

# ASEAN'S CONSTITUTIONALIZATION OF INTERNATIONAL LAW: CHALLENGES TO EVOLUTION UNDER THE NEW ASEAN CHARTER<sup>1</sup>

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**Abstract:** 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 parallel language similar to the US and German Model BITs; 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 constitutionalization of international law.

*"[W]ithout a contract among nations peace can neither be inaugurated nor guaranteed."*

- IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL SKETCH<sup>3</sup>

## INTRODUCTION

Since its entry into force on December 15, 2008,<sup>4</sup> the Association of Southeast Asian Nations (ASEAN) Charter has triggered 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

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<sup>3</sup> IMMANUEL KANT, TO PERPETUAL PEACE: A PHILOSOPHICAL SKETCH (trans. by Ted Humphrey, Hackett Publishing Co. Inc., 2003), at 13.

<sup>4</sup> See ASEAN Charter Overview in <http://www.aseansec.org/21861.htm> (last visited 5 October 2010); ASEAN Secretariat, "ASEAN Embarks on a New Era --- ASEAN Charter Fully Ratified", 21 October 2008, at <http://www.aseansec.org/22022.htm> (last visited 5 October 2010).

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.<sup>5</sup>

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.<sup>6</sup> 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.”<sup>7</sup> 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,”<sup>8</sup> they also bound themselves to act according to specific ASEAN Principles.<sup>9</sup> 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 sovereignty, territorial integrity, non-interference and renunciation of aggression), but also formally set as key ASEAN Principles contemporary multilateral norms on free trade, democratic government, and the promotion and protection of human rights.<sup>10</sup>

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<sup>5</sup> See Simon Chesterman, *Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person*, 12 S.Y.B.I.L. 199 (2008), at 204-207; Simon S.C. Tay, *The ASEAN Charter: Between National Sovereignty and the Region’s Constitutional Moment*, 12 S.Y.B.I.L. 151 (2008), at 158-162; Paul J. Davidson, *The Role of International Law in the Governance of International Economic Relations in ASEAN*, 12 S.Y.B.I.L. 213 (2008), at 218-223; Mely Caballero-Anthony, *The ASEAN Charter: An Opportunity Missed or One that Cannot Be Missed?*, Southeast Asian Affairs (2008), 71-85.

<sup>6</sup> 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 (2008), at 413-431.

<sup>7</sup> Charter of the Association of Southeast Asian Nations (ASEAN) [hereafter, “ASEAN Charter”], at <http://www.aseansec.org/21069.pdf>, Article 5(2).

<sup>8</sup> ASEAN Charter, Article 2(1).

<sup>9</sup> ASEAN Charter, Article 2(2).

<sup>10</sup> On the wider reach of ASEAN Charter norms particularly in promoting human rights, 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* - Göttingen Journal of International Law; Vol. 1, No. 1, p. 77-114, at <http://goedoc.sub.uni-goettingen.de/goescholar/handle/goescholar/3132>. The fourteen ASEAN Charter Principles are contained in Articles 2(2)(a) to 2(2)(n):

Nearly 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 Thailand's bloody political demonstrations, the Philippines' natural disasters and extrajudicial killings, up to the forthcoming 2010 elections of Myanmar given the exclusion and/or non-participation of its renowned democratic opposition leader Aung Saan Suu Kyi, highlight the need for reinvigorated discussion of the role and competencies of ASEAN under its new Charter,<sup>11</sup> particularly the constitutional dimensions of the ASEAN Charter on the relationship between ASEAN and its Member States.<sup>12</sup>

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“(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.”

<sup>11</sup> See Haacke, Jürgen (2010) *The Myanmar imbroglio and ASEAN: heading towards the 2010 elections. International affairs*, 86 (1). pp. 153-174; Kavi Chongkittavorn, “The fall-out of the Thai political crisis on ASEAN”, *The Nation*, April 19, 2010, at <http://www.nationmultimedia.com/home/2010/04/19/opinion/The-fall-out-of-the-Thai-political-crisis-on-Asean-30127385.html> (last visited 5 October 2010); Mazwin Nik Anis, “Disasters main topic at ASEAN meet”, *The Star Online*, October 28, 2010 at <http://thestar.com.my/news/story.asp?file=/2010/10/28/nation/7314644&sec=nation> (last visited 28 October 2010).

<sup>12</sup> 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

For the purposes of this Article I refer to “constitutionalization” only in a specific limited sense, in order to describe the passage of the ASEAN Charter and its ongoing constitutive decision-making processes, transforming ASEAN from a loose cooperation of Southeast Asian states into an integrated organization with international legal personality.<sup>13</sup> 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,<sup>14</sup> the “rules of recognition” in the international legal regime created by the new ASEAN Charter should also be sketched.<sup>15</sup> 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.”<sup>16</sup> As I discuss in the Conclusion of this Article, however, the ideological overinclusiveness of the ASEAN Charter presages a subtle paradigm shift, towards

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Singapore. See <http://cil.nus.edu.sg/wp/wp-content/uploads/2009/10/Mission-Statement-CIL-ASEAN-Integration-through-Law-Project-12-Oct-20091.pdf> (last visited 28 October 2010).

<sup>13</sup> The ASEAN Charter entered into force on 15 December 2008. See *full text at* <http://www.aseansec.org/21069.pdf> (last visited 2 April 2010). For an overview of the fundamental changes and transition of ASEAN as a loose cooperation of States to a formal international organization, see Diane A. Desierto, *Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia*, 36 INT’L J. LEG. INFO. 3, 387-431 (2008).

<sup>14</sup> 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. 21, 545-561 (2008).

<sup>15</sup> A “rule of recognition” is defined 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 GODEFRIDUS J.H. HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* (Brill, 1983), at p. 55. Nicholas Onuf identifies “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*...” Nicholas Onuf, *The Constitution of International Society*, 5 EUR. J. INT’L L. 1, 10(1994):

“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.

<sup>16</sup> Anne Peters, *Membership in the Global Constitutional Community*, in JAN KLABBERS, ANNE PETERS, & GEIR ULFSTEIN, *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* 153, 204 (2009) [hereafter, “KLABBERS, PETERS & ULFSTEIN”].

deliberate constitutionalization of a distinct regional identity 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),<sup>17</sup> 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.<sup>18</sup> 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

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<sup>17</sup> For recent critiques on the Charter-based ASEAN on human rights compliance issues, see John Arendshorst, *The Dilemma of Non-Interference: Myanmar, Human Rights, and the ASEAN Charter*, 8 NW. U. J. INT'L HUM. RTS. 102, at 112-115 (Fall 2009); Hao Duy Phan, *A Blueprint for a Southeast Asian Court of Human Rights*, 10 Asian-Pac. L. & Pol'y J. 384, 386-388, (2009).

<sup>18</sup> 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 GOETTINGEN J. INT'L L. 77, 87-91 (2009).

determination or subsequent agreement (such as the ASEAN Intergovernmental 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,<sup>19</sup> they do pose significant constitutional ambiguities for the Southeast Asian community as well as 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,”<sup>20</sup> where “international institutions form an increasingly dense network and nation-States lose competences.”<sup>21</sup> This definition, when

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<sup>19</sup> TOMMY KOH, ROSARIO G. MANALO, & WALTER WOON (EDS.), *THE MAKING OF THE ASEAN CHARTER* 6-8, 74-75 (2009) [hereafter, “KOH, MANALO & WOON”].

<sup>20</sup> JÜRGEN HABERMAS, *THE DIVIDED WEST* (2006), at p. 115. See Garrett Wallace Brown, *Kantian Cosmopolitan Law and the Idea of a Cosmopolitan Constitution*, 27 *History of Political Thought* 4, 661 (Winter 2006), at 672:

“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’.”

<sup>21</sup> Jürgen Habermas, *The Constitutionalization of International Law and the Legitimation of Problems of a Constitution for World Society*, *Constellations*, Vol. 15, Issue No. 4, pp. 444-455 (December 2008), at 444. 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 (Winter 2010), at 452-453:

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.<sup>22</sup> ICJ 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 and tribunals.<sup>23</sup> 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.<sup>24</sup> For many of its proponents, however, constitutionalization is an opportunity to

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“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"..."

<sup>22</sup> See Michael Wood, ‘*Constitutionalization of International Law: A Sceptical Voice*’, pp. 85-98 in KAIYAN HOMI KAIKOBAD AND MICHAEL BOHLANDER (EDS.), *INTERNATIONAL LAW AND POWER: PERSPECTIVES ON LEGAL ORDER AND JUSTICE: ESSAYS IN HONOUR OF COLIN WARBRICK* (Martinus Nijhoff Publishers, 2009);

<sup>23</sup> Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT’L L. 265, 297 (April 2009).

