Promoting ASEAN Economic Community through greater participation and transparency in treaty making procedures: Thailand’s internal process and ASEAN Rules of Procedure

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Introduction

2015 is fast approaching for the much anticipated ASEAN Economic Community (AEC). There is no denying the importance of the successful conclusion of this new beginning for South East Asian nations. From the summit in Kuala Lumpur in December 1997, ASEAN leaders have agreed that ASEAN is to be “transformed”, into a “stable, prosperous and highly competitive region, with equitable economic development and reduced poverty and socio-economic disparities”¹. Since then, a lot of work has been done to reach such goals and in January 2007, the leaders have affirmed their strong commitment and agreed to hasten the establishment of the AEC from 2020 to 2015. It is envisaged that ASEAN will become a region with free movement of goods, services, investment, skilled labour, and free flow of capital.

In doing so, ASEAN needs a to have “a strengthened institutional framework and a unified legal identity as set forth in the ASEAN Charter by putting in place rule-based system to realise” such “establishment”².

ASEAN as a rule based organization: Rules of Procedure for Conclusion of International Agreement by ASEAN

Article 41(7) of the ASEAN Charter states that “ASEAN may conclude agreements with countries or sub-regional, regional and international organizations and institutions. The procedures for concluding such agreements shall be prescribed by the ASEAN Coordinating Council in consultation with the ASEAN Community Council”. Rules of Procedures (RoP)

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¹ Para 1, Introduction, ASEAN Economic Blueprint

² Preamble, Paragraph 7, Declaration on the ASEAN Economic Community Blueprint
for Conclusion of International Agreement by ASEAN emerge from this. Drafted by High Level Legal Experts’ Group on Follow-up to the ASEAN Charter (HLEG), the RoP was adopted by the ASEAN Coordinating Council, (ACC) on 16 November 2011 at Bali, Indonesia.

Before & After:

Prior to the creation of such RoP, when ASEAN concludes an agreement with an external party it does not do so as a single legal entity. Rather, Member States enter into an agreement collectively and any obligations incurred are upon each ASEAN Member States individually.

With the AEC as a single market, it is hoped that the RoP will facilitate ASEAN becoming a legal entity in its own right- enabling ASEAN to conclude international agreement with other non-Member States with clarity and legal certainty.

Rule 1 of the RoP states that the procedure will be for the “conclusion of international agreements by ASEAN as an intergovernmental organization in the conduct of external relations”. Thus, ASEAN Member States will still be able to enter into international agreement individually or even collectively with differing obligations incurred to each Member States. Therefore the RoP does not replace Member States sovereignty in treaty making. Rather, it prepares the path for ASEAN to be united and gain its place on the world stage as one, rightful entity in areas of activities that Member States deem ready.

Before the RoP, the treaty-making process commences with ASEAN Sectoral Ministerial Body (ASMB) negotiating with an external party, either directly or through the ASEAN Secretariat. Final agreed text, once reached, is endorsed by the ASMB before opinions are sought from individual country’s relevant authorities. Their internal procedures would also be conducted at this stage. Approval and consent to be bound by ASEAN Member States will then be expressed before or at the signatory stage.

As we can see from the process described above, information sharing and access to the content of the negotiation do not seem to be the priorities. Opinions are indeed sought, but at a stage where the final agreed text have already been decided.

It may be argued that before the RoP, agreements are concluded to create legal obligations between individual ASEAN Member States (rather than ASEAN as a single legal identity) and an external party. Therefore, it is unnecessary for each Member States to be informed
again every steps of the way. However, with ASEAN as a single legal entity, a common position and consent from all of the Member States are necessary to conduct a legitimate negotiation and conclusion of an agreement. In order to achieve these, approval needs to be sought from all Member States. A procedure that pays attention to transparency and information sharing is therefore crucial to gain the authority that ASEAN needs for its treaty-making function.

The RoP: How it Works?

Prior to the Negotiation

Before the RoP, authorisation to commence negotiation is not needed, nor does representative needs to be officially appointed. Rule 3 of the RoP changes this and states clearly that a proposal to commence a negotiation needs to be coordinated with the Committee of Permanent Representatives to ASEAN (CPR) by the relevant ASMB at the Senior Official level. Then the ASEAN Foreign Ministers (AMM) Meeting, either on its own or through CPR will decide on the proposal before appointing the appropriate representative to commence negotiation on behalf of ASEAN.

A common position will therefore emerge from such proposal and its considerations. Rule 4 of the RoP ensures that such common position shall be achieved through the ASMB at the Senior Official level. Again, the Rule states that this will be done through coordination with the CPR. Consultation with the AMM Meetings may also be done if and when necessary. Such common position will then form the basis for the negotiation, which will be adhered to by the representative appointed under Rule 3.

