

VIEWS AND COMMENTS

'ASEAN': Bilateralism Or Regionalism?

Saumya Gopalan*

The Association of Southeast Asian Nations, popularly known as ASEAN, was established in 1967 as a framework for political, legal, economic and cultural cooperation among the member states. It now comprises of Brunei, Malaysia, Singapore, Thailand, Philippines and Indonesia¹ and has been widely regarded as a successful regional organisation. While not disputing the success of the organisation, this article seeks to explode the myth that ASEAN, in its plethora of activities, reflects and essentially involves regionalism and not bilateralism or trilateralism.

Regionalism essentially involves an assertion of regional identity through cooperation in various fields. It means that all the countries in the region which have got together to form a regional organisation collectively cooperate with one another, and that agreements, treaties and declarations are made as an organisation and not as and between individual countries. Not only can India along with other Asian nations constituting SAARC learn from ASEAN's experience of regional cooperation and organisation, but India's association with the ASEAN could prove quite beneficial as well.

The countries in the ASEAN share dual characteristics — they remain part of the developing world and yet have more developments in science than most other developing countries. India could well benefit by a transfer of technology from these developing countries than from the developed West, where dumping of obsolete technology on India remains a strong possibility. The ASEAN markets could also be the answer to India's predicament of the search for new export markets, provided India comes up with strategies that would give it a foothold in trade and commerce in the economically powerful region. Therefore, it becomes relevant to study the nature of ASEAN.

Legal Cooperation

Legal cooperation in the ASEAN is to be understood in the light of the fact that the legal systems in the member countries are dissimilar.² Thus, it is simpler for countries with similar legal systems to cooperate at a bilateral or trilateral level rather than for countries with dissimilar legal systems to cooperate at the regional level. This is more so in the light of the fact that harmonisation of the laws among the ASEAN countries has not taken any concrete shape until now.

* IV Year B.A. LL.B (Hons.), NLSIU.

1. ASEAN was established by the ASEAN (Bangkok) Declaration 1967 and it reflects the rationale of promotion of regional cooperation for furtherance of mutual interests such as peace, progress, prosperity, freedom, social justice and political, economic, social and cultural well-being. See Preamble of 1967 Declaration.

2. Singapore, Malaysia and Brunei are Common Law countries; Thailand and Indonesia have Civil Law while Philippines has a mixture of the two.

Legal cooperation within the ASEAN may be classified as follows:

1. Judicial cooperation
2. Arbitration cooperation
3. Extradition cooperation
4. Settlement of Disputes

1. Judicial Cooperation

Judicial cooperation essentially involves an exchange of documents and writs, automatic service of process, cooperation in serving judicial documents, obtaining evidence, transmission of judicial records and recognition and enforcement of foreign judgments. On matters of service of process such as exchange of documents and writs, Singapore, Malaysia and Brunei have had an automatic service of process even before the establishment of ASEAN, due to the historic link with England and its legal system.³ Such an automatic service of process does not exist at the regional level, obviously due to the dichotomy in the legal systems of the ASEAN countries.

Cooperation in civil and commercial matters, in serving judicial documents, obtaining evidence and transmission of judicial records exists between Thailand and Indonesia.⁴

As regards post-judgment matters such as recognition and enforcement of foreign judgments, cooperation exists only between Malaysia and Singapore due to their colonial links with England. No cooperation exists at the regional level.

It is important to note that no judicial cooperation prior to or after the judgment exists at the regional level, and this is attributed to the lack of harmonisation of the legal systems among the ASEAN countries.

2. Arbitration Cooperation

At present, there is no cooperation on arbitration matters except in the case of Malaysia and Singapore which have achieved this through a bilateral treaty. No regional instrument has emerged on arbitration among the members of the ASEAN. While conceding to the fact that there will be lesser impediments to achieving regional cooperation in arbitration than in other legal areas as the procedure and the law to be applied are flexible in the case of arbitration, some amount of consensus on harmonisation and assimilation of the various laws is clearly required, which is obtrusively absent at the present point in time.⁵ Thus arbitration cooperation at the regional level remains a dream, while that at the bilateral level is a strong possibility.

