TREATY MAKING POWER IN ASEAN: LEGAL ANALYSIS ON ASEAN PRACTICES
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Abstract
As the ASEAN Charter has entered into force, ASEAN has become an international organization with legal basis and has a capacity to do any legal conduct. One of them is the power to make an international treaty. Furthermore, some questions arise regarding such power, for instance, can the Secretary General of the ASEAN make an international treaty on behalf of the ASEAN’s member countries, what kind of international treaty that can be made, and how does the legal implication for ASEAN’s member countries upon an international treaty signed by the ASEAN. This paper will analyze practices of international treaty making by the ASEAN before and after the ASEAN Charter entered into force, and will suggest matters that need to be solved by the ASEAN in its effort to strengthen its legal system, particularly in making international treaty.
Since the entry into force of the ASEAN Charter in 2008, it is widely said that ASEAN has moved from a loose organization to a rule-based one. It implies that the activities of ASEAN shall be on the basis of law applicable to the organization. ASEAN Charter as a treaty known to international law will serve as a legal basis to all activities conducted by ASEAN, both for internal and external objectives.

Unfortunately, ASEAN as an international organization for the purpose of international law has not received much attention from international legal scholars. Albeit its growing structure as a mature international organization, it is hardly approached from international law perspective. On the other hand, as commonly experienced by many organizations alike, some legal questions may arise with regard to ASEAN. Is ASEAN an international organization having legal capacity to enter into a treaty? If yes, how does it exercise its treaty making power?

In order to answer these questions, it is worth exploring the defined concept of ASEAN as subject of international law and what elements are required to constitute an international organization for having quality as a subject of international law. This paper attempts to discuss the practical problem arising from its practices before the entry into force of ASEAN Charter and explore the remaining potential conflict that might be encountered in the future. This paper will demonstrate that the legal
problems facing ASEAN treaty making power are those that have encountered the International Law Commission when it dealt with the problematic question of treaties concluded by international organizations. The first is the question on the status of its members when ASEAN concluded a treaty and the second is on the representation, in the sense of whether ASEAN could conclude a treaty on behalf of its members. The paper will explore the issue that needs to be addressed by ASEAN with a view to strengthening its rule-based system as an organization, particularly in treaty making regime.

A. ASEAN as an International Organization

ASEAN Charter endorses in Article 3 its legal personality by providing that ASEAN, as an intergovernmental organization, is hereby-confferred legal personality. The formulation is carefully drafted in a way that the Charter is only confirming the legal fact that ASEAN is, and was before, an intergovernmental organization having legal personality. It must be held, that the personality under international law has been already enjoyed by ASEAN before the Charter. Chesterman\(^1\) puts it correctly when arguing that the fact that ASEAN now claims international legal personality in the Charter does not mean it lacked it previously, nor that it now possesses it in any meaningful way.

From the legal writings and the jurisprudence it might be concluded that the question as to whether international organizations are subject of international law as well as the question on their legal capacity to enter into treaties has been completely resolved either in theoretical or practical level. However, preconditions established by international law (objective criteria) shall be met before an organization is recognized as international organization for that purpose. It is widely agreed that there are at least two constituent elements required to form an international organization status, i.e. a treaty establishing the organization and a permanent independent organ detached from that of the founders. The ILC in its present works on the responsibility of international organizations defines international organization as:

2 The ICJ in the most important case on this matter, i.e. *Reparation for Injuries Suffered in the Service of the United Nations Case, 1949*, has affirmed that the United Nations is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claim. ICJ Reports, 1949, pp.178-179. This established view was reaffirmed in ICJ Advisory Opinion in Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980, which is held that: *International Organizations are subjects of international law, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.*

“International organization” means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities;4

When the two criteria apply to ASEAN, it appears that since its inception through Bangkok Declaration in 1967 until 1976 ASEAN lacked its legal personality. It was not a proper international organization in the sense of international law since, although established by a treaty, it was lacking the organ detached from its founders. It was merely a joint organ, which acted on behalf of its members. The establishment of the ASEAN Secretariat in 19765, gives effect to its legal status because the second precondition, i.e. an organ detached from its founder has then been fulfilled. Since then, ASEAN could be qualified an international organization for the purpose of international law in the sense that it is a distinct entity subject of international law.

