Association of Southeast Asian Nations (ASEAN)

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A. Introduction

1 The Association of Southeast Asian Nations (‘ASEAN’) is Southeast Asia’s primary regional organization (see also → International Law, Regional Developments: South and South-East Asia; → Regional Co-operation and Organization: Asian States; → Regional Co-operation and Organization: Pacific Region). It promotes economic and political cooperation among its members as well as regional peace and security. Established in 1967, ASEAN’s five original members were Indonesia, Malaysia, the Philippines, Singapore, and Thailand. They were joined by Brunei in 1984 after it had gained independence from the United Kingdom, Vietnam in 1995, Laos and Burma (Myanmar) in 1997, and finally Cambodia (delayed by its internal political struggle) in 1999. Thus, ASEAN presently includes ten States with rather different cultures (for example, Indonesia has the world’s largest Muslim population), political systems (for example, democracies, monarchies, communist party, and military regimes) and levels of economic development (for example, poor Cambodia and rich Singapore). ASEAN members include two formal US treaty allies (Thailand and the Philippines) and another close security partner of the US (Singapore).

2 Currently, there are two ASEAN candidate States. Papua New Guinea has had observer status since 1976 and submitted its request to join ASEAN in 2009. Timor-Leste made its bid for accession in 2006 (welcomed by Indonesia).

3 ASEAN has had observer status with the UN General Assembly since 2006. Its secretariat is based in Jakarta, Indonesia. Indonesia, the largest country, which, after the fall of Suharto in 1998, became the most vibrant democracy within the group, is the only ASEAN member admitted to the G20.

4 In 2015, the total land area of ASEAN covered more than 4.4 million km² with a total population of more than 628 million people and a GDP of more than US$2.4 trillion (Selected Basic ASEAN Indicators as of August 2016; this and other ASEAN documents can be found at https://data.aseanstats.org/ [6 October 2017]). But there are enormous differences among ASEAN Member States in the wide range of average per capita income. The ‘ASEAN six majors’ (Indonesia, Thailand, Malaysia, Philippines, Singapore, and Vietnam) have the six largest economies which are many times the size of the other four ASEAN Member States. This makes an integrated trade policy on a regional level rather difficult.

5 Some of the world’s most important sea lanes, such as the Straits of Malacca (→ Malacca, Straits of), through which a large part of global trade passes, are in the region. Southeast Asia is also a region where the worlds of India and → China meet.

B. Historical Background

1. Bangkok Declaration (1967)

6 In the 1960s, Southeast Asia was beset with conflicts which, inter alia, involved Indonesia and Malaysia, the Philippines and Malaysia (concerning Sabah), Singapore’s secession from Malaysia, the problem of Mindanao in the south of Thailand, the 1962 military coup in Burma, and most important of all, the war in Indochina (Vietnam, Laos, and Cambodia). Against this background, ASEAN was formed as a security association on the basis of the ASEAN Declaration of 8 August 1967 (also known as the Bangkok Declaration). It replaced the Association of Southeast Asia (‘ASA’) that had been established in 1961 by the Philippines, Malaysia, and Thailand (→ ANZUS Pact [1951]; → Southeast Asia Treaty Organization [SEATO]). The Bangkok Declaration mentioned among the objectives of ASEAN (a) the acceleration of economic growth, social progress and cultural development in the region; and (b) the promotion of regional peace and stability. While ASEAN was
formed mainly as a response to the threat of communist takeovers in the region, there was also an increasing lack of confidence in Southeast Asia in the role of external powers.

7 Although the containment of Chinese and Vietnamese communism was originally the dominant motive for the formation of ASEAN, a further purpose of the organization was to promote economic development among its members. In addition, ASEAN served to reduce conflicts among its Member States and to provide regional stability. Still, there were quite different perceptions and interests among the members. For example, while Indonesia was primarily interested in using regional co-operation to strengthen its own power position, Malaysia and Singapore expected ASEAN to assist in constraining Indonesia.

8 ASEAN acted not only as a security community, it also offered a vehicle for Southeast Asian States to speak with one voice in the broader international arena during the Cold War (1947–91). ASEAN members were quite aware of the divergent geo-political interests of stronger powers, such as India, China, Japan, and the US in the South China Sea (→ Spratly Islands) and the Pacific Ocean. Significantly, in 1971 ASEAN declared that Southeast Asia was a zone of peace, freedom, and neutrality, indicating that the region did not wish to be drawn into either of the two Cold War camps (→ Neutrality, Concept and General Rules).

2. ASEAN Treaty of Amity and Co-operation (TAC) (1976)

9 The victory of the communists in Vietnam in 1975 and the reunification of the country presented problems for ASEAN. The relations between ASEAN members and Vietnam remained frequently tense (eg because of Vietnam’s invasion of Cambodia in 1978 to force out Pol Pot’s Khmer Rouge) until the tables turned and Vietnam was finally able to join ASEAN in 1995. After the Bali Summit in 1976, ASEAN tried to focus more on the development of economic co-operation. In 1976, ASEAN also agreed on the ASEAN Treaty of Amity and Co-operation (‘TAC’) as one of the most important instruments of the organization.

10 The TAC laid down fundamental principles that apply to the relations of ASEAN members among each other. These principles include (1) mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations; (2) the right of every State to lead its national existence free from external interference, subversion or coercion; (3) non-interference in the internal affairs of other ASEAN members; (4) peaceful settlement of disputes; (5) renunciation of the threat or use of force; and (6) effective co-operation among ASEAN members. The TAC is remarkable in that it departed for the first time in a very significant way from the usual practice of ASEAN to accept only loose, informal, and legally non-binding documents, especially in the first ten years of the history of the organization.

11 The treaty was later amended to permit non-regional countries to accede. Subsequently 15 States joined, including Japan, South Korea, Australia, China, Russia, and India, but the US stood apart until, in a policy shift under the Obama administration, it also decided to sign the TAC in 2009.

