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# INTERNATIONAL LAW ON DEFENCE PROCUREMENT

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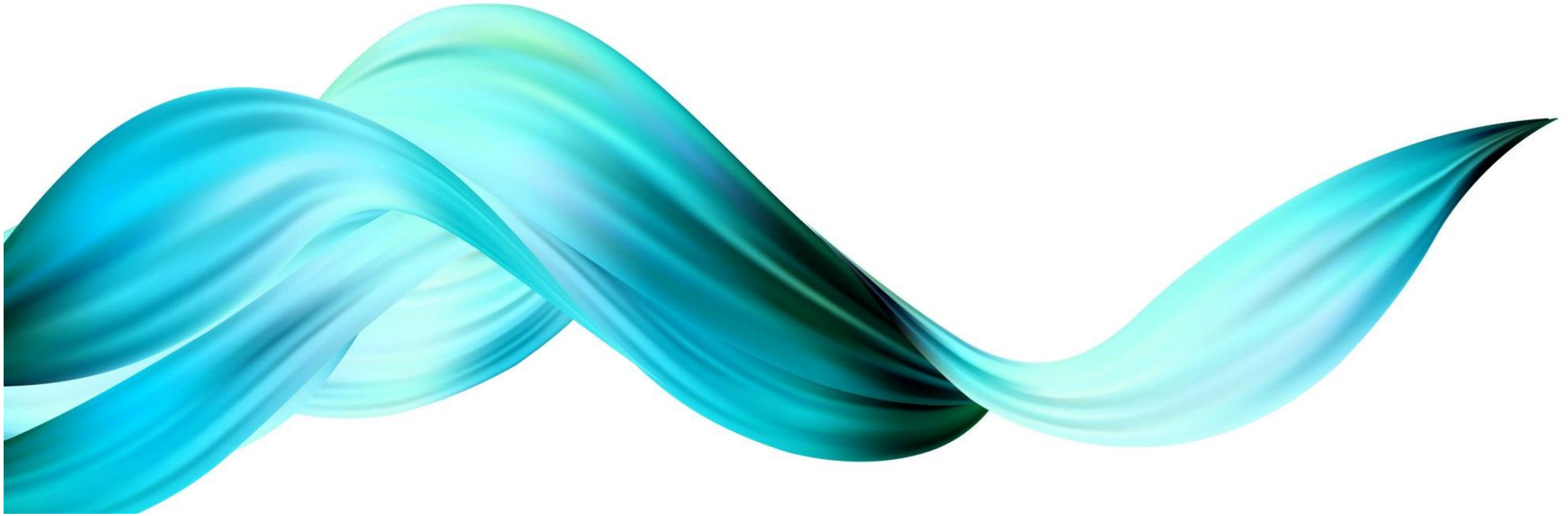
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# INTRODUCTION

- Procurement, public or defence, is a critical governmental function.
  - Primary Objective: To ensure that the requisite goods and services as required by the government from time to time is accessible at the appropriate time and in reasonable and economical manner.
  - Since public procurements are often met through the public funds, hence it is of utmost significance to ensure that the procedure governing procurement, should be carried out on the fundamental ethos of transparency, integrity and accountability.
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# FUNDAMENTAL PRINCIPLES OF PROCUREMENT

# ASCERTAINING NET WORTH

## VALUE FOR MONEY

- The term ‘*value*’, a subjective and intangible element, broadly resonates with the extent to which a product or service adds to the quality of life of a person. It talks about the sense of satisfaction that a person derives by using a product or service and the extent of this satisfaction often is a key determinant of the value of this product or service.



## COST OF PROCUREMENT

- While determining the value of a product or service, one needs to parallelly assess the ‘*Cost of Ownership*’ to understand the net worth of a product.



These two concepts put together bring us closer to the concept of ***Value for Money***. Largely subjective again, one is said to achieve *value for money*, when the perceived value of the product matches with the total cost of the product.

# PRINCIPLE OF NON- DISCRIMIN ATION

- While conducting public procurement, any government should accord to the products and services and consequently the suppliers of any other member nation to the agreement a treatment - “*No less favourable*” than they give to their domestic products, services, and suppliers.
- The country procuring a specific product or service is required to ensure that it does not treat its local industries and domestic suppliers differently on the basis of a greater or lesser degree of foreign affiliation or ownership as well as to ensure that its entities do not discriminate against domestic suppliers because their good or service is produced in a specific region.
- Incentivising domestic investments through offsets with a view to encourage local development, or according to a preferential treatment to domestic vendors in order to improve the balance of payment account, etc, are explicitly prohibited
- However, an exception can be made in the favour of developing countries allowing them to negotiate or reservation the said provision regarding the possible use of offsets provided these are used only for the qualification to participate in the procurement process and not as criteria for awarding contracts

