

Chapter 1

Introduction and parameters of inquiry

This contribution sets out the legal effects of ASEAN external agreements within ASEAN Member States, with regard to the relationship between ASEAN as an International Organisation and its members. In particular, it demonstrates how ASEAN practice in relation to its external relations is, on the whole, likely to contribute to an increased role for the ASEAN Secretariat.

In approaching the theme of internal effects of external agreements, we distinguish three types of agreements. First, agreements which ASEAN concludes as an International Organisation. Such agreements do not bind Member States and do not show internal effects within domestic legal orders. However, they might strengthen the monitoring and facilitating functions of the Secretariat in relation to Member States' treaty obligations and thus have internal effects within the ASEAN legal order or, better expressed, as we will argue, its legal *regime*.

Agreements with non-ASEAN Member States usually take the form of international treaties between state parties, which is the second type of agreement. Such agreements may well be read in a rather uncontroversial manner to suggest plainly that they are plurilateral agreements indistinguishable from other international law agreements. There is nothing specific about them when it comes to internal effects or otherwise. We discuss their internal effects within Member

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States from the points of view of both international law and, in a comparative perspective, domestic constitutional law. Since knowledge about the constitutional practices of ASEAN Member States with regard to the internal effects of international law is uneven and in any event rather sparse, this part of the argument largely models different possibilities. As yet, we do not have sufficiently evolved case-studies on the internal effects of these plurilateral agreements. We draw on ASEAN Member States' domestic practices to the extent that we could gather it. We note, and are aware, that our access and thus knowledge is distributed unevenly, with most references stemming from the Singapore context. In light of the need for further studies in this regard, for now, we further engage in a specific case study of the implementation of the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW). We do so for inspiration and by proxy, believing that this is illuminating and helpful for readers in imagining what impact ASEAN plurilateral legal relations might have. Finally, to note in regard to plurilateral agreements, we do pay tribute to the classical distinction between monism and dualism. But we argue that the actual practice of states frequently converges on matters such as how international law influences the interpretation of domestic law, even if it is not directly applicable.

The third and final type of agreements that we distinguish is, in fact, a second way of reading those international treaties between ASEAN states and third states. It notably credits the fact that a sub-group of contracting parties together form ASEAN. We call the treaties 'joint ASEAN agreements' and draw attention to a series of features that

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justify treating them as something distinct and specific. Such features include the fact that the treaties are signed by ASEAN members in one column and by the other party (or parties) in another. In addition, some agreements have modalities of entering into force or modalities of termination suggesting that ASEAN Member States need to act jointly. The first reading of the agreements would look at those features as immaterial symbolism. We suggest that they do matter more than that and will support that suggestion in our reading of these agreements as ‘joint ASEAN agreements’.

Where it concerns the direct effect of joint ASEAN agreements within the legal orders of the Member States, it is true that on the whole, these do not differ from plurilateral agreements and general international law. However, owing to obligations of membership and the principle of ASEAN centrality – two factors which we will explain in further detail below¹ – their indirect effects are likely to be stronger. Furthermore, they impact the relationship between ASEAN as a separate entity and its members. In particular, they trigger the Secretariat’s functions of monitoring and facilitating compliance.

The contribution proceeds by setting out the further parameters and backgrounds to our enquiry (Chapter 2). This involves a first reading of the ASEAN Charter and a discussion of the prospects of further legalisation. We see this section as a necessary lead-up to asking whether it might be justified to speak of an ‘ASEAN legal order’ and what that might mean. It is in light of that discussion that we introduce

¹ See Section 6.2.

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the slightly less ambitious and more fitting notion of an ASEAN legal regime. We further introduce the three types of external agreements in a succinct overview (Chapter 3) and then discuss each in turn. Chapter 4 focuses on agreements that ASEAN concludes as an International Organisation. It provides an introduction to ASEAN's external relation powers and argues that Member States are not bound by these agreements, absent a more specific provision to that effect in the Charter.

