

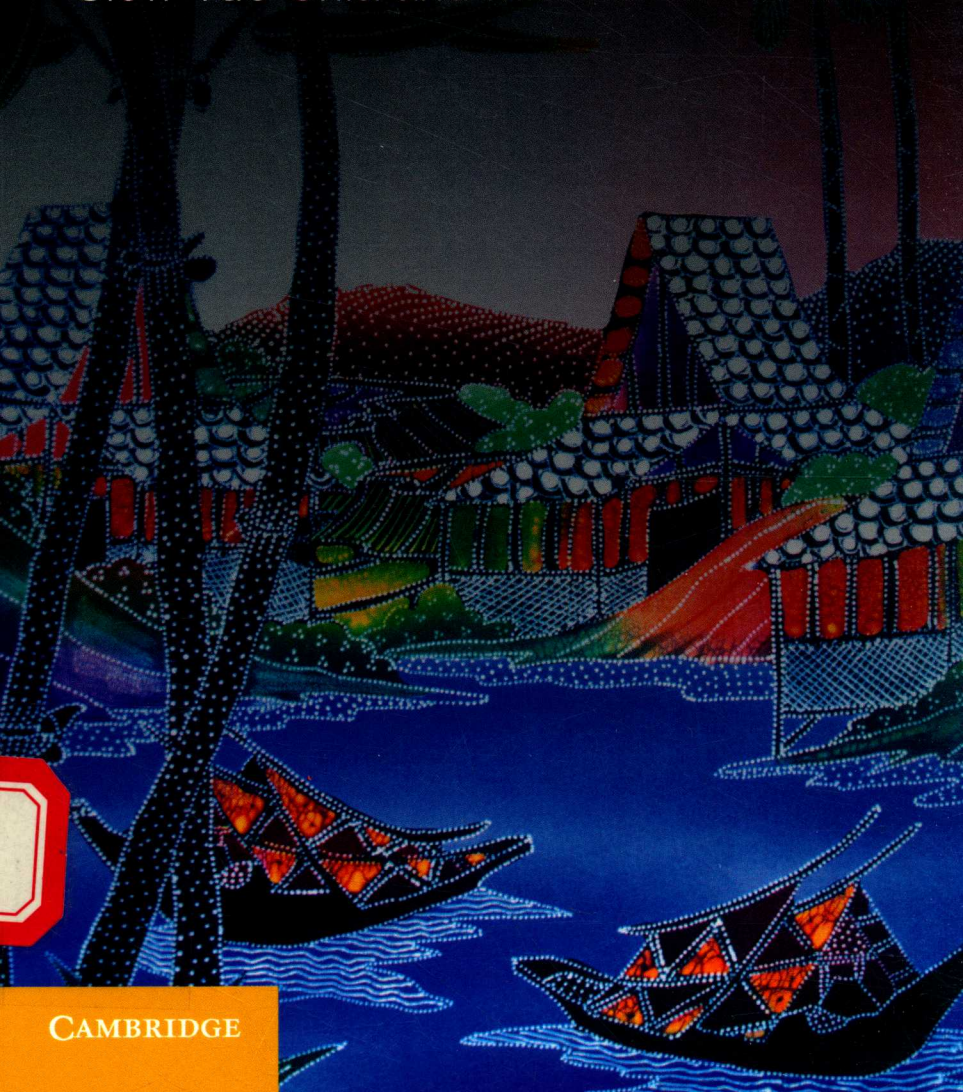
Integration Through Law

The Role of Law and the Rule of Law in ASEAN Integration

ASEAN Economic Cooperation and Integration

Progress, Challenges and
Future Directions

Siow Yue Chia and Michael G. Plummer



CAMBRIDGE

INTEGRATION THROUGH LAW

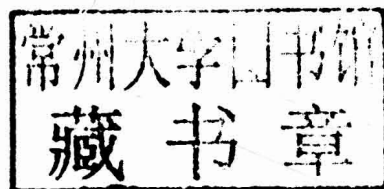
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General Editors: J. H. H. Weiler, Tan Hsien-Li and Michael Ewing-Chow

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GENERAL EDITORS' PREFACE

This monograph is published within the context of a wide-ranging research project entitled, *Integration Through Law: The Role of Law and the Rule of Law in ASEAN Integration (ITL)*, undertaken by the Centre for International Law at the National University of Singapore and directed by J. H. H. Weiler, Michael Ewing-Chow and Tan Hsien-Li.

The Preamble to the ASEAN Charter concludes with a single decision: "We, the Peoples of the Member States of the Association of Southeast Asian Nations ... [h]ereby decide to establish, through this Charter, the legal and institutional framework for ASEAN." For the first time in its history of over four decades, the Legal and the Institutional were brought to the forefront of ASEAN discourse.

The gravitas of the medium, a Charter: the substantive ambition of its content, the creation of three interlocking Communities, and the turn to law and institutions as instruments for realization provide ample justification for this wide-ranging project, to which this monograph is one contribution, examining ASEAN in a comparative context.

