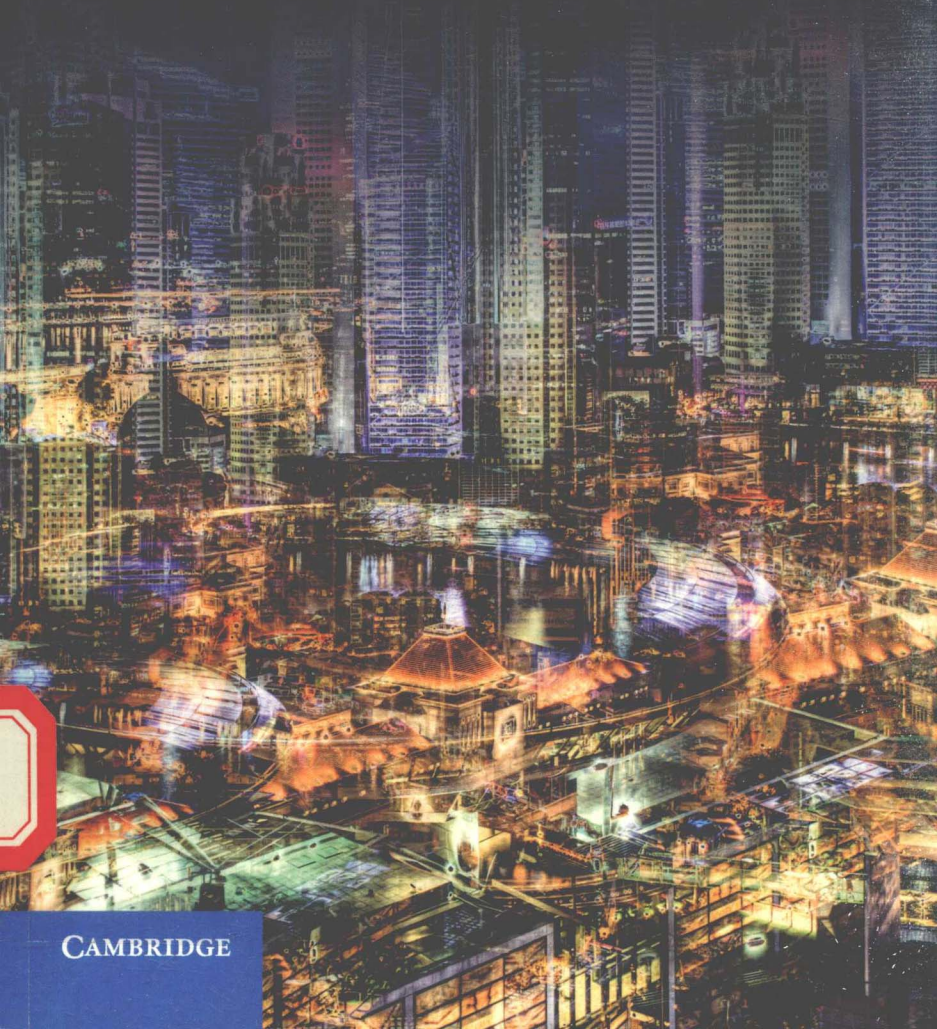


**Integration Through Law**

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

# **Towards a Rules-Based Community: An ASEAN Legal Service**

Jean-Claude Piris and Walter Woon



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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## NOTE ON THE AUTHORS

### **Jean-Claude Piris**

President of Piris Consulting SPRL, a consulting firm on international issues, especially in European and public international law. Member of the Board of Trustees of the Academy of European Law, Trier, of the Advisory Board of the Centre for European Legal Studies, University of Cambridge, of the Scientific Board of the Robert Schuman Foundation, Paris and of the Governing Board of the European Institute for Public Administration, Maastricht. Member of the Audit Committee of the EU's Council.

Former Legal Counsel of the European Council (Heads of State or Prime Ministers of the EU member states) and of the EU Council of Ministers, Director General of the Legal Service of the Council (1988–2010). Jean-Claude Piris was the legal adviser of the intergovernmental conferences which negotiated and adopted the Treaties of Maastricht (1991–2), Amsterdam (1996–7), Nice (2000–1), the Constitutional Treaty (Rome, 2004) and Lisbon (2007). Barrister of the Council in a number of cases before the EU Court of Justice. Legal Director of the OECD (1985–8). French diplomat at the United Nations (1979–83). French Conseiller d'État (1972–2004). Senior Emile Noël Fellow at the Jean Monnet Centre of European Law and Fellow at the Straus Centre at NYU (2010–11). Alumnus École nationale d'administration

(ENA), postgraduate in Public Law (Paris), graduate in Political Science (Bordeaux).

