THE INTERNAL EFFECTS OF ASEAN EXTERNAL RELATIONS

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.

INGO VENZKE is an Associate Professor in the Department of International and European Law at the University of Amsterdam.

LI-ANN THIO is a Professor in the Faculty of Law at the National University of Singapore.
INTEGRATION THROUGH LAW
THE ROLE OF LAW AND THE RULE OF LAW IN ASEAN INTEGRATION

General Editors
J. H. H. Weiler, European University Institute
Tan Hsien-Li, National University of Singapore

The Association of Southeast Asian Nations (ASEAN), comprising the ten member states of Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam, has undertaken intensified integration into the ASEAN Community through the Rule of Law and Institutions in its 2007 Charter. This innovative book series evaluates the community-building processes of ASEAN to date and offers a conceptual and policy toolkit for broader Asian thinking and planning of different legal and institutional models of economic and political regional integration in the region. Participating scholars have been divided up into six separate thematic strands. The books combine a mix of Asian and Western scholars.

Centre for International Law, National University of Singapore (CIL-NUS)

The Centre for International Law (CIL) was established in 2009 at the National University of Singapore’s Bukit Timah Campus in response to the growing need for international law expertise and capacity building in the Asia-Pacific region. CIL is a university-wide research centre that focuses on multidisciplinary research and works with other NUS or external centres of research and academic excellence. In particular, CIL collaborates very closely with the NUS Faculty of Law.
THE INTERNAL EFFECTS
OF ASEAN EXTERNAL
RELATIONS

INGO VENZKE AND LI-ANN THIO
CONTENTS

General editors’ preface  page xi
Acknowledgements  xvii
List of abbreviations  xviii

1 Introduction and parameters of inquiry  1

2 Contextualising ASEAN  7
   2.1 ASEAN Charter: continuity or rupture?  8
   2.2 The consensus rule  12
   2.3 Towards legalisation  17
   2.4 Institutional set-up by comparison  23
   2.5 An ‘ASEAN legal order’ or an ‘ASEAN legal regime’?  25

3 Types of external agreements  28
   3.1 Agreements by ASEAN as an International Organization  31
   3.2 Plurilateral agreements  33
   3.3 Joint ASEAN agreements  34

4 Agreements of ASEAN as an International Organization  36
   4.1 Introductory note on the Secretariat  36
   4.2 Other ASEAN actors in external relations  38
   4.3 Contours of external powers  40
   4.4 Implied external powers?  47
   4.5 Who is bound? The effect on Member States  50
   4.6 Members’ concurrent and subsidiary responsibility or indirect liability  55

5 Plurilateral agreements  71
   5.1 Terminology: monism, dualism and (in)direct effects  74
   5.2 Views from general international law  79
CONTENTS

5.3 Requirements of specific legal instruments and regimes 91
5.4 The view from European law 97
5.5 The view from domestic law 103
  5.5.1 Dualism 105
  5.5.2 Monism 113
5.6 Usual mixtures 121
  5.6.1 Effects on interpretation 122
  5.6.2 Kinds of agreements 130
5.7 Law and policy considerations 131

6 Case study on the Convention to Eliminate All Forms of Discrimination Against Women 136
  6.1 Status of treaty law within domestic legal orders 139
  6.2 Constitutional amendments and judicial enforcement 143
    6.2.1 Embodying treaty obligations in basic law 143
    6.2.2 Use of treaty norms to inform the formulation of fundamental laws 146
    6.2.3 Specific clauses 151
  6.3 Conforming statutes to CEDAW 153
  6.4 National mechanisms 163
  6.5 Promotional activities and non-legal approaches 169

7 Joint ASEAN agreements 174
  7.1 An (ill-)fitting comparison: mixed agreements 178
  7.2 ASEAN centrality and obligations of membership 180
  7.3 Consequences for Member State institutions: ASEAN centrality 185
  7.4 Functions of the Secretariat 188
    7.4.1 Channeling information, coordination 189
    7.4.2 Implementation and facilitating compliance 192
    7.4.3 Monitoring 193
  7.5 Dispute settlement mechanisms 195

viii
CONTENTS

8 Conclusions: assessing the internal effects of ASEAN external relations 201

Executive summary 205

Bibliography 209

Index 223
This monograph is published within the context of a wide-ranging research project entitled Integration Through Law: The Role of Law and the Rule of Law in ASEAN Integration (ITL), undertaken by the Centre for International Law at the National University of Singapore and directed by J. H. H. Weiler and Tan Hsien-Li.

The Preamble to the ASEAN Charter concludes with a single decision: “We, the Peoples of the Member States of the Association of Southeast Asian Nations . . . [h]ereby decide to establish, through this Charter, the legal and institutional framework for ASEAN.” For the first time in its history of over four decades, the Legal and the Institutional were brought to the forefront of ASEAN discourse.