3. The ‘ASEAN Way’

12 One of the hallmarks of ASEAN from the very beginning has been the so-called ‘ASEAN way’ of decision-making. This process is based upon a strict interpretation of the principle of non-interference into the domestic affairs of other ASEAN members as confirmed in the 1976 TAC. It emphasizes informal efforts looking for consensus and relying on confidence-building instead of moving forward through legally binding and enforceable commitments.
or agreements. Asian leaders tend to give priority to cultivating personal relations and elite diplomacy, including informal meetings without a set agenda or interlocutors.

13 The ASEAN way has induced some commentators to dismiss ASEAN as a mere ‘talking shop’ which has been seen as largely ineffective in dealing with problems such as drug trafficking, human trafficking, the need for wildlife protection, and illegal logging. On the other hand, it must be acknowledged that the ‘ASEAN way’ has facilitated co-operation and interaction among its members and beyond, a remarkable achievement considering that ASEAN members had been kept apart from each other for a century by colonization.

14 The ASEAN principles of the non-use of force and non-intervention are firmly grounded on basic principles of international law, the United Nations Charter and the Friendly Relations Declaration (1970). They are not really peculiar norms of ASEAN only. The consensus-method of decision-making is known to other international organizations as well, although in most other cases there will be a possibility of overcoming an impasse and reaching binding decisions for all members through majority-voting, a concept that is clearly alien to ASEAN’s history of decision-making.

15 Nevertheless, ASEAN’s adherence to the consensus principle reflects the strong attachment of ASEAN members to the principles of sovereignty and sovereign equality of States, which are also the fountain of the principle of non-intervention. The disadvantage of an extreme application of the consensus principle in its peculiar ASEAN manifestation is, of course, that it allows progress only on the basis of the smallest common denominator. For shaping ASEAN into an organization that can deal effectively with the challenges of globalization and competition from China and India, the principle may not be the optimal method of decision-making and moving the organization forward.

16 In the course of its history, spanning now more than four decades, ASEAN has taken many economic integration and other initiatives in a broad range of sectors. Some of the more important steps will be briefly discussed in the following subsections.

4. ASEAN Free Trade Area (AFTA) (1993)

17 Following a Thai proposal made in 1991, the basis for the ASEAN Free Trade Area (‘AFTA’) was laid in 1992 by the adoption of the Agreement on the Common Effective Preferential Tariff (‘CEPT’) Scheme. The purpose of the scheme was to reduce tariffs and to strengthen the competitiveness of ASEAN members as a manufacturing basis producing for the global market. As a free trade area, ASEAN does not impose a common external tariff on imported goods. Each ASEAN member is free to impose tariffs on goods from outside according to its national schedule. Regarding products originating in an ASEAN Member State, members had to apply a tariff rate between 0% and 5%. The most recent four members (Cambodia, Laos, Myanmar, and Vietnam) were given more time to introduce the CEPT scheme. ASEAN agreed to have zero tariff rates on all imports by 2010 for the ASEAN-6 (Brunei, Indonesia, Malaysia, the Philippines, Singapore, and Thailand) and by 2015 for the other ASEAN members. Under ASEAN rules of origin, the CEPT covers only goods originating in ASEAN which generally means that local ASEAN content must make up at least 40% of the free on board value of goods.

18 AFTA’s purpose was to promote the competitive advantage of the region as a single production unit. This required the elimination of tariff and non-tariff barriers to trade among ASEAN members. Tariff reduction policy has been quite successful. In 2005, tariffs on almost 99% of the products in the Inclusion List of the ASEAN-6 had been reduced to no more than 5%. More than 60% of these products enjoyed zero tariffs. For the ASEAN-6, the average tariff of 12% when AFTA was created had gone down to 2% in 2005. As to the newer ASEAN members (Cambodia, Laos, Myanmar, and Vietnam), about 81% of the
products on their Inclusion List had been reduced to within the 0–5% range (Ewing-Chow [2008]).

19 ASEAN has taken a number of other non-tariff initiatives seeking to advance economic integration. They include measures and policies relating to ASEAN financial and monetary integration; trans-ASEAN transportation networks; air travel sector integration; interoperability and interconnectivity of telecommunications equipment and services; trans-ASEAN energy networks; integration of infrastructure and human resources development; tourism; and food security. But it has been rather difficult for ASEAN to dismantle internal trade barriers, in part due to the large differences in the level of economic development between members.

5. ASEAN Industrial Co-operation Scheme

20 The ASEAN Industrial Co-operation Scheme (‘AICO’) was established in 1996, making use of the CEPT scheme for manufacturing companies with transnational activities within ASEAN. Its aim was to promote production integration across borders by a tariff preferential rate of not more than 5% applied to the output of approved products, as well as raw materials and intermediate products. A Protocol to Amend the Basic Agreement on the ASEAN Industrial Co-operation Scheme was signed in 2004 to provide for new preferential tariff rates.

6. ASEAN Framework Agreement on Services

21 The ASEAN Framework Agreement on Services (‘AFAS’) was adopted in Bangkok in 1995. It aims at progressively introducing market access and equal national treatment for service suppliers across ASEAN countries (→ National Treatment, Principle). The AFAS largely conforms to the → General Agreement on Trade in Services (1994) (‘GATS’), but seeks to achieve a higher level of commitments of ASEAN members among each other, which is known as the GATS-Plus principle.

22 In 2003, a Protocol to Amend the ASEAN Framework Agreement on Services was signed to allow for the application of the ‘ASEAN Minus X formula’, meaning that ASEAN members willing to liberalize a certain services sector may advance to do so without being obliged to extend the concessions to ASEAN members who are not prepared to join the agreement.