<sup>24</sup> Frank Schorkopf and Christian Walter, *Elements of Constitutionalization: Multilevel Structures of Human Rights Protection in General International and WTO-Law*, 4 German Law Journal 1359-1374 (2003), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=348>; Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 Harv. J. Int’l L. J. 223 (2006), at 224-229; Jeffrey L. Dunoff, *Constitutional Conceits: The WTO’s ‘Constitution’ and the Discipline of International Law*, 17 Eur. J. Int’l L. 3 (2006), at 650-655; FRANCISCO ORREGO VICUÑA, *INTERNATIONAL DISPUTE SETTLEMENT IN AN EVOLVING GLOBAL SOCIETY: CONSTITUTIONALIZATION, ACCESSIBILITY, PRIVATIZATION* (Cambridge University Press, 2004), at 124-127.



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.<sup>25</sup>

Constitutionalization also has its “thick” and “thin” versions.<sup>26</sup> “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, 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, customary international law and the general practice of States and non-State actors.<sup>27</sup> This type of ‘internationalized’ constitutionalism remains less robust than its domestic counterpart: “[a]ll 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

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<sup>25</sup> See JAN KLABBERS, ANNE PETERS, & GEIR ULFSTEIN, *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* (2009), at 3-44; Bardo Fassbender, *The meaning of international constitutional law*, pp. 307-328, at 321-327, in NICHOLAS TSAGOURIAS (ED.), *TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN MODELS* (2007); Erika de Wet, *The International Constitutional Order*, 55 INT’L COMP. L. Q. 51 (2006), at 51-54, 56-58; Armin von Bogdandy, *Constitutionalism in International Law: Comment on a Proposal from Germany*, 47 HARV. INT’L L. J. 223 (2006), at 230-233, 237-240; Matthias Goldmann, *Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority*, 9 GERMAN L.J. 1865 (November 2008), at 1868-1871; Andrea Hamann and Helene Ruiz-Fabri, *Transnational Networks and Constitutionalism*, 6 INT’L J. CONST. L. (July-Oct 2008) 481, at 484-485, 489-495; 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. 1, 39-75 (2001).

<sup>26</sup> Anne Peters and Klaus Armingeon, *Introduction – Global Constitutionalism from an Interdisciplinary Perspective*, 16 INDIANA J. GLOBAL LEG. STUD. 2 (2009), 393.

<sup>27</sup> For varying applications of this proposal, see Karolina Milewicz, *Emerging Patterns of Global Constitutionalism: Toward a Conceptual Framework*, 16 IND. J. GLOBAL LEG. STUD. 413 (2009); Beth Simmons, *Civil Rights in International Law: Compliance with Aspects of an ‘International Bill of Rights’*, 16 IND. J. GLOBAL LEG. STUD. 437 (2009); Daniel Bodansky, *Is There an International Environmental Constitution?*, 16 IND. J. GLOBAL LEG. STUD. 565 (2009); Anne van Aaken, *Defragmentation of Public International Law Through Interpretation: A Methodological Proposal*, 16 IND. J. GLOBAL LEG. STUD. 483 (2009). For seminal work on the architecture of transgovernmental networks and how they directly influence the spread of liberal internationalism, see Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VIRG. J. INT’L L. (2002) 1; Anne Marie Slaughter, *Global Governmental Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT’L L. 1041 (2003); ANNE MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).



label constitutional.”<sup>28</sup> Ultimately, “thick” constitutionalists visualize modern international law to be moving towards the realization of the Kantian-Habermasian paradigm of international public order,<sup>29</sup> 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-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.”<sup>30</sup> 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.”<sup>31</sup> 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.<sup>32</sup>

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

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<sup>28</sup> BARDO FASSBENDER, *THE UNITED NATIONS CHARTER AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY* 57 (2009).

<sup>29</sup> See Armin von Bogdandy and Sergio Dellavalle, *Universalism Renewed: Habermas’ Theory of International Order in Light of Competing Paradigms*, 10 *GERMAN L.J.* 5 (Jan 2009), at .25-29

<sup>30</sup> Alec Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 16 *IND. GLOBAL LEG. STUD.* 621, 626 (2009).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 625. See also Thomas Cottier, *Multilayered Governance, Pluralism, and Moral Conflict*, 16 *IND. J. GLOBAL LEG. STUD.* 647, at 655-658 (2009).

*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 for these broad questions, and suggests areas for further research. As much as possible, I confine the analysis to legal questions based on the ASEAN Charter and a voluminous body of related instruments, treaties and practices. However, when necessary, 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 second year of existence as an international organization with legal personality.<sup>33</sup> Part I (*Functional Constitutionalization in the ASEAN Charter*) 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'

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<sup>33</sup> However, note the argument that the organization's legal status was already in existence before the ASEAN Charter. See Simon Chesterman, *Does ASEAN Exist? The Association of South East Asian Nations as an International Legal Person*, 12 Singapore Yearbook of International Law 199 (2008), at 204-207.

hierarchy with the ASEAN Summit as the supreme governing body of the organization.<sup>34</sup> 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 (*Structural Challenges to Constitutionalization of International Law in ASEAN*) 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 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 precommitting 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 (*From Constitutionalization to Constitutive Decision: ASEAN Charter Processes and the Rule of Law*) contends that while the ASEAN Charter has boldly

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<sup>34</sup> For a concise summary of the legal hierarchy from the EU integration model, see Patricia Luíza Kegel and Mohamed Amal, *The Problem of Legal Implementation and Sovereignty*, in *ELEMENTS OF REGIONAL INTEGRATION: A MULTIDIMENSIONAL APPROACH* 209-226 (Ariane Kössler and Martin Zimmek eds., 2008).

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 and 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,"<sup>35</sup> 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 inimitably lean towards a thick version of the constitutionalization of international law. At this point in time, the main challenge against realizing ASEAN's project of constitutionalization lies with building and enforcing "ASEAN Law" in genuine accord with the Charter's Organizational Purposes—and for Southeast Asian states to translate normative aspiration into effective decision.

## I. 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.<sup>36</sup> 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").<sup>37</sup> The 1967 ASEAN Bangkok Declaration

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<sup>35</sup> ASEAN Charter, Article 52(1).

<sup>36</sup> 1976 Treaty of Amity and Cooperation, at <http://www.aseansec.org/1217.htm> (last visited 2 April 2010); 1967 ASEAN Bangkok Declaration at <http://www.aseansec.org/1212.htm> (last visited 2 April 2010).

<sup>37</sup> For an overview of pre-Charter ASEAN's consensus decision-making in foreign policy, see Tobias Ingo Nischalke, *Insights from ASEAN's Foreign Policy Cooperation: The 'ASEAN Way', a Real Spirit or Phantom?*, 22 *Contemporary Southeast Asia* 1 (2000), 89-112; SHAUN NARINE, *EXPLAINING ASEAN: REGIONALISM IN SOUTHEAST ASIA* 9-38 (2002); DAVID H. CAPIE AND PAUL M. EVANS, *THE ASIA-PACIFIC SECURITY LEXICON* (Institute of Southeast Asian Studies, 2002), at 136-146.

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.<sup>38</sup> The 1976 TAC sealed the best-efforts nature of this intergovernmental framework, where the ASEAN Member States "strive to achieve the closest cooperation on the widest scale."<sup>39</sup> The scope of cooperation provided for under the 1976 TAC spanned economic, social, technical, scientific, administrative and security concerns of the Southeast Asian region.<sup>40</sup> Cooperation is ultimately limited by ASEAN's overarching principles of "mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations," "the right of every State to lead its national existence free from external interference, subversion or coercion," "non-interference in the internal affairs of one another," "settlement of differences or disputes by peaceful means," "renunciation of the threat or use of force" and "effective cooperation."<sup>41</sup> Most importantly, the 1976 TAC stressed the pacific settlement of disputes firstly through direct ministerial negotiations.<sup>42</sup> Should negotiations fail, ASEAN Member States could undertake dispute resolution through "good offices, mediation, inquiry, conciliation,"<sup>43</sup> informal or ad hoc third-party assistance of a fellow Member State,<sup>44</sup> or recourse to any of the modes of peaceful settlement of disputes under the Charter of the United Nations.<sup>45</sup>

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<sup>38</sup> 1967 ASEAN Bangkok Declaration, third paragraph:  
"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.  
(c) Ad-Hoc Committees and Permanent Committees of specialists and officials on specific subjects.  
(d) 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 Committee and such other committees as may hereafter be established."