# PRINCIPLE OF TRANSPAREN CY

- Procuring authorities are duty bound to ensure that the procurement process is transparent with all the stakeholders can access the necessary information at the right time
- There should be concurrent, balanced and unrestricted dissemination of information relating the bidding opportunities and the corresponding bidding process and evaluation criteria leading to award of contracts and the rules regarding contract management, etc. to the relevant stakeholders including the bidders
- General Financial Rules of 2017 as well as on the Manual for Public Procurement of Goods of 2017 which specifically prescribes that all the procuring entities should ensure that procedural framework for procurement should be fair and transparent in nature.
- Publishing laws, regulations, judicial pronouncements and administrative rulings of general application and any procedures regarding government procurement covered by the Agreement



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# PRINCIPLES OF PROFESSIONALISM



- Procuring entities are duty bound to conduct the said process professionally and ensure that the process imbibes the features of efficiency, integrity and follows a reasonable timeframe for its completion.
  - Procuring entity to avoid any practices which may lead to a wastage in investment or time of the public and the government and categorically instructs the authorities to comply with the 'Code of Integrity for Public Procurement'
  - The methodology adopted for public procurement should be reasonable and at the same time cost effective and should not be other complicated than what is required and also encourages government officials to undergo training if so is required.
  - It is mandated in public interest to ensure that they maintain the highest standards for the fair and equitable treatment of suppliers and the promotion of competition in public procurement of competition, economy, and transparency in areas connected to public procurement.
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# PRINCIPLES OF PROFESSIONALISM







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# BROADER OBLIGATION PRINCIPLE

- Objectives of fostering the developmental goals of the government
  - Preference to be also accorded to local products and services over a direct importation.
  - need to strengthen the domestic industrial base's indigenous production capabilities and further specifies that the procurement process should support the government's broader social policy and programme objectives (such as economic growth, local industry strengthening through "Make in India," ease of doing business, job and employment creation, and so on
  - enhancing accessibility to the procured items to all the sections of the society.
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## EXTENDED LEGAL RESPONSIBILITY PRINCIPLE

- Interface with other laws of the country
  - Indian judiciary extensively scrutinizes a procurement contract going beyond the contours of procurement laws examining the procedure of decision making to fundamental rights, fair play, and legitimacy.
  - Further, amongst other laws, the manual also categorically recognizes the role of the procuring authorities to ensure due compliance with mercantile laws, anti-corruption laws, laws on institutional governance with Right to Information Act, and many more
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## PUBLIC ACCOUNTABILITY PRINCIPLE

- procuring authorities being considered as a governmental entity themselves have a larger degree of accountability and responsibility of regulatory compliance and more importantly to ensure that procurement as a functional tool should contribute towards the development of the country.
  - the procuring agency to record at each stage the reasons for shortlisting or selecting a specific vendor or bid and constantly assess the evaluation criteria to ensure that appropriate decisions are undertaken and in the interest of transparency and public accountability, such reasons should also be made available in the public domain
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# INTERNATIONAL LAW ON PUBLIC PROCUREMENT – SECURITY EXCEPTION

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# WTO GOVERNMENT PROCUREMENT AGREEMENT 2014



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# UNCITRAL MODEL LAWS ON PROCUREMENT OF GOODS, CONSTRUCTION AND SERVICES 2011

Achieving economy and efficiency	Wide participation by suppliers and contractors, with procurement open to international participation as a general rule	Assuring integrity, fairness, and public confidence in the procurement process and
Ensuring fair, equal, and equitable treatment	Maximizing competition	Promoting transparency

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# DEFENCE PROCUREMENT REGIME IN EUROPEAN UNION

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# EU PUBLIC PROCUREMENT DIRECTIVE

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compatible with the WTO GPA

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included the exception in the favour of national security and provision for providing necessary protection to domestic industries are also provided in these directives

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European Union is one of the very few continents which have a fully developed normative framework on Defence Procurement

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separates Public Procurement from Defence Procurement

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the defence procurement contracts are subject to the legal regimes developed by different countries with the European Union → this has always been a hindrance in achieving a uniform defence procurement normative framework to be uniformly applicable across the European Union

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# TREATY FOUNDING EUROPEAN UNION