7. ASEAN Investment Area

23 Two important agreements in the area of investment promotion by ASEAN were the 1987 ASEAN Agreement for the Promotion and Protection of Investment (known as the ASEAN Investment Guarantee Agreement) and the 1998 Agreement on the ASEAN Investment Area (‘AIA’). The aim of the AIA was to facilitate the free flow of direct investment, technology, and skilled professionals. The AIA opened all industries to investment with certain phased exclusions; granted immediate national treatment to ASEAN investors (with some exceptions); eliminated barriers to investment; streamlined investment procedures; and increased transparency. The agreement was expanded to cover not only manufacturing, but also agriculture, mining, forestry, fishery, and services incidental to those sectors. End-dates were set for the phasing out of temporal exclusion lists applicable in these areas.

24 In 2003, ASEAN decided to move forward and see which services can be included in the AIA. The work on this expansion of the AIA concerns areas such as education services, health care, telecommunication, tourism, banking and finance, insurance, trading, e-
commerce, distribution and logistics, transportation and warehousing, as well as professional services, such as accounting, engineering and advertising.

25 The 1987 and 1998 agreements were consolidated in 2009 by the ASEAN Comprehensive Investment Agreement (‘ACIA’), which entered into force in 2012. The ACIA applies to measures of an ASEAN Member State relating to investors of another Member State, or investments, in its territory, made by investors of another Member State, Art. 3 (1). It generally covers manufacturing; agriculture; fishery; forestry, mining and quarrying; services incidental to these sectors; and any other sectors Member States may agree upon, Art. 3 (3). The agreement provides for national treatment, Art. 5; most-favoured-nation treatment (→ Most-Favoured-Nation Clause), Art. 6; prohibition of performance requirements, Art. 7; → fair and equitable treatment and full protection and security, Art. 11; free transfers, Art. 13; rules on expropriation and compensation, Art. 14; general exceptions, Art. 17; security exceptions, Art. 18; transparency, Art. 21; and other issues frequently addressed in international investment agreements.

26 As to dispute settlement, a distinction is made between two types of disputes. The first type concerns disputes between or among member States concerning the interpretation of application of the ACIA. Art. 27 says that such disputes will be settled under the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism (see below).

27 The second type of disputes refers to investor-State disputes between an ASEAN Member State and an investor of another ASEAN Member State. Such disputes concerning loss incurred ‘or damage by reason of an alleged breach of any rights conferred by the Agreement with respect to the investment of that investor’, Art. 29 (1), are governed by Arts 28–41 of the ACIA. Claims can be submitted directly against an ASEAN Member State to the courts or tribunals of that State; under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (‘ICSID Convention’ [opened for signature 18 March 1965, entered into force 14 October 1966] 575 UNTS 159); under the ICSID Additional Facility Rules ([1979] 1 ICSID Rep 217); under the UNCITRAL Arbitration Rules ([12 April–6 May 1976] GAOR 31st Session Supp 17, 35); to the Kuala Lumpur Regional Arbitration Centre or any other ASEAN regional arbitration centre; or to any other arbitration institution upon which the parties agree, Art. 33 (1).

28 As far as publicly known, there have so far been only two arbitration cases under the 1987 ASEAN Agreement. The first one, Yaung Chi Oo Trading Pte Ltd v Myanmar (2003) (arbitrators: James Crawford [Australia], Francis Delon [France], and Sompong Sucharitkul [Thailand]) was brought by a Singaporean investor against Burma on grounds of expropriation for cancelling its license to operate a brewery in that country. The case was dismissed by the tribunal for lack of jurisdiction because the claim related to a dispute that preceded Myanmar’s accession in 1997 to the ASEAN Agreement at issue. The second case, Cemex Asia Holdings Ltd v Indonesia, concerned a claim by a Singaporean company which had made a cement investment in Indonesia. The case was settled in 2006.


29 In 1997, on the 30th anniversary of ASEAN, leaders agreed on the ASEAN Vision 2020:

[A] shared vision of ASEAN as a concert of Southeast Asian nations, outward looking, living in peace, stability and prosperity, bonded together in partnership in dynamic development and in a community of caring societies.
At the 9th ASEAN Summit in 2003, it was then decided that an ASEAN Community should be established by 2020 (‘ASEAN Concord II’, also known as the ‘Bali Concord II’). Five years later, in 2007, ASEAN members advanced the original target date of 2020 and signed the Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015.

30 The Bali Concord II declared that there would be three pillars of the ASEAN Community:

Namely political and security co-operation, economic co-operation, and socio-cultural co-operation ... for the purpose of ensuring durable peace, stability and shared prosperity in the region, Art. 1, [and an] economic region in which there is a free flow of goods, services, investment and a freer flow of capital (Art. 1 Section B).

31 The ASEAN Community concept was built upon upon three pillars: (a) the ASEAN Political-Security Community; (b) the ASEAN Economic Community; and (c) the ASEAN Socio-Cultural Community. Each of these pillars was covered by a ‘Blueprint’ and there was also an Initiative for ASEAN Integration (‘IAI’) Strategic Framework and IAI Work Plan Phase II (2009–2015). These documents were integrated into a Roadmap for an ASEAN Community 2009–2015.

32 With the goal of regional economic integration by 2015, the ASEAN Economic Community (‘AEC’) was at the core of the concept of the ASEAN Community. It was defined by the following four key characteristics

[(a)] A single market and production base, [(b)] a highly competitive economic region, [(c)] a region of equitable economic development, and [(d)] a region fully integrated into the global economy (ASEAN Economic Community Blueprint).

It was noted that the AEC will ‘transform ASEAN into a region with free movement of goods, services, investment, skilled labour, and freer flow of capital’, ibid. A master plan for establishing the AEC, the ASEAN Economic Blueprint, was adopted at the ASEAN Summit in Singapore in 2007.

C. Current Legal Situation

33 In addition to the aforementioned instruments, ASEAN’s current phase of development is based upon the legal framework created by the ASEAN Charter adopted in 2007. It focuses on the AEC, which was formally established at the end of 2015, supplemented by the new AEC Blueprint 2025, adopted at the 27th ASEAN Summit in November 2015.