4 Draft articles on the responsibility of international organizations, adopted by the International Law Commission at its sixty-third session, in 2011, Article 2 (a).
B. ASEAN Treaty Making Power

Since 1976 and before ASEAN Charter, ASEAN has exercised its treaty making power. However, the rules of ASEAN prior to the ASEAN Charter did not as yet contain any clear rules for regulating the conclusion of treaties with other subjects of international law on its behalf, but the principles have been laid down that the capacity to make treaties resides in its plenary organ, i.e. ASEAN Ministerial Meeting. ASEAN external relations will be the primary responsibility of the ASEAN Ministerial Meeting, which will formulate, when appropriate in consultation with relevant Ministers, guidelines for establishment of the machinery for the formalization, supervision, suspension or termination of negotiations with other governments and international organizations. According to Bangkok Declaration 1967, external relations between ASEAN and third countries and international organizations should have the approval of the Foreign Ministers. The Chairman of the ASEAN Standing Committee will be authorized to sign all agreements reached between ASEAN and third parties.

The ASEAN Charter has provided general rules on ASEAN external relation and under Article 41 (7) prescribes that ASEAN may conclude agreements with countries or sub-regional, regional and international organizations and institutions. The procedures for concluding such agreements shall be prescribed by the ASEAN Coordinating Council in consultation with the ASEAN Community Councils. Such procedures are still in intensive labour.
i. Relation between Members and Treaties Concluded by ASEAN

At initial stage, and even until recently, confusion has come to fore with regard to status of treaties concluded by the so-called ASEAN. In this regard, one must be cautious in dealing with the term ASEAN. The term of ASEAN in legal terms as a distinct entity detached from its members is always confused with ASEAN as a merely collective noun for all the members, which is frequently used in many ASEAN documents and writings. The practices of ASEAN in concluding treaties with other subjects of international law shows that the term ASEAN tends to be interpreted as a collective noun of all the members instead of a distinct entity. It could be seen for instance in the Cooperation Agreement between the Member Countries of ASEAN and the EEC, 7 March 1980. The agreement was signed by all foreign ministers of ASEAN member states on one part and by President in office of the Council of the EC on the other part. Thus, it is not a bilateral agreement between ASEAN as an organization, which has been incorrectly claimed as the first agreement that it has signed as an international entity, but merely a multilateral between individual members of ASEAN and the EEC.

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6 The term treaties in this paper will cover all formal instruments concluded by ASEAN, such as agreements, MOUs, Arrangements, Exchange of Notes, and other designations without making any distinction whether they are properly regarded as treaties for the purpose of the Vienna Convention on the Law of Treaties.
Another example could also be found in the exchange of letters constituting an agreement establishing the Sectoral Dialogue between ASEAN and the Republic of Korea. On one part this agreement was signed by Minister of Foreign Affairs of the Republic of Korea and on the other part by Minister for Foreign Affairs of Indonesia as Chairman of the ASEAN Standing Committee. Looking at this participation clause alone, one might assume that this agreement is concluded by ASEAN as a proper distinct entity in pursuant to the rules of ASEAN. However, from the terms of the agreement, it reveals that ASEAN in this case is merely a collective noun of all the members since the word ASEAN refers to *ASEAN member countries*. The Chairman of ASEAN Standing Committee signed the letter on behalf of ASEAN member countries instead of ASEAN. In this instance *ASEAN* is not a party and no legal effects devolve upon it. One may be questioning whether *ASEAN* as a distinct entity could conclude that particular treaty. The answer is obviously negative. A dialogue between ASEAN and a third country is not a bilateral relation between ASEAN as a distinct entity and the country concerned, but a kind of multilateral relations in which the member states of ASEAN individually involve. Thus, ASEAN as a distinct entity was lacking capacity to deal with such a relation on its own behalf.

