

ASEAN'S Constitutionalization of International Law: Challenges to Evolution Under the New ASEAN Charter*

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This Article discusses the normative trajectory of international obligations assumed by Southeast Asian countries (particularly the Organizational Purposes that mandate compliance with international treaties, human rights and democratic freedoms), and the inevitable emergence of a body of discrete "ASEAN Law" arising from the combined legislative functions of the ASEAN Summit and the ASEAN Political, Economic and Social Communities. I discuss several immediate and short-term challenges from the increased constitutionalization of international obligations, such as: 1) the problem of incorporation (or lack of direct effect) and the remaining dependence of some Southeast Asian states on their respective constitutional mechanisms to transform international obligations into binding constitutional or statutory obligations; 2) the problem of hybridity and normative transplantation, which I illustrate in the interpretive issues regarding the final text of the ASEAN Comprehensive Investment Agreement, which draws some provisions from GATT 1994 and contains language similar to the U.S. and

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German Model Bilateral Investment Treaties; and 3) the problem of diffuse or insufficient judicial oversight within ASEAN, seen through lingering dependence on national court implementation despite the regional effort at standardization of legal norms on specific areas of trade, security and human rights. I conclude that leaving these problems unaddressed could impede Southeast Asia's vast potential to contribute to the project of constitutionalizing international law.

INTRODUCTION	269
I. FUNCTIONAL CONSTITUTIONALIZATION IN THE ASEAN CHARTER	282
A. Pre-Charter ASEAN	282
B. ASEAN Charter	287
C. Functional Constitutionalization and the ASEAN Bureaucracy	295
II. STRUCTURAL CHALLENGES TO ASEAN'S CONSTITUTIONALIZATION OF INTERNATIONAL LAW.....	297
A. The Problem of Incorporation or Lack of Direct Effect.....	299
B. The Problem of Hybrid Interpretation	305
C. The Problem of Diffuse or Insufficient Judicial Oversight.....	313
CONCLUSION: FROM CONSTITUTIONALIZATION TO CONSTITUTIVE DECISION—ASEAN CHARTER PROCESSES AND THE RULE OF LAW	317

“[W]ithout a contract among nations peace can neither be inaugurated nor guaranteed.” — Immanuel Kant¹

INTRODUCTION

Since its entry into force on December 15, 2008,² the Association of Southeast Asian Nations (ASEAN) Charter has triggered

1. IMMANUEL KANT, *TO PERPETUAL PEACE: A PHILOSOPHICAL SKETCH* 13 (Ted Humphrey trans., Hackett Publishing Co. Inc., 2003) (1795).

various fundamental questions from public law and international relations scholars—ranging from issues such as the attribution of intergovernmental acts to ASEAN Member States as opposed to ASEAN as an international organization, the powers of pre-existing as opposed to future ASEAN institutions and most importantly, the respective competencies retained or ceded by its Member States to the “new” ASEAN.³

Before the entry into force of its new charter, ASEAN was known as a loose intergovernmental cooperation between ten Southeast Asian states—the original five ASEAN Members (Malaysia, Indonesia, the Philippines, Thailand and Singapore), which later expanded to include the more recent “CMLV” group of States (Cambodia, Myanmar, Laos and Vietnam), as well as Brunei.⁴ Under the new Charter, however, ASEAN Member States have expressly committed themselves to “take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter, and to comply with all obligations of membership.”⁵ While ASEAN Member States obligated themselves to “reaffirm and adhere to the fundamental principles contained in the declarations, agreements, conventions, concords, treaties, and other instruments of ASEAN,”⁶ they also bound themselves to act according to specific ASEAN Principles.⁷ The fourteen ASEAN Charter Principles not only include pre-Charter norms from the formative instruments underlying ASEAN as an intergovernmental cooperation of States (such as the emphasis on respect for national

2. *ASEAN Charter Overview*, ASEAN SECRETARIAT, <http://www.aseansec.org/21861.htm> (last visited Oct. 5, 2010); Press Release, ASEAN Secretariat, ASEAN Embarks on a New Era—ASEAN Charter Fully Ratified (Oct. 21, 2008), available at <http://www.aseansec.org/22022.htm>.

3. See Mely Caballero-Anthony, *The ASEAN Charter: An Opportunity Missed or One that Cannot Be Missed?*, 2008 SE. ASIAN AFF. 71; Simon Chesterman, *Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person*, 12 SING. Y.B. INT’L L. 199, 204–07 (2008); Paul J. Davidson, *The Role of International Law in the Governance of International Economic Relations in ASEAN*, 12 SING. Y.B. INT’L L. 213, 218–23 (2008); Simon S.C. Tay, *The ASEAN Charter: Between National Sovereignty and the Region’s Constitutional Moment*, 12 SING. Y.B. INT’L L. 151, 158–62 (2008).

4. For a brief history of Southeast Asian regionalism, see Diane A. Desierto, *Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia*, 36 INT’L J. LEGAL INFO. 388, 413–31 (2008).

5. Charter of the Association of Southeast Asian Nations art. 5(2), Nov. 20, 2007 [hereinafter ASEAN Charter].

6. *Id.* art. 2(1).

7. *Id.* art. 2(2).

sovereignty, territorial integrity, non-interference and renunciation of aggression), but also formally set as key ASEAN Principles contemporary multilateral norms of free trade, democratic government and the promotion and protection of human rights.⁸

Over two years after the entry into force of the ASEAN Charter, the normative and institutional transition of ASEAN from a loose intergovernmental cooperation to a formal international organization remains very much a complex process. Recent crises facing ASEAN Member States, such as the Cambodia-Thailand border dispute over

8. See Diane A. Desierto, *Universalizing Core Human Rights in the "New" ASEAN: A Reassessment of Culture and Development Justifications Against the Global Rejection of Impunity*, 1 GÖTTINGEN J. OF INT'L L. 77, 77–114 (2009) (discussing the wider reach of ASEAN Charter norms particularly in promoting human rights). The ASEAN Charter lists the fourteen key principles of the organization:

- (a) respect for the independence, sovereignty, equality, territorial integrity, and national identity of all ASEAN Member States;
- (b) shared commitment and collective responsibility in enhancing regional peace, security, and prosperity;
- (c) renunciation of aggression and of the threat or use of force or other actions in any manner inconsistent with international law;
- (d) reliance on peaceful settlement of disputes;
- (e) non-interference in the internal affairs of ASEAN Member States;
- (f) respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion;
- (g) enhanced consultations on matters seriously affecting the common interest of ASEAN;
- (h) adherence to the rule of law, good governance, the principles of democracy and constitutional government;
- (i) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;
- (j) upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States;
- (k) abstention from participation in any policy or activity, including the use of its territory, pursued by any ASEAN Member State or non-ASEAN State or any non-State actor, which threatens the sovereignty, territorial integrity or political and economic stability of ASEAN Member States;
- (l) respect for the different cultures, languages and religions of the peoples of ASEAN, while emphasizing their common values in the spirit of unity in diversity;
- (m) the centrality of ASEAN in external political, economic, social and cultural relations while remaining actively engaged, outward-looking, inclusive and non-discriminatory; and
- (n) 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, in a market-driven economy.

ASEAN Charter, *supra* note 5, art. 2(2)(a)–(n).

areas in the vicinity of Preah Vihear;⁹ Thailand's bloody political demonstrations between forces of Thaksin Shinawatra's "red shirt" United Front for Democracy Against Dictatorship (UDD) and the "yellow shirt" People's Alliance for Democracy (PAD);¹⁰ the Philippines' experience from 2009 to 2010 with natural disasters, extrajudicial killings and states of emergency;¹¹ and the 2010 elections of Myanmar, which excluded the recently released democratic opposition leader Aung San Suu Kyi;¹² all highlight the need for reinvigorated discussion of the role and competencies of ASEAN under its new charter,¹³ particularly the constitutional dimensions of the ASEAN Charter on the relationship between ASEAN and its Member States.¹⁴

For the purposes of this Article, I refer to "constitutionalization" only in a specific limited sense, in order to describe the passage

9. Olivia Rondonuwu, *ASEAN Seeks Peaceful End to Thai-Cambodian Conflict*, REUTERS, Feb. 22, 2011, <http://af.reuters.com/article/worldNews/idAFTRE71L1AC20110222>.

10. *Profile: Thailand's Reds and Yellows*, BBC NEWS, Apr. 20, 2010, <http://news.bbc.co.uk/2/hi/8004306.stm>.

11. David McNeill, *Philippines Declares State of Emergency After 46 Are Killed in Election Bloodbath*, THE INDEPENDENT (U.K.), Nov. 25, 2009, <http://www.independent.co.uk/news/world/asia/philippines-declares-state-of-emergency-after-46-are-killed-in-election-bloodbath-1826943.html>; Philip Tubeza, *UN on RP Disasters: Worst Is Yet To Come*, PHILIPPINE DAILY INQUIRER, Oct. 28, 2009, <http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20091028-232631/UN-on-RP-disasters-Worst-yet-to-come>. See generally HUMAN RIGHTS WATCH, "THEY OWN THE PEOPLE": THE AMPATUANS, STATE-BACKED MILITIAS, AND KILLINGS IN SOUTHERN PHILIPPINES (2010), available at <http://www.hrw.org/en/reports/2010/11/16/they-own-people-0>.

12. See *UN Condemns Burma's Human Rights and Unfair Elections*, BBC NEWS, Nov. 18, 2010, <http://www.bbc.co.uk/news/world-asia-pacific-11793615>.

13. See Jürgen Haacke, *The Myanmar Imbroglia and ASEAN: Heading Towards the 2010 Elections*, 86 INT'L AFF. 153, 153-74 (2010); Mazwin Nik Anis, *Disasters Main Topic at ASEAN Meet*, THE STAR ONLINE, Oct. 28, 2010, <http://thestar.com.my/news/story.asp?file=/2010/10/28/nation/7314644&sec=nation>; Kavi Chongkittavorn, *The Fall-Out of the Thai Political Crisis on ASEAN*, THE NATION, Apr. 19, 2010, <http://www.nationmultimedia.com/home/2010/04/19/opinion/The-fall-out-of-the-Thai-political-crisis-on-Asean-30127385.html>.

14. The National University of Singapore, through its Centre for International Law (CIL), has recently launched its research project on ASEAN Legal Integration. The project is headed by Professor Joseph Weiler of New York University and Professor Michael Ewing-Chow of the National University of Singapore. See *Integration through Law: The ASEAN Way in a Comparative Context*, CTR. FOR INT'L L. (Oct. 12, 2009), <http://cil.nus.edu.sg/wp/wp-content/uploads/2009/10/Mission-Statement-CIL-ASEAN-Integration-through-Law-Project-12-Oct-20091.pdf>.

of the ASEAN Charter and its ongoing constitutive decision-making processes, transforming ASEAN from a loose cooperation of South-east Asian states into an integrated organization with international legal personality.¹⁵ To the extent that “constitutionalization” seeks to identify political arrangements in the international plane that *functionally* determine (the “legislative” function), apply (the “executive” function) or interpret (the “judicial” function) a set of common and distinguishable norms,¹⁶ the “rules of recognition” in the international legal regime created by the new ASEAN Charter should also be sketched.¹⁷ This descriptive approach accepts the notion of a “traditional understanding of international organizations’ founding document as a hybrid treaty-constitution, [which does not] rely on any material, value-loaded (constitutionalist) principles, but merely on the fact that the founding treaties established institutional structures, delineated the competences of the organization and defined the terms of membership.”¹⁸ As I discuss in the conclusion of this Article, however, the ideological over-inclusiveness of the ASEAN Charter

15. For an overview of the fundamental changes and transition of ASEAN as a loose cooperation of States to a formal international organization, see Desierto, *supra* note 4, at 387–431.

16. For a useful review of the common content to the theory of constitutionalization in international law, see Susan C. Breau, *The Constitutionalization of the International Legal Order*, 21 LEIDEN J. INT’L L. 545, 545–61 (2008).

17. See G.J.H. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 55 (1983) (defining a “rule of recognition” as “a rule specifying some feature or features possession of which by a suggested rule is taken as conclusive affirmative indication that it is a rule of the group to be supported by the social pressures it exerts”). See also Nicholas Onuf, *The Constitution of International Society*, 5 EUR. J. INT’L L. 1, 10 (1994) (identifying “rules of recognition” in the international legal regime using a constructivist method, asserting that “prescriptive statements [that enjoy] some considerable degree of formality and institutional support are *legal*”). Onuf states:

To view constitution as process makes change the subject without making theory the objective. As presented in these pages, constructivism is not a theory. Its terms are deliberately inclusive, and it acknowledges change—change as a pervasive and inevitable feature of social construction—in the very definition of those terms. Many, perhaps most, deeds are responses to rules. Rules are regulative because agents usually choose to follow them, and continuity and stability rather than change is the result. Those same rules are constitutive because they do not provide agents with choices. Every time agents choose to follow a rule, they *change* it—they strengthen the rule—by making it more likely that they and others will follow the rule in the future. Every time agents choose not to follow a rule, they change the rule by weakening it and in so doing they may well contribute to the constitution of some new rule. (*Italics in the original.*)

Id. at 18.

18. Anne Peters, *Membership in the Global Constitutional Community*, in *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* 153, 204 (Jan Klabbers et al. eds., 2009).

presages a subtle paradigm shift towards deliberate constitutionalization of a distinct regional identity, one governed by liberal democratic values in the Southeast Asian region. More than any other nuance to the ASEAN Charter era, it is this shift that perhaps should not be overlooked in analyzing the trajectory of ASEAN's institutional and normative development as a regional organization.

I also submit that the complex marriage of political and legal issues affecting different governance areas under the new charter-based organization of Southeast Asian states should provoke us to search for the authoritative decision-making processes within this new regional order. When ASEAN confronts urgent regional issues regarding international investment and trade, human rights and collective security, environment, religion and cultural diversity, it does so now not only as a rules-based organization, but also as a concrete polity made up of state and non-state constituencies. This should affect not just the assessment of usual criticisms against ASEAN (especially on questions of human rights, lack of transparency and accountability for non-compliance with international obligations),¹⁹ but also more importantly, the understanding of how ASEAN decision-makers now reach their conclusions of legality within the charter framework, processes and institutions.

Unlike the paradigm of the European Union and its well-integrated institutions, ASEAN integration is evidently as cautious as it is landmark. It took forty years working together as a loose international cooperation before Southeast Asian states agreed to constitutionalize their international legal obligations inter se in the ASEAN Charter.²⁰ As this Article will show, the Southeast Asian region appears to be evolving towards the consolidation of "ASEAN Law," but it does so with some subsisting ambivalence among the ASEAN membership on the process of public interactions between the Member States' domestic legal systems and the new ASEAN institutions. Conflicting views on ASEAN's new mandate and role for the region are best illustrated by the gap between the actual constitutive decisions taken to create the ASEAN Charter institutions and the choice to leave critical organizational matters for future determination or subsequent agreement (such as the ASEAN Intergovernmental

19. For recent critiques on the charter-based ASEAN on human rights compliance issues, see John Arendshorst, Note, *The Dilemma of Non-Interference: Myanmar, Human Rights, and the ASEAN Charter*, 8 NW. UNIV. J. INT'L HUM. RTS. 102, 112-15 (2009); see also Hao Duy Phan, *A Blueprint for a Southeast Asian Court of Human Rights*, 10 ASIAN-PAC. L. & POL'Y J. 384, 386-88 (2009).

20. See Desierto, *supra* note 8, at 87-91.

Commission on Human Rights and the ASEAN Dispute Settlement Mechanism, whose respective constitutive instruments passed long after the entry into force of the ASEAN Charter). While these decisions were justified as part of the contingent realities of the charter-negotiating process,²¹ they do pose significant constitutional ambiguities for the Southeast Asian community as well as for third-party observers.