1. The ASEAN Charter

(a) Background

34 The idea of developing a Charter for ASEAN appeared in the Vientiane Action Programme (2004–2010). In December 2005, following the Kuala Lumpur Declaration on the Establishment of the ASEAN Charter, an Eminent Persons Group (‘EPG’) of ten elder statesmen was appointed to discuss the matter. The Group submitted a report in January 2007 to the 12th ASEAN Summit. In accordance with the Cebu Declaration on the Blueprint for the ASEAN Charter, a High Level Task Force on Drafting the ASEAN Charter, consisting of ten senior officials, was then appointed.

35 The ASEAN Charter was adopted in Singapore on 20 November 2007. After ratification or acceptance by all ASEAN members, it entered into force on 15 December 2008. The
treaty was registered with the United Nations in accordance with Art. 102 (1) United Nations Charter.

36 According to the ASEAN website:

[T]he ASEAN Charter serves as a firm foundation in achieving the ASEAN Community by providing legal status and institutional framework for ASEAN. It also codifies ASEAN norms, rules and values; sets clear targets for ASEAN; and presents accountability and compliance .... With the entry into force of the ASEAN Charter, ASEAN will henceforth operate under a new legal framework and establish a number of new organs to boost its community-building process.

37 One important innovation is that the Charter for the first time confers legal personality on ASEAN as an inter-governmental organization, Art. 3. It also establishes privileges and immunities for ASEAN, its officials, and the permanent representatives, and contains a number of provisions on ASEAN external relations, Arts 41–46. As to ASEAN’s structure, the ASEAN Summit will now be convened twice a year, instead of once, and new bodies are created, such as the ASEAN Co-ordinating Council, three Community Councils, a Committee of Permanent Representatives to ASEAN, and the ASEAN Human Rights Body (see below). There is a single chairmanship for top ASEAN bodies. The role of the Secretary-General is strengthened and the number of his deputies is increased from two to four. There are more meetings of more bodies. Criteria for the admission of new members are clearly spelt out for the first time, Art. 6.

38 It is important to also note some of the unchanged central elements. First, the basic principle of the ‘ASEAN way’ of decision-making remains → consultation and → consensus, Art. 20 (see below). Second, ASEAN member continue to contribute to the annual operating budget of the ASEAN secretariat on the basis of equal sharing.

(b) Purposes and Principles
(i) Purposes
39 Art. 1 of the Charter lays down a rather long list of purposes of ASEAN as follows:

1. To maintain and enhance peace, security and stability and further strengthen peace-oriented values in the region;

2. To enhance regional resilience by promoting greater political, security, economic and socio-cultural co-operation;

3. To preserve Southeast Asia as a Nuclear Weapon-Free Zone and free of all other weapons of mass destruction;

4. To ensure that the peoples and Member States of ASEAN live in peace with the world at large in a just, democratic and harmonious environment;

5. To create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labour; and freer flow of capital;

6. To alleviate poverty and narrow the development gap within ASEAN through mutual assistance and co-operation;
7. To strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN;

8. To respond effectively, in accordance with the principle of comprehensive security, to all forms of threats, transnational crimes and transboundary challenges;

9. To promote sustainable development so as to ensure the protection of the region’s environment, the sustainability of its natural resources, the preservation of its cultural heritage and the high quality of life of its peoples;

10. To develop human resources through closer co-operation in education and life-long learning, and in science and technology, for the empowerment of the peoples of ASEAN and for the strengthening of the ASEAN Community;

11. To enhance the well-being and livelihood of the peoples of ASEAN by providing them with equitable access to opportunities for human development, social welfare and justice;

12. To strengthen co-operation in building a safe, secure and drug-free environment for the peoples of ASEAN;

13. To promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building;

14. To promote an ASEAN identity through the fostering of greater awareness of the diverse culture and heritage of the region; and

15. To 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.

(ii) Principles

Furthermore, the Charter also lines up a longer list of principles, some of which seem to repeat basic ideas already referred to in the list of purposes. The Charter first reaffirms ‘the fundamental principles contained in the declarations, agreements, conventions, concords, treaties and other instruments of ASEAN’, Art. 2 (1), and then provides in Art. 2 (2) the following list of principles, in accordance with which ASEAN and its members shall act:

(a) Respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States;

(b) shared commitment and collective responsibility in enhancing regional peace, security and prosperity;

(c) renunciation of aggression and of the threat or use of force or other actions in any manner inconsistent with international law;

(d) reliance on peaceful settlement of disputes;

(e) non-interference in the internal affairs of ASEAN Member States;
(f) respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion;

(g) enhanced consultations on matters seriously affecting the common interest of ASEAN;

(h) adherence to the rule of law, good governance, the principles of democracy and constitutional government;

(i) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;

(j) upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States;

(k) abstention from participation in any policy or activity, including the use of its territory, pursued by any ASEAN Member State or non-ASEAN State or any non-State actor, which threatens the sovereignty, territorial integrity or political and economic stability of ASEAN Member States;

(l) respect for the different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity;

(m) the centrality of ASEAN in external political, economic, social and cultural relations while remaining actively engaged, outward-looking, inclusive and non-discriminatory; and

(n) 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, in a market-driven economy.

(c) Institutional Structure

41 After addressing membership issues in Chapter III, Arts 4–6, Chapters IV and X of the Charter set out an elaborate institutional structure of the organization, in particular Arts 7–15. The most important organ remains the ASEAN Summit which consists of the heads of State or government of ASEAN Member States, Art. 7 (1). Summit meetings are held twice annually or convened as special or ad hoc meetings when necessary, Art. 7 (3). As the ‘supreme policy-making body of ASEAN’, the role of the ASEAN Summit is to:

Deliberate, provide policy guidance and take decisions on key issues pertaining to the realisation of the objectives of ASEAN, important matters of interest to Member States and all issues referred to it.

By other ASEAN bodies and to exercise a number of other functions set out in Art. 7 (2).