- TEFU governs the programmes for promoting green innovation and also allows the members to impose trade restrictive measures as much as necessary to promote green innovation
- Article 346 of TEFU – Imposition of Trade Restrictive Measures for protection of national security
- Article 346 of TEFU which empowers respective countries to impose a trade restrictive measure if the same is required for the purposes of ensuring national security
- EU also used this provision to bring within the ambit of defence procurement those products or services which aren't sensitive or classified but used in the defence procurement related transactions like stationery, cleaning services, food supplies. This practice is often criticized for being a blatant misuse

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# TREATY FOUNDING EUROPEAN UNION – ART 346

- Member nations can deviate from the established norms and principles of laws governing the European Union including the trading norms and adopt measures which might be discriminatory in nature while indulging in defence procurement as long it is justified that such a discriminatory measure is necessary for the protection of their essential security interest.
  - Implementation of such a discriminatory measure is allowed as far as trading or procurement of ammunitions and other war related material is concerned.
  - The said clause also warns against the misuse of the provision and states that implementation of such discriminatory measure should be made in such a manner that it doesn't adversely affect the intra-union trade in non-defence related products.
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# TREATY FOUNDING EUROPEAN UNION – ART 346

- However, this happens to be one of the most misinterpreted provisions of the said Treaty by inferring that this provision allows the member nations to relate the products and services which are being traded or procured for defence purposes from the purview of the TEFU and application of general EU Directives on inter-country trade which was ultimately resolved by an '*Interpretative Communication*'.
  - In December 2006, the European Commission issued an interpretative communication, titled '*Interpretative Communication on the Application of Article 296 of the Treaty in the Field of Defence Procurement*' where in it categorically explained the most appropriate interpretation of the said disputed article i.e., Article 346 of TEFU.
  - The Member States can deviate from the established norms and principles governing trading relations in European Union as far as a trade or procurement is in the field of defence and the same is done on an *ad hoc* basis.
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# TREATY FOUNDING EUROPEAN UNION

Further at the time of invoking this Article 346, the concerned Member nation should establish that the pre-requisites for establishment of this provision has been met. These pre-requisites are as follows:

- The concerned national measure which is being sought to be imposed under Article 346 should relate to '*Defence Goods*' as expounded by the Schedule prepared by the European Council in 1958.
- The said relevant national measure needs to be implemented otherwise, the '*Essential Security Interest*' of the State shall be at stake and

**Although the '*Interpretative Communication*' doesn't mention the extent to which a member state can deviate from such a provision, nonetheless, any discriminatory measure which is being sought to be implemented should draw a causal link of necessity between the required deviation and the protection of an essential security interest.**

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# DEFENCE AND SECURITY DIRECTIVE 2014

- Prior to the establishment of the Defence and Security Directive of 2014, non-military but sensitive or classified procurement was covered under the '**Public Sector or Utilities Directive**' which is the applicable Directive in the sphere of Public Procurement.
  - However, with the implementation of the Defence and Security Directive of 2014, this form of procurement was brought within the ambit of Defence Procurement.
  - Objective of DSD - developing a standard regulatory framework for defence procurement where in it can be ensured that the procurement process maintains or follows a non-discriminatory approach having due regards to the need to protecting national security
  - Further to bring a procurement within the ambit of Defence and Procurement the requisite contracts should be beyond certain thresholds are subject to constant revisions
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# DEFENCE AND SECURITY DIRECTIVE 2014 – PROCUREMENT PROCESS

- It allows the contracting parties when in talks for a procurement of defence related items are free to choose the negotiated procedure with prior notice as a standard procurement procedure.
  - Prior notice - ensures that adequate transparency is ensured in such contracts
  - This can be done by the contracting parties under two specific circumstances:
    - The first circumstance or case deals with those procurement agreements which involves procurement of maritime or aviation related transport services for the armed forces of the countries who are at present deployed beyond the borders of the country within which they are located.
    - For the second circumstance to be made applicable, a sense of urgency needs to be invoked. In these matters, the contracting parties are allowed to follow an already negotiated process without giving a prior notice in the event of an unforeseen urgency or crisis
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# DSD 2014 – SECURITY OF INFORMATION

Given the varied nature of stakeholders involved in a defence procurement contract, it is absolutely pertinent to ensure that any form of classified and sensitive information that is being traded or dealt with should be protected. The said Directive in this regard amongst other aspects, allows a contracting party to requisition the following from the concerned economic operators:

- The Economic Operators need to provide a commitment which they in turn need to obtain from the prospective tenderers and their sub-contractors wherein they commit to protect the respect for the privacy of all classified material in their care or coming to their attention, in accordance with the applicable Member State security clearance laws;
  - The Economic Operator need to identify the potential tenderers and their subsequent sub-contracts who will be given the responsibility of executing the contract.
  - The Economic Operator also has to ensure that the sub-contractors who will be so engaged possesses the requisite capability in terms of their financial and human resources who can not only finish the work order on time but they should also be capable to maintain the required transparency in the process.
  - The Economic Operator also needs to obtain another commitment from the tenderer to supply the aforementioned data from any additional subcontractors it employs during the course of the contract.
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# DSD 2014 – SECURITY OF SUPPLY

- Ensuring the security of Supplies that is sought to be procured under defence procurement contracts is another core aspect of the EU Defence and Security Directive. The EU Defence and Security Directive categorically provides a normative framework according to which the contracting authorities:
  - Certificate of Validation - establishes (to the satisfaction of the contracting authority) the ability of the tenderer to perform its obligation of exportation, safe and secure transit of the goods under a particular contract, if the work order is awarded.
  - The Economic Operators should also disclose to the contracting authority any form of limitation or objection involving the usage or which may hinder the transport of goods associated with the contract.
  - The Economic Operators should also provide a Certificate establishing that it is feasible for a prospective tenderer, having due regards to its place of operations and presence across the continent that it will be in a position to abide by all the requirements of the contracting states.
  - The Economic Operators are also required to provide an undertaking from the tenderer in order to establish that the latter possesses the capacity to meet any possible or additional needs of the contracting authority either during a crisis situation or any change that may be required due to a regulatory change in the governance of the country.
  - An undertaking to the effect of ensuring the ability of the tender to provide adequate after sale services like maintenance, remodelling or reformation of the supplies under the contract of procurement.
  - The tenderer must also submit an undertaking assuring the Economic Operator to provide timely information regarding any change in the ownership of its organization, processes or logistical or financial presence or changes in the supply chain or its policies which may have any impact on its operations.
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# DSD 2014 - REMEDIES

- The EU Defence and Security Directive also provides for '**Remedial Provisions**' in addition to its substantive provisions. These Remedial Provisions are in tandem with the '**Remedies Directive**'.
  - As per the said Directive, the Member States are allowed to establish institutional framework which will exclusively look into disputes relating to defence procurement and other areas governing national security.
  - Such an institutional framework shall function on the fundamental principles of natural justice, equity and good conscience and will strive to follow due process in judicial review.
  - Further it also advocates for establishment of a court or tribunal which can act as an appellate body in such matters.
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# DSD 2014 - OFFSETS

- It is interesting to note that the Defence and Security Directive of EU doesn't explicitly mention about Offsets.
  - However, the European Commission has time and again constantly either by way of Interpretative Communication or through Guidance Note constantly mentioned that Offsets are discriminatory by its very nature as it is based on national protectionist model and hence under the EU Defence Procurement regime, Offsets will not be considered as a criterion on which a defence procurement contract will be awarded.
  - However, this is not a blanket prohibition and under few exception cases, specific offset practices may be allowed which can be imposed under the exceptions made under the EU Treaties, most popular being the nation security exception under Article 346 of the TEFU.
  - Even though the said regime doesn't mention about Offsets, nonetheless, it does mention 'sub-contracting' which is another way to introduce offsets but having due regards to the non-discriminatory principle of the EU Law.
  - 'Sub-Contracting' in the context of the EU Defence and Security Directive means that the contracting authority may insist that the tenderer to whom a Defence Procurement Contract has been awarded should engage domestic vendors for the purposes of sub-contracting or sub-letting few aspects of the work order that it has so received.
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# OECD GUIDING PRINCIPLES ON PUBLIC PROCUREMENT



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# OECD GUIDING PRINCIPLES ON PUBLIC PROCUREMENT


- Governs government procurement contracts within OECD countries.
  - Defence Exception - Allows its member nations to deviate from these established principles for reasons necessary for protection of classified information in Defence Sector.
  - While the OECD Principle on Public Procurement has left the regulation of Defence Procurement Contract to the domain of the respective nations, nonetheless, on a principle basis, the principle of transparency and non-discrimination should be followed across all forms of procurement.
  - More importantly, exceptions to competitive tendering shall not be abused to procure daily military equipment when there are no national interests at stake.
  - Similarly, state-owned enterprises, which are often key economic operators, may use more flexible procurement procedures when they compete with private companies for the production of goods and services.
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# OECD GUIDING PRINCIPLES ON PUBLIC PROCUREMENT

