

THE ASEAN CHARTER:
ASEAN FAILURE OR MEMBER FAILURE?

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I. INTRODUCTION

By the end of the twentieth century, the Association of Southeast Asian Nations (ASEAN) was experiencing growing pains. The organization had changed vastly since its inception in 1967, when it served as a political bulwark against the Cold War superpowers in order to protect the independence of its founding member states—Indonesia, the Philippines, Singapore, Malaysia, and Thailand.¹ By the 1990s, ASEAN’s primary mission was to be an engine for regional economic growth.² And by the 2000s, ASEAN had embraced Brunei, Cambodia, Laos, Myanmar, and Vietnam as members, and sought to resolve security issues in Southeast Asia.³ These successive changes produced a chaotic and weak structure, and proponents of the 2007 ASEAN Charter desired a document that would enable ASEAN to better facilitate economic integration and enhance security cooperation among the members.⁴ But they failed because of deeply seated norms, encapsulated by the “ASEAN Way.”

1. SHAUN NARINE, *EXPLAINING ASEAN: REGIONALISM IN SOUTHEAST ASIA* 12 (2002).

2. See DONALD E. WEATHERBEE, *INTERNATIONAL RELATIONS IN SOUTHEAST ASIA: THE STRUGGLE FOR AUTONOMY* 205 (2d ed. 2009) (explaining that the shift in focus at the 1992 Singapore Summit represented a turning point, in which economic integration, rather than foreign policy, would justify ASEAN’s existence).

3. *Id.* at 94–95, 105 (describing the addition of five new member states, and discussing the emergence of an “ASEAN Security Community”).

4. See Simon S.C. Tay, *The ASEAN Charter: Between National Sovereignty and the Region’s Constitutional Moment*, 12 *SING. Y. B. INT’L L.* 151, 155–56 (2008) (discussing ASEAN’s community-building efforts, which included economic and political-security pillars, as a motivating purpose behind the Charter).

The “ASEAN Way” refers to several principles which collectively prevent organizational change,⁵ and can be reduced to two essential components. First, it emphasizes decision-making through informal consultation among diplomats, which facilitates group consensus at official meetings.⁶ Second, it is a series of six behavioral principles set forth in the 1976 Treaty of Amity and Cooperation: (1) respect for state sovereignty; (2) freedom from external interference; (3) non-interference in internal affairs; (4) peaceful dispute settlement; (5) renunciation of the use of force; and (6) cooperation. Of these, member states particularly emphasize non-interference in each other’s internal affairs.⁷

Critics object that the ASEAN Way’s emphasis on consultation, consensus, and non-interference forces the organization to adopt only those policies which satisfy the “lowest common denominator.”⁸ These critics are correct that decision-making by consensus requires members to see eye to eye before ASEAN can move forward on an issue, but these principles emerged to ensure stability in a historically tumultuous region.⁹ Still, the diversity of the organization’s membership

5. See generally RODOLFO C. SEVERINO, *SOUTHEAST ASIA IN SEARCH FOR COMMUNITY: INSIGHTS FROM THE FORMER ASEAN SECRETARY-GENERAL 1–37* (2006) (devoting an entire chapter to a discussion of the ASEAN Way).

6. Paul J. Davidson, *The Role of Law in Governing Regionalism in Asia*, in *GOVERNANCE AND REGIONALISM IN ASIA* 224, 228 (Nicholas Thomas ed., 2009); Beverly Loke, *The ‘ASEAN Way’: Towards Regional Order and Security Cooperation?*, 30 MELB. J. POL. 8 (2005); Pushpa Thambipillai, *Negotiating Styles*, in *THE ASEAN READER* 73–74 (2d prtg. K.S. Shandu et al., eds. 2003).

7. Treaty of Amity and Cooperation in Southeast Asia, art. 2, Feb. 24, 1976, 1025 U.N.T.S. 15,063; see also *ASEAN – Overview*, ASEAN, <http://www.aseansec.org/64.htm> (last visited Oct. 5, 2010) (explaining that the Treaty of Amity and Cooperation represents a commitment among the member states to adhere to certain behavioral norms); Susumu Yamakage, *The Construction of an East Asian Order and the Limitations of the ASEAN Model*, 12 ASIA-PAC. REV. 1, 6 (2005) (“The principle of non-intervention in internal affairs is retained as a basic tenant of ASEAN. This is due to the fact that the so-called “ASEAN WAY”—decision by consensus—is an obstacle to change.”).

8. See, e.g., Barry Desker, *Is the ASEAN Charter Necessary?*, RSIS COMMENTS (S. Rajaratnam School of Int’l Stud.), July 17, 2008 (the ASEAN Way “prioritizes agreement by consensus and the adoption of the lowest common denominator.”).

