Treaty Management in International Organisations: Lessons Learnt and ASEAN Practice

2 December 2016
Jakarta, Indonesia

Workshop Report
Executive Summary

Organised by

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List of Abbreviations

AMS	ASEAN member states
ASEAN	Association of Southeast Asian Nations
ASEC	ASEAN Secretariat
ASLOM	ASEAN Senior Law Officials Meeting
CIL	Centre for International Law
CoE	Council of Europe
CPR	Committee of Permanent Representatives to ASEAN
EU	European Union
FTA	Free Trade Agreement
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
IAEA	International Atomic Energy Agency
IMO	International Maritime Organization
IO	international organisation
LSAD	Legal Services and Agreements Directorate, the ASEAN Secretariat
MoU	Memorandum of Understanding
NGO	non-governmental organisation
ROPCIA	Rules of Procedure for the Conclusion of International Agreements by ASEAN
SG	Secretary-General
UK	United Kingdom
UN	United Nations

Summary of the Workshop

1. The Workshop on "Treaty Management in International Organisations: Lessons Learnt and ASEAN Practice" (**"Workshop"**) was held on 2 December 2016 by the Centre for International Law (**"CIL"**) and the Secretariat of the Association of Southeast Asian Nations (**"ASEC"**), with the support of the Deutsche Gesellschaft für Internationale Zusammenarbeit (**"GIZ"**) GmbH.

2. This Workshop focused on the treaty management practices of the Association of Southeast Asian Nations (**"ASEAN"**). The Workshop was specifically designed for ASEAN member states (**"AMS"**), most notably the representatives of the Committee of the Permanent Representatives to ASEAN (**"CPR"**), ASEAN Senior Law Officials Meeting (**"ASLOM"**), and relevant AMS' legal officers and ASEC desk officers who both are already familiar with the practice of states and international organisations (**"IO"**) in the conclusion and management of international agreements.

3. The objectives of the Workshop were as follows.

    a. To provide a perspective on the treaty management and practice of other established IOs

    b. To promote awareness and identify issues and challenges in the context of ASEAN's legal personality

    c. To identify best practices and measures needed to address possible problems in the ASEAN treaty management

    d. To identify and raise awareness of gaps and issues in the ASEAN treaty management and practice

    e. To promote a more cohesive practice in the management of ASEAN instruments by AMS and ASEC

f. To promote higher compliance with the obligations prescribed in ASEAN instruments

4. Attended by approximately 80 representatives from the CPR, ASLOM, AMS and ASEC, the Workshop offered perspectives on the treaty management practices of ASEAN, the Council of Europe (**"CoE"**) and the International Atomic Energy Agency (**"IAEA"**). The Workshop also discussed domestic treaty management practices of the United Kingdom (**"UK"**), Singapore and Thailand.

5. The Workshop identified challenges in the treaty management practices of ASEAN and a set of recommendations aimed at improving treaty practices in the region in general and ASEAN treaty management practice in particular. These issues are captured in this report.

6. The Workshop speakers, listed below, are experts experienced in treaty law and practice and the international and domestic legal frameworks in which treaties are concluded.

a. Ms Jill Barrett

- Visiting Reader, School of Law, Queen Mary University of London
- Former Legal Counsellor, Foreign and Commonwealth Office, United Kingdom

b. Ms Ana Gómez Heredero

- Head, Treaty Office Unit, Council of Europe

c. Mr Un Sovannasam

- Director, Legal Services and Agreements Directorate, ASEAN Secretariat

d. Ms Rena Lee

- Senior State Counsel, International Affairs Division, Attorney-General's Chambers, Republic of Singapore

e. Dr Tull Traisorat

- Director, Treaty Division, Department of Treaties and Legal Affairs, Ministry of Foreign Affairs, Kingdom of Thailand

f. Mr Anthony Wetherall

- Senior Research Fellow, Centre for International Law, National University of Singapore
- Former Legal Officer, Nuclear and Treaty Law Section, Office of Legal Affairs, the International Atomic Energy Agency

g. Ms Ranyta Yusran

- Research Fellow, Centre for International Law, National University of Singapore

