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978-1-107-49815-0 - Asean's External Agreements: Law, Practice and the Quest for Collective Action

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

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[More information](#)

Chapter 1

Introduction

The Association of Southeast Asian Nations (ASEAN), apart from being a regional integration project for its member states, today also exhibits the 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 co-operation with its external partners in a regional architecture that is open, transparent and inclusive'.¹ Accordingly, its member states vow to act consistently with the principle of 'the centrality of ASEAN in external political, economic, social and cultural relations while remaining actively engaged, outward-looking, inclusive and non-discriminatory'.² Or as the ASEAN anthem puts it in a more poetic fashion: 'ASEAN we are bonded as one / Look-in out-ward to the world'.³ With particular regard to the conduct of the external relations of ASEAN, the member states pledge 'on the basis of unity and solidarity, [to] coordinate and endeavour to develop common positions and pursue joint actions'.⁴ Furthermore,

¹ Art. 1(15) ASEAN Charter. ² Art. 2(2)(m) ASEAN Charter.

³ ASEAN Anthem, 'The ASEAN Way', lyrics by Payom Valaiphatchra, music composed by Kittikhun Sodprasert and Sampow Triudom, reproduced in www.asean.org/asean/about-asean/asean-anthem (last accessed 19 March 2014).

⁴ Art. 41(4) ASEAN Charter.

INTRODUCTION

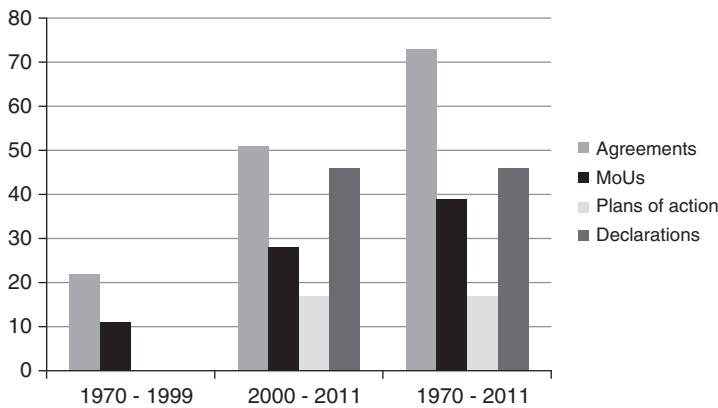


Chart 1.1 ASEAN external instruments, 1970–2011

the Association itself has been accorded the express power to ‘conclude agreements with countries or sub-regional, regional and international organisations and institutions.’⁵ The stage is thus set, in legal terms, for ASEAN as an emerging global player.

And indeed, ASEAN external relations have burgeoned over the past years if one considers the rapidly increasing number of international legal and other instruments which 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 in the region, as well as with the world at large. 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 socio-cultural co-operation. As Chart 1.1 illustrates, 142 of

⁵ Art. 41(7) ASEAN Charter.

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Excerpt

[More information](#)

INTRODUCTION

these, or 81%, 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. Against this backdrop, ASEAN as an idea or label is certainly present on the international scene. However, despite the general interest in ASEAN in the legal and regional integration literature, ASEAN external relations have thus far not been the subject of detailed scholarly assessment.⁶ In light of its increasing external activity and the wealth of what we call here generically 'ASEAN external instruments', this is a gap which the present study seeks to fill. To this end, we present the first comprehensive legal–political analysis of these instruments. More specifically, we establish an inventory and typology of the existing stock of agreements, organised in terms of legal quality (bindingness), time, content, contracting party (on the ASEAN side) and external partners; and subsequently undertake a more in-depth assessment of the practice and general patterns of ASEAN external relations which can be seen to emerge. The objective is to provide a macro- rather than a micro-analysis of ASEAN external instruments; not to analyse in detail the content of all ASEAN external instruments but rather to establish criteria in order to create a typology and enable us to address the following main questions: what is the legal quality of the

⁶ For examples see S. Chesterman, 'Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person' (2008) 12 *SYBIL* 199; J. Wang, 'International Legal Personality of ASEAN and the Legal Nature of the China–ASEAN FTA' in J. Wong, Z. Keyuan and Z. Huaqun (eds.), *China–ASEAN Relations: Economic and Legal Dimensions* (Singapore: World Scientific, 2006), pp. 111–31.

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[More information](#)

INTRODUCTION

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 (which also serves as a resource for other scholars) and offering on the basis of our analysis some preliminary answers to these questions, the study will create the foundation for the investigation of ASEAN as an international actor and as a treaty-maker, establishing connections to more general questions of contemporary international law and international relations, including questions about the relationship between legal and political 'actorness' on the international stage, as well as about the relationship between international organisations and their member states, and between internal integration and external action. This study by no means answers all these questions, but we hope to establish some initial conclusions and to provide a basis for further work, by others as well as by ourselves.

We begin our inquiry with an examination in Chapter 2 of the legal-institutional framework for the exercise by ASEAN, as an inter-governmental international organisation, of its external-relations powers. As has already been noted, the ASEAN Charter grants ASEAN an explicit legal personality and an external or international dimension is included

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Excerpt

[More information](#)

INTRODUCTION

in its mandate and list of tasks, with a particular emphasis given to what is called the 'centrality of ASEAN' in a regional context. Provision is made for granting different types of partnership status to individual third countries. 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 international 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'. It is this mechanism and its legal and political implications that we will explore in the following chapters.