The term *ASEAN* as is envisaged in the Charter may pose an already long confusion and appeared to be so when it was being discussed in the various discussions in the High Legal Expert Group for the implementation of Article 41 (7) of the Charter. This Article only states
that *ASEAN may conclude agreements with countries or sub-regional, regional and international organizations and institutions*. However, it does not define the notion of *ASEAN* in terms of whether it is a distinct organization or simply a joint collective of Member States.

From the legal perspective, ASEAN external relations under Article 47 (1) shall be distinguished into two different legal characters:

a. The relations between ASEAN member countries and a third party where the status of each member country is as an independent subject of international law. In this regard, the term *ASEAN* is only used to refer to each member country as collective members.

b. The relations between ASEAN as a subject of international law, as a distinct subject separated from its members with a third party. In this regard, member countries of ASEAN are in the position as components of the ASEAN’s organs (Standing Committee, Committee, etc.).

On the first category, with regard to the relations between ASEAN as collective members with a third party, it is often stated that “ASEAN has made numerous international agreements with other countries or international organizations”. However, when such agreements use the term *ASEAN*, it will refer to each member country separately and forming as a *collective group* without necessarily relinquishing its independent status. This is reflected in the participation clause of such agreements
where all members are, individually, required to put their respective signatures in the agreement. For example, in the Cooperation Agreement between the Member Countries of ASEAN and the EEC, 7 March 1980, all members of ASEAN individually signed the agreement and for the EEC, on the other hand, it was signed by its authorized representative, i.e. President of the Council. In this agreement, each individual member country entered into contractual agreement with EEC as an international organization. In this case, ASEAN is not an organization as a distinct subject independently from its members. It is a logical consequence of the fact where the scope of the agreement is not within ASEAN’s competence as an independent international organization, but rests on the authorities of the member countries.

On the second category, ASEAN has made numerous agreements in its capacity as a distinct subject separated from its members, in which the term ASEAN Secretariat is commonly used. The agreements made by ASEAN as an international organization and on its own behalf are, among others, as follows:

a. The Agreement relating to the Privileges and Immunities of the ASEAN Secretariat, 20 January 1979, between ASEAN Secretariat and Indonesia.

c. The Agreement on the Use and Maintenance of the Premises of the ASEAN Secretariat, 15\textsuperscript{th} March 1996, between ASEAN Secretariat and Indonesia.

d. Memorandum of Understanding between the Secretariat of the Association of Southeast Asian Nations (ASEAN) and the Secretariat of the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP Secretariat).

e. Arrangement between the ASEAN Secretariat and the United States Patent and Trademark Office (USPTO) on Cooperation in the Field of Intellectual Rights, 19\textsuperscript{th} April 2005.

f. Memorandum of Understanding between the Secretariat of the Association of Southeast Asian Nations (ASEAN) and the Shanghai Cooperation Organization (SCO), 21\textsuperscript{st} April 2005.

g. Memorandum of Understanding for Administrative Arrangements, this memorandum of understanding (MoU) will form the basis of Cooperation between the Association of Southeast Asian Nations Secretariat and Asian Development Bank (24\textsuperscript{th} August 2006).

In the aforementioned agreements, ASEAN Secretariat acted on its own behalf as an independent legal subject, separated from its member countries. The Secretary General of ASEAN signed the agreements. This position is a logical consequence to the fact that the substance of the agreements is within the scope the ASEAN Secretariat competence.
Therefore, from the execution of such agreements shall not arise any obligation to its member countries, as they are not parties to the agreements.

Two agreements that have been concluded by ASEAN on its behalf are worth noting, i.e. the Agreement relating to the Privileges and Immunities of the ASEAN Secretariat, 20 January 1979 and the Agreement on the Use and Maintenance of the Premises of the ASEAN Secretariat, 25 November 1981. The parties to the respective agreements are on one part ASEAN as a distinct entity detached from its members and, on the other part, Indonesia. Although Indonesia is a member, its status vis a vis ASEAN in this agreement is a distinct subject separated from the personality of ASEAN. The participation clause of the agreements clearly indicates that Secretary General ASEAN who signed the agreements represents ASEAN per se not that of member states.

