Chapter 1

Introduction

1.1 Why this study?

The Association of Southeast Asian Nations (ASEAN) is an unusual international organisation in full development. It started out as a regional organisation devoted to preventing conflict between its members; a fear fed by Indonesia's so-called '*konfrontasi*' policy in the 1960s. It soon developed in the direction of a free trade area fostering economic cooperation between its members. With these objectives and their interrelationship, ASEAN might well have looked to the European Communities (EC) as a model. But the organisation and its members have always maintained that ASEAN must find its own way to economic integration as a barrier against internecine conflict. Hence, ASEAN has remained an 'international-organisation-lite', primarily directed by deliberative bodies of the members and having only weak organs of a purely international character, such as a secretariat.

This situation has made for very interesting developments in the external relations of ASEAN. In spite of the organisation's lack of a treaty-based personality, international agreements, especially in the field of trade and economic cooperation (by far the largest category of ASEAN's international agreements), have been created in ever-increasing numbers over the last decade. These agreements have been concluded by the governments of the member states acting together, as so-called plurilateral agreements, with one

or more third states. The most important category of these agreements consists of trade liberalisation agreements or full free trade agreements, (FTAs) in line with the worldwide trend of having recourse to such agreements in the absence of serious progress in the World Trade Organization's (WTO) Doha Development Agenda. It is these agreements that are the primary subject of this study.

The study begins with asking whether ASEAN trade agreements follow worldwide trends as far as the substantive content of such agreements are concerned, in particular whether the tendency towards including more and more so-called 'behind the border' subjects is also followed by ASEAN. This is indeed the case, just as the inclination to include robust provisions on dispute settlement is also based on international practice in relation to free trade area agreements. The study also examines how, although ASEAN has been equipped with full internal and external legal personality since its 2007 Charter, the practice of concluding trade agreements through the individual member states has continued. This tendency in ASEAN treaty practice raises the following questions: to what extent is it possible to continue with the habitual technique of concluding trade agreements through individual member states? Especially given that it has been demonstrably shown that having such agreements concluded by each member state has legal effects throughout the life of such agreements – from negotiation and conclusion (treaty-making), through the possible breach of the agreements and recourse to available remedies (treaty-breaking) – which may have been unintended and are in some respects undesirable? Should it after all conform to the (officially rejected) EU model

and resort to mixed treaty-making and a greater role for truly international organs, namely, the ASEAN Secretariat?

This study does not seek to give a definitive answer to these questions, nor does it venture to suggest *one model* trade agreement for ASEAN. Rather, it suggests *different models* for ASEAN trade agreements, and then analyses their possible impact on the different stages in the life of an agreement, from treaty-making to treaty-breaking.

This monograph has the following sequence: the Introduction below sets the contextual background and outlines the objectives of the study. Chapter 2 focuses on substantive treaty subjects and analyses existing ASEAN external trade agreement practice alongside selected non-ASEAN trade agreements. Chapter 3 turns to the institutional dimension and provides a description of possible treaty models available to ASEAN and its member states. Chapter 4 treats the subject of dispute settlement and the issues that are raised by ASEAN member state agreements with third states. In Chapter 5, we present our conclusions following the 'treaty-making' through 'treaty-breaking' framework.

1.2 Background and context

ASEAN was first created in 1967 when the foreign ministers of Indonesia, Malaysia, the Philippines, Singapore and Thailand signed the 1967 ASEAN Declaration.[1] Although economic development and trade cooperation already figured in this

[1] 1967 ASEAN Declaration, adopted by the foreign ministers at the first ASEAN Ministerial Meeting in Bangkok, Thailand, 8 August 1967.

text, there can be little doubt that these countries were originally preoccupied by political issues, such as certain old conflicts among some of them and the question of coexistence with other major Asian powers, notably China, India and Japan. Over the years, ASEAN has been expanded and strengthened, by growing membership, increasing trade and economic cooperation, and strengthening its institutions.