During the Negotiation

The representative then has the obligation to ensure that relevant ASMB at the senior officials level are consulted and kept informed of the negotiation progress. The communication is two-sided in that he/she may also seek further instruction from them, encouraging dialogue which allows for more active participation from Member States. In addition, the ASMB at the senior official levels may request to be consulted or informed, as well as give further instruction to the representative, at anytime. Thus, one can see that there are many more opportunities for information to be shared, details to be discussed, and differences to be settled at this stage.
**Draft Text Stage**

When negotiation is completed, the draft text may be initialised by the representative. However, this does not mean that it will become the final text. The initialling of the text is only to ascertain the form and content of the negotiation. Such text will still be subjected to further endorsement by the ASMB at the Senior Officials level – which will be done, again, in coordination with the CPR who will in turn submit the text to the AMM Meeting for its consideration. As we can see at this stage, there are many levels of checks to be done on the text before ASEAN as a legal entity could express their consent to be bound. With all concerned parties working together, Member States’ interests which form ASEAN common positions should theoretically be taken into account from the very start, with the safety net of more checks and endorsements before the signatory/act of formal confirmation stage.

**Signatory/Act of Formal Confirmation Stage**

Rule 8 (1) of the RoP states that the consent of ASEAN to be bound by an international agreement shall be expressed by signature or an act of formal confirmation, depending on whether the international agreement states as such or that the intention of ASEAN during the negotiation has so been expressed. If an act of formal confirmation is to be taken in addition, then Rule 8 (3) needs to be followed. Full Power in accordance with Rule 9 needs to be issued in accordance with Rule 8 (2) (b) and Rule 8 (3) (b). It is for the AMM Meeting, either on its own or again working with the CPR, to decide on the signing or an act of formal confirmation – and also whether or not to appoint the ASEAN Secretary-General to sign the agreement on behalf of ASEAN.

The AMM Meeting has the power, either on its own or through the CPR, to instruct the Secretary-General to issue a Full Power for the negotiation and/or signing of the international agreement.

The RoP also apply to the amendment, suspension and termination of international agreements where ASEAN, as a single legal entity, is a party as well. Thus, the RoP can provide a complete process for the ASEAN treaty-making function.
Strengthening ASEAN community with a view to establish ASEAN Economic Community by 2015

Article 3 of the ASEAN Charter conferred upon ASEAN a legal personality as an inter-governmental organisation. Since the ability to enter into international agreement is one of the main features of a legitimate international organisation, the RoP will enable Article 3’s status to be applied properly. As treaty-making power is a very important function in exercising sovereign authority, having a clear, well-defined RoP will greatly help propelling ASEAN forward, on the world stage, as a legitimate, single legal entity. Additionally, the RoP will also enable ASEAN Member States to determine their common position and increase their negotiation power as a collective entity.

Thailand’s internal procedure

The Thai Constitution: S.190 – the background

In Thailand, the subject of treaty-making has been an issue of significant public interest. Unsurprisingly, treaty-making has always been an important authority for a legitimate state. It signifies the state’s very existence in the eyes of the international communities. By accepting an agreement with a certain state, the sovereignty of that state is recognized. This also signifies a level of trust and could even reflect the degree of good-standing/credit of that state as obligations between the parties are created.

Before section 190, Thailand has laid down the process for treaty-making in its Constitution B.E. 2540, section 224. With literal translation, the section stated:

“The King has the prerogative to conclude a peace treaty, armistice, and other treaties with other countries or international organizations.

A Treaty that provides for a change in the Thai territories, the extraterritorial areas in which the Kingdom has a sovereign right, or any jurisdictional area the Kingdom has acquired through treaty or through international law, or requires the enactment of an Act for its implementation must be approved by Parliament.”

3 Charter of the Association of Southeast Asian Nations, Article 3 - Legal Personality of ASEAN: “ASEAN, as an inter-governmental organization is hereby conferred legal personality"
Under this section, the Cabinet has the prerogative to conclude treaties with countries and international organizations except treaties providing for a change in the Thai territories or the Thai extraterritorial areas over which Thailand has sovereign right or jurisdiction under any treaty or international law. Where such treaties require further legislation of an Act for their implementations, the prerogative of the Cabinet will also be limited. Parliament’s approval is needed for such treaties to be concluded.

The intention behind such a section could be clearly seen. The categories of treaties falling under S.224 have significant impact over state’s authority and thereby potentially greatly affect the lives of its citizens. And since Thailand is a democratic society, eligible Thai citizens can indirectly participate in the running of their country through political elections. Thus Members of Parliament represent the wish of their constituents. Therefore, seeking approval from Parliament means citizens’ voices are heard through the process – making the process more democratic.