3. Viti Muntarbhorn, *Legal Cooperation among ASEAN countries* (Bangkok: Aksirnsiam Press, 1987) 32.

4. The Declaration of the ASEAN Concord of 1976 made a specific mention of judicial cooperation among the ASEAN countries and this acted as a catalyst for Indonesia and Thailand to enter into a treaty concerning judicial cooperation in 1978. This agreement does not cover criminal cases and deals with cooperation prior to the judgement alone.

5. See further, *Arbitration under the Auspices of the Kuala Lumpur Centre 1979*, (Kuala Lumpur: AALCC — Regional Centre for Arbitration at Kuala Lumpur, 1982).

3. Extradition Cooperation

Extradition treaties have existed between the members of the ASEAN for many years prior to the establishment of ASEAN itself.⁶ Extradition has also been singled out in the ASEAN instruments as one of the main subjects for regional cooperation. The ASEAN Concord of 1976 has adopted as one of its programmes of action a "study on how to develop judicial cooperation including the possibility of an ASEAN extradition treaty."⁷ Yet, this has not come into existence because of the numerous obstacles facing legal cooperation in ASEAN at the regional level.

The impediments to the conclusion of an ASEAN treaty in this regard are as follows:

1. Difference in the degree of proof in the Common law and the Civil law countries.⁸ Unless the Common law countries consider discarding the *prima facie* test and lowering the degree of proof required for facilitating extradition, it is improbable that regionalism can be achieved in this regard.
2. Uncertainty exists in the area of what constitutes a political offence, for it to be considered as an exception to extradition.
3. Presence of red-tapism, procedural delays and the involvement of many government ministries and courts, act as disincentives for achieving regional cooperation.⁹

4. Settlement of Disputes

The Treaty of Amity and Cooperation in Southeast Asia, 1976 is significant in this regard as it emphasises respect for justice and the rule of law,¹⁰ and had for the first time, introduced a machinery for settlement of disputes within the region. A 'High Council' comprising of a representative at the ministerial level from each of the contracting parties is provided for in Article 14 to take cognizance of disputes.¹¹ It is pertinent to note that regionalism in this area does not exist to date despite the giant step towards the establishment of regional cooperation in the ASEAN as the 'High Council' remains a machinery on paper. Thus, it is obvious that as regards legal cooperation, cooperation exists only in the bilateral and not in the regional form. One exception to this is cooperation against drug trafficking where regional cooperation in the form of the use of legal machinery to combat drug trafficking has been explored and established successfully. The ASEAN Declaration of Principles to Combat the Abuse of Narcotic Drugs, 1976 has been the stepping stone to cooperation in this area.¹² However, it remains an exception and not a rule for regionalism.

6. Eg., extradition treaty between Thailand and Malaysia came into existence in 1959, before the birth of ASEAN.

7. Declaration of ASEAN Concord, Bali, 24 Feb. 1976, Part A(6).

8. Where the degree of proof required is that which would be adequate to establish a *prima facie* case against the accused, as is required by the Common Law countries and Philippines, the degree of proof is so high as to imply criminality and punishability. In the Civil Law countries, the degree of proof is much more relaxed.

9. Eg., in the case of Malaysia, the procedure involves the passing of extradition requests through 3 Ministries: the Ministry of Foreign Affairs, the Attorney General's Chambers and the Ministry of Home Affairs.

10. See further, Preamble to the Treaty.

11. It is empowered to recommend to the parties in dispute appropriate means of settlement such as good office, mediation, inquiry or conciliation. If the disputing parties so agree, it may constitute itself into a committee of mediation, inquiry or conciliation.

12. This Declaration imposes an obligation on each member country of the ASEAN to intensify its vigilance, preventive and penal measures with regard to illicit traffic in drugs as well as manufacture, as well as cooperation within the members of the ASEAN in areas such as exchange of information regarding the offenders and the offences, and in the fields of drug research and education.

