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ASEAN Integration Through Law Project

Executive Summaries

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ASEAN Economic Cooperation and Integration:

Progress, Challenges and Future Direction

Chia Siow Yue and Michael G. Plummer

EXECUTIVE SUMMARY

ASEAN economic cooperation and integration have come a long way since the organization's early days, when cooperation was more political and diplomatic than economic in nature. Beginning with the ASEAN Free-trade Area (AFTA) in 1992, ASEAN economic cooperation has become increasingly prominent, and in the 21st Century it represents an integral part of the regional economic landscape.

The ASEAN Economic Community (AEC) initiative, conceived in 2003 and officially launched in 2007, constitutes by far the most ambitious attempt by ASEAN Member States to create a "unified market and production base" and envisions arguably the deepest economic cooperation program in the developing world. Its goal is to allow free flow of goods, services, foreign direct investment (FDI), and skilled labour, and freer flow of capital within the region, to be accomplished by 2015 (2020 for the transitional ASEAN economies). The AEC is being implemented in the context of a rapidly-changing global and regional architecture, with multilateral trade negotiations on hold and "mega-regional" trade pacts in negotiation, including the Trans-pacific Partnership (TPP) and the Regional Economic Comprehensive Partnership (RCEP), the latter being a manifestation of "ASEAN Centrality". The stakes associated with the successful construction of the AEC are clearly very high for ASEAN and its Member States.

The goal of this monograph is give a contextual review of ASEAN economic cooperation in general and the AEC in particular, analyse its economic implications, assess its implementation to date, and consider future challenges. Below we summarize some of the major findings.

In terms of the potential economic benefits from the AEC, the literature underscores several key benefits of economic integration, including an enlarged market with economies of scale and scope, improved resource allocation with free movement of factors of production, improved resource pools with inflows of capital and labour, and competition leading to improved efficiency and innovation. In an earlier study (Plummer and China 2009), we assess the benefits of the AEC to various ASEAN stakeholders (government, business, labour, consumers) as stemming from:

****Benefits from Liberalisation of Trade in Goods and Services***, with a single market and production base allowing ASEAN to benefit from economies of scale and efficiency in production network processes, boost competitiveness, strengthen ASEAN institutions, and improve the region's socioeconomic environment.

The elimination of intra-ASEAN tariffs and non-tariff barriers will boost intra-ASEAN trade and in the process have positive effects on economic growth and employment, result in more efficient allocation of resources and thus gains in productivity, encouraging foreign and domestic investments, lower business costs, increase economic competitiveness, and lower consumer prices and widen

consumer choice. Liberalisation of the services sector is particularly important, given its rising contribution to output and employment in the region, relevance to value chains, and relatively high status quo barriers. In addition, addressing behind-the-border measures such as those related to competition policy and intellectual property rights (IPR) protection, as well as infrastructure and spatial connectivity, should yield substantial gains.

****Benefits from Liberalisation of Investment and Skilled Labour Flows***, with greater FDI inflows bringing in financial resources for fixed investment as well as technological and managerial knowhow, participation in regional production networks and global supply chains, resulting in improved efficiency in production and marketing. The ASEAN Comprehensive Investment Area (ACIA), which began implementation in 2012, should lead this process; it is comprised of four components of FDI liberalisation, facilitation, promotion and protection. In addition, skilled labour mobility (including professionals) is essential for effective implementation of services liberalisation and FDI liberalisation as well as for deeper economic integration. A free flow of skilled labour will increase ASEAN's attraction to foreign MNCs, particularly as it meets their need for intra-corporate transferees of management and technical personnel. The easier movement of ASEAN professionals within the region will facilitate people-to-people contact and enable transfers of knowhow, experiences and best practices.

****Financial and Capital Market Development***, with more efficient markets to finance trade, investment and corporate development in ASEAN countries. Cooperation in ASEAN and in ASEAN +3 (that is, including also China, Japan and South Korea) have resulted in several financial initiatives such as Chiang Mai Initiative Multilateralised, Asian Bond Market, and Regional Surveillance Mechanism.

****Narrowing the Development Gap***, with Cambodia, Lao PDR, Myanmar and Vietnam (CLMV) beginning to catch-up with the more advanced ASEAN Member States. As detailed at length in this study ASEAN economies are characterised by wide economic diversity in factor endowments, economic structures and levels of economic development. It is generally accepted that a wide development gap would lead to negative spill-over effects between rich and poor neighbourhoods as well as hindering consensus building and the speed of progress towards the ASEAN Economic Community. The Initiative for ASEAN Integration (IAI) is the key policy instrument to provide economic and technical development assistance to the CLMV countries, embodying also the transfer of knowhow, development experience and best practices from the more advanced ASEAN Member States. Moreover, regional production networks hold great promise in plugging in CLMV productive factors into the global and regional economies; hence, the anticipated boost to these networks via the AEC should benefit significantly ASEAN's poorest members.

While it is difficult to put numbers to the potential economic effects of the AEC, our earlier study uses a Computable General Equilibrium (CGE) model to gauge the effects assuming complete elimination of tariffs and NTBs, liberalisation of five service sectors, AEC-induced changes in FDI and a 5 per cent reduction in trade costs. Despite the fact some of the most important benefits of the AEC are not included in the simulated scenarios (e.g., competition policy, greater IPR protection, financial cooperation, other behind-the border measures), the study estimates that the increase in economic welfare should be 5.3 per cent or US $69 billion relative to the baseline, that is, more than 6 times the effect estimated for AFTA. All ASEAN countries benefit.

Hence, the potential gains are large. Nevertheless, implementation of such an ambitious program in the context of such a diverse region is difficult. The "ASEAN Scorecard," an implementation tracking mechanism undertaken by the ASEAN Secretariat, attempts to gauge annual progress in meeting the exigencies of the AEC Blueprint. In essence, ASEAN countries have thus far fully implemented commitments related to freer flow of capital (except Myanmar), free flow of skilled labour, priority integration sectors, competition policy, mineral, ICT, taxation (except Cambodia), and e-commerce. Moreover, all ASEAN countries have more than half implemented free flow of goods, free flow of services, free flow of investments, food-agriculture-forestry, consumer protection, transport, energy, IAI and external economic relations.

However, the compliance record is mixed. Much remains to be done if the AEC is to be completed on schedule.

In sum, ASEAN economic cooperation and integration have come a long way. From a set of token cooperative initiatives during its first few decades to a "single market and production base" in the form of the AEC, ASEAN now can boast an increasingly-integrated region with a clear plan for deepening integration in the future. The progressively outward-oriented nature of the trade and investment regimes of ASEAN member economies is consistent with the direction of the AEC and related initiatives, which stress the need for "open regionalism" more than most other regional economic groupings. No doubt this reflects the fact that the lion's share of ASEAN's trade and investment interaction is extra-regional. But it also is an expression of ASEAN's development strategy, one that would well be imitated by the many other regional economic groupings sprouting up throughout the world.

Outward orientation has served ASEAN well. It has been one of the fastest growing regions in the world for the past quarter century, with a major downturn only during the Asian Financial Crisis of 1997-98. While there is considerable variance in performance across ASEAN countries, per capita income on average has been rising robustly, poverty rates have been falling, and social indicators have been improving. Although the US Financial Crisis of 2008-2009 and the on-going Eurozone Sovereign Debt Crisis have affected ASEAN growth over the past five years due to their exposure to global markets, liberal trade and investment regimes have allowed them to bounce back quickly, helped in part by buoyant commodity demand (until recently) by China and India for the resource-rich ASEAN economies.

We show in this study that the AEC has made substantive progress in implementing measures outlined in the AEC Blueprint and in subsequent initiatives such as ASEAN infrastructure connectivity. But much more remains to be done. Indeed, the implementation rate has been slowing down, rather than rising as it will need to do to meet the rapidly-approaching deadline of 2015. As some of the more difficult issues remain, it will take a good deal of political momentum at the highest levels to ensure a successful outcome.

But the timing is less significant than the final product. The EU Single Market Programme, dubbed "EC 1992" due to the fact that it was intended to be completed at the end of 1992, had only half of its ambitious policy agenda in place by then and just over three-fourths by the end of 1994. But the markets continued to respond positively to the initiative, as they saw so much progress (when there was so much pessimism to start). Today, the Single Market Programme is

considered a great success (certainly not to be confused with issues associated with monetary union). Likewise, ASEAN should keep its "eye on the prize": a single market and production base. Hopefully this can be done by 2015; but what needs to take priority is getting it right, rather than getting it done on time.

Finally, given the rapidly-changing regional economic architecture, ASEAN will need to play an active, contributing role to advance its interests. ASEAN leaders realise this. For example, in November 2012, ASEAN and six of its FTA partners launched the Regional Comprehensive Econership (RCEP) initiative, which is to create a "flexible" FTA with negotiations beginning early in 2013 and concluding in 2015. The RCEP is an ASEAN initiative, a concrete manifestation of "ASEAN Centrality". With some ASEAN members being part of the on-going TPP negotiations while others are not, the RCEP will serve to unite ASEAN under the Asian-FTA track.

In sum, ASEAN has come a long way, but still has a long way to go, with many exciting prospects as well as challenges) that await.

Models of Supranational Legal Integration

Comparative Toolbox from the Universe of International and Regional Organizations

Carlos Closa and Lorenzo Casini

EXECUTIVE SUMMARY

States formalize their cooperative relations with the aim of providing, together, certain public goods that they cannot provide in isolation. The range of these goods is greatly varied, encompassing security, identity and religion; and development, infrastructure and regulatory frameworks for trade, labour or air transport, for instance. To this end, states accept to be bound by formal arrangements whereby they commit to deliver these goods, but also to respect the agreements concluded. Formal institutions respond precisely to these needs for provision and commitment.

Globalization has underlined the inability of states to provide goods in isolation and has hence accelerated legal integration at international and supranational levels: the number of international institutions – now over 60,000 – began growing after World War II and is still rising; the relations between state administrations and international institutions are becoming ever more numerous; forms of regional organization have been spreading; new forms of global networks and global "administrations" have been developing.

As a consequence, scholars worldwide have devoted themselves to studying global governance, international organizations, and regionalism. From these various perspectives, what has emerged clearly is that a mono-disciplinary approach is not capable of capturing all the implications related to these issues, which means that it becomes crucial to combine different fields of research. In this context, the use of concepts derived from both political science and law has turned out to be extremely effective, such as in the case of regime theory being used to explain the formation of global regulatory systems. This is why this book presents these two perspectives jointly, in its endeavor to define models of international and supranational legal integration.

Our aim, therefore, is threefold. First, we map and outline models of regional integration by studying their institutional design and processes of governance. Second, we extend our analysis to IOs and other international regimes, to identify which techniques are capable of governing complex global legal systems. Third, we offer a toolbox of institutional processes and legal mechanisms, which may be adopted by current or new projects of international and supranational integration, such as ASEAN.

We address these aims in two chapters, both based on the idea of integration is a formal process.

Chapter One (**Governance Structures and Processes in Integration Organisations: Formalisation of Institutional Credible Commitments for Governance**, by Carlos Closa) assesses the empirical models of formalization, based on a large sample of existing organizations across all continents. The chapter unveils the structure of formal commitments used in integration and other international organizations. It focuses on the formal mechanisms that secure "credible commitments": Credible commitments result from institutional design which comprises a number of instruments: the regulation of membership; the institutional structure of integration organisations; the decision-making procedure; the nature of derived norms and the mechanisms for their incorporation into national orders; and the mechanisms of jurisdictional control, supervision and scrutiny. Each of these serves to "lock" participants into integration schemes, and restricts their freedom to withdraw from accepted commitments. The chapter does not explore the causality link between informal/formal integration, nor does it "measure" informal integration or consider the achievements gained under informal integration. The chapter examines the structure of formalised institutional commitments, by looking at the organs for decision-making, the procedures for taking decisions and the model of derived norms. It also provides a classification of the different integration schemes by examining the relationship between an integration organisation's objectives and the formal instruments available to it for generating credible commitments. As the thesis of this chapter is that the objectives of regional integration organisations inspire a given institutional structure, it will also examine the kind of objectives existing within integration organisations. A data set comprising the institutional features of eighty-five integration and/or international organisations provides the empirical evidence underlying the arguments of this chapter. The analysis will show that States entering regional (and other) organizations accept formal commitments to achieve their goals with the expectation that other participant States will reciprocate, and it will also examine how this happens.

Chapter Two (***The Development of International Legal Regimes: Models And Instruments for Legal Integration Beyond States***, by Lorenzo Casini) focuses on the legal mechanisms and instruments that drive the development of international regimes, their institutional features and their functioning. To outline and critically describe the typology of international organizations and their regimes, and to identify the main legal techniques of governance, the analysis will cover most of the eighty-five international and regional organizations examined in Chapter One (such as the EU, ECOWAS, MERCOSUR and ASEAN) as well as other international institutions of both intergovernmental and hybrid public-private nature (such as the ISO and ICANN). In this Chapter, the perspective adopted is essentially a "managerial" one, which seeks to avoid bias connected to any given political objective. International regimes have increasingly been using accountability mechanisms, but principally to ensure their own efficiency and effectiveness rather than to address any democratic gaps. In other words, the need to enhance the legitimacy and accountability of IOs has a functional reason; this is confirmed by the fact that all regimes tend to adopt similar mechanisms regardless of the degree of "democracy" they may present.

