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.

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COMPARATIVE REGIONAL INTEGRATION

Governance and Legal Models

CARLOS CLOSA AND LORENZO CASINI

With a Study by Omri Sender on International Secretariats in Comparative Perspective

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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 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

PREFACE

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

[1] See S. Cassese, *Relations between International Organizations and National Administrations*, International Institute of Administrative Sciences, Proceedings of the XIXth International Congress of Administrative Sciences (London: Kluwer Law and Taxation Publishers, 1983).

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 mono-disciplinary 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

[2] A.-M. Slaughter, *A New World Order* (Princeton University Press, 2004); E. Kinney, "The Emerging Field of International Administrative Law: Its Contents and Potential," 54 *Administrative Law Review* 415 (2002); B. Kingsbury, N. Krisch and R. B. Stewart, "The Emergence of Global Administrative Law," 68 *Law and Contemporary Problems* 15 (2005).

[3] For a multidisciplinary approach, see K.-H. Ladeur (ed.), *Public Governance in the Age of Globalization* (Aldershot: Ashgate, 2004); D. Held and M. Koenig-Archibugi (eds.), *Taming Globalization: Frontiers of Governance* (London: Polity Press, 2003).

[4] J. Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press, 2nd edn, 2009); H. G. Schermers and N. M. Blokker, *International Institutional Law, Unity Within Diversity* (Leiden: Martinus Nijhoff, 5th edn., 2011); J. E. Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005).

[5] *Inter alia*, A. Acharya, "The Emerging Regional Architecture of World Politics," 59:4 *World Politics* 629–652 (2007); P. J. Katzenstein, *A World of Regions: Asia and Europe in the American Imperium* (Ithaca, NY: Cornell University Press, 2005); E. D. Mansfield and E. Solingen, "Regionalism," 13:1 *Annual Review of Political Science* 145–163 (2010); A. Panagariya, "The Regionalism Debate: An Overview," 22:4 *The World Economy* 477–512 (1999).

and law has turned out to be extremely effective,[6] such as in the case of regime theory being used to explain the formation of global regulatory systems.[7] 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

[6] W. Mattli and N. Woods (eds.), *The Politics of Global Regulation* (Princeton University Press, 2009); also, J. Pauwelyn, R. Wessel and J. Wouters (eds.), *Informal International Lawmaking: Mapping the Action and Testing Concepts of Accountability and Effectiveness* (Oxford University Press, 2012).

[7] See J. G. Ruggie, "International Responses to Technology: Concepts and Trends," 29 *International Organization* 557 (1975); and S. D. Krasner (ed.), *International Regimes* (London: Cornell University Press, 1983), particularly S. D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," pp. 1 *et seq*., and R. O. Keohane, "The Demand for International Regimes," pp. 141 *et seq*.; and B. Simma, "Self-Contained Regimes," 16 *Netherlands Yearbook* 111 (1985). See also B. Simma and D. Pulkowski, "Of Planets and the Universe: Self-Contained Regimes in International Law," 17 *European Journal of International Law* 483 (2006); A. Hasenclever, P. Mayer and V. Rittberger, *Theories of International Regimes* (Cambridge University Press, 1997); and V. Rittberger (ed.), *Regime Theory and International Relations* (Oxford: Clarendon Press, 1993).

aims in two chapters, both based on the idea that integration is a formal process.[8]

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

[8] See the seminal work by M. Cappelletti, M. Seccombe and J. H. H. Weiler (eds.), *Integration Through Law: Europe and the American Federal Experience* (Berlin and New York: Walter de Gruyter, 1985) (6 vols.) (see especially vol. I entitled *Methods, Tools, and Institutions*).

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).[9] In this chapter, the perspective

[9] Union of International Associations, *Yearbook of International Organizations* (Brussels: Union of International Associations, 48th edn., 2011); B. Kingsbury, N. Krisch and R. B. Stewart, "The Emergence of Global Administrative Law," 68 *Law and Contemporary Problems* 15 (2005); and on the 100-odd cases examined in S. Cassese *et al.*, *Global Administrative Law: The Casebook* (Rome, New York and Edinburgh:

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

IRPA-IILJ, 3rd edn., 2012); A. Berman, S. Duquet, J. Pauwelyn, R. Wessel and J. Wouters (eds.), *Informal International Lawmaking: Case Studies* (The Hague: TOAE, 2012).

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

[10] G. Scelle, "Le droit public et la théorie de l'État," in G. Scelle *et al.* (eds.), *Introduction à l'étude du droit*, vol. I (Paris: Arthur Rousseau, 1951), pp. 32 *et seq*.; and S. Cassese, "Le droit tout puissant et unique de la société. Paradossi del diritto amministrativo," *Rivista Trimestrale di Diritto Pubblico* 895 (2010).

[11] For a similar approach in the context of the European Community, see the chapters by G. Gaia, P. Hay and R. Rotunda, in M. Cappelletti, M. Seccombe and J. H. H. Weiler (eds.), *Integration Through Law: Europe and the American Federal Experience* (Berlin and New York: Walter de Gruyter, 1985) (6 vols.), vol. I, Book 2, *Political Organs, Integration Techniques and Judicial Process*, pp. 113 *et seq*.

regardless of whether the "pendulum" swings towards "nationalism" or "transnationalism, federalism, or [a] broad grouping of states."[12]

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.

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[12] M. Cappelletti, "Foreword" to P. Hay and R. D. Rotunda, *The United States Federal System* (Milan: Giuffrè, 1982), p. xi.

ABBREVIATIONS

AAEU	Agreement on Arab Economic Unity
ACP	Africa, Caribbean, Pacific Group of States
ACS	Association of Caribbean States
AEC	African Economic Community
AFTA	African Free Trade Area
AfTA	Asian Free Trade Area
ALADI	Asociación Latinoamericana de Integración
ALBA	Alternativa Bolivariana de las Américas
ANZCERTA	Australia New Zealand Closer Economic Agreement
APEC	Asia Pacific Economic Cooperation
APSA	African Peace and Security Architecture
ASEAN	Association of South East Asian Nations
ATJ	Andean Tribunal of Justice
AU	African Union
BMC	Budget and Management Committee (APEC)
CACJ	Central American Court of Justice
CACM	Central American Common Market
CAN	Community of Andean Nations
CARICOM	Caribbean Community
CCJ	Caribbean Court of Justice
CDS	South American Defense Council
CEFTA	Central European Free Trade Agreement

LIST OF ABBREVIATIONS

CEMAC	Communauté Économique et Monétaire de l'Afrique Centrale
CEN-SAD	Community of Sahel-Saharan States
CENTO	Central Treaty Organization
CFA	Communauté Financière Africaine
CHF	Swiss francs
CIS	Commonwealth of Independent States
CJEU	Court of Justice of the European Union
CLACS	Community of Latin American and Caribbean States
CMA	Common Monetary Area
CMC	Common Market Council (MERCOSUR)
CO	Coordinated Organizations
CoE	Council of Europe
COMESA	Common Market for Eastern and Southern Africa
DFAIT	Department of Foreign Affairs and International Trade
DLS	Department of Legal Services
EA Summit	East Asian Summit
EAC	East African Community
EACJ	East African Court of Justice
EAEC	East Asia Economic Caucus
EALA	East African Legislative Assembly
EASA	European Aviation Safety Agency
EC	European Community
ECCAS	Economic Community of Central African States

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)