42 Another organ is the ASEAN Co-ordinating Council which comprises the ASEAN Foreign Ministers, Art. 8, who meet at least twice a year. In addition, there are ASEAN Community Councils, which reflect the three main pillars of ASEAN and are composed of the ASEAN Political-Security Community Council, the ASEAN Economic Community Council, and the
ASEAN Socio-Cultural Community Council, Art. 9. Each of these councils has relevant ASEAN Sectoral Ministerial Bodies under its purview, Art. 10; for a list see Annex 1.

Other provisions deal with the ASEAN Secretary-General (appointed for a non-renewable term of 5 years) and the ASEAN Secretariat which is based in Jakarta and was originally set up in 1976, Art. 11; for immunities see Art. 18; the Committee of Permanent Representatives, Art. 12; for immunities see Art. 19; and the ASEAN National Secretariats, Art. 13.

The promotion and protection of human rights and fundamental freedoms is listed as one of the purposes of ASEAN in the Charter, Art. 1 (7) (see also Art. 2 (2)). Art. 14 establishes the novel ASEAN human rights body. In the negotiations on the Charter, ASEAN’s principle of non-intervention into the internal affairs of members remained a big obstacle to creating an effective regional human rights institution (see Malanczuk 111–22). While Indonesia, the Philippines, and Thailand were generally in favour of providing the body with authority to monitor and investigate human rights abuses, other ASEAN members, especially those frequently accused of human rights violations, such as Cambodia, Laos, Myanmar, and Vietnam, were able to invoke the non-intervention principle to render the commission almost powerless. But even Brunei and Singapore had reservations because they did not wish to invite interference into their internal affairs.

According to the Charter, the ‘ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting’, Art. 14 (2). In 2008, the four ASEAN members with established national human rights commissions (Indonesia, Malaysia, Singapore, and Thailand) convened a High Level Panel to prepare terms of reference for the proposed ASEAN Human Rights Body (‘AHRB’). In 2009, ASEAN decided to name the AHRB as the ASEAN Intergovernmental Commission on Human Rights (‘AICHR’) and adopted a set of Terms of Reference (‘ToR’). The AICHR is an integral part of ASEAN’s organizational structure and not an independent body. It has no investigative or adjudicative functions. The focus is on the promotion rather than on the protection of human rights (for details see Malanczuk ibid). The Commission drafted the ASEAN Human Rights Declaration, which was adopted by ASEAN in November 2012. The non-inclusive, non-transparent drafting process and the Declaration itself have been criticized in view of clauses that may be used to excessively limit the scope of individual rights on the ASEAN sub-regional level in comparison with international human rights standards.

Another institution mentioned in Chapter IV is the ASEAN Foundation, Art. 15, and a further provision, Art. 16, notes that ASEAN ‘may engage with entities which support the ASEAN Charter’. These ‘entities associated with ASEAN’ are listed in Annex 2 and include parliamentarians, business organizations, think tanks and academic institutions, as well as civil society organizations.

Following Chapter IX which is dedicated to Budget and Finance, Arts 29–30, Chapter X entitled ‘Administration and Procedure’ lays down rules on the Chairman of ASEAN, Arts 31–32, diplomatic protocol and practice, Art. 33, and determines that the working language of ASEAN is English, Art. 34. Chapter XI is concerned with ‘Identity and Symbols’, Arts 35–40.

(d) Decision-Making

The core provisions on ASEAN decision-making are laid down in Art. 20, entitled ‘Consultation and Consensus’. It says:
1. As a basic principle, decision-making in ASEAN shall be based on consultation and consensus.

2. Where consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made.

3. Nothing in paragraphs 1 and 2 of this Article shall affect the modes of decision-making as contained in the relevant ASEAN legal instruments.

These rules basically reflect the traditional ‘ASEAN way’, except that Art. 20 (2) opens a new avenue to possibly elect for majority decision-making on a case-by-case basis.

49 Art. 21, dealing with ‘Implementation and Procedure’, further clarifies that each ASEAN Council ‘shall prescribe its own rules of procedure’, Art. 21 (1). There is a special rule governing the implementation of economic commitments which is known as the ‘ASEAN Minus X formula’ that has already been mentioned above. Under this formula, a Member State may opt out from certain economic schemes in which it is not yet ready to participate, although it has taken part in determining and approving such economic schemes in the first place. Art. 21 (2) permits the use of:

[a] formula for flexible participation, including the ASEAN Minus X formula, in the implementation of economic commitments in ASEAN, where there is a consensus to do so.

(e) Compliance

50 The ASEAN Charter did not adopt early proposals (favoured particularly by Indonesia and the Philippines) in its drafting history for sanctions in case of breaches of the Charter. It also rejected the idea of establishing a mechanism to monitor compliance with ASEAN agreements (opposed in particular by Vietnam, Cambodia, and Myanmar (formerly Burma). After noting that ASEAN member States have equal rights and obligations, Art. 5 (1), the central provisions addressing implementation of obligations under the Charter are laid down in Art. 5 (2) and (3):

Member States shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of membership. In the case of a serious breach of the Charter or non-compliance, the matter shall be referred to Article 20.

51 Art. 20 (4) states that in the case of a serious breach of the Charter or non-compliance, the matter shall be referred to the ASEAN Summit for decision. This again means that the consensus principle applies, with the possible exception of Art. 20 (2).

(f) Dispute Settlement

(i) Charter Provisions

52 Dispute settlement is dealt with in Chapter VIII of the Charter, Arts 22–28. At the outset, Art. 22 lays down two general principles. First, members ‘shall endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation’ (→ Peaceful Settlement of International Disputes). Second, ASEAN is required to ‘establish dispute settlement mechanisms in all fields of ASEAN co-operation’.
Art. 23 provides options to agree to settle a dispute through *good offices*, *conciliation*, and *mediation* at any time and within an agreed time limit and to invite the ASEAN Chairman or the ASEAN Secretary-General to play a role in this respect in an ex-officio capacity.

Art. 24 provides for distinctive procedures depending on the type of dispute at issue:

1. Disputes relating to specific ASEAN instruments shall be settled through the mechanisms and procedures provided for in such instruments.

