac0733a.pdf) of ASEAN’s agreements were implemented. There are several reasons for non-compliance – lack of capacity, not in line with national interest, (realist and self-interested), procedural issues, ambiguity, ASEAN Way – informal, flexible and non-legalistic, low levels of legalization and institutionalization, path dependence (habituated practice), lack of information, lack of capacity, lack of faith in system, ambiguity, unrealistic and insufficient dispute settlement mechanism, and weak rule of law at national and regional levels.

While the [ASEAN Charter](https://asean.org/asean/asean-charter/charter-of-the-association-of-southeast-asian-nations/) under Chapter VIII talks about Dispute Settlement Mechanisms, and there is a [2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms](https://www.dol.go.th/legal/Documents/4Protocol_to_the_ASEAN.pdf), ASEAN is yet to fully establish a functional dispute settlement mechanism. Article 23 of the ASEAN Charter mentions Alternative Dispute Resolution solutions. There are instrument-specific mechanisms which are given under Article 24(1) of the ASEAN Charter. The [Treaty of Amity and Cooperation (TAC) of 1976](https://asean.org/treaty-amity-cooperation-southeast-asia-indonesia-24-february-1976/) and the [2004 Protocol on Enhanced Dispute Settlement Mechanism](https://asean.org/?static_post=asean-protocol-on-enhanced-dispute-settlement-mechanism) exist as well which are generally used for economic agreements. Article 25 of the ASEAN Charter has a ‘catch-all’ clause for all other disputes that do not fall within the above ambit. However, the TAC is weak, and the 2004 Protocol goes first to consultation and consensus. If it is modelled on the WTO then why is it only efficient to only have 60 days to settle the dispute? According to the theory of Chayes and Chayes this would not be efficient and it is seen that the ASEAN Member States prefer to use other forums such as the International Centre for Settlement of Investment Dispute or the World Trade Organization over ASEAN Charter-sanctioned Dispute Settlement Mechanisms. All ASEAN Dispute Settlement Mechanisms are ad hoc and none are activated.

According to the [Report of the Eminent Persons Group on the ASEAN Charter](https://www.asean.org/wp-content/uploads/images/archive/19247.pdf) (EPG Report), ASEAN’s problem is not one of lack of vision, ideas, and action plans. The real problem is one of ensuring compliance and effective implementation of decisions. The solution of which is the establishment of dispute settlement mechanisms, inclusion of compliance monitoring, advisory, consultation as well as enforcement mechanisms, and entrusting the Secretary-General with the role of monitoring and reporting cases of non-compliance. The ASEAN Secretariat should collect, analyze the data and do performance reviews. This would ensure greater transparency and information sharing. Further, instead of using only consensus based and informal mechanisms to deal with conflicts, there is a need for collective effort to build a more [rules-based community](https://grojil.org/2019/11/25/discussing-the-difference-in-the-pre-charter-and-post-charter-modalities-of-asean/) to accelerate regional integration and future response to events.

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