The focus will therefore be on a classification of IOs, and on the common threads in the development of international regimes and their mechanisms for ensuring accountability: the increasing differentiation and separation of functions – the "legislative" (norm-making), "judicial" (dispute settlement), and executive-administrative ones; the emergence of intra- and interIO institutional pluralism; the growing degree of proceduralization; the need for multiple forms of legitimacy and the adoption of different mechanisms for

accountability. These threads may not all occur simultaneously in every regime, and there are many asymmetries. One thread may be more common than another.

See, for example, the different ways in which international administrations emerge: these are stronger in global private regimes or in political unions (such as the EU), but weaker in free trade areas. This analysis will enable the main techniques of governance and models of legal integration beyond the State to be identified: indirect rule, role splitting, and normative supremacy. All these techniques can be productively adopted at various levels, in the pursuit of international and supranational legal integration.

The analysis offers the first comprehensive overview and conceptualization of different models of international and supranational integration. It illustrates which governance processes and institutional choices – and how and why – are developed by regional organizations. It also displays which legal instruments – regulatory, organizational, procedural – are adopted to achieve integration. It explains how different objectives can influence institutional design and the integration model: for example, a free trade area could insist only on supremacy and refrain from adopting instruments for indirect rule, while a political union would rather engage with all available techniques in all their possible declinations: from the most sophisticated (such as preliminary ruling by domestic judges) to the most effective (such as “higher law” clauses). Finally, this book aims to provide academics and practitioners with a toolbox of concepts that may be fruitfully used regardless of whether the “pendulum” – as Mauro Cappelletti observed in the 1980s – swings towards “nationalism” or “transnationalism, federalism, or [a] broad grouping of states”.

ASEAN Legal Service

Walter Woon and Jean-Claude Piris

EXECUTIVE SUMMARY

ASEAN was conceived in 1967 as a confidence-building measure to foster trust among the five original members of the association. The organisation has gradually expanded to cover all the states of Southeast Asia (with the exception of Timor Leste) and now extends to cooperation in practically all areas of the economy, foreign policy and government. The goal of ASEAN is to create a community by 2015, comprising three pillars: the ASEAN Economic Community (AEC), the ASEAN Political-Security Community (APSC) and the ASEAN Socio-Cultural Community (ASCC). The primary framework document for this purpose is the ASEAN Charter. It is clearly stated in the Charter, and repeatedly re-emphasised subsequently, that the ASEAN Community will be rules-based and underpinned by the rule of law.

It is impossible to create a rules-based ASEAN Community without some means of drafting, interpreting and enforcing rules. The major shortcoming of ASEAN as an organisation is the inability to follow through on the many agreements, declarations, road-maps and instruments that have proliferated over the years. The proliferation of such ASEAN documents creates a need for a centralized authority to ensure coherence and legal efficacy. An ASEAN Legal Service is necessary to ensure that the vital legal infrastructure of the ASEAN Community is properly developed. Without such a centralized service, the legal development of the ASEAN Community will continue to be ad hoc. There will be an increasing risk of incoherence, inconsistencies and even outright contradictions in the noodle-bowl of obligations entered into by ASEAN Member States in the creation of the ASEAN Community.

Functions of the ASEAN Legal Service

An ASEAN Legal Service would have a significant role to play in the development of ASEAN as a rulesbased, law-abiding organisation, in the following areas:

(a) Drafting of agreements, rules and regulations both for internal as well as external purposes;

(b) Providing the institutional legal memory of ASEAN by maintaining records, updating agreements and other legal instruments and ensuring that inconsistencies are resolved;

(c) Providing impartial expert legal advice to the ASEAN Summit, the member states, the Secretary-General, the Community Councils, the ministerial bodies and the Committee of Permanent Representatives, as well as other ASEAN bodies;

(d) Assisting the Secretary-General in monitoring the implementation of and compliance with ASEAN agreements;

(e) Providing legal representation for ASEAN as an entity;

(f) Assisting the ASEAN Summit, the Secretary-General and other dispute resolution bodies in the settlement of disputes.

(a) Drafting of agreements

ASEAN aims to be a rules-based organisation. Such an organisation needs clear rules. There are four aspects to this: firstly, the internal agreements that bind ASEAN member states and create the infrastructure of the organisation; secondly, the agreements between ASEAN and outside parties; thirdly, the internal rules and regulations necessary to realise the ASEAN single market and production base; and fourthly, the harmonization of the domestic laws of ASEAN member states. A rules-based organisation whose working language is English must have a core of competent legal draughtsmen. Apart from the issue of linguistic and legal competence, there is also the matter of political neutrality. An ASEAN Legal Service will be able to provide dedicated and continuous attention to the drafting of agreements. Experience in ASEAN affairs is essential for good drafting. This experience can only be accumulated if there is a proper legal service.

(b) Institutional memory and avoidance of inconsistencies

The ASEAN Summit, ASEAN Coordinating Committee, Community Councils, Sectoral Ministerial Bodies and other organs of ASEAN will issue an increasing volume of documents as the ASEAN Community develops. The necessary expertise for drafting these documents and ensuring consistency and coherence can only be provided by a proper professional legal service that deals exclusively with ASEAN matters. The Legal Service should be responsible for monitoring the many agreements that emanate from the various meetings. The task of keeping track of these agreements and updating them as they are amended is also crucial. A rules-based organisation can only thrive if the rules can be found. There has to be an authoritative source for ASEAN agreements, rules and regulations.

(c) Giving legal advice

If ASEAN is to be taken seriously as a rules-based organisation, there must be an independent legal service uninfluenced by national agendas to render impartial legal advice to the ASEAN Summit and other organs of ASEAN. This is particularly the case where the ASEAN Economic Community is concerned, since economic integration requires the existence of a coherent and enforceable set of rules and regulations.
Bodies like the ASEAN Economic Ministers' Meeting (AEM), the ASEAN Investment Area Council (AIA Council) and the Senior Economic Officials' Meeting (SEOM) are the key to the creation of a viable single market and production base. These bodies need to be able to have access to impartial and credible legal advice in the discharge of their functions. The Secretary-General also requires strong legal back-up to discharge the many tasks that he is entrusted with. The ASEAN Secretariat will also need legal advice in order to function efficiently, as does the Committee of Permanent Representatives. The legal services of the member states cannot fulfill the need for legal advice even if officers could be assigned on a long-term basis. There will always be the suspicion of national bias, whether conscious or

unconscious. An independent ASEAN service is required if legal advice is to be credible and authoritative.

(d) Monitoring implementation of and compliance with ASEAN agreements

One major criticism of ASEAN is that implementation of agreements has not been consistent or effective. The Secretary-General is now entrusted with the function of monitoring compliance by member states with the obligations they have undertaken. He requires the assistance of legally-trained officers in this task. This monitoring function is complementary to the task of maintaining the Table of Ratifications.

(e) Legal Representation

ASEAN now has a legal personality separate from the member states. The intent of the Charter is to create a juridical person that can own property and enforce rights independently of the member states. Inevitably, ASEAN will become embroiled in legal disputes, whether involving commercial contracts, tenancies or employment matters. Representing ASEAN before legal tribunals would be a natural role for an ASEAN Legal Service.

(f) Settlement of Disputes

The dispute settlement mechanisms established by the ASEAN Charter and other ASEAN instruments envisage a key role to be played by the ASEAN Summit, the Secretary-General, the Chairman of ASEAN and the ASEAN Coordinating Council. In discharging the vital function of ensuring the peaceful and legally-binding settlement of disputes, especially in the economic sphere, it is essential that these organs be supported by competent and experienced legal officers. Only a proper Legal Service can develop the necessary experience and expertise in ASEAN dispute settlement. Crucially, only an ASEAN Legal Service can be counted on to be impartial and politically neutral in settling disputes amongst member states. An effective means of settling disputes is absolutely vital to the success of the ASEAN Community, particularly the ASEAN Economic Community.

Structure of the Legal Service

The Legal Service should have a very senior member of the ASEAN Secretariat as its Head (viz, the Legal Counsel of ASEAN). The Legal Counsel of ASEAN should be openly recruited (ie, not politically appointed by the member states) and have the rank of Deputy Secretary General in order to ensure that he has sufficient status and seniority to effectively fulfil his crucial functions. The Legal Counsel should normally serve for two three-year terms; a shorter term of office will not allow the Legal Counsel adequate time to do the job, nor will it be attractive to candidates with the desired skills and experience.

There should be three deputies with the rank of Director. Their appointment should be based exclusively on merit and not to fill a national quota. Each should be responsible for one ASEAN Community Council, supported by a team of competent and able lawyers. Given the complex legal work to be accomplished in an international community dealing with delicate matters, these lawyers should constitute an elite. They should be openly recruited based on experience and competence.

While there will be a strong preference for ASEAN nationals to fill these positions, it might be necessary to admit a few non-ASEAN nationals as legal officers. A professional Legal Service needs the best people it can get; it may not be possible to find the necessary talent within ASEAN for some time to come. It should be made absolutely clear that it would not be possible to give any guarantee of an equal representation of ASEAN nationalities in the Legal Service. Admission of candidates of unsatisfactory quality merely to satisfy a national quota would be a recipe for disaster. It would be fatal for the *esprit de corps* of the Legal Service if incompetent persons were recruited purely on the grounds of their nationality.

In addition, there may be a list of consultants who would be able to work when needed, either part-time or for ad hoc projects. The list should be drawn from law firms, and/or from universities or from former lawyers in an ASEAN Member State or in another intergovernmental international organisation.

Recruitment should be by open application rather than nomination by member states. An independent panel comprising judges or senior lawyers of any nationality should be constituted to select suitable candidates. The level of salary and perks must be competitive with that of competent international lawyers. It will not be easy to attract candidates of sufficient calibre if salaries are pegged at an unrealistically low level.

It is of vital importance that the Legal Counsel and members of the Legal Service be insulated from political pressure from member states. The value of having an independent Legal Service is precisely that: it is independent of the member states and therefore can be counted on to act impartially. Moreover, deficiencies in pay and terms of service compared to the private sector can be compensated for if the members of the Legal Service feel that they are performing a valuable task, carrying with it professional satisfaction. This can only be fostered be ensuring that the Service is not buffeted by political winds.

'Same Same but Different':
International Secretariats in Comparative Perspective

Omri Sender

EXECUTIVE SUMMARY

Secretariats are the central organs of modern international organizations, so much that they are often mistaken for the organizations themselves. Also known as bureaus or commissions, they are in fact the permanent administrative bodies of such organizations, primarily responsible for coordinating their day-today work and executing much of their will. Although the international secretariat is indeed only one component of a broader institutional set-up created by the enabling agreement that is reached among the relevant parties (most often States), it serves to hold the wider treaty system together and, moreover, provides the international organization with continuity and a recognizable profile in the global arena. While the role of secretariats has traditionally been limited to performing tasks of a technical-clerical nature, in the modern era they commonly perform policy-related functions as well, increasingly exerting influence and employing technocratic expertise. Rather than merely execute the agenda of the international regime that they serve, they are now often asked to take a substantive part in shaping it. This has led to greater focus on their work, and to a growing recognition of secretariats as international actors in their own right.

This contribution too sets out to take a close look at international secretariats, with the primary objective of providing distilled hard data on how they are structured and what precisely it is that they do. It constructs comprehensive profiles of six select international secretariats, all serving regional organizations that together encompass the four corners of the earth: the Technical Secretariat of the Common Market of the South (MERCOSUR); the Secretariat of the Asia Pacific Economic Cooperation (APEC) Forum; the Commission of the Economic Community of West African States (ECOWAS); the Secretariat of the European Free Trade Association (EFTA); the Secretariat of the North American Free Trade Agreement (NAFTA); and the General Secretariat of the Organization of American States (OAS). Each of these is put under the microscope for a close examination of its history and evolution, mandate, organizational structure, financial underpinning, day-to-day functions and human resources. Drawing on official sources and direct inquiries to officials, the paper details both the formal attributes and tasks of each secretariat, as well as its actual practices and the position it has within the international organization in which it operates. The result is a formal inventory of secretariats that illuminates the wide array of possibilities for institutional design, and provides a toolbox for those contemplating the establishment of a new secretariat or reforming an existing one.

From the detailed examination of the six secretariats and the parallels of experience which it erects emerge, moreover, several general observations. These include the finding that while scholars may still disagree on whether or not secretariats are vital to the effectiveness of international regimes, States certainly tend to believe that the answer is in the affirmative. Another such finding is that that Member States (and secretariats themselves) have the option of advancing substantive values and worldviews even within the secretariat's seemingly technical operative framework, if they so choose.

The data collected and the comparative perspective further allow for the identification of several institutional parameters that may distinguish between influential secretariats that take an active part in executing the regional project, and those whose role is far more limited.

These parameters go beyond the formal mandate to include, for example, the length of term of the secretariat's head and the existence or not of a legal department within the secretariat. Such an analytical framework enables not only a characterization of the two general types of secretariats, but also the construction of a possible explanation of why Member States might choose either model for their international organization. In short, it is suggested that States wishing to promote a supranational regime dedicated to a multi-purpose regional project will tend to establish secretariats that enjoy bureaucratic authority and are expected to shape the organization's policy rather than merely execute it. In contrast, when Member States opt for an inter-national regime and seek to accomplish a more limited regional objective against the backdrop of significant power asymmetries between them, they will tend to set up a secretariat whose role will be predominantly administrative.

The Role of the Public Bureaucracy in Policy Implementation in Five ASEAN Countries

Jon S.T. Quah

EXECUTIVE SUMMARY

The public bureaucracy is a key institution in the ASEAN countries because it is usually the largest employer and is also responsible for the implementation of public policies. How effective are the public bureaucracies in the ASEAN countries in policy implementation? This book focuses on the public bureaucracies' role in policy implementation in Indonesia, Malaysia, Philippines, Singapore and Vietnam. Its purpose is twofold: (1) to analyse the role of the public bureaucracies in policy implementation in these five countries; and (2) to compare the performance of the five public bureaucracies in policy implementation and to explain their different levels of effectiveness.