A final clarification on the use of term “constitutionalization” in this Article: as deployed in the structural analysis of the ASEAN Charter in this article, I do not intend to approximate the full breadth of the conceptual framework pushed by “constitutionalization” proponents. Jürgen Habermas described constitutionalization of international law as an “alternative to the evolution of a [completely Kantian] cosmopolitan constitution,”²² where “international institutions

21. Pengirna Dato Paduka Osman Patra, *Heart Labour*, in *THE MAKING OF THE ASEAN CHARTER* 6–8 (Tommy Koh et al. eds., 2009); Walter Woon, *The ASEAN Charter Dispute Settlement Mechanisms*, in *THE MAKING OF THE ASEAN CHARTER* *supra*.

22. JÜRGEN HABERMAS, *THE DIVIDED WEST* 115 (Ciaran Cronin ed. & trans., 2006). See Garrett Wallace Brown, *Kantian Cosmopolitan Law and the Idea of a Cosmopolitan Constitution*, 27 *HIST. OF POL. THOUGHT* 661, 672 (2006). Brown states:

In *The Critique of Pure Reason*, Immanuel Kant writes that “a constitution allowing the greatest possible human freedom in accordance with laws which ensure that the freedom of each can coexist with the freedom of all the other[s], is at all events a necessary idea which must be made the basis not only of the first outline of a political constitution but of all laws as well.” By constitution, we can understand that Kant does not specifically mean a written political document, but rather is alluding to the underlying normative principles that underwrite a juridical condition of mutual *public right*. In this regard, a constitution refers to the totality of laws that should be publicized so as to create a rightful condition of mutual freedom between individuals, states and associations. What is to be *constituted* within a Kantian system of laws is the idea that the mutual protection of individual freedom is paramount for the creation of a condition of universal justice and that all subsequent laws should reflect a commitment to this corresponding universal condition of *public right*. Kant defines the relationship between public right and his constitutionalism as:

The sum of laws which need to be promulgated generally in order to bring about a rightful condition is *public right*. —Public right is therefore a system of laws for a people, that is, a multitude of human beings, or for a multitude of peoples, which, because they affect one another, need a rightful condition under a will uniting them, a constitution (*constitutio*), so that they may enjoy what is laid down as right.

We can understand Kant to mean that these principles should not only be the concern of domestic constitutions, but also a requirement of all laws, which should ultimately culminate in a cosmopolitan constitution. Since humanity has an “original possession of the earth in common” and since we are bounded by spherical cohabitation, any domestic and international constitution “will always remain provisional unless this contract extends to the entire human race.”

Id. (quoting IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 89 (M. Gregor ed., Cambridge Univ. Press 1996) (1797)).

form an increasingly dense network and nation-States lose competences.”²³ This definition, when applied to international law, understandably evokes skepticism from international legal scholars, due to connotations of imposed uniformity, eroded sovereignties and the collapse of traditional distinctions between constitutional processes and international legal processes.²⁴ International Court of Justice Judge Bruno Simma considers the “constitutionalization” descriptor “misleading,” when all that it allegedly conveys is a contemporary “widening and thickening of international law” norms, organizations

23. Jürgen Habermas, *The Constitutionalization of International Law and the Legitimation of Problems of a Constitution for World Society*, 15 CONSTELLATIONS 444, 444 (2008). For a recent description of the Kantian-Habermasian paradigm, see Robert J. Delahunty and John Yoo, *The Philosophy of International Law: Kant, Habermas, and Democratic Peace*, 10 CHI. J. INT’L L. 437, 452–53 (2010). Delahunty and Yoo state:

Habermas’ version of the “Kantian project” seeks, like that of Kant himself, to transform or “constitutionalize” classic, state-centered public international law. The “constitutionalization” of international law, Habermas argues, would construct an international legal order that “renders war as a legitimate means of resolving conflicts, indeed war as such, impossible, because there cannot be ‘external’ conflicts within a globally inclusive commonwealth. What had hitherto been military conflicts would assume the character of police actions and operations of criminal justice.” In other words, under a “constitutionalized” international system, states would no longer be able to exercise the “right” to go to war—the “core component” of classic public international law. The question then, of course, becomes how such a “constitutionalized” international order is to be achieved.

Even more firmly than Kant, Habermas rejects the possibility of bringing about the “legal pacification of world society by repressive means, that is, through a despotic monopoly of power.” Neither Kant nor Habermas, therefore, claims that perpetual peace can only be achieved through creating a world-state, even of a federal kind. In place of that proposal, Habermas invokes Kant’s “core innovation” which was to envision “the transformation of international law as a law of states into cosmopolitan law as a law of individuals.” Instead of being merely the citizens of their own states, individuals would be viewed as members of a “cosmopolitan commonwealth,” and their “civil rights” would “penetrate international relations too.” This transformation, Habermas suggests, would mean more than merely codifying certain basic legal rights that anyone, whether a citizen or not, might claim against any state. It would entail a fundamental change, not only in the relations between states and rights-bearing individuals, but also between states and other states. World citizenship would necessitate some form of world legal order—an order that subordinated the legal systems of particular states to a globalized legal system. To realize the idea of world citizenship, therefore, states would have to sacrifice not only their internal, but also their external, sovereignty to “a higher authority.”

Id. (internal citations omitted).

24. See Michael Wood, *Constitutionalization of International Law: A Sceptical Voice*, in INTERNATIONAL LAW AND POWER: PERSPECTIVES ON LEGAL ORDER AND JUSTICE: ESSAYS IN HONOUR OF COLIN WARBRICK 85, 85–98 (Kaiyan Homi Kaikobad & Michael Bohlander eds., 2009).

and tribunals.²⁵ Scholars also differ on the potential use and application of tools of constitutional analysis into the analysis of contemporary (and often specialized) international legal structures and norms in various fields such as international trade, investment and dispute settlement.²⁶ For many of its proponents, however, constitutionalization is an opportunity to draw from a conceptual framework that views international law from the lens of public authority, shared normativity and the assumption of legislative, executive and judicial functions by different international institutions.²⁷ It is this particular mode of framing the *problematique* for a charter-based international organization that I will subscribe to in this Article.

Constitutionalization also has its “thick” and “thin” versions.²⁸ “Thick” constitutionalism in international law accepts the decentralized nature of the international system, but also stresses the institutionally based process of international governance created by the collective activities of the United Nations, regional organizations, intergovernmental networks and non-state or non-profit international groups and alliances. Such modern institutions perform basic constitutive functions, advancing a liberal democratic order premised on a set of universally held values and norms defined by treaties, custom-

25. Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT'L L. 265, 297 (2009).

26. See FRANCISCO ORREGO VICUÑA, INTERNATIONAL DISPUTE SETTLEMENT IN AN EVOLVING GLOBAL SOCIETY 124–27 (2004); Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARV. INT'L L. J. 223, 224–29 (2006); Jeffrey L. Dunoff, *Constitutional Concepts: The WTO's “Constitution” and the Discipline of International Law*, 17 EUR. J. INT'L L. 647, 650–55 (2006); Frank Schorkopf & Christian Walter, *Elements of Constitutionalization: Multilevel Structures of Human Rights Protection in General International and WTO-Law*, 4 GERMAN L. J. 1359, 1359–74 (2003), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=348>.

27. See Bogdandy, *supra*, note 26, at 230–33, 237–40; Deborah Z. Cass, *The “Constitutionalization” of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EUR. J. INT'L L. 39 (2001); Bardo Fassbender, *The Meaning of International Constitutional Law*, in TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN MODELS (Nicholas Tsagourias ed., 2007); Matthias Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, 9 GERMAN L.J. 1865, 1868–71 (2008); Andrea Hamann & Helene Ruiz-Fabri, *Transnational Networks and Constitutionalism*, 6 INT'L J. CONST. L. 481, 484–85, 489–95 (July–Oct. 2008); Jan Klabbers, *Setting the Scene*, in THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW, *supra* note 18, 3–44; Erika de Wet, *The International Constitutional Order*, 55 INT'L COMP. L. Q. 51, 51–54, 56–58 (2006).

28. Anne Peters & Klaus Armingeon, *Introduction—Global Constitutionalism from an Interdisciplinary Perspective*, 16 IND. J. GLOBAL LEGAL STUD. 385, 393 (2009).

ary international law and the general practice of States and non-state actors.²⁹ This type of “internationalized” constitutionalism remains less robust than its domestic counterpart:

All it should strive for is the establishment and maintenance of an international order in which basic rights and interest of individuals and communities are acknowledged, and conflicting claims peacefully settled. Given the diversity of our world, such order can only be based on a framework which in the history of political ideas we have come to label constitutional.³⁰

Ultimately, “thick” constitutionalists visualize modern international law to be moving towards the realization of the Kantian-Habermasian paradigm of international public order,³¹ where a federation of closely cooperating liberal democracies execute, implement and interpret a narrow (but potentially widening) set of common international norms.

On the other hand, the “thin” version of constitutionalization in international law does not extend its theoretical objectives to the liberal-democratic Kantian-Habermasian paradigm. Instead, “thin” constitutionalists limit the project of constitutionalization in international law under a pluralist perspective, one that does not espouse particular values or normative positions a priori. Alec Stone Sweet, for example, operationally defines a constitution as “a body of meta-

29. For varying applications of this proposal, see Anne van Aaken, *Defragmentation of Public International Law Through Interpretation: A Methodological Proposal*, 16 IND. J. GLOBAL LEGAL STUD. 483 (2009); Daniel Bodansky, *Is There an International Environmental Constitution?*, 16 IND. J. GLOBAL LEG. STUD. 565 (2009); Karolina Milewicz, *Emerging Patterns of Global Constitutionalism: Toward a Conceptual Framework*, 16 IND. J. GLOBAL LEGAL STUD. 413 (2009); Beth Simmons, *Civil Rights in International Law: Compliance with Aspects of an “International Bill of Rights”*, 16 IND. J. GLOBAL LEGAL STUD. 437 (2009). For the seminal work on the architecture of transgovernmental networks and how they directly influence the spread of liberal internationalism, see ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (Princeton Univ. Press 2004); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1 (2002); Anne-Marie Slaughter, *Global Governmental Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT’L L. 1041 (2003).

30. BARDO FASSBENDER, *THE UNITED NATIONS CHARTER AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY* 57 (2009).

31. See Armin von Bogdandy & Sergio Dellavalle, *Universalism Renewed: Habermas’ Theory of International Order in Light of Competing Paradigms*, 10 GERMAN L.J. 5, 25–29 (2009).

norms, those higher-order legal rules and principles that specify how all other lower-order legal norms are to be produced, applied, enforced, and interpreted. Meta-norms constitute political systems in perpetuity.”³² Constitutionalization, in his view, represents “the commitment on the part of any given political community to be governed by constitutional rules and principles . . . [where] constitutionalism is a variable.”³³ Legal or constitutional pluralism does not prescribe *ex ante* that such meta-norms necessarily adopt liberal democratic values, human rights treaties or *jus cogens* norms, although the practices of some international regimes (such as the European Union) might be inclined towards them.³⁴

In this Article, I first use the “thin” version of constitutionalization to highlight the structural and functional political arrangements now extant from the ASEAN Charter. I then draw insights from the “thick” version of constitutionalization—particularly its deliberate emphasis of a definite liberal democratic vision for a given constitutional order—by contrasting the ASEAN Charter’s seemingly more liberal and pro-democratic normative trajectory with the current state of ASEAN institutions’ structural design. While the ASEAN system has developed under the Charter to the point that there are discernible executive, legislative and judicial *functions* assumed within the Charter system and its currently evolving bureaucracy, we should also consider several deep structural issues related to such functions. From the executive standpoint, how do we ensure the direct effect of ASEAN instruments and ASEAN Summit decisions in individual Member States? Legislatively, how do we reconcile a vast body of ASEAN treaties, agreements and instruments generated over forty years, and differentially applicable to public and private sectors, with future ASEAN Summit decisions and directives issued in relation to ASEAN Communities’ recommendations? And perhaps most controversially, do Southeast Asian states and their respective constituencies have recourse to any *ex post* review of ASEAN policies and decisions, through dispute settlement or any form of judicial oversight?

This Article offers some tentative answers to these broad questions, and suggests areas for further research. As much as possible, I confine the analysis to legal questions based on the ASEAN

32. Alec Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 16 *IND. J. GLOBAL LEGAL STUD.* 621, 626 (2009).

33. *Id.*

34. *Id.* at 632. See also Thomas Cottier, *Multilayered Governance, Pluralism, and Moral Conflict*, 16 *IND. J. GLOBAL LEGAL STUD.* 647, 655–58 (2009).

Charter and a voluminous body of related instruments, treaties and practices. When necessary, however, I also point out nascent policy areas that cannot be discussed in depth at this point in time, since the Charter-based ASEAN is only in its third year of existence as an international organization with legal personality.³⁵ Part I thus presents a descriptive examination of ASEAN Charter institutions and how they respectively assume executive, legislative and judicial functions in relation to Southeast Asian governance. I delineate each of these functions from the pre-Charter era of ASEAN as an international cooperation under the 1976 Treaty of Amity and Cooperation (TAC), and point out fundamental differences in scope, competencies and powers now possessed by ASEAN Charter institutions such as the ASEAN Summit, the ASEAN Communities, the ASEAN Coordinating Council, the ASEAN Secretariat and the Committee of Permanent Representatives. I show that, unlike the European model of vertical integration, the constitutionalization of international law in ASEAN adopts a *horizontal embeddedness* where national governments and domestic institutions maintain preexisting linkages to ASEAN institutions, under an “abbreviated” hierarchy with the ASEAN Summit as the supreme governing body of the organization.³⁶ The result is a dispersed and diffuse ASEAN bureaucracy, which, while highly dependent on Member State governments for funding and operational implementation, nonetheless recognizes subsidiarity in agenda setting, information dissemination, and performance monitoring with counterpart administrative agencies and civil society groups in the ASEAN Political, Economic and Socio-Cultural Communities.

Part II proceeds to discuss several immediate and short-term challenges from the increased constitutionalization of international obligations under the ASEAN Charter framework, such as: 1) the problem of incorporation (or lack of direct effect), and the remaining dependence of some Southeast Asian states on their respective constitutional mechanisms to transform international obligations into binding constitutional or statutory obligations; 2) the problem of hybrid interpretation (or the need for judicial sensitivity to the comparative jurisprudence generated by other national courts in Southeast

35. However, note the argument that the organization’s legal status was already in existence before the ASEAN Charter. See Chesterman, *supra*, note 3, at 204–07.

36. For a concise summary of the legal hierarchy from the EU integration model, see Patricia Luíza Kegel & Mohamed Amal, *The Problem of Legal Implementation and Sovereignty*, in *ELEMENTS OF REGIONAL INTEGRATION: A MULTIDIMENSIONAL APPROACH* 209 (Ariane Kössler & Martin Zimmek eds., 2008).

Asia), which I problematize through the as yet undefined role of domestic courts in the enforcement of future arbitral awards arising from disputes involving the ASEAN Comprehensive Investment Agreement; and 3) the problem of diffuse or insufficient judicial oversight within ASEAN, seen from the Charter's continuing dependence on national governments or national courts despite the regional effort at standardization of legal norms on specific areas of trade, security and human rights. The incremental development and unclear mandates of some of the new ASEAN institutions (such as the ASEAN Intergovernmental Commission on Human Rights which was subsequently created under future Terms of Reference as provided for in the Charter) likewise affect the project of constitutionalization, since ASEAN decision-makers become vulnerable to political suasion in designing these institutions, rather than pre-committing them to a settled mandate under the ASEAN Charter. If left unaddressed, these problems could seriously impede the potential for thicker constitutionalization of international law in ASEAN.

