COMPARATIVE REGIONAL INTEGRATION

*Comparative Regional Integration: Governance and Legal Models* is a ground-breaking comparative study on regional or supranational integration through international and regional organizations. It provides the first comprehensive and empirically based analysis of governance systems by drawing on an original sample of eighty-five regional and international organizations. The authors explain how and why different organizations select specific governance processes and institutional choices, and outline which legal instruments – regulatory, organizational or procedural – are adopted to achieve integration. They reveal how different objectives influence institutional design and the integration model, for example a free trade area could insist on supremacy and refrain from adopting instruments for indirect rule, while a political union would rather engage with all available techniques. This ambitious work merges different backgrounds and disciplines to provide researchers and practitioners with a unique toolbox of institutional processes and legal mechanisms, and a classification of different models of regional and international integration.

In the study “Lead, follow or get out of the way? International secretariats in comparative perspective,” Sender takes a close look at international secretariats, with the principal objective of providing distilled hard data on how secretariats are structured and what it is, precisely, that they do.

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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

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.
COMPARATIVE REGIONAL INTEGRATION
Governance and Legal Models

CARLOS CLOSA AND LORENZO CASINI

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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 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.
GENERAL EDITORS’ PREFACE

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.
GENERAL EDITORS’ PREFACE

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
GENERAL EDITORS’ PREFACE

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
States formalize their cooperative relations with the aim of providing, together, certain public goods that they cannot provide in isolation. The range of these goods is greatly varied, encompassing security, identity and religion; and development, infrastructure and regulatory frameworks for trade, labor or air transport, for instance. To this end, States accept to be bound by formal arrangements whereby they commit to deliver these goods, but also to respect the agreements concluded. Formal institutions respond precisely to these needs for provision and commitment.

Globalization has underlined the inability of States to provide goods in isolation and has hence accelerated legal integration at international and supranational levels: the number of international institutions – now over 60,000 – began growing after the Second World War and is still rising; the relations between State administrations and international institutions are becoming ever more numerous;¹ forms of regional organization have been spreading; new

forms of global networks and global “administrations” have been developing.²

As a consequence, scholars worldwide have devoted themselves to studying global governance,³ international organizations (IOs)⁴ and regionalism.⁵ From these various perspectives, what has emerged clearly is that a multidisciplinary approach is not capable of capturing all the implications related to these issues, which means that it becomes crucial to combine different fields of research. In this context, the use of concepts derived from both political science

and law has turned out to be extremely effective, such as in the case of regime theory being used to explain the formation of global regulatory systems. This is why this book presents these two perspectives jointly, in its endeavor to define models of international and supranational legal integration.

Our aim, therefore, is threefold. First, we map and outline models of regional integration by studying their institutional design and processes of governance. Second, we extend our analysis to IOs and other international regimes, to identify which techniques are capable of governing complex global legal systems. Third, we offer a toolbox of institutional processes and legal mechanisms, which may be adopted by current or new projects of international and supranational integration, such as ASEAN. We address these


Chapter 1 assesses the empirical models of formalization, based on a large sample of existing organizations across all continents. The chapter unveils the structure of formal commitments used in integration and other international organizations. It focuses on the formal mechanisms that secure “credible commitments.” Credible commitments result from institutional design which comprises a number of instruments: the regulation of membership; the institutional structure of integration organizations; the decision-making procedure; the nature of derived norms and the mechanisms for their incorporation into national orders; and the mechanisms of jurisdictional control, supervision and scrutiny. Each of these serves to “lock” participants into integration schemes, and restricts their freedom to withdraw from accepted commitments. The chapter does not explore the causality link between informal/formal integration, nor does it “measure” informal integration or consider the achievements gained under informal integration. The chapter examines the structure of formalized institutional commitments, by looking at the organs for decision-making, the procedures for taking decisions and the model of derived norms. It also provides a classification of the different integration schemes by examining the relationship between an integration organization’s

objectives and the formal instruments available to it for generating credible commitments. As the thesis of this chapter is that the objectives of regional integration organizations inspire a given institutional structure, it will also examine the kind of objectives existing within integration organizations. A data set comprising the institutional features of eighty-five integration and/or international organizations provides the empirical evidence underlying the arguments of this chapter. The analysis will show that States entering regional (and other) organizations accept formal commitments to achieve their goals with the expectation that other participant States will reciprocate, and it will also examine how this happens.