### *Books*

- 2013: *Il Trattato di Lisbona*; foreword by Giorgio Napolitano, President of the Italian Republic.
- 2012: *The Future of Europe: Towards a Two-Speed EU?* (Cambridge University Press); foreword by Joseph H. H. Weiler.
- 2010: *The Lisbon Treaty: A Legal and Political Analysis* (Cambridge University Press); foreword by Angela Merkel, Chancellor of the Federal Republic of Germany.
- 2007: *Il Processo di riforma dell'UE – Il trattato costituzionale nella prospettiva del trattato di riforma*; foreword by Giuliano Amato, Minister of Home Affairs, former Prime Minister of Italy.
- 2006: *The Constitution for Europe: A Legal Analysis* (Cambridge University Press).
- 2006: *Le traité constitutionnel pour l'Europe: une analyse juridique*; preface by Jean-Claude Juncker, Prime Minister of Luxembourg.
- 2006: *El tratado Constitucional para Europa: un análisis jurídico*; foreword by Alberto Navarro, Secretary of State of Spain for the EU.

### *Articles*

Report of the Tommaso Padoa-Schioppa Group: 'Completing the Euro: A Road Map towards Fiscal Union in Europe' (Paris, 2012).

'Is It Time for the Euro Area to Develop Further Closer Cooperation among its Members?' (J. Monnet Papers, New York University, December 2011).

'Does the EU Have a Constitution? Does It Need One?' (Harvard Law School, 1999, *European Law Review*, also published in French, *RTDE*, and in German, *Europarecht*, 2000).

'The 1996 Intergovernmental Conference' (1995, *European Law Review*, also published in French, *RTDI*, 1995, in Spanish, *Gaceta Jurídica de la CEE*, 1995 and in Italian, *Il Diritto dell' Unione Europea*, 1996).

### *Lectures*

King's College London, December 2013: 'The Five Crises in Europe and the Future of the EU' (E!Sharp on-line).

Ditchley (UK), 2012: 'A Two-Tier Europe and its Consequences'.

Brussels, European Parliament, 2012: 'Challenges of Multi-Tier Governance in the EU: Which Institutional Solutions?'

Berlin, Humboldt University, 2012: 'The Euro Crisis, Democratic Legitimacy and the Future Two Speed Europe'.

Oxford University, 2012: 'The Future of Europe: Towards a Two Speed EU?'

National University of Singapore, Centre for International Law, 2012: 'The Euro Crisis, Democratic Legitimacy and a Future Two Speed Europe'.

Ditchley, 2011: 'Who Holds the Power in Europe?'

Singapore, 2011: 'The EU Foreign Policy after the Lisbon Treaty'.

Harvard Law School, 2010: 'The EU External Relations'.

### *Conferences*

At universities: Barcelona, Berlin (Humboldt), Brussels, Helsinki, Istanbul (Yeditepe), London, Cambridge, Oxford, Milan, Reykjavik, ENA (Strasbourg), Sciences-Po Paris, Collège d'Europe (Bruges), European University Institute (Florence), Fordham (New York), Columbia (New York), Harvard (Massachusetts), New York University, Victoria (British Columbia, Canada), National University of Singapore, University of International Business and Economics of Beijing.

To political authorities and senior officials: in Frankfurt (European Central Bank), Athens, Barcelona, Brussels, Bucharest, Copenhagen, Ditchley, Dublin, Helsinki, Linz, Madrid, Paris, Prague, Reykjavik, Rome, Vienna, Vilnius, Warsaw, etc. Three written submissions to the United Kingdom's House of Lords and House of Commons, at their request.

### *Decorations*

Grand Officier de la Couronne (Belgique, 2013), Grand Cross in the Order of Knighthood of Henry the Navigator (Portugal, 2012), Commander in the Order of Orange-Nassau (Netherlands, 2011), Chevalier (1997) and Officier (2010) de la Légion d'Honneur (France), Grosse Goldene Ehrenzeichen mit dem Stern (Austria, 2002), Commander in the Order of Isabel la

Católica (Spain, 1997), Ridder af 1 grad Dannebrogorden (Denmark, 1995).

### **Walter Woon**

Professor Walter Woon read law at the National University of Singapore on a DBS Scholarship from 1977 to 1981. He graduated with an LLB (First Class Hons) in 1981 at the top of the class, winning the Adrian Clark Memorial Gold Medal. He was also awarded the Law Society of Singapore Book Prize (three times, in 1978, 1979 and 1980), the Leow Chia Heng Prize (1981) and the External Examiners' Special Cash Prize (1981). The same year he also topped the Postgraduate Practice Law Course (PLC), winning the Aw Boon Haw & Aw Boon Par Memorial Prize and the Tan Ah Tah Book Prize. He attended St John's College, Cambridge on a Commonwealth Scholarship from 1982 to 1983, graduating with an LLM (First Class Hons), and was awarded the Wright Prize and Whytehead Scholarship.