Chapter 5 then approaches the heart of the matter: the effect of external agreements within Member States. It offers an introduction which seeks to clarify key terms in the debate and first sets out the view from international law in this regard (5.1). It argues that general doctrine and jurisprudence do not demand that international law be given any specific domestic effect. Specific legal regimes, however, might require particular implementing action, specifically, enabling and conforming domestic legislation. However, contrary to the view from European Law, international law does not generally require that its provisions be given direct effect (5.2). A comparison with the view from European Law clarifies that part of the argument (5.3).

Domestic law might of course grant certain international law norms direct effect in the absence of an international legal obligation to do so. We approach the view from domestic law first in terms of monism and dualism (5.4), but then suggest that domestic legal systems often converge with respect to their treatment of international law, especially in the indirect effect they give to it; that is, in the way it matters for the construction of domestic statutes (5.5). Since

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there is considerable flux in how domestic legal practice actually deals with international law – something that the broad concepts of monism and dualism hardly capture – we close this section with a discussion of the policy considerations that could further inform how domestic law treats international law. As noted, we model possibilities at this stage, which we support with references to the domestic practices of ASEAN Member States. We do not as yet have the necessary access to the constitutional doctrine of all ASEAN Member States which would be needed to support a more concrete and comparative analysis (5.6). For now, we turn to a case study in Chapter 6 on the internal effects of the CEDAW which offers a concrete application of the broader argument. Through examining this field of law, we are able to glean ASEAN Member States' attitudes towards international law and its internal effects; it offers clues on how they will approach the internal effects of ASEAN external agreements.

Chapter 7 introduces and distinguishes joint ASEAN agreements from other international treaties. It first further clarifies what we mean by joint ASEAN agreements, by distinguishing them from the European Union practice of 'mixed agreements' (7.1). We then offer evidence that supports singling them out as specific or distinct agreements (7.2), and we draw attention to the consequences that they have in terms of internal effects (7.3). We distinguish two levels of those effects. The first pertains to the relationship between the institution of ASEAN as an International Organisation and its Member States. Those are the effects within the ASEAN legal regime. In particular, we see a number of functions that accrue to the Secretariat by virtue of ASEAN's

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external relations practice (7.4). We also turn to the ASEAN Summit in that regard and draw out the implications of joint ASEAN agreements for dispute settlement processes (7.5). In conclusion, we summarise and commit to reading at least some of ASEAN's external agreements as joint agreements (Chapter 8).

Chapter 2

Contextualising ASEAN

Our enquiry is set against the broader theme of how political and legal cultures provide incentives and constraints on creating a legal regime within the ASEAN sub-regional context. Specific factors in this regard include the rich variety between its members in terms of political systems. Within the ten ASEAN states, the polities range from the authoritarian to the more democratic. They notably include socialist regimes (Vietnam, Laos), Westminster-influenced parliamentary democracies (Malaysia, Singapore), a Malay Muslim monarchy (Brunei), polities dominated by the military (Myanmar), and secular presidential-based systems (Indonesia, Philippines) where the influence of religion on public life is a significant factor. Given the diversity in terms of politics, ethnicity, culture, languages, colonial history and levels of development, it is not surprising that pragmatism and functionalism were the key unifying forces extant within ASEAN.

Key to the later turn to a more rules-based regime was the desire of ASEAN and its Member States for deeper regional integration, which was complicated by the persistence to a large degree of the 'ASEAN Way' or a non-legalistic, diplomatic approach towards managing international relations. In this section we thus sketch the trajectory ASEAN has embarked upon towards the goals of legal integration, and the institutions it has set up, before

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approaching the question of whether it is at all justified to speak of an ASEAN legal order or legal regime and what that might mean.