<sup>39</sup> 1976 Treaty of Amity and Cooperation, Article 8.

<sup>40</sup> 1976 Treaty of Amity and Cooperation, Article 7.

<sup>41</sup> 1976 Treaty of Amity and Cooperation, Articles 2(a) to 2(e).

<sup>42</sup> 1976 Treaty of Amity and Cooperation, Article 14.

<sup>43</sup> 1976 Treaty of Amity and Cooperation, Article 15.

<sup>44</sup> 1976 Treaty of Amity and Cooperation, Article 16.

<sup>45</sup> 1976 Treaty of Amity and Cooperation, Article 17.

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, 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 (Cambodia, Myanmar, Laos and Vietnam, otherwise known in ASEAN documentation as the CMLV group, as well as Brunei).<sup>46</sup> 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.<sup>47</sup> 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),<sup>48</sup> which administered the Common Effective

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<sup>46</sup> See SHAUN NARINE, *EXPLAINING ASEAN: REGIONALISM IN SOUTHEAST ASIA* (2002), at 113-123.

<sup>47</sup> See VISU SINNADURAI, *MULTILATERAL TREATIES BETWEEN ASEAN COUNTRIES* (1986); HIRO KATSUMATA (ED.), *ASEAN'S COOPERATIVE SECURITY ENTERPRISE: NORMS AND INTERESTS IN THE ASEAN REGIONAL FORUM* (2009); MARK BEESON, *INSTITUTIONS OF THE ASIA-PACIFIC: ASEAN, APEC, AND BEYOND* 17-36, 56-73 (2009); MARIA LOURDES ARANAL SERENO AND JOSEPH SEDFREY SANTIAGO (EDS.), *THE ASEAN: THIRTY YEARS AND BEYOND* (Institute of International Legal Studies, University of the Philippines Law Center, 1997).

<sup>48</sup> See *key instruments of economic cooperation in* Framework Agreements on Enhancing ASEAN Economic Cooperation, Singapore, 28 January 1992, at <http://www.aseansec.org/12374.htm> (last visited 2 April 2010); Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, 28 January 1992, at <http://www.aseansec.org/12375.htm> (last visited 2 April 2010); Protocol to Amend the Agreement on ASEAN Preferential Trading Arrangement, 15 December 1995, at <http://www.aseansec.org/12373.htm> (last visited 2 April 2010); Protocol for the Accession of the Socialist Republic of Vietnam to the Framework Agreements on Enhancing ASEAN Economic Cooperation, 15 December 1995, at <http://www.aseansec.org/12370.htm> (last visited 2 April 2010); Protocol to Amend the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, 15 December 1995, at <http://www.aseansec.org/12371.htm> (last visited 2 April 2010); Protocol to Amend the Framework Agreements on Enhancing ASEAN Economic Cooperation, 15 December 1995, at <http://www.aseansec.org/12369.htm> (last visited 2 April 2010); ASEAN Framework Agreement on the Facilitation of Goods in Transit, 16 December 1998, at <http://www.aseansec.org/7377.htm> (last visited 2 April 2010); Protocol on the Special Arrangement for Sensitive and Highly Sensitive Products, 30 September 1999, at <http://www.aseansec.org/1207.htm> (last visited 2 April 2010); Protocol Regarding the Implementation of the CEPT Temporary Exclusion List, 23 November 2000, at <http://www.aseansec.org/12365.htm> (last visited 2 April 2010); First Protocol to Amend the Protocol on Special Arrangements on Sensitive and Highly Sensitive Products, 3 September 2004, at <http://www.aseansec.org/22976.pdf> (last visited 2 April 2010).

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 superseded by the 2009 ASEAN Trade in Goods Agreement.<sup>49</sup> Political cooperation, on the other hand, was centrally facilitated by the ASEAN Regional Forum (ARF),<sup>50</sup> the principal Southeast Asian venue for inter-ASEAN and intra-ASEAN dialogue, negotiations and formalization of Member State commitments on regional security issues.<sup>51</sup> Other key institutions include the ASEAN Leaders' Summit (the highest decision-making body of pre-Charter ASEAN's intergovernmental cooperation) 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.<sup>52</sup>

By the time the ASEAN States started considering formal integration at the 11<sup>th</sup> ASEAN Summit in Kuala Lumpur in 2005,<sup>53</sup> 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.<sup>54</sup> 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

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<sup>49</sup> ASEAN Trade in Goods Agreement, 26 February 2009, at <http://www.aseansec.org/22223.pdf> (last visited 2 April 2010). 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 (2004), at 125-200

<sup>50</sup> See Concept Paper of the ASEAN Regional Forum (ARF), Terms of Reference of the ARF Unit, Terms of Reference of the ARF Fund, Terms of Reference of ARF Secondment, Terms of Reference of ARF Eminent Expert Persons, ARF Concept Paper of Preventive Diplomacy, Guidelines for the Operation of the ARF EEEPs, ARF Concept Paper on Enhancing Ties Between Track I and Track II, all at <http://www.aseanregionalforum.org/PublicLibrary/TermsOfReferencesandConceptPapers/tabid/89/Default.aspx> (last visited 2 April 2010).

<sup>51</sup> 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 THE PACIFIC REVIEW 2, 183-194 (1998).

<sup>52</sup> Carolina G. Hernandez, *Institution-Building through an ASEAN Charter*, unpublished paper presented at the 8<sup>th</sup> Europe-East Asia Thinktank Dialogue "Strengthening Regional and Inter-Regional Cooperation in Responding to Rising Extremism and Resurging Nationalism", Konrad Adenauer Stiftung, Institute for Strategic and Development Studies, and the European Institute of Asian Studies, Berlin, 29 October – 3 November 2006, available online at [http://www.kas.de/upload/auslandshomepages/singapore/Hernandez\\_AseanCharta.pdf](http://www.kas.de/upload/auslandshomepages/singapore/Hernandez_AseanCharta.pdf) (last visited 2 April 2010).

<sup>53</sup> Kuala Lumpur Declaration on the Establishment of the ASEAN Charter, 12 December 2005, at <http://www.aseansec.org/18030.htm> (last visited 2 April 2010); See Cebu Declaration on the Blueprint of the ASEAN Charter, 13 January 2007, at <http://www.aseansec.org/19257.htm> (last visited 2 April 2010);

<sup>54</sup> 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 2, 239-275 (Spring 2004).



implementing protocols, sectoral communiqués and organizational declarations), which applied to different regulatory areas, 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.<sup>55</sup> 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.<sup>56</sup>

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 States. 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 States declined to do so (or failed to achieve any consensus when urged to do so),<sup>57</sup> frequently justifying their refusal through the 1976 TAC's core principle of non-interference (non-intervention).<sup>58</sup> 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 privately-

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<sup>55</sup> For a list of ASEAN treaties as of February 2010 and their respective ratification statuses, see <http://www.aseansec.org/Ratification.pdf> (last visited 2 April 2010).

<sup>56</sup> Zakaria Haji Ahmad, *The Structure of Decision-Making*, pp. 28-35, at 30-32 in *THE 2<sup>ND</sup> ASEAN READER* (Sharon Siddique and Sree Kumar (eds.), 2004) [hereafter, "SIDDIQUE & KUMAR"].

<sup>57</sup> Robin Ramcharan, *ASEAN and Non-interference*, 52-57 in SIDDIQUE & KUMAR; Julie Ginsberg, *ASEAN: The Association of Southeast Asian Nations*, Council of Foreign Relations, February 25, 2009, available at <http://www.cfr.org/publication/18616/> (last visited 2 April 2010).

<sup>58</sup> See Amitav Acharya, *ASEAN at 40: Mid-Life Rejuvenation?*, *Foreign Affairs*, August 15, 2007, at <http://www.foreignaffairs.com/articles/64249/amitav-acharya/asean-at-40-mid-life-rejuvenation> (last visited 2 April 2010).

brokered) settlement of differences at the ministerial level.<sup>59</sup> Notwithstanding the “hybrid treaty-constitution” status of 1967 ASEAN Bangkok Declaration and 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”. To avoid normative conflicts, Charter rights and obligations expressly prevail over inconsistent norms in pre-Charter instruments.<sup>60</sup> 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.”<sup>61</sup> 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,<sup>62</sup> liberal democratic values of representation and participation,<sup>63</sup> development-oriented capitalism and trade liberalization<sup>64</sup> and the deliberate creation of a regional political identity under ASEAN.<sup>65</sup> 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 with all obligations of membership.”<sup>66</sup> Significantly included among the broad compass of Charter provisions that ASEAN Member States are

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<sup>59</sup> John Funston, *ASEAN and the Principle of Non-intervention: Practice and Prospects*, Institute of Southeast Asian Studies (ISEAS) Working Paper No. 5 (March 2000), available at <http://www.iseas.edu.sg/trends520.pdf> (last visited 10 March 2010).