While the ideas behind this section may be clearly analysed as above, the intention to ensure that extensive impacts to the life of citizens and the country’s position are not overlooked was not written down in the section itself. This means the section may, and arguably was, applied without sufficient regards to its underlying principle to protect and safeguard the country’s interest and its people. It has been argued that s.224 have been misused – that the Cabinet abused wordings of the section in such a way that citizen’s participation is non-existence and that their authority has been exercised unjustly. The negotiation process of a treaty was also inaccessible by the public, meaning negotiators, and those who wish to interfere for private gains, could be given free hand to do anything.

Without such transparency, the public predictably could not participate to a sufficient level. This, it was argued, means Thailand and its citizens suffer from inappropriately negotiated/concluded treaties. Many pressure groups were formed to push for such grievance to be heard, particularly in the field of agriculture and SMEs who are major parts of Thailand’s economy. The balance of power, under S.224, was argued to be tipped too favourably for the Cabinet.

It was argued that, in order to regain such a balance and achieve a more democratic process of treaty-making, S.224 was amended and re-emerged as section 190 of the Constitution B.E. 2550.
Section 190 and Thailand’s Treaty-Making Procedure

Section 190 of the Constitution B.E. 2550 (enacted in 2007) has changed the concept of check and balance on treaty-making practice of Thailand. In order to address the above issues, the categories of treaties to be scrutinized by Parliament have been increased. The process prescribed under the section also provides the public more access to information on particular treaty in question and thus further include them in the treaty-making process. The new S.190 now reads (with literal translation) as followed:

“The King has the prerogative to conclude a peace treaty, armistice and other treaties with other countries or international organizations.

A treaty that provides for a change in the Thai territories, the extraterritorial areas in which the Kingdom has a sovereign right, or any jurisdictional area the Kingdom has acquired through treaty or through international law, or requires the enactment of an Act for its implementation, or has extensive impacts on the country’s economic and social stability, or has significant bindings on trade, investment, or national budget, must be approved by the National Assembly. This approval of the National Assembly shall be made within sixty days as from the day such a treaty is received.

Prior to the conclusion of a treaty with other countries or international organizations under paragraph two, the Executive Branch shall publicize relevant information, make arrangement for a public hearing on the matter, and provide clarification of such a treaty to the National Assembly, in which the Executive Branch is required to propose the negotiation framework to the National Assembly for approval.

After the signing of the treaty under paragraph two, the Executive Branch, before expressing its intent for any bindings, shall provide access to the details of the treaty to the public. In a case where the implementation of such a treaty will affect the people or the small or medium sized entrepreneurs, the Executive Branch shall take actions to make corrections or help the affected individuals in a timely, suitable and fair manner.

A law shall be enacted on the procedures of the conclusion of a treaty having extensive impacts on the country’s economic and social stability, or having significant bindings on trade or investment, including actions to make corrections or help the individuals affected by the observance of such a treaty with consideration of fairness between those benefiting the observance of the treaty and those affected by it, and of people.
In the case where a problem occurs under paragraph two and cannot be resolved, the Constitutional Court shall have the power to make a final decision. Provisions under section 154 (1) shall be applied mutatis mutandis to the petition of the case to the Constitutional Court for decision”.

It can clearly be seen that there are many additions to the new S.190.

The present Constitution now provides two more categories of treaties that the Cabinet shall submit to the Parliament. These are 1) a treaty that has extensive impacts on economic or social security of the country and 2) a treaty that generates significant commitment in trade, investment and budget of the country.

Moreover, clear concept of public participation is now laid down in S.190. Merely seeking Parliament’s approval is no longer enough. In the age of information society, details are in demand and their availability are often equate with transparency and accountability. Thus, public accessibility to information now plays a very important role.

Paragraph 3, in particular, provides that before negotiation can commence, the Cabinet now has to publicise relevant information and make arrangement for a public hearing on the matter to be negotiated before submitting a negotiation framework to the Parliament for approval. Further, prior to expressing consent to be bound, the Cabinet has to facilitate public access to the content and the details of such treaty before submitting the treaty to the Parliament again for its approval, emphasising the importance the section gives to public involvement in treaty-making process.

Not only that this procedure provide clear role for public participation, S.190 also entrusts the Constitutional Court with power to determine which treaty concluded falls within the categories that need Parliament’s approval. It may be argued that this is the attempt to re-balance the power of the Executive Branch by placing a limitation on its power and making it answerable to the public via envisaged increased participation.

