INVESTING THE ASEAN WAY

In recent decades, Southeast Asia has become one of the world’s most popular destinations for foreign investment. The member states of the Association of Southeast Asian Nations (ASEAN) have employed varying modalities to pursue first security and then economic cooperation. This book explores regional law and governance in ASEAN through the lens of its regulation of foreign investment. It adopts a new framework to identify the unique ontological autonomy of the ASEAN Investment Regime beyond a simple aggregation of its individual member states. It deploys a sociology-led approach (especially constructivism) and emphasizes ideational factors (such as culture and norms) that guide state actions from within. The book explores the manner in which ASEAN’s history and culture have fundamentally shaped its foreign investment policies, leading to outcomes that often depart fundamentally from the external structure and script of Global Investment Law.

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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
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The Association of Southeast Asian Nations (ASEAN), comprising the ten member states of Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the 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.
INVESTING THE ASEAN WAY
Theories and Practices of Economic Integration in Southeast Asia

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*page 74*
This book aims to capture the complex history and culture of the Association of Southeast Asian Nations (ASEAN) as a way of understanding and evaluating the creation and utility of external and internal investment norms. ASEAN is our dominant analytical focus in this book as, we argue, its precepts have fundamentally configured the norms of international investment within the broader universe of bilateral investment treaties (BITs) and investment chapters under free trade agreements (FTAs) concluded by ASEAN member states. In doing so, this book critiques the clichéd assumption that thick (Western) legalization settings are the correct normative baseline for the ASEAN economic integration agenda.

In our view, this flaw is attributable to the unwillingness of the conventional scholarship on international investment law to interrogate the central assumptions underpinning the norms constructed around the protection of foreign investment, particularly as to their utility in a regional integration scheme.\(^1\) The end result is a restatement of analytical positions and normative claims with a heavy focus on the benefits of third-party adjudication which seem especially poorly suited to

\(^{1}\) For a rare and insightful analysis on how regional initiatives are fundamentally reshaping international regimes on trade and investment, see Damian Chalmers & Julia Slupska, *The Regional Remaking of Trade and Investment Law*, 30 (1) EUR. J. INT’L L. 169–7 (2019).
the ASEAN context. In this regard, this book intends to “shift the needle” in scholarly and policy discourse.

Our goal, however, is not to only focus on the development of treaty rules within ASEAN on foreign investment. Within the existing literature, there is already thoughtful and insightful engagement with the specific norms on foreign investment under the ASEAN treaties.\(^2\) In fact, there are a number of existing books that already offer this type of dominant focus on investment law. We seek instead to investigate those norms against theories of economic integration in order to generate robust assessment as to strengths and weaknesses of the ASEAN investment project (which are combined in Chapters 5 and 6, the Conclusion).

It would be remiss of this book not to address the recent turbulence in international economic relations and their inevitable impacts on ASEAN economic integration. To be sure, a double tribulation of the United States–China trade war and the outbreak of the COVID-19 pandemic has dealt a blow to the ASEAN economy. Yet, it has also demonstrated remarkable levels of resiliency. While Asia’s trade volume had contracted by 10 percent on a year-on-year basis by May 2020, “high frequency indicators” such as global

shipping, packaging indexes and port calls, herald Asia’s faster-than-expected economic rebound.3

In fact, Southeast Asia remains the most integrated area in Asia (driven by trade and investment) as measured by the Asia-Pacific Regional Cooperation and Integration Index (ARCII).4 The pandemic has accelerated recent regionalization trends in ASEAN,5 which have pushed intra-ASEAN trade fourfold from 2010 to 2017.6 The United States–China trade war as well as the increasing labor cost in China have forced foreign investors to source their manufacturing to ASEAN members. In fact, Google and LG have already shifted their smartphone assembly operations to Vietnam. Malaysia has become the third-largest solar-cell-module maker outside of China, as it has launched manufacturing capacity of 4.3 gigawatts. Thailand has recently announced an ambitious plan of becoming an “electric vehicle hub” in next five years by popularizing electric buses and taxis for government and public transportation uses.7

This auspicious background lends credence to the main thesis of this book that timely economic integration within ASEAN, both deep and broad, is necessary to boost

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4 Id. at xx.
7 Id.
PREFACE

the post-pandemic recovery.8 Here, the ASEAN characteristics are uniquely situated to incentivize foreign investment into the region. In comparison to its equivalents in Europe or North America, the ASEAN Investment Regime (AIR) is distinct in the sense that it has evolved against the background of open regionalism as well as a robust working relationship between the government and the business sector.9 Thus, any future legal and institutional upgrading of the AIR must be able to harness these rich traditions to contribute effectively to the common prosperity of the region. In particular, the clichéd Western style of formal legalism must be rethought and reinvented in a way which complements, rather than supplants, the deep-rooted cultural forestructures within the region.