<sup>60</sup> ASEAN Charter, Article 52(2).

<sup>61</sup> ASEAN Charter, Article 2(1).

<sup>62</sup> ASEAN Charter, Articles 1(1) to 1(4), and Articles 2(2)(a) to 2(2)(d).

<sup>63</sup> ASEAN Charter, Articles 1(7), 1(11), 1(13), and Articles 2(2)(f) to 2(2)(i).

<sup>64</sup> ASEAN Charter, Articles 1(5), 1(6), 1(9), 1(10), and Article 2(2)(n).

<sup>65</sup> ASEAN Charter, Articles 1(14) to 1(15), Articles 2(2)(l) to 2(2)(m).

<sup>66</sup> ASEAN Charter, Article 5(2). Italics supplied.

expressly obligated to implement are “the United Nations Charter *and* international law, including international humanitarian law, subscribed to by ASEAN Member States”;<sup>67</sup> “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”;<sup>68</sup> as well as “adherence to the rule of law, good governance, the principles of democracy and constitutional government”<sup>69</sup> and “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice.”<sup>70</sup> 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.<sup>71</sup>

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. Just like the Leaders’ Summit, the ASEAN Summit is composed of the Heads of State of the ASEAN Member States.<sup>72</sup> Instead of the annual Leaders’ Summit meetings, the ASEAN Summit is now mandated to meet at least bi-annually, convening special or *ad hoc* sessions in between each meeting when necessary.<sup>73</sup> 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,”<sup>74</sup> which “deliberate[s], provide[s] policy guidance, and take[s] decisions on key issues pertaining to the realization of the objectives of 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.”<sup>75</sup> The ASEAN Summit possesses considerable continuing administrative authority, shown by the fact

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<sup>67</sup> ASEAN Charter, Article 2(2)(j). Italics supplied.

<sup>68</sup> ASEAN Charter, Article 2(2)(n).

<sup>69</sup> ASEAN Charter, Article 2(2)(h).

<sup>70</sup> ASEAN Charter, Article 2(2)(i).

<sup>71</sup> I have argued elsewhere that this extends to international human rights obligations. 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 Goettingen J. Int’l L. 77 (2009).

<sup>72</sup> ASEAN Charter, Article 7(1).

<sup>73</sup> ASEAN Charter, Article 7(3).

<sup>74</sup> ASEAN Charter, Article 7(2)(a).

<sup>75</sup> ASEAN Charter, Article 2(2)(b).

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,”<sup>76</sup> as well as “authorise the establishment and dissolution of Sectoral Ministerial Bodies and other ASEAN institutions.”<sup>77</sup> 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,<sup>78</sup> ASEAN Community Councils (the ASEAN Political-Security Community Council, the ASEAN Economic Community Council and the ASEAN Socio-Cultural Community Council),<sup>79</sup> Secretary- General and Permanent Secretariat,<sup>80</sup> Committee of Permanent Representatives to ASEAN,<sup>81</sup> ASEAN National Secretariats,<sup>82</sup> 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”).<sup>83</sup> 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.”<sup>84</sup> Arguably, 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)”.<sup>85</sup> The Leaders’ Summit in pre-Charter

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<sup>76</sup> ASEAN Charter, Article 7(2)(c).

<sup>77</sup> ASEAN Charter, Article 2(2)(f).

<sup>78</sup> ASEAN Charter, Article 8.

<sup>79</sup> ASEAN Charter, Article 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.”

<sup>80</sup> ASEAN Charter, Article 11.

<sup>81</sup> ASEAN Charter, Article 12.

<sup>82</sup> ASEAN Charter, Article 13.

<sup>83</sup> ASEAN Charter, Article 7(2)(d). Italics supplied.

<sup>84</sup> ASEAN Charter, Article 1(8).

<sup>85</sup> ASEAN Charter, Article 7(2)(e).

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.<sup>86</sup> 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.<sup>87</sup> 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,<sup>88</sup> 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: “[w]hen 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.”<sup>89</sup> 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.<sup>90</sup> 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 Charter and other ASEAN instruments.”<sup>91</sup> On April 8, 2010 (or about two years from the passage of the Charter), ASEAN Member States signed the Protocol on this new dispute settlement mechanism.<sup>92</sup> (I briefly discuss the implications of this Protocol in relation to the problem of judicial oversight in Part II.)

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-

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<sup>86</sup> ASEAN Charter, Article 20(2): “Where consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made.”

<sup>87</sup> Rosario Gonzalez-Manalo, *Drafting ASEAN's Tomorrow: The Eminent Persons Group and the ASEAN Charter*, 37-46, at 42 in KOH, MANALO & WOON.

<sup>88</sup> ASEAN Charter, Articles 22 to 24.

<sup>89</sup> ASEAN Charter, Article 26.

<sup>90</sup> ASEAN Charter, Article 27(2).

<sup>91</sup> ASEAN Charter, Article 25.

<sup>92</sup> “ASEAN Pact to Settle Conflicts”, *Straits Times*, 8 April 2010, available at [http://www.straitstimes.com/BreakingNews/SEAsia/Story/STIStory\\_512087.html](http://www.straitstimes.com/BreakingNews/SEAsia/Story/STIStory_512087.html) (last visited 8 April 2010).

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.”<sup>93</sup> The National Secretariats continue their pre-Charter functions of coordinating the implementation of ASEAN decisions in the respective Southeast Asian jurisdictions,<sup>94</sup> while retaining a limited ability to influence the ASEAN Summit’s agenda by “coordinat[ing] and support[ing] the national preparations of ASEAN meetings,”<sup>95</sup> as previous National Secretariats have 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 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.<sup>96</sup> The ASEAN Secretary-General now discharges *de jure* (with a broader administrative complement and operational budget),<sup>97</sup> its former pre-Charter functions as *de facto* Chief Administrative Officer,<sup>98</sup> although he or she now has a fixed and non-renewable five-year term under the Charter.<sup>99</sup>

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<sup>93</sup> ASEAN Charter, Article 13(a) and 13(b). *See also* “Strong ASEAN community up to members, says PM”, Viet Nam News, 8 April 2010, available at <http://vietnamnews.vnagency.com.vn/Politics-Laws/198480/Strong-ASEAN-community-up-to-members-says-PM-.html> (last visited 8 April 2010).

<sup>94</sup> ASEAN Charter, Article 13(c), *see* note 43.

<sup>95</sup> ASEAN Charter, Article 13(d), *see* note 43.

<sup>96</sup> ASEAN Charter, Article 9(4).

<sup>97</sup> ASEAN Charter, Article 11(4) to 11(8), in relation to Articles 30(1) to 30(4).

<sup>98</sup> ASEAN Charter, Article 11(3) in relation to 11(2):

“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.”

<sup>99</sup> ASEAN Charter, Article 11(1).

The ASEAN Charter also created new institutions as part of the implementation framework for all future ASEAN Summit decisions, as well to ensure compliance with the existing corpus of ASEAN Law. It formally designated ASEAN Sectoral Ministerial Bodies,<sup>100</sup> 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.<sup>101</sup> 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.<sup>102</sup> Finally, in perhaps the most controversial (or oft-critiqued) institution of the Charter, an ASEAN Human Rights Body was pre-authorized, whose "terms of reference [are] to be determined by the ASEAN Foreign Ministers Meeting."<sup>103</sup> 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).<sup>104</sup> 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, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Vietnam),<sup>105</sup> but also provides for procedures for admission of new members, despite the fact that there do not appear to be any other geographically-defined

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<sup>100</sup> ASEAN Charter, Article 10 (1):

"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."

<sup>101</sup> ASEAN Charter, Article 8(2).

<sup>102</sup> ASEAN Charter, Article 12.

<sup>103</sup> ASEAN Charter, Article 14(2).

<sup>104</sup> See full text of the Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights at <http://www.aseansec.org/DOC-TOR-AHRB.pdf> (last visited 2 April 2010).

<sup>105</sup> ASEAN Charter, Article 4.