There is great diversity in the policy contexts of the five ASEAN countries. First, the size of these countries in terms of land area and population ranging from the smallest (the city state of Singapore) to the largest (the world's largest archipelago of Indonesia) are two important aspects which influence greatly the public bureaucracy's effectiveness in policy implementation. Second, the colonial legacy is another significant factor as the legacy of former British colonies like Singapore and Malaysia appears to be more positive than the colonial legacies of the Dutch for Indonesia, the Spanish and United States for the Philippines, and the French for Vietnam. Third, there is a wide disparity in GDP per capita between Singapore's GDP per capita of US$49,271 in 2011 and the other four ASEAN countries, with Vietnam having the lowest GDP per capita of US$1,374 for the same year. Finally, except for Vietnam, which is a Communist state, the other four countries have democratic political systems as Indonesia and the Philippines are presidential democracies, Malaysia is a constitutional monarchy, and Singapore is a parliamentary democracy. In short, the policy contexts of the five ASEAN countries have a tremendous impact on their public bureaucracies' role in policy implementation as a favourable policy context will enhance their role while an unfavourable policy context will undermine it.

To ensure consistency and to facilitate comparative analysis, Van Meter and Van Horn's definition of policy implementation and their framework of analysis involving these five variables is adopted in the country chapters, namely: the clarity of the policy standards and objectives; their communication to the implementers; the availability of policy resources; the effectiveness of the implementing agencies; and the disposition of the implementers. Thus, effective policy implementation requires the proper communication of policy standards and objectives to the implementers, capable implementing agencies, and supportive implementers.

The following approach is employed for the five country chapters, beginning with an analysis of the country's policy context and a profile of its public bureaucracy before analysing the latter's role in policy implementation according to Van Meter and Van Horn's five variables. The implementation of two ASEAN policies—the ASEAN Cosmetic Directive (ACD) and the ASEAN Ministerial Meeting on Transnational Crime (AMMTC) and Senior Officers Meeting on Transnational Crime (SOMTC)—are analysed as case studies in the five countries to facilitate comparative analysis.

This book is divided into six chapters, consisting of the five country chapters on Indonesia, Malaysia, Philippines, Singapore and Vietnam, and the final chapter, which provides a comparative analysis of the role of the public bureaucracies in policy implementation in these five countries. In Chapter 1, Agus Pramusinto contends that the Indonesian public bureaucracy's role in policy implementation has been adversely affected by the democratization of its political system, which has transformed the hegemonic party system into a multi-party system. During the New Order regime, the public bureaucracy formulated the laws, which were easily approved by the National Assembly because President Suharto relied on Presidential Instructions to expedite the policy formulation process. However, the policy formulation process during the post-Suharto period became less efficient and more time-consuming because of the need for public consultation, the representation of many political parties and the longer agenda in the National Assembly. More importantly, the implementing agencies in Indonesia are ineffective because of their incompetent staff, the disparity in span of control among ministries, and their vulnerability to political pressures from members of the National Assembly.

The role of the Malaysian public bureaucracy in policy implementation is analysed by Nik Rosnah Wan Abdullah in Chapter 2. She argues that while the public bureaucracy in Malaysia has been effective as reflected in the increase in its percentile rank on the World Bank's governance indicator on government effectiveness from 76.1 to 81 from 1996 to 2011, its role in policy implementation has been hindered by these two weaknesses: (1) its ethnic preference for Malay or *Bumiputra* candidates and discrimination towards the Chinese and Indians in recruitment and promotion in the civil service; and (2) corruption as manifested in Malaysia's increased level of perceived corruption on Transparency International's Corruption Perceptions Index in recent years.

Vicente Chua Reyes Jr. shows in Chapter 3 that the public bureaucracy in the Philippines is dysfunctional and ineffective in policy implementation because it suffers from systemic corruption and operates in an environment characterised by weak rule of law. Among the five ASEAN countries, the Philippines is perceived to be the most corrupt, according to five indicators of corruption. Similarly, in terms of the World Bank's rule of law governance indicator, the Philippines' percentile rank has decreased significantly from 51.2 in 1996 to 34.7 in 2011.

As Singapore has the most stable and least corrupt political system with the highest degree of rule of law among the five ASEAN countries, it is not surprising that its public bureaucracy is also the most effective in policy implementation as reflected in the World Bank's governance indicator on government effectiveness from 1996-2011 and the Political and Economic Risk's (PERC's) assessment of the effectiveness of the five ASEAN public bureaucracies from 1998-2010. In Chapter 4, David S. Jones attributes the effectiveness of Singapore's public bureaucracy in policy implementation to these factors: its policy of meritocracy with the retention of the Public Service Commission; the Corrupt Practices Investigation Bureau's effectiveness in curbing corruption; the availability of resources and funding to meet operational requirements; decentralisation in service delivery, budget allocations, personnel management and procurement; and inter-agency cooperation in implementing polices.

Chapter 5, which is written by Jairo Acuna-Alfaro and Tran Ngoc Anh, focuses on the public bureaucracy's role in policy implementation in Vietnam, a Communist state under the absolute control of the Communist Party of Vietnam (CPV), which is responsible for the development and implementation of personnel policies of the cadres and civil servants. This means that, unlike their

politically neutral counterparts in Indonesia, Malaysia, Philippines and Singapore, most Vietnamese public officials and civil servants are CPV members who are trained by the CPV and are loyal to its goals and ideology. Indeed, Vietnam's public bureaucracy is ineffective in policy implementation because of these four problems: its general performance appraisal system does not assess actual staff performance; the difficulty in enforcing disciplinary action against incompetent civil servants; the limited capacity of its civil servants, which is reflected in their lack of training in state management and their low level of education; and the low salaries of civil servants, which not only encourages corruption but also leads to their brain drain to the private sector and their holding of several jobs to supplement their low wages.

In Chapter 6, Jon S.T. Quah compares the performance of the public bureaucracies in policy implementation in the five ASEAN countries and concludes that their effectiveness depends on (1) whether their policy contexts are favourable or unfavourable; and (2) whether their public bureaucracies are effective or ineffective. This means that a country with a favourable policy context and an effective public bureaucracy will be more effective in policy implementation than a country with an unfavourable policy context and an ineffective public bureaucracy. Singapore is the most effective in policy implementation because of its favourable policy context and its effective public bureaucracy. Conversely, Indonesia is the least effective in policy implementation because of its unfavourable policy context and its ineffective public bureaucracy. Malaysia, Vietnam and the Philippines occupy intermediate positions between Singapore and Indonesia and are ranked second, third and fourth respectively, depending on the nature of their policy contexts and the levels of effectiveness of their public bureaucracies.

Finally, the comparative analysis of the implementation of the ACD and the AMMTC and SOMTC in the five ASEAN countries shows that their public bureaucracies are more effective in implementing the ACD than the AMMTC and SOMTC for three reasons. First, the ACD focuses on a single issue while the AMMTC and SOMTC deal with eight types of transnational crimes. Second, the ACD's narrower scope means that fewer agencies are involved in its implementation in contrast to the implementation of the AMMTC and SOMTC, which requires more implementing agencies because of their wider scope. Third, while both policies have encountered problems in implementation, the problems in implementing the AMMTC and SOMTC are more serious than those faced in implementing the ACD. In sum, the five ASEAN countries have been more effective in implementing the ACD than the AMMTC and SOMTC because the former involves a single issue, involves fewer implementing agencies, and have fewer implementation problems.

From Community to Compliance?

The Evolution of Monitoring Obligations in ASEAN

Simon Chesterman

EXECUTIVE SUMMARY

For most of its history, the Association of Southeast Asian Nations (ASEAN) reflected the wariness shown by many Asian states towards international organisations with binding obligations. In the past decade, however, ASEAN has undergone a transformation from a periodic meeting of ministers to setting ambitious goals of becoming an ASEAN Community by 2015. ASEAN has positioned itself at the centre of Asian regionalism through hub and spoke arrangements with China, India and Japan and is arguably the most important Asian international organisation in the continent's history.

An important tension in this transformation is the question of whether the 'ASEAN way' — defined by consultation and consensus, rather than enforceable obligations — is consistent with the establishment of a community governed by law. The National University of Singapore's Integration Through Law (ITL) project takes seriously the ASEAN claim to desire compliance with the various obligations that are the foundation of these new communities.

An important part of any compliance regime is the knowledge of what steps towards compliance have in fact been taken. Such knowledge presumes the collection of data on compliance, either for self-assessment or evaluative purposes. The collection of those data is referred to here as 'monitoring'. The term embraces any institution, process, or practice (including informal practices) that gathers or shares information about whether or to what extent an ASEAN obligation has been complied with, in the sense of substantive compliance, or implemented, in the sense of formal compliance.

A survey of ASEAN agreements, however, reveals other apparent purposes for monitoring. In addition to assessing substantive and formal compliance (described here as compliance stricto sensu and implementation respectively), monitoring may provide an authoritative interpretation of the content of an obligation or the framework for taking on future obligations. A fourth purpose of monitoring may be the facilitation of long-term implementation through such measures as confidence-building and technology transfers. A fifth purpose may be purely symbolic: certain monitoring mechanisms are best understood as an expression of unity or of seriousness about an issue, rather than an intention to follow through on binding commitments.

The survey reveals a clear increase in recourse to monitoring over time, and more willingness for that monitoring to focus on substantive compliance or implementation, rather than coordinating interpretation, facilitation, or serving symbolic purposes. This trend is clearest in the economic sphere but is broadly consistent with the adoption of the ASEAN Charter in 2007 and the goal of creating an ASEAN

Community by 2015. It is reasonable to conclude that more monitoring will correlate with greater respect for and implementation of the relevant agreements.

Two barriers remain. The first is the resources available to ASEAN itself, which continue to be a fraction of what any comparable regional organisation has at its disposal. This imposes hard constraints on the capacity of the Secretariat to play a meaningful role. Effective monitoring costs money. But there are costs associated with the failure to monitor also.

Secondly, the member states of ASEAN have historically been resistant to binding obligations generally. The failure to establish meaningful monitoring mechanisms in the first decades of ASEAN was not accidental — indeed, it is arguable that frequently there was no intention to follow through on obligations at all. That position has changed in recent years, however, in part through rising comfort levels with international obligations in general and the necessity of confronting specific collective action problems in particular.

It remains to be seen whether these trends herald a more measured approach to decision-making in ASEAN — in which commitments are made only when there is an intention to be bound, rather than as part of a shared aspiration. In the case of the three communities, however, such aspirations served the important purpose of setting ambitious goals to be achieved by 2015. Moving forward, monitoring progress towards those goals may yet see ASEAN move from community to compliance.

Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments

Robert Beckman, Leonardo Bernard, Hao Duy Phan, Tan Hsien-Li and Ranyta Yusran

EXECUTIVE SUMMARY

Introduction

As the Association of Southeast Asian Nations (ASEAN) approached its 40th anniversary, calls were made to strengthen the organization and to make it a more rules-based organization. In 2005, an Eminent Persons Group (EPG), consisting of ten former leaders and ministers of ASEAN states, was established to make recommendations on the promulgation of a Charter for ASEAN. The EPG Report was issued in December 2006, and it was endorsed by the Heads of ASEAN member states at the 12th ASEAN Summit in Cebu in January 2007.

The EPG Report stated that ASEAN's problem was not one of lack of vision, ideas, or action plans. Rather, ASEAN's real problem was one of ensuring compliance and effective implementation of its decisions and agreements. It further stated that ASEAN must establish a culture of honouring and implementing its decisions and agreements, and must do so on time as delays and non-compliance are counter-productive, undermine ASEAN's credibility, and disrupt ASEAN's efforts in building the ASEAN Community. The EPG therefore pushed for the institutionalisation of effective monitoring and dispute settlement mechanisms. It recommended that dispute settlement mechanisms (DSMs) be established in all fields of ASEAN cooperation. Failure to comply with decisions of the DSMs should be referred to the ASEAN Summit for possible measures to address non-compliance; and the Secretary-General should be entrusted with the role of monitoring compliance and reporting cases of non-compliance. It is significant that the adherence to the rule of law and institutions is deemed so crucial to ASEAN's transformation that while the ASEAN Charter does not incorporate all the EPG recommendations, most of the recommendations pertaining to compliance monitoring and dispute settlement are.

This book aims to investigate whether ASEAN's faith in dispute settlement and monitoring mechanisms as means to better compliance is justified and the extent to which they can facilitate this process. First, it examines all ASEAN DSMs and inquires whether these DSMs can be effective in promoting compliance. Second, it maps out and dissects ASEAN's compliance mechanisms so that their strengths and weaknesses as well as overlaps and lacunae can be more easily comprehended and systematic improvements can be made. Third, it makes various recommendations on what steps should be taken to strengthen DSMs and establish effective compliance monitoring mechanisms in ASEAN.

