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978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu, Rob McLaughlin, Donald R. Rothwell, See Seng Tan

Frontmatter

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THE LEGAL AUTHORITY OF ASEAN AS A SECURITY INSTITUTION

The Association of Southeast Asian Nations (ASEAN) has achieved deeper regional market integration to lay a socio-economic foundation for the development of a regional community, yet inter-state trust is by no means assured as Southeast Asian nations remain steadfast in maintaining their political regime stability against external interference. However, through its institutional practices, ASEAN has emerged as a distinct model of security institution, while the region's contemporary security landscape has diversified with various non-traditional security issues. By looking beyond the veneer of diplomacy and prevailing political circumstances, this book examines the legal nature and form of ASEAN's authority to address diverse regional security issues. It provides a fresh perspective on ASEAN's role as a security institution. With an interdisciplinary analysis, this book reveals the normative role that ASEAN plays in facilitating the processes of norm development, localisation and internalisation as it deals with contemporary security challenges confronting Southeast Asia.

HITOSHI NASU is Professor of International Law at the University of Exeter. He is an expert of public international law, especially in the fields of international security law and the law of armed conflict. He is the author of *International Law on Peacekeeping* (2009) and co-editor of *Human Rights in the Asia-Pacific Region: Towards Institution Building* (2011), *Asia-Pacific Disaster Management* (2013), *New Technologies and the Law of Armed Conflict* (2014), and *Legal Perspectives on Security Institutions* (2015).

Cambridge University Press

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Frontmatter

[More Information](#)

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Frontmatter

[More Information](#)

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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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.

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Frontmatter

[More Information](#)

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Frontmatter

[More Information](#)

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 Frontmatter
[More Information](#)

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CONTENTS

List of Tables page x
General Editors’ Preface xi
Preface xvii
Table of Cases xx
Table of Legislation and National Policy xxi
*Table of Treaties and Other International
Instruments* xxviii
List of Abbreviations xli

Introduction 1

1. ASEAN as a Security Institution: Its Legal, Normative and
Institutional Framework 14
1.1 Defining ASEAN as a ‘Security Institution’ 14
1.2 Characterising ASEAN’s Role in Regional Security 15
1.3 ASEAN’s Legal Framework for Regional Security 21
1.4 ASEAN’s Normative Framework for Regional
Security 26
1.4.1 The Principle of Non-Interference 27
1.4.2 The Principle of Comprehensive Security 31
1.4.3 The ‘ASEAN Way’: The Institutional Decision-
Making Principle 35
1.4.4 The Principle of Shared Commitment and
Collective Responsibility 39
1.5 ASEAN’s Institutional Framework for Regional
Security 42
1.6 The Legal Parameters of ASEAN’s Authority
as a ‘Security Institution’ 52

Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu , Rob McLaughlin , Donald R. Rothwell , See Seng Tan

Frontmatter

[More Information](#)

CONTENTS

2. Nuclear Security 54
 - 2.1 Introduction 54
 - 2.2 ASEAN's Engagement with Nuclear Security 56
 - 2.3 Nuclear Security Law and Policy in ASEAN Member States 63
 - 2.4 ASEAN's Institutional Evolution for Nuclear Energy Regulation 73
 - 2.5 Concluding Observations 76
3. Counter-Terrorism 78
 - 3.1 Introduction 78
 - 3.2 ASEAN's Engagement with Counter-Terrorism 81
 - 3.3 Counter-Terrorism Law and Policy in ASEAN Member States 96
 - 3.4 Concluding Observations 109
4. Maritime Security 112
 - 4.1 Introduction 112
 - 4.2 ASEAN's Engagement with Maritime Security 114
 - 4.3 Maritime Security Law and Policy in ASEAN Member States 121
 - 4.4 ASEAN's Engagement with the South China Sea Dispute 130
 - 4.5 Concluding Observations 137
5. Cyber Security 139
 - 5.1 Introduction 139
 - 5.2 ASEAN's Engagement with Cyber Security 142
 - 5.3 Cyber Security Law and Policy in ASEAN Member States 148
 - 5.4 ASEAN's Role in Cyber Warfare 156
 - 5.5 Concluding Observations 159
6. Human Trafficking and People Smuggling 161
 - 6.1 Introduction 161
 - 6.2 ASEAN's Response to Human Trafficking 164
 - 6.3 ASEAN's Response to People Smuggling 175

CONTENTS

- 6.4 Legal and Policy Responses to Human Trafficking and
People Smuggling in ASEAN Member States 179
- 6.5 Concluding Observations 189
- 7. Food Security 191
 - 7.1 Introduction 191
 - 7.2 ASEAN’s Engagement with Food Security 194
 - 7.3 Comparison with APEC’s Food Security Policy 200
 - 7.4 Food Security Law and Policy in ASEAN Member
States 203
 - 7.5 Concluding Observations 209
- Conclusion 211
- Bibliography* 223
- Index* 262