Southeast Asian states left out of ASEAN.<sup>106</sup> The Charter encourages entities (State and non-State) to officially associate with ASEAN,<sup>107</sup> accredits Ambassadors from non-ASEAN States and intergovernmental organizations,<sup>108</sup> confers to non-ASEAN States the formal status of Dialogue Partner, Sectoral Dialogue Partner, Development Partner, Special Observer, Guest or any other status to be determined at the ASEAN Foreign Ministers Meeting.<sup>109</sup> To date, ASEAN has extensive economic and political security partnerships with the “ASEAN Plus 3” (China, Japan and Korea),<sup>110</sup> the United States,<sup>111</sup> Europe,<sup>112</sup> Australia,<sup>113</sup> Canada,<sup>114</sup> China,<sup>115</sup> India,<sup>116</sup>

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<sup>106</sup> ASEAN Charter, Article 6.

<sup>107</sup> ASEAN Charter, Article 16.

<sup>108</sup> ASEAN Charter, Article 46.

<sup>109</sup> ASEAN Charter, Article 44(1) and 44(2).

<sup>110</sup> For the historical overview of the ASEAN+3 partnership, see <http://www.aseansec.org/16580.htm> (last visited 2 April 2010).

<sup>111</sup> See Joint Vision Statement on ASEAN-United States of America Enhanced Partnership, at <http://www.aseansec.org/17871.htm> (last visited 2 April 2010); ASEAN-United States of America Joint Declaration for Cooperation to Combat International Terrorism, 2002, at <http://www.aseansec.org/17871.htm> (last visited 2 April 2010); Memorandum of Understanding between the US Department of Commerce and the ASEAN Secretariat concerning Cooperation on Trade-Related Standards and Conformance Issues, 2001, at <http://www.aseansec.org/5979.htm> (last visited 2 April 2010).

<sup>112</sup> For the historical overview of the ASEAN-Europe partnership, see <http://www.aseansec.org/23216.htm> (last visited 2 April 2010). See also Memorandum of Understanding between the European Community and ASEAN Concerning Cooperation on Standards and Conformance, 1 October 1999, at <http://www.aseansec.org/5671.htm> (last visited 2 April 2010); Financing Memorandum between the European Community and Government of Brunei Darussalam, 21 January 1994, at <http://www.aseansec.org/5658.htm> (last visited 2 April 2010); Cooperation Agreement between the Member Countries of ASEAN and the European Community, 7 March 1980, at <http://www.aseansec.org/1501.htm> (last visited 2 April 2010); Nuremberg Declaration on an Enhanced EU-ASEAN Partnership, 15 March 2007, at <http://www.aseansec.org/20693.pdf> (last visited 2 April 2010); Plan of Action to Implement the Nuremberg Declaration on an Enhanced EU-ASEAN Partnership, at <http://www.aseansec.org/21122.pdf> (last visited 2 April 2010).

<sup>113</sup> See Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, 2009, at <http://www.aseansec.org/22260.pdf> (last visited 2 April 2010); Framework for the AFTA-CER Closer Economic Partnership, 2007, at <http://www.aseansec.org/14005.htm> (last visited 2 April 2010); Plan of Action to Implement the Joint Declaration on ASEAN-Australia Comprehensive Partnership, 2007, at <http://www.aseansec.org/21373.htm> (last visited 2 April 2010); Ministerial Declaration on the AFTA-CER Closer Economic Partnership, 2002, at <http://www.aseansec.org/12780.htm> (last visited 2 April 2010).

<sup>114</sup> For the historical overview of the ASEAN-Canada partnership, see <http://www.aseansec.org/5590.htm> (last visited 2 April 2010). See also ASEAN-Canada Joint Declaration for Cooperation to Combat International Terrorism, 28 July 2006, at <http://www.aseansec.org/18596.htm> (last visited 2 April 2010).

<sup>115</sup> For the historical overview of the ASEAN-China partnership (separate and independent from the ASEAN +3), see <http://www.aseansec.org/20185.htm> (last visited 2 April 2010). See key agreements such as Memorandum of Understanding between ASEAN and the Government of the People’s Republic of China on Strengthening Sanitary and Phytosanitary Cooperation, 2007, at <http://www.aseansec.org/21089.pdf> (last visited 2 April 2010); Memorandum of Understanding between the ASEAN Secretariat and the Ministry of Agriculture of the People’s Republic of China on Agricultural Cooperation, 2007, at <http://www.aseansec.org/19286.htm> (last visited 2 April 2010); Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People’s Republic of China, 2004, at <http://www.aseansec.org/16646.htm> (last visited 2 April 2010); Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Cooperation

Japan,<sup>117</sup> Russia,<sup>118</sup> the Republic of Korea,<sup>119</sup> and New Zealand,<sup>120</sup> among others. Significantly in 2009, the United States of America signed the Instrument of Accession to the ASEAN's 1976 Treaty of Amity and Cooperation.<sup>121</sup>

### ***C. Functional Constitutionalization and the ASEAN Bureaucracy***

Having recently entered into force in 2008, the ASEAN Charter is still 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.<sup>122</sup> 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 Intergovernmental 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

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between ASEAN and the People's Republic of China, 2004, at <http://www.aseansec.org/16635.htm> (last visited 2 April 2010); Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People's Republic of China, 2002, <http://www.aseansec.org/13196.htm> (last visited 2 April 2010); Joint Declaration of ASEAN and China on Cooperation in the Field of Non-traditional Security Issues, 2002, at <http://www.aseansec.org/13185.htm> (last visited 2 April 2010).

<sup>116</sup> See ASEAN-India Partnership for Peace, Progress, and Shared Prosperity, 2004, at <http://www.aseansec.org/16839.htm> (last visited 2 April 2010); Framework Agreement on Comprehensive Economic Cooperation between the Republic of India and ASEAN, 2003, at <http://www.aseansec.org/15278.htm> (last visited 2 April 2010); ASEAN-India Joint Declaration for Cooperation to Combat International Terrorism, 2002, at <http://www.aseansec.org/15276.htm> (last visited 2 April 2010).

<sup>117</sup> For the historical overview of the ASEAN-Japan partnership and major agreements on the free trade area, see document links listed in <http://www.aseansec.org/4973.htm> (last visited 2 April 2010).

<sup>118</sup> For the historical overview of the ASEAN-Russia partnership and major agreements, see <http://www.aseansec.org/5922.htm> (last visited 2 April 2010) and document links listed in <http://www.aseansec.org/4981.htm> (last visited 2 April 2010).

<sup>119</sup> See ASEAN-ROK free trade area document links listed in <http://www.aseansec.org/4980.htm> (last visited 2 April 2010).

<sup>120</sup> For the historical overview of the ASEAN-New Zealand partnership and major agreements on the free trade area, see document links listed in <http://www.aseansec.org/4976.htm> (last visited 2 April 2010).

<sup>121</sup> "United States Accedes to the Treaty of Amity and Cooperation in Southeast Asia", 22 July 2009 Press Release, US Department of State, available at <http://www.state.gov/r/pa/prs/ps/2009/july/126294.htm> (last visited 2 April 2010).

<sup>122</sup> See Chairman's Statement of the 16<sup>th</sup> ASEAN Summit "Towards the ASEAN Community: From Vision to Action", Hanoi, Vietnam, 9 April 2010, at <http://www.aseansec.org/24509.htm> (last visited 10 April 2010).

Agreement on the Privileges and Immunities of ASEAN, but they have not concluded or ratified remaining Community agreements that would expedite ASEAN integration.<sup>123</sup> 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,<sup>124</sup> political tensions at Bangkok between the Thai government and the Thaksin Shinawatra-led opposition<sup>125</sup> and the recent massacre of journalists and civilians in southern Philippines.<sup>126</sup> 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.<sup>127</sup>

From a constitutionalization standpoint, the Charter-based ASEAN established functional competencies within the ASEAN bureaucracy,<sup>128</sup> 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 authority 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

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<sup>123</sup> *Id.* at paras. 12-37.

<sup>124</sup> See John Rutwich, "ASEAN Urges Myanmar to Hold Fair Election", 9 April 2010, Reuters, at <http://www.reuters.com/article/idUSSGE63803N20100409?type=marketsNews> (last visited 10 April 2010).

<sup>125</sup> See Statement by the Secretary-General on the Situation in Thailand, 12 April 2010, at <http://www.aseansec.org/24541.htm> (last visited 10 April 2010).

<sup>126</sup> "No justice from ASEAN for massacre victims", Philippine Daily Inquirer, 1 April 2010, at <http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20100401-261888/No-justice-from-ASEAN-for-massacre-victims> (last visited 10 April 2010).