7. The next section of the report covers the challenges and recommendations identified during discussion on the topics below.

a. The role of a treaty office in managing treaties/instruments

b. Treaty practice related to agreements concluded by an IO and AMS' internal procedures

c. Treaty practice related to agreements concluded by ASEAN and its relation to AMS' internal procedures for the conclusion of international agreements

d. Lessons learnt and the way forward

Identification of Challenges and Recommendations

A. The Role of a Treaty Office in Managing Treaties or Instruments

8. The discussion in this topic focused on the mandate given to a Secretary-General (**"SG"**) as the depositary of the legal instruments of an IO, specifically the function of the Treaty Office in managing an IO's legal instruments.

9. The discussion highlighted the role of the Treaty Offices of the CoE, the IAEA and ASEAN; treaty management functions; determination of the status of the legal instruments of an IO; interpretation of those legal instruments; the general role of the Secretariat in treaty management; and the general criteria on what constitutes good treaty management.

10. A list of generic criteria on good treaty management in IOs and in domestic jurisdictions was presented and summed up as the "PLATO" Principles—**P**rofessional, **L**egal, **A**ssured, **T**ransparent and **O**rganised.

    - **Professional** refers to the approach to treaty work by treaty professionals and their organisations.
    - **Legal** means legal requirements must be met and lawyers should be fully engaged.
    - **Assured** means reliable, dependable, trustworthy and guaranteed.
    - **Transparent** means easy access to relevant information regarding treaties, clear guidelines for treaty officials, etc.
    - **Organised** means treaty management practice should be systematic, efficient and regularly updated.

11. The discussion identified the challenges faced by ASEAN's treaty office and offered recommendations to improve ASEAN's treaty management, by comparing and assessing the different practices of the CoE, the IAEA and ASEAN.

Challenges

12. The designation and role of the depositary in ASEAN agreements and instruments are in many cases ambiguous and could be subject to various interpretations.

    While the ASEAN SG is appointed as the depositary in ASEAN legal instruments, such a designation and role are not always clear and consistent in the context of, for instance, ASEAN+1 Free Trade Agreements (**"FTA"**) or agreements concluded between ASEAN and external parties. The practice varies from one ASEAN+1 FTA to another.

13. The meaning of the term "competent authority" of a state during a notification process is vague.

    In other words, who is competent to notify the depositary that his/her state has completed its internal procedure for the treaty to enter into force? Within ASEAN, although the SG as the depositary of ASEAN legal instruments could only validate the notifications deposited by the Permanent Mission of each member state to ASEAN, sometimes the member states' relevant ASEAN sectoral bodies—depending on the subject matter of the treaty—insist that they have the authority to deposit and notify the depositary of the completion of the relevant state's internal procedures.

14. It is difficult to determine when a treaty enters into force.

    In some cases, there is a lack of information on the date on which a member state has notified the depositary of its completion of internal procedure. In other cases, the provision on "entry into force" in some ASEAN agreements is not clear and is open to different interpretations.

15. It is unclear what steps should be taken if there is a political imperative to complete the ratification of a treaty in a short period of time while some states parties cannot complete their internal procedures or enact the necessary implementing legislation in time.

Recommendations

16. The depositary of ASEAN agreements and the role of the depositary in each ASEAN agreement could be consistent.

    It is recommended that in ASEAN legal instruments, the ASEAN SG acts as the depositary. The depositary will then notify all states parties of all depositary matters through their respective Permanent Missions in Jakarta. This reflects the best practice in the management of treaties.