Chapters 3 and 4 introduce the inventory of ASEAN external instruments which we have compiled and explain the typology we developed to organise these instruments to make visible the main trends and patterns, but also pathologies, of ASEAN external action. The inventory and typology tables are included as appendices to this volume. We assess the inventory of ASEAN external instruments according to what we call here their 'legal quality', i.e. the extent to which they represent 'hard', enforceable legal commitments or rather 'soft', non-binding, declaratory instruments, not least in view of the 'ASEAN Way' built on inter-governmental consensus rather

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Excerpt

[More information](#)

INTRODUCTION

than judicialisation.⁷ There is indeed some evidence of what might be called an externalisation of the 'ASEAN Way', but we also 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 2011⁸). The starting point of our analysis of legal quality is the instruments' self-definition (as an international agreement, a memorandum of understanding, a plan of action or a declaration). Legal quality is, however, not determined solely by formal designation; the parties' intention to be legally bound (or not) is ultimately inferred from other factors, including the wording of the instrument and the nature of the obligations it contains. We have therefore analysed the available texts of ASEAN international agreements and memoranda of understanding to obtain a more fine-grained picture of legal quality for these two categories.

Two further parameters are used in this initial analysis of ASEAN's external instruments: the subject content or field, and the partners with which ASEAN has developed these relatively formalised external relationships. We find that of the three pillars of ASEAN (economic, political and security, and social and cultural co-operation) ASEAN is most active externally in the economic field: 50% of all ASEAN external

⁷ See P.J. Davidson, 'The Role of Law in Governing Regionalism in Asia' in N. Thomas (ed.), *Governance and Regionalism in Asia* (London: Routledge, 2009), pp. 224–49.

⁸ For the relevant tables, see Chapter 3.

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Excerpt

[More information](#)

INTRODUCTION

instruments and 82% of all external agreements are categorised as economic. However, many instruments cover a number of different fields of co-operation, and we thus developed a fourth category, that of partnership and co-operation instruments. Two of these categories (economic instruments and partnership and co-operation instruments) are the subject of a more detailed analysis in Chapters 5 and 6. The majority of the political and security instruments are joint declarations between ASEAN and its major partners on the combating of terrorism. There are relatively few specific instruments on social and cultural co-operation; however these sectors are present in many of the partnership and co-operation instruments, in particular in plans of action. There is in fact 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 co-operation 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 co-operation instruments.

In terms of ASEAN's partners, although relations with countries in the region are clearly important, its external relations are not limited to these. Relations with its eleven dialogue partners⁹ (Australia, Canada, China, the EU, India, Japan, Korea, New Zealand, Pakistan, Russia and the USA)

⁹ Art. 44 of the ASEAN Charter provides for the designation of dialogue partners.

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Excerpt[More information](#)

INTRODUCTION

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 clearly predominate,¹⁰ 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 the most significant in terms of legal analysis, in our typology of ASEAN external instruments: the designation of the party or parties 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 member 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; only one minor international agreement has been

¹⁰ See further Chapter 3, Chart 3.8.

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Excerpt

[More information](#)

INTRODUCTION

concluded by ASEAN per se since 2009.¹¹ On the other hand the number of instruments – of all kinds – using the ‘collectively ASEAN’ label has strikingly increased in recent years.¹² 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.

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 we cannot argue that the non-binding character of an instrument makes 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 economically and/or politically salient content (paradigmatically ASEAN + 1 preferential trade agreements), whereas ASEAN per se is more in evidence in more technical agreements with other international organisations, as well as in softer instruments such as plans of action.¹³ This practice, analysed more closely in Chapter 4,

¹¹ An Implementation Agreement for the ASEAN–German Regional Forest Programme (Phase II) 2009; the text of this agreement is not available at the time of writing so its legal quality cannot be verified.

¹² See Chart 1.1 in this chapter, and Chapter 3, Table 3.2.

¹³ See Chapter 4 and Appendix 3.

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Excerpt[More information](#)

INTRODUCTION

reveals what might be termed a paradox in ASEAN external relations, namely the emphasis on the central and proactive role for ASEAN and at the same time a clear current choice not to deploy ASEAN as a party in its own right.

From a legal perspective, the identity of the parties to an international instrument crystallises in the issue of international responsibility. In Chapter 4, having taken a close look at the practice of ASEAN and its member states in the adoption and conclusion of external instruments, we turn to the implications of this practice in terms of international responsibility and the interrelation between different treaty norms. It is virtually impossible to situate ASEAN and its external relations in the traditional framework of the law of treaties and rules of international responsibility without relying on its member states rather than on ASEAN's own legal personality. In most cases it is the member states which are the contracting and the responsible parties. This creates a tension with the ambitions exhibited in the ASEAN Charter, which explicitly confers legal personality on ASEAN and stresses its proactive and central role in ASEAN external relations. 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 the 'idea of ASEAN' as a constructed identity is absent. These include the use of the ASEAN collective label (and the ASEAN logo), the grouping together of the ASEAN member states as parties to external instruments, and the role of the ASEAN Secretariat as a depository for its members. There is a real sense in which, within ASEAN itself and for its member states, the agreements concluded by the member states themselves under the