<sup>127</sup> See "ASEAN convenes on human rights in Indonesia", 1 April 2010, Xinhua News, at [http://news.xinhuanet.com/english2010/world/2010-04/01/c\\_13234165.htm](http://news.xinhuanet.com/english2010/world/2010-04/01/c_13234165.htm) (last visited 10 April 2010); "ASEAN Human Rights Body Rebuffs Victims, Activists", Jakarta Globe, 29 March 2010, at <http://www.thejakartaglobe.com/national/asean-human-rights-body-rebuffs-victims-activists/366568> (last visited 10 April 2010).

<sup>128</sup> On the constitutionalist theory of formal international organizations, see Geir Ulfstein, *Institutions and Competences*, pp. 45-80 in KLABBERS, PETERS, & ULFSTEIN.

comprise the ASEAN Summit. Constitutional controls, at least as understood in contemporary domestic constitutional systems' theories of separation of powers and checks and balances,<sup>129</sup> 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.

## II. STRUCTURAL CHALLENGES TO ASEAN'S CONSTITUTIONALIZATION OF INTERNATIONAL LAW

Considering the Charter-based ASEAN's model of "horizontal embeddedness" (where preexisting 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"?<sup>130</sup> This key ASEAN Charter Principle obligates ASEAN as an international organization to ensure that its 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 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 indeed be the case that the political culture of ASEAN leadership causes selective enforcement of international law,<sup>131</sup> pending actual empirical

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<sup>129</sup> 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. 3, 633-729 (Jan. 2000).

<sup>130</sup> ASEAN Charter, Article 2(2)(j).

<sup>131</sup> 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*, March 2009, Nuffield College Politics Working Group Paper, Oxford, available online at <http://www.nuff.ox.ac.uk/politics/papers/2009/Jones.March2009.pdf> (last visited 10 April 2010).

measurement this claim of international (non) compliance will remain strongly disputed. For this reason, I invite scrutiny instead to structural issues that 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*. All three problems are interspersed in the issue of Charter-based legality. Incorporation involves the layering in of ASEAN and international obligations within Southeast Asian legal systems,<sup>132</sup> 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),<sup>133</sup> 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.<sup>134</sup> Finally, judicial oversight is crucial for both institutional accountability and legal consistency in ASEAN.<sup>135</sup> 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

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<sup>132</sup> 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 (Martinus Nijhoff Publishers, 1993).

<sup>133</sup> *See* ULF LINDERFALK, *ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES* 101-132 (2007).

<sup>134</sup> 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. 505 (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* 301-393, 487-496 (Oxford University Press, 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, and Annelise Riles, *International Law in Domestic Courts: A Conflict of Laws Approach*, (April 23, 2009), American Society of International Law Proceedings, Vol. 103, 2009; Duke Law School Public Law & Legal Theory Paper No. 253; Cornell Legal Studies Research Paper No. 09-016. Available at SSRN: <http://ssrn.com/abstract=1413189> (last visited 10 April 2010).

<sup>135</sup> 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 (Clarendon Press, 1993, reissued in 2000 by The Lawbook Exchange).



harmonization and legal predictability. In practice, however, absent regular and institutionalized judicial cooperation (or more ideally, “court-to-court communications”<sup>136</sup>) 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.”<sup>137</sup> 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.<sup>138</sup> 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.

A brief perusal of the written constitutions of the ten Southeast Asian states reveals that while international law occupies the normative rank of either statutory legislation or constitutional norms,<sup>139</sup> there are few jurisdictions (such as the Philippines and Thailand) which arguably contain some constitutional space for self-executing treaties.<sup>140</sup> While the majority of

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<sup>136</sup> See *paradigmatic example of this contemporary litigation practice in the American Law Institute’s Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases*, 16 May 2000, at <http://www.ali.org/doc/Guidelines.pdf> (last visited 10 April 2010).

<sup>137</sup> ASEAN Charter, Article 5(2). Italics supplied.

<sup>138</sup> See ASEAN Charter, Article 7(2) and Articles 20(1) to 20(4).

<sup>139</sup> For a comprehensive survey of incorporation mechanisms across constitutions around the world, see LAMBERTUS ERADES, M. FITZMAURICE, AND C. FLINTERMAN, *INTERACTIONS BETWEEN INTERNATIONAL AND MUNICIPAL LAW: A COMPARATIVE CASE LAW STUDY* (T.M.C. Asser Institut – The Hague, 1993 ed.). See also CARMELO V. SISON AND ROSHAN T. JOSE (EDS.), *CONSTITUTIONAL AND LEGAL SYSTEMS OF ASEAN COUNTRIES*, (University of the Philippines, 1990).

<sup>140</sup> See *global survey of individual national courts’ jurisprudence on implementation of treaties (whether by direct application or requiring further legislative transformation)* in LAMBERTUS ERADES, M. FITZMAURICE AND C. FLINTERMAN, *INTERACTIONS BETWEEN INTERNATIONAL AND MUNICIPAL LAW: A COMPARATIVE CASE LAW STUDY* (T.M.C. Asser Institut – The Hague, 1993 ed.), 961-1028.

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.”<sup>141</sup> 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.<sup>142</sup> 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.”<sup>143</sup> 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.<sup>144</sup> Brunei Darussalam’s 1984 Constitution 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.”<sup>145</sup> 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.<sup>146</sup> Laos’ President

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<sup>141</sup> 1957 Malaysian Constitution (as amended in 1996), Sec. 76(1)(a).

<sup>142</sup> 1945 Indonesian Constitution (as amended in 2002), Arts. 11(1) to 11(3).

<sup>143</sup> 1992 Constitution of the Socialist Republic of Vietnam, Art. 84(13).

<sup>144</sup> 2008 Constitution of the Republic of the Union of Myanmar, Clause 209:  
“209. The President, in accordance 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 such treaties;

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

<sup>145</sup> 1984 Brunei Constitution (as revised), Sec. 42.1(b).

<sup>146</sup> 1965 Singapore Constitution, as amended in 2008, Part 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



has the power to “declare on the ratification or abolition of all treaties and agreements signed with foreign countries,”<sup>147</sup> but the Lao Constitution does not indicate whether legislative approval is necessary before such treaties and agreements could be given effect. Thailand’s 2007 Constitution 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,”<sup>148</sup> but it does not provide for categorical language on the direct effect of such conventions and international obligations. However, 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.<sup>149</sup>

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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.”

<sup>147</sup> 1991 Constitution of the Lao People’s Democratic Republic, Article 53(11).

<sup>148</sup> 2007 Thailand Constitution, Part 6, Sec. 82, first para.

<sup>149</sup> 2007 Thailand Constitution, Sec. 190:

“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.

The 1987 Philippine Constitution stands alone among Southeast Asian constitutions for expressly “adopt[ing] the generally accepted 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,”<sup>150</sup> 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.<sup>151</sup> 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.<sup>152</sup> Finally, among the ten Southeast Asian states, only Cambodia’s 1933 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.”<sup>153</sup>

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 Vienna Convention on the Law of Treaties

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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.”

<sup>150</sup> 1987 Philippine Constitution, Art. II Sec. 2.

<sup>151</sup> *Government of Hongkong Special Administrative Region v. Hon. Felixberto T. Olalia Jr. et al.*, G.R. No. 153675, April 19, 2007 (en banc); *Republic of the Philippines v. Sandiganbayan et al.*, G.R. No. 104768, July 21, 2003 (en banc); *Victor Borovsky v. The Commissioner of Immigration et al.*, G.R. No. L-4352, September 28, 1951 (en banc); *Boris Mejoff v. The Director of Prisons*, G.R. No. L-4254, September 26, 1951 (en banc).

<sup>152</sup> 1987 Philippine Constitution, Art. VII, Sec. 21. See *Pimentel v. Executive Secretary et al.*, G.R. No. 158088 July 6, 2005; *Abaya et al. v. Ebdane et al.*, G.R. No. 167919, February 14, 2007.

<sup>153</sup> 1933 Cambodia Constitution (as revised), Art. 31, first para.

(VCLT) clearly states that internal law cannot be invoked as a justification for failure to perform treaty obligations (subject, of course, to content and good faith rules under VCLT Article 46),<sup>154</sup> 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 obligations creates an interpretive space for ASEAN Member States to argue their respective 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.”<sup>155</sup> 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.”<sup>156</sup> 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.<sup>157</sup> If and when the Protocol enters into force and ASEAN member States avail themselves of its procedures, it is possible then 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

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<sup>154</sup> Vienna Convention on the Law of Treaties, Articles 27 and 46.