17. Standard final clauses for ASEAN instruments could be determined.

    Examples of such clauses include the status of "completion of a state's internal procedure" in relation to ratification, acceptance, approval, notification or accession, and the entry into force of an ASEAN legal instrument. Guidelines are needed on what to do if a state cannot complete its internal procedures within a time period specified by an agreement. Article 25(1) of the Protocol on the Legal Framework to Implement the ASEAN Single Window is an example of a provision that specifies a time period in which AMS must complete their internal procedures for the Protocol to enter into force. However, there are no guidelines on what to do when not all AMS were able to complete their internal procedures within the time limit set out by the Protocol. Below are three possible solutions.

    a. Regulate that the treaty will enter into force by way of "tacit acceptance", whereby a state party that has not ratified a treaty that it has signed for a certain period of time—for example, two years—will be deemed to have accepted the obligations under that treaty, unless the state party objects within a stipulated period of time. Tacit acceptance has also been used within the framework of some IOs, in particular under treaties relating to the protection of the environment.

    b. Put a clause stating that if the treaty has not entered into force after the deadline set by the treaty has lapsed, it will enter into force for the states that have completed their internal procedures after a certain period of time and after a certain number of states have notified the depositary of the completion of their procedures. An example of determining a specific

deadline for the entry into force of a legal instrument can be seen in Article 7(2), Chapter 18 of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area.

c. Draft the treaty in a way that allows it to come into force with a small number of ratifications, so that it does not have to be ratified by all states parties. States that are ready can bring the treaty into force upon themselves. Those that are not yet ready, should there be a political imperative, may issue a political statement, such as a non-binding declaration stating that the ratification of the treaty may take place on a certain date or within a certain period of time, or that they support the objectives of the treaty and are working towards ratification.

B. Treaty Practice Related to Agreements Concluded by an IO and Member States' Internal Procedures

18. The discussion on this topic focused on the internal procedures of the CoE and the IAEA in relation to the process of concluding an international agreement with member states and/or other states, organisations or third parties. The discussion also included a general overview of treaty practice related to agreements concluded by an IO and a discussion on the internal procedure of the UK in concluding and implementing agreements concluded by an IO of which the UK is a member.

19. The discussion identified challenges faced by ASEAN's treaty office and offered recommendations to improve ASEAN's treaty management, by comparing and assessing the different practices of the UK, CoE and IAEA.

Challenges

20. ASEAN has no common, consistent approach in relation to Article 102 of the UN Charter. Some ASEAN legal instruments are registered with the United Nations (**"UN"**) SG, while others are not.

Recommendations

21. ASEAN could clarify when to register a treaty with the UN.

    Bilateral or multilateral agreements that are not adopted by an organ of an IO and not ratified by the IO member states do not need to be registered with the UN. However, all treaties adopted by an organ of an IO and ratified by its member states will be registered with the UN upon their entry into force. For example, the General Agreement on Privileges and Immunities of the CoE, adopted on 2 September 1949, was ratified by all the CoE member states and was therefore registered with the UN. Furthermore, the UN Treaty Handbook may serve as a guideline on when to register a treaty with the UN (https://treaties.un.org/doc/source/publications/THB/English.pdf).

22. Although there are no issues on the confidentiality of ASEAN agreements, ASEAN could adopt a practice similar to the CoE with regard to such a subject.

    In the CoE, agreements (usually bilateral) concluded by the CoE that concern privileges, immunities or financial matters are kept confidential and will not be published on the CoE website. The CoE relies on the respective technical departments that conclude the treaties in determining whether they are confidential. Once the departments deem the treaty confidential, the Treaty Office will not publish it on the CoE website.

C. Treaty Practice Related to Agreements Concluded by ASEAN and ASEAN Member States' Internal Procedures

23. The discussion of this topic focused on the internal procedures of ASEAN and AMS in relation to the process of concluding and implementing agreements concluded by ASEAN (both with AMS and external parties) as an intergovernmental organisation and also as a group of AMS. The internal procedures of ASEAN and AMS on the conclusion and implementation of ASEAN agreements are very relevant to the implementation of the 2011 Rules of Procedure for the Conclusion of International Agreements by ASEAN (**"ROPCIA"**). Examples of agreements concluded by ASEAN with an

AMS and an external party include the 2012 Agreement between Indonesia and ASEAN on Hosting and Granting Privileges and Immunities to the ASEC and the 2007 MoU by ASEAN and the UN. This session also discussed agreements concluded by AMS collectively, which entail separate rights and obligations from those of ASEAN, and agreements concluded with external parties. The purpose of this session was to discern the different internal processes, if any, in concluding these agreements.