The gravitas of the medium, a Charter: the substantive ambition of its content, the creation of three interlocking Communities, and the turn to law and institutions as instruments for realization provide ample justification for this wide-ranging project, to which this monograph is one contribution, examining ASEAN in a comparative context.

That same substantive and, indeed, political ambition means that any single study, illuminating as it may be, will cover but a fraction of the phenomena. Our modus operandi in this project was to create teams of researchers from Asia and elsewhere who would contribute individual monographs within an overall framework which we had
designed. The project framework, involving several thematic clusters within each monograph, is thus determined by the framework and the place of each monograph within it.

As regards the specific content, however, the authors were free, indeed encouraged, to define their own understanding of the problem and their own methodology and reach their own conclusions. The thematic structure of the entire project may be found at the end of this Preface.

The project as a whole, and each monograph within it, display several methodological sensibilities.

First, law, in our view, can only be understood and evaluated when situated in its political and economic context. Thus, the first studies in the overall project design are intended to provide the political, economic, cultural and historical context against which one must understand ASEAN and are written by specialists in these respective disciplines. This context, to a greater or lesser degree, also informs the sensibility of each monograph. There are no “black letter law” studies to be found in this project and, indeed, even in the most technical of areas we encouraged our authors to make their writing accessible to readers of diverse disciplines.

Comparative experience suggests that the success of achieving some of the more ambitious objectives outlined in Article 1 of the Charter will depend in no small measure on the effectiveness of legal principles, legal rules and legal institutions. This is particularly true as regards the success of establishing “an ASEAN Community comprising the ASEAN Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community as provided for in the Bali Declaration of ASEAN Concord II”. Article 2(2)(n)
stipulates the commitment of ASEAN Member States to act in accordance with the principle of “adherence to multilateral trade rules and ASEAN’s rules-based regimes for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration.” The ASEAN Member States therefore envisage that rules of law and the Rule of Law will become a major feature in the future of ASEAN.

Although, as seen, the Charter understands itself as providing an institutional and legal framework for ASEAN, the question of the “role of law and the rule of law” is not advocacy but a genuine enquiry in the various substantive areas of the project as to:

- the substantive legal principles and substantive rules of the various ASEAN communities;
- the procedural legal principles and rules governing institutional structures and decision-making processes;
- implementation, enforcement and dispute settlement.

One should not expect a mechanical application of this scheme in each study; rather, a sensibility that refuses to content itself with legal enactments as such and looks to a “living” notion of law and institutions is ubiquitous in all the studies. Likewise, the project is sensitive to “non Law.” It variously attempts to locate the appropriate province of the law in this experience. That is, not only the role of law, but also the areas that are and should remain outside the reach of legal institutionalization with due sensitivity to ASEAN and Asian particularism and political and cultural identities.
The project, and the monographs of which it is made, are not normatively thick. They do not advocate. They are designed, for the most part, to offer reflection, discuss the pros and cons, and in this way enrich public awareness, deepen understanding of different options and in that respect contribute indirectly to policymaking.

This decisive development of ASEAN has been accompanied by a growing Asian interest in various legal and institutional forms of transnational economic and political cooperation, notably the various voices discussing and showing an interest in an East Asia Integration project. The number of Free Trade Agreements (FTAs) and Regional Trade Agreements (RTAs) has increased from six in 1991 to 166 in 2013, with a further 62 in various stages of negotiations.

Methodologically, the project and many of the monographs are comparative in their orientation. Comparative law is one of the few real-life laboratories that we have in which to assess and understand the operation of different legal and institutional models designed to tackle similar objectives and problems. One should not need to put one’s own hand in the fire to learn that it scorches. With that in mind a couple of monographs offer both conceptual reflection and pragmatic “tool boxing” on some of the key elements featuring in all regional integration systems.

Comparative law is in part about divergence: it is a potent tool and means to understand one’s own uniqueness. One understands better the uniqueness of Apples by comparing them to Oranges. You understand better the specialness of a Toyota by comparing it to a Ford.
Comparative law is also about convergence: it is a potent tool and means to understand how what are seemingly different phenomena are part of a broader trend, an insight which may enhance both self-understanding and policy potentialities.

Although many studies in the project could have almost immediate policy implications, as would the project as a whole, this is not its only or even principal purpose. There is a rich theory of federalism which covers many countries around the world. There is an equally rich theory of European integration, which has been associated with the advent of the Union. There is also considerable learning on Free Trade Areas and the like.

To date, the study of the legal aspects of ASEAN specifically and other forms of Asian legal integration has been derivative of, and dependent on, theoretical and conceptual insight which were developed in different contexts.

One principal objective of ITL and these monographs will be to put in place the building blocks for an authentic body of ASEAN and Asian integration theory developed in, and with sensitivity to, the particularities and peculiarities of the region and continent. A theory and conceptual framework of Asian legal integration will signal the coming of age of research of and in the region itself.