II. Dispute Settlement Mechanisms in ASEAN

1. Early Phase: Promotion of Regional Peace and Security

During the initial phase of its development between 1967 and 1976, the focus of ASEAN was on managing tensions and preventing armed conflicts between member states. The first legallybinding agreement entered into by ASEAN member states is the 1976 Treaty of Amity and Cooperation in

Southeast Asia (TAC). The TAC states that two of the fundamental principles for cooperation in the region are the renunciation of the threat or use of force and the settlement of differences or disputes by peaceful means. It provides that disputes between members shall be settled among themselves through friendly negotiations; and if negotiations fail to reach any solution, the dispute could be referred to a High Council consisting of one ministerial representative from each State party to the TAC. The High Council is a political body, not a legal body, and its purpose is to encourage the peaceful settlement of any dispute which might endanger peace and security in the region. Its main function is arguably to put political pressure on the parties to a dispute to settle it peacefully in the interests of the region as whole.

From the first two Summits in 1976 and 1977 to the third Summit in 1987, ASEAN focused on building regional stability and security; and served as a forum for the political and business leaders as well as civil servants from ASEAN member states to interact. From such confidence-building measures arose an understanding among ASEAN member states to build a unique non-legalistic, consensual and pragmatic 'ASEAN Way' to approach problems and settling differences or disputes. This understanding is reflected in the absence of dispute settlement clause in most of ASEAN agreements during this period. Even in those instances when an ASEAN agreement did contain a dispute settlement clause, it usually provided that the dispute should be settled amicably by the parties through consultations or negotiations. The dispute settlement clauses in most ASEAN agreements did not provide for referral of the dispute to a third party such as an arbitral tribunal or an international court.

2. Economic Development Phase: Economic Integration and the Need for DSMs

The end of the Cold War brought a change to the international and regional economic environment: China's moves toward modernisation, Japan's role as capital exporter and the increased involvement of Russia and the Eastern European countries in the global economy. ASEAN member states also faced new challenges such as exchange rate fluctuations, low commodity prices, trade imbalances and international debt problems. All of these factors, coupled with the improved regional security due to the end of the Cambodian conflict, made it necessary for ASEAN to step up their collaboration to develop their industries, increase the sharing of markets among member states and strengthen their competitiveness with other regions. ASEAN decided that it was necessary to establish a DSM for the economic agreements so that member states could enforce their rights against other members if disputes arose on the interpretation or application of provisions in the agreements. The result was the 1996 Protocol on Dispute Settlement Mechanism, which was applied retroactively to ASEAN economic agreements listed in its Appendix.

In 2003, ASEAN member states made a decision to move toward the creation of an ASEAN Community. As a consequence, they also made a commitment to improve the DSM for economic agreements. The result was the 2004 Enhanced Dispute Settlement Mechanism (2004 Protocol), which was modelled on the DSM of the WTO. The essence of the 2004 Protocol is a mandatory dispute settlement process involving a panel to assess disputes that cannot be settled through good offices, mediation or conciliation. As a general rule, the panel has sixty days to come up with recommendations. The rationale for the short mandated timeline may have been to prevent disputes from festering and to prevent the aggrieved party from continuing to suffer damages. However, it is highly unrealistic to expect the panel to be able to resolve disputes within sixty days, especially in circumstances where cases involve huge amounts of data.

3. The Post-Charter Phase: The Onset of DSM through the ASEAN Charter

Most of the recommendations in the EPG Report with respect to DSM were accepted and have been implemented. They are either provided for in the Charter itself or in Protocols adopted subsequently. The net effect is that DSMs now exists for any dispute on the interpretation or application of an

ASEAN agreement, including the ASEAN Charter. The general rule of DSMs under the Charter is if an ASEAN instrument contains specific mechanisms and procedures for the settlement of disputes concerning the provisions of that instrument, those mechanisms and procedures shall be followed. The Charter then affirms that disputes concerning the interpretation or application of the provisions in an ASEAN economic agreement shall be settled in accordance with the 2004 Protocol. Other disputes concerning the interpretation or application of the provisions of the ASEAN Charter or other ASEAN non-economic instruments that do not have specific provisions on dispute settlement shall be settled in accordance with the 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (2010 Protocol). Finally, disputes which do not concern the interpretation or application of the provisions of any ASEAN instrument shall be resolved in accordance with the TAC.

The 2010 Protocol establishes a DSM for disputes between ASEAN member states concerning the interpretation or application of the provisions in three categories of ASEAN instruments. First, disputes concerning the provisions in the ASEAN Charter. Second, disputes concerning provisions in ASEAN instruments that expressly provide that all or part of the 2010 Protocol will apply. Third, disputes concerning other ASEAN instruments, unless a specific means of settling such disputes has been provided. The third category seems to exclude the application of the 2010 Protocol to ASEAN instruments that contain dispute settlement clauses providing that any disputes on their interpretation or application are to be resolved by negotiation and consultation among the parties to the dispute.

The 2010 Protocol is a major step forward because it contains rules providing for three non-binding forms of dispute settlement involving third parties: good offices, mediation and conciliation. In addition, it provides for referral of disputes to an arbitral tribunal, which is a legally binding form of third party dispute settlement. Disputes can be referred to third party mechanisms by mutual agreement of the parties to the dispute or by a decision of the ASEAN Coordinating Council (ACC) directing the parties to use one of the DSMs provided for in the 2010 Protocol.

However, the major weakness in these procedures is that according to ASEAN practice and as provided in Article 20.1 of the ASEAN Charter, decisions of the ACC, whose members include the disputing states, must be made by consensus. Therefore, unless the consensus rule is changed, the effect of the procedures might be to merely put political pressure on the two parties to the dispute to agree to accept one of the third party DSMs.

III. Recommendations on Dispute Settlement Mechanisms

To enhance the potential usage and efficacy of the ASEAN dispute settlement mechanisms, we offer some substantive suggestions based on our study of ASEAN instruments, hard and soft international law and our observations and experience working in this field in the ASEAN region.

Scope of Application of the 2010 Protocol

As indicated in Article 2(1)(b), the 2010 Protocol does not apply to ASEAN instruments that already contain specific clauses for settling disputes. This exclusion would apply, for example, to instruments advocating negotiation, consultation, mediation or conciliation methods in the event a dispute arises. This would mean that disputes arising from such instruments are precluded from the arbitral functions provided by the 2010 Protocol, i.e., they are technically subject to talks in ‘perpetuity’ and cannot draw to a close if

the disputing parties cannot reach a mutually agreeable result. To overcome this lacuna, the 2010 Protocol should apply to all ASEAN instruments that provide that disputes on the interpretation or application of their provisions should be resolved 'by negotiation' or 'by negotiation and consultation'. This would facilitate dispute resolution and the implementation of such instruments.

Rules of Procedure for Third Party Fact-Finding

It is recommended that ASEAN should amend the 2010 Protocol to include provisions for fact-finding by experts agreed to by the parties to the dispute in the course of mediation or conciliation. It is sometimes the case that a dispute on the interpretation or application of the provisions in an instrument is more about the facts than on a point of law. That is to say, the disputing parties have radically different interpretations of the facts and they do not trust each other's version of the facts. If they could, with the assistance of a mediator or conciliator, appoint neutral experts to investigate the facts and compile a non-binding report, that 'neutral' report could be instrumental in getting the two parties to resolve the dispute.

Dispute Settlement Mechanisms in Specific Non-Economic Agreements

ASEAN Community-building is multi-faceted and there are instances where non-economic cooperation (e.g. migrant worker and human trafficking issues) is so important that it would be helpful to have a means for dispute resolution. Hence, when negotiating an ASEAN agreement, ASEAN member states could decide that the 2010 Protocol would automatically apply if a dispute arose and omit. dispute settlement clause. Otherwise, to be on the safe side, ASEAN member states could include a specific clause in that instrument referring all disputes to the 2010 Protocol.

Amend the 2004 Protocol

There seems to be a consensus among legal experts in trade law that the timelines in the 2004 Protocol are too short and that the system of dispute settlement may not work because of this factor. Therefore, we recommend that a group of experts be established to review the timelines and make recommendations for amendments.

IV. Compliance Monitoring Mechanisms in ASEAN

1. The Role of the ASEAN Secretariat in Compliance Monitoring

Prior to the first ASEAN summit in 1976, there were no ASEAN instruments that contained any compliance monitoring mechanisms. In 1976, the ASEAN Secretariat was established with a Secretary-General who was given functions and powers to 'harmonize, facilitate and *monitor progress in the implementation of all approved ASEAN activities*'. This suggests that the SecretaryGeneral is responsible for monitoring the progress of implementation of all ASEAN instruments. However, our study on compliance monitoring in ASEAN during the 1976-1992 period reveals that the ASEAN member states failed to comply and cooperate with the Secretary-General in his function to monitor compliance. This not only had important implications with respect to the actual remit of the Secretary-General and Secretariat, but also demonstrated the ASEAN member states' explicit undermining of the office they created for the organisation's Secretary-General.

2. Compliance Monitoring Mechanisms to Ensure an Enhanced ASEAN Economic Cooperation

The adoption of the 1992 Singapore Declaration marked a significant shift of priorities in ASEAN toward the enhancement of ASEAN economic cooperation; and eventually, towards the establishment of an ASEAN Common Market. It seems that at this stage ASEAN realized that it needed to focus and advance its compliance monitoring efforts to accommodate the realization of the above goal. Establishing compliance monitoring mechanisms for ASEAN economic instruments was the focus during this period.

Generally, ASEAN economic agreements have a form of centralised compliance monitoring comprising of three tools: (1) the meetings of the AEM and senior officials; (2) a notification procedure adopted in the 1998 Protocol on Notification Procedure; and (3) a reporting mechanism as a part of ASEAN dispute settlement scheme established in the Bali Concord II which comprises a legal unit in the ASEAN Secretariat, the ASEAN Consultation to Solve Trade and Investment Issues and the ASEAN Compliance Monitoring Body.

Despite the improvements made in the field of economic cooperation, the execution of compliance monitoring functions provided for in the various ASEAN instruments is still problematic for several reasons: first, the ambiguous role of the Secretary-General and other ASEAN bodies or institutions in relation to compliance monitoring has left ASEAN instruments related to political-security and socio-cultural cooperation without a centralized monitoring authority. Second, except for a number of ASEAN economic instruments, there are still no established procedures and mechanisms setting out how to conduct compliance monitoring for the implementation of all ASEAN instruments and on the specific roles of relevant ASEAN bodies/institutions. Third, it is too early to evaluate the effectiveness of the compliance monitoring mechanisms for ASEAN economic instruments. This is due in part to the fact that the 1998 Notification Protocol has not come into force and the work of the ASEAN

Consultation to Solve Trade and Investment Issues and the ASEAN Compliance Monitoring Body remains largely unknown.

3. Compliance Monitoring for the ASEAN Charter and Post-Charter Instruments

Moving to the developments surrounding the ASEAN Charter, ASEAN member states intensified their desire for greater rule of law and institutions in this new phase of growth of the organisation. As mentioned previously, the EPG Report advising on this trajectory recommended the establishment of comprehensive dispute settlement mechanisms and entrusted the ASEAN Secretary-General with compliance monitoring. Curiously, the EPG Report seemed to consider compliance monitoring as part of dispute settlement mechanisms when they are in fact very different. It did not detail other important mechanisms that could promote and ensure compliance, such as reporting requirements, monitoring mechanisms and technical assistance. In addition, the EPG Report failed to make clear recommendations on the roles of the Secretary-General, the Secretariat and other ASEAN bodies on compliance monitoring mechanisms.

Since the Charter is to a large extent based on the EPG Report, it also fails to clearly define the functions and powers of the various ASEAN bodies with respect to compliance monitoring. Article 27.2 of the Charter provides for compliance with decisions of DSM, but not for compliance with ASEAN decisions or agreements. The Charter clearly sets out the roles of each ASEAN body with respect to the implementation of ASEAN agreements and decisions. However, with respect to monitoring compliance with agreements and decisions, the Charter only provides that the Secretary-General shall 'facilitate and monitor progress in the implementation of ASEAN *agreements and decisions*, and submit an annual report on the work of ASEAN to the ASEAN Summit'. It is not clear what is meant by the phrase 'ASEAN agreements and decisions'. This ambiguity reflects the practice of ASEAN member states of making major commitments in non-legally binding instruments. It is also not clear what the roles of the Secretary-General and the Secretariat are in monitoring compliance of member states with ASEAN agreements and decisions. Furthermore, there are no clear procedures for the Secretary-General, the Secretariat and ASEAN member states to follow with regard to the compliance monitoring mechanisms.

The practice of ASEAN with respect to agreements and decisions after 2007 reflects the ambiguities in the Charter. Many of the agreements give the responsibility of compliance monitoring to bodies other than the Secretary-General. For example, the 2007 ASEAN Economic Community Blueprint provides that the

ASEAN Secretariat shall review and monitor compliance of implementing the Blueprint. It further provides that 'the Secretary-General of ASEAN shall report the progress of AEC to relevant ministerial meetings and the Summit'. By contrast, the 2009 Blueprint on ASEAN Political Security Community does not give the ASEAN Secretariat the responsibility for monitoring compliance, but only gives the Secretary-General the responsibility of reporting the progress of implementation of the Blueprint to the annual ASEAN Summit through the ASEAN Political Security Community Council. These ambiguities are exacerbated because ASEAN has not adopted any protocols or rules of procedure clarifying the roles of the Secretary-General or other ASEAN bodies in the monitoring of compliance with ASEAN agreements and decisions.

V. Recommendations on Compliance Monitoring Mechanisms

Perhaps even before the recourse to regional dispute settlement mechanisms can be feasibly envisaged by the ASEAN member states, the primary step towards compliance in the region should be to activate proper monitoring of ASEAN instruments.