Finally, the Conclusion contends that while the ASEAN Charter has boldly embarked on an ideologically driven project of constitutionalization of international law, its concept of legality will ultimately be influenced by the constitutive and authoritative decisions of ASEAN's governing institutions. If the pre-Charter ASEAN was a loose agglomeration of bilateral, trilateral and multilateral arrangements among Southeast Asian states expressed in numerous treaties, instruments and agreements, ASEAN under its new Charter now creates a variable admixture of legally binding but potentially unenforceable international obligations for its membership. Since Article 52 of the ASEAN Charter provides for legal continuity with pre-Charter ASEAN "treaties, conventions, agreements, concords, declarations, protocols, and other ASEAN instruments,"³⁷ ASEAN decision-makers thus crucially determine and locate "ASEAN Law" for Southeast Asian states and their respective constituencies. Considering the ASEAN Charter's emphasis on further developing the concept of a "Southeast Asian" identity under shared values, principles and purposes, its organizational aspirations inevitably lean towards a thick version of the constitutionalization of international law. At this point in time, the main obstacle to the realization of ASEAN's project of constitutionalization lies in building and enforcing "ASEAN Law" in genuine accord with the Charter's Organizational Purposes. The challenge remains for Southeast Asian states to translate these normative aspirations into effective decisions.

37. ASEAN Charter, *supra* note 5, art. 52(1).

II. FUNCTIONAL CONSTITUTIONALIZATION IN THE ASEAN CHARTER

A. *Pre-Charter ASEAN*

The main constitutive documents of the pre-Charter ASEAN are the 1976 Treaty of Amity and Cooperation (TAC) and the 1967 ASEAN Bangkok Declaration.³⁸ Both instruments clearly defined the terms of Southeast Asian regional economic, political and socio-cultural cooperation under an intergovernmental framework operating through Member States' consensus vote (otherwise known as the "ASEAN Way").³⁹ The 1967 ASEAN Bangkok Declaration provided for narrow institutional machinery, governed by Southeast Asian governments through their respective foreign ministers at Annual Meetings and Special Meetings. Pending these Annual and/or Special Meetings, ASEAN would undertake implementation of the region's cooperation agenda through a semi-permanent administrative cohort of Standing Committees, ad hoc Committees and Permanent Committees of Specialists, working alongside counterpart National Secretariats in ASEAN Member States.⁴⁰ The 1976 TAC sealed the

38. Treaty of Amity and Cooperation in Southeast Asia, Feb. 24, 1976, 1023 U.N.T.S. 320, available at <http://www.aseansec.org/1217.htm>; The ASEAN Declaration, Aug. 8, 1967, <http://www.aseansec.org/1212.htm> (last visited Apr. 2, 2010) [hereinafter ASEAN Bangkok Declaration].

39. For an overview of pre-Charter ASEAN's consensus decision-making in foreign policy, see DAVID H. CAPIE & PAUL M. EVANS, *THE ASIA-PACIFIC SECURITY LEXICON* 136–46 (2002); SHAUN NARINE, *EXPLAINING ASEAN: REGIONALISM IN SOUTHEAST ASIA* 9–38 (2002); Tobias Ingo Nischalke, *Insights from ASEAN's Foreign Policy Cooperation: The "ASEAN Way", a Real Spirit or Phantom?*, 22 *CONTEMP. SE. ASIA* 89 (2000).

40. The ASEAN Bangkok Declaration states:

THIRD, that to carry out these aims and purposes, the following machinery shall be established:

- (a) Annual Meeting of Foreign Ministers, which shall be by rotation and referred to as ASEAN Ministerial Meeting. Special Meetings of Foreign Ministers may be convened as required.
- (b) A Standing committee, under the chairmanship of the Foreign Minister of the host country or his representative and having as its members the accredited Ambassadors of the other member countries, to carry on the work of the Association in between Meetings of Foreign Ministers. Ad-Hoc Committees and Permanent Committees of specialists and officials on specific subjects.
- (c) A National Secretariat in each member country to carry out the work of the Association on behalf of that country and to service the Annual or Special Meetings of Foreign Ministers, the Standing

best-efforts nature of this intergovernmental framework, where the ASEAN Member States “strive to achieve the closest cooperation on the widest scale.”⁴¹ The scope of cooperation provided for under the 1976 TAC spanned economic, social, technical, scientific, administrative and security concerns of the Southeast Asian region.⁴² Cooperation is ultimately limited by ASEAN’s overarching principles of “[m]utual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations,” “[t]he right of every State to lead its national existence free from external interference, subversion or coercion,” “[n]on-interference in the internal affairs of one another,” “[s]ettlement of differences or disputes by peaceful means,” “[r]enunciation of the threat or use of force” and “[e]ffective cooperation.”⁴³ Most importantly, the 1976 TAC stressed the peaceful settlement of disputes firstly through direct ministerial negotiations.⁴⁴ Should negotiations fail, ASEAN Member States could undertake dispute resolution through “good offices, mediation, inquiry or conciliation,”⁴⁵ informal or ad hoc third-party assistance of a fellow Member State⁴⁶ or recourse to any of the modes of peaceful settlement of disputes under the Charter of the United Nations.⁴⁷

ASEAN endured as a regional cooperation for over forty years, a period remarkable for the absence (or containment) of political security tensions between ASEAN Member States,⁴⁸ the steady economic development of the original five ASEAN Members (Singapore, Thailand, Malaysia, Indonesia and the Philippines) and the relatively recent admission of other Southeast Asian states (Cambo-

Committee and such other committees as may hereafter be established.

ASEAN Bangkok Declaration, *supra* note 38, para. 3.

41. Treaty of Amity and Cooperation in Southeast Asia, *supra* note 38, art. 8.

42. *Id.* arts. 7–8.

43. *Id.* arts. 2(a)–2(f).

44. *Id.* art. 14.

45. *Id.* art. 15.

46. *Id.* art. 16.

47. *Id.* art. 17.

48. With the endorsement of the UN Security Council, ASEAN has been leading mediation efforts with respect to the eruption of a border dispute in 2011 between ASEAN Member-States, Thailand and Cambodia. See Press Release, ASEAN Secretariat, Historic Firsts: ASEAN Efforts on Cambodian-Thai Conflict Endorsed by UNSC, Feb, 21, 2011 available at <http://www.aseansec.org/25924.htm>; *Thailand-Cambodia Border Dispute: UN Calls for Truce*, BBC NEWS, Feb, 14, 2011, <http://www.bbc.co.uk/news/world-asia-pacific-12448622>.

dia, Myanmar, Laos and Vietnam, otherwise known in ASEAN documentation as the CMLV group, as well as Brunei).⁴⁹ During this time, ASEAN institutions developed through a gradual accretion process created piecemeal by bilateral, trilateral and multilateral negotiations formalized in separate international treaties, agreements, instruments, protocols and communiqués.⁵⁰ Cooperation was implemented through regulatory entrenchment, which relied on the establishment of inter-departmental or inter-agency administrative networks between Southeast Asian states.

Over the forty years of ASEAN's existence as a regional cooperation, ASEAN intergovernmental policies flourished in the economic, political-security, socio-cultural, environmental, transport and communication sectors. Economic cooperation was driven primarily by the ASEAN Free Trade Area (AFTA),⁵¹ which administered the Common Effective Preferential Tariff (CEPT) mechanism among ASEAN Member States alongside the rules of multilateral trade in GATT 1994. Many of the key legal instruments on ASEAN economic cooperation would later be harmonized, supplemented or super-

49. See SHAUN NARINE, *EXPLAINING ASEAN: REGIONALISM IN SOUTHEAST ASIA* 113–23 (2002).

50. See *ASEAN'S COOPERATIVE SECURITY ENTERPRISE: NORMS AND INTERESTS IN THE ASEAN REGIONAL FORUM* (Hiro Katsumata ed., 2009); *THE ASEAN: THIRTY YEARS AND BEYOND* (Maria Lourdes Aranal Sereno & Joseph Sedfrey Santiago, eds., 1997); MARK BEESON, *INSTITUTIONS OF THE ASIA-PACIFIC: ASEAN, APEC, AND BEYOND* 17–36, 56–73 (2009); *MULTILATERAL TREATIES BETWEEN ASEAN COUNTRIES* (Visu Sinnadurai ed., 1986).

51. For key instruments of economic cooperation, see, for example, First Protocol to Amend the Protocol on Special Arrangements on Sensitive and Highly Sensitive Products, Sept. 3, 2004, <http://www.aseansec.org/22976.pdf>; Protocol Regarding the Implementation of the CEPT Temporary Exclusion List, Nov. 23, 2000, <http://www.aseansec.org/12365.htm>; Protocol on the Special Arrangement for Sensitive and Highly Sensitive Products, Sept. 30, 1999, <http://www.aseansec.org/1207.htm>; ASEAN Framework Agreement on the Facilitation of Goods in Transit, Dec. 16, 1998, 38 I.L.M. 502, *available at* <http://www.aseansec.org/7377.htm>; Protocol to Amend the Agreement on ASEAN Preferential Trading Arrangement, Dec. 15 1995, 35 I.L.M. 1086, *available at* <http://www.aseansec.org/12373.htm>; Protocol for the Accession of the Socialist Republic of Vietnam to the Framework Agreements on Enhancing ASEAN Economic Cooperation, Dec. 15, 1995, 35 I.L.M. 1093, *available at* <http://www.aseansec.org/12370.htm>; Protocol to Amend the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, Dec. 15, 1995, 35 I.L.M. 1084, *available at* <http://www.aseansec.org/12371.htm>; Protocol to Amend the Framework Agreements on Enhancing ASEAN Economic Cooperation, Dec. 15, 1995, 35 I.L.M. 1093, *available at* <http://www.aseansec.org/12369.htm>; Framework Agreements on Enhancing ASEAN Economic Cooperation, Singapore, Jan. 28 1992, 31 I.L.M. 506, *available at* <http://www.aseansec.org/12374.htm>; Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, Jan. 28 1992, 31 I.L.M. 513, *available at* <http://www.aseansec.org/12375.htm>.

sed by the 2009 ASEAN Trade in Goods Agreement.⁵² Political cooperation, on the other hand, was centrally facilitated by the ASEAN Regional Forum (ARF),⁵³ the principal Southeast Asian venue for inter-ASEAN and intra-ASEAN dialogue, negotiations and formalization of Member State commitments on regional security issues.⁵⁴ Other key institutions include the ASEAN Leaders' Summit (the highest decision-making body of pre-Charter ASEAN) and the ASEAN Secretariat and Office of the Secretary-General, whose operational mandates, in turn, were contoured along the annual agenda set by each Leaders' Summit.⁵⁵

By the time the ASEAN States started considering formal integration at the 11th ASEAN Summit in Kuala Lumpur in 2005,⁵⁶ ASEAN States had already built up a copious body of "ASEAN Law"—separately negotiated treaties, agreements and other instruments that applied to specific regulatory areas.⁵⁷ Before the entry into force of the ASEAN Charter on December 15, 2008, ASEAN States had already concluded at least 313 main treaties (not taking into account implementing protocols, sectoral communiqués and organizational declarations), which applied to different regulatory areas,

52. ASEAN Trade in Goods Agreement, Feb. 26, 2009, <http://www.aseansec.org/22223.pdf>. For the most authoritative and comprehensive discussions of the ASEAN Free Trade Area's operations during the pre-Charter ASEAN, see PAUL J. DAVIDSON, *ASEAN: THE EVOLVING LEGAL FRAMEWORK FOR ECONOMIC COOPERATION* 51–124 (2002); MOHAMMED ZAKIRUL HAFEZ, *THE DIMENSIONS OF REGIONAL TRADE INTEGRATION IN SOUTHEAST ASIA* 125–200 (2004).

53. See *Terms of Reference and Concept Papers*, ASEAN REGIONAL FORUM <http://www.aseanregionalforum.org/PublicLibrary/TermsOfReferencesandConceptPapers/tabid/89/Default.aspx> (last visited Feb. 21, 2010).

54. For a review of ASEAN regional security initiatives and policies in the pre-Charter ASEAN, see Kusuma Snitwongse, *Thirty Years of ASEAN: Achievements Through Political Cooperation*, 11 PAC. REV. 183 (1998).

55. Carolina G. Hernandez, *Institution-Building Through an ASEAN Charter* (paper originally presented at the 8th Europe-East Asia Thinktank Dialogue: Strengthening Regional and Inter-Regional Cooperation in Responding to Rising Extremism and Resurging Nationalism, Konrad-Adenauer-Stiftung, Inst. for Strategic and Development Stud. and the European Inst. of Asian Stud.) (Oct. 29–Nov. 3, 2006), (available at http://www.kas.de/upload/auslandshomepages/singapore/Hernandez_AseanCharta.pdf).

56. Kuala Lumpur Declaration on the Establishment of the ASEAN Charter, Dec. 12, 2005, <http://www.aseansec.org/18030.htm>; see also Cebu Declaration on the Blueprint of the ASEAN Charter, Jan. 13, 2007, <http://www.aseansec.org/19257.htm>.

57. On the effects of 'localization' of transnational norms upon the subsequent development of ASEAN institutions, see Amitav Acharya, *How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism*, 58 INT'L ORG., 239 (2004).

such as human security, trade, investment, finance, commerce, maritime and admiralty, communications and transportation, energy, environment, agriculture and food security, intellectual property, education, health and cultural exchanges.⁵⁸ ASEAN Member States implemented these treaties within their respective jurisdictions, based on their own constitutional or statutory procedures. In setting and assessing operational timetables, performance targets and policy conformity, national secretariats worked with their counterpart Southeast Asian administrative agencies, the ASEAN Secretariat and the Office of the Secretary-General. The ASEAN Leaders' Summit would then annually decide and formulate its multi-sector cooperation agenda based on these national government-led agency initiatives and recommendations.⁵⁹

ASEAN cooperation in the pre-Charter era featured more *legislative* (law-making) and *executive* (law-implementing) functions, rather than formal *judicial* oversight or interpretation. The ASEAN Leaders' Summit was the official intergovernmental body of pre-Charter ASEAN, where treaties, regulatory instruments, agreements and protocols were signed at the most senior level by Southeast Asian heads of state. While the Leaders' Summit could certainly have taken up some quasi-judicial oversight functions (such as hearing national government petitions or motions seeking fellow States' compliance with ASEAN treaties, agreements and instruments), as a matter of public practice Southeast Asian heads of state declined to do so (or failed to achieve any consensus when urged to do so),⁶⁰ frequently justifying their refusal through the 1976 TAC's core principle of non-interference (non-intervention).⁶¹ In over forty years as a regional cooperation, ASEAN has stood by this principle of non-interference by refraining from openly criticizing Member States' human rights records, refusing support to any opposition movements, insisting on consensus voting and resorting to informal (and often

58. For a list of ASEAN treaties as of September 2010 and their respective ratification statuses, see *Table of ASEAN Treaties/Agreements and Ratification*, ASEAN SECRETARIAT, available at <http://www.aseansec.org/Ratification.pdf> (last visited Feb. 21, 2011).

59. Zakaria Haji Ahmad, *The Structure of Decision-Making*, in THE 2ND ASEAN READER 30–32 (Sharon Siddique & Sree Kumar eds., 2004).

60. Robin Ramcharan, *ASEAN and Non-Interference*, in THE 2ND ASEAN READER, *supra* note 59, at 52–57; Isabella Bennett & Julie Ginsberg, *Backgrounder, ASEAN: The Association of Southeast Asian Nations*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/publication/18616/> (last visited Feb. 21, 2011).