2. Disputes which do not concern the interpretation or application of any ASEAN instrument shall be resolved peacefully in accordance with the Treaty of Amity and Co-operation in Southeast Asia and its rules of procedure.

3. Where not otherwise specifically provided, disputes which concern the interpretation or application of ASEAN economic agreements shall be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

Moreover, unless other specific rules apply, Art. 25 envisages special mechanisms for interpretative disputes:

Where not otherwise specifically provided, appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments.

If, after applying the aforementioned provisions, a dispute still remains unresolved, the matter is to be referred for decision to the ASEAN Summit, Art. 26. Monitoring compliance with any dispute settlement decisions is entrusted to the ASEAN Secretary-General who reports to the ASEAN Summit, Art. 27 (1). In addition, any member affected by non-compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, may refer the matter to the ASEAN Summit for a decision, Art. 27 (2).

Finally, there is a default clause in Art. 28 which stipulates:

Unless otherwise provided for in this Charter, Member States have the right of recourse to the modes of peaceful settlement contained in Article 33 (1) of the Charter of the United Nations or any other international legal instruments to which the disputing Member States are parties.

(ii) Dispute Settlement under ASEAN Economic Agreements

As noted in Art. 24 (1) and (3) of the Charter, as far as economic agreements are concerned, there are special ASEAN dispute settlement mechanisms that need to be considered (for example, concerning investment as discussed above). Following the Bali Concord II, recommendations of a High Level Task Force on ASEAN Economic Integration led to the creation of a comprehensive dispute settlement system including, for example, the ASEAN Consultation to Solve Trade and Investment Issues (‘ACT’) and the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism.
The ACT is a non-adjudicative instrument, as it is not legally binding and offers businesses informal avenues for submitting complaints about practical cross-border problems. It is modelled upon the WTO Textiles Monitoring Body and encourages resolution of problems through consultations of the ASEAN Member States involved leading to a non-binding finding.

The 2004 Protocol replaced the earlier 1996 ASEAN Protocol on Dispute Settlement Mechanism. It applies to disputes arising under ASEAN economic agreements (covered agreements, Art. 1.2). The procedures under the Protocol are closely modelled upon the WTO Dispute Settlement Understanding ('DSU'), including the panel proceedings, appellate review, and implementation with a compliance phase, compensation, or suspension of concessions. But there are some special ASEAN characteristics.

First, ASEAN members are allowed to seek recourse to other fora before a party has made a request under the Protocol, see Art. 1.3. As there is no exclusive ASEAN jurisdiction, this invites forum-shopping. Second, the precise relationship between the Protocol and the ASEAN Charter is not clear (especially as regards Arts 26 and 27, see Vergano). Third, the Panel is required to submit its recommendations within 60 days, or in exceptional cases 70 days, from its establishment which, in the light of WTO experience, does not seem to be very realistic. Fourth, costs of ASEAN disputes are to be covered by an ASEAN Dispute Settlement Fund, Art. 17. The costs covered are the expenses of the panels, the appellate body, and any relevant costs of the ASEAN Secretariat. Not covered by the Fund are costs of the parties, including legal costs. The particular apportionment of costs under the scheme may be problematic in view of the different financial capacity of ASEAN members.

While the dispute settlement mechanism set up by ASEAN for economic agreements looks impressive on paper, it is remarkable that ASEAN members have not resorted to any of these instruments up to now to settle a specific dispute. Again, the ‘ASEAN way’ and the preference to avoid confrontation and to find a solution in negotiations are likely to help explain this. Another contributing factor might be the culturally induced, peculiar nature of substantive obligations in a number of ASEAN economic agreements. As observed by Vergano:

Co-operative language is often preferred to the provision of a set of enforceable rights and obligations. The small amount of legally binding obligations must be coupled with the proliferation of agreements, which creates different, and often overlaying ‘layers’ of obligations which may be in practice difficult to map (at 11).

(iii) 2010 Protocol on Dispute Settlement Mechanisms

Arts 22 (2) and 25 of the Charter were followed up by a Protocol to the ASEAN Charter on Dispute Settlement Mechanisms, which was adopted in 2010. The preamble records:

Desire of ASEAN Leaders in transforming ASEAN into a rules-based organisation with practical, efficient and credible mechanisms in place to resolve disputes in an effective and timely manner.

The Protocol applies:

[T]o disputes which concern the interpretation or application of:

(a) the ASEAN Charter;
(b) other ASEAN instruments unless specific means of settling such disputes have already been provided for; or

(c) other ASEAN instruments which expressly provide that this Protocol or part of this Protocol shall apply (Art. 2 (1)).

64 In addition, parties may agree that the Protocol shall apply to a dispute. Art. 3 (1) States that the Protocol ‘shall be interpreted in accordance with the customary rules of treaty interpretation of public international law’.

65 Special provisions deal with the options of consultation, Art. 5, good offices, mediation and conciliation, Arts 6 and 7. The main body of the Protocol, however, is concerned with the establishment of an effective system of arbitration that can be initiated at the request of one party. It largely follows the usual models of international arbitration. Apart from laying down rules on the request for arbitration, Art. 8, the reference to the ASEAN Co-ordinating Council, Art. 9, the procedural rules, Art. 10, the arbitrators, Art.11, the functions of the arbitral tribunal, Art. 12, the Protocol includes provisions on the rights of third parties, Art. 13, the applicable law, Art. 14, the award, Art. 15, compliance with the award and settlement, Art. 16, costs, Art. 17, and the respective functions of the ASEAN Secretariat. Moreover, there are four detailed Annexes outlining: Rules of Good Offices, Annex 1; Rules of Mediation, Annex 2; Rules of Conciliation, Annex 3; and Rules of Arbitration, Annex 4.