That same substantive and, indeed, political ambition means that any single study, illuminating as it may be, will cover but a fraction of the phenomena. Our *modus operandi* in this project was to create teams of researchers from Asia and elsewhere who would contribute individual monographs within an overall framework which we had designed. The

project framework, involving several thematic clusters within each monograph, is thus determined by the framework and the place of each monograph within it.

As regards the specific content, however, the authors were free, indeed encouraged, to define their own understanding of the problem and their own methodology and reach their own conclusions. The thematic structure of the entire project may be found at the end of this Preface.

The project as a whole, and each monograph within it, display several methodological sensibilities.

First, law, in our view, can only be understood and evaluated when situated in its political and economic context. Thus, the first studies in the overall project design are intended to provide the political, economic, cultural and historical context against which one must understand ASEAN and are written by specialists in these respective disciplines. This context, to a greater or lesser degree, also informs the sensibility of each monograph. There are no "black letter law" studies to be found in this project and, indeed, even in the most technical of areas we encouraged our authors to make their writing accessible to readers of diverse disciplines.

Comparative experience suggests that the success of achieving some of the more ambitious objectives outlined in Article 1 of the Charter will depend in no small measure on the effectiveness of legal principles, legal rules and legal institutions. This is particularly true as regards the success of establishing "an ASEAN Community comprising the ASEAN Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community as

provided for in the Bali Declaration of ASEAN Concord II". Article 2(2)(n) stipulates the commitment of ASEAN Member States to act in accordance with the principle of "adherence to multilateral trade rules and ASEAN's rules-based regimes for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration." The ASEAN Member States therefore envisage that rules of law and the Rule of Law will become a major feature in the future of ASEAN.

Although, as seen, the Charter understands itself as providing an institutional and legal framework for ASEAN, the question of the "role of law and the rule of law" is not advocacy but a genuine enquiry in the various substantive areas of the project as to:

- the substantive legal principles and substantive rules of the various ASEAN communities;
- the procedural legal principles and rules governing institutional structures and decision-making processes;
- implementation, enforcement and dispute settlement.

One should not expect a mechanical application of this scheme in each study; rather, a sensibility that refuses to content itself with legal enactments as such and looks to a "living" notion of law and institutions is ubiquitous in all the studies. Likewise, the project is sensitive to "non Law." It variously attempts to locate the appropriate province of the law in this experience. That is, not only the role of law, but also the areas that are and should remain outside the reach of legal institutionalization with due sensitivity to ASEAN and Asian particularism and political and cultural identities.

The project, and the monographs of which it is made, are not normatively thick. They do not advocate. They are designed, for the most part, to offer reflection, discuss the pros and cons, and in this way enrich public awareness, deepen understanding of different options and in that respect contribute indirectly to policymaking.

This decisive development of ASEAN has been accompanied by a growing Asian interest in various legal and institutional forms of transnational economic and political cooperation, notably the various voices discussing and showing an interest in an East Asia Integration project. The number of Free Trade Agreements (FTAs) and Regional Trade Agreements (RTAs) has increased from six in 1991 to 166 in 2013, with a further 62 in various stages of negotiations.

Methodologically, the project and many of the monographs are comparative in their orientation. Comparative law is one of the few real-life laboratories that we have in which to assess and understand the operation of different legal and institutional models designed to tackle similar objectives and problems. One should not need to put one's own hand in the fire to learn that it scorches. With that in mind a couple of monographs offer both conceptual reflection and pragmatic "tool boxing" on some of the key elements featuring in all regional integration systems.

Comparative law is in part about divergence: it is a potent tool and means to understand one's own uniqueness. One understands better the uniqueness of Apples by comparing them to Oranges. You understand better the specialness of a Toyota by comparing it to a Ford.

Comparative law is also about convergence: it is a potent tool and means to understand how what are seemingly different phenomena are part of a broader trend, an insight which may enhance both self-understanding and policy potentialities.

Although many studies in the project could have almost immediate policy implications, as would the project as a whole, this is not its only or even principal purpose. There is a rich theory of federalism which covers many countries around the world. There is an equally rich theory of European integration, which has been associated with the advent Union. There is also considerable learning on Free Trade Areas and the like.

To date, the study of the legal aspects of ASEAN specifically and other forms of Asian legal integration has been derivative of, and dependent on, theoretical and conceptual insight which were developed in different contexts.

One principal objective of ITL and these monographs will be to put in place the building blocks for an authentic body of ASEAN and Asian integration theory developed in, and with sensitivity to, the particularities and peculiarities of the region and continent. A theory and conceptual framework of Asian legal integration will signal the coming of age of research of and in the region itself.

Although the monographs form part of an overarching project, we asked our authors to write each as a "stand-alone" – not assuming that their readers would have consulted any of the other titles. Indeed, the project is rich and few will read all monographs. We encourage readers to pick and choose from the various monographs and design their own

menu. There is, on occasion, some overlap in providing, for example, background information on ASEAN in different studies. That is not only inevitable but desirable in a project of this amplitude.

The world is increasingly witnessing a phenomenon of interlocking regional organization where the experience of one feeds on the others. In some way, the intellectual, disciplinary and comparative sensibility of this project is a microcosm of the world it describes.