9. See *infra* Part II.2.

does make coordinated progress towards any goal extremely difficult.

Indeed, ASEAN's membership has become a heterogeneous patchwork.¹⁰ For example, the member states' economies vary dramatically: At one end is Singapore's entrepôt economy, with a gross domestic product (GDP) of \$52,200 (USD).¹¹ At the other is Myanmar, a poverty-stricken exporter of natural resources, with a GDP of \$1,100.¹² The members' governments are wildly different as well: For example, Indonesia is a democracy,¹³ while Vietnam¹⁴ and Laos are communist states.¹⁵ Moreover, according to Worldwide Governance Indicators of rule of law, Singapore ranks in the 90th percentile, Thailand, Malaysia, and Brunei rank in the 50th to 60th percentile, and Myanmar ranks in the 4th percentile.¹⁶

ASEAN's diverse political makeup points to a deeper issue that the critics miss: the members may not have a common conception of the ASEAN Way. Myanmar, Cambodia, and Laos emphasize non-interference.¹⁷ However, older members

10. See Rodolfo Severino, *Framing the ASEAN Charter: An ISEAS Perspective*, in *FRAMING THE ASEAN CHARTER: AN ISEAS PERSPECTIVE*, 3–4 (Rodolfo Severino ed., 2005) available at www.iseas.edu.sg/Framing_ASEAN_Charter.pdf (cataloguing the vast differences among the ASEAN states, including “their widely different historical legacies, their divergent strategic outlooks, the diverse compositions of their populations, the uneasy nature of their recent relations, and the lack of a regional identity among their peoples”).

11. *The World Factbook: Singapore*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/sn.html> (last visited Oct. 3, 2010).

12. *The World Factbook: Burma*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/bm.html> (last visited Oct. 3, 2010).

13. See *The World Factbook: Indonesia*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/id.html> (last visited Oct. 3, 2010) (describing form of government as “republic” and detailing electoral process for executive and legislative branches of government).

14. *The World Factbook: Vietnam*, CIA <https://www.cia.gov/library/publications/the-world-factbook/geos/vm.html> (last visited Oct. 3, 2010).

15. *The World Factbook: Laos*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/la.html> (last visited Oct. 3, 2010).

16. *Governance & Anti-Corruption: WGI 1996-2010 Interactive*, WORLD BANK.ORG http://info.worldbank.org/governance/wgi/mc_chart.asp (select “Rule of Law” in “Indicator” menu, “East Asia” in “Region” menu; then select Brunei, Malaysia, Myanmar, Singapore, and Thailand and click “Submit Choices”).

17. See H.E.Than Shwe, Prime Minister & Senior General, Union of Myan., Opening Remarks at the Sixth ASEAN Summit in Hanoi (Dec. 15, 1998), available at <http://www.aseansec.org/8740.htm> (cautioning that

focus on cooperation and coordination.¹⁸ These differences not only impede the members' efforts to find common solutions to particular difficulties, but also make it difficult to determine when collective action is appropriate in a given situation.

Despite these vast differences, observers maintained high hopes for the Charter. The former secretary-general of ASEAN hoped that the instrument would explicitly reject genocide, the use of child soldiers, and discrimination on the basis of gender, race, religion, or ethnicity.¹⁹ Others wanted the Charter to bolster economic integration by improving ASEAN's dispute settlement mechanism and by developing protocol by which to sanction states that violate trade agreements.²⁰ Observers also anticipated that the Charter would

ASEAN's solidarity can be maintained only if the member states adhere to the principles of sovereignty and non-interference) [hereinafter Shwe, Opening Remarks]; Sisavath Keobounphanh, Prime Minister of Lao People's Democratic Republic, Opening Remark at the Sixth ASEAN Summit (Dec. 15, 1998), *available at* <http://www.aseansec.org/8742.htm> (noting that ASEAN's strength is derived from its adherence to the principles of respect for the independence and identity of all nations, and non-interference in internal affairs).

18. *See, e.g.*, Phan Van Khai, Prime Minister, Socialist Republic of Viet., Keynote Address at the Sixth ASEAN Summit in Hanoi (Dec. 15, 1998), *available at* <http://www.aseansec.org/8749.htm> ("[W]ith the common legal basis of the Treaty of Amity and Cooperation; [and] with 'the ASEAN way', we will definitely strengthen our one-mindedness") [hereinafter Kahi Keynote Address]; Dato' Seri Dr. Mahathir Bin Mohamad, Prime Minister, Malay., Opening Remarks at the Sixth ASEAN Summit in Hanoi (Dec. 15, 1998), *available at* <http://www.aseansec.org/8741.htm> (imploring member states to adhere to the principles that foster positive member state relations) [hereinafter Mohamad, Opening Remark]; Chuan Leekpai, Prime Minister, Thai., Opening Remarks at the Opening Ceremony of the Sixth ASEAN Summit (Dec. 15, 1998), *available at* <http://www.aseansec.org/8735.htm> (explaining that ASEAN membership entails an individual and collective responsibility to make sacrifices and contributions in service of ASEAN) [hereinafter Leekpai, Opening Remarks].