With regard to those agreements, ASEAN has a capacity to perform all rights and obligations without necessarily being supported by its member states. The matters covered by the agreements are concerning administrative and diplomatic matters which are exclusively under competence of ASEAN as a distinct entity. They are *inter alia* juridical capacity of the Secretariat within Indonesian territory and the enjoyment of privileges and immunities by the Secretary General and the staff including the premises of the Secretariat.

These practices have shown that the relation between members and treaties concluded by ASEAN as a distinct organization is merely “third
party” in the sense that they are not automatically bound by it. This legal construction is compatible with the principle enshrined in the 1986 Vienna Convention on the Law of Treaties concluded by International Organizations. The ILC in preparing that Convention was encountered with the question of effects of treaties concluded by an organization on its member states, which should be relevant to be regulated under the present Convention. The Commission came out with a proposal which was then under the Draft Article became Article 36 bis:

Article 36 bis
Obligations and rights arising for States members of an international organization from a treaty to which it is a party.
Obligations and rights arise for States members of an international organization from the provisions of a treaty to which that organization is a party when the parties to the treaty intend those provisions to be the means of establishing such obligations and according such rights and have defined their conditions and effects in the treaty or have otherwise agreed thereon, and if:
(a) the States members of the organization, by virtue of the constituent instrument of that organization or otherwise, have unanimously agreed to be bound by the said provisions of the treaty; and
(b) the assent of the States members of the organization to be bound by the relevant provisions of the treaty has been duly brought to the knowledge of the negotiating States and negotiating organizations.

The proposed draft became a most difficult part during the negotiation in the Diplomatic Conference and was finally being rejected. The proposed article was widely claimed as compatible solely in the light of the case of the European Economic Community. Most views were in favor of a default rule that member states should be third parties *vis a vis*
treaties concluded by international organizations to which they are members. Finally, the Conference provided only a saving-clause (Article 74, para. 3), which states that *the provisions of the present Convention shall not prejudge any question that may arise in regard to the establishment of obligations and rights for States members of an international organization under a treaty to which that organization is a party.* The formulation of this saving clause received cautious reaction from many delegations by emphasizing that it should not be understood as allowing any possibility of a treaty concluded by an international organization producing any legal effects for States members of the organization which were not parties to the treaty, unless those States members expressly consented to accept the relevant provisions of the treaty.

During the drafting exercise on Vienna Convention on the Law of Treaties by the ILC, an attempt had been made to enable a state or an organ on behalf of one or more states to conclude a treaty to be binding for those states concerned. Due to its complexity, the embryonic idea was immediately aborted and did not even reach the drafting stage of the ILC. The Commission left aside the question and considered it as a problem of

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representation. The representation of one State by another State or by an international organization or, more generally, of one subject of law by another subject of law probably gives rise to complex problems of treaty law.

However, when it dealt with the draft of the Vienna Convention on the Law of Treaties concluded by International Organizations (the then Vienna Convention of 1986) a similar question came out again. It was expected that the Commission refrained, as did the United Nations Conference on the Law of Treaties, from dealing with that question. If the Vienna Convention of 1969 remained silent on the representation of the corporate body by another corporate body, it is reasonable to adopt the same position as regards treaties to which an international organization is a party.\(^{10}\) It appeared however that it was not merely a question of representation which it could easily set aside.