66 The 2010 Protocol is an important step forward in ASEAN’s quest to become a more rules based organization. It can assist in securing compliance of ASEAN members with ASEAN rules. This will naturally depend on the political will to make use of the mechanism. However, a decision on what kind of sanctions may be applied in cases of breach has been deferred. But the mechanism cannot be used to deal with the internal situation of an ASEAN member, for example, Myanmar (statement by Indonesian Foreign Minister Marty Natalegawa, Bangkok Post 8 April 2010). Moreover, private parties have no access to the system.

2. The ASEAN Economic Community and the AEC Blueprint 2025

67 The AEC was formally established on 31 December 2015, although a number of originally envisaged measures for realizing the AEC had to be deferred. Moreover, while ASEAN has been very successful in reducing tariffs, at the same time non-tariff barriers within ASEAN have increased considerably, somewhat offsetting the achievements in tariff liberalization.

68 A new AEC Blueprint 2025 was drafted to provide guidance for the strategic direction of ASEAN regional integration for the next 10 years and adopted at the 27th ASEAN Summit in November 2015. The AEC Blueprint 2025 focuses on more complex issues, such as reducing non-tariff barriers, addressing rules of origin, introducing trade facilitation measures, harmonizing standards, and improving regulatory convergence. In February 2017, the ASEAN Economic Council also adopted the AEC 2025 Consolidated Strategic Action Plan, which contains a detailed timeframe and clear action lines. The question will again be primarily about securing compliance.

3. ASEAN External Relations

69 Chapter XII of the ASEAN Charter, Arts 41–46, lays down the basic legal framework for the conduct of external relations. Over the five decades of its existence, ASEAN has developed extensive external relations with so-called ‘dialogue partners’ as well as with other regional and international organizations. This complex network includes a number of important free trade arrangements. ASEAN plays a prominent role in the development of
Asian regionalism beyond the ambit of Southeast Asia. Only some major aspects of this role will be briefly addressed in the following.

(a) East Asian Economic Caucus Proposal (1990)

70 In spite of ASEAN’s new economic focus after 1976, there was little movement in this area, especially in the mid-1980s. With the subsequent accession of new members, in the following years ASEAN then aimed at stronger integration. There was some discontent with the increasing influence of the US in the Asia-Pacific Region and in APEC in particular. This led Malaysia’s Prime Minister, Mahathir Mohamed, in 1990 to propose the establishment of an East Asian Economic Caucus, comprising the members of ASEAN, China, Japan, and South Korea. This idea, however, was successfully opposed by the US, Australia, South Korea, and Japan. Indonesia also mistrusted the proposal.

71 The formation of APEC, which established a small secretariat in Singapore in 1992, was initially a further obstacle to the further advancement of the idea. As it turned out later, however, APEC did not live up to the expectations of its creators. But the development of regional trading blocs like the → North American Free Trade Agreement (1992) (‘NAFTA’) and the EU made it clear that there was a need for a regional East Asian response.

(b) ASEAN Regional Forum (1993)

72 In the 1990s, ASEAN became increasingly concerned with issues of peace and security in the region. The end of the Cold War presented the organization with new questions as to the appropriate concept of security under the changed international environment. In 1993, the ASEAN Regional Forum (‘ARF’) was established to deal with security issues in the broader context of the Asia-Pacific region. As noted in the First ARF Chairman’s statement (1994), the objectives of the ARF are:

(a) To foster constructive dialogue and consultation on political and security issues of common interest and concern; [and] (b) to make significant contributions to efforts towards confidence-building and preventive diplomacy in the Asia-Pacific region.

73 As the principal forum for security dialogue in Asia, the ASEAN Regional Forum has 27 members, including the members of the East Asian Summit, plus Bangladesh, Canada, Mongolia, North Korea, Russia, the European Union, the US and Pakistan. But the debates in this forum did not lead to much action. It is notable, however, that in 1995, the Southeast Asian Nuclear-Weapon-Free Zone Treaty was signed. After ratification by the last member, the Philippines, it became fully effective on 21 June 2001.

(c) ASEAN+3 (East Asian Regionalism) (1997)

74 When the first Asia-Europe Meeting (‘ASEM’) to be held in Bangkok in 1996 was being prepared, ASEAN members asked China, Japan, and South Korea to join them as the representatives of Asia. The regular meetings among the Asian partners that emerged from this initiative became the nucleus for the ASEAN+3 co-operative mechanism. Due to economic and political changes, the US and Australia no longer opposed such a grouping in principle (see Stubbs 443). There was a first informal gathering of ASEAN+3 at the 1997 ASEAN Summit in Kuala Lumpur, followed by many others on a regular basis at different diplomatic levels.

75 The East Asian Financial Crisis of 1997 had a devastating economic, social and psychological impact on the region. Under the leadership of Mahathir Mohamad, Malaysia subsequently renewed its earlier proposal by the so-called Chiang-Mai Initiative. The plan
aimed at stronger economic integration of ASEAN countries among themselves, as well as with the so-called ASEAN+3 countries, China, Japan, and South Korea.

76 The Asian Financial Crisis 1997–1998 was a decisive catalyst for East Asian regionalism. It became obvious that ASEAN and APEC were unable to deal with the problems, attributed to huge speculative short-term capital movements mainly controlled by hedge funds betting against national currencies, when the currency crisis matured into a financial and serious economic crisis with disastrous social consequences. As noted by Stubbs:

A clear consensus has emerged in the region that the International Monetary Fund (IMF), in conjunction with the US government, initially misdiagnosed the problem and chose to impose a set of solutions that only served to exacerbate the situation. The IMF’s policy of cutting public spending and allowing interest rates to rise and currencies to float freely simply ignored the unique characteristics of the Asian currency crisis. The region was plunged deeper into recession and had to endure major social upheavals before a revised set of IMF policies was implemented. Moreover, the opposition of the US and other Western governments to a proposed Asian Monetary Fund, which could have provided a regional vehicle for dealing with the crisis, also antagonized opinion leaders in the region (Stubbs 448–49).