- In order to ensure a level playing competitive field, OECD Principles require that the norms of competitive bidding should be categorically defined in order to avoid an abuse of the said field. This is applicable for Defence Procurements as well.
  - Wherever non-competitive tendering process is adopted by a member nation, in such cases, the member nations should conduct random or surprise review audits once in every three quarters.
  - For adoption of non-competitive tendering process, it is of paramount importance that the government officials engaged in such process should be classified as 'Higher Level of Authorizing Personnel' in all respondent countries.
  - The Principles further encourage the government to establish a procedural framework for infusing the principles of transparency and non-discrimination and integrity measures in the process of Competitive Bidding and Tendering.
  - The Member Nations of OECD can deviate from the established norms of public procurement and defence procurement provided they provide an explanation in writing justifying the need for such deviation.
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# DEFENCE COOPERATI ON PRACTICE IN ASEAN

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# DEFENCE COOPERATION IN ASEAN NATIONS

- Public and Defence Procurements are formally regulated by domestic legal framework.
  - All the defence related procurement whether military or non-military has been made by the member nations having due regards to the national interests without any form of regional cooperation or coordination.
  - However, given the common security threats faced by the regions, over the past few years, many ASEAN countries have resorted to a series of bilateral defence networking system consisting of a series of agreements and best practices.
  - This network of informal bilateral ties is called the '*ASEAN Defence Spider Web*'.
  - Underpinning this form of cooperation is a widespread conviction on the part of ASEAN leaders that bilateral cooperation offers advantages over other forms of multilateral military cooperation.
  - These series of Bilateral Defence Cooperation Agreements primarily involve sharing of classified information and intelligence sharing in order to develop military contacts.
  - Such understandings are also instrumental in removing mutual suspicions and tensions, or to combat common security problems in border and maritime areas, including smuggling, drug trafficking, piracy, and protection of EEZs.
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# DEFENCE COOPERATION IN ASEAN NATIONS

- In this informal regional arrangement, there has been a steady increase in the mutual use of defence facilities and conducting of joint military exercises and training programmes have been introduced.
  - The focus of such cooperation is to strengthen air and maritime cooperation.
  - For instance, the Air Force Department of Singapore and Thailand conduct joint training sessions in Philippines and Brunei.
  - Similarly, Malaysia and Philippines have a Bilateral Defence Cooperation Agreement under which the armed forces of the countries are brought together for advanced training courses in their respective field.
  - Singapore has similarly tied up with Indonesia in order to train its navel base on Indonesian waters and to use air combat ranges in Sumatra.
  - Under the aegis of the FPDA, Malaysia and Singapore expanded military cooperation to include participation in annual exercises and the organization's Integrated Air Defense System (IADS).
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# DEFENCE COOPERATION IN ASEAN NATIONS

- These developments in bilateral defence cooperation ties amongst ASEAN Countries indicate a growing interest among the countries to come together for facing any possible forms of external threats.
  - This was seen in the 1990s, when anticipating the withdrawal of the United States of America from the defence bases located in Philippines, Singapore and the United States of America came together to implement certain bilateral agreements thereby facilitating the use of military facilities of Singapore overhaul, resupply, and logistics support by the shipping and aviation crew of the United States.
  - This cooperative arrangement enabled Singapore to enhance and develop its docking facilities in order to provide for proper logistical support for visits by U.S. aircraft carriers.
  - Similarly, the United States has similar 'Logistical Support Arrangements' with many ASEAN countries like Indonesia, Brunei and Malaysia.
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# DEFENCE COOPERATION IN ASEAN NATIONS

- While there are many such instances of defence cooperation on a bilateral basis in the ASEAN region, the prospects of developing a coordinated front for matters of defence relations let alone defence procurement in ASEAN region remains a distant reality. It is highly doubtful that ASEAN can develop an effective regional collective security, despite common concerns of the ASEAN countries over China's potential threat to regional security.
  - Many policy analysts have classified ASEAN countries as relatively 'weak countries' for lack of political and social cohesion.
  - The weakness of these states—reflected in the continuing preoccupation of ASEAN members with internal security and regime survival—makes intra-ASEAN defense and security cooperation more difficult and many countries depend upon bilateral cooperative arrangements rather than relying upon regional arrangements. Their focus is to strengthen their domestic military capabilities.
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# DEFENCE COOPERATION IN ASEAN NATIONS

- ASEAN as a regional arrangement is devoid of a common goal or principle for defence related matters. Accordingly, in matters of defence procurement, their procedures are distinct and unique and lack the fundamental principle of transparency.
  - Despite many countries in the ASEAN region have the requisite advance technology in defence related matters like the latest advanced technologies and equipments and sufficient financial aid to support a cooperative regional defence arrangement, the added apprehension towards each other, especially China, has always hindered the process of achieving an united front as can be seen in the European Union.
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THANK YOU

