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978-1-316-60655-1 - The Internal Effects of Asean External Relations

Ingo Venzke and Li-Ann Thio

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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.

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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.

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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

Cambridge University Press

978-1-316-60655-1 - The Internal Effects of Asean External Relations

Ingo Venzke and Li-Ann Thio

Frontmatter

[More information](#)

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

Cambridge University Press
978-1-316-60655-1 - The Internal Effects of Asean External Relations
Ingo Venzke and Li-Ann Thio
Frontmatter
[More information](#)

CONTENTS

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

Executive summary 205

Bibliography 209

Index 223

Cambridge University Press
978-1-316-60655-1 - The Internal Effects of Asean External Relations
Ingo Venzke and Li-Ann Thio
Frontmatter
[More information](#)

Cambridge University Press

978-1-316-60655-1 - The Internal Effects of Asean External Relations

Ingo Venzke and Li-Ann Thio

Frontmatter

[More information](#)

GENERAL EDITORS' PREFACE

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

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Ingo Venzke and Li-Ann Thio

Frontmatter

[More information](#)

GENERAL EDITORS' PREFACE

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)

Cambridge University Press

978-1-316-60655-1 - The Internal Effects of Asean External Relations

Ingo Venzke and Li-Ann Thio

Frontmatter

[More information](#)

GENERAL EDITORS' PREFACE

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.

Cambridge University Press

978-1-316-60655-1 - The Internal Effects of Asean External Relations

Ingo Venzke and Li-Ann Thio

Frontmatter

[More information](#)

GENERAL EDITORS' PREFACE

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.

Cambridge University Press

978-1-316-60655-1 - The Internal Effects of Asean External Relations

Ingo Venzke and Li-Ann Thio

Frontmatter

[More information](#)

GENERAL EDITORS' PREFACE

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 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

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Ingo Venzke and Li-Ann Thio

Frontmatter

[More information](#)

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 microcosm 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

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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

ABBREVIATIONS

IACHR	Inter-American Convention on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICSID	International Center for the Settlement of Investment Disputes
ILC	International Law Commission
IO	International Organisation
IPA	Inter-Parliamentary Assembly
ITA	International Tin Agreement
ITC	International Tin Council
JCC	Joint Cooperation Committee
MCW	Magna Carta of Women
MNCWA	Myanmar National Committee for Women's Affairs
MOU	Memorandum of Understanding
MoWA	Ministry of Women's Affairs
MOWE	Ministry of Women Empowerment
MWFCD	Ministry of Women, Family and Community Development
NCAW	National Committee for the Advancement of Women
NCRFW	National Commission on the Role of Filipino Women
ONCWA	National Commission on Women's Affairs
PCIJ	Permanent Court of International Justice
PoA	plan of action
PRC	People's Republic of China
ROK	Republic of Korea
SEOM	Senior Economic Officials Meeting
TAC	Treaty of Amity and Cooperation

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[More information](#)

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