61. See Amitav Acharya, *ASEAN at 40: Mid-Life Rejuvenation?*, FOREIGN AFF., Aug. 15, 2007, available at <http://www.foreignaffairs.com/articles/64249/amitav-acharya/asean-at-40-mid-life-rejuvenation>.

privately brokered) settlement of differences at the ministerial level.⁶² Notwithstanding the “hybrid treaty-constitution” status of the 1967 ASEAN Bangkok Declaration and the 1976 TAC, pre-Charter ASEAN did not exemplify full functional constitutionalization.

B. ASEAN Charter

The ASEAN Charter created both continuity and change in the region's legal framework and processes. On the one hand, Article 52(1) of the ASEAN Charter provides that “[a]ll treaties, conventions, agreements, concords, declarations, protocols and other ASEAN instruments which have been in effect before the entry into force of this Charter shall continue to be valid.”⁶³ To avoid normative conflicts, Charter rights and obligations expressly prevail over inconsistent norms in pre-Charter instruments.⁶⁴ A key ASEAN Principle “reaffirm[s] and adhere[s] to the fundamental principles contained in the declarations, agreements, conventions, concords, treaties and other instruments of ASEAN.”⁶⁵ Evidently pre-Charter “ASEAN Law” would continue to bind ASEAN Member States unless otherwise provided in the Charter or terminated by future legislation in ASEAN's new institutions.

On the other hand, change occurred in both normative and institutional aspects. Normatively, the ASEAN Charter Purposes (Article 1) and Principles (Article 2) espouse pacifism,⁶⁶ liberal democratic values of representation and participation,⁶⁷ development-oriented capitalism and trade liberalization⁶⁸ and the deliberate creation of a regional political identity under ASEAN.⁶⁹ The Charter obligates ASEAN Member States to “take *all* necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter *and* to comply

62. John Funston, *ASEAN and the Principle of Non-Intervention: Practice and Prospects* (Inst. of Se. Asian Studies (ISEAS), Working Paper No. 5, 2000), available at <http://www.iseas.edu.sg/trends520.pdf>.

63. ASEAN Charter, *supra* note 5, art. 52(1).

64. *Id.* art. 52(2).

65. *Id.* art. 2(1).

66. *Id.* arts. 1(1)–1(4), 2(2)(a)–2(2)(d).

67. *Id.* arts. 1(7), 1(11), 1(13), 2(2)(f)–2(2)(i).

68. *Id.* arts. 1(5), 1(6), 1(9), 1(10), 2(2)(n).

69. *Id.* arts. 1(14)–1(15), 2(2)(l)–2(2)(m).

with all obligations of membership.”⁷⁰ Significantly included among the broad compass of Charter provisions that ASEAN Member States are expressly obligated to implement are “the United Nations Charter *and* international law, including international humanitarian law, subscribed to by ASEAN Member States”;⁷¹ “multilateral trade rules and ASEAN’s rules-based regimes for effective implementation of economic commitments and progressive reduction towards the elimination of all barriers to regional economic integration, in a market-driven economy”;⁷² as well as “adherence to the rule of law, good governance, the principles of democracy and constitutional government”⁷³ and “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice.”⁷⁴ Given these broadly worded terms of obligation, Southeast Asian states appear to have expressly accepted a much wider range of international legal norms than their commitments under the pre-Charter ASEAN.⁷⁵

ASEAN Charter institutions nominally continue much of pre-Charter ASEAN’s horizontally embedded bureaucracy, albeit with several hierarchical changes. The pre-Charter ASEAN Leaders’ Summit was replaced by the ASEAN Summit. Like the Leaders’ Summit, the ASEAN Summit is composed of the heads of state of the ASEAN Member States.⁷⁶ Instead of the annual Leaders’ Summit meetings, the ASEAN Summit is now mandated to meet at least semi-annually, convening special or ad hoc sessions in between each meeting when necessary.⁷⁷ In contrast to the Leaders’ Summit, however, the ASEAN Summit has more expansive and consolidated policy-making, administrative, decision-making and oversight authority to guide and direct various levels of the ASEAN bureaucracy. The ASEAN Summit is the “supreme policy-making body of ASEAN,”⁷⁸ which “deliberate[s], provide[s] policy guidance, and take[s] decisions on key issues pertaining to the realization of the objectives of

70. *Id.* art. 5(2) (emphasis added).

71. *Id.* art. 2(2)(j) (emphasis added).

72. *Id.* art. 2(2)(n).

73. *Id.* art. 2(2)(h).

74. *Id.* art. 2(2)(i).

75. I have argued elsewhere that this extends to international human rights obligations. See Desierto, *supra* note 8.

76. ASEAN Charter, *supra* note 5, art. 7(1).

77. *Id.* art. 7(3).

78. *Id.* art. 7(2)(a).

ASEAN, important matters of interest to Member States and all issues referred to it by the ASEAN Coordinating Council, the ASEAN Community Councils, and ASEAN Sectoral Ministerial Bodies.”⁷⁹ The ASEAN Summit possesses considerable continuing administrative authority, shown by the fact that it can directly instruct ASEAN Council Ministers “to hold ad hoc inter-Ministerial meetings, and address important issues concerning ASEAN that cut across the Community Councils,”⁸⁰ as well as “authorise the establishment and dissolution of Sectoral Ministerial Bodies and other ASEAN institutions.”⁸¹ However, it is doubtful if the ASEAN Summit’s authority to dissolve “other ASEAN institutions” could extend to Charter-based institutions such as the ASEAN Coordinating Council,⁸² the ASEAN Community Councils (the ASEAN Political-Security Community Council, the ASEAN Economic Community Council and the ASEAN Socio-Cultural Community Council),⁸³ the Secretary-General and Permanent Secretariat,⁸⁴ the Committee of Permanent Representatives to ASEAN⁸⁵ and the ASEAN National Secretariats,⁸⁶ among others. Interpreting this degree of administrative authority for the ASEAN Summit would defeat the Charter’s Amendments procedure under Article 48, which separately requires Member States to ratify any amendments to the Charter.

A further innovation in the ASEAN Summit is its generously worded and undefined emergency powers. (It can “address emergency situations affecting ASEAN by taking *appropriate* actions.”)⁸⁷ This dovetails with the Charter Purpose of effective response, “in accordance with the principle of comprehensive security, to all forms of threats, transnational crimes and transboundary challenges.”⁸⁸ Argu-

79. *Id.* art. 7(2)(b).

80. *Id.* art. 7(2)(c).

81. *Id.* art. 7(2)(f).

82. *Id.* art. 8.

83. *Id.* art. 9. The ASEAN Community Councils “ensure the implementation of the relevant decisions of the ASEAN Summit,” “coordinate the work of the different sectors under its purview, and on issues which cut across the other Community Councils,” and “submit reports and recommendations to the ASEAN Summit on matters under its purview.” *Id.*

84. *Id.* art. 11.

85. *Id.* art. 12.

86. *Id.* art. 13.

87. *Id.* art. 7(2)(d) (emphasis added).

88. *Id.* art. 1(8).

ably, this untested residual authority exists in addition to the plenary rule-making powers of the ASEAN Summit.

Apart from its assumption of executive and legislative functions, however, the ASEAN Summit appears to have also been vested with a form of *quasi-judicial* oversight. The Charter empowers the ASEAN Summit to “decide on matters referred to it under Chapters VII (Decision-Making) and VIII (Settlement of Disputes).”⁸⁹ The Leaders’ Summit in pre-Charter ASEAN observed a strict consensus rule in decision-making. While the ASEAN Charter maintains the consultation and consensus rule (*musyawarah-mufakat*), it *does* permit the ASEAN Summit flexibility to devise alternative forms of decision-making when consensus cannot be achieved.⁹⁰ This provision was included in the Charter after taking into consideration the recommendation of the Eminent Persons Group (EPG), a body created by pre-Charter ASEAN to draw up guidelines for drafting the Charter.⁹¹ In providing for the ASEAN Summit’s decision-making authority, the Charter text does not differentiate between *factual* and *legal* determinations. While the Charter provides for dispute settlement as provided in specific ASEAN instruments such as the ASEAN Protocol on Enhanced Dispute Settlement Mechanism and the 1976 TAC,⁹² the ASEAN Summit also has explicit authority to decide disputes that remain unresolved notwithstanding the application of other dispute settlement procedures within the Charter framework: “When a dispute remains unresolved, after the application of the preceding provisions of this Chapter, this dispute shall be referred to the ASEAN Summit, for its decision.”⁹³ A Member State’s non-compliance with findings, decisions or recommendations resulting from any ASEAN dispute settlement mechanism is likewise referable to the ASEAN Summit for decision.⁹⁴ The Charter does not provide any recourse from an ASEAN Summit decision, although it does pre-authorize the future establishment of a dispute settlement mechanism for disputes “which concern the interpretation or application of this

89. *Id.* art. 7(2)(e).

90. *Id.* art. 20(2) (“Where consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made.”).

91. Rosario Gonzalez-Manalo, *Drafting ASEAN’s Tomorrow: The Eminent Persons Group and the ASEAN Charter*, in *THE MAKING OF THE ASEAN CHARTER*, *supra* note 21, at 42.

92. ASEAN Charter, *supra* note 5, arts. 22–24.

93. *Id.* art. 26.

94. *Id.* art. 27(2).

Charter and other ASEAN instruments.”⁹⁵ On April 8, 2010 (or about two years after the passage of the Charter), ASEAN Member States signed the Protocol on this new dispute settlement mechanism.⁹⁶

Many of the Charter institutions were built on the existing administrative linkages of ASEAN as a regional cooperation. The key difference between these institutions and their pre-Charter predecessors is a matter of mandate. At the most localized level of the ASEAN bureaucracy, the ASEAN National Secretariats crucially “serve as the national focal point” and the “repository of information on all ASEAN matters at the national level.”⁹⁷ The National Secretariats continue their pre-Charter functions of coordinating the implementation of ASEAN decisions in their respective Southeast Asian jurisdictions,⁹⁸ while retaining a limited ability to influence the ASEAN Summit’s agenda by “coordinat[ing] and support[ing] the national preparations of ASEAN meetings,”⁹⁹ as previous National Secretariats had done when ASEAN was a regional cooperation. Other Charter institutions that have also continued their functions from pre-Charter ASEAN include the ASEAN Communities, the ASEAN Office of the Secretary-General and the ASEAN Permanent Secretariat. The Charter formally vests each ASEAN Community Council (whether Political-Security, Economic or Socio-Cultural) with the authority to “ensure the implementation of the relevant decisions of the ASEAN Summit,” coordinate internally with its operational sectors and externally with other Community Councils, as well as submit reports and recommendations to the ASEAN Summit for its consideration and decision.¹⁰⁰ The ASEAN Secretary-General now discharges *de jure* (with a broader administrative complement and operational budget),¹⁰¹ its former pre-Charter functions as *de fac-*

95. *Id.* art. 25.

96. Ubaidillah Masli, *ASEAN Pact To Resolve Conflicts*, BRUNEI NEWS, Apr. 9, 2010, available at <http://news.brunei.fm/2010/04/09/asean-pact-to-resolve-conflicts/>. For a brief discussion of the implications of this Protocol in relation to the problem of judicial oversight, see *infra* Part II.

97. ASEAN Charter, *supra* note 5, art. 13(a)–(b); see also *Strong ASEAN Community up to Members, Says PM*, VIET NAM NEWS, Apr. 8, 2010, <http://vietnamnews.vnagency.com.vn/Politics-Laws/198480/Strong-ASEAN-community-up-to-members-says-PM-.html>.

98. ASEAN Charter, *supra* note 5, art. 13(c).

99. *Id.* art. 13(d).

100. *Id.* art. 9(4).

101. Compare *id.* art. 11(4)–11(8), with *id.* art. 30.

to Chief Administrative Officer,¹⁰² although he or she now has a fixed and non-renewable five-year term under the Charter.¹⁰³

The ASEAN Charter also created new institutions as part of the framework to implement all future ASEAN Summit decisions and to ensure compliance with the existing corpus of ASEAN Law. It formally designated ASEAN Sectoral Ministerial Bodies,¹⁰⁴ which took over from the inter-ministry or inter-department linkages between Southeast Asian governments during pre-Charter ASEAN, as well as an ASEAN Coordinating Council as an institutional liaison between the ASEAN Community Councils.¹⁰⁵ Consistent with ASEAN's formal organizational status, the Charter established a Committee of Permanent Representatives to ASEAN that vested each Representative with the rank of Ambassador.¹⁰⁶ Finally, in perhaps the most controversial (or oft-critiqued) institution of the Charter, an

102. Compare *id.* art. 11(3), with *id.* art. 11(2). Article 11(2) states:

2. The Secretary-General shall:

- (a) carry out the duties and responsibilities of this high office in accordance with the provisions of this Charter and relevant ASEAN instruments, protocols, and established practices;
- (b) facilitate and monitor progress in the implementation of ASEAN agreements and decisions, and submit an annual report on the work of ASEAN to the ASEAN Summit;
- (c) participate in meetings of the ASEAN Summit, the ASEAN Community Councils, the ASEAN Coordinating Council, and ASEAN Sectoral Ministerial Bodies and other relevant ASEAN meetings;
- (d) present the views of ASEAN and participate in meetings with external parties in accordance with approved policy guidelines and mandate given to the Secretary-General; and
- (e) recommend the appointment and termination of the Deputy Secretaries-General to the ASEAN Coordinating Council for approval.

Id.

103. *Id.* art. 11(1).

104. Article 10(1) of the Charter states:

1. ASEAN Sectoral Ministerial Bodies shall:

- (a) function in accordance with their respective mandates;
- (b) implement the agreements and decisions of the ASEAN Summit under their respective purview;
- (c) strengthen cooperation in their respective fields in support of ASEAN integration and community-building; and
- (d) submit reports and recommendations to their respective Community Councils.

Id. art. 10(1).

105. *Id.* art. 8(2).

106. *Id.* art. 12.

ASEAN Human Rights Body was pre-authorized, whose “terms of reference [are] to be determined by the ASEAN Foreign Ministers Meeting.”¹⁰⁷ About two years after the passage of the Charter, ASEAN Foreign Ministers approved and issued the Terms of Reference for the ASEAN Intergovernmental Commission on Human Rights (AICHR).¹⁰⁸ As I discuss in Part II, in relation to the problem of judicial oversight, the AICHR presents a clear example of a disjunctive space between the Charter’s normative aspirations towards thick constitutionalism and the actual choices made by ASEAN’s authoritative decision-makers.

Finally, a significant structural change in the new Charter-based ASEAN is its potentially sweeping organizational inclusiveness. It enumerates ASEAN membership as currently composed of all of Southeast Asia’s states (Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People’s Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Vietnam),¹⁰⁹ but also provides for procedures for admission of new members, despite the fact that there do not appear to be any other geographically defined Southeast Asian states left out of ASEAN.¹¹⁰ The Charter encourages entities (State and non-state) to officially associate with ASEAN,¹¹¹ accredits Ambassadors from non-ASEAN States and intergovernmental organizations,¹¹² and allows the ASEAN Foreign Ministers Meeting to confer to non-ASEAN States the formal status of Dialogue Partner, Sectoral Dialogue Partner, Development Partner, Special Observer, Guest or any other status.¹¹³ To date, ASEAN has extensive economic and political security partnerships with the “ASEAN Plus 3” (China, Japan and Korea),¹¹⁴ the United States,¹¹⁵ Europe,¹¹⁶ Australia,¹¹⁷ Cana-

107. *Id.* art. 14(2).

108. *See Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights*, ASEAN SECRETARIAT, <http://www.aseansec.org/DOC-TOR-AHRB.pdf> (last visited Feb. 21, 2011).

109. ASEAN Charter, *supra* note 5, art. 4.

110. *Id.* art. 6.

111. *Id.* art. 16.

112. *Id.* art. 46.

113. *Id.* arts. 44(1)–(2).