<sup>155</sup> ASEAN Charter, Article 25.

<sup>156</sup> 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, Hanoi, 8 April 2010, *available at* <http://www.aseansec.org/24506.htm> (last visited 10 April 2010).

<sup>157</sup> *See full text of the 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms in* <http://cil.nus.edu.sg/2010/2010-protocol-to-the-asean-charter-on-dispute-settlement-mechanisms/> (last visited 28 October 2010).

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.<sup>158</sup> 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.<sup>159</sup> National courts will thus play key roles in the enforcement process, particularly in the assessment of national governments' 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,

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<sup>158</sup> See for example the diverse attitudes of Southeast Asian national courts in the enforcement of arbitral awards, in Huala Adolf, *Improving the Enforcement of International Arbitration Awards in ASEAN Countries*, ASEAN Law Association 10<sup>th</sup> General Assembly (unpublished paper), at <http://www.aseanlawassociation.org/10GAdocs/Indonesia6.pdf> (last visited 5 November 2010). Southeast Asian states, prior to the ASEAN Charter, also undertook their own respective 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*, pp. 513-515 in KERNIAL SINGH SANDHU (ED.), *THE ASEAN READER* (Institute of Southeast Asian Studies, 1992).

<sup>159</sup> On the increasing importance of inter-judicial coordination and dialogue in the enforcement of international law by domestic courts, 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.* 4, 1027-1030 (2009).

consider comparative jurisprudential methodology when adjudicating cases involving ASEAN law, decisions and norms.<sup>160</sup> Such an approach is not novel, since it merely situates ASEAN norms within the unitary system of treaty interpretation under Article 31 of the Vienna Convention on the Law of Treaties. 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.<sup>161</sup>

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,<sup>162</sup> although ASEAN economic ministers at the 2010 ASEAN meeting urged the ACIA's entry into force by August 2010.<sup>163</sup> According to the ASEAN Fact

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<sup>160</sup> 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 Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 Am. J. Int'l L. 2 (2008), 241, at 251-252; Francesco Francioni, *International Law as a Common Language for National Courts*, 36 Tex. Int'l L.J. 587, at 590-596 (2001); 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, 124-129 (Fall 2002); 'International Law in National Courts: Discussion' in James Crawford and Margaret Young (eds.), *The Function of Law in the International Community: An Anniversary Symposium*, (2008), Proceedings of the 25<sup>th</sup> Anniversary Conference of the Lauterpacht Centre for International Law. Available at [http://www.lcil.cam.ac.uk/25th\\_anniversary/book.php](http://www.lcil.cam.ac.uk/25th_anniversary/book.php) (last visited 10 April 2010).

<sup>161</sup> See Vienna Convention on the Law of Treaties, Article 31(1) to 31(3).

<sup>162</sup> See Petchanet Prachuankrai, "ASEAN investment liberalization could be delayed by the desire to protect many sectors", *The Nation*, February 25, 2010, at <http://www.nationmultimedia.com/home/2010/02/25/business/Asean-investment-liberalisation-could-be-delayed-b-30123351.html> (last visited 28 October 2010); Bernie Cahiles-Magkilat, "Constraints leave RP behind in ASEAN investment scheme integrated", *The Manila Bulletin*, August 22, 2010, at <http://www.mb.com.ph/articles/273687/constraints-leave-rp-behind-asean-investment-schemeintegrated> (last visited 28 October 2010).

<sup>163</sup> ASEAN Comprehensive Investment Agreement, *full text available at* <http://www.asean.org/documents/FINAL-SIGNED-ACIA.pdf> (last visited 10 April 2010). See "Cross-

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.”<sup>164</sup> The 1987 ASEAN IGA will terminate as soon as the ACIA enters into force.<sup>165</sup>

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.”<sup>166</sup> Accordingly, the ACIA makes it clear that its provisions apply to all ten ASEAN Member States,<sup>167</sup> to ensure uniform treatment and increased protection of covered investments in the Southeast Asian region.<sup>168</sup> The ACIA maintains the 1987 ASEAN IGA’s guarantees of national treatment,<sup>169</sup> most favored nation (MFN) treatment,<sup>170</sup> fair and equitable treatment,<sup>171</sup> the prohibition against expropriation and the requirement of just compensation for lawful expropriations.<sup>172</sup>

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investments in ASEAN States Urged”, Business Mirror, 9 April 2010, at [http://businessmirror.com.ph/index.php?option=com\\_content&view=article&id=23910:cross-investments-in-asean-states-urged&catid=23:topnews&Itemid=58](http://businessmirror.com.ph/index.php?option=com_content&view=article&id=23910:cross-investments-in-asean-states-urged&catid=23:topnews&Itemid=58) (last visited 10 April 2010).

<sup>164</sup> ASEAN Comprehensive Investment Agreement Fact Sheet, 26 February 2009, at <http://www.aseansec.org/Fact%20Sheet/AEC/2009-AEC-024.pdf> (last visited 10 April 2010).

<sup>165</sup> ASEAN Comprehensive Investment Agreement [hereafter “ACIA”], Article 47(1).

<sup>166</sup> ACIA, Art. 1.

<sup>167</sup> 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. See ACIA, Art. 23.

<sup>168</sup> See Timothy G. Nelson, *Investor-State Arbitration and Investment Treaty Protection – the South-East Asian Angle*, 28 ARELJ (2009), 213-225 at [http://www.skadden.com/content%5CPublications%5CPublications1869\\_0.pdf](http://www.skadden.com/content%5CPublications%5CPublications1869_0.pdf) (last visited 10 April 2010).

<sup>169</sup> ACIA, Art. 5.

<sup>170</sup> ACIA, Art. 6.

<sup>171</sup> ACIA, Art. 11.

<sup>172</sup> ACIA, Art. 14.

At the same time, the ACIA abandons many of the problematic aspects of the 1987 ASEAN IGA. The ACIA definition of “investments” and “covered investors” is consistent with the broader definitions for such terms under the US and German model BITs.<sup>173</sup> 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.*”<sup>174</sup> Instead, the ACIA transposes the element of management or business operations in its denial of benefits clause,<sup>175</sup> which is worded similarly to the denial of benefits clause under Article 17 of the Energy Charter Treaty.

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,<sup>176</sup> 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.”<sup>177</sup> 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.<sup>178</sup> Other new provisions of the ACIA include: guarantees of compensation to

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<sup>173</sup> See definition of investor and covered investments, *inter alia*, in ACIA Arts. 3, 4(a), 4(c), 4(d), and 4(e), *in relation to 2004 United States Model BIT*, at <http://www.state.gov/documents/organization/117601.pdf> (last visited 10 April 2010); and the 2008 German Model BIT, at <http://ita.law.uvic.ca/investmenttreaties.htm> (last visited 10 April 2010).

<sup>174</sup> 1987 ASEAN Agreement for the Promotion and Protection of Investments, Art. 1(2), at <http://www.aseansec.org/12812.htm> (last visited 10 April 2010). [hereafter, “1987 ASEAN IGA”]. Italics supplied.

<sup>175</sup> ACIA, Arts. 19(1)(a) and 19(1)(b).

<sup>176</sup> 1987 ASEAN IGA, 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.” (Italics supplied.)

<sup>177</sup> ACIA, Art. 4(a).

<sup>178</sup> 1987 ASEAN IGA, 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



investors in cases of strife (due to armed conflict or civil strife or state of emergency);<sup>179</sup> an expanded enumeration of transfers relating to a covered investment;<sup>180</sup> permitted measures that host States may adopt to safeguard their respective balances-of-payments;<sup>181</sup> and perhaps most importantly, general exceptions and security exceptions provisions<sup>182</sup> that appear wholly identical to 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.<sup>183</sup> 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.<sup>184</sup> 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;
- (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.<sup>185</sup>

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the host country and upon such conditions as it deems fit for the purposes of this Agreement.” (Italics supplied.)

<sup>179</sup> ACIA, Art. 12, which appears similarly-worded as Article 4(1) of the 1980 Sri Lanka-United Kingdom BIT 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 Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, 30 ILM 577 (1991).

<sup>180</sup> See ACIA, Art. 13, in relation to 1987 ASEAN IGA Art. VII(1).

<sup>181</sup> ACIA, Art. 16.

<sup>182</sup> ACIA, Articles 17 and 18.

<sup>183</sup> ACIA, Articles 30 and 31.

<sup>184</sup> ACIA, Article 32.

