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Koh Kheng-Lian, Nicholas A. Robinson and Lye Lin-Heng

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## ASEAN ENVIRONMENTAL LEGAL INTEGRATION

While the environmental performance of most Association of Southeast Asian Nations (ASEAN) member states is above the world average, ASEAN nations will continue to face growing environmental challenges due to pressures exerted on them such as population growth, urbanization and industrialization. The authors of this book look at how the member states of ASEAN employ law as a means of regional integration within the context of environmental conservation. While the goal of new laws is to implement sustainable development, it continues to be an ongoing adaptive process, since clear and immediate answers to environmental challenges are rarely available. Readers of this book will gain a clear idea of the evolving cooperation for sustainability within ASEAN at regional and global levels, and the areas of focus for the future. The book will be of interest to policy and decision-makers, as well as environmental organizations and academics in the field.

**Koh Kheng-Lian** is Emeritus Professor at the Faculty of Law at the National University of Singapore, and former Director of the Asia-Pacific Centre for Environmental Law (APCEL). She was IUCN-Commission for Environmental Law Regional Vice-Chair for South and East Asia, and a member of its Steering Committee.

**Nicholas A. Robinson** is Gilbert and Sarah Kerlin Distinguished Professor Emeritus at Pace Law School, USA, and also serves as Adjunct Professor at the Yale School of Forestry & Environmental Studies. He was chair of the IUCN-Commission for Environmental Law, and Legal Advisor to IUCN.

**Lye Lin-Heng** is Director of the Asia-Pacific Centre for Environmental Law (APCEL) and former Vice-Dean of the Faculty of Law, National University of Singapore (NUS). She is Visiting Associate Professor at the Yale School of Forestry & Environmental Studies and former Vice-Chair of the IUCN Academy of Environmental Law and a member of its Board of Governors, representing South-east Asia.

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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.

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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.

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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

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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.

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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

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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

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## FOREWORD

It gives me pleasure to write the foreword to this important monograph by three good friends.

Emeritus Professor Koh Kheng-Lian, Emeritus Professor Nicholas A. Robinson and Associate Professor Lye Lin-Heng are three outstanding scholars of environmental law. Both Koh and Robinson have won the Elizabeth Haub Prize for Environmental Law. Koh was former IUCN–WCEL (International Union for Conservation of Nature–World Commission on Environmental Law ) Regional Vice-Chair for South and East Asia and a member of its Governing Board, and Robinson was former Chair of IUCN–WCEL and its Governing Board.

Koh initiated a course on ASEAN Environmental Law, Policy and Governance at the Faculty of Law, National University of Singapore (NUS), and has given extensive lectures on the subject in the University of Mexico, the William Richardson School of Law of the University of Hawaii, USA and also a number of law schools in the ASEAN countries.

Robinson and Lye co-teach Comparative Environmental Law at the School of Forestry at Yale University. Lye is the co-founder of the highly successful Master's program on Environmental Management at NUS, and teaches environmental law at NUS, Yale University and the University of Sydney. She is a member of the Board of Governors of the IUCN Academy of Environmental Law.

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## FOREWORD

ASEAN is undergoing a historic transition, from an association to a community by 2015. The adoption of the ASEAN Charter in 2008 was a turning point. ASEAN's ambition is to be a rule-based organization and to take its commitments seriously. It is in this context that the Centre for International Law, NUS and New York University's Law School have jointly launched a major research project on ASEAN integration and the role that law plays in this process.

This monograph is one of a series covering different aspects of ASEAN integration.

I am glad that environment has been included as one book in this series. As the authors have pointed out, over the past thirty-five years, ASEAN has enacted a large corpus of declarations, principles and treaties relating to the environment. My impression is that, in some cases, not all the ASEAN countries have ratified the agreements or implemented other instruments. In other cases, even if all ASEAN countries have ratified an agreement, the implementation has been less than satisfactory. This could be due to a lack of capacity or lack of political will or simply to bad governance. We must develop a culture of taking our commitments seriously.

I thank the authors for their honest evaluation of the progress ASEAN has achieved and for their recommendations on what ASEAN should do in the future. Southeast Asia has one of the world's richest biodiversity. It is also the home of some of the world's largest remaining rain forests. ASEAN countries are rapidly urbanizing. There is therefore much at stake environmentally. Let us hope that the leaders of ASEAN will heed the recommendations of the authors.

**Tommy Koh**

**Chair**

**Centre for International Law, NUS**



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The authors assume responsibility for any errors and omissions. This is the first study of its kind involving environmental law across the ASEAN member states, and the authors would be grateful to receive comments or suggestions from readers.