114. For the historical overview of the ASEAN +3 partnership, see *ASEAN Plus Three Cooperation*, ASEAN SECRETARIAT, <http://www.aseansec.org/16580.htm> (last visited Feb. 21, 2011).

da,¹¹⁸ China,¹¹⁹ India,¹²⁰ Japan,¹²¹ Russia,¹²² the Republic of Korea¹²³ and New Zealand,¹²⁴ among others. Significantly, in 2009, the Unit-

115. See Joint Vision Statement on ASEAN-United States of America Enhanced Partnership (Sept. 15, 2005), available at <http://www.aseansec.org/17871.htm>; ASEAN-United States of America Joint Declaration for Cooperation to Combat International Terrorism, (Aug. 1, 2002), available at <http://www.aseansec.org/7424.htm>; Memorandum of Understanding Between the U.S. Department of Commerce and the ASEAN Secretariat Concerning Cooperation on Trade-Related Standards and Conformance Issues (Apr. 5, 2001), available at <http://www.aseansec.org/5979.htm>.

116. For the historical overview of the ASEAN-Europe partnership, see *Overview of ASEAN-EU Dialogue Relations*, ASEAN SECRETARIAT, <http://www.aseansec.org/23216.htm>. See also Nuremberg Declaration on an Enhanced EU-ASEAN Partnership (Mar. 15, 2007), available at <http://www.aseansec.org/20693.pdf>; Plan of Action to Implement the Nuremberg Declaration on an Enhanced EU-ASEAN Partnership, available at <http://www.aseansec.org/21122.pdf>; Memorandum of Understanding Between the European Community and ASEAN Concerning Cooperation on Standards and Conformance (Oct. 1, 1999), available at <http://www.aseansec.org/5671.htm>; Financing Memorandum Between the European Community and Government of Brunei Darussalam (Jan. 21, 1994), available at <http://www.aseansec.org/5658.htm>; Cooperation Agreement Between the Member Countries of ASEAN and the European Community (Mar. 7, 1980), available at <http://www.aseansec.org/1501.htm>.

117. See Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (Feb. 27, 2009), available at <http://www.aseansec.org/22260.pdf>; Framework for the AFTA-CER Closer Economic Partnership (2007), available at <http://www.aseansec.org/14005.htm>; Plan of Action to Implement the Joint Declaration on ASEAN-Australia Comprehensive Partnership (Aug. 1, 2007), available at <http://www.aseansec.org/21373.htm>; Ministerial Declaration on the AFTA-CER Closer Economic Partnership (Sept. 14, 2002), available at <http://www.aseansec.org/12780.htm>.

118. For the historical overview of the ASEAN-Canada partnership, see ASEAN-Canada Dialogue (Aug., 2010), available at <http://www.aseansec.org/5590.htm>. See also *ASEAN-Canada Joint Declaration for Cooperation to Combat International Terrorism* (July 28, 2006), available at <http://www.aseansec.org/18596.htm>.

119. For the historical overview of the ASEAN-China partnership (separate and independent from the ASEAN +3), see ASEAN-People's Republic of China, ASEAN SECRETARIAT, <http://www.aseansec.org/20185.htm>. See Memorandum of Understanding between ASEAN and the Government of the People's Republic of China on Strengthening Sanitary and Phytosanitary Cooperation (Nov. 20, 2007), available at <http://www.aseansec.org/21089.pdf>; Memorandum of Understanding between the ASEAN Secretariat and the Ministry of Agriculture of the People's Republic of China on Agricultural Cooperation (Jan. 14, 2007), available at <http://www.aseansec.org/19286.htm>; Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People's Republic of China (Nov. 29, 2004), available at <http://www.aseansec.org/16646.htm>; Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Cooperation Between ASEAN and the People's Republic of China (Nov. 29, 2004), available at <http://www.aseansec.org/16635.htm>; Framework Agreement on Comprehensive Economic Cooperation Between ASEAN and the People's Republic of China (Nov. 4, 2002), available

ed States signed the Instrument of Accession to the ASEAN's 1976 Treaty of Amity and Cooperation.¹²⁵

C. *Functional Constitutionalization and the ASEAN Bureaucracy*

Having entered into force in 2008, the ASEAN Charter remains in the nascent stages of implementation. The 2010 ASEAN Summit chaired by Vietnam focused on the continued implementation of the ASEAN Charter and the Roadmap for an ASEAN Community, specifically addressing issues of economic recovery and development, intra-ASEAN connectivity, climate change, education and human resource development.¹²⁶ The ASEAN Summit noted the establishment of new ASEAN institutions such as the ASEAN Coordinating Council, the Community Councils, the Committee of Permanent Representatives to ASEAN and the ASEAN Intergovernmen-

at <http://www.aseansec.org/13196.htm>; Joint Declaration of ASEAN and China on Cooperation in the Field of Non-Traditional Security Issues (Nov. 4, 2002), available at <http://www.aseansec.org/13185.htm>.

120. See ASEAN-India Partnership for Peace, Progress, and Shared Prosperity (Nov. 30, 2004), available at <http://www.aseansec.org/16839.htm>; Framework Agreement on Comprehensive Economic Cooperation between the Republic of India and ASEAN (Oct. 8, 2003), available at <http://www.aseansec.org/15278.htm>; ASEAN-India Joint Declaration for Cooperation to Combat International Terrorism (Oct. 8, 2003), available at <http://www.aseansec.org/15276.htm>.

121. For the historical overview of the ASEAN-Japan partnership and major agreements on the free trade area, *ASEAN-Japan*, ASEAN SECRETARIAT, <http://www.aseansec.org/4973.htm> (last visited Feb. 21, 2011).

122. For the historical overview of the ASEAN-Russia partnership and major agreements, see *ASEAN-Russia Dialogue Relations*, ASEAN SECRETARIAT, <http://www.aseansec.org/5922.htm> (last visited Feb. 21, 2011); *Russia Federation*, ASEAN SECRETARIAT, <http://www.aseansec.org/4981.htm> (last visited Feb. 21, 2011).

123. For a list of relevant documents, see *ASEAN-ROK*, ASEAN SECRETARIAT, <http://www.aseansec.org/4980.htm> (last visited Apr. 2, 2010).

124. For the historical overview of the ASEAN-New Zealand partnership and major agreements on the free trade area, see *ASEAN-New Zealand*, ASEAN SECRETARIAT, <http://www.aseansec.org/4976.htm> (last visited Feb. 21, 2011).

125. Press Release, U.S. Dep't of State, United States Accedes to the Treaty of Amity and Cooperation in Southeast Asia (July 22, 2009), available at <http://www.state.gov/r/pa/prs/ps/2009/july/126294.htm>.

126. See ASEAN Chairman, Chairman's Statement of the 16th ASEAN Summit: Towards the ASEAN Community: From Vision to Action (Apr. 9, 2010), available at <http://www.aseansec.org/24509.htm>.

tal Commission on Human Rights, but also admitted the incomplete status of ASEAN's implementing legal framework. The heads of state at the ASEAN Summit signed the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms and the Agreement on the Privileges and Immunities of ASEAN, but they have not concluded or ratified remaining Community agreements that would expedite ASEAN integration.¹²⁷ During the same 2010 Summit, however, the current ASEAN leadership did not take categorical action beyond muted public pronouncements on urgent issues, such as the Myanmar junta's exclusion of opposition leader Aung San Suu Kyi from upcoming elections,¹²⁸ political tensions at Bangkok between the Thai government and the Thaksin Shinawatra-led opposition¹²⁹ and the recent massacre of journalists and civilians in the southern Philippines.¹³⁰ While the ASEAN Summit's reticence to adopt direct action could be seen as a remnant of the pre-Charter emphasis on non-interference, it is also more likely that the ASEAN Summit suffers from institutional inertia in negotiating the transition to a Charter-based system. As an example, the first meeting of the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2010 exhibited implementation difficulties arising from ambiguities on its institutional mandate, rules of procedure and operational guidelines.¹³¹

From a constitutionalization standpoint, the Charter-based ASEAN established functional competencies within the ASEAN bureaucracy¹³² but not without attendant complications. As previously discussed, the Charter's design for the ASEAN Summit, as ASEAN's highest decision-making body, combines ultimate legislative and executive powers in the organization with (some) quasi-judicial authori-

127. *Id.* ¶¶ 12–37.

128. See John Rutwich, *ASEAN Urges Myanmar To Hold Fair Election*, REUTERS, Apr. 9, 2010, <http://www.reuters.com/article/idUSSGE63803N20100409?type=marketsNews>.

129. See ASEAN Secretary-General, *Statement by the Secretary-General on the Situation in Thailand* (Apr. 12, 2010), <http://www.aseansec.org/24541.htm>.

130. Nikko Dizon, *No Justice from ASEAN for Massacre Victims*, PHILIPPINE DAILY INQUIRER, Apr. 1, 2010, <http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20100401-261888/No-justice-from-ASEAN-for-massacre-victims>.

131. See *ASEAN Convenes on Human Rights in Indonesia*, XINHUA NEWS, Apr. 2, 2010, http://news.xinhuanet.com/english2010/world/2010-04/01/c_13234165.htm; Ismira Lutfia & Markus Junianto Sihaloho, *ASEAN Human Rights Body Rebuffs Victims Activists*, JAKARTA GLOBE, Mar. 29, 2010, <http://www.thejakartaglobe.com/national/asean-human-rights-body-rebuffs-victims-activists/366568>.

132. On the constitutionalist theory of formal international organizations, see Geir Ulfstein, *Institutions and Competences*, in *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW*, *supra* note 18, 45–80.

ty in dispute settlement between ASEAN Members. While numerous ASEAN subsidiary bodies such as the Community Councils and other Charter organs play important roles in the ASEAN legislative and executive processes, the Charter makes it clear that ultimate authority is vested in the decision-making authority of the heads of state that comprise the ASEAN Summit. Constitutional controls, at least as understood in contemporary domestic constitutional systems' theories of separation of powers and checks and balances,¹³³ are markedly lacking in the Charter-based ASEAN. As I show in Part II, this gap is a frequent undercurrent in the structural challenges that confront ASEAN's attempt at constitutionalization.

III. STRUCTURAL CHALLENGES TO ASEAN'S CONSTITUTIONALIZATION OF INTERNATIONAL LAW

Considering the Charter-based ASEAN's model of "horizontal embeddedness" (where pre-existing ASEAN cooperative networks were transposed into a formal international organization) in which the ASEAN Summit acts as the executive, legislative and quasi-judicial epicenter, how do we visualize ASEAN's implementation of the fundamental Charter Principle of "upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States"?¹³⁴ This key ASEAN Charter Principle obligates ASEAN as an international organization to ensure that the Member States comply with, and abide by, the fundamental norms of general international law. Implementing this ASEAN Charter Principle thus requires scrutiny into how ASEAN Member States indeed achieve international legal compliance through their executive branches' and national courts' respective implementation and recognition of international legal norms.

As the ASEAN Summit and the rest of the ASEAN bureaucracy acts to further implement the Charter and the increasing body of ASEAN Law, I submit that there are three key systemic issues arising from ASEAN's structural design that will have an immediate and long-term impact on ASEAN policy-making. While it may in-

133. Professor Ackerman's model of "constrained parliamentarism" through the intermediation of other checking institutions might be the most useful and applicable paradigm for reconceptualizing the diffuse bureaucratic structure of a Charter-based ASEAN. See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 633-729 (2000).

134. ASEAN Charter, *supra* note 5, art. 2(2)(j).

deed be the case that the political culture of ASEAN leadership causes selective enforcement of international law,¹³⁵ pending actual empirical measurement this claim of international (non) compliance will remain strongly disputed. For this reason, I invite scrutiny instead to structural issues that could qualitatively affect the legality of ASEAN Summit decisions, ASEAN Law and international law among the ASEAN Member States: the problem of incorporation (lack of direct effect), the problem of hybridity and normative transplantation and the problem of diffuse or insufficient judicial oversight.

The three foregoing problems are all interspersed in the issue of Charter-based legality. Incorporation involves the layering in of ASEAN and international obligations within Southeast Asian legal systems¹³⁶ and calls into question the binding nature and scope of these obligations within each ASEAN Member State. National courts' hybrid interpretations of ASEAN norms provoke methodological issues of context within the unitary system of interpretation of the Vienna Convention on the Law of Treaties (VCLT),¹³⁷ and particularly, the leeway that ASEAN Member States possess in interpreting the Charter, ASEAN Summit decisions, ASEAN Law and (incorporated) international law from the lens of their respective domestic courts as well as from the comparative jurisprudence of other Southeast Asian courts.¹³⁸ Finally, judicial oversight is crucial for

135. Dr. Lee Jones has incisively proposed that ASEAN states have intervened in the affairs of other Southeast Asian states, but that the principle of non-interference ultimately served as a subterfuge for Southeast Asian elites' attempts to maintain a non-communist social order. See Lee Jones, *ASEAN and the Norm of Non-Interference in Southeast Asia: A Quest for Social Order*, (Nuffield College Politics Working Group Paper, 2009), available at <http://www.nuff.ox.ac.uk/politics/papers/2009/Jones.March2009.pdf>.

136. On the role of domestic legal systems in the implementation of international law, see BENEDETTO CONFORTI, *INTERNATIONAL LAW AND THE ROLE OF DOMESTIC LEGAL SYSTEMS* 8–12, 34–40, 108–114 (1993).

137. See ULF LINDERFALK, *ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* 101–32 (2007).

138. For an example of domestic jurisprudence on treaties, see I.M. Sinclair, *The Principles of Treaty Interpretation and their Application by English Courts*, 12 INT'L & COMP. L.Q. 508 (1963). For an example of the reference to comparative jurisprudence in the interpretation of international law, see ALEXANDER ORAKHELASHVILI, *THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW* 301–93, 487–96 (2008). Finally, Karen Knop, Ralf Michaels and Annelise Riles argue a “conflict of laws” paradigm for international law as applied by domestic courts. See Karen Knop, Ralf Michaels, & Annelise Riles, *International Law in Domestic Courts: A Conflict of Laws Approach* (Cornell Legal Studies Research Paper No. 09-016, 2009), available at <http://ssrn.com/abstract=1413189> (last visited Feb. 21, 2011).

both institutional accountability and legal consistency in ASEAN.¹³⁹ Judicial oversight, even if administered primarily by national courts (and possibly subsidiarily by the ASEAN Summit), creates the possibility of review, remedy and recourse available to Member States' internal constituencies against ASEAN actions. In theory, the collective oversight functions discharged by national courts and the ASEAN Summit should advance the implementation of "ASEAN Law" and international law across Southeast Asia through harmonization and legal predictability. In practice, however, absent regular and institutionalized judicial cooperation (or more ideally, "court-to-court communications"¹⁴⁰) among Southeast Asian courts, there will likely be a continuing cacophony of varying judicial interpretations and disparate national implementation of "ASEAN Law" and international law.

A. The Problem of Incorporation or Lack of Direct Effect

The ASEAN Charter appears silent on the possibility of the direct effect of the Charter or ASEAN Summit decisions within Member States. Rather, Article 5(2) of the Charter obligates Member States to "take *all necessary measures*, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter *and* to comply with all obligations of membership."¹⁴¹ While ASEAN Summit decisions are binding on the membership, the Charter does not provide precise terms for the implementation of these decisions by the Member States.¹⁴² While Article 5(2) of the Charter indicates enactment of domestic legislation as one way of giving effect to Charter provisions or membership obligations, it is only one example of the "necessary measures" that a Member State could pursue. Depending on the constitutional or statutory mechanisms within each Member State, Charter provisions, membership obligations, ASEAN Summit decisions and international law could therefore be self-executing or non-self-executing.

139. On the problems that can arise from wrongful application of the judicial function in international law, see HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 85–138 (The Lawbook Exchange 2000) (1993).