Professor Woon was called to the Singapore Bar in 1984 and was appointed Senior Counsel (equivalent of Queen's Counsel) in 2007. He has appeared in several cases before the Court of Appeal and in 1995 represented the Presidency in the only case to have come before the Constitutional Tribunal.

He was Sub-Dean and Vice-Dean of the Law Faculty of the National University of Singapore from 1988 to 1991. From 1992 to 1996 he was a Nominated Member of Parliament, during which time he introduced the Maintenance of Parents Act as a private member's bill, the only one to have been passed into law. He was Legal Adviser to the President and the Council of Presidential Advisers from 1995 to 1997.



Between 1989 and 2001 he was a director of two companies listed on the Stock Exchange of Singapore, Intraco Ltd and Natsteel Ltd.

Between 1998 and 2006 Professor Woon was Singapore's Ambassador to Germany, Greece, the EU, Belgium, Luxembourg, the Netherlands and the Vatican. He was awarded the Grand Cross of the Order of St Gregory the Great in 2006.

Professor Woon was appointed second Solicitor-General in 2006, subsequently becoming Solicitor-General and then serving as Attorney-General of Singapore from 2008 to 2010. He also served as Judge Advocate General (2007–10), Member of the Board of Directors of the Monetary Authority of Singapore (2008–10) and Member of the Presidential Council for Minority Rights (2008–10).

In 2007 Professor Woon was an alternate member of the High Level Task Force to draft the ASEAN Charter. He functioned as delegation leader of the Singapore delegation in the latter half of the process and presented the completed Charter to the ASEAN leaders at the Thirteenth ASEAN Summit in Singapore (November 2007).

Professor Woon is currently David Marshall Professor at the Faculty of Law, National University of Singapore. He is concurrently Dean of the Singapore Institute of Legal Education, which oversees the Bar Examination and Foreign Practitioners Examination for persons seeking to practise law in Singapore. Professor Woon is also the Deputy Chairman of the Centre for International Law (CIL) National University of Singapore; the President of the Society for International Law Singapore (SILS); an Executive Committee

Member of the Asian Society of International Law (Asian SIL); President of the Goethe Institute Society of Singapore; and an Honorary Fellow of the Singapore Institute of Directors (SID).

Professor Woon is the author of *Walter Woon on Company Law* (now in its 3rd edition), the standard text on Company Law in Singapore. His other publications include: *The Commercial Law of Singapore* (Cambridge, 1986); (with Andrew Hicks), *The Companies Act of Singapore – An Annotation* (1994, with supplements up to 2003); (as editor), *The Singapore Legal System* (1989); *Basic Business Law* (1994); (with Andrew Hicks), *The Companies Act of Malaysia – An Annotation* (1995, with supplements up to 2004); *The Annotated Statutes of Singapore*, vol. 1, *Companies and Securities Industry Acts* (1997); *Halsbury's Laws of Singapore*, vol. 6, *Company Law* (2000). His articles have also appeared in *Malayan Law Journal*, *Malaya Law Review*, *Securities Industry Review*, *Law Society Journal*, *Singapore Academy of Law Journal*, *Australian Journal of Corporate Law*, *Pacific Rim Law and Policy Journal* and *Korean Journal of International Law*. He is currently working on a Commentary on the ASEAN Charter for the Centre for International Law, National University of Singapore.

## 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 "standalone" – not assuming that their readers would have consulted any of the other titles. Indeed, the project is rich and few will read all monographs. We encourage readers to 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



## PREFACE

ASEAN is an organisation propelled by a mixture of idealism and hot air. From its inception as a confidence-building association in 1967 to the ambitious adoption in the 2011 Bali Concord III of an ASEAN common platform on global issues, there have been many idealistic statements and declarations. The great failing of ASEAN, repeatedly identified by successive Secretaries-General and the Eminent Persons' Group on the ASEAN Charter, has been the failure to follow up on the grand designs with concrete measures.

Idealism was the primary driver of the ASEAN Charter, which came into force in December 2008. Hitherto, ASEAN had functioned without a formal legal structure. There was in fact no treaty governing the structure and administration of the organisation. Business was done on an ad hoc basis. It was felt that after four decades some formal legal structure had to be given to the organisation if it was to be fit to meet the challenges of the twenty-first century.

The level of ambition is high. The declared goal is to create by 2015 an ASEAN Community comprising three pillars: the ASEAN Economic Community (AEC), the ASEAN Political-Security Community (APSC) and the ASEAN Socio-Cultural Community (ASCC). None of this will work unless there is an infrastructure of law. Indeed, in the ASEAN Charter and subsequent declarations by the