**Strengths and weaknesses**

Section 190 was created with the intention to make the process of treaty-making more transparent and democratic. It is based on the idea that public scrutiny in the form of accessibility to information and the existence of the opportunity to engage in public debates will achieve these results – that the power of the Executive Branch will be kept in checked
and that abuse of such power will not be able to take place. In addition, with the negotiation framework that has been approved by the National Assembly, the position put forward in the negotiation may be said to have had the blessing of its citizens. This has been argued that such knowledge could even increase the negotiator’s bargaining power.

However, while the section is drafted with the best of intention, there are still many issues to be ironed out and the present S.190 leaves much room for improvement. One of the main, and perhaps most crucial, issues is that of definition. This will now be discussed in more details.

“Extensive impact...”

Because the definition of “treaty”, in general, can be wide-reaching and inclusive, S.190 attempts to narrow down its categories of treaty by listing different types of treaties intended to be covered. However, the language used to describe additional categories is very open to interpretation. Previously, the categories of treaty under s.224 are of definite natures. Issues on jurisdiction may be decided with much more certainty and one either enacts a law or one does not. Now, with S.190, one must consider what may be seen as “extensive impacts” or “significant” – highly subjective concepts are now involved.

There is no precedent on how treaty having “extensive impacts on the country’s economic and social stability, or has significant bindings on trade, investment, or national budget” is to be distinguished from others that need no approval from Parliament. Now, 4 years on from the section’s coming into force in 2007, not much clarity in these particular definitions have been achieved.

Lack of clarity in the definition of key terms and concepts in S.190 means the procedures for the all-important treaty-making may be open to interpretations. Such uncertainty is bad news for practitioners (such as government officials and negotiators) as they are at risk of being personally responsible if their versions of interpretations are deemed to be “wrong”. This greatly inhibits S.190’s positive effects since, unfortunately but not surprisingly, practitioners tend to err on the cautious side and advice for a large number of international agreements to be negotiated and concluded in accordance with the procedures under S.190. Cumbersome results inevitably follow, with delays in the process not being a rarity.

In addressing the problem, reviews of S.190 have been conducted in March 2011. It was envisaged at the creation of S.190 that Paragraph 5 will be of significant help to determine
the categories of treaty to be applied more precisely. However, while such law is still to be enacted, government organisations/departments/legal institutions involved have been working together to advise on how the section should be interpreted and to hasten the legislation in Paragraph 5. Whether such legislation will solve the problem remains to be seen.

**Thailand’s treaty – making process and ASEAN RoP**

Both, RoP and s.190, have the key stages of proposal/authorisation before negotiation and the endorsement to be done before expressing consent to be bound. When one put the two together, one can see that s.190 will come into play at the two points of the RoP by ASEAN. These are the proposal and the endorsement stages.

At the proposal stage, the CPR will inform its relevant domestic authority who will conduct their internal domestic procedures. For Thailand’s case, this is the procedures laid down under s.190. If the international agreement is not deemed to be under the covered treaties in s.190 para 2, then the proposal may proceed through to the authorisation stage in the RoP straight away. However, if it is, then the public must be given access to the content of the negotiation as discussed above and the negotiation framework must be approved by the Parliament before it can then proceed accordingly.

A common position is then reached at this stage in ASEAN. The negotiation is carried on in accordance with the RoP. Then at the endorsement stage, the draft text will be sent by the CPR to, in the case of Thailand, the Ministry of Foreign Affairs to consider on legal and policy basis. If it is not deemed to be under s.190 para 2, the text will be approved by the Cabinet before the signing or expressing consent to be bound. If it is, then not only that the Cabinet will need to approve the text, the Cabinet themselves will need to get the Parliament’s approval before allowing for the signing or expressing consent to be bound. After such approval is received, the agreement may continue on its path in the RoP to the signatory/act of formal confirmation stage.

For Thailand, it is envisaged that the potential abuse of treaty-making power will be prevented through having a clear, detailed process. In ASEAN, it is hoped that ASEAN will build up its characteristic as a single legal entity through being a rule-based organisation – with treaty-making procedure as one of its important functions that can be used to achieve such a goal.
Conclusion

In order to ensure ASEAN becomes one single legitimate entity on the world stage and wins its own rightful place, its positions need to be accountable and representative of its Member States. Having a clear set of rules for its various activities as a single legal entity will help. But what is more important is the political wills of ASEAN Member States to ensure the process of creating a single economic community can evolve. Thailand’s experience with section 190 shows that the issues involving treaty-making power can be complex and, at times, highly sensitive. While the RoP is the movement in the right direction, much more work will need to be done.