Economic Cooperation

It was the need for economic cooperation that brought together the countries of the ASEAN in the first place. However, despite the increasing importance of economic and commercial issues, cooperation continues to exist more in the bilateral or trilateral form than in the regional form.

1. Double Taxation Treaties

At the bilateral level, taxation has been high on the ASEAN agenda for several years. In 1985, under the Committee on Finance and Banking of ASEAN, an ASEAN Working Group on Tax Matters agreed to exchange information on bilateral tax treaties concluded with countries beyond the ASEAN on an informal basis and to establish an ad hoc committee to prepare a study on the harmonisation of tax treaties as well as a model for tax negotiations between ASEAN and other countries.¹³ The present situation regarding the existence of bilateral double taxation treaties among the ASEAN countries is that Brunei, Indonesia and Malaysia have not concluded any such treaties with any member country of the ASEAN; Singapore concluded a treaty exclusively with Malaysia, while Philippines and Thailand have taken the initiative and concluded treaties with Indonesia, Malaysia and Singapore. This could be attributed to the fact that Indonesia and Brunei are not very open to the idea of giving double taxation reliefs to the other countries in the ASEAN. This is evident from the fact that these two countries have not concluded a single treaty on double taxation reliefs with any of the other member countries of the ASEAN. Another reason for an absence of regional cooperation in this area is the lack of consensus as regards the principles and conditions to be incorporated in an ASEAN treaty on double taxation reliefs.

2. ASEAN Industrial Projects

The U.N. proposal for the establishment of an ASEAN Industrial Project in each ASEAN country on the basis of joint investment by the member countries was accepted by ASEAN in the ASEAN Concord of 1976 and initiated in the Basic Agreement on ASEAN Industrial Projects, 1980.¹⁴ This is one area where ample scope exists for regionalism, and yet this has not been achieved at present. Singapore has been sceptical about this arrangement and has not invested in such projects in other countries apart from a 1% stake.¹⁵ This scepticism has split the ASEAN and prevented regional cooperation among all the member countries of the ASEAN as envisaged by the Basic Agreement. Moreover, in the absence of any semblance of a supra-national legal system or law in the region, a conflict of national laws is very much prevalent, thereby hindering the existence of regionalism. Due to these impediments, only 3 of such projects are in operation at present¹⁶ and the Industrial Projects in general have proved to be unsuccessful.

13. *Supra*, n. 3 at p. 37.

14. The Agreement stipulates that the host country would hold 60% of the equity while other countries in the ASEAN would hold the remaining 40%. Private participation in the equity is at the discretion of the ASEAN governments concerned, provided each State has 1/3 of the equity stipulated in the Agreement.

15. *Supra* n. 3 at p. 42.

16. The UREA project of Malaysia & Indonesia, and the ASEAN Hepatitis B Vaccine Project of Singapore.

3. ASEAN Customs Code of Conduct

This was established in 1983 and though it is not legally binding, it is an instrument, the provisions of which, affect general customs laws in the ASEAN countries.¹⁷ While some amount of regional cooperation has been achieved in establishing a Customs Code of Conduct, it would be premature at this point to categorically state that this is an example of regionalism within the ASEAN as the idea of a common customs union is yet to take shape. The idea that has been mooted is that there should be a customs union between Brunei, Indonesia, Malaysia, Philippines and Thailand, so that there would be common external tariffs on imports coming from non-ASEAN countries, and a free trade area should be established in Singapore which should be linked up with the customs union envisaged, but restricted to goods of ASEAN origin.¹⁸ This is so in view of the fact that Singapore is keen on remaining a free trade area. This idea, which could perhaps lead to regionalism, has not been concretised yet, with the protectionist attitude of Indonesia and the nationalistic tendencies of the other member countries acting as impediments.