Challenges

24. The interpretation of ROPCIA—particularly whether an agreement concluded by ASEAN as an intergovernmental organisation will impose obligations on AMS—depends on the way each member state interprets and applies it to each agreement and on the provisions of the agreement itself.

25. ASEAN does not have guidelines or procedures to deal with mixed agreements, i.e. agreements that give rise to rights and obligations to both ASEAN and AMS; contracts with an international character; and non-binding agreements concluded by ASEAN as an intergovernmental organisation. ROPCIA only serves as guidelines for ASEAN in concluding international agreements and differentiates such agreements from those concluded by AMS with external parties.

26. The internal procedures of some AMS are ambiguous and do not differentiate clearly between agreements concluded by ASEAN as an intergovernmental organisation and agreements concluded by the AMS collectively. Contrary to the internal procedures of some AMS, ROPCIA makes a distinction between the treaty-making capacity of ASEAN and that of individual AMS. As such, ASEAN+1 FTAs—legal instruments concluded based on collective negotiations by AMS—are not considered "international agreements of ASEAN" and do not fall under the scope of application of ROPCIA.

27. ROPCIA is ambiguous on whether it is the CPR or the sectoral bodies that have the role and authority to initiate the negotiation of an international

agreement to be concluded by ASEAN. While ROPCIA seems to grant the CPR the authority to decide on the negotiations of ASEAN agreements, in reality the negotiation of an international agreement to be concluded by ASEAN is usually initiated by the concerned sectoral bodies, because they engage directly with external partners. The CPR will later decide on the act of confirmation and authorisation of the SG to sign the agreement.

Recommendations

28. ASEAN could review and improve its treaty practice and management.

    Although the drafters of ROPCIA did not intend to abandon ASEAN practice vis-à-vis agreements concluded by AMS collectively, ASEAN could refer to specific guidelines on each phase leading up to the conclusion of an international agreement by ASEAN as an intergovernmental organisation and by AMS collectively, e.g., the negotiation phase, the drafting phase, etc. It may also be useful for relevant sectoral bodies and the CPR to reach a common position at the consultation stage on the status of the agreement; whether it is an agreement concluded by ASEAN or an agreement creating rights and obligations upon individual member states.

29. AMS could consider classification of certain agreements as agreements concluded by ASEAN to help them determine the appropriate internal procedures.

    Internal procedures would be clearer if member states could consider that agreements with a certain nature (such as development cooperation and collaborative activities within the framework of ASEAN that are submitted to AMS for consideration or approval) are in general agreements concluded by ASEAN as an intergovernmental organisation rather than agreements concluded by AMS collectively.

30. ASEAN could develop a common understanding on ROPCIA.

    Such an understanding is relevant not only to AMS but also to different divisions of ASEC, considering the different procedures applied by each member state and the fact that not all AMS have a separate internal

procedure on agreements concluded by ASEAN as an intergovernmental organisation. Therefore, it is necessary to have tools such as explanatory notes and to disseminate information on ROPCIA and the different rules of procedures and corresponding guidelines, especially to officers and officials who do not have a legal background.

31. ASEAN and AMS may also consider providing clarity on the areas of competency in which ASEAN may conclude agreements as an intergovernmental organisation, in order to avoid different interpretations by individual AMS as to whether an agreement concluded by ASEAN creates rights and obligations on them.

32. ASEAN could adopt guidelines for the AMS or internal guidelines within ASEC on the conclusion of non-binding agreements and contracts with external parties by ASEAN, and other agreements that create rights and obligations upon both ASEAN and AMS.

D. Lessons Learnt and the Way Forward

33. This discussion identified good treaty management practices and the problems related to ASEAN treaty management practice. It also identified issues surrounding the conclusion and implementation of international agreements concluded by ASEAN as an intergovernmental organisation and by AMS collectively with a view to possibly expediting the process of consultation and approval for such conclusion.

