

Integration through Law: The ASEAN Way in a Comparative Context

*A Research Project on the Role of Law and the Rule of Law
in Asian Legal Integration*

Mission Statement

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I. Premise, Principal Objectives and Method

The Preamble to the ASEAN Charter concludes with a single decision: “We, the Peoples of the Member States of the Association of South East 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.

At the center of the research project will be the legal and institutional dimensions of ASEAN. To our knowledge, there has not to date been sustained research which has attempted to deal in a comprehensive manner with all principal *legal* issues involved in the complex reality which the Association represents.

At one level the primary and self-evident justification for this Research Project is the simple fact that the ASEAN Charter itself placed the legal and institutional at its core – as, arguably, its principal ‘added value’ to ASEAN’s prior incarnations.

However, there are deeper additional reasons.

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.”¹ 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.

The Integration Through Law (ITL) project will, thus, explore conceptually and pragmatically both the potential and the limitations of law in the ongoing ASEAN experience.

Areas of legal exploration will include but not be limited to:

- The substantive legal principles and substantive rules of the various ASEAN communities;

¹ ASEAN Charter, Preamble.

- The procedural legal principles and rules governing institutional structures and decision making processes;
- Implementation, Enforcement and Dispute Settlement.

The inquiry will attempt to locate the appropriate province of the law in this experience *i.e.* not only the role of law but also the areas which 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 will not be normative – it will not advocate. It will 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) have increased from 6 in 1991 to 166 this year with a further 62 in various stages of negotiations.

The project will attempt to assess these developments with a view towards evaluating their impact on ASEAN's objectives, but more importantly by constituting an important conceptual and policy toolkit for more broad Asian thinking and planning of different legal and institutional models of economic and political regional integration.

Methodologically, the project will be comparative in its orientation. Comparative Law is one of the few real-life laboratories which we have to assess, 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 burns.

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.

II. Scope, Intended Audiences

1. Academic, Intellectual and Conceptual

The proposed Project will be a marquee activity of the CIL@NUS. ITL is designed to make a signal contribution to scholarship.

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 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.

2. Policy Making

As stated, ITL is not designed to be a “Policy Bible” for the officers of ASEAN and the policy makers in its Member States. Policy making should be left to Policy Makers. The correct role of academia in the policy making process, and the role that ITL plans to play is to provide the policy makers with a hugely rich set of models, options and analyses which will enhance the policy making process. As the research project moves ahead it will produce a stream of Working Papers on myriad issues within its overall objectives which, it is hoped will be useful for the various policy making communities. It will conclude with a series of major publications which would constitute an ongoing source and resource for future policy debates and decision making.

3. Service to the Legal Communities of ASEAN and beyond

Where appropriate, under the auspices of the ITL project, authoritative texts, authored by leading scholars will be prepared on the various “rules based regimes” which are part of ASEAN. Knowledge of the law is, obviously, a pre-condition for successful implementation thereof.

4. Education

A major effort of ITL will be the preparation of Legal Teaching Resources in the form of Course Packs, model courses of the Law of ASEAN, teacher and practitioner training Seminars and

other activities designed to facilitate the acquisition in the relevant constituencies of the legal skills and knowledge necessary for the successful accomplishment of ASEAN's objectives, and, extending beyond ASEAN to equip lawyers and policy makers in the Region with the necessary toolkits to assess, evaluate, choose and operate from the vast number of models or Regional Trade Agreements.

5. Networking

ITL will not be only an inward looking project. In addition to scholars from within ASEAN and Asia it will involve scholars from all over the world – wherever there is a comparative experience which may enhance understanding of the options available to ASEAN and Asia. However, just as important as this intellectual traffic from outside towards ASEAN and Asia, will be the intellectual traffic from inside ASEAN and Asia towards the rest of the world.

A goal of the project will be to put ASEAN and Asian legal integration on the research and policy making agendas of the principal Research institutions and Think Tanks in Europe, the Americas and elsewhere. ITL will be designed to create a worldwide network of ASEAN and Asian centric scholars and thinkers.

III. Management of the Project

A Consultative Committee consisting notably of persons of relevant experience in the evolution of ASEAN will accompany the Project in all its phases.

The Project will be directed by Professor Joseph Weiler who holds a joint appointment at NYU School of Law and the National University of Singapore. Professor Michael Ewing-Chow from NUS will serve as Co-Director.

They will be joined by an Executive Director, Dr Tan Hsien-Li.

IV. Perspectives

We expect that "Integration through Law: The ASEAN Way in a Comparative Context" will become the focal point of discussion of models of cooperation and integration throughout Asia and will constitute a very important legal resource on ASEAN worldwide.

PROJECT DESIGN

The basic design is simple.