The delicate problem facing the conference has apparently posed the similar confusion to the ASEAN practices. ASEAN practices have also shown a “peculiar” model, which is not compatible with the principle of “third party” status of its members. There are several agreements which were binding all members with a third party, concluded by the Secretary General of ASEAN, such as the following:

a. ASEAN – China Memorandum of Understanding on Cultural Cooperation (Bangkok 3rd August 2005), signed by the Secretary General of ASEAN;

b. Memorandum of Cooperation between the Department of Commerce of the United States of America and the Association of Southeast Asian Nations (ASEAN) Secretariat concerning Cooperation on Trade Related Standards and Conformance Issues (5th April 2001), signed by the Secretary General of ASEAN;

c. Memorandum of Understanding between the Governments of the Member Countries of the Association of Southeast Asian Nations (ASEAN) and the Ministry of Agriculture of the People’s Republic of China on Agricultural Cooperation (Phnom Penh, 2nd November 2002), signed by the Secretary General of ASEAN;

d. Memorandum of Understanding between the Governments of the Member Countries of the Association of Southeast Asian Nations (ASEAN) and the Government of the People’s Republic of China on Cooperation in the Field of Non-traditional Security Issues (Bangkok, 10th January 2004), signed by the Secretary General of ASEAN;

e. Memorandum of Understanding between the Governments of the Member Countries of the Association of Southeast Asian Nations (ASEAN) and the Government of the People’s Republic of China on Transport Cooperation (Vientiane, 27nd November 2004), signed by the Secretary General of ASEAN;
f. Memorandum of Understanding between the Governments of the Member Countries of the Association of Southeast Asian Nations (ASEAN) and the Ministry of Agriculture of the People’s Republic of China on Agricultural Cooperation (Cebu, 14th January 2007), signed by the Secretary General of ASEAN;

These agreements pose various legal questions and perhaps reflect two legal scenarios. Could it be presumed that ASEAN as a distinct organization is entitled to bind its members into a treaty concluded by it? Are the scopes of cooperation contained in the agreements exclusively under ASEAN competence as a distinct personality? Two scenarios might be relevant, first that ASEAN in this regard is a distinct personality performing competences that have been transferred to it, or secondly, ASEAN is merely acting on behalf of its members for which ASEAN itself as a distinct personality is not bound. The second scenario is a question of representation, which will be discussed, in the next part.

Whatever scenario may apply, these agreements are not legally compatible to what has been cautiously envisaged by the Vienna Convention of 1986. Article 36 bis proposed at the Vienna Conference was claimed as fitting to the supranational model such European Union, where some sovereign competences have been transferred to the organization. Even under the EU Law, the Union cannot conclude treaties which competences are not exclusively under it. In the event where competence is shared between the organization and its members, both can
become parties. Such an agreement is known, in the EC model, as a “mixed agreement”.¹¹

In relation to ASEAN capacity to conclude treaties, a legal question has been put forward to the 23rd ASEAN Standing Committee Meeting 1991, with respect to the possibility of ASEAN to accede to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. The meeting rightly holds that ASEAN did not possess sufficient legal capacity to accede to that Protocol since ASEAN has no competence in respect of matters governed by the Convention or its protocol. ASEAN per se could not carry out general obligations as provided for within Art. 2 of the Convention since those matters fall into competence of respective member states and such competence is never being transferred to ASEAN.

Within the legal principle that was finally adopted under the current law of treaties, one may consider that the listed agreements are peculiar on some basic legal reasons. First, it is lacking procedural requirement for the Vienna Convention 1969 principle of “consent to be bound by a treaty” since it is not the member itself establishing its consent but another third party. It is worth taking into account that international law does not recognize the practices where a state can delegate its treaty

making capacity to another subjects of international law to act for and on behalf of that state to establish consent to be bound by an international agreement notwithstanding the question of “representation” which will be discussed later. Second, the treaty making capacity is an integrated part of state sovereignty and the exclusive domain of national authority. Even the European Commission (EC) practices, which have become supranational and integrated, it can only sign agreements in which its members have transferred the competence to the EC Council.