140. See a paradigmatic example of this contemporary litigation practice in the *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases*, AMERICAN LAW INSTITUTE (May 16, 2000), <http://www.ali.org/doc/Guidelines.pdf> (last visited Apr. 10, 2010).

141. ASEAN Charter, *supra* note 5, art. 5(2) (emphasis added).

142. *Id.* arts. 7(2), 20(1)–(4).

A brief perusal of the written constitutions of the ten South-east Asian states reveals that while international law occupies the normative rank of either statutory legislation or constitutional norms,¹⁴³ there are few jurisdictions (such as the Philippines and Thailand) that arguably contain some constitutional space for self-executing treaties.¹⁴⁴ While the majority of these constitutions appear to require legislative enactment to give effect to treaties (such as Malaysia, Indonesia, Vietnam, Myanmar, and for certain categories of treaties in the Philippines and Thailand), others are silent on the matter altogether (such as Brunei, Singapore and Laos). The Malaysian Federal Parliament is vested by the Malaysian Constitution with the power to make laws “for the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organisation of which the Federation is a member.”¹⁴⁵ Indonesia’s President possesses constitutional authority to “conclude treaties with other countries” with the approval of the *Dewan Perwakilan Rakyat* (People’s Representative Council) or subject to statutory regulation.¹⁴⁶ Vietnam’s Constitution fully empowers its legislative branch, through the National Assembly, to “decide fundamental policies in external relations; to ratify or annul international agreements that have been signed or entered upon the proposal of the President.”¹⁴⁷ Myanmar’s 2008 Constitution also distinguishes between treaties and agreements that require approval of its legislative branch through the *Pyidaungsu Hluttaw*, and those that do not require such approval.¹⁴⁸ Brunei Darussalam’s 1984 Con-

143. For a comprehensive survey of incorporation mechanisms across constitutions around the world, see LAMBERTUS ERADES, INTERACTIONS BETWEEN INTERNATIONAL AND MUNICIPAL LAW: A COMPARATIVE CASE LAW STUDY (Malgosia Fitzmaurice & Cees Flinterman eds., 1993). See also CONSTITUTIONAL AND LEGAL SYSTEMS OF ASEAN COUNTRIES (Carmelo V. Sison ed., 1990).

144. For a global survey of individual national courts’ jurisprudence on implementation of treaties (whether by direct application or requiring further legislative transformation), see ERADES, *supra* note 143, at 886–944.

145. PERLEMBAGAAN MALAYSIA [CONSTITUTION] Aug. 31, 1957, sec. 76(1)(a).

146. UNDANG-UNDANG DASAR REPUBLIK INDONESIA [CONSTITUTION] Aug. 18, 1945, arts. 11(1)–11(3) (amended 2002).

147. HIẾN PHÁP CỘNG HÒA XÃ HỘI CHỦ NGHĨA VIỆT NAM [CONSTITUTION] Apr. 15, 1992, art. 84(13) (Vietnam).

148. CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 10, 2008, sec. 209. Section 209 of the Constitution states that:

209. The President, in accord with the law:

(a) shall enter into, ratify or annul international, regional or bilateral treaties which require the approval of the *Pyidaungsu Hluttaw*, or revoke from such treaties;

stitution does not clearly indicate whether treaties are self-executing or non-self-executing, although the Constitution prohibits the introduction (without prior consent of Brunei's monarch) of legislative bills "which shall appear inconsistent with obligations imposed upon His Majesty the Sultan and Yang Di-Pertuan or Her Majesty by Treaty or Agreement."¹⁴⁹ A similar ambiguity appears from the text of Singapore's 1965 Constitution (as amended in 2008), which is silent on the effect of treaties and international obligations, employing language instead that refers to the capacity of the State to enter into such treaties and obligations.¹⁵⁰ Laos' President has the power to "declare on the ratification or abolition of all treaties and agreements signed with foreign countries,"¹⁵¹ but the Laos Constitution does not indicate whether legislative approval is necessary before such treaties and agreements could be given effect. Thailand's 2007 Constitution

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- (b) may enter into, ratify or annul international, regional or bilateral treaties which do not require the approval of the *Pyidaungsu Hluttaw*, or revoke from such treaties.

Id.

149. PERLEMBAGAAN NEGERI BRUNEI [CONSTITUTION] Sept. 29, 1959, art. 42.1(b) (amended 1984).

150. CONSTITUTION OF THE REPUBLIC OF SINGAPORE Aug. 9, 1965, pt. III, cl. 7 (amended 1963). According to article III clause 7:

Participation in co-operative international schemes which are beneficial to Singapore

7. Without in any way derogating from the force and effect of Article 6, nothing in that Article shall be construed as precluding Singapore or any association, body or organisation therein from—

- (a) participating or co-operating in, or contributing towards, any scheme, venture, project, enterprise or undertaking of whatsoever nature, in conjunction or in concert with any other sovereign state or with any Federation, Confederation, country or countries or any association, body or organisation therein, where such scheme, venture, project, enterprise or undertaking confers, has the effect of conferring or is intended to confer, on Singapore or any association, body or organisation therein, any economic, financial, industrial, social, cultural, educational or other benefit of any kind or is, or appears to be, advantageous in any way to Singapore or any association, body or organisation therein; or
- (b) entering into any treaty, agreement, contract, pact or other arrangement with any other sovereign state or with any Federation, Confederation, country or countries or any association, body or organisation therein, where such treaty, agreement, contract, pact or arrangement provides for mutual or collective security or any other object or purpose whatsoever which is, or appears to be, beneficial or advantageous to Singapore in any way.

Id.

151. CONSTITUTION OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC Aug. 14, 1991, art. 53(11).

might appear to distinguish between self-executing and non-self-executing treaties. The Thai Constitution obligates the State to “promote friendly relations with other countries and adopt the principle of non-discrimination and . . . comply with human rights conventions in which Thailand is a party thereto as well as international obligations concluded with other countries and international organizations,”¹⁵² but it does not provide for categorical language on the direct effect of such conventions and international obligations. Nevertheless the Thai Constitution contains language that specifically distinguishes a limited set of treaties that would expressly require approval of the National Assembly, from the Thai monarch’s general constitutional authority to conclude treaties.¹⁵³

The 1987 Philippine Constitution stands alone among South-east Asian constitutions for expressly “adopt[ing] the generally ac-

152. CONSTITUTION OF THE KINGDOM OF THAILAND Aug. 19, 2007, pt. 6, sec. 82, para. 1.

153. According to sec. 190 of the CONSTITUTION OF THE KINGDOM OF THAILAND:

The King has the prerogative to conclude a peace treaty, armistice and other treaties with other countries or international organizations.

A treaty which provides for a change in the Thai territories or the Thai external territories that Thailand has sovereign right or jurisdiction over such territories under any treaty or an international law or requires the enactment of an Act for its implementation or affects immensely to economic or social security of the country or results in the binding of trade, investment budget of the country significantly must be approved by the National Assembly. In such case, the National Assembly must complete its consideration within sixty days as from the date of receipt of such matter.

Before the conclusion of a treaty with other countries or international organizations under paragraph two, the Council of Ministers must provide information thereon to the public, conduct public consultation and state information in relevant thereto to the National Assembly. In such case, the Council of Ministers must submit negotiation framework to the National Assembly for approval.

Upon giving signature to the treaty under paragraph two, the Council of Ministers shall, prior to give consent to be bound, facilitate the public to get access to the details of such treaty. In the case where the application of such treaty has affected the public or small and medium entrepreneurs, the Council of Ministers must revise or render remedy to such effects rapidly, expediently and fairly.

There shall be a law determining measure and procedure for the conclusion of a treaty having immense effects to economic or social security of the country or resulting in the binding of trade or investment of the country significantly and the revision or rendering of remedy to the effects of such treaty with due regard to the fairness among the beneficiaries, the affected persons and the general public.

A matter arising from the provisions of paragraph two falls within the jurisdiction of the Constitutional Court and the provisions of section 154 (1) shall apply *mutatis mutandis* to the referring of the matter to the Constitutional Court.

Id. § 190.

cepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations,"¹⁵⁴ a constitutional provision that the Philippine Supreme Court has repeatedly used as the basis for declaring that the Universal Declaration of Human Rights (by nature a non-binding international instrument) has full legal and binding effect in the Philippines.¹⁵⁵ Despite this liberality, however, the 1987 Philippine Constitution also carves out a legislative role in treaty ratification, which, based on recent judicial interpretations, appears to reserve constitutional space for self-executing as opposed to non-self-executing treaties and international agreements.¹⁵⁶ Finally, among the ten Southeast Asian states, only Cambodia's 1993 Constitution (as amended in 1999) directly refers to international treaties and human rights law instruments: "The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights."¹⁵⁷

Considering the lack of unanimity among ASEAN Member States as to the effect of international obligations and norms (such as the ASEAN Charter provisions, ASEAN Summit decisions, and international treaties and conventions which ASEAN Member States are mandated to uphold under Article 2(2)(j) of the ASEAN Charter) within their respective jurisdictions, the binding effect and obligatory scope of Charter norms and Charter-authorized norms (such as ASEAN Summit decisions) are put into serious question. Can ASEAN Member States invoke domestic constitutional procedures to suspend or delay compliance with ASEAN Summit decisions, the continuously-growing body of ASEAN Law, and international law norms embraced under the ASEAN Charter? While the VCLT clearly states that internal law cannot be invoked as a justification for failure to perform treaty obligations (subject, of course, to content and

154. SALIGANG BATAS NG PILIPINAS [CONSTITUTION] Feb. 2, 1987, art. II, sec. 2 (Phil.).

155. *Government of Hongkong Special Administrative Region v. Hon. Felixberto T. Olalia Jr.*, G.R. No. 153675 (S.C., Apr. 19, 2007) (en banc) (Phil.); *Republic of the Philippines v. Sandiganbayan*, G.R. No. 104768 (S.C., July 21, 2003) (en banc) (Phil.); *Boris Mejoff v. The Director of Prisons*, G.R. No. L-2855 (S.C., July 30, 1949) (en banc) (Phil.); *Victor Borovsky v. The Commissioner of Immigration et al.*, G.R. No. L-2852 (S.C., June 30, 1949) (en banc) (Phil.).

156. SALIGANG BATAS NG PILIPINAS [CONSTITUTION] Feb. 2, 1987, art. VII, sec. 21 (Phil.). *See Abaya v. Ebdane*, G.R. No. 167919 (S.C., Feb. 14, 2007); *Pimentel v. Executive Secretary*, G.R. No. 158088 (S.C., July 6, 2005).

157. CONSTITUTION OF THE KINGDOM OF CAMBODIA Sept. 21, 1993, art. 31, para. 1.

good faith rules under VCLT Article 46),¹⁵⁸ the ambiguity of ASEAN Member States' Charter Article 5(2) duty to “*take all necessary measures, including the enactment of appropriate domestic legislation*” to comply with ASEAN obligations¹⁵⁹ creates an interpretive space for ASEAN Member States to argue their respective inter-internal or constitutional laws in order to justify suspending, delaying or declining to comply with ASEAN Summit decisions, ASEAN Law and international law norms subsumed in the ASEAN Charter.

The signing of the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms on April 8, 2010 appears promising in that ASEAN foreign ministers clearly have begun to consider the problem of incorporation or lack of direct effect. It may be recalled that Article 25 of the ASEAN Charter called for the establishment of “appropriate dispute settlement mechanisms, including arbitration,” for disputes “which concern the interpretation or application of this Charter and other ASEAN instruments.”¹⁶⁰ Following the 2010 ASEAN Summit meeting in Hanoi, Vietnam, the ASEAN Chair reported that ASEAN Foreign Ministers:

reaffirmed the commitment to finalise the three other instruments, namely (i) the rules for references to the ASEAN Summit, (ii) the procedures for authorisation under internal law and domestic law, and (iii) the rules of procedure for requesting the ASEAN Secretariat to interpret the ASEAN Charter, of which the first one shall become an integral part of the Protocol.¹⁶¹

While the Protocol is still pending ratification by the ASEAN Member States, it should be pointed out that the Protocol promisingly provides for a full range of dispute settlement procedures, including consultation, good offices, mediation and conciliation, and arbitration.¹⁶² If and when the Protocol enters into force and ASEAN Member States avail themselves of its procedures, it is possible then

158. Vienna Convention on the Law of Treaties, arts. 27, 46, May 23, 1969, 1155 U.N.T.S. 331.

159. ASEAN Charter, *supra* note 5, art. 5(2).

160. *Id.* art. 25.

161. ASEAN Chair, Statement of the ASEAN Chair on the Signing of the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms by the Foreign Ministers of ASEAN (Apr. 8, 2010), <http://www.aseansec.org/24506.htm>.

162. Protocol to the ASEAN Charter on Dispute Settlement Mechanisms, Apr. 8, 2010, *available at* <http://cil.nus.edu.sg/2010/2010-protocol-to-the-asean-charter-on-dispute-settlement-mechanisms>.

that guidance may be provided on the problem of incorporation or lack of direct effect. Certainly, resolving this problem strikes at the core of the authoritative and binding interpretation of Charter obligations in relation to ASEAN Member States' internal constitutional procedures.

B. *The Problem of Hybrid Interpretation*

In the forty years of cooperative existence of pre-Charter ASEAN, hybridity and normative transplantations within ASEAN instruments were arguably non-issues in treaty interpretation. Before the ASEAN Charter, courts in Southeast Asia separately undertook to interpret ASEAN instruments, conventions and all other agreements according to their respective legal systems' jurisprudence and legal methods.¹⁶³ There was little necessity for an ASEAN Member State's court to look to the comparative jurisprudence of its counterpart courts, since pre-Charter ASEAN was a loose cooperation that did not require normative harmonization among ASEAN states.

However, today's Charter-based ASEAN can no longer afford oblivious Southeast Asian judiciaries. Because Article 5(2) of the Charter requires Member States to "*take all necessary measures . . . to effectively implement the provisions of this Charter and to comply with all obligations of membership,*" vesting national governments with the central role in the implementation of ASEAN Summit decisions, ASEAN Law and international law embraced within the ASEAN Charter, inevitably, national courts have to significantly participate in the project of constitutionalization of international law in ASEAN.¹⁶⁴ National courts will thus play key roles in the enforcement process, particularly in the assessment of national governments'

163. See Adolf Huala, *Improving the Enforcement of International Arbitration Awards in ASEAN Countries* (paper presented at the ASEAN Law Association 10th General Assembly) (providing an example of the diverse attitudes of Southeast Asian national courts in the enforcement of arbitral awards), available at <http://www.aseanlawassociation.org/10GAdocs/Indonesia6.pdf>. Southeast Asian states, prior to the ASEAN Charter, also undertook their own independently customized procedures to comply with targets and schedules under the ASEAN Free Trade Agreement. See Seiji Naya and Pearl Imada, *Implementing AFTA: 1992–2007*, in *THE ASEAN READER* 513–15 (Kernial Singh Sandhu ed., 1992).