Although the monographs form part of an overarching project, we asked our authors to write each as a “standalone” – not assuming that their readers would have consulted any of the other titles. Indeed, the project is rich and few will read all monographs. We encourage readers to
GENERAL EDITORS’ PREFACE

pick and choose from the various monographs and design their own menu. There is, on occasion, some overlap in providing, for example, background information on ASEAN in different studies. That is not only inevitable but desirable in a project of this amplitude.

The world is increasingly witnessing a phenomenon of interlocking regional organization where the experience of one feeds on the others. In some way, the intellectual, disciplinary and comparative sensibility of this project is a micro-cosm of the world it describes.

The range of topics covered in this series comprises:

The General Architecture and Aspirations of ASEAN
The Governance and Management of ASEAN: Instruments, Institutions, Monitoring, Compliance and Dispute Resolution
Legal Regimes in ASEAN
The ASEAN Economic Community
ASEAN and the World
The Substantive Law of ASEAN
ACKNOWLEDGEMENTS

We are indebted to the co-directors of the project ‘ASEAN Integration Through Law’, Professors Joseph H.H. Weiler and Michael Ewing-Chow, as well as executive director Dr. Hsien-Li Tan. They offered valuable guidance, support, comments and suggestions while writing this contribution.

We thank the participants of the workshop in Amsterdam on ASEAN external relations (July 2012) and Martine van Trigt for her assistance. We are furthermore grateful to our commentators at the Singapore workshop (August 2012), Professors Marise Cremona and Jürgen Ruland, for their helpful critiques. Professor André Nollkaemper has read the manuscript at a later stage, and Christiane Ahlborn commented on parts – many thanks to both.

We thank Chen Zhida for his assistance with research and Tatevik Manucharyan for her help in meticulously formatting the text and finalizing it.
ABBREVIATIONS

AAF ASEAN Automotive Federation
AANZFTA ASEAN-Australia-New Zealand Free Trade Area
ACT ASEAN Council of Teachers
AICHR ASEAN Inter-Governmental Commission for Human Rights
AKFTA ASEAN-Korea Free Trade Area
ARIO Articles on the Responsibility of International Organizations
ASEAN Association of Southeast Asian Nations
ASG ASEAN Secretary-General
BITs Bilateral Investment Treaties
CEDAW Convention to Eliminate All Forms of Discrimination Against Women
CMCF Communications and Multimedia Content Forum
DSM Dispute Settlement Mechanism
ECHR European Convention on Human Rights
ECtHR European Court of Human Rights
EEC European Economic Community
EPG Eminent Persons’ Group
GATT General Agreement on Tariffs and Trade
GFP Gender Focal Points
GMAGs Gender Mainstreaming Action Groups
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>IACHR</td>
<td>Inter-American Convention on Human Rights</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICSID</td>
<td>International Center for the Settlement of Investment Disputes</td>
</tr>
<tr>
<td>ILC</td>
<td>International Law Commission</td>
</tr>
<tr>
<td>IO</td>
<td>International Organisation</td>
</tr>
<tr>
<td>IPA</td>
<td>Inter-Parliamentary Assembly</td>
</tr>
<tr>
<td>ITA</td>
<td>International Tin Agreement</td>
</tr>
<tr>
<td>ITC</td>
<td>International Tin Council</td>
</tr>
<tr>
<td>JCC</td>
<td>Joint Cooperation Committee</td>
</tr>
<tr>
<td>MCW</td>
<td>Magna Carta of Women</td>
</tr>
<tr>
<td>MNCWA</td>
<td>Myanmar National Committee for Women’s Affairs</td>
</tr>
<tr>
<td>MOU</td>
<td>Memorandum of Understanding</td>
</tr>
<tr>
<td>MoWA</td>
<td>Ministry of Women’s Affairs</td>
</tr>
<tr>
<td>MOWE</td>
<td>Ministry of Women Empowerment</td>
</tr>
<tr>
<td>MWFCD</td>
<td>Ministry of Women, Family and Community Development</td>
</tr>
<tr>
<td>NCAW</td>
<td>National Committee for the Advancement of Women</td>
</tr>
<tr>
<td>NCRFW</td>
<td>National Commission on the Role of Filipino Women</td>
</tr>
<tr>
<td>ONCWA</td>
<td>National Commission on Women’s Affairs</td>
</tr>
<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
</tr>
<tr>
<td>PoA</td>
<td>plan of action</td>
</tr>
<tr>
<td>PRC</td>
<td>People’s Republic of China</td>
</tr>
<tr>
<td>ROK</td>
<td>Republic of Korea</td>
</tr>
<tr>
<td>SEOM</td>
<td>Senior Economic Officials Meeting</td>
</tr>
<tr>
<td>TAC</td>
<td>Treaty of Amity and Cooperation</td>
</tr>
</tbody>
</table>
ABBREVIATIONS

TOR       Terms of Reference
UDHR      Universal Declaration of Human Rights
UNAT      UN Administrative Tribunal
VCCR      Vienna Convention on Consular Relations
VCLT      Vienna Convention on the Law of Treaties