Introduction

It is sometimes seen as paradoxical that Asia – the most populous and economically dynamic region on the planet – is the most lacking in formal intergovernmental structures. There is no regional framework comparable to the African Union, the Organization of American States or the European Union; in the United Nations, the Asia-Pacific Group of fifty-three states rarely adopts common positions on issues and discusses only candidacies for international posts. Such sub-regional groupings that exist within Asia have tended to coalesce around shared national interests rather than shared identity.¹

In part this is due to the diversity of the continent. Indeed, the very concept of ‘Asia’ derives from a term used in Ancient Greece rather than indigenous political or historic roots. Today, regional cohesion is complicated by the need to accommodate the great power interests of China and India.² But the limited nature of regional bodies is also consistent with a general wariness of delegating sovereignty to international organisations. Asian countries, for example, have by far the lowest rate of acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ) and membership of the International Criminal Court (ICC); they are also least likely to have signed

conventions such as the International Covenant on Civil and Political Rights (ICCPR) or the International Covenant on Economic, Social and Cultural Rights (ICESCR), or to have joined the World Trade Organization (WTO). Figure 0.1 shows the participation of states in different international institutions.

For most of its history, the Association of Southeast Asian Nations (ASEAN) reflected such wariness. Its foundational document, the Bangkok Declaration, essentially stated a few shared goals and announced an annual meeting of foreign ministers.\(^3\)

\(^3\) The ASEAN Declaration (Bangkok Declaration), Indonesia–Malaysia–Philippines–Singapore–Thailand, done at Bangkok, 8 August 1967. See generally Sheldon Simon, ‘ASEAN and Multilateralism: The Long,
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. Building on the adoption of a Charter that entered into force in 2008, this seeks to create an Economic Community, a Political-Security Community and a Socio-Cultural Community. In contrast with weak groupings such as the Shanghai Cooperation Organisation (SCO) and the South Asian Association for Regional Cooperation (SAARC), ASEAN has positioned itself at the centre of Asian regionalism through hub and spoke arrangements with China, India, Korea and Japan, and is arguably the most important Asian international organisation in the history of the continent.

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 the new communities. An important part of any compliance regime is the knowledge of which steps towards compliance have in fact been taken. Such knowledge presumes the collection of data on compliance, either for self-assessment or evaluative purposes.

Bumpy Road to Community’, Contemporary Southeast Asia, 30(2) (2008), 264.
In this book, the collection of those data will be referred to as ‘monitoring’. The term will be used broadly to embrace any institution, process or practice (including informal practices) that gathers or shares information about whether or to what extent an ASEAN obligation has been (a) complied with, in the sense of substantive compliance, or (b) implemented, in the sense of formal compliance. Chapter 1 surveys ASEAN’s evolving approach to monitoring and the various mechanisms that have been put in place to monitor compliance in its three pillars: economic, political-security and socio-cultural. Such mechanisms are not limited to formal monitoring regimes but may also include informal and non-state mechanisms. It is important to stress that this study does not reach conclusions as to whether each of the various monitoring regimes have been effective in practice. Instead, the focus is on the institutional design of the various monitoring regimes.

As the survey reveals, gathering data on compliance is an important reason why monitoring takes place – but it is not the only reason. In the literature on the intersection between international law and international relations, important distinctions are drawn between implementation, compliance and effectiveness. As Paul Szasz noted in a volume dedicated to the

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role of monitoring, the goal is typically not punishing non-compliance but assisting states ‘to improve and enhance compliance with treaty obligations’. Drawing on the survey of ASEAN and other examples of monitoring, Chapter 2 develops a taxonomy of purposes to be served by monitoring. In addition to assessing substantive and formal compliance (described here as *compliance sensu stricto* 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 be bound by and comply with the precise content of a given obligation. Having developed this taxonomy, Chapter 2 shows the way in which the willingness to accept monitoring in general has increased over time, as has the preparedness to create monitoring mechanisms for compliance and implementation, rather than simply for interpretive, facilitative or symbolic purposes. That trend is particularly clear with respect to ASEAN’s nascent Economic Community, where there is growing tolerance for objective third-party monitoring which is more insulated from political pressure.

Finally, Chapter 3 offers a ‘toolkit’ of monitoring possibilities to guide future practice. Assuming a coherent

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answer to the question of why monitoring is being undertaken, this chapter outlines how mechanisms to fulfil the relevant function might be structured. Important variables include who is monitoring, how data are collected, when monitoring takes place, what powers the monitors have and the transparency of the monitoring process.