164. See Eyal Benvenisti and George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law: A Rejoinder to Nikolaos Lavranos, Jacob Katz Cogan, and Tom Ginsburg*, 20 *EUR. J. INT'L L.* 1027, 1027–30 (2009) (detailing the increasing importance of inter-judicial coordination and dialogue in the enforcement of international law by domestic courts).

compliance with ASEAN Summit decisions, ASEAN law and international law embraced within the ASEAN Charter. For this reason, national courts must be conscious of their institutional interrelatedness as gatekeepers of the ASEAN Charter framework and, when appropriate, consider comparative jurisprudential methodology when adjudicating cases involving ASEAN law, decisions and norms.¹⁶⁵ Such an approach is not novel, since it merely situates ASEAN norms within the unitary system of treaty interpretation under Article 31 of the VCLT. When interpreting ASEAN law, decisions and norms as primarily contained in international treaties and other instruments, national courts could thus consider treaty texts and contexts, the subsequent and contemporaneous practices of ASEAN states, as well as the relevant principles of international law.¹⁶⁶

A national court's interpretation of ASEAN law, without due regard for the comparative jurisprudence of other Southeast Asian courts or the regional processes of ASEAN law-making, could jeopardize the future of a Charter-based ASEAN, through creeping erosions on the supposedly binding effect of ASEAN law or the competences of Charter-based institutions. To illustrate the extent to which hybrid judicial interpretations can undermine legality within ASEAN, let us consider the issue of judicial supervision in the enforcement of arbitral awards involving the ASEAN Comprehensive Investment Agreement (ACIA). Signed by ASEAN States on February 26, 2009, as of this writing the ACIA has not yet entered into force due to ratification delays from ASEAN Member States concerned about finalizing their own reservation lists of protected investments.¹⁶⁷ ASEAN

165. The proposal for a comparative jurisprudential methodology for national courts applying international law has had its share of advocates within this decade's scholarly literature. See, e.g., SHAHEED FATIMA, USING INTERNATIONAL LAW IN DOMESTIC COURTS, paras. 11.1–11.12 (2005); Mirna E. Adjami, *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence?*, 24 MICH. J. INT'L L. 103, 124–29 (2002); Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241, 251–52 (2008); Francesco Francioni, *International Law as a Common Language for National Courts*, 36 TEX. INT'L L.J. 587, 590–96 (2001); International Law in National Courts, (James Crawford and Margaret Young eds., July 11–12, 2008) (group discussion paper presented at the 25th Anniversary Conference of the Lauterpacht Centre for International Law), available at http://www.lcil.cam.ac.uk/25th_anniversary/book.php.

166. See Vienna Convention on the Law of Treaties, *supra* note 158, art. 31(1)–(3).

167. See Bernie Cahiles-Magkilat, *Constraints Leave RP Behind in ASEAN Investment Scheme Integrated*, THE MANILA BULLETIN, Aug. 22, 2010, <http://www.mb.com.ph/articles/273687/constraints-leave-rp-behind-asean-investment-schemeintegrated>; Petchanet Prachuangkrai, *ASEAN Investment Liberalization Could Be Delayed by the Desire to Protect Many Sectors*, THE NATION, Feb. 25, 2010, <http://www.nationmultimedia.com/>

economic ministers at the 2010 ASEAN ministerial meeting “agreed to progress work to facilitate greater ASEAN investment flows through joint investment promotions, advancing work on best practices on investment and engaging the private sector in further consultations to obtain feedback on improving the ASEAN investment climate.”¹⁶⁸ According to the ASEAN Fact Sheet on the ACIA, the ACIA is:

the result of a consolidation and revision of two ASEAN Investment Agreements: the 1987 ASEAN Agreement for the Promotion and Protection of Investments (known as the Investment Guarantee Agreement or ASEAN IGA), and the 1998 Framework Agreement on the ASEAN Investment Area (commonly known as the AIA Agreement), as well as its related Protocols.¹⁶⁹

The 1987 ASEAN IGA will terminate as soon as the ACIA enters into force.¹⁷⁰

The ACIA's stated objective is “to create a free and open investment regime in ASEAN in order to achieve the end goal of economic integration” through “progressive liberalization of the investment regimes of Member States,” “provision of enhanced protection to investors of all Member States and their investments,” “improvement of transparency and predictability of investment rules, regulations and procedures conducive to increased investment among Member States,” “joint promotion of the region as an integrated investment area” and “cooperation to create favourable conditions for investment by investors of a Member State in the territory of other Member States.”¹⁷¹ Accordingly, the ACIA makes it clear that its

home/2010/02/25/business/Asean-investment-liberalisation-could-be-delayed-b-30123351.html. As of this writing, six ASEAN Member-States have already ratified the ACIA—Brunei Darussalam, Cambodia, Laos, Malaysia, Myanmar and the Philippines. See *Table of ASEAN Treaties/Agreements and Ratifications*, ASEAN SECRETARIAT, <http://www.aseansec.org/Ratification.pdf> (last visited Feb. 27, 2011).

168. ASEAN Comprehensive Investment Agreement, Feb. 26, 2009, <http://www.asean.org/documents/FINAL-SIGNED-ACIA.pdf> [hereinafter ACIA] (not yet in force). See Joint Media Statement of the 42nd ASEAN Economic Ministers' (AEM) Meeting (Aug. 25, 2010), available at <http://www.aseansec.org/25084.htm>.

169. ASEAN SECRETARIAT, ASEAN COMPREHENSIVE INVESTMENT AGREEMENT FACT SHEET (2009), available at <http://www.aseansec.org/Fact%20Sheet/AEC/2009-AEC-024.pdf>.

170. ACIA, *supra* note 168, art. 47(1).

171. *Id.* art. 1.

provisions apply to all ten ASEAN Member States,¹⁷² to ensure uniform treatment and increased protection of covered investments in the Southeast Asian region.¹⁷³ The ACIA maintains the 1987 ASEAN IGA's guarantees of national treatment,¹⁷⁴ most favored nation (MFN) treatment,¹⁷⁵ fair and equitable treatment,¹⁷⁶ the prohibition against expropriation and the requirement of just compensation for lawful expropriations.¹⁷⁷

At the same time, the ACIA abandons many of the problematic aspects of the 1987 ASEAN IGA. The ACIA definitions of "investments" and "covered investors" are consistent with the broader definitions for such terms under the U.S. and German Model Bilateral Investment Treaties.¹⁷⁸ The ACIA no longer follows the 1987 ASEAN IGA's strict definition of an investor company as a "corporation, partnership or other business association, incorporated or constituted under the laws in force in the territory of any Contracting Party *wherein the place of effective management is situated.*"¹⁷⁹ Instead, the ACIA transposes the element of management or business operations in its denial of benefits clause,¹⁸⁰ which is worded similarly to the denial of benefits clause under Article 17 of the Energy Charter Treaty.

172. The ACIA provides for some special and differential treatment for newer ASEAN Member States (mainly the CMLV countries), such as through technical assistance, recognition of their commitments according to individual stages of development, among others. *Id.* art. 23.

173. See Timothy G. Nelson, *Investor-State Arbitration and Investment Treaty Protection—The South-East Asian Angle*, 28 *AUSTL. RESOURCES & ENERGY L.J.* 213, 213–25 (2009).

174. ACIA, *supra* note 168, art. 5.

175. *Id.* art. 6.

176. *Id.* art. 11.

177. *Id.* art. 14.

178. Compare U.S. MODEL BILATERAL INVESTMENT TREATY (2004), available at <http://www.state.gov/documents/organization/117601.pdf>, and GERMAN MODEL BILATERAL INVESTMENT TREATY (2008), available at <http://ita.law.uvic.ca/investmenttreaties.htm>, with ACIA, *supra* note 168, arts. 3, 4(a), 4(c)–4(e).

179. Agreement Among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore and the Kingdom of Thailand for the Promotion and Protection of Investments art. 1(2), Dec. 15, 1987, 27 *I.L.M.* 612, available at <http://www.aseansec.org/12812.htm>, [hereinafter 1987 ASEAN IGA] (emphasis added).

180. ACIA, *supra* note 168, arts. 19(1)(a)–(b).

The ACIA also relaxes the 1987 ASEAN IGA's strict terminology on the applicability of the treaty. The 1987 ASEAN IGA had restricted covered investments only to government "approved" and "registered" investments,¹⁸¹ which the ACIA changed by defining a "covered investment" as an investment in the territory of a Member State or

of any other Member State in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter, and has been admitted according to its laws, regulations, and national policies, *and where applicable*, specifically approved in writing by the competent authority of a Member State.¹⁸²

The ACIA also abandons the 1987 ASEAN IGA's confusing reference to investments as those "brought into the territory" of a Contracting State, which had appeared to restrict the applicability of the 1987 ASEAN IGA only to investments that originate from ASEAN investors.¹⁸³ Other new provisions of the ACIA include: guarantees of compensation to investors in cases of strife (due to armed conflict or civil strife or state of emergency);¹⁸⁴ an expanded enumeration of transfers relating to a covered investment;¹⁸⁵ permitted measures that

181. 1987 ASEAN IGA, *supra* note 179, art. II(1) ("This Agreement shall apply only to investments brought into, derived from or directly connected with investments brought into the territory of any Contracting Party by nationals or companies of any other Contracting Party *and which are specifically approved in writing and registered by the host country* and upon such conditions as it deems fit for the purposes of this Agreement."(emphasis added)).

182. ACIA, *supra* note 168, art. 4(a).

183. 1987 ASEAN IGA, *supra* note 179, art. 2(1) ("This Agreement shall apply only to investments brought into, derived from or directly connected with investments *brought into the territory* of any Contracting Party by nationals or companies of any other Contracting Party and which are specifically approved in writing and registered by the host country and upon such conditions as it deems fit for the purposes of this Agreement." (emphasis added)).

184. See ACIA, *supra* note 168, art. 12, which appears similarly-worded as Article 4(1) of the 1980 Sri Lanka-United Kingdom BIT, Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments, U.K.-Sri Lanka art. 4(1), Feb. 13, 1980, 1227 U.N.T.S. 19825, that provided for compensation to investors for losses to investment suffered as a consequence of "war or other armed conflict, revolution, a state of national emergency, revolt, insurrection, or riot." See *Asian Agric. Prods. Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award and Dissenting Opinion (June 27, 1990), 6 ICSID Rev.—FILJ 526 (1991), 30 I.L.M. 577 (1991).

185. Compare ACIA, *supra* note 168, art. 13, with 1987 ASEAN IGA, *supra* note 179, art. VII(1).

host States may adopt to safeguard their respective balances-of-payments;¹⁸⁶ and perhaps most importantly, general exceptions and security exceptions provisions¹⁸⁷ that appear wholly identical to the General Agreement on Tariffs and Trade (GATT) 1994's Articles XX (General Exceptions) and XXI (Security Exceptions).

Unlike the 1987 ASEAN IGA, the ACIA now accommodates other dispute resolution mechanisms apart from arbitration, such as conciliation and consultation.¹⁸⁸ Investors may submit to arbitration any claims based on breach of ACIA obligations (on national treatment, MFN treatment, senior management and board of directors, treatment of investment, compensation in cases of strife, transfers, expropriation and compensation) relating to the management, conduct, operation, sale or other disposition of a covered investment, for which the investor has suffered loss or damage arising from such breach.¹⁸⁹ At its own discretion, the investor may submit such claim to any of the following institutions, in the alternative:

- (a) to the courts or administrative tribunals of the disputing Member State, provided that such courts or tribunals have jurisdiction over such claims; or
- (b) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the disputing Member State and the non-disputing Member State are parties to the ICSID Convention; or
- (c) under the ICSID Additional Facility Rules, provided that either of the disputing Member State or the non-disputing Member State is a party to the ICSID Convention; or
- (d) under the UNCITRAL Arbitration Rules; or
- (e) to the Regional Centre for Arbitration at Kuala Lumpur or at any other regional centre for arbitration within ASEAN; or
- (f) if the disputing parties agree, to any other arbitration institution.¹⁹⁰

186. ACIA, *supra* note 168, art. 16.

187. *Id.* arts. 17–18.

188. *Id.* arts. 3–31.

189. *Id.* art. 32.

190. *Id.* art. 33.

The ACIA contains extensive provisions on the governing law of the arbitration, the procedures for appointment of arbitrators and the conduct of the arbitration, up to the issuance of the arbitral award,¹⁹¹ and also appears to apply the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards to claims submitted under the ACIA.¹⁹² However, the ACIA also stresses that “[e]ach Member State shall provide for the enforcement of an award in its territory.”¹⁹³ This stand-alone provision in the ACIA is unqualified, and does not contain any reference to the 1958 New York Convention’s procedures and limited grounds for refusal of recognition and enforcement.¹⁹⁴ This gap calls into question the actual scope of judicial supervision retained by Southeast Asian national courts in relation to arbitral awards arising from the ACIA.

It should be recalled that Contracting States to the 1958 New York Convention have the express duty to “recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.”¹⁹⁵ Courts of Contracting States have the duty to refer the parties to arbitration “unless [they] find[] that the said agreement is null and void, inoperative or incapable of being performed.”¹⁹⁶ Contracting States have the obligation to “recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.”¹⁹⁷ Article V lists exclusive grounds under which recognition and enforcement of arbitral awards may be

191. *Id.* arts. 33–41.

192. “New York Convention means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, United States of America on 10 June 1958.” *Id.* art. 28(h). “Unless the disputing parties otherwise agree, the tribunal shall determine the place of arbitration in accordance with the applicable arbitration rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.” *Id.* art. 36(5). “A claim that is submitted for arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article 1 of the New York Convention.” *Id.* art. 41(8).

193. *Id.* art. 41(9).

194. *Id.* arts. 3–6.

195. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 2(1), Jun. 10, 1958, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

196. *Id.* art. 2(3).

197. *Id.* art. 3.

refused. Article VI entitles courts to adjourn decision on the enforcement of the award and may order the other party to give suitable security if an application for vacatur or suspension of the award has been made pursuant to Article V(1)(e). These common international obligations for all Contracting States to the 1958 New York Convention build up a system of control mechanisms that uniformly delineate the authority of courts and the prerogative of arbitrators.¹⁹⁸

The ACIA does not clearly indicate if ASEAN Member States providing for enforcement of arbitral awards in their respective territories have to follow the abovementioned control mechanisms of the 1958 New York Convention. This can be potentially problematic, since some Southeast Asian national courts might rely on this gap to undertake judicial review *de novo* of arbitral awards, and thus reach into the intrinsic features of the awards and the arbitrators' disposition of the issues on the merits. The ACIA's provisions for General Exceptions also include a "public morals or public order" exception,¹⁹⁹ which could have entirely different municipal connotations and jurisprudential understandings for various national courts in Southeast Asia. The same ambiguity can exist for the ACIA's Security Exceptions, where any Member State is not prevented from "taking any action which it considers necessary for the protection of its essential security interests."²⁰⁰ Significantly, the ACIA's wording of both these provisions on General Exceptions and Security Exceptions appears to have been largely adopted from another specialized treaty regime, Articles XX (General Exceptions) and XXI (Security Exceptions) of the GATT 1994, as well as Article XIV of the General Agreement on Trade in Services (GATS).²⁰¹ The international trade law regime contains its own jurisprudence on the interpretation of these exceptions.²⁰² While it would appear from the text of the ACIA that the adaptation of trade law provisions is deliberate,²⁰³ these un-

198. See W.M. REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR 109–30 (1992).

199. ACIA, *supra* note 168, art. 17(1)(a).

200. *Id.* art. 18(b).

201. See General Agreement on Tariffs and Trade 1994 arts. XX, XXI, Apr. 15, 1994, 1867 U.N.T.S. 190 (1995); General Agreement on Trade in Services art. XIV, Apr. 15, 1995, 1869 U.N.T.S. 196 (1995).

202. See PETROS C. MAVROIDIS, THE GENERAL AGREEMENT ON TARIFFS AND TRADE: A COMMENTARY 185–86, 257–59 (2005); Andrew Emmerson, *Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse?*, 11 J. INT'L ECON. L. 135, 135–54 (2008); Peter Lindsay, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*, 52 DUKE L.J. 1277, 1287–96 (2003).

