ASEAN INTEGRATION THROUGH LAW

MODELS OF SUPRANATIONAL LEGAL INTEGRATION
Comparative Toolbox from the Universe of International and Regional Organizations

Carlos Closa and Lorenzo Casini

EXECUTIVE SUMMARY

June 2013

MODELS OF SUPRANATIONAL LEGAL INTEGRATION
Comparative Toolbox from the Universe of International and Regional Organizations

Carlos Closa and Lorenzo Casini

EXECUTIVE SUMMARY

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, labour 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 World War II and is still rising; the relations between state administrations and international institutions are becoming ever more numerous; forms of regional organization have been spreading; new forms of global networks and global "administrations" have been developing.

As a consequence, scholars worldwide have devoted themselves to studying global governance, international organizations, and regionalism. 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 and law has turned out to be extremely effective, such as in the case of regime theory being used to explain the formation of global regulatory systems. 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 aims in two chapters, both based on the idea of integration is a formal process.

Chapter One (***Governance Structures and Processes in Integration Organisations: Formalisation of Institutional Credible Commitments for Governance***, by Carlos Closa) 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 organisations; 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 formalised 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 organisation's 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 organisations inspire a given institutional structure, it will also examine the kind of objectives existing within integration organisations. A data set comprising the institutional features of eighty-five integration and/or international organisations 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 Two (***The Development of International Legal Regimes: Models And Instruments for Legal Integration Beyond States***, by Lorenzo Casini) 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 One (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). In this Chapter, the perspective 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 identified: indirect rule, role splitting, and normative supremacy. All these techniques can be productively adopted at various levels, in the pursuit of international and supranational legal integration.

The analysis 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 regardless of whether the "pendulum" – as Mauro Cappelletti observed in the 1980s – swings towards "nationalism" or "transnationalism, federalism, or [a] broad grouping of states".