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.

**Pieter Jan Kuijper** is Professor of the Law of International Organizations, Amsterdam Centre for International Law (ACIL), University of Amsterdam. He previously worked for the European Commission, most recently as Principal Legal Adviser and Director of the External Relations and Trade Law team of the Commission Legal Service. He has also been Director of the Legal Affairs Division of the WTO Secretariat (1999–2002). His publications have concentrated on EU law, WTO law and general international law, and the relationship between them.
JAMES H. MATHIS is an Associate Professor in the Department of International Law and Research Fellow in the Amsterdam Centre for International Law (ACIL), University of Amsterdam. His research interests include international trade law and the WTO, domestic regulation issues in regional trade agreements, transatlantic trade issues, and regional/international competition policies. James is the managing editor of Legal Issues of Economic Integration, serves on the advisory board for the Trade Law Centre of Southern Africa (TRALAC), and is an occasional adviser on trade and competition issues for UNCTAD, Geneva.

NATALIE Y. MORRIS-SHARMA is Counsellor (Legal) at the Permanent Mission of the Republic of Singapore to the UN in New York, and Deputy Senior State Counsel with the International Affairs Division of Singapore’s Attorney-General’s Chambers. Natalie is Singapore’s representative on the Sixth Committee, which is the primary forum for the consideration of legal questions in the UN General Assembly. She also advises the Government of Singapore on public international law issues, including regional trade and investment agreements involving ASEAN and EU. The views expressed herein are her own and do not necessarily reflect the views of the Government of Singapore.
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 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

FROM TREATY-MAKING TO TREATY-BREAKING
Models for ASEAN External Trade Agreements

PIETER JAN KUIJPER,
JAMES H. MATHIS AND
NATALIE Y. MORRIS-SHARMA
CONTENTS

General editors' preface page xi
List of abbreviations xvii

1. Introduction 1
   1.1 Why this study? 1
   1.2 Background and context 3
   1.3 The two objectives of the study 7
   1.4 Summary of the external relations powers of ASEAN 11
   1.5 Observed and projected trends in ASEAN external relations powers 14
      1.5.1 Substantive content of ASEAN agreements 15
      1.5.2 Developing different models for ASEAN international agreements 16
      1.5.3 Rules on dispute settlement in agreements between ASEAN and third states 17
   1.6 Conclusions to be drawn from the study 18

2. Substantive components of an ASEAN trade agreement from an external perspective 20
   2.1 Introduction 20
   2.2 A methodology for treating soft law in PTAs 22
   2.3 The subject areas and agreements identified for examination 28
      2.3.1 Introduction 28
      2.3.2 Subject areas considered 31
      2.3.3 Trade agreements chosen for analysis 35
   2.4 Regulatory subject areas in selected trade agreements 38
      2.4.1 Introduction 38
      2.4.2 General regulatory cooperation provisions 39
CONTENTS

2.4.3 Intellectual property (IP rights) 42
2.4.4 Competition law and policy 49
2.4.5 Public procurement 54
2.4.6 Services and investment 57
2.4.7 Product and food safety standards (TBT- and SPS-type measures) 62
2.4.8 Conclusion: regulatory subject areas 67
2.4.9 Customs procedures and trade defence instruments 71
2.4.10 Anti-dumping provisions 76
2.4.11 Safeguards (emergency measures) 80
2.4.12 Conclusion: trade measures 83
2.5 Chapter conclusion 84

3. Moving forward: different institutional models for ASEAN’s external trade agreements 87
3.1 Introduction 87
3.2 ASEAN member state agreements: ASEAN member states as parties without ASEAN 91
  3.2.1 Plurilateral ASEAN member state agreements: every party owes and is owed obligations 92
  3.2.2 Combined ASEAN member state agreements: rights and obligations between member states and dialogue partners 99
  3.2.3 Common ASEAN member state agreements: an exercise of collective competence by member states 103
  3.2.4 Demi-common ASEAN member state agreements 108
  3.2.5 Enabling the enforcement of ASEAN’s role in ASEAN member state agreements 110
  3.2.6 Alternative approaches to the ASEAN minus X formula 113
3.3 ASEAN alone agreements: ASEAN as party without its member states 119
  3.3.1 Parties to the agreement 119
  3.3.2 ASEAN’s role 123
  3.3.3 Entry into force 125
  3.3.4 Who negotiates 125

viii
CONTENTS

3.4 Mixed ASEAN agreements: ASEAN member states as parties together with ASEAN 126
   3.4.1 The concept of mixed agreements 127
   3.4.2 Plurilateral mixed ASEAN agreements: every party owes and is owed obligations 136
   3.4.3 Combined mixed ASEAN agreements: rights and obligations between ASEAN and its member states, of the one part, and dialogue partners, of the other part 140
   3.4.4 Common mixed ASEAN agreements: an exercise of collective competence by ASEAN and its member states 141
   3.4.5 Demi-common mixed ASEAN agreements 147

3.5 Chapter conclusion 149

4. The rules on dispute settlement in agreements between ASEAN member states and third states: a critical inventory 152
   4.1 Introduction 152
   4.2 Preliminary issues 158
      4.2.1 Who can be a party to a dispute settlement procedure? 158
      4.2.2 Which (parts of) agreements are covered? 162
      4.2.3 Causes of action 164
      4.2.4 Who or which entities can trigger state responsibility? 167
      4.2.5 Relation with other agreements and other dispute settlement organs 169
   4.3 Steps leading up to the arbitral procedures 172
      4.3.1 Liaison office 172
      4.3.2 Consultations and alternative dispute settlement 173
   4.4 The arbitral procedure itself 176
      4.4.1 Establishment and composition of panels/requirements for panel members 176
      4.4.2 Position of third parties 179
      4.4.3 Functions and proceedings of arbitral tribunals 182
      4.4.4 Interim and final reports 184
   4.5 Implementation and compliance 185
      4.5.1 Implementation of the final report 185
      4.5.2 Monitoring 187
CONTENTS

4.6 Conclusion 189

5. From treaty-making to treaty-breaking 197
  5.1 Introduction 197
  5.2 Substantive regulatory and trade provisions 198
    5.2.1 Obligatory provisions for regulatory and trade
         subjects 198
    5.2.2 Cooperative instruments for regulatory and trade
         subjects 202
  5.3 The dispute settlement provisions 205
    5.3.1 Introduction 205
    5.3.2 The three suggested solutions and the consequences of their
         application 207
  5.4 Who should be the parties to ASEAN’s international trade
      agreements? 212

Executive summary 216
Appendices 224
Bibliography 229
Index 234
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 . . . hereby 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.

xiv
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
## Abbreviations

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

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