In terms of membership, Brunei Darussalam acceded in 1984 and, in 1995, Viet Nam. Two years later, in 1997, the Lao People's Democratic Republic and Myanmar followed. Cambodia joined in 1999. The countries that acceded during the 1990s are still in another phase of development compared with the original ASEAN countries. Hence, differentiation in obligations between the ASEAN-6 and the newer members (also known as 'CLMV') has become an accepted feature of ASEAN integration.[2]

The economic aspects of increasing cooperation and integration first appeared with the conclusion of the Agreement on ASEAN Preferential Trading Arrangements in 1977, and grew through many intermediary agreements (which remain in force) to be rounded out by the ASEAN

[2] ASEAN is an economically diverse region. Of the CLMV, Cambodia, Laos and Myanmar are currently designated by the United Nations as least-developed countries. The GDP per capita, for example, of Brunei, Singapore and Malaysia are the highest among the ASEAN countries, and are currently above the world average. The ASEAN Free Trade Area (AFTA) was notified to the World Trade Organization (WTO) on 30 October 1992, as a free trade agreement under the Enabling Clause. See WTO at: http://rtais.wto.org/UI/PublicShowMemberRTAIDCard.aspx?rtaid=126.

Trade In Goods Agreement (ATIGA) of 2009. The ASEAN Free Trade Area (AFTA) is now virtually established, according to the Secretariat.[3]

The institutional development of ASEAN lagged behind the development of the organisation as such. This has to do with what has been called 'the ASEAN way' of doing things, traditionally characterised by discussions and consultations until consensus emerges (*musjawarah*); a great reliance on agreement at the top, between the heads of state; and a concomitant scepticism towards legal rule-making, enforcement and institution-building.[4] Hence, the organisation functioned mainly through its meetings between member states at different levels for some time, and had a Secretariat that was limited in size, power and influence. For a long time, the member states did not even care to grant legal personality under national or international law to ASEAN.

It was only in 1976 that the Secretariat was given a legal basis with the conclusion of the Agreement on the Establishment of the ASEAN Secretariat. With this came the beginning of serious institution-building. Through many intermediate steps,[5] and after a forceful report by the ASEAN Eminent Persons Group, the organisation was finally given a solid institutional basis, including legal personality, with the

[3] See the AFTA section of the ASEAN website at: www.ASEAN.org.

[4] Considerable remnants of these tendencies are still present in Art. 20 of the ASEAN Charter, on decision-making.

[5] One can refer here to the 1979 Agreement between the Government of Indonesia and ASEAN, relating to the privileges and immunities of the ASEAN Secretariat and its various amending Protocols of 1983, 1989, 1992 and 1997.

2007 ASEAN Charter that entered into force in late 2008.[6] It was only after this step that the members' wariness of legal rules and anything like an ASEAN legal order started to erode, a process that is still going on today.

The abiding scepticism with respect to legal rules has had the ineluctable consequence that when legal and institutional progress in building ASEAN as an organisation is made, it is fragmented and incremental almost by nature. It is fragmented because the different aspects of ASEAN are kept separate and are not integrated in one (horizontal) international legal instrument. Thus, one has different groups or lineages of international agreements for the institutional, the political, the economic, the cultural and the dispute settlement sides of ASEAN. Each of these lineages of agreements has developed through incremental and cumulative steps, represented by successive agreements and protocols.[7]

The horizontal fragmentation creates uncertainty about the relationship between the different domains of ASEAN, while the vertical stacking of agreements, often with the earlier agreements remaining in force,[8] contributes to a lack of clarity about the cumulative level of rights and obligations in each domain. It is possible to conclude that

[6] Source, ASEAN website at: www.ASEAN.org.

[7] The research compiled for this monograph located forty-six 'core agreements' and seventy-three 'related' or 'collateral' agreements in the field of economic policies.

[8] This is called the principle of legal continuity in ASEAN, see Art. 52 of the ASEAN Charter.

scepticism about law breeds uncertainty about the legal rights and obligations in the system of accumulated ASEAN agreements, which in turn may feed legal scepticism.