It is obvious that in concluding such legally incompatible ASEAN agreements as listed-above, the Secretary General of ASEAN and the member states do not intend to perceive ASEAN a supranational model, which can bind the members. It is highly presumed that such practices could happen due to a lack of legal awareness with regard to the meaning of ASEAN as a distinct personality and be exacerbated by the spirit of “ASEAN Way”, which tends to sacrifice the legal premises for political consensus and ASEAN conveniences.

ii. The Problem of Representation

The problem of representation is a subject of debate under the Law of Treaties. The question arises whether a subject of international law may act on behalf of other subjects to conclude a treaty for the latter. The question appears to be closely related, albeit distinguishable, to the problem of the status of member states vis a vis treaties concluded by their
organization in a way that the organization may be construed as acting on behalf of its members.

This question of representation had been discussed by the ILC in drafting the Vienna Convention on the Law of Treaties of 1969. The Commission finally left aside the question and considered it as a problem of representation rather than the Law of Treaties. The representation of one State by another State or by an international organization or, more generally, of one subject of law by another subject of law probably gives rise to complex problems of treaty law.

The question of representation, by which one binds another states to a treaty, becomes complex and untenable in the current globalization. The question of representation is not only complex at international level but also at national/constitutional level. Democratization at national level under globalization is characterized by the increasing independent powers invested with the various organs of a state, coupled with the increasing role of individuals vis a vis their state, has affected the right of legation and posed a problem of democratic accountability of any treaty concluded by a state. The separation of powers, i.e. executive, legislative, judicative has become strict so that it raises question as to whether the executive can represent legislative and judicative interest with relations to other states. Under these circumstances, treaty making power as traditionally invested with executive branch is under intensive question and states become cautious in defining and regulating the executive treaty making exercises.
Indonesia under democratization and constitutional consolidation would be encountered with constitutional difficulty with the question of representation. The sovereignty principle on “consent of state” would be at stake when representation takes place. Indonesian Constitution 1945 and the Law No. 24 Year 2000 on Treaties have not paved the way for another state or international organization to bind Indonesia to a treaty. There is no precedent under Indonesian practices where government submits to a parliament for ratification a treaty signed by another sovereign power to be binding upon Indonesia. None even imagines that it may happen in the current constitutional context.

An agreement signed by the Secretary General of ASEAN on behalf of member countries, in principle, is not binding member countries on the basis that the requirement of “consent to be bound by a treaty” by Indonesia in accordance with Article 11 of Vienna Convention 1969 on the Law of Treaties and the Law of 24 Year 2000 has not been fulfilled. In this case there is no expressed consent from its individual members to be bound to the agreement. The very fact that its members are said to having authorized the Secretary General of ASEAN to do so cannot be invoked as legally sufficient for establishing consent to be bound by a treaty by the member state, as required by the Vienna Convention.

Under Indonesian law, the problem of “Full Power” for expressing the consent of the State to be bound by a treaty arises. If an international agreement signed by the Secretary General of ASEAN and assumed that it is binding for Indonesia, it will be construed that the Secretary General
has obtained a full power from Indonesia. Full power is a constitutional power and only presented to the national officials. Granting full power to an international organization is not an accepted practice according to Indonesian Law of Treaties.

Based on these principles, a country cannot ratify a legal act conducted by another subject of international law. In this regard, for an agreement, which is signed by the Secretary General of ASEAN or an appointed official of a member country and requires ratification, the members are not in a legal position to ratify the foresaid agreement. As ratification means “to confirm the conduct of its representative who is signing an agreement”, it would be peculiar if member states, through their national mechanism, ratify the conduct of the foreign officials. Further consequence is that a member state as a state party does not have the direct competent authority to conduct a legal act in relation to the agreement itself, such as invalidity; termination; suspension; amendments; and modification. Such legal acts can only and have to be conducted through and under the approval of the Secretary General as the signatory party.

ASEAN has abundant practices concerning the problematic situation. Adding to the agreements listed-above, one may look at the Memorandum of Understanding between the Governments of the Member Countries of the Association of Southeast Asian Nations (ASEAN) and the Government of Australia on the ASEAN - Australia Economic Cooperation Program (AAECP) Phase III (Bangkok, 27th July 30
1994). For ASEAN signed by H.E. Surin Pitsuwan, Deputy Minister of Foreign Affairs, Acting Minister of Foreign Affairs of Thailand.