(d) Chiang-Mai Currency Swaps Initiative (1997)

77 In 1997 in Chiang-Mai, situated in the cooler hilly parts of northern Thailand, the ASEAN+3 also laid the ground for a bilateral system of currency swaps and exchange of information on short-term capital movements (→ Monetary Law, International). In March 2010, agreement was reached among 13 Asian countries to extend this bilateral network and create the Chiang Mai Initiative Multilateralization Agreement. The Agreement involving the ASEAN+3 (→ Hong Kong also participates as part of China) provides a US$120 billion currency swaps arrangement, 80% financed by Japan, China, and South Korea, to provide emergency US dollar liquidity to countries confronted with a foreign exchange crisis (Financial Times of 24 March 2010).

(e) East Asia Summit (2005)

78 The idea of an East Asia Summit was rolled out in the final report 2002 of a study group that had been established by the ASEAN+3 countries. Originally, the report did not envisage including Australia, New Zealand or India, but suggested, for a start, to limit the membership to the ASEAN+3. In 2004, however, a decision was made to convene the first East Asia Summit in 2005 in Laos with 16 members: the ASEAN+3 and also Australia, New Zealand, and India. Furthermore, Russia was present as an observer, aspiring to become a member.

79 The next Summit in 2007 adopted the Singapore Declaration on East Asian Energy Security and the Environment and established the Economic Research Institute for ASEAN and East Asia. At this meeting, Myanmar successfully blocked any discussion of its internal situation.

80 While the 4th Summit, scheduled for 2008 in Thailand, was delayed and had to be rescheduled to 2009 because of the internal political crisis in that country, border clashes between Cambodia and Thailand also began in June 2008 concerning the old territorial dispute over the Preah Vihear Temple (→ Temple of Preah Vihear Case). Among the issues dealt with at the 4th Summit was a report on a Comprehensive Economic Partnership for East Asia (‘CEPEA’). This concept had been particularly advanced by Japan and suggested to conclude a free trade agreement among the 16 members of the East Asia Summit. But
the relationship of CEPEA to other proposed free trade arrangements, such as the East Asia Free Trade Area (‘EAFTA’), remained unclear.

81 At the 5th East Asia Summit in 2010, it was decided that the US and Russia, who were both attending the meeting, should join the next Summit in October 2011 as formal members, bringing the total number of member States of the East Asia Summit up to 18. But there was no still clarity about the notion of a future East Asian Community—a possible long-term goal that had been circulating since the creation of the East Asian Summit in 2005—and the precise role of ASEAN+3 or the East Asian Summit in the process of developing a new East Asian regional architecture. Even the relationship between ASEAN+3 and the East Asian Summit is ambiguous, and so is the connection to the broader framework of APEC (to which India, although it has requested to be admitted, does not belong because of an APEC → moratorium on the accession of new members).

(f) ASEAN Free Trade Agreements

82 ASEAN has concluded free trade agreements (some of which include investment) with Australia and New Zealand, China, India, Japan, South Korea, and, most recently in September 2017, with Hong Kong. Moreover, in 2011, ASEAN proposed the Regional Comprehensive Economic Partnership (‘RCEP’) project, which would include the 10 ASEAN countries in addition to China, Japan, South Korea, Australia, New Zealand, and India. These 16 countries contain about one half of the global population and about 30% of global GDP. Negotiations began in 2012 and are continuing, while Asian partners are still weighing the consequences of the decision of the United States under President Trump in 2017 to abandon the Transpacific Partnership Agreement (‘TPP’).

D. Concluding Remarks

83 As noted above, one of the purposes of ASEAN confirmed in the Charter is:

[T]o create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labour; and freer flow of capital.

84 European integration has frequently been cited as a model towards which ASEAN should develop. But ASEAN’s concept of creating a single market, mentioned as one of the purposes of the organization in the ASEAN Charter, is not likely to be the same as the notion envisaged by the Single European Act, adopted in 1986 under the Delors Commission with the aim of establishing a Single Market of the European Community (‘EC’) by the end of 1992. In contrast to the EC, the ASEAN Economic Community is not likely to produce a custom union with a common external tariff policy, although it may have enhanced free movement of goods, services, capital, and labour. Singapore has an almost zero tariff policy which will stand in the way of reaching an agreement within the diverse composition of ASEAN on a common external tariff and will also create substantial problems with Singapore’s free trade agreements with non-ASEAN partners (Ewing-Chow [2008]).

85 While there has been a significant move in the past decades towards more integration in ASEAN, even in 2025 the level of integration is still likely to be far from the model of the European Union. This is due to the lack of supranational institutions (→ Supranational Law), such as any equivalents to the European Commission, the Council of the EU, or the European Court of Justice, and the absence of the primacy and direct effect of a legal system comparable to EU law with the → acquis communautaire with which all Member States are obliged to comply (→ European [Economic] Community). Stronger regional
integration is hampered by ASEAN’s dominant principle of non-intervention in internal affairs. At the same time, the ASEAN way reflects the considerable diversity among the 10 Member States.

86 ASEAN has certainly made good progress in economic and political co-ordination and has contributed to regional security, but it has not yet become a major actor on the multilateral level. The ASEAN Regional Forum has led to better transparency and defence co-operation, including white paper[s], military exchanges, and the maintenance of a list of experts who may assist in conflict resolution. But generally military co-operation and anti-terrorist activities are conducted on the bilateral level because of the different political priorities of the participating States. ASEAN has not yet developed into a strong regional security community.

87 ASEAN has been helpful in serving as a neutral venue for building multilateral co-operation because the forum appears to be less threatening than Japan or China. Indeed, the leaders of China, Japan, and South Korea have found it convenient in the past to meet on the sidelines of the annual ASEAN+3 meetings.

88 When celebrating its 50th anniversary in 2017, ASEAN has generally quite rightly been seen as a success story, following its own gradual and consensus-based method of intergovernmental cooperation and limited integration, which is appropriate for the heterogeneity and diverse traditions of Southeast Asia.

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