<sup>185</sup> ACIA, Article 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,<sup>186</sup> and also appears to apply the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards to claims submitted under the ACIA.<sup>187</sup> However, the ACIA also stresses that “[e]ach Member State shall provide for the enforcement of an award in its territory.”<sup>188</sup> 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.<sup>189</sup> 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.”<sup>190</sup> Courts of Contracting States have the duty to refer the parties to arbitration “unless it finds that the said agreement is null and void, inoperative or incapable of being performed”.<sup>191</sup> 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.”<sup>192</sup> Article V lists exclusive grounds under which recognition and enforcement of arbitral awards may be 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

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<sup>186</sup> ACIA, Articles 33 to 41.

<sup>187</sup> See ACIA, Art. 28(h) (“(h) “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.”); Art. 36(5) (“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.”); Art. 41(8) (“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.”)

<sup>188</sup> ACIA, Art. 41(9).

<sup>189</sup> ACIA, Arts. III to VI.

<sup>190</sup> 1958 New York Convention, Art. II(1).

<sup>191</sup> 1958 New York Convention, Art. II(3).

<sup>192</sup> 1958 New York Convention, Article III.

obligations for all Contracting States to the 1958 New York Convention builds up a system of control mechanisms that uniformly delineate the authority of courts and the prerogative of arbitrators.<sup>193</sup>

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,<sup>194</sup> 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".<sup>195</sup> 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 General Agreements on Tariffs and Trade (GATT) 1994, as well as Article XIV of the General Agreement on Trade in Services (GATS).<sup>196</sup> The international trade law regime contains its own jurisprudence on the interpretation of these exceptions.<sup>197</sup> While it would appear from the text of the ACIA that the adaptation of trade law provisions is deliberate,<sup>198</sup> these unsettled provisions of GATT Articles XX and XXI and GATS Article XIV

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<sup>193</sup> See W.M. REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR* (Duke University Press, 1992), at 109-130.

<sup>194</sup> ACIA, Article 17(1)(a).

<sup>195</sup> ACIA, Article 18(b).

<sup>196</sup> See GATT 1994 Article XX (General Exceptions), GATT 1994 Article XXI (Security Exceptions), and GATS Article XIV (General Exceptions).

<sup>197</sup> See PETROS C. MAVROIDIS, *THE GENERAL AGREEMENT ON TARIFFS AND TRADE: A COMMENTARY* (Oxford University Press, 2005), at p. 185-186, 257-259; Andrew Emmerson, *Conceptualizing Security Exceptions: Legal Doctrine or Political Excuse?*, 11 *J. Int'l Econ. L.* 1 (2008), at 135-154; Peter Lindsay, *The Ambiguity of GATT Article XXI: Subtle Success or Rampant Failure?*, 52 *Duke L.J.* 1277 (2003), at 1287-1296.

<sup>198</sup> See ACIA Article 17 (2):

"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*."

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 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, the matter shall be referred to the ASEAN Summit for decision."<sup>199</sup> However, the Charter 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

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<sup>199</sup> ASEAN Charter, Articles 27(2) and 20(4).

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 lacking 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,"<sup>200</sup> "respect for fundamental freedoms, the promotion and protection of human rights, and constitutional government,"<sup>201</sup> "upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States."<sup>202</sup>

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."<sup>203</sup> 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.<sup>204</sup> Clearly, the literal

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<sup>200</sup> ASEAN Charter, Art. 2(2)(h).

<sup>201</sup> ASEAN Charter, Art. 2(2)(i).

<sup>202</sup> ASEAN Charter, Art. 2(2)(j).

<sup>203</sup> See Terms of Reference of ASEAN Intergovernmental Commission on Human Rights, Clauses 1.1 and 1.6, at <http://www.aseansec.org/DOC-TOR-AHRB.pdf> (last visited 10 April 2010).

<sup>204</sup> *Id.* at Clause 4:

"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;

enforcement of 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,<sup>205</sup> their enforcement abilities 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,<sup>206</sup> 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.<sup>207</sup> 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).<sup>208</sup> The comparative jurisprudence on international law continues to be thinly

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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 organizations 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.”

<sup>205</sup> See BENEDETTO CONFORTI AND FRANCESCO FRANCONI, *ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS* (Brill Publishers, 1997); Michael Kirby, *Domestic courts and international human rights law: The ongoing judicial conversation*, 27 *Netherlands Quarterly on Human Rights* 2, 291-308 (2009). Although see HENRY J. STEINER, PHILIP ALSTON, & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, AND MORALS: TEXT AND CASES* 42-57 (Oxford University Press, 2008).

<sup>206</sup> Andrew Harding, *Comparative Law and Legal Transplantation in South East Asia: Making Sense of the 'Nomic Din'* in DAVID NELKEN AND JOHANNES FEEST (EDS), *ADAPTING LEGAL CULTURES* (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, 321-334 (1992).

<sup>207</sup> See Valeriane Toon, *International Criminal Court: Reservations of Non-State Parties in Southeast Asia*, 26 *Contemporary Southeast Asia* (2004);

<sup>208</sup> See David Martin Jones, *Security and democracy: the ASEAN charter and the dilemmas of regionalism in South-East Asia*, 84 *International Affairs* 4 (2008), 735-756, at 741-745.

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”<sup>209</sup> 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.

This Part II has attempted to expose some common structural challenges to the constitutionalization of international law in the Charter-based ASEAN. In the Conclusion (*From Constitutionalization to Constitutive Decision: ASEAN Charter Processes and the Rule of Law*), 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 processes to exact rules-based conduct from ASEAN Member States. International legal compliance cannot be left in stasis during ASEAN’s institutional transition.

#### **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.”<sup>210</sup> 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

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<sup>209</sup> See David P. Fidler, *Introduction: Eastphalia Emerging? Asia, International Law, and Global Governance*, 17 *Indiana Journal of Global Legal Studies* 1, 1-12 (Winter 2010); Tom Ginsburg, *Eastphalia as the Perfection of Westphalia*, 17 *Indiana Journal of Global Legal Studies* 1 (Winter 2010), at 27-45.

<sup>210</sup> Chesterman, Simon, *Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person*, 12 *Singapore Yearbook of International Law* 199, 205 (2008).



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,<sup>211</sup> but it must also be stressed that many of ASEAN's accomplishments 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.<sup>212</sup> It would be easier to accept these conflicting realities once one probes the constructivist history behind the creation of a "Southeast Asian" region.<sup>213</sup> 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

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<sup>211</sup> See among others John Arendshorst, *The Dilemma of Non-interference: Myanmar, Human Rights, and the ASEAN Charter*, 8 Northwestern U. J. Int'l H. Rts. 1, 102-121 (Fall 2009); *The limits of politeness: ASEAN's Failure*, The Economist, 28 February 1998; Lee Jones, *ASEAN's Burma Policy: from Constructive Engagement to Critical Disengagement*, 4 Asian Security 3, 271-293 (September 2008).

<sup>212</sup> Robin Ramcharan, *ASEAN and Non-interference: A Principle Maintained*, 22 Contemporary Southeast Asia 60(2000), at 86.

<sup>213</sup> Diane A. Desierto, *Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia*, 36 Int'l J. Leg. Info. 388 (2008), at 389 and 413-419.

Declaration (and to some extent, the ASEAN Charter).<sup>214</sup> In a region whose very identity appears more a product of choice,<sup>215</sup> rather than inseparably-intertwined histories,<sup>216</sup> 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 *mushawarah* and *mufakat* concepts in the ASEAN Charter,<sup>217</sup> 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 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 as I have described here, 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'<sup>218</sup> of States as much as non-State actors, on established intergovernmental networks as well as non-governmental cooperative frameworks.<sup>219</sup> 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

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<sup>214</sup> 1954 Bandung Principles, authored by Jawaharlal Nehru and Chou En Lai, during the historic African-Asian People's Conference. See George McTuman Kahin, *The Asian-African Conference, Bandung, Indonesia, 1955* (Cornell University Press, Ithaca, New York, 1970), at 29.

<sup>215</sup> 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, Articles 1(14), 2(2)(1), 12, 35, 36, 37, 38, 39, 40.

<sup>216</sup> See AMITAV ACHARYA, *THE QUEST FOR IDENTITY: INTERNATIONAL RELATIONS IN SOUTHEAST ASIA* at 26-31, and 83-93 (2000).

<sup>217</sup> ASEAN Charter, Articles 2(2)(a) to (g).

<sup>218</sup> See W. Michael Reisman, *Myth System and Operational Code*, 3 *Yale Studies in World Public Order*, 229 at 230-238 (1977).

<sup>219</sup> 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).

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