Chapter 2 focuses on the legal mechanisms and instruments that drive the development of international regimes, their institutional features and their functioning. To outline and critically describe the typology of international organizations and their regimes, and to identify the main legal techniques of governance, the analysis will cover most of the eighty-five international and regional organizations examined in Chapter 1 (such as the EU, ECOWAS, MERCOSUR and ASEAN), as well as other international institutions of both intergovernmental and hybrid public–private nature (such as the ISO and ICANN). In this chapter, the perspective

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PREFACE

adopted is essentially a “managerial” one, which seeks to avoid bias connected to any given political objective. International regimes have increasingly been using accountability mechanisms, but principally to ensure their own efficiency and effectiveness rather than to address any democratic gaps. In other words, the need to enhance the legitimacy and accountability of IOs has a functional reason; this is confirmed by the fact that all regimes tend to adopt similar mechanisms regardless of the degree of “democracy” they may present. The focus will therefore be on a classification of IOs, and on the common threads in the development of international regimes and their mechanisms for ensuring accountability: the increasing differentiation and separation of functions – the “legislative” (norm-making), “judicial” (dispute settlement) and executive-administrative ones; the emergence of intra- and inter-IO institutional pluralism; the growing degree of proceduralization; the need for multiple forms of legitimacy and the adoption of different mechanisms for accountability. These threads may not all occur simultaneously in every regime, and there are many asymmetries. One thread may be more common than another. See, for example, the different ways in which international administrations emerge: these are stronger in global private regimes or in political unions (such as the EU), but weaker in free trade areas. This analysis will enable the main techniques of governance and models of legal integration beyond the State to be


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identified: indirect rule, role-splitting and normative supremacy.\textsuperscript{10} All these techniques can be productively adopted at various levels, in the pursuit of international and supranational legal integration.\textsuperscript{11}

This book offers the first comprehensive overview and conceptualization of different models of international and supranational integration. It illustrates which governance processes and institutional choices – and how and why – are developed by regional organizations. It also displays which legal instruments – regulatory, organizational, procedural – are adopted to achieve integration. It explains how different objectives can influence institutional design and the integration model: for example, a free trade area could insist only on supremacy and refrain from adopting instruments for indirect rule, while a political union would rather engage with all available techniques in all their possible declinations: from the most sophisticated (such as preliminary ruling by domestic judges) to the most effective (such as “higher law” clauses). Finally, this book aims to provide academics and practitioners with a toolbox of concepts that may be fruitfully used


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PREFACE

regardless of whether the “pendulum” swings towards “nationalism” or “transnationalism, federalism, or [a] broad grouping of states.”

The book further includes, as a study by Omri Sender, a detailed comparative overview of the design and role of secretariats serving selected regional organizations. Secretariats are the organs to which supra-State delegation happens (when it actually happens), and in trying to understand the potential and constraints of institutionalized international cooperation, their role should not be overlooked. The detailed parallels of operating experiences provided in the study offer a wealth of empirical evidence, and some general observations, to consider together with the thesis presented in Chapters 1 and 2.