203. See ACIA, *supra* note 168, art. 17(2). Article 17(2) states:

settled provisions of GATT Articles XX and XXI and GATS Article XIV do not provide a consistent source of jurisprudential and legal guidance for Southeast Asian national courts. In cases where these exceptions are invoked, therefore, it is possible that some national courts in Southeast Asia would avail themselves of the gap in the language of the ACIA on enforcement of arbitral awards, or the interpretive uncertainty underlying ACIA Articles 17 and 18, to undertake a more extensive form of judicial review beyond the grounds indicated in Article V of the 1958 New York Convention. National courts' hybrid and disparate interpretations of these exceptions, without reference to fellow Southeast Asian courts' judicial interpretations alongside the ACIA text and context, could thus undermine ACIA legality and the objectives of ASEAN economic integration.

C. *The Problem of Diffuse or Insufficient Judicial Oversight*

The actual reach of the vast and wide-ranging international obligations assumed under the ASEAN Charter will ultimately depend on the effectiveness and efficiency of Southeast Asian national courts in adjudicating controversies arising from their respective governments' (non)compliance with Charter-based or Charter-incorporated international legal norms. How this tension is managed, I submit, will be determinative of the success of the ASEAN Charter's project of constitutionalization of international law. Can Southeast Asian national courts still separately undertake their own judicial oversight powers on their respective governments without acknowledging the larger consequences of their judicial decisions on the Charter-based ASEAN communities? If a national court declines to compel the government of an ASEAN Member State to comply with ASEAN law, ASEAN Summit decisions or international law as embraced within the ASEAN Charter, can ASEAN realistically compel compliance? Article 27(2) of the ASEAN Charter provides that "[a]ny Member State affected by non-compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, may refer the matter to the ASEAN Summit for a decision," while Article 20(4) of the ASEAN Charter indicates that "[i]n the case of a serious breach of the Charter or non-compliance,

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2. Insofar as measures affecting the supply of financial services are concerned, paragraph 2 (Domestic Regulation) of the Annex on Financial Services of the General Agreement on Trade in Services in Annex 1B to the WTO Agreement ("GATS") shall be incorporated into and form an integral part of this Agreement, *mutatis mutandis*.

Id.

the matter shall be referred to the ASEAN Summit for decision.”²⁰⁴ The Charter, however, is silent on what such ASEAN Summit decisions could entail in actual practice. Could these decisions impose sanctions, declare duties to make reparations (analogous to consequences of breaching international obligations under the Articles on State Responsibility) or affect the membership status of the non-complying ASEAN Member State? These vague references to ASEAN Summit decisions (and the corresponding lack of categorical substantive guidelines in the Charter) thus appear to subject the issue of oversight more to political suasion than actual international legality.

Perhaps the most extreme example of this tension can be seen from the contrast between the ASEAN Charter’s deep commitment to international human rights obligations and the unclear competence of the ASEAN Intergovernmental Commission on Human Rights (AICHR). The ASEAN Charter expressly incorporated as part of its binding Principles sweeping duties of ASEAN Member States that obligate them to observe “adherence to the rule of law, good governance, the principles of democracy and constitutional government”;²⁰⁵ “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice”;²⁰⁶ and “upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States.”²⁰⁷

Given these extensive commitments assumed by ASEAN, the Terms of Reference for the AICHR vested it with the organizational mandate, *inter alia*, to “protect human rights and fundamental freedoms” and “uphold international human rights standards as prescribed by the Universal Declaration on Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties.”²⁰⁸ To fulfill this mandate, however, the AICHR was only created as a “consultative body,” with marginal implementing capacity to fulfill a narrow set of functions.²⁰⁹ Clearly, the literal enforcement of

204. ASEAN Charter, *supra* note 5, arts. 20(4), 27(2).

205. *Id.* art. 2(2)(h).

206. *Id.* art. 2(2)(i).

207. *Id.* art. 2(2)(j).

208. See ASEAN SECRETARIAT, TERMS OF REFERENCE OF ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS, cls. 1.1, 1.6, available at <http://www.aseansec.org/DOC-TOR-AHRB.pdf>.

209. *Id.* cl. 4. Clause 4 states:

ASEAN Member States' international human rights commitments would be a shared responsibility of Southeast Asian national governments, as overseen by their respective national courts in specific cases.

While national courts are indeed valuable actors in enforcing international human rights obligations,²¹⁰ their enforcement abilities

4. Mandate and Functions

- 4.1. To develop strategies for the promotion and protection of human rights and fundamental freedoms to complement the building of the ASEAN Community;
- 4.2. To develop an ASEAN Human Rights Declaration with a view to establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights;
- 4.3. To enhance public awareness of human rights among the peoples of ASEAN through education, research and dissemination of information;
- 4.4. To promote capacity building for the effective implementation of international human rights treaty obligations undertaken by ASEAN Member States;
- 4.5. To encourage ASEAN Member States to consider acceding to and ratifying international human rights instruments;
- 4.6. To promote the full implementation of ASEAN instruments related to human rights;
- 4.7. To provide advisory services and technical assistance on human rights matters to ASEAN sectoral bodies upon request;
- 4.8. To engage in dialogue and consultation with other ASEAN bodies and entities associated with ASEAN, including civil society organisations and other stakeholders, as provided for in Chapter V of the ASEAN Charter;
- 4.9. To consult, as may be appropriate, with other national, regional and international institutions and entities concerned with the promotion and protection of human rights;
- 4.10. To obtain information from ASEAN Member States on the promotion and protection of human rights;
- 4.11. To develop common approaches and positions on human rights matters of interest to ASEAN;
- 4.12. To prepare studies on thematic issues of human rights in ASEAN;
- 4.13. To submit an annual report on its activities, or other reports if deemed necessary, to the ASEAN Foreign Ministers Meeting; and
- 4.14. To perform any other tasks as may be assigned to it by the ASEAN Foreign Ministers Meeting.

Id.

210. See BENEDETTO CONFORTI & FRANCESCO FRANCONI, ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS (1997); Michael Kirby, *Domestic Courts and International Human Rights Law: The Ongoing Judicial Conversation*, 27 NETH. Q. OF HUM. RTS. 291, 291–308 (2009). *But see* HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, AND MORALS: TEXT AND CASES 42–57 (2008).

are also contingent on their relative institutional strengths within their respective countries. Although Southeast Asian legal systems are well-used to pluralist legal orders and normative transplantations,²¹¹ contemporary Southeast Asian courts do not exhibit uniformity or similarity in their degree of receptiveness to international law, more so their reference or use of comparative foreign sources. Many Southeast Asian states have not ratified the Rome Statute of the International Criminal Court.²¹² The new ASEAN members such as Cambodia, Laos, Myanmar and Vietnam are not mature democracies in the same vein as the original five ASEAN Member States (Malaysia, the Philippines, Thailand, Indonesia and Singapore).²¹³ The comparative jurisprudence on international law continues to be thinly reported from Southeast Asian national courts, more so on international human rights issues. It therefore remains to be seen if modern Southeast Asian courts can rigorously discharge their gatekeeping functions in the enforcement of the ASEAN Charter, ASEAN laws and numerous international laws embraced by the ASEAN Charter. If indeed, as some scholars have recently observed, international law is moving towards an “Eastphalia”²¹⁴ where international law now infuses Asian governance, it is all the more important that ASEAN address the problem of diffuse or insufficient judicial oversight to keep Southeast Asian states in the Charter-based ASEAN along this “Eastphalian” path.

Part II has attempted to expose some common structural challenges to the constitutionalization of international law in the Charter-based ASEAN. In the Conclusion, I propose that this project of constitutionalization of international law in ASEAN must come to terms with the realities of effective decision. Even as reforms and institutions are continuously being built into the new, Charter-based ASEAN, Southeast Asian constituencies must exhaust Charter pro-

211. Andrew Harding, *Comparative Law and Legal Transplantation in South East Asia: Making Sense of the “Nomic Din”*, in ADAPTING LEGAL CULTURES 199 (David Nelken and Johannes Fees eds., 2001). See also John R. Schmidhauser, *Legal Imperialism: Its Enduring Impact in Colonial and Post-Colonial Judicial Systems*, 13 INT’L POL. SCI. REV. 3, 321–34 (1992).

212. See Valeriane Toon, *International Criminal Court: Reservations of Non-State Parties in Southeast Asia*, 26 CONTEMP. SE. ASIA 218 (2004).

213. See David Martin Jones, *Security and Democracy: The ASEAN Charter and the Dilemmas of Regionalism in South-East Asia*, 84 INT’L AFF. 735, 741–56 (2008).

214. See David P. Fidler, *Introduction: Eastphalia Emerging? Asia, International Law, and Global Governance*, 17 IND. J. GLOBAL LEGAL STUD. 1, 1–12 (2010); Tom Ginsburg, *Eastphalia as the Perfection of Westphalia*, 17 IND. J. GLOBAL LEGAL STUD. 1, 27–45 (2010).

cesses to exact rules-based conduct from ASEAN Member States. International legal compliance cannot be left in stasis during ASEAN's institutional transition.

IV. CONCLUSION: FROM CONSTITUTIONALIZATION TO CONSTITUTIVE DECISION—ASEAN CHARTER PROCESSES AND THE RULE OF LAW

It would be inaccurate to say that ASEAN only began its international legal existence through the binding force and effect of the ASEAN Charter. As Simon Chesterman rightly held, “even before adopting the Charter, ASEAN was certainly a permanent association of states, with lawful objects, equipped with at least rudimentary organs from the outset, growing into a Secretariat over time.”²¹⁵ However, it is another matter altogether to determine ASEAN's political and economic salience as a Charter-based organization of States moving towards integration in various functional areas. As I discussed in Part I, the Charter-based ASEAN appears to espouse some functional constitutionalization of international law, albeit incompletely. Certainly, a Charter-based ASEAN has generated a form of normative explosion in innumerable areas of Southeast Asian governance, with forty years worth of ASEAN instruments, treaties and agreements carried over and given full effect in the new ASEAN Charter era. The Charter-based ASEAN has also boldly set its sights on the incorporation of settled bodies of conventional and customary international law, international human rights law and multilateral trade rules within the framework of ASEAN policymaking. Without parallel institutional adaptation at pace with the normative explosion, therefore, it remains an open question if the Charter-based ASEAN can fully realize all of the Charter's more deeply internationalist Purposes and Principles.

One way of explaining the lag between norms and institutions in today's Charter-based ASEAN is to recognize that the Charter still reflects a lingering tension between ASEAN's move towards internationalism, while retaining a marked emphasis on the principles of sovereign independence and non-interference. Much has been written about ASEAN “exceptionalism” or inutility due to these principles,²¹⁶ but it must also be stressed that many of ASEAN's accom-

215. Chesterman, *supra* note 3, at 205.

216. See, e.g., John Arendshorst, *The Dilemma of Non-Interference: Myanmar, Human Rights, and the ASEAN Charter*, 8 NW. U. J. INT'L HUM. RTS. 1, 102–21 (2009); Lee Jones,

plishments in the last forty years in security, trade and intergovernmental administrative cooperation are attributable to the fact that these principles endured within the Southeast Asian diplomatic lexicon.²¹⁷ It is easier to accept these conflicting realities once one probes the constructivist history behind the creation of a “Southeast Asian” region.²¹⁸ Unlike the predominantly shared religious, political, economic, social and cultural histories of Europe, Southeast Asia was initially a fictive construct of states that had considerably different colonial and postcolonial experiences, political struggles, economic power, linguistic traditions and religions. Southeast Asian states have had less than a century of re-experienced political sovereignty after their independence from imperial fetters—it was not coincidental that Jawaharlal Nehru’s 1954 Bandung Principles of mutual non-aggression, non-interference and sovereign equality of states resound distinctly from ASEAN’s 1976 TAC and 1967 Bangkok Declaration (and to some extent, the ASEAN Charter).²¹⁹ In a region whose very identity appears more a product of choice,²²⁰ rather than of inseparably intertwined histories,²²¹ it is not difficult to see why Southeast Asian states would still keep principles of non-interference, respect for national sovereignty, as well as the *mushawaharah* and *mufakat* concepts in the ASEAN Charter,²²² even as the Charter embraces more internationalist principles and norms.

The litmus test for international legality in a Charter-based ASEAN depends on the calibrated interpretation of the abovementioned principles in the implementation of ASEAN law and international law. Implementation will depend on the concerted efforts of

ASEAN’s Burma Policy: From Constructive Engagement to Critical Disengagement, 4 ASIAN SEC. 3, 271–93 (2008); *The Limits of Politeness*, ECONOMIST, Feb. 28, 1998, available at <http://www.economist.com/node/114305>.

217. Robin Ramcharan, *ASEAN and Non-Interference: A Principle Maintained*, 22 CONTEMP. SE. ASIA 60, 86 (2000).

218. Desierto, *supra* note 4, 389, 413–19.

219. The 1954 Bandung Principles were authored by Jawaharlal Nehru and Chou En Lai, during the historic African-Asian People’s Conference. See GEORGE MCTURNAN KAHIN, *THE ASIAN-AFRICAN CONFERENCE, BANDUNG, INDONESIA 1955*, 29 (1970).

220. One need not look far from the ASEAN Charter text to see the purposeful forging of the Southeast Asian identity and its visible symbols, such as the ASEAN motto of “One Vision, One Identity, One Community,” the ASEAN flag, the ASEAN emblem and anthem, ASEAN Day, as well as the establishment of a Committee of Permanent Representatives to ASEAN. See ASEAN Charter, *supra* note 5, arts. 1(14), 2(2)(1), 12, 35–40.

221. See AMITAV ACHARYA, *THE QUEST FOR IDENTITY: INTERNATIONAL RELATIONS IN SOUTHEAST ASIA 26–31*, 83–93 (2000).

222. ASEAN Charter, *supra* note 5, arts. 2(2)(a)–(g).

the ASEAN Summit, the ASEAN Community Councils and other Charter bodies, with national governments and domestic courts. Given the institutional structure and decision-making processes of ASEAN that I have described, it should be apparent that the authoritative and constitutive bases for ASEAN decisions are defined not just by the formal legal instruments that comprise forty years' worth of ASEAN law, the continued issuance of ASEAN "legislation" through the ASEAN Summit decisions and new treaties being concluded by ASEAN states, *but also* from the operational practices or "operational codes"²²³ of States and non-state actors, on established intergovernmental networks as well as non-governmental cooperative frameworks.²²⁴ The problems of incorporation (or lack of direct effect), hybrid interpretations and diffuse or insufficient judicial oversight persist because the formal expressions of "ASEAN Law" (through the Charter, ASEAN treaties and agreements and ASEAN Summit decisions) outpace the actual operational practices, powers and/or codes of key ASEAN actors—the ASEAN Summit and the fabric of ASEAN Charter bodies, as well as the Member States and their respective national governments and courts.

While constitutionalization has many analytical uses (especially in locating the point at which ASEAN's "soft" laws and regulations harden into firm international obligations of ASEAN Member States under the new Charter-based system), it is still necessary to cultivate a deeper understanding of the ASEAN institutional practices and beliefs that translate ASEAN norms and decisions into effective operational policies. It is in this sense that the structural considerations I have laid out in this article only offer a starting point in the analysis of ASEAN decision-making and the concept of legality within a Charter-based ASEAN. From a normative standpoint, the ASEAN Charter exemplifies an ideological project towards "thicker" constitutionalization of international law. This in itself has a revolutionary potential for entrenching the rule of law across all of Southeast Asia's diverse polities. The impediments of incorporation, hybrid interpretations and diffuse judicial oversight must be resolved in order to transform constitutionalized international law into effective ASEAN decisions and policies. To prevent reducing the Charter to a future rhetoric of nominal (and not actual) international legality, the

223. See W. Michael Reisman, *Myth System and Operational Code*, 3 YALE J. WORLD PUB. ORD. 229, 230–38 (1977).

224. See Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 2–92 (2002).

design, mandate and powers of ASEAN institutions must evolve to embrace and realize the new Charter ideologies.