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978-1-107-50023-5 - From Treaty-Making to Treaty-Breaking: Models for Asean External Trade Agreements

Pieter Jan Kuijper, James H. Mathis and Natalie Y. Morris-Sharma

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## FROM TREATY-MAKING TO TREATY-BREAKING

*From Treaty-Making to Treaty-Breaking* is the first high-level analysis of ASEAN's external trade agreements with non-ASEAN states. It clearly sets out the intended, and unintended, consequences of ASEAN's prevailing method of treaty-making, with suggested guidelines for the future. The book begins by asking whether ASEAN trade agreements follow worldwide trends in the substantive content of such agreements. It raises questions such as: to what extent is it possible to continue concluding trade agreements through individual member states?; what are the legal consequences – from negotiation and conclusion (treaty-making) through to possible breach of the agreements (treaty-breaking)?; should ASEAN resort to mixed treaty-making? This study does not seek to give a definitive answer to these questions, rather it opens up the topic to readers by suggesting different possible models for ASEAN trade agreements. This thought-provoking book will appeal to anyone interested in trade negotiations and trade agreements, particularly in Asia.

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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.

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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](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781107500235](http://www.cambridge.org/9781107500235)

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First published 2015

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloging in Publication data*

Kuijper, Pieter Jan, author.

From treaty-making to treaty-breaking : models for ASEAN external trade agreements / Pieter J. Kuijper, James H. Mathis, Natalie Y. Morris-Sharma.

pages cm. – (Integration through law : the role of law and the rule of law in ASEAN integration; 6)

ISBN 978-1-107-50023-5 (paperback)

1. Foreign trade regulation – Southeast Asia. 2. Rule of law – Southeast Asia. 3. Southeast Asia – Economic integration. 4. ASEAN. 5. ASEAN. Charter (2005) 6. Treaty-making power – Southeast Asia. I. Mathis, James H., author. II. Morris-Sharma, Natalie Y., author. III. Title.

KNC947.A35K85 2015

382/.9159–dc23

2014042936

ISBN 978-1-107-50023-5 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

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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 II”. Article 2(2)(n)

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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.

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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,

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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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ABBREVIATIONS

|         |                                                          |
|---------|----------------------------------------------------------|
| AANZFTA | ASEAN–Australia–New Zealand Free Trade Agreement         |
| ACIA    | ASEAN Comprehensive Investment Agreement                 |
| ACP     | African, Caribbean and Pacific Group of States           |
| AFTA    | ASEAN Free Trade Area                                    |
| AIFTA   | ASEAN–India Free Trade Agreement                         |
| AJCEP   | ASEAN–Japan Comprehensive Economic Partnership Agreement |
| ASEAN   | Association of Southeast Asian Nations                   |
| ATIGA   | ASEAN Trade In Goods Agreement                           |
| DSU     | WTO Dispute Settlement Understanding                     |
| EC      | European Communities / European Community                |
| ECJ     | European Court of Justice                                |
| EEC     | European Economic Community                              |
| EFTA    | European Free Trade Association                          |
| ESFTA   | EFTA–Singapore Free Trade Agreement                      |
| EU      | European Union                                           |
| EUKFTA  | EU–Korea Free Trade Agreement                            |
| FAIA    | ASEAN–India Framework Agreement                          |
| FTA     | free trade agreement                                     |
| GATT    | General Agreement on Tariffs and Trade                   |
| GIs     | geographical indications                                 |
| GPA     | WTO Agreement on Public Procurement                      |

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ABBREVIATIONS

|        |                                                                                                                                |
|--------|--------------------------------------------------------------------------------------------------------------------------------|
| ILC    | International Law Commission                                                                                                   |
| IP     | intellectual property (rights)                                                                                                 |
| MFN    | most-favoured-nation                                                                                                           |
| MRA    | mutual recognition agreement/arrangement                                                                                       |
| MoU    | memorandum of understanding                                                                                                    |
| NAFTA  | North American Free Trade Area                                                                                                 |
| O-P-D  | obligation, precision and delegation                                                                                           |
| PTA    | preferential trade agreement                                                                                                   |
| SPS    | sanitary and phytosanitary measures                                                                                            |
| TBT    | technical barriers to trade                                                                                                    |
| TFEU   | Treaty on the Functioning of the European Union                                                                                |
| TRIPS  | Agreement on Trade-Related Aspects of Intellectual Property Rights                                                             |
| VCLT   | Vienna Convention on the Law of Treaties                                                                                       |
| VCLTIO | Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations |
| WIPO   | World Intellectual Property Organization                                                                                       |
| WTO    | World Trade Organization                                                                                                       |