2.1 ASEAN Charter: continuity or rupture?

With the advent of the ASEAN Charter, which was adopted at the 13th ASEAN Summit in 2007 and entered into force in December 2008, the question arises as to whether a new form of governance has taken shape. Does it confirm, modify or supersede what has been described as the ‘ASEAN Way’? To some extent, the ASEAN Charter was designed to signal a shift from the ‘ASEAN Way’ in international affairs. All the same, it may be more accurate to view its contents as a confirmation of existing practice, or an evolutionary modification pursuant to deeper regional integration, particularly economic integration.¹ The ‘ASEAN Way’ has been the time-honoured *modus operandi* governing the conduct of ASEAN members since the creation of the grouping on 8 August 1967. How do relational governance and a rule-oriented approach towards institutionalised co-operation inter-relate? To what extent have relationships undergone institutionalisation, measured against the common markers of binding legal obligation, precision (such that the parties know what conduct is required or prohibited), and

¹ L. Chun Hung, ‘ASEAN Charter: Deeper Regional Integration under International Law’ (2010) 9 *Chinese Journal of International Law* 821–837; L. Leviter, ‘The ASEAN Charter: ASEAN’s Failure or Member Failure?’ (2010) 43 *Journal of International Law and Politics* 159–210.

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1. ASEAN CHARTER: CONTINUITY OR RUPTURE?

delegation to an autonomous agent for monitoring and enforcement?²

The twin pillars of the ‘ASEAN Way’ rested on *musyawarah* (discussion and consultation) and *mufakat* (consensus-seeking). This commitment to reach decisions by consensus and consultation would avoid the need to take a formal vote or follow a procedure. As Paul Davidson described it:

Relations based governance relies on the personal relationship of the actors to establish the parameters of their cooperation; agreements are based on the mutual relations of the actors and depend on knowledge of and familiarity with each other . . . maintenance of good relations is relied on for the ‘enforcement’ of commitments.³

Further, there was a desire to handle things in a fraternal (within the family) manner through the dominant method of quiet diplomacy and a resistance towards ceding sovereignty to an international or supranational body. This is reflected in

² For those three factors see J. Goldstein, M. Kahler, R. D. Keohane and A.-M. Slaughter, ‘Introduction: Legalization and World Politics’ (2000) 54 *International Organization* 385–399. For the argument that they fall short in capturing the broader and more subtle sociological dynamics of socialization see M. Finnemore and S. Toope, ‘Alternatives to “Legalization”: Richer Views of Law and Politics’ (2001) 55 *International Organization* 743–758; now also F. Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge: Cambridge University Press, 2014) 32–33.

³ P. J. Davidson, ‘The Role of International Law in the Governance of International Economic Relations in ASEAN’ (2008) 12 *Singapore Year Book of International Law* 213–224, at 214.

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the six principles contained in the 1976 Treaty of Amity and Cooperation (TAC)⁴. A 1987 Protocol opened the TAC to accession by other states in Southeast Asia and beyond.⁵ These principles are contained in Article 2 TAC:

- a. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;
- b. The right of every State to lead its national existence free from external interference, subversion or coercion;
- c. Non-interference in the internal affairs of one another;
- d. Settlement of differences or disputes by peaceful means;
- e. Renunciation of the threat or use of force;
- f. Effective cooperation among themselves.

Despite the adherence to the cardinal ASEAN principle of non-interference in internal affairs⁶ as a manifestation of the international law principle of sovereign equality, which formerly justified turning a blind eye to, e.g. human rights abuses in a member state, this was never strictly adhered to and has gradually been relaxed.⁷ One might add that ASEAN Member

⁴ Treaty of Amity and Cooperation in Southeast Asia, Bali, Indonesia, 24 February 1976.

⁵ To date these include China, India, Japan, Pakistan, South Korea, Russia, New Zealand, Mongolia, Australia, France, East Timor, Bangladesh, Sri Lanka, North Korea, the European Union and the United States.

⁶ Art. 2(2)(e) ASEAN Charter.

⁷ See e.g. ASEAN criticism against Myanmar's government crackdown on protesting monks in August 2007, Statement by ASEAN Chair (September 2007) at www.aseansec.org/20974.htm (references to 'flexible' and 'constructive' engagement). Consider also Art. 2(2)(g) ASEAN Charter, which calls for 'enhanced consultation on matters seriously affecting the common interest of ASEAN'.