T A B L E S

Table 2.1	Status of Nuclear Security-Related Treaties and Legislation	<i>page 65</i>
Table 3.1	Status of Counter-Terrorism Treaties and Legislation	99
Table 4.1	Status of Maritime Security-Related Treaties and Legislation	124
Table 5.1	Status of Cyber Security-Related Treaty and Legislation	150
Table 6.1	Status of UN Trafficking Protocol, Legislation and TIP Ranking	185
Table 6.2	Status of UN Smuggling Protocol and Legislation	187

Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu , Rob McLaughlin , Donald R. Rothwell , See Seng Tan

Frontmatter

[More Information](#)

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 realisation 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

GENERAL EDITORS' PREFACE

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)

GENERAL EDITORS' PREFACE

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 institutionalisation 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 policy-making.

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 sixty-two 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 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,

Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu , Rob McLaughlin , Donald R. Rothwell , See Seng Tan

Frontmatter

[More Information](#)

GENERAL EDITORS' PREFACE

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 organisation 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

Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu , Rob McLaughlin , Donald R. Rothwell , See Seng Tan

Frontmatter

[More Information](#)

PREFACE

The Association of Southeast Asian Nations (ASEAN) has celebrated a fiftieth anniversary in 2017. Its history, development and achievements are all remarkable for an institution that started as an informal arrangement of geographically proximate states with diverse political, economic, cultural and religious traditions and interests. The volume of academic literature and policy study has grown, particularly since the end of the Cold War, with many devoted to the assessment of ASEAN's role in and contribution to regional security. Despite the significance of such literature to the understanding of ASEAN and its role in regional security, there is a need for fresh perspectives with a more objective, legal assessment of ASEAN's authority to address regional security issues.

The intention of this book is to present ASEAN as a distinct model of security institution, different to a collective security institution or an integrated regional institution, by critically evaluating the normative role of ASEAN in light of regional principles and application thereof in practice. We are keenly aware of the importance of understanding the historical, geopolitical and socio-cultural backgrounds to inform legal inquiries into ASEAN's authority in regional security and therefore sought guidance from a variety of regional security experts so that our legal inquiry is reflective of

PREFACE

a robust and up-to-date assessment of the socio-political environment of the region.

The outcome of the four-year-long collaborative research is compiled in this book. While all the authors exercised oversight of this research project and in preparation of the final manuscript, primary responsibility for research and writing of each chapter was allocated as follows: Chapter 1 (Nasu); Chapter 2 (McLaughlin); Chapter 3 (Tan); Chapter 4 (Rothwell); Chapter 5 (Nasu); Chapter 6 (Nasu); and Chapter 7 (Nasu). Hitoshi Nasu, as the lead author, took the overall editorial responsibility including the drafting of the Introduction and Conclusion. A substantial part of Chapter 3 has been reproduced from: See Seng Tan and Hitoshi Nasu, 'ASEAN and the Development of Counter-Terrorism Law and Policy in Southeast Asia' (2016) 39 *University of New South Wales Law Journal* 1219–38, with permission granted by the executive editor of the journal.

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Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu, Rob McLaughlin, Donald R. Rothwell, See Seng Tan

Frontmatter

[More Information](#)

PREFACE

Kim (Korea Maritime Institute), Masahiro Kurosaki (National Defence Academy of Japan), Futoshi Matsumoto (Institute for International Policy Studies), Hiroshi Ohta (Waseda University), Willem Pretorius (Australia-Asia Program to Combat Trafficking in Persons), Ainsley Stinson (UN Office on Drugs and Crime), Ian Storey (Institute of Southeast Asian Studies), Hsien-Li Tan (Centre for International Law, National University of Singapore), Ranyta Yusran (Centre for International Law, National University of Singapore), Joseph H. H. Weiler (European University Institute) and two anonymous reviewers.

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Finally, we thank our colleagues at the Australian National University and S. Rajaratnam School of International Studies and our respective families and friends for their support and encouragement.

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Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu , Rob McLaughlin , Donald R. Rothwell , See Seng Tan

Frontmatter

[More Information](#)

TABLE OF CASES

Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) [1986] ICJ Rep 14.

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Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu , Rob McLaughlin , Donald R. Rothwell , See Seng Tan

Frontmatter

[More Information](#)

TABLE OF LEGISLATION AND NATIONAL POLICY

Brunei Darussalam

Anti-Terrorism (Financial and Other Measures) Act 2002

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TABLE OF LEGISLATION AND NATIONAL POLICY

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Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu , Rob McLaughlin , Donald R. Rothwell , See Seng Tan

Frontmatter

[More Information](#)

TABLE OF LEGISLATION AND NATIONAL POLICY

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Law on Food 2012

Law on Immigration 2011

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TABLE OF LEGISLATION AND NATIONAL POLICY

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Proceeds of Unlawful Activities Act 2001

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Myanmar

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Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu , Rob McLaughlin , Donald R. Rothwell , See Seng Tan

Frontmatter

[More Information](#)