The range of topics covered in this series comprises:

The General Architecture and Aspirations of ASEAN

The Governance and Management of ASEAN: Instruments,
Institutions, Monitoring, Compliance and Dispute
Resolution

Legal Regimes in ASEAN

The ASEAN Economic Community

ASEAN and the World

The Substantive Law of ASEAN

ABBREVIATIONS

AANZFTA	ASEAN–Australia–New Zealand Free Trade Area
ABMI	Asian Bond Market Initiative
ACIA	ASEAN Comprehensive Investment Area
ACCSQ	ASEAN Consultative Committee for Standards and Quality
ACFTA	ASEAN–China FTA
ACMF	ASEAN Capital Market Forum
ADB	Asian Development Bank
AEC	ASEAN Economic Community
AEMM	ASEAN Economic Ministers' Meeting
AFAGIT	ASEAN Framework Agreement on the Facilitation of Goods in Transit
AFAS	ASEAN Framework Agreement on Services
AFC	Asian Financial Crisis
AFMM	ASEAN Finance Ministers' Meeting
AFTA	ASEAN Free Trade Area
AHTN	ASEAN Harmonised Tariff Nomenclature
AIA	ASEAN Investment Area
AIC	ASEAN Industrial Complementation
AICO	ASEAN Industrial Cooperation
AIF	ASEAN Infrastructure Fund
AIFS	ASEAN Integrated Food Security
AIFTA	ASEAN–India Free Trade Area

LIST OF ABBREVIATIONS

AIJV	ASEAN Industrial Joint Venture
AIMO	ASEAN Integration Monitoring Office
AIP	ASEAN Industrial Project
AJCEP	ASEAN-Japan Comprehensive Economic Partnership
AKFTA	ASEAN-Korea Free Trade Area
AMBDC	ASEAN Mekong Basin Development Cooperation
APAEC	ASEAN Plan of Action on Energy Cooperation
APSC	ASEAN Political-Security Community
APT	ASEAN Plus Three
APTERR	ASEAN Plus Three Emergency Rice Reserve
APTCS-FSBD	APT Comprehensive Strategy on Food Security and Bio-energy Development
ASCC	ASEAN Socio-Cultural Community
ASEAN	Association of Southeast Asian Nations
ASEAN+3	ASEAN + China, Japan and South Korea
ASEAN+6	ASEAN+3 (+ India, Australia and New Zealand)
ASEAN ₅	Original ASEAN Members (Indonesia, Malaysia, the Philippines, Thailand and Singapore)
ASEAN ₆	Indonesia, Malaysia, the Philippines, Singapore, Thailand and Brunei, Darussalam
ASEAN ₁₀	Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Viet Nam
ASEAN PTA	ASEAN Preferential Trading Arrangement

LIST OF ABBREVIATIONS

ASSM	ASEAN Single Shipping Market
ASW	ASEAN Single Window
ATIGA	ASEAN Trade in Goods Agreement
B-to-B	brand-to-brand
CEPEA	Comprehensive Economic Partnership for East Asia
CEPT	Common Effective Preferential Tariff
CET	Common External Tariff
CGE	Computable General Equilibrium
CGIF	Credit Guarantee and Investment Facility
CLMV	Cambodia, Lao People's Democratic Republic, Myanmar and Vietnam
CMIM	Chiang Mai Initiative Multilateralised
CTC	change in tariff classification
CTH	change in tariff heading
CTSH	change in tariff sub-heading
CU	customs union
EAFTA	East Asia Free Trade Area
EEC	European Economic Community
EED	Equitable Economic Development
EU	European Union
FDI	foreign direct investment
FTA	free trade agreement
GATS	General Agreement on Trade in Services
GEL	General Exclusion List
GFC	global financial crisis
GNI	gross national income
GNI-PPP	gross national income based on purchasing-power parity
HDI	Human Development Index

LIST OF ABBREVIATIONS

HLTF	High Level Task Force
HSL	highly sensitive list
IAI	Initiative for ASEAN Integration
ICT	information and communication technology
IL	inclusion list
IPR	intellectual property rights
IT	information technology
LPI	Logistics Performance Index
MAAFS	Multilateral Agreement on the Full Liberalisation of Air Freight Services
MFA	Multi-Fibre Arrangement
MFN	most-favoured nation
MNC	multinational corporation
MNP	Movement of Natural Persons
MRA	mutual recognition arrangement
NAFTA	North American Free Trade Area
NSW	national single window
NTB	non-tariff barrier
NTM	non-tariff measure
OECD	Organisation for Economic Co-operation and Development
PIS	priority integration sector
ppp	purchasing-power parity
PTA	Preferential Trade Arrangement
QR	quantitative restriction
RCEP	Regional Comprehensive Economic Partnership
ROO	rules of origin
RVC	regional value content

LIST OF ABBREVIATIONS

SL	sensitive list
SME	small and medium-sized enterprise
SOE	state-owned enterprise
SPCD	Strategic Plan of Customs Development
TEL	temporary exclusion list
TPP	Trans-Pacific Partnership
UNIDO	United Nations Industrial Development Organization
VAP	Vientiane Action Programme
WTO	World Trade Organization

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