Establish priorities regarding which ASEAN agreements and decisions should be monitored

ASEAN has adopted hundreds of instruments setting out commitments to cooperate on various matters. Many of the major commitments are set out in decisions of the ASEAN Summit in non-legally binding instruments. Given that it is the responsibility of the ACC to coordinate the implementation of agreements and decisions of the ASEAN Summit, they should establish a priority list of the most important agreements and decisions that should be subjected to compliance monitoring mechanisms.

Clarify the roles of Secretary-General and various ASEAN bodies in a Rules of Procedure for the compliance monitoring of instruments covered by the remit of the ASEAN Charter

Rules of Procedure should be adopted by the ACC to clarify the respective roles of the ASEAN Secretary-General and other bodies in monitoring compliance with ASEAN agreements and decisions. First, based on updated list of all ASEAN instruments that have entered into force prepared by the ASEAN Secretary-General, the ASEAN Summit should adopt an annual or periodic shortlist of priority activities that identifies instruments that need immediate or rapid implementation. Second, relevant ASEAN Sectoral Ministerial Body and Secretariat should prepare a checklist of information that member states need to give to the Secretariat for the purpose of compliance monitoring of each instrument in the priority shortlist. Third, based on the checklist, ASEAN member states should prepare reports detailing the implementation of and compliance with the relevant ASEAN instruments and submit these reports to the Secretariat. Fourth, the Secretariat will then compile these reports and prepare its own a monitoring report based on these submissions. Fifth, the relevant ASEAN Community Council, with the assistance of the relevant ASEAN Sectoral Ministerial Body, will review the monitoring report, offer constructive recommendations to improve member states' implementation and integrate its review and recommendations in the monitoring report and submit it to the ASEAN Summit through the ACC. Sixth, the ASEAN Summit, after receiving the monitoring report from the ACC, should consider the monitoring report and decide to adopt the recommendation made by the relevant Councils or take other measures.

Clarify procedures for cases of non-compliance

The Rules of Procedure should provide clauses setting out the roles and responsibilities of the ASEAN Secretariat, Secretary-General and other ASEAN bodies in situations where Member States have failed to comply with ASEAN agreements and decisions. This should include provisions for seeking clarification from the member state regarding the reasons for non-compliance, for providing legal and technical assistance to member states who are unable to comply, and for reporting situations of non-compliance to the relevant ASEAN bodies, including the ASEAN Summit.

Include the Rules of Procedure proper processes for the compliance monitoring of pre-Charter instruments

Apart from the above proposed rules of procedure, ASEAN should establish set processes for the compliance monitoring of pre-Charter ASEAN instruments since they tend to give compliance monitoring powers to other entities and not to the Secretariat. To simplify matters, the ASEAN member states could consider adopting a simple binding instrument specifying the compliance monitoring powers of the Secretary-General (and by association, the Secretariat) to such pre-Charter instruments by including the Secretary-General as part of the monitoring body and/or that such bodies should report to the Secretary-General. This would help to streamline, coordinate, and centralise compliance monitoring in the organisation and across the entire ASEAN region.

Review compliance monitoring mechanisms in existing ASEAN instruments

Many existing ASEAN instruments have unique compliance monitoring mechanisms that give responsibilities to various committees or bodies. Once the Rules of Procedure have been adopted for setting out the default procedures for reporting by member states and compliance monitoring by the ASEAN Secretariat or other ASEAN bodies, the compliance monitoring mechanisms in existing ASEAN instruments should be reviewed and amended to conform to the said Rules of Procedure.

Institute unambiguous ASEAN law-making practices

In addition to the above, ASEAN should remember that better compliance and implementation of ASEAN instruments does not solely depend on dispute settlement and monitoring mechanisms. Even before the law is utilised, it must be properly legislated. At the most fundamental level, ASEAN law must be systematically made; there should be differentiation between hard and soft law so that they can be applied correctly. This would also mean that soft law on important regional issues (ASEAN human rights declarations and terms of references), while not binding, would have more weight than merely hortatory or rhetorical declarations. In addition, there must be systematic curating of ASEAN instruments from the organisation's inception to date. Presently, the exact number and names of the entire archive of ASEAN instruments remains obscure, not only to the public but also to the Secretariat and member states. Improved compliance cannot come without knowing exactly the obligations of each of the member states.

Civil institutional infrastructure at the national level

Lastly, compliance with ASEAN instruments generally necessitates implementation through law and policy at the national level. Thus, member states should strengthen domestic infrastructure such that ASEAN instruments can have real effect, even if ASEAN instruments cannot be challenged before municipal courts. For example, with the onset of the AEC, member states should fine-tune their laws and policies to remove trade barriers, as well as to inform and educate the public and private sectors on the systemic changes and how the ASEAN economic agreements work. These efforts necessitate not only work by the national legal agencies but also the non-legal state bodies such as the departments of economy, finance, agriculture, industry, and socio-cultural development.

ASEAN's Economic Integration Model: A Conceptual Approach

Jacques Pelkmans

EXECUTIVE SUMMARY

Understanding ASEAN's economic integration model is a genuine challenge. A fundamental reason why conceptual difficulties arise in the case of the ASEAN Economic Community (=AEC) is that ASEAN architects observe two stylized (regional) economic integration approaches in the world which they do *not* want to pursue : the 'EU model', which is supranational, far too ambitious and also to a degree 'open-ended' in terms of further ambitions ; and the classical free trade area (= FTA) approach, even when upgraded a little nowadays. The AEC is based on two concepts, presented as 'parallel' the 'single market' and (ASEAN as a) 'production base' for segments of global value chains. These two instruments have to be understood in the light of what matters most to ASEAN: the medium or long-run growth prospect for the region. Thus, if the production base is expected to be growth-enhancing in a powerful way (as experience in East Asia suggests), the single market as a 'concept' may well be downgraded in actual practice. Since global value chains thrive on 'openness' of economies and easy market access (in particular, in East Asia), market access in East Asia via FTAs might rank as high or higher for the success of the ASEAN production base than the pursuit of an ever deeper – indeed, 'single' - internal ASEAN market. The present monograph will focus on the ASEAN economic integration logic from a conceptual point of view, but the intricate and multi-fold linkages with measures relevant for ASEAN as a 'production base' have explicitly been addressed as well.

The present contribution to the ASEAN-Integration-through-Law project aims to scrutinize the concepts, logic, sequencing, coherence and options for the 2015 AEC. The author assumes an economic perspective, whilst taking due account of institutional, legal and political economy aspects. Economic integration processes largely take place in markets. Nevertheless, a political desire to pursue (ever) 'deeper' economic integration requires (ever) more demanding regulatory, economic policy, political and institutional as well as legal commitments by participating countries. This is bound to extend decision-making from trade (and 'ASEAN') ministers to broader government policies and reforms of standing economic regulation practices. Assuring 'deeper' economic integration is therefore very different in nature than fixing a classical FTA.

The AEC combines two concepts, the "ASEAN Single Market" (which is likely to grow into its own sui generis notion of deeper market integration) and ASEAN as a "production base" for world multinationals as well as for ASEAN business itself (the latter is a most unclear concept, even when carefully checking the ASEAN Blueprint / Roadmap with some 300 items of concrete measures and milestones). The underlying strategic economic aim that unites all ASEAN countries is rapid and steady development, underpinned by long-term economic growth and an acceptance of gradual structural change.

The monograph takes a systematic look at these 'concepts', starting from the fundamentals of economic integration - which also matter for ASEAN - , ASEAN's four strategic choices about what FTA-plus to opt for (these choices are illustrated in a comparison with NAFTA), the

economic rationale of the AEC, the Bali Vision and a scrutiny of the five instrumental economic concepts (free flows, Single ASEAN Market, ASEAN as production base, equitable development and its economic competitiveness). The economic rationale is developed for two stylized scenarios : a cooperative ASEAN-led development strategy and a pro-competitive single-market minus serving development. This conceptual and economic foundation is followed by a careful summary of and commentary on the entire AEC Roadmap. Subsequently, this analysis is deepened for the first three of these five instrumental concepts by scrutinizing the substance of the commitments in the Roadmap in considerable depth, including progress to date. Interestingly, even though the Roadmap became publicly available only in 2009, one can already discern many instances where ASEAN has deepened its commitments and/or made progress beyond what was originally drafted. The AEC has clearly stimulated strategic thinking in ASEAN Member States and prompted policy action over a wide front of policy domains. However, in a conceptual approach, such 'good news' is less important than the verification of whether ASEAN is living up to the conceptual requirements of what a single market and/or (ASEAN as a) production base is or will be. The analysis of the progress towards a Single Market is easier in this respect, not only because the conceptual analysis is helped by a six-stages theory of market integration developed in Section 2.2 - comprising two high stages akin to a Single Market - but also because of the instrumental economic concepts emphasized by ASEAN itself (in particular, the ‘free flows’). Our conclusion is that ASEAN will not enjoy free flows, when studying today's calendars and follow-up commitments, but it is not excluded that - with some delay beyond 2015 - a quasi-single-market might eventually develop. The current plans are, more often than not, ambivalent and the history of ASEAN as well as its 'allergy' for even the slightest forms of centralization or common regulation/harmonization does not sit comfortably with the requirement that ASEAN is ready to develop the 'positive integration' to make that quasi-single-market function properly and the free flows truly free.

In goods markets, a number of weaknesses has survived in ATIGA and need to be addressed. Far worse, the issue of 'core NTMs' and the removal or reduction of TBTs, already around for a long time, have not even begun to be taken serious ten years after Bali. In services, there are a number of inconsistencies and uncertainties ; when zooming in on subdomains, one inevitably finds loose ends and 'flexibilities' (i.e. national restrictions can be retained) ; the area of network industries' services is dealt with insufficiently and without much conviction, whereas transport protectionism inside ASEAN would seem to prevent much progress. In financial services, very little had happened - not surprising given the soft text in the Roadmap - but the year 2013 suddenly brought to the surface a most ambitious and well-thought out strategy of financial market integration, together with the pursuit of an ASEAN capital market and solutions for demanding problems of financial stability in such a single market. However, the strategy for financial market integration is so ambitious that it would appear far out of bounds for the routine commitments of ASEAN even with the greater acceptance of common measures in the AEC.

In investment, there is still no routine commitment to accept 100 per cent equity for foreign investors, although the production base idea strongly suggests that one wishes to attract precisely world-class foreign investors. The free flow of skilled labour is highly conditional and carefully separated from the MRAs for professional services.

Our analysis has not traced anywhere an operational definition of ASEAN as a production base. Moreover, many quasi-single-market measures also appear to serve, actually or potentially, the notion of this production base. However, a good deal of measures of the production base tends to be national, ranging from the business and investment climate to education, infrastructure (both domestic and cross-border), technical infrastructure for testing, standards, repairs and more generally the absorption of technology (which in turn hinges on high quality education), and policies such as competition policy and consumer protection. It extends to the actual conduct of the customs for business, long a concern in ASEAN. We undertake an attempt to exploit the recent empirical economics of global value chains to formulate an economic rationale for the production base approach by ASEAN and it turns out to be a most interesting argument, further strengthened by the determination of middle-income ASEAN countries to escape the 'middle income trap'.

We attempt to provide critical ingredients for an ASEAN strategy underpinning the AEC, as this seems to be lacking, an omission likely to severely hinder future developments. Apart from the four strategic choices when building an AEC (see before), we also compare the substance of NAFTA with the expected substance of the AEC (and the EU single market as a contrast). This detailed comparison helps one to appreciate the concrete implications of the present AEC design and hopefully clarifies the need for a well-thought-out AEC strategy. ASEAN does not have to copy NAFTA and it can also go beyond it but it must identify consistent and workable alternatives in any event. The two economic scenarios set out in section 2.5 indicate the beginnings of such a strategic reflection.

Three options are distinguished subsequently. One is the AEC as a single-market-minus, a very demanding but attractive option, not least because a lot of what is implied in this option would also be useful for the production base. A second is ASEAN as a production base. However, how much “ASEAN” this really is remains unclear: ASEAN's production base is much more interesting as part of 'factory Asia' if deep FTAs with East Asia and some other trading partners can be concluded jointly for ASEAN as a single group. Nevertheless, the success of the production base for ASEAN' s economic development hinges on a non-AEC property : the capability of individual ASEAN countries to develop backward and forward linkages with the local economy. The third one is really a symbiosis between the former two, not least in the light of the pressures emerging from the catch-up growth of two giants in the region: India and China. Such a symbiosis is not easily leading to coherence and consistency but this may improve over time, as before with AFTA. Indeed, time is a friend of coherence and deepening. One should regard the symbiosis as a 'living compact' for purposes of market integration and development, complemented by a range of national policies, often emulated between the ASEAN countries. In this sense, the Bali Vision may be rationalized after all and its more mature version might eventually vindicate.

The Foundation of the ASEAN Economic Community: An Institutional and Legal Profile

Stefano Inama and Edmund Sim

EXECUTIVE SUMMARY

This book provides a critical overview of the legal and institutional foundations of the ASEAN Economic Community (AEC), an ambitious plan to create a single economic entity in Southeast Asia. If successful, the AEC would create a tremendous production base and market that would rival nation-states such as China and India.

The difficulty for the AEC is that, unlike nation-states, ASEAN does not have sufficiently developed legal and institutional foundations. This deficiency goes back to the founding of ASEAN as first and foremost a political grouping during the Cold War, with economic considerations being of secondary importance. Although competition since the end of the Cold War has spurred economic cooperation in Southeast Asia, the continuing emphasis on political and diplomatic matters has limited such cooperation.

ASEAN has maintained an informal decision-making process based on consensus among its member states and ASEAN member states have not delegated any power to supranational entities for economic matters.