On the contrary, ASEAN has also experienced a situation where member states assumed representation despite ASEAN as a distinct personality not really requiring it. In 1985 ASEAN was authorized to conclude agreements on cultural matters with UNDP on ASEAN Training Course for Drug Rehabilitation Professionals and on ASEAN Law Enforcement Training Course. In this case ASEAN is assigned to conclude those agreements but again not on its behalf but on behalf of its members. It only performs its task as coordinator and it is the members who implement the training courses. If one looks at the project documents on such ASEAN training courses, it might be agreed that, instead of its members, ASEAN per se could be a party to the agreements. It is firstly because the conclusion of those agreements are in accordance with the objectives of ASEAN as specified within Bangkok Declaration, thus, it has competence in respect of matters governed by the agreements, and secondly, ASEAN as an entity could undertake the programs as covered by the agreements without necessarily involving the personalities of its members.

C. ASEAN Treaty Making Power under ASEAN Charter and its Rules

As indicated in the previous part, ASEAN Charter provides specific rules on treaty making power. It is prescribed by Article 41 (7) that the procedures for concluding such agreements shall be prescribed by the
ASEAN Coordinating Council in consultation with the ASEAN Community Councils. The set of procedures is under negotiation by the High Legal Experts Group, which consists of legal officials from member states. From the Law of Treaties perspective, such procedures are tantamount to the rules of the organization as referred to by the Vienna Convention of 1986.

The procedures are expected to make a clear distinction on the conclusion of agreements concluded by ASEAN as a distinct personality and those that are concluded by all ASEAN member states collectively. The critical issues worth exploring would be to what extent ASEAN may be entitled to conclude treaties on its own behalf. This is the problem of scope of competences to be conferred to ASEAN for it to be subject matters of treaties it concludes. There must be a clear rule and principle for ASEAN concerning the entitled subject matters, which are and not within its competences. At least there must be a component organ under ASEAN whose task is to determine whether or not a subject matter could be contained in a treaty concluded by ASEAN. The rule is necessary in order to ensure that ASEAN concludes a treaty containing matters within its competences, otherwise, it requires collateral participation from its members as envisaged by so called “mixed agreements”.

It should cover the matter as required by 1986 Vienna Convention to be regulated by the rules of organization. The Convention emphasizes the determining role of the “rules of the organization” to govern the acts of organization in concluding a treaty. The rules mean, in particular, the
constituent instruments, decisions and resolutions adopted in accordance with them, and established practice of the organization. The Convention makes references to the rules of the organizations in dealing with some aspects of treaty making, which shall be provided by ASEAN rules, among others:

1. The use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State or in the rules of any international organization. The ASEAN Charter uses the term “agreements” instead of “treaties” and therefore should not affect the validity of the instruments under such different term.

2. The capacity of an international organization to conclude treaties. It prescribes a regime that governs what subject matters that are within and beyond the scope of ASEAN Treaty making power. This particular issue is concerning power sharing between member states and the organization, which will determine the scope of competence of ASEAN in making treaties. Such competence is normally governed by constitutional provisions of the organizations. It appears that ASEAN Charter provides no provision on this competence and therefore an implied power might be presumed in such manner in accordance with the purposes and objectives of ASEAN.

3. Full powers.
4. Act of Organization to express its consent to be bound by a treaty in the form of Signature, Act of Formal Confirmation (corresponding to that of ratification by a State), Accession, Accession and Acceptance.

5. Acceptance to Treaties providing for rights and obligations for third states or third organizations.

6. Amendments of a provision of a treaty.

7. Notifications with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty.

8. The appointment of arbitrators or conciliators under dispute settlement mechanism.

As ASEAN has grown into a mature rule-based organization on the basis of its Charter and having in mind that its role is becoming expansive at international level, it is inevitable that ASEAN as a subject of international law should be an international law-abiding organization. It in this regard, international legal norms governing the relations between and by international organization shall be respected. Therefore, compatibility of ASEAN rules with the international norms becomes necessary.

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