ASEAN’s External Agreements

ASEAN is coming of age as an international actor and international treaty-maker. To date, more than 200 external agreements and other instruments have been concluded in the name of ASEAN. This book provides the first systematic account of the legal framework governing ASEAN’s burgeoning external relations practice. It focuses in depth on ASEAN’s wide-ranging mandate to promote its values and principles in the wider region and beyond, as well as the highly intergovernmental, and at times haphazard, handling of the bloc’s relations with the outside world. Furthermore, it reveals that there are two basic meanings of ASEAN in its international dealings, which have important implications under international law: ASEAN as an international organisation with its own legal personality and ASEAN as the collectivity of its member states. This timely and thoughtful book is a valuable resource for practitioners and scholars of international law, ASEAN law, international relations, regional integration and governance.

Marise Cremona is Professor of European Law and a co-Director of the Academy of European Law at the European University Institute, Florence. Her research interests are in the external relations law of the European Union; she is particularly interested in the constitutional basis for EU external relations law and the legal and institutional dimensions of the EU’s foreign policy, the interaction between national, regional and international legal and policy regimes, and the EU as an exporter of values and norms.

David Kleimann is a Doctoral Researcher at the Law Department of the European University Institute (EUI) in Florence and a Research Fellow at the European Centre for International
Political Economy (ECIPE) in Brussels. Within the area of international trade law and policy, his main expertise and research interest is the substantive coverage of the most recent generation of preferential trade agreements (PTA), as well as the institutional innovations that these treaties feature. Moreover, he has a keen interest in the policy implications of the European Parliament’s empowerment on trade policy matters following the entry into force of the Lisbon Treaty.

Joris Larik is a Senior Researcher at The Hague Institute for Global Justice and Associate Fellow at the Leuven Centre for Global Governance Studies, KU Leuven. Dr Larik’s work focuses on global governance reform and the advancement of global normative frameworks, the legal and policy aspects of EU external relations, comparative and multilevel constitutional law and comparative regional integration.

Rena Lee is Senior State Counsel with the International Affairs Division of the Attorney-General’s Chambers in Singapore. She covers a range of issues in various areas of international law, including law of the sea, boundary delimitation, human rights, climate change and privileges and immunities. Rena has been part of Singapore’s delegation in several fora, both multilateral and bilateral, including the UN and ASEAN. The views expressed in this book are her own views and do not represent the views of either the Attorney-General’s Chambers of Singapore or the Government of Singapore.

Pascal Venesson is Professor of Political Science at the S. Rajaratnam School of International Studies (RSIS), Nanyang Technological University, Singapore. His research and teaching lie at the intersection of the fields of international relations and strategic studies. Before joining RSIS, he held the Chair “Security in Europe”, at the European University Institute, Robert Schuman Center for Advanced Studies.
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. 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 centre that focuses on multidisciplinary research and works with other NUS or external centres of research and academic excellence. In particular, CIL collaborates very closely with the NUS Faculty of Law.
INTEGRATION THROUGH LAW
The Role of Law and the Rule of Law in ASEAN Integration

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

ASEAN’S EXTERNAL AGREEMENTS
Law, Practice and the Quest for Collective Action

MARISE CREMONA, DAVID KLEIMANN, JORIS LARIK, RENA LEE AND PASCAL VENNESSON
CONTENTS

List of tables  page xi
List of charts  xii
General editors’ preface  xiii

1. Introduction  1

2. The legal and institutional framework for ASEAN external agreements: the centrality of ASEAN  23
   2.1 ASEAN legal personality and its implications  23
   2.2 Scope, principles and objectives of ASEAN external powers  32
      2.2.1 External objectives: the regional dimension  37
      2.2.2 Partner status  42
      2.2.3 Trade objectives  44
      2.2.4 Other objectives requiring external action  47
      2.2.5 Principles governing external action  49
   2.3 Who represents ASEAN and who concludes external agreements? Procedures under the Charter  51

3. An inventory and typology of ASEAN external instruments: overview and trends  58
   3.1 Introduction  58
   3.2 Legal quality  61
   3.3 A quantitative and content-based perspective on ASEAN’s external instruments  68
   3.4 Who are ASEAN’s treaty partners?  79

4. ASEAN as a contracting party  84
   4.1 Introduction  84
CONTENTS

4.2 The different modes of ASEAN external relations 85
4.3 Treaty-making practice before and after the Charter 87
   4.3.1 Economic instruments 88
   4.3.2 Political and security instruments 91
   4.3.3 Socio-cultural instruments 92
   4.3.4 Partnership and co-operation instruments 94
4.4 Law of treaties and international responsibility: the
   ASEAN paradox and the pathology of legal ambiguity 102
4.5 International identity: indicators of collectivity 120
4.6 Chapter conclusions 130