TABLE OF LEGISLATION AND NATIONAL POLICY

Act to Define the Baselines of the Territorial Sea of the
Philippines 1961 (amended in 1968 and 2009)

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Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu, Rob McLaughlin, Donald R. Rothwell, See Seng Tan

Frontmatter

[More Information](#)

TABLE OF LEGISLATION AND NATIONAL POLICY

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Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu , Rob McLaughlin , Donald R. Rothwell , See Seng Tan

Frontmatter

[More Information](#)

TABLE OF LEGISLATION AND NATIONAL POLICY

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TABLE OF TREATIES AND OTHER
INTERNATIONAL INSTRUMENTS

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Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu , Rob McLaughlin , Donald R. Rothwell , See Seng Tan

Frontmatter

[More Information](#)

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

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Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu , Rob McLaughlin , Donald R. Rothwell , See Seng Tan

Frontmatter

[More Information](#)

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

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xxx

Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu, Rob McLaughlin, Donald R. Rothwell, See Seng Tan

Frontmatter

[More Information](#)

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

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Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu, Rob McLaughlin, Donald R. Rothwell, See Seng Tan

Frontmatter

[More Information](#)

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

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Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu, Rob McLaughlin, Donald R. Rothwell, See Seng Tan

Frontmatter

[More Information](#)

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

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Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu, Rob McLaughlin, Donald R. Rothwell, See Seng Tan

Frontmatter

[More Information](#)

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

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Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu, Rob McLaughlin, Donald R. Rothwell, See Seng Tan

Frontmatter

[More Information](#)

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

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Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu, Rob McLaughlin, Donald R. Rothwell, See Seng Tan

Frontmatter

[More Information](#)

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

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Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu, Rob McLaughlin, Donald R. Rothwell, See Seng Tan

Frontmatter

[More Information](#)

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

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Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu , Rob McLaughlin , Donald R. Rothwell , See Seng Tan

Frontmatter

[More Information](#)

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

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Commonwealth of Independent States in Combating
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Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu, Rob McLaughlin, Donald R. Rothwell, See Seng Tan

Frontmatter

[More Information](#)

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

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Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu , Rob McLaughlin , Donald R. Rothwell , See Seng Tan

Frontmatter

[More Information](#)

TREATIES AND OTHER INTERNATIONAL INSTRUMENTS

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ABBREVIATIONS

ACCT	ASEAN Convention on Counter Terrorism
ACWC	ASEAN Commission on the Promotion and Protection of the Rights of Women and Children
ADMM	ASEAN Defence Ministers' Meeting
AERR	ASEAN Emergency Rice Reserve
AICHR	ASEAN Intergovernmental Commission on Human Rights
AIFS	ASEAN Integrated Food Security
APEC	Asia-Pacific Economic Cooperation
APTERR	ASEAN Plus Three Emergency Rice Reserve
ARF	ASEAN Regional Forum
ASEAN	Association of Southeast Asian Nations
ASEANTOM	ASEAN Network of Regulatory Bodies on Atomic Energy
CERT	Computer Emergency Response Team
COMMIT	Coordinated Mekong Ministerial Initiative against Trafficking
CSCE	Conference on Security and Co-operation in Europe
CTTC	Counter-Terrorism and Transnational Crime

LIST OF ABBREVIATIONS

CUES	Code for Unplanned Encounters at Sea
DOC	Declaration on the Conduct of Parties in the South China Sea
DPRK	Democratic People’s Republic of Korea
EAS	East Asia Summit
EAERR	East Asia Emergency Rice Reserve
ETS	European Treaty Series
EU	European Union
FAO	Food and Agricultural Organization
IAEA	International Atomic Energy Agency
ICT	Information and Communications Technology
IMO	International Maritime Organization
Lao PDR	Lao People’s Democratic Republic
LOSC	Law of the Sea Convention
MLAT	Mutual Legal Assistance Treaty
NEC-SSN	Nuclear Energy Cooperation Sub-Sector Network
OECD	Organisation for Economic Co-operation and Development
OSCE	Organization on Security and Co-operation in Europe
PRC	People’s Republic of China
ReCAAP	Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia
SAARC	South Asian Association for Regional Cooperation
SOM	Senior Officials Meeting

LIST OF ABBREVIATIONS

SOMTC	Senior Officials Meeting on Transnational Crime
SPA-FS	Strategic Plan of Action on Food Security
SUA	Suppression of Unlawful Acts against the Safety of Maritime Navigation
TAC	Treaty of Amity and Cooperation in Southeast Asia
TIP	Trafficking in Persons
UK	United Kingdom
UN	United Nations
UNCTAD	UN Conference on Trade and Development
UNTS	UN Treaty Series
US	United States of America
ZOPFAN	Zone of Peace, Freedom and Neutrality

Cambridge University Press

978-1-108-70565-3 — The Legal Authority of ASEAN as a Security Institution

Hitoshi Nasu , Rob McLaughlin , Donald R. Rothwell , See Seng Tan

Frontmatter

[More Information](#)