The introduction of the ASEAN Charter in 2007, intended to implement greater emphasis on rules in ASEAN's operations, has helped in a somewhat limited fashion. Furthermore, with regard to economic matters, the ASEAN Charter also prioritizes the creation of a single market and a single production base, even though the latter is more achievable politically and would more quickly generate benefits for the general population.

In this book the AEC, ATIGA and other relevant ASEAN legal instruments are analytically examined to conclude that the AEC legal texts does not provide the tools, nor the juridical arsenal to establish the single production base and *"a fortiori"*, the single market.

ASEAN has undertaken the complex task of creating a single economic entity but without a single regulator. The ASEAN Secretariat has very limited powers, with almost all decisions still being made by the ASEAN member states themselves. Nor have the ASEAN member states used dispute resolution to enforce the terms of the AEC agreements and commitments. In many cases ASEAN member states prefer to use non-ASEAN legal norms and forums to resolve their disputes.

As a result, implementation of the AEC by 2015 has been an inconsistent, stop-start process. The shortcomings of the current system are illustrated in our book through comparison with the EU, which has strong regional institutions to whom member states have delegated powers to achieve economic integration, and NAFTA, which relies more on a normative approach and dispute resolution to enforce its trade and investment norms. The authors' analysis of trade in goods and services, investment, dispute resolution and other aspects of the AEC indicates that

with ASEAN's having neither strong regional institutions nor strong dispute resolution or set of norms, full and effective implementation of the AEC is unlikely to result.

With the ASEAN Charter due for review, the authors suggest various options for the improved operation of ASEAN:

- Remain at the status quo, which means that investors will continue to seek alternative markets or demand a higher return premium for investing in the AEC.
- Improve the administration of the ASEAN institutions.
- Develop indigenous ASEAN law and principles that can be applied in the AEC.
- Develop a hierarchy of legal norms for the AEC.
- Improve dispute resolution.
- Provide a right of action for the private sector.
- Enhance feedback and consultation with the private sector.
- Strengthen the ASEAN institutions' powers of oversight, inquiry, proposal, initiating action, and sanction.
- Increase financial support for the ASEAN institutions.
- Create new ASEAN institutions.

In the authors' view, attracting investors to a single production base in ASEAN requires at the very least improved monitoring, administration and implementation of AEC measures. This, in the authors' view, is best served by improving predictability and clarity in the operations of the ASEAN institutions.

The authors understand that ASEAN leaders need to balance both the external factors (competition for foreign direct investment) and internal factors (economic development for the general population) pushing for the AEC with the mainly domestic factors (vested interests, fears of losing sovereignty) motivating against the AEC. Yet in the authors' opinion, the factors in favor of continued regional integration through the AEC are stronger, and necessitate adopting some, if not all, of the policy options discussed in this book. Only by moving beyond the status quo can both the single production base and the single market be achieved in ASEAN, to the benefit of all the citizens of ASEAN.

ASEAN's External Agreements: Law, Practice and the Quest for Collective Action

Marise Cremona, David Kleimann, Joris Larik, Rena Lee and Pascal Vennesson

EXECUTIVE SUMMARY

The Association of Southeast Asian Nations (ASEAN), apart from being a regional integration project for its Member States, also exhibits an ambition to play a role on the global stage. The ASEAN Charter, which was signed in 2007 and entered into force the year after, posits as one of the purposes of the Association '[t]o maintain the centrality and proactive role of ASEAN as the primary driving force in its relations and cooperation with its external partners in a regional architecture that is open, transparent and inclusive.' Furthermore, the Association itself has been accorded to express power to 'conclude agreements with countries or sub-regional, regional and international organisations and institutions.' The stage is thus set, in legal terms, for ASEAN as an emerging global player.

And indeed a rapidly increasing number of international legal and other instruments carry the name 'ASEAN' and/or involve all the Member States together. The term 'collectively ASEAN' is the hallmark of the Association's formalised relations with its external partners. No fewer than 175 instruments, including international agreements, memoranda of understanding, plans of action and declarations exist today, covering the fields of economic, security, political and sociocultural cooperation, and 81% of these have been concluded or issued since the year 2000. Although there is undoubtedly a wide variation in the legal and political significance of these instruments, the overall level of external activity is considerable and growing.

This study presents the first comprehensive legal-political analysis of these 175 instruments. More specifically, we organise the existing stock of instruments into an inventory and typology, organised in terms of legal quality (bindingness), time, content, contracting party on the ASEAN side and external partners. The objective is to provide a macro- rather than a micro-analysis of ASEAN external instruments; to establish criteria so as to create a typology and enable us to address the following main questions: What is the legal quality of the different types of ASEAN external instrument? What exactly is an 'ASEAN external agreement'? Is ASEAN exercising the legal personality granted by its Charter in 2008? Who actually concludes these agreements and adopts these instruments? What legal consequences does this entail, for ASEAN, its member states and third parties? What makes ASEAN a collective actor internationally and what do these external instruments tell us about the role that ASEAN plays in its member states' foreign policies? In presenting our inventory and typology tables, which also serve as a resource for other scholars, and offering on the basis of our analysis some preliminary answers to these questions, this study creates the foundation for the investigation of ASEAN as an international actor and as a treaty-maker.

We begin our study with an examination of the legal-institutional framework for the exercise by ASEAN, as an intergovernmental international organisation, of its external relations powers. The ASEAN Charter grants ASEAN an explicit legal personality and an external or international dimension is included in its mandate and list of tasks, with a particular emphasis given to what is

called the ‘centrality of ASEAN’ in a regional context. The Charter provides a potentially extensive treaty-making power and Rules of Procedure have now been adopted for treaty negotiation and conclusion by ASEAN. However the making of ASEAN as an international actor depends not only on the possession of legal powers but also on the political will and institutional capacity to use them. And here we find that the coming into force of the Charter has not in fact led to an increase in treaty-making by ASEAN itself as an internal organisation. The preferred, or default, method is still for treaties to be concluded (and joint declarations and plans of action to be agreed) by the governments of the ASEAN member states. In so doing they act as a collectivity – ‘collectively ASEAN’.

We assess the inventory of ASEAN external instruments according to four parameters: their ‘legal quality’; their substantive content or field; the third country or countries with whom they are agreed; and the party adopting the instrument on the ASEAN side. As far as their legal quality is concerned, i.e. the extent to which they represent ‘hard’, enforceable legal commitments or rather ‘soft’, non-binding, declaratory instruments, we find a number of legally binding agreements, especially in the economic field, and especially recently (70% of all ASEAN external agreements have been concluded since 2000, and 30% were concluded in the three years between 2009 and 2011). Our analysis finds no significant divergence between the legal quality implied by the formal designation of these instruments and their legal quality identified according to the generally accepted criteria that we adopt.

The second parameter is the subject content or field. We find that of the three pillars of ASEAN (economic; political and security; and social and cultural cooperation) ASEAN is most active externally in the economic field: 50% of all ASEAN external instruments and 82% of all external agreements are categorised as economic. However, many instruments cover a number of different fields of cooperation, and we therefore developed a fourth category, that of partnership and cooperation instruments. There is a correlation between the content and the legal quality of instruments. For example, a very high proportion of binding external agreements are economic (82%), and a high proportion of economic instruments are legally binding (67%). Conversely, a high proportion of partnership and cooperation instruments are at the lower end of the legal quality spectrum (69%), and approximately 67% of all Plans of Action and Declarations are partnership and cooperation instruments.

In terms of the partners with which ASEAN has developed these relatively formalised external relationships, although relations with countries in the region are clearly important, its external relations are not limited to these. Relations with its 11 dialogue partners (Australia, Canada, China, the EU, India, Japan, Korea, New Zealand, Pakistan, Russia and the USA) predominate and 43% of all external instruments have been agreed with one of only three of these partners (China, the EU and Korea). For these three partners, economic instruments predominate, as do instruments at the higher end of the legal quality spectrum (agreements and Memoranda of Understanding).

We then turn to the fourth parameter, and perhaps the most significant in legal terms, in our typology of ASEAN external instruments: the designation of the party/ies on the ASEAN side. A basic distinction must be made between instruments agreed by ASEAN *per se* as a distinct legal person, and instruments agreed by the ASEAN member states acting collectively as ASEAN. We are interested in the first place in mapping this phenomenon, in establishing what types of instrument in terms of legal quality, content and partners are agreed by ASEAN per se, and by the member states as 'collectively ASEAN'. In the second place we attempt to identify what is meant by the 'collectively ASEAN' label: what indicators of collectivity do we find that might perhaps justify giving a political or even legal significance to this label? And what – if any – are the legal implications for the members states, or for ASEAN, of this practice when it is used in the conclusion of an international agreement?

It might have been expected that the granting of express legal personality to ASEAN by the Charter would have stimulated an increased use by ASEAN of its treaty-making power. However there is no sign that this has – at least so far – occurred. On the other hand the number of instruments – of all kinds – using the 'collectively ASEAN' label has strikingly increased in recent years. ASEAN and its member states continue to express ASEAN's identity and their aspirations for the centrality of its regional role through the 'collectively ASEAN' label. Indeed, we identify in some cases ambiguity as to the identity of the contracting or adopting party/ies, and thus ambiguity as to the bearer of legal rights and obligations.

It is notable that there is no simple correlation between the legal quality of the instrument and the decision to act either as ASEAN per se, or through the member states as 'collectively ASEAN'. Overall the 'collectively ASEAN' formula is the preferred form for both binding agreements and for 'softer' instruments – around two-thirds of all external instruments – and the non-binding character of an instrument does not make it more likely to be agreed by ASEAN per se. On the other hand, when we bring the content of the instrument and the identity of the partner into the picture we can see a pattern: the use of the 'collectively ASEAN' label by the ASEAN member states predominates in the case of legally binding agreements with politically salient content (for example ASEAN+1 preferential trade agreements), whereas ASEAN per se is more in evidence in more technical agreements with other international organizations.

This practice reveals a paradox in ASEAN external relations, namely the emphasis on the central and proactive role for ASEAN while at the same time a clear current choice not to deploy ASEAN as a party in its own right. At the same time it is possible to identify a number of what one might call 'indicators of collectivity': indications that although ASEAN as a legal person stays in the background, this does not mean that ASEAN as a constructed identity is absent. There is a sense in which, within ASEAN itself and for its member states, the agreements concluded by the member states under the 'collectively ASEAN' label are 'ASEAN agreements' and part of the external relations of ASEAN, and not only of ten individual states in Southeast Asia. Given Article 1(15) of the Charter establishing as an objective the 'centrality and proactive role of ASEAN' in its external relations it can be argued that the implementation of such an agreement becomes 'an obligation of [ASEAN] membership' within the meaning of Article 5(2) of the Charter and that, in addition to the member states' international law obligations to the third country treaty partner, there is an obligation of mutual cooperation between ASEAN member states and its organs, since the

implementation of such an agreement may be said to have become an obligation on the member states which is linked to their membership of ASEAN.

Economic instruments account for more than half of all ASEAN external instruments. We focus on the preferential trade agreements (PTAs) concluded by the ASEAN Member States with external partners. These ASEAN+1 PTAs are not concluded by ASEAN *per se*, but rather by ASEAN acting collectively. This is a choice which follows logically from the level of internal integration of ASEAN institutionally as well as economically; there is no real incentive either for ASEAN Member States or for third parties to move to ASEAN *per se* PTAs. For a third country the only advantage would be if ASEAN could offer (more) effective implementation and enforcement of a trade agreement. At present, given ASEAN's limited institutional powers and capacity, it cannot do so. ASEAN Member States are not ready to transfer that degree of competence, nor the necessary institutional capacity, to ASEAN either internally or externally.

However an analysis of the ASEAN+1 PTAs also shows that these plurilateral agreements have a collective dimension: the comparison of the coverage and depth of the agreements with the ASEAN internal *acquis* demonstrates that ASEAN member states are highly consolidated amongst each other. Their commitments vis-à-vis their external partners never exceed the ASEAN internal commitment level – even in areas where the differentiation of commitments is technically possible. In other words, the ceiling of commitments is determined by lowest common denominator among ASEAN members as reflected in the ASEAN internal acquis. Below this ceiling, the depth and coverage of commitments varies in correlation with the intensity of trade between ASEAN member states and the external partner. This finding, however, does not imply (necessarily) an ex ante collective decision reflecting a common political preference of ASEAN Member States not to go beyond the acquis. The 'collective pattern' of commitments that we find in the external economic agreements is rather a result of structural factors, notably the necessity to accommodate those among the parties that have the lowest ambition and the attribution of obligations in the plurilateral context leading to a free-rider problem in the course of negotiations.

Alongside these ASEAN+1 PTAs, some individual ASEAN member states may (and in fact do) seek more ambitious accords that exceed both the ASEAN internal acquis and the respective ASEAN+1 PTA through parallel bilateral agreements with the same external partners. They are able to do this in legal terms because ASEAN is a free trade area and not a customs union and because the collective ASEAN+1 PTA is concluded by its member states as a plurilateral agreement and not by ASEAN per se. The member states are the bearers of the rights and obligations under the agreement and precisely for that reason are not prevented from concluding subsequent or parallel bilateral agreements with the same external partner.

The choice of concluding these ASEAN+1 PTAs as member states with the 'collectively ASEAN' label attached is thus a consequence of ASEAN's level of internal integration. It also has the consequence that while ASEAN as an international organisation is given a (albeit limited) degree of identity (the ASEAN label), it is unlikely to become a rival to its member states as an international actor. It can operate alongside its members without displacing them.

