

Integration Through Law

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

The Foundation of the ASEAN Economic Community

An Institutional and Legal Profile

Stefano Inama and Edmund W. Sim



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INTEGRATION THROUGH LAW

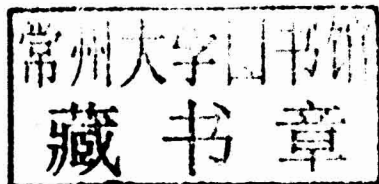
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General Editors: J. H. H. Weiler, Tan Hsien-Li and Michael Ewing-Chow

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CAMBRIDGE
UNIVERSITY PRESS

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University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107498136

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First published 2015

A catalog record for this publication is available from the British Library

Library of Congress Cataloging in Publication data

Inama, Stefano, author.

The foundation of the ASEAN Economic community : an institutional and legal profile / Stefano Inama, Edmund W. Sim.

pages cm. – (Integration through law: the role of law and the rule of law in asean integration ; 5)

Includes bibliographical references and index.

ISBN 978-1-107-49813-6 (Paperback)

1. Southeast Asia-Economic integration. 2. ASEAN. 3. ASEAN-Charters.
4. Business enterprises-Law and legislation-Southeast Asia 5. South Asian cooperation. I. Sim, Edmund W., author. II. Title.

KNE171.I53 2015

337.1'59-dc23 2015007337

ISBN 978-1-107-49813-6 Paperback

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THE FOUNDATION OF THE ASEAN ECONOMIC COMMUNITY

ASEAN has undertaken the complex task of creating a single economic entity for Southeast Asia by 2015 in the form of the ASEAN Economic Community (AEC), but without regulators or supranational institutions, its implementation has been an inconsistent process. Through comparisons with the EU and NAFTA, this book illustrates the shortcomings of the current system, enabling readers to understand both the potential of regional economic development in ASEAN and its foundational and institutional deficiencies. The authors' analysis of trade in goods and services, investment, and dispute resolution in the AEC indicates that, without strong regional institutions, strong dispute resolution, or a set of norms, full and effective implementation of the AEC is unlikely to result. The book offers clear solutions for the ASEAN institutions to help the AEC reach its full potential. Written by two leading practitioners, this insightful book will interest policymakers, students, and researchers.

STEFANO INAMA is a Chief and trade lawyer at UNCTAD. He has been responsible for the preferences and trade laws section in UNCTAD and Coordinator of the UNCTAD commercial diplomacy program. He has also provided trade policy advice for the last 20 years to governments during the WTO negotiations and the implementation aspects of WTO agreements, as well as during negotiations of Free Trade Agreements such as the ASEAN-China, EU-South Africa, SADC, and the Tripartite Free Trade area as well

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The views expressed are those of this author and do not necessarily reflect the views of UNCTAD or any other UN institutions or agencies.

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INTEGRATION THROUGH LAW

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

General Editors

J. H. H. Weiler, European University Institute

Tan Hsien-Li, National University of Singapore

Michael Ewing-Chow, National University of Singapore

The Association of Southeast Asian Nations (ASEAN), comprising the ten member states of Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam, has undertaken intensified integration into the ASEAN Community through the Rule of Law and Institutions in its 2007 Charter. This innovative book series evaluates the community-building processes of ASEAN to date and offers a conceptual and policy toolkit for broader Asian thinking and planning of different legal and institutional models of economic and political regional integration in the region. Participating scholars have been divided up into six separate thematic strands. The books combine a mix of Asian and Western scholars.

**Centre for International Law, National University of Singapore
(CIL-NUS)**

The Centre for International Law (CIL) was established in 2009 at the National University of Singapore's Bukit Timah Campus in response to the growing need for international law expertise and capacity building in the Asia-Pacific region. CIL is a university-wide research center that focuses on multidisciplinary research and works with other NUS or external centers of research and academic excellence. In particular, CIL collaborates very closely with the NUS Faculty of Law.

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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

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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 11." 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.

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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

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

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

The range of topics covered in this series comprises:

The General Architecture and Aspirations of ASEAN

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

Legal Regimes in ASEAN

The ASEAN Economic Community

ASEAN and the World

The Substantive Law of ASEAN

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Chapter 1

Introduction

This book provides a critical overview of the efforts of the Association of Southeast Asian Nations (ASEAN) in its ASEAN Economic Community (AEC) project and the existing agreements and institutional tools available to ASEAN in constructing the AEC. The focus is on the intra-ASEAN foundations of the AEC, examining both the language and substance of the underlying agreements, as well as the institutional arrangements currently in place.

A necessary premise to the introduction of this book is that the ASEAN Charter and the related ASEAN agreements and protocols are examined in the light of their objectives of achieving economic integration, more specifically a single market and a single production base according to the objectives of the ASEAN Charter.

It has to be recognized that trade and economic integration was not a founding pillar of ASEAN. The Bangkok Declaration of 1967 establishing ASEAN was focused on political and diplomatic cooperation in Southeast Asia, in the context of the Cold War. However the fact that objectives of economic integration are becoming an important aspect of ASEAN and are explicitly included in the ASEAN Charter, adopted forty years later in 2007, demands a revisiting of the ASEAN instruments to assess whether ASEAN has matched economic integration objectives with the necessary means to achieve them.