The Project will convene 4 Research Groups, each focused on one of the principal themes investigated. Each Research Group will be composed of leading, or very promising researchers from ASEAN, Asia more generally and other jurisdictions from which the comparative

experience is deemed relevant. Within each Group, typically two researchers will team up to co-author a joint paper or coordinate parallel papers. Investigators may also include officials of ASEAN teaming up with an academic scholar.

As indicated in the Mission Statement the Papers will aim both at an academic and scientific audience but will be relevant to the policy making communities.

It is envisaged that each Group (or sub-group where relevant) will hold an initial orientation meeting in which the overall orientation of the Group as well as the specific research questions, and methodology for the individual papers will be finalized. These meetings will be chaired by the directors.

Once the teams get down to work they will be encouraged and facilitated to meet at least once during the period of research and writing to ensure progress and coordination of the joint or parallel papers.

Two Plenaries are then envisaged: An “internal” Plenary, with all investigators the purpose of which will be to present first drafts, and to cross fertilize among the groups, and a second “external” Plenary, in which final drafts will be presented to the outside world of scholars and policy makers.

A final period of revision and editing will be allowed before publication of the studies in book form.

We envisage close cooperation between the investigators and ASEAN and Member States’ officials. Indeed, some officials will be invited to be co-investigators. We will also make provisions for the investigators to interview officials so that such officials will be able to act as living resources for the investigators.

The Research Groups and Sub-Groups

I. General Architecture Group

A. Objectives and Aspirations: Potential and Constraints

The purpose of this group will be to examine the objectives and principal means for their achievement through an analysis of the overall structure of ASEAN. The critical component will consist of an analysis of the match between ends and means, situated in the political, cultural, economic, social and historical context of the region. Both potential and constraints will be highlighted. It is in the context of this Group that a Prolegomena for a Theory of ASEAN Legal Integration will be developed.

1. The Aspirations of ASEAN in their Political and Cultural Context: Potential and Constraints

An international relations and a realpolitik analysis of the body and its member states and regional powers including an analysis of the competing institutions and initiatives.

2. The Aspirations of ASEAN in their Economic Context: Potential and Constraints

A macroeconomic analysis of the actual economic incentives and realities of ASEAN as a regional integrated economic entity including an analysis of the competing institutions and initiatives.

3. The Role of Law in the ASEAN Project: Potential and Constraints

This will be based on a questionnaire about the role of law in the ASEAN framework.

4. *What is the "ASEAN Way"?*

5. A Documentary Dynamic Analysis of the Evolution of the Objectives of ASEAN and the Means for their Achievement

An investigation into the objectives and functions of ASEAN as conceptualized at the beginning of the body and how those objectives and functions have changed over the years.

6. A Comparative Tool Box

This will be a synthetic account describing other regional integration organizations such as CAFTA, NAFTA, Mercosur, CEP and the EU so as to situate on a spectrum the different levels of ambition each organization aspires towards.

7. Group Report: The Aspirations of ASEAN: Matching Ends and Means

8. Prolegomena for a Theory of ASEAN Integration

This will seek to map out for the first time a deep theoretical understanding about ASEAN Integration and how this theory may inform future integration initiatives.

B. Governance and Management

To understand the Law one must understand how the law (or 'non law') is made and the political potential and constraints on developing legal instruments. In this element will be studied also the 'law of decision making' – often implicit but always existent.

1. Institutions and Decision Making Processes: Inventory and Critical Analysis

An International Organization Analysis of the Institutions and Processes of ASEAN. Including a Critical Analysis of the Match between Function and Powers

This will be a detailed study into the current functions and powers of the ASEAN Secretariat and will be done through interviews by way of a template questionnaire.

2. Comparative Toolbox from the Universe of Regional Integration Organizations

A map of the various institutions and processes used by other Regional Integration Organizations.

3. An Exploration of the Role and Constraints of the ASEAN Secretariat Legal Division

4. Comparative Toolbox from the Universe of Secretariats

A comparative account of how other Secretariats (Regional as well as Treaty Secretariats) and their functions and powers. A template questionnaire will be used to gather the data.

5. Governance and Management: The Member State Apparatus: An Inventory and Critical Analysis

An analysis of each member state's decision making and implementation processes particularly as pertains to ASEAN and ASEAN disciplines.

6. Group Report: ASEAN Governance & Management: The match between Functions and Powers

C. ASEAN Instruments

The purpose of this element is to make an inventory and to analyze the legal and political significance of the various tools through which governance and management are to be given effect: Blueprints, Framework Agreements, Concept Papers, Action Plans, Conventions, Agreements, Declarations etc. and then to offer a toolkit drawn from the comparative universe of FTAs and other integration experiences.