We then turn to partnership and cooperation instruments, assessing the role of ASEAN as a 'regional architect' and partner of other international organisations. In numerical terms, this is an important category and these instruments are especially important as a basis for relations with ASEAN's Dialogue Partners, and in particular with the six most important partners in terms of external instruments (China, EU, Korea, USA, Australia and Japan). Three important features emerge. First, in the interaction between ASEAN and other international organizations we see evidence of the ability of ASEAN itself - as an international organisation - to use its legal personality and express its autonomous identity through legal agreements. Second, the majority of these instruments have been adopted in the 'collectively ASEAN' form. They express the ASEAN methodology of governance of the wider region within which ASEAN finds itself, ASEAN's regional strategy: the 'open regional architecture' mentioned in Article 1(15) of the ASEAN Charter. For example, since the Treaty of Amity and Cooperation in Southeast Asia (TAC) was first concluded in 1976 it has expanded to include not only the new ASEAN members but also non-ASEAN states. We argue that while the TAC illustrates the relatively weak autonomy of the ASEAN, at the same time by means of this instrument the ASEAN extends the reach of its basic principles to a wider group of countries, especially but not only those in its own wider region. The 'collectively ASEAN' form of external relations may lessen the likelihood of the creation of an autonomous (and potentially rivalrous) actor; however it also increases the ability of ASEAN to extend participation in regional frameworks to non ASEAN partners.

Third, we see a strong propensity for soft rather than hard legal instruments, reflecting in ASEAN external relations the internal modus operandi of the 'ASEAN Way'. The regional architecture promoted by ASEAN is regionalism according to the 'ASEAN Way' and its methodologies characterise these broader regional processes, which tend to be based on dialogue and declarations rather than formal institutions and treaties. These soft instruments are comprehensive and cross-sectoral in character and reiterative in the way in which they refer back to previous instruments and forward to future tasks, providing a framework for on-going dialogue and the development of common understanding and shared purposes. We argue that they represent a strategy of 'omni-enmeshment': engaging with third parties to draw them into a deeper involvement in the region, placing them within a web of sustained exchanges and relationships.

This volume finally places the analysis of ASEAN external instruments and the findings of the previous chapters in the broader context of an appreciation of ASEAN as a regional organisation and offers a perspective on its external strategy that draws on the major strands of international relations scholarship. We argue for an eclectic approach which draws insights from the main explanatory frameworks, applying these to the key characteristics we have identified as belonging to ASEAN external instruments, the legal characteristics of the instruments themselves and the practice of ASEAN and its member states in their use. We find evidence in ASEAN's external instruments for a double hedging strategy on the part of the member states, designed to protect their sovereignty from being challenged either by external super- and regional powers or by moves towards supranational forms of integration. Thus on the one hand we find a regional strategy based on complex regional balancing, 'omni-enmeshment', seeking to involve all the various regional and global actors in the region's affairs in order to give them a stake in the region's well-being and security, and an open architecture which is prepared to include non member states in key ASEAN initiatives. This can be characterised as an externalisation of the

‘ASEAN Way’; certainly it is founded on a close link between internal modes of integration and external policies.

On the other hand we see the member states taking care to avoid the transfer of competences (or sovereignty) to ASEAN, and the emphasis on the member states as ‘collectively ASEAN’. ASEAN operates through and alongside its member states and neither legally nor politically does its external action displace that of its member states. Central to this analysis is the recognition that while ASEAN itself undoubtedly possesses – and on occasion uses – legal personality and the capacity to enter into international agreements, in ASEAN practice this legal personality is de-coupled from the identity and centrality of ASEAN as a regional actor. ASEAN and its member states have found ways to express that identity and centrality without engaging ASEAN as a legal person, a practice which we call ‘collectively ASEAN’.

Our typology of ASEAN external instruments takes as its starting point the Table of ASEAN Treaties/ Agreements and Ratification, which was put together by the ASEAN Secretariat. This initial list of instruments was then supplemented and refined using ASEAN web resources, the Documents database of the National University of Singapore’s Centre for International Law, and a number of treaty databases which are country specific. Even so, the text of a number of the instruments cannot, at present, be located. The list of instruments is organized into three inventories, which are incorporated in Annexes 1, 2, and 3. These inventories are organized according to types of instruments (Annex 1), third country parties (Annex 2), and ASEAN party (Annex 3). Using these inventories, we analyse the legal quality of a selection of instruments (Annexes 4 and 5) and have constructed a content-based typology, which can be found in Annexes 6 to 9. Within each typology category, the instruments are sorted by third country party, and then chronologically.

We do not hold out either that the list of instruments is comprehensive or that the versions of the instruments we have used, which were culled from public sources, are authentic. It will be possible to refine and add to the inventory and typology over time; a fully comprehensive and maintained database of ASEAN external instruments would help to achieve a higher degree of legal certainty. Meanwhile the inventories and typology presented here are an important resource for those studying ASEAN external relations.

From Treaty-making to Treaty-breaking: Models for ASEAN External Trade Agreements

Pieter Jan Kuijper, James Mathis and Natalie Morris

EXECUTIVE SUMMARY

This study demonstrates the different methods by which the Association of Southeast Asian Nations (ASEAN) and its member states can conclude trade agreements with non-member states. It then considers the implications of these different forms for the substantive provisions that may likely be contained in future trade agreements and the mechanisms that may be used in them for resolving disputes among the signatories. These elements are covered through all of the aspects of the treaty process, from 'treaty-making' through 'treaty-implementation' and to 'treaty-breaking'.

There are three general methods (or forms) that we know from the law and practice of ASEAN and other international organisations that appear to be open to ASEAN and its members. They are made possible by the powers granted to ASEAN by its member states by the various treaties that form the foundation of the organisation. These explicitly include the power to conclude international agreements, but without being very precise as to how the organisation should exercise this treatymaking power.

The first form is that an external agreement can be concluded by all or some of the member states of ASEAN on behalf of themselves, as individual states or as a collective embodiment 'in the name of' the organisation. The second form, and at the other end of this spectrum, is when ASEAN as an organisation is the only stated party on its side of an agreement. Third, and somewhere in the middle of this spectrum, there is the possibility of what has been called in European Union (EU) law, a 'mixed agreement', that is to say that ASEAN and its member states together can conclude an agreement on the side of ASEAN. As we will see, the first and third methods have many variations.

In order to better understand the three methods of treaty-making as they might apply to ASEAN and its member states, we study both the founding instrument of ASEAN and their development over the years, and also delve into the practice of ASEAN and its member states in concluding international agreements. We find that ASEAN member states are concluding external trade agreements as individual states in the manner of the first type of agreement described above. ASEAN as an organisation has not been a party to these trade agreements either as a sole party (as per the second form referred to above) or as a party together with the member states in the form of a mixed agreement (as per the third form referred to above).

There are implications flowing from each type of these forms of agreements for most, if not all, aspects covering the treaty-making, treaty-implementation, and treatybreaking process. The notion of state and/or organisational responsibility controls each aspect. As ASEAN is not now a party to present agreements, there is no responsibility on the part of ASEAN for the obligations contained in an external trade agreement. In the existing ASEAN external trade agreements, all rights and obligations are solely in the realm of the individual member states to each agreement and each

member state carries those rights and obligations in respect of all other signatories to the agreement.

This includes the other ASEAN member states as well as the dialogue partner, the non-ASEAN party signatory to the agreement. This means that rights and obligations can be (and are) created *inter se* among the ASEAN member states via these external trade agreements.

We find certain ambivalence in this practice of generating *inter se* rights and obligations in trade agreements with non-ASEAN parties. On the one hand, it is recognised that the member states can proceed with internal enhancements of ASEAN economic integration during the process of negotiating provisions in a new external agreement. At the same time however, any institutional apparatus that services those new rights and obligations only flows from the external agreement, including the dispute settlement mechanism particular to it. The effect of this is to enhance substantive provisions in the internal order of ASEAN but it does not enhance internal institutional development, including ASEAN's dispute settlement mechanism. As the establishment of a stronger external presence for ASEAN is a stated objective of the current blueprint for the organisation, one has to query if this method of treaty-making is complementary to that goal.

A stronger external presence for ASEAN can still be achieved with external trade agreements concluded by the ASEAN member states, and without ASEAN as a party. However, instead of creating rights and obligations *inter se* among the ASEAN member states, the external trade agreements can be focussed on creating rights and obligations between the ASEAN member states on the one hand, and the non-ASEAN parties on the other. This can happen if the external trade agreement is entered into by the ASEAN member states as a collectivity, as in form one described above. In this way, a small 'tweak' projects a new trajectory of putting regional integration of the ASEAN Economic Community first. The emphasis becomes one of building a stronger external presence for ASEAN as a basis for integration into the global community, rather than the other way around. Some may question the feasibility of having ASEAN member states collectively enter into an external trade agreement, without the benefit of the ASEAN minus X formula to enable the agreement to come into force with fewer than ratifications from all the ASEAN member states, when their levels of economic development are so varied. Therefore, it is important to also examine possible alternatives to the ASEAN minus X formula.

Another way of achieving a stronger external presence for ASEAN is by engaging ASEAN as an international legal person in its own right, in the external trade agreements. ASEAN can take its own rights and responsibilities under an external trade agreement even if it is not a party to the agreement, provided there is an explicit written agreement to this effect.

This would be another variation of the form one agreement. Alternatively, ASEAN can be a party to the agreement, either alone, as in form two above, or alongside member states, as in form three. For this, there would need to be some kind of competence transferred to ASEAN. Thus far, ASEAN member states have been reluctant to transfer powers to ASEAN beyond the capacity to coordinate or monitor specific rights and responsibilities. While this would render an ASEAN-alone external trade agreement an unrealistic goal in the shorter term, it would still leave open the possibility of ASEAN being a party to an external trade agreement alongside member states. In

fact, such ‘mixed’ agreements may be a useful way forward, as it brings together the separate personality of ASEAN and the sovereignty of member states in a single agreement.

The institutional side of treaty-making (the way in which international agreements are concluded by states and international organisations) must also take into account the evolution of the substantive side of treaty-making.

We recognise that there are substantive implications that flow from each type of agreement described and most of these implications revolve around the role of a regional organisation (ASEAN) in facilitating the rights and obligations assumed by its member states. For this, it is important to survey some substantive trends in trade agreement practice with the goal of revealing what might be the potential of ASEAN in the field of external relations in the longer run.

One development that is clearly visible is the growing number of subjects covered in international trade agreements and their close connection to national domestic regulation in many fields, such as environment and health standards, intellectual property rights, competition law, government procurement, service provider standards and certifications, and investment rules. The implications that flow from these regulatory subjects depend on whether the provisions are legally precise in obligation and subject to dispute settlement mechanisms, or whether the subject area is addressed in a more cooperative manner as an on-going policy activity between governments, regulatory agencies, firms and consumers.

For those subject areas with legal precision, one perceives a strong national, or member state, role in their domestic regulatory character and where the regional organisation has not generated substantive legal acts of its own. Responsibility accordingly flows as it will be states that seek to enforce and states that will respond to others’ claims of enforcement. The increasing attention paid in such new agreements to more rigorous dispute settlement design serves as evidence of these developments.

But this also highlights a weakness. Dispute settlement mechanisms of the agreements concluded by ASEAN member states with third states also suffer from the tendency, as noted above, of the ASEAN member states not to state that they conclude these agreements as a group that acts as one party (on the side of ASEAN). The resulting legal confusion can be considerable. When it is conceivable, as signalled earlier, that ASEAN member states, by concluding a free trade agreement with a dialogue partner, also create rights and obligations among themselves, they may also then litigate against each other to secure those rights and obligations. That may or may not have been the intention of the drafters of these agreements but could be contrary to the principle of the centrality of ASEAN in the relations of ASEAN member states with third states.

The study looks into all the implications of this strange situation and suggests a number of ways out of this dilemma. New agreements with third states could be drafted in a different way. This can be done minimally by making clear in the text of an agreement that the members of ASEAN conclude the agreement as one party. An even stronger way would be to opt for the mixed agreement, where ASEAN as an organisation and its member states together would conclude the agreement. Another method, which could also be applied to existing agreements, is the making of a unilateral declaration on behalf of all ASEAN member states that among themselves they will

only apply the rules of their internal free trade area and not the provisions of the agreement with the third state. A third manner, of rather minimal character, would be to ensure by a small amendment to the protocol on internal dispute settlement that any dispute between ASEAN countries flowing from an agreement with a third state would be decided by the ASEAN internal dispute settlement mechanism.

Where other aspects of the dispute settlement provisions of the agreements with third states are concerned, the study gives an analysis of the most important provisions in the light of comparable provisions in the Dispute Settlement Understanding of the WTO and a number of important trade agreements among third countries. On that basis, many specific improvements to the agreements between ASEAN member states and third states are suggested, but also some points are highlighted where these ASEAN external agreements are ahead of the others.

The less formalistic and more 'cooperative' style of approaching domestic regulatory issues also has its institutional implications. Here one sees a strong desire by signatories to generate processes that gradually address the range of non-tariff regulatory barriers. This is where the regional organisation can become an important partner in facilitating the use of cooperation instruments such as transparency systems for notifications, requests and responses for information, and processes to achieve forms of recognition for services and product standards. It is also conceivable that in this terrain of regulatory cooperation the regional organisation can also be summoned to assume a coordinating or notification responsibility for elements within an external trade agreement on behalf of and alongside its member states.