4. Investment Promotion

While investment promotion is high on the agenda of all the ASEAN countries and the investment promotion law is specially geared towards this end, the pertinent issue at hand is not how successful each of the member states have been in promoting investment in their countries, but how much of an initiative has been taken towards regional cooperation in this regard, especially in terms of harmonisation of the investment promotion laws. The range of laws and the different investment promotion schemes that exist point to the fact that it is an uphill task even to achieve re-alignment of their national policies on investment. This difficulty is accentuated in the presence of polarities that exist in these policies specially in terms of Singapore's *laissez faire* policy versus Indonesia's protectionism.¹⁹ Investment promotion is one area where nationalistic and individualistic tendencies exist strongly and the countries of the ASEAN compete with each other in attracting investors. Thus, any question of harmonisation of laws and regional cooperation in this regard may demand a pursuance of regional interest at the expense of national interest, which the members of the ASEAN are not prepared for at the present point in time.

5. Miscellaneous Projects

It cannot be disputed that some amount of regional cooperation does exist in terms of tariff concessions granted through the Agreement on ASEAN Preferential Trading Arrangements of 1977, industrial complementation through the Agreement on ASEAN Industrial Complementation Projects 1981 and industrial joint ventures through the Basic Agreement on Industrial Joint Ventures 1983. However, success has not been significant in any of these projects and hence they have not played a key role in terms of regionalism in the economic sphere within the ASEAN.²⁰

17. The salient features of this Code are that it has achieved uniformity in valuation and classification of goods, and cooperation in combating smuggling and customs frauds among the member countries.

18. See, Chia, Siow Yu (ed.) ASEAN Economic Cooperation, (Singapore: ISEAS, 1980).

19. See, Charles Draper, Private Foreign Investment in ASEAN: A Study of Trends, Policies, Incentives and Impediments (Bangkok: Economic Cooperation Centre for the Asian and Pacific Region, 1984).

20. See, S. Drummond, "Fifteen Years of ASEAN," Journal of Common Market Studies, XX, 5 (1982): 301-319.

There is ample room for further cooperation in the ASEAN in economic, commercial and industrial matters. For example, there is an absence of cooperation on and harmonisation of intellectual property law, foreign exchange regulations, development and transfer of technology, labour and immigration laws, banking and insurance laws and environmental law.

Conclusion

It would not be an understatement to conclude that ASEAN is a regional organisation with a loose form of cooperation. Cohesiveness does not exist among the member countries as in the case of EEC or any other international organisation, primarily because the tendencies of these countries have been geared towards being more nationalistic than regionalistic. It therefore, appears that regionalism is yet to take root within the ASEAN, perhaps with the exception of the political field which has evidenced a fair amount of regionalism.

With the recent tendency of regionalism and a movement away from globalism in the world economy, a curtailment of imports and inwards-looking markets are the direct result. With the rise of protectionism in the world economy, the importance of regionalism in ASEAN cannot be over emphasised. Southeast Asian countries would find it increasingly difficult to export their goods to Europe and the U.S due to the establishment of a common market in North America and Europe. Thus, cooperation in trade and commerce within the region increases in importance, and ASEAN is a medium through which the member countries' markets could be extended to each other, to ensure that their collective economic interests are protected.

Despite its existence for 25 years, ASEAN cannot be said to be a regional organisation in the true sense of the term. It is a forum under which the Southeast Asian countries have got together, but the transition towards regionalism is yet to be achieved. In view of the current trend towards regionalism in the world economy, it would be to the benefit of all the countries in the ASEAN that regionalism, both in terms of economic and legal cooperation, is conscientiously pursued.

Thus the importance of ASEAN for India can neither be ignored nor under-estimated. While one may have been sceptical in the past regarding India's trade relations with the ASEAN, and felt that India should first make peace with its neighbours and make a success of its own regional organisation — SAARC — before taking a giant step towards ASEAN, the fact that bright prospects exist for closer relations between India and ASEAN, in the light of Prime Minister Narasimha Rao's recent visit to Thailand cannot be denied.

India's membership in the ASEAN may remain a distant possibility. However, India's status as a sectoral dialogue partner of the ASEAN is the stepping stone towards closer trade and economic relations with the ASEAN, which would prove to be vital to the Indian economy in the days to come.