5. Beyond market access? The anatomy of ASEAN's
preferential trade agreements 134
   5.1 Introduction 134
   5.2 ASEAN economic integration through law: a point of
   reference for ASEAN's preferential trade agreements 139
   5.3 ASEAN's preferential trade agreements in the context
   of East Asian growth in regionalism 146
   5.4 Factors explaining substantive coverage and depth of
   de jure economic integration in ASEAN's PTAs 149
      5.4.1 Heterogeneity and proximity 150
      5.4.2 The relationship between de facto and de jure
      economic integration 155
      5.4.3 The intensity of ASEAN's trade with
      ASEAN + 1 partners 166
      5.4.4 Preliminary conclusions 178
   5.5 The substantive coverage and depth of ASEAN's PTAs 186
      5.5.1 The substantive coverage of ASEAN's PTAs 188
      5.5.2 The proliferation of co-operation provisions in
      ASEAN's PTAs 194
      5.5.3 The depth of WTO-plus commitments in
      ASEAN's PTAs 197
      5.5.4 The depth of WTO-extra commitments in
      ASEAN's PTAs 219
   5.6 Summary, conclusions and policy implications 227
6. A regional strategy: a typology of ASEAN partnership and co-operation agreements
6.1 Introduction 236
6.2 Overview of the category 236
6.3 The three hallmarks of ASEAN through partnership and co-operation 238
6.3.1 ASEAN as a regional architect 239
6.3.2 Soft law and the externalisation of the ASEAN Way 244
6.3.3 ASEAN inter pares: the emergence of the legal person 250
6.4 Conclusion 254

7. Between great-power rivalries and supranationality: ASEAN external instruments and regional hedging strategies 257
7.1 Introduction 257
7.2 Debating ASEAN external instruments 259
7.2.1 Liberal views of ASEAN external instruments: market demands, regionalism and the benefits of legalisation 265
7.2.2 Constructivism: ASEAN external instruments as social processes 268
7.2.3 Realism: ASEAN external instruments as the continuation of diplomacy and strategy by other means 271
7.2.4 ‘Analytical eclecticism’ and ASEAN external instruments 276
7.3 ASEAN external instruments and hedging strategies 278
7.3.1 Paradoxes of ASEAN external instruments 278
7.3.2 Great-powers rivalry and regional integration in Southeast Asia 281
7.3.3 ASEAN external instruments and external hedging: ‘omni-enmeshment’ of third parties and complex regional balancing 285
CONTENTS

7.3.4 ASEAN external instruments and intraregional hedging: collective action without supranationality 292
7.4 Conclusion 295

Executive summary 297
Appendices 311
Index 567
Tables

Table 3.1  Indicators of legal quality (parties’ intention to enter into legal relations)  page 63
Table 3.2  ASEAN external instruments 1970–2011  69
Table 3.3  Content typology of all instruments, 1970–2011  71
Table 4.1  The six modes of ASEAN external relations  86
Table 5.1  Milestones of ASEAN economic integration through law  140
Table 5.2  Japan–ASEAN trade intensity  170
Table 5.3  Australia–ASEAN trade intensity  171
Table 5.4  New Zealand–ASEAN trade intensity  172
Table 5.5  Korea–ASEAN trade intensity  173
Table 5.6  India–ASEAN trade intensity  174
Table 5.7  China–ASEAN trade intensity  175
Table 5.8  WTO-plus and WTO-extra policy area coverage in ASEAN’s PTAs  189
Table 5.9  WTO-plus policy-area coverage in ASEAN’s PTAs  191
Table 5.10  WTO-extra policy-area coverage in ASEAN’s PTAs  192
Table 5.11  Tariff elimination coverage under ASEAN’s PTAs  201
Table 5.12  Distribution of tariff lines by liberalisation status  204
Table 5.13  ‘Hoekman index’: services commitment levels in ASEAN’s PTAs  214
CHARTS

Chart 1.1 ASEAN external instruments, 1970–2011 page 2
Chart 3.1 Categories of instrument, 1970–2011 70
Chart 3.2 Content typology of all instruments, 1970–2011 71
Chart 3.3 Agreements by content category, 1970–2011 73
Chart 3.4 Memoranda of understanding by content category, 1970–2011 73
Chart 3.5 Plans of action by content category, 1970–2011 74
Chart 3.6 Declarations by content category, 1970–2011 74
Chart 3.7 ASEAN’s top six partners, 1970–2011 – categories of instrument 77
Chart 3.8 ASEAN’s top six partners, 1970–2011 – instruments according to content 82
Chart 4.1 ASEAN practice in concluding external instruments 86
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