This raises the appropriate institutional form of future ASEAN external agreements and, in particular, some aspects that are associated with the third form, the mixed agreement. This model is the subject of special attention because it has developed into such an important type of agreement in the EU. Although the EU is wholly different from ASEAN, this is not in and of itself a reason why this model could not be usefully applied within the ASEAN framework. It provides a judicious combination between the separate personality and competence of the organisation and the remaining sovereignty of the member states, of which most states, but certainly the ASEAN member states, remain so jealous. The 'centrality' of ASEAN and national sovereignty combined: one can see why 'mixity' might be an attractive model for ASEAN.

Ultimately, which of the three general methods (and their respective variations) is most suited to ASEAN's future external trade agreements will depend on factors such as the subject matter of the agreement and ASEAN's own stage of regional integration. We consider that what may have worked for ASEAN's existing external trade agreements may not work for the newer agreements on the horizon. Importantly, if and when a decision is taken to structure ASEAN's external trade agreements in any particular way, it should be a conscious decision, involving a considered examination of the different available options.

Rules of Origin in ASEAN: A Way Forward

Stefano Inama and Edmund W. Sim

EXECUTIVE SUMMARY

The rules of origin (RoO) constitute a fundamental foundation for any preferential trade agreement (PTA). RoOs are similar to nationality and citizenship rules for natural persons in a nation-state. Qualifying persons may enjoy the benefits of citizenship, such as freedom of movement, permanent residency and the like. Similarly, RoOs determine the applicable duty rate and other treatment for goods in the PTA.

Taken in this context, the ASEAN RoOs, originating in the ASEAN Preferential Trade Agreement (APTA), developed in the ASEAN Free Trade Area (AFTA) agreement and purportedly refined in the ASEAN Trade in Goods Agreement (ATIGA), have created a relatively muddled and confused trading situation. The ASEAN RoOs are both ill-defined and ill-administered, resulting in less-than optimal usage of the ASEAN trade preferences and stunting the growth of the ASEAN Economic Community (AEC). These deficiencies have been carried forward into ASEAN's free trade agreements (FTAs) with its main dialogue partners of Australia-New Zealand, China, India, Japan and Korea.
The poor definition of ASEAN RoOs dates back to the APTA and AFTA. The concept of regional value added as a qualifying RoO was not properly spelled out, with ASEAN customs authorities and practitioners having to fill out the details through trial and error, often to the detriment of the business sector. Continued underuse of the ASEAN trade preferences led further tinkering of RoOs by ASEAN authorities, such as the introduction of product-specific RoOs as well as the alternative rule of change in tariff classification. Yet despite these revisions, effected in their latest form in the ATIGA, the ASEAN RoOs remain relatively ill-defined and difficult to administer.

The poor administration of ASEAN RoOs also has been a persistent problem. Despite repeated attempts to ease administrative burdens on importers and exporters, and thereby expand use of the ASEAN trade preferences, ASEAN customs authorities remain wedded to the verification and authentication of Form D certificate of origin documents rather than using modern trade facilitation approaches that would focus on the data contained in those documents instead of the documents themselves.

After surveying both the ASEAN RoOs and their administration, the authors recommend that ASEAN leaders reform both.

The RoOs in ATIGA and ASEAN FTAs can be simplified by focusing on 1) an overall improvement of the legal texts in terms of transparency and predictability (2) applying a percentage criterion based on value of materials 3) lowering the regional value content required to qualify as ASEAN-origin. 4) clarifying the text of product specific rules of origin.

The administration of ASEAN RoOs can be improved by 1) expanding the use of self-certification, 2) moving away from document-based verification and 3) shifting to modern post-entry audit and trade facilitation approaches.

By imposing greater clarity in the RoOs and their administration, ASEAN authorities can encourage the use of the ASEAN trade preferences by all segments of the business community. Only then can all sectors participate in the AEC and enjoy its benefits.

The Internal Effects of ASEAN External Relations

Ingo Venzke and Li-ann Thio

EXECUTIVE SUMMARY

Starting with a typology of ASEAN external agreements, the authors go on to provide an original reading of plurilateral agreements as 'joint' agreements. The book then offers both a clarification of the effects - direct or indirect - of external agreements within the legal orders of ASEAN Member States, and an explanation of the effects of external agreements within the legal regime of ASEAN. The authors conclude with a discussion of the role of ASEAN centrality and the role of the secretariat in shaping it.

This book:

- Provides the first-ever account of the internal effect of ASEAN external agreements
- Offers an original reading of ASEAN external agreements as 'joint' agreements
- Clarifies the obligations, responsibilities and liabilities of Member States arising from ASEAN external agreements

ASEAN as a Negotiator/Actor in International Forums –

Reality, Potential and Constraints

Dr Paruedee Nguitragool and Prof Jürgen Rüland

EXECUTIVE SUMMARY

This book addresses a topic which in the proliferating literature on the Association of Southeast Asian Nations (ASEAN) has so far been almost entirely neglected. While ASEAN's practices in intra-regional cooperation are well covered and some information exists about ASEAN's agency in international forums of the East Asian and Asia-Pacific region, hardly anything is known about ASEAN as an actor and negotiator in global forums such as the United Nations, the World Trade Organization (WTO), the International Monetary Fund (IMF) or the climate change and non-proliferation regimes. Available information is unsystematic, scattered and often anecdotal.

In the study, we argue that in global forums, ASEAN has to contend with four constraining factors: First, the ASEAN Way as the grouping's repository of shared cooperation norms and, second, as a direct outflow of the former, ASEAN's organizational structure. Neither ASEAN's value system nor its internal structure is conducive to collective action in the global political arena. Both are the legacies of a "cognitive prior" shaped by centuries of conflict, threats, instability and political uncertainties which has deeply engrained distrust, suspicion and ill-feelings towards the external world in the minds of decision-makers and major parts of the public. These legacies are reflected in the strong emphasis of the ASEAN Way on sovereignty norms. The seemingly cosmopolitan liberal norms ASEAN adopted with the Bali Concord II of 2003 and elevated to quasi-constitutional status in the ASEAN Charter enacted in 2008 may have eased external normative pressures on ASEAN, but have done little to overcome ASEAN's cohesiveness dilemma. On the contrary, they have, and this is our third major point, exacerbated the association's collective action problems by creating a value base which is contradictory below the surface of rhetorical unity. Fourth and, finally, we argue that Southern regional organizations such as ASEAN also grapple with an uneven institutional playing field. While it is true that the legitimacy of the established international institutional order including its representativeness, decision-making procedures and normative underpinnings, is coming under siege, the institutional power of the mainly Western creators of this order is only gradually eroding and thus markedly curtailing the scope for effective collective action of Southern regional actors.

The study proceeds in six major steps. Following the introductory chapter that lays out the research questions, we develop in Chapter 2 an analytical framework. After identifying shortcomings of neo-functionalist and rational choice-based neo-institutional approaches applied in the analysis of the negotiating behavior of the EU in international forums, we propose a constructivist reinterpretation of the neo-functionalist externalization hypothesis. It makes the argument that ASEAN externalizes its weakly developed internal cohesion which is the result of a cognitive prior that has deeply inculcated in the region's collective memory notions of a hostile external world.

Repeated experiences of insecurity and vulnerability and a long history of victimization by Great Powers have on the one hand given rise to attempts of overcoming these adverse legacies through

regional cooperation, but on the other also preserved sentiments of lingering distrust and suspicion towards neighbors. The result was a continued concern for self-help, national resilience, the protection of national sovereignty and shallow regional integration which has been reproduced whenever political events seemed to have affirmed the experiences of the past. This led ASEAN member states to pursue a pragmatic, flexible and context-sensitive foreign policy which responds seismically to global and regional power-shifts. The norms and institutions guiding regional cooperation fit this state of mind quite well and impede the deepening of regional cohesion. It is thus hardly surprising that ASEAN member states also practice collective action in global forums only in issues are of minor relevance or when there is a high degree of congruence of their interests. ASEAN's repository of cooperation norms and its institutional set-up may foster a certain level of mutual consultation and coordination, but rarely full-fledged collective action. We try to measure ASEAN's cohesion in global forums by drawing from more recent actorness research and developing a fourdimensional typology of cohesion (bloc, quasi-bloc, caucus, non-cooperation). Based on negotiation theory, we lay the ground for the empirical analysis by conceptualizing international negotiations as a multi-staged process in which actors employ a range of strategies including leadership, framing, coalition-building, forum shopping as well as image-building and the generation of "soft power."

The empirical part (Chapter 3 to 5) is the result of comprehensive data collection and data mining. Much of the information comes in the form of newly collected primary data such as content analysis of official documents and speeches, intensive newspaper analysis, statistics and interviews with diplomats from ASEAN member countries, former and current officials of the ASEAN Secretariat as well as think tank and university scholars.

Chapter 3 seeks to capture the cognitive prior, that is, the historically grown ideational context in which ASEAN operates. The chapter portrays Southeast Asia as a region which in pre-colonial times has localized Hindu-Brahmanic and Sinic power-sensitive state craft, the essence of which has been persistently reproduced through wars, colonial conquest, Great Power interventions and a highly asymmetric global distribution of power. These ideational and historical legacies have translated into a normative and institutional structure which limits the depth of cooperation and impedes the development of collective negotiation capacities which would match those of the economically advanced nations.

Chapter 4 explores ASEAN behavior during three stages of international negotiation. Evidence for cohesive cooperation is ambiguous. ASEAN's role as an initiator, innovator and agenda-setter in international negotiations is largely confined to minor or special issues; in key issues of the global order such as UN reform, trade liberalization and climate change it has rather been a reactive force. ASEAN can also hardly be considered an innovative norm entrepreneur in international relations. By and large, it stands for rather conservative and conventional Westphalian sovereignty norms. Although framing its negotiation position in Third Worldist and developmentalist language, ASEAN has rarely been a radical challenger of the existing international institutional architecture. Even where the association as a whole or individual member states saw their interests jeopardized in international negotiations, it has usually abstained from pursuing obstructive and intransigent negotiation strategies.

Yet, ASEAN members' pragmatic behavior which has made them amenable to package deals, side payments and second-best solutions also prevented a stronger bloc-type attitude at the end of the negotiation process when decisions are prepared and made. In the decision-making process, we found on closer scrutiny a comparatively high degree of ASEAN unity at least in the UN General Assembly. Yet, we observed quasi-bloc behavior primarily in votes on rather insignificant issues. Compliance, too, was rather mixed. It was higher in the international trade regime than in human rights and environmental issues.

As regards ASEAN's negotiation strategies we found no clear pattern, too. Our evidence suggests that in the application of negotiation strategies, ASEAN cohesion fluctuates between quasi-bloc and caucus. Preliminary evidence suggests that the degree of unity is greatest in the attempt of generating and projecting "soft power," resulting in quasi-bloc behavior. A relatively high degree of unity also appears in the way ASEAN frames its goals in negotiations and in forum shopping, displaying a modicum of agreement in identifying which international forum suits their interests best. Much less cohesive, and, hence, much more caucus-type behavior prevails in the pursuit of leadership and executive positions as well as in coalition-building. These two strategies are more often and much stronger dominated by national interests than the negotiation strategies mentioned before. Hence, the tendency for bowling alone and acting in an uncoordinated way.

The empirical part of the study ends with two case studies: one exploring ASEAN's behavior as negotiator on an issue where material values were at stake (WTO agricultural negotiations) and another one on an issue where ideational values mattered (human rights issues in the UN and the ILO). Although ASEAN's behavior on first sight might appear puzzling in the two cases, on closer scrutiny it fitted very well our main argument in which ASEAN was strongly guided by its cognitive prior.

The final Chapter (Chapter 6) concludes the study, summarizes major findings, relates them to our initial set of theoretical assumptions and outlines recommendations on how ASEAN's cohesion in global forums may be strengthened. They focus on improvements in the process of knowledge generation for international negotiation, better multi-level processes of coordination and reforms of the ASEAN Secretariat. We propose to upgrade the Secretariat to a catalyst of knowledge and specialized knowhow that member states may need and tap in order to act cohesively and competently in international negotiations. This entails a marked expansion of the secretariat's expert personnel, a massive increase of funding and the acceptance on the part of member states that the Secretariat becomes a nodal point in the organization including a certain degree of centralization, albeit without supra-national competences. We also discuss the drawbacks of such a strategy which ASEAN countries may fear. They include a mission creep of the Secretariat and a tendency to seek autonomy from its principals, the member governments. We believe that these fears, given ASEAN's normative disposition, weigh strongly and explain why the grouping may at best strengthen its Secretariat incrementally. Despite the ASEAN Charter which also pursues the objective of making ASEAN a more assertive and more cohesive player in global forums, its impact will remain limited in the foreseeable future.

ASEAN Environmental Legal Integration: Sustainable Goals?

Kheng-Lian Koh, Nicholas Robinson, and Lin Heng Lye

EXECUTIVE SUMMARY

While the environmental performance of most ASEAN member states is above the world average, ASEAN nations will continue to face growing environmental challenges due to pressures exerted on them such as population growth, urbanization and industrialization. The authors of this book look at how the member states of ASEAN employ law as a means of regional integration within the context of environmental conservation. While the goal of new laws is to implement sustainable development, it continues to be an ongoing adaptive process, since clear and immediate answers to environmental challenges are rarely available. Readers of this book will gain a clear idea of the evolving cooperation for sustainability within ASEAN at regional and global levels, and the areas of focus for the future. The book will be of interest to policy and decision makers, as well as environmental organizations and academics in the field.

This book:

- Gives a clear overview of current ASEAN environmental law and how it may develop in the future
- Situates ASEAN environmental law in a wider political and economic context at both a regional and global level
- Presents a clear analysis of the complexities associated with creating and managing environmental law in today's constantly changing world