Carlos Closa and Lorenzo Casini
Madrid and Rome

# Abbreviations

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<th>Abbreviation</th>
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<tr>
<td>AAEU</td>
<td>Agreement on Arab Economic Unity</td>
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<td>ACP</td>
<td>Africa, Caribbean, Pacific Group of States</td>
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<td>ACS</td>
<td>Association of Caribbean States</td>
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<td>AEC</td>
<td>African Economic Community</td>
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<td>AFTA</td>
<td>African Free Trade Area</td>
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<td>AfTA</td>
<td>Asian Free Trade Area</td>
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<td>ALADI</td>
<td>Asociación Latinoamericana de Integración</td>
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<td>ALBA</td>
<td>Alternativa Bolivariana de las Américas</td>
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<tr>
<td>ANZCERTA</td>
<td>Australia New Zealand Closer Economic Agreement</td>
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<td>APEC</td>
<td>Asia Pacific Economic Cooperation</td>
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<td>APSA</td>
<td>African Peace and Security Architecture</td>
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<td>ASEAN</td>
<td>Association of South East Asian Nations</td>
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<td>ATJ</td>
<td>Andean Tribunal of Justice</td>
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<td>AU</td>
<td>African Union</td>
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<td>BMC</td>
<td>Budget and Management Committee (APEC)</td>
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<td>CACJ</td>
<td>Central American Court of Justice</td>
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<td>CACM</td>
<td>Central American Common Market</td>
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<tr>
<td>CAN</td>
<td>Community of Andean Nations</td>
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<td>CARICOM</td>
<td>Caribbean Community</td>
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<td>CCJ</td>
<td>Caribbean Court of Justice</td>
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<td>CDS</td>
<td>South American Defense Council</td>
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<td>CEFTA</td>
<td>Central European Free Trade Agreement</td>
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<td>Abbreviation</td>
<td>Full Name</td>
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<tr>
<td>CEMAC</td>
<td>Communauté Économique et Monétaire de l’Afrique Centrale</td>
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<td>CEN-SAD</td>
<td>Community of Sahel-Saharan States</td>
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<td>CENTO</td>
<td>Central Treaty Organization</td>
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<td>CFA</td>
<td>Communauté Financière Africaine</td>
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<td>CHF</td>
<td>Swiss francs</td>
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<td>CIS</td>
<td>Commonwealth of Independent States</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>CLACS</td>
<td>Community of Latin American and Caribbean States</td>
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<td>CMA</td>
<td>Common Monetary Area</td>
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<td>CMC</td>
<td>Common Market Council (MERCOSUR)</td>
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<td>CO</td>
<td>Coordinated Organizations</td>
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<td>CoE</td>
<td>Council of Europe</td>
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<td>COMESA</td>
<td>Common Market for Eastern and Southern Africa</td>
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<tr>
<td>DFAIT</td>
<td>Department of Foreign Affairs and International Trade</td>
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<td>DLS</td>
<td>Department of Legal Services</td>
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<td>EA Summit</td>
<td>East Asian Summit</td>
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<td>EAC</td>
<td>East African Community</td>
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<td>EACJ</td>
<td>East African Court of Justice</td>
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<td>EAEC</td>
<td>East Asia Economic Caucus</td>
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<td>EALA</td>
<td>East African Legislative Assembly</td>
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<td>EASA</td>
<td>European Aviation Safety Agency</td>
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<td>EC</td>
<td>European Community</td>
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<td>ECCAS</td>
<td>Economic Community of Central African States</td>
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LIST OF ABBREVIATIONS

ECHA European Chemicals Agency
ECJ European Court of Justice
ECLAC UN Economic Commission for Latin America and the Caribbean
ECO Economic Cooperation Organization
ECOWAS Economic Community of West African States
EEA European Economic Area
EEC European Economic Community
EES European Economic Space
EFSA European Food Safety Authority
EFTA European Free Trade Association
EPO European Patent Organization
ESO EFTA Statistical Office
EU European Union
EUI European University Institute
FAO Food and Agriculture Organization
FMSN Frente Farabundo Martí de Salvación Nacional
FOCEM Structural Convergence Fund for MERCOSUR
FSA Financial Services Authority
GAFTA Greater Arab Free Trade Area
GATT General Agreement on Tariffs and Trade
GCC Cooperation Council for the Arab States of the Gulf
GMC Common Market Group (MERCOSUR)
GUAM Organization for Democracy and Economic Development (ODED-GUAM)