All researchers of ASEAN have to grapple with this situation, and this study faces similar dilemmas. All the more so, since some of the important international agreements that ASEAN has concluded with major powers in Asia and the Pacific, such as Australia, China, India, Japan, Korea and New Zealand, have a similar structure in which different sectors are kept separate and these sectors are then also characterised by cumulating successive agreements.[9]

1.3 The two objectives of the study

The first objective of this study is to demonstrate that ASEAN can conclude trade agreements with non-member states in a number of different ways. After examining three methods of treaty-making open to ASEAN and its members, the study turns to its second objective, which is to spell out in some detail the legal and institutional implications for ASEAN in each of these cases.

The powers granted to ASEAN by its member states by the various treaties that form the foundation of the organisation, in particular the 2007 ASEAN Charter, include the power

[9] See the agreements with China, Japan and India that have this structure. Recently, however, some of these agreements have been made as comprehensive (all-in-one) agreements, such as the agreements with Korea and Australia and New Zealand. This is an important step forward.

to conclude international agreements. The foundational treaties, as will be demonstrated below, are not very precise as to how the organisation should exercise this treaty-making power. Hence, ASEAN and its member states have a certain leeway to choose different methods of exercising this power and, in particular, to decide who will negotiate and who will be the contracting parties on the side of ASEAN. There are generally three methods that we know from the law and practice of other international organisations that appear to be open to ASEAN and its member states as well, simply because the relevant foundational treaty articles do not prescribe a particular choice:

(i) agreements concluded by ASEAN member states – whether plurilaterally or in combination (i.e., on behalf of themselves as states), or in common (as some collective embodiment 'in the name of' the organisation);
(ii) agreements concluded by ASEAN alone – where ASEAN as an organisation can be the only stated party on its side of the agreement; and
(iii) agreements concluded, on the side of ASEAN, by ASEAN and its member states together – what has been called in EU law, a 'mixed agreement'.

As a preliminary remark on these three categories it is important to elaborate a bit on methods (i) and (iii). In agreements with third states concluded by ASEAN member states plurilaterally and agreements so concluded by member states 'in the name of the organisation', the presumption should be that member states are individually responsible

insofar as each of them has individually breached treaty obligations. This contrasts with method (iii) where, in the case of EU mixed agreements with one third party, the EU and its member states together are identified as one party to the agreement 'of the one part' and the third country is the party 'of the other part'. In multilateral mixed agreements, as will be discussed in Chapter 4, other techniques are used to identify the EU and its member states as one party, such as disconnection clauses.

In order to demonstrate that the three methods of treaty-making are open to ASEAN and its member states, we not only study the foundational instruments of ASEAN and their development over the years, but also delve into the practice of ASEAN and its member states in concluding international agreements. It is important here not to stop at present practice, but to project some trends into the future, with the goal of revealing what might be the potential of ASEAN in the field of external relations in the long run. To this end we study the trends in the institutional aspects of international agreements concluded by ASEAN and other comparable international organisations. However, this is not sufficient. 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. Only if one knows what the trends are concerning the contents of international trade agreements concluded by states and international organisations (i.e., the substance they put into the agreements) does one understand how

the institutions of states and international organisations need to recognise and, possibly, adapt to these trends.

One development that is clearly visible is the growing number of subjects covered in international trade agreements and their close connection to national regulation in many fields, such as the environment, health, intellectual property, competition, procurement, etc. In this light, it is not surprising that one of the institutional developments following from it is the increasing attention paid in such agreements to dispute settlement and the enforcement of the rules laid down in the agreement. This trend also needs further analysis.

Having shown that three models of treaty-making are available, feasible and have been, or could easily be, used by ASEAN and its member states, the study turns to its second main objective. This is to spell out in some detail the legal and institutional implications for ASEAN flowing from the three models of treaty-making. Such implications have not yet been analysed in sufficient detail, and we propose that they be taken into account throughout the life of each model of international agreement. The whole cycle of treaty-making and treaty-breaking will thus be considered: what will be the legal consequences for the conclusion of each type of treaty, how will the models play out at the stage of treaty application (who is responsible for which obligations, who can demand the application of which obligations from whom?) and of treaty-breaking (who will bear the responsibility for non-conformity of legislation or practice? etc.)?