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. The
GENERAL EDITORS’ PREFACE

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 an additional 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.
GENERAL EDITORS’ PREFACE

Comparative law is also about convergence: it is a potent tool and means to understand how 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 insights 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 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 of the 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 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
ACKNOWLEDGMENTS

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SD Myers v. Canada

Philippe Gruslin v. Malaysia
Philippe Gruslin v. Malaysia, ICSID No. ARB/99/3, Award (Nov. 27, 2000).

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- **Yaung Chi Oo v. Myanmar**
  - *Yaung Chi Oo Trading Pte Ltd. v. Gov’t of the Union of Myanmar*, ASEAN I.D. Case No. ARB 01/1 (Mar. 31, 2003), 42 ILM 540 (2003).

- **SGS v. Philippines**
  - *SGS Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (Jan. 29, 2004).

- **Malaysian Historical Salvors Award on Jurisdiction**
  - *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction (May 17, 2007).

- **Desert Line Projects v. Yemen**
  - *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award (Feb. 6, 2008).

- **Malaysian Historical Salvors Annulment Decision**

- **Churchill Mining v. Indonesia**
  - *Churchill Mining PLC & Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 & 12/40, Award (Dec. 6, 2016).

- **Lao Holdings v. Laos**
  - *Lao Holdings N.V. v. The Lao People’s Democratic Republic*, ICSID Case No. ARB (AF)/12/6, Award (Aug. 6, 2019).
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Reparation case

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ICM Agriculture v. Commonwealth
ICM Agric. Pty, Ltd. v. Commonwealth, [2009] HCA 51, 81–86 (French, C.J., Gummow, & Crennan, JJ.); id. at 142–54 (Hayne, Kiefel, & Bell, JJ.).
ABBREVIATIONS

ACIA  ASEAN Comprehensive Investment Agreement
ADB  Asian Development Bank
AEC  ASEAN Economic Community
AFTA  ASEAN Free Trade Area
AHKFTA  ASEAN–Hong Kong Free Trade Agreement
AIA  ASEAN Investment Area
AIR  ASEAN Investment Regime
APEC  Asia-Pacific Economic Cooperation
ARCII  Asia-Pacific Regional Cooperation and Integration Index
ASA  Association of Southeast Asia
ASEAN  Association of Southeast Asian Nations
ASEAN Charter of the Association of Southeast Asian Nations
BIT  Bilateral Investment Treaty
CAI  EU–China Comprehensive Agreement on Investment
CCI  Coordinating Committee on Investment
CEP  Comprehensive Economic Partnership
CIM  Contract Intensive Money
COVID-19  Coronavirus Disease 2019
CPTPP  Comprehensive and Progressive Agreement for Trans-Pacific Partnership

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LIST OF ABBREVIATIONS

DNA  Deoxyribonucleic Acid
DSB  Dispute Settlement Body
EEC  European Economic Community
EFTA  European Free Trade Association
EU  European Union
EVSL  Early Voluntary Sectoral Liberalization
FAO  Food and Agricultural Organization
FDI  Foreign Direct Investment
FTA  Free Trade Agreement
GATS  General Agreement on Trade in Services
GATT  General Agreement on Tariffs and Trade
GDP  Gross Domestic Product
GIL  Global Investment Law
GVC  Global Value Chain
HIV/AIDS  Human Immunodeficiency Virus/Immunodeficiency Syndrome
ICJ  International Court of Justice
ICR  Interstate Cooperative Regime
ICSID  International Centre for Settlement of Investment Disputes
ICSID Convention  Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IMF  International Monetary Fund
IO  International Organization
IR  International Relations
ISDS  Investor-State Dispute Settlement
MFN  Most-Favored-Nation
MNE  Multinational Enterprise
MRA  Mutual Recognition Arrangement

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# List of Abbreviations

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<th>Abbreviation</th>
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<tr>
<td>NAFTA</td>
<td>North American Free Trade Area</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<td>PECC</td>
<td>Pacific Economic Cooperation Council</td>
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<tr>
<td>RCEP</td>
<td>Regional Comprehensive Economic Partnership</td>
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<td>ROO</td>
<td>Rules of Origin</td>
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<td>SME</td>
<td>Small or Medium-sized Enterprise</td>
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<td>SOM</td>
<td>Senior Officials Meeting</td>
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<td>TRIMs</td>
<td>Trade-Related Investment Measures</td>
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<td>TRN</td>
<td>Trans-governmental Regulatory Network</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<td>UNCTAD</td>
<td>United Nations Conference on Trade and Development</td>
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<td>USTR</td>
<td>United States Trade Representative</td>
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<td>VAP</td>
<td>Vientiane Action Programme</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>WHO</td>
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