1. The Instruments of Governance of ASEAN – An Inventory and critical analysis

D. Ensuring Implementation, Compliance and the Peaceful Resolution of Disputes

An essential element in any integration effort is a mechanism for making negotiated political bargains stick. This is a key legal element in the entire project often disguised as Dispute Settlement. The ITL project will examine the mechanisms proposed and available for ensuring implementation and compliance – with or without a dispute – the sharp edge of the rule of law.

1. Conceptual Paper – The Politics of Compliance and Dispute Settlement in Regional Integration. The relationship between Decision Making and Compliance.

2. ASEAN Instruments of Monitoring

A descriptive paper on the various ASEAN instruments for monitoring found in the documents as well as any non-documented mechanisms.

3. Dispute Settlement – Critical Analysis of Existing Instruments

4. Comparative Toolbox

A comparative account of the various dispute settlement mechanisms in the various Regional Integration Organizations such as the Andean Community and its adoption of the EU's Reference Procedure, NAFTA's differentiated mechanisms and the absence of an automaticity clause as well as the depoliticized mechanism of the WTO.

5. Group Report: A Differentiated Approach to ASEAN Compliance and Dispute Settlement: A Policy Oriented Report

E. The ASEAN Legal Order: The legal regimes of ASEAN and that of its Member States

The main purpose of this section will be to map the constitutional landscape of ASEAN on a Member by Member basis – providing a crucial piece in the understanding of the potential and constraints to the role of law and the rule of law and the relationship between ASEAN law and the domestic law of its Member States.

1. Concept Paper – The Role of Member State Jurisdictions in Enhancing the Rule of Law.

2. Country by Country Reports based on an ITL Template questionnaire.

II. The ASEAN Economic Community (AEC) Group

This is an open ended element of the project given the vast array of economic activities projected under the AEC. The initial selection is meant to lay the foundations as concerns some

of the fundamental basic tools and instruments involved in the AEC project. Particular attention will be given to some of the implicit disciplines and challenges of moving from a tariff free zone to an NTB (non tariff barrier) free zone.

1. Conceptual Paper: FTA, Customs Union, Common Market, Economic Community – A Trade Economist Perspective

This will be a conceptual paper on the political economy of the different regional integration projects before examining the ASEAN Economic Community and the kind of entity that is aspired toward. This should provide a more ASEAN focused perspective on the sort of regional integration model envisaged by ASEAN.

2. Conceptual Paper: NTBs, Regulation, Mutual Recognition and Harmonization – The Comparative Legal Context and the Political-Legal Implications of a Single Market in Goods

Subject to a stable text and finalized disciplines, this paper will provide a commentary on the various disciplines relating to goods as well as be a “handbook” of the ASEAN Free Trade Area (AFTA).

3. Services : Legal Lessons from GATS and the EU – relevant to the ASEAN Project

Similarly, subject to the above, this will provide a commentary relating to services though due to the complexities of services liberalization, this will use a greater comparative analysis.

4. Investment: Legal Lessons from NAFTA and the Universe of BITs relevant to the ASEAN Project

III. ASEAN External Legal Relations Group

ASEAN has made huge strides in developing RTA to State and RTA to RTA Agreements. The critical edge in this practice is that the international agreement will often have sharper edges than the corresponding internal ASEAN regime. A second sensitive point is the myriad range of Rules of Origin of ASEAN as well as the individual Member States which at times defeat the economic advantages (as distinct from the political advantages) of the Agreements. This, too, is an open ended element, focusing on what is considered essential and where there can be most legal added value.

1. The External Legal Agreements of ASEAN – An Inventory and Current Model for Negotiations

This will be a descriptive analysis of the current situation in ASEAN.

2. Towards an ASEAN Model External Agreement?

This may be combined with the descriptive paper above to propose one possible model for ASEAN.

3. Disentangling Rules of Origin in ASEAN External Relations

4. The Internal Effect of ASEAN External Relations and its impact on the legal order of ASEAN

This will examine the status of international agreements and their implementation in ASEAN.

5. Dispute Settlement of External Agreements

This will be an inventory of the dispute settlements used by the various instruments.

6. ASEAN as a negotiator in international Fora – Reality, Potential and Constraints

This will be a realist international relations paper looking at how ASEAN may use its collective abilities and powers to better position itself for international negotiations.

IV. ASEAN and Human Rights

V. ASEAN and the Environment

VI. The Legal Education and Training Group

An important byproduct of the ITL project will be the preparation of instruction materials at both University and Practitioner Level. These materials in modular form will be made freely available online on the CIL website.

1. Preparation of Teaching Modules corresponding to each of the previous group products
2. Preparation of Governmental Official Training Sessions for the above