34. The discussion on challenges and recommendations focused on the ASEAN treaty management practice—especially in relation to ROPCIA—reflecting on the treaty management practices of the CoE and IAEA and the internal procedure of the UK on conclusion of agreements by an IO to which it is a party.

Challenges

35. There is a lack of clarity on whether some ASEAN agreements are binding. For example, what is the status of an MoU? Do ASEAN MoUs constitute "agreements", especially those with specific final clauses? Do they have any legal consequences in cases of non-implementation or non-compliance?

36. There is a lack of consistency in standard clauses in the agreements that ASEAN enters into, in particular, the final clauses on the operational and procedural aspects of the treaty, including provisions on entry into force, declaration, reservation, withdrawal, depositary, dispute settlement, amendment, duration, authentic texts, etc.

37. There is also a lack of clarity and/or consistency in the ASEAN procedure with regard to amendments and withdrawal from ASEAN legal instruments. Questions that arise include the following. Do all amendments to and withdrawal from all of ASEAN legal instruments need to go through the same process as their conclusions? Does ASEAN need a simplified procedure instead? How does ASEAN determine which instruments need to go through the full process of amendment or withdrawal, and which ones may go through a simplified procedure? Who may be in charge of the amendment or withdrawal? There are arguments that certain bodies, such as the ASEAN Agricultural Ministers, are not competent to make amendments to treaties, since they are arguably not competent to make decisions that create legally binding consequences.

Recommendations

38. Clearer guidelines are needed on how to determine if an instrument is binding.

39. Guidelines are needed on standard clauses to be included in the agreements ASEAN enters into, such as final clauses (clauses on the operational and procedural aspects of the treaty), which include provisions on entry into force, withdrawal, depositary, dispute settlement, amendment, duration, authentic texts, etc.

Guidelines should also exist to provide for references on what should be included in the preamble of an ASEAN agreement, what terms should be used for binding instruments or non-binding instruments, and what main points should be included in the body of the text. In this regard, one may use the CoE Model Final Clauses for Conventions as a reference.

40. There should be guidelines on amendments to and withdrawal from ASEAN legal instruments, i.e., instruments concluded among AMS under the auspices of ASEAN. Specifically, the guidelines should include the following: how to initiate the amendment or withdrawal procedure; who has the competence to propose the amendment or withdrawal; what steps need to be taken; when the amendment or withdrawal takes effect; and whether certain treaties may be amended in a simplified procedure and if so, what types of treaties may undergo such a process. ASEAN could consider the following two practices of the IMO and CoE.

    a. In the IMO, there is a notion of "tacit acceptance" in amending a treaty. Very technical economic agreements (usually found in annexes to a broader treaty) are normally amended regularly. Under the notion of "tacit acceptance", these treaties are automatically binding upon the states parties, unless they object. This will save time, since those agreements do not have to go through the full ratification process of the states parties.

        If ASEAN decides to formulate some model rules on tacit acceptance, there should also be guidelines on when to use these rules and how to implement them. The practice must be consistent with internal laws of AMS, and they must be able to implement the amendment within the time frame set out by the amendment and/or the main treaty. However, if they are not able to do so, perhaps they should not agree to the tacit acceptance procedure.

    b. Another example is the CoE procedure with regard to amendment of technical appendixes to treaties. According to this procedure, following the lapse of a certain period of time, amendments to appendixes shall enter into force for those contracting parties that have not filed any

objection, unless one-third of the contracting parties have notified objections.

ASEAN may also consider to put a clause in the agreement clearly distinguishing the procedure that will apply in case of amendment to the annex (i.e., the simplified procedure) from the procedure that will apply to amendments to the main text of the treaty.

41. ROPCIA should have guidelines prescribing each step that needs to be taken during the negotiation, e.g., each negotiating party needs to clarify or seek clarification on what the agreement is intended for; whether it is meant to be binding; whether it is intended to be concluded by ASEAN, AMS or both; and what substantive and procedural clauses it should contain, etc.