The aim here is not to offer an explanation of compliance with international obligations in ASEAN generally. The more modest goal is to answer three questions central to ASEAN’s development as a rules-based legal entity: what forms of monitoring have been used to date; why these mechanisms were implemented and the extent to which they have been successful; and how best practices could improve on that record. As we shall see, the failure to create strong monitoring mechanisms is not accidental. In the coming years, a key challenge for ASEAN will be whether the trend from either no monitoring or purely symbolic or facilitative monitoring can be continued.
Chapter 1

ASEAN’s Approach to Monitoring

Historically, ASEAN had little provision for monitoring obligations – arguably because there was little interest in compliance at all. Writing in 1998, the former Secretary-General of ASEAN stated that ASEAN ‘is not and was not meant to be a supranational entity acting independently of its members. It has no regional parliament or council of ministers with law-making powers, no power of enforcement, no judicial system.’ This was consistent with the view that ASEAN was intended to be a kind of social rather than a legal community.

Over time this changed, with the adoption of various agreements that included reporting obligations. The signing of the ASEAN Charter in 2007 signalled a paradigm shift. As Tommy Koh and others argued, the purpose of the Charter was to make ASEAN a more rules-based organisation: ‘The “ASEAN Way” of relying on networking, consultation, mutual accommodation and consensus will not be done away with. It will be supplemented by a new culture of adherence to rules.’ This point was emphasised also in the Report of the Eminent Persons Group, which explicitly linked

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1 Rodolfo Severino, ‘Asia Policy Lecture: What ASEAN Is and What It Stands For’ (The Research Institute for Asia and the Pacific, University of Sydney, Australia, 22 October 1998).


rule adherence to legal personality. Whether the ‘ASEAN Way’, epitomised by musjawarah (consultation) and mufukat (consensus), is compatible with a rules-based organisation will be a key challenge to the organisation in years to come.

Two obstacles remain. The first is capacity, including the comparatively few resources available to ASEAN in general, and the unfunded mandates created in certain regimes in particular. Writing in 2011, Azmi Mat Akhir optimistically argued that the challenge confronting ASEAN was the need to coordinate the increasingly complex and multi-sectoral activities being undertaken in ASEAN’s name. The mandate

4 Report of the Eminent Persons Group on the ASEAN Charter (ASEAN, Jakarta, December 2006), para. 43: ‘By embarking on building the ASEAN Community, ASEAN has clearly signalled its commitment to move from an Association towards a more structured Intergovernmental Organisation, in the context of legally binding rules and agreements. In this regard, ASEAN should have legal personality.’


7 Azmi Mat Akhir, ‘ASEAN into the Future: Towards a Better Monitoring and Evaluation of Regional Co-operation Programmes’, in Lee Yoong
ASEAN’s approach to monitoring

of the Secretariat, for example, has increased – but only slightly. In the 1976 Agreement establishing the Secretariat, the Secretary-General was given limited responsibilities to ‘ascertain facts or seek clarifications for the purpose of reporting to the Standing Committee for its consideration’ and ‘harmonise, facilitate and monitor progress in the implementation of all approved ASEAN activities’. A 1989 Protocol expanded the powers slightly, granting three new Bureau Directors what appeared to be proprio motu powers to ‘monitor developments on ASEAN cooperation and activities within their respective purviews and keep the Secretary-General and the Deputy Secretary-General informed of the developments thereof to facilitate their respective areas of work’. This was extended to the Secretary-General in 1992 in a further protocol, which stated that the Secretary-General could ‘initiate, advise, co-ordinate and implement ASEAN activities’, including ‘monitor[ing] the implementation of the approved ASEAN 3-year Plan and submit[ting] recommendations as and when necessary to the ASEAN Standing Committee’. The 2004 Vientiane Action Programme included provision for the Secretary-General to report annually on implementation progress through the

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8 Agreement on the Establishment of the ASEAN Secretariat, done at Bali, 24 February 1976, arts. 3(2)(v), 3(2)(vii).

9 Protocol Amending the Agreement of the Establishment of the ASEAN Secretariat, done at Bandar Seri Begawan, 4 July 1989, art. 5(2)(b).

10 Protocol Amending the Agreement on the Establishment of the ASEAN Secretariat, done at Manila, 22 July 1992, art. 2.
ASEAN Standing Committee to the ASEAN Ministerial Meeting.

In 2007, the ASEAN Charter adopted similar language but a slightly broader remit, empowering the Secretary-General to ‘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’; he or she is separately empowered to ‘monitor compliance’ with the outcome of an ASEAN dispute settlement mechanism, submitting a report to the ASEAN Summit.

The second barrier is ongoing political resistance to binding obligations in general. This is not always easy to explain, such as when ASEAN members agree to stricter obligations in their WTO or Bilateral Investment Treaty agreements than they do within the context of the putative ASEAN Economic Community. This second barrier is a legacy of the view that many ASEAN agreements were never intended to be implemented. The organisation itself once estimated that only around 30 per cent of the agreements signed in its first four decades saw meaningful follow-through.

13 Ibid., art. 27(1).
14 Lay Hong Tan, ‘Will ASEAN Economic Integration Progress Beyond a Free Trade Area?’, International and Comparative Law Quarterly, 53(4) (2004), 935 at 967.