19. *See* Severino, *supra* note 10, at 18.

20. Denis Hew, *Towards an ASEAN Charter: Regional Economic Integration*, in FRAMING THE ASEAN CHARTER, *supra* note 10, at 33, 34-36.

protect human rights as a common value,²¹ and that it might create a mechanism to resolve non-economic disputes.²²

After a two-year process,²³ however, the resulting forty-page Charter did little more than grant ASEAN a legal personality,²⁴ which means little in light of ASEAN's institutional incapacity.²⁵ To wit, the Charter simply consolidates ASEAN's existing pronouncements,²⁶ setting forth purposes and principles which largely reflect those functions found in previous agreements.²⁷ Additionally, the Charter's procedures for the members' rights and obligations, decision-making process, and dispute settlement do not markedly differ from the ASEAN Way.²⁸ The Charter also clarifies the organization's

21. See, e.g., Leo Suryadinata, *Towards an ASEAN Charter: Promoting an ASEAN Regional Identity*, in FRAMING THE ASEAN CHARTER, *supra* note 8, at 41, 44; Abdul Khalik, Opinion, *If Not Democracy, What Values Exist in Southeast Asia?*, JAKARTA POST, Aug. 8, 2007, at 1.

22. Locknie Hsu, *Towards an ASEAN Charter: Some Thoughts from the Legal Perspective*, in FRAMING THE ASEAN CHARTER, *supra* note 10, at 45, 49.

23. ASEAN announced its commitment to establish a Charter in December 2005. Kuala Lumpur Declaration on the Establishment of the ASEAN Charter (Dec. 12, 2005), available at <http://www.aseansec.org/18030.htm> [hereinafter Kuala Lumpur Declaration]. It adopted the Charter in November 2007. Singapore Declaration on the ASEAN Charter (Nov. 20, 2007), available at <http://www.aseansec.org/21233.htm>.

24. Charter of the Association of Southeast Asian Nations, art. 3, Nov. 20, 2007, available at <http://www.aseansec.org/21069.pdf> [hereinafter ASEAN Charter].

25. For example, the Charter provided for the creation of a human rights body, but gave it neither a structure nor a function. See *id.* art. 14 (establishing a human rights body but leaving its form and function to be determined at a later date). See also Simon Chesterman, *Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person* in LIFE AFTER THE CHARTER 18, 18 (Institute of Southeast Asian Studies ed., 2010) (arguing that ASEAN's legal personality means little in light of the organization's inability to do anything).

26. See, e.g., AMITAV ACHARYA, WHOSE IDEAS MATTER? AGENCY AND POWER IN ASIAN REGIONALISM 140 (2009).

27. Compare ASEAN Charter, *supra* note 24, art. 1 (highlighting as ASEAN's purposes the creation of a single market, the strengthening of democracy in Southeast Asia, and narrowing the development gap), with Declaration of ASEAN Concord II (Bali Concord II) at B(3), Oct. 7, 2003, 43 I.L.M. 18 (2004) (emphasizing the need to create a single market), and Vientiane Action Program ¶ 1.1.ii, Nov. 29, 2004, 2004 ASEAN DOCUMENT SERIES 20 (articulating the need for ASEAN to promote human rights).

28. This point is further discussed *infra* Part IV.

structure,²⁹ affords ASEAN certain immunities and privileges,³⁰ and sets forth budgetary protocol.³¹ Last, it provides for the organization's administrative functions,³² discusses ASEAN's symbols, and articulates mechanisms to govern ASEAN's legal and extra-regional relationships.³³

In this Note, I argue that ASEAN's failure to develop a more robust Charter represents a failure of the older (and more progressive) member states to persuade the others to set aside the ASEAN Way. Indeed, while ASEAN has always functioned more as an instrument of the member states rather as a monolithic entity, some member states have tried to push ASEAN forward with respect to both economic integration and security cooperation. And although ASEAN has had more success in developing legal structures by which to pursue economic integration, neither aim has been wholly successful. The Charter was an effort by proponents of ASEAN integration to correct these deficiencies. But their ambitious aims were counterbalanced by the ASEAN Way—a core norm that makes ASEAN inherently resistant to change. Because of their failure, ASEAN will continue to be a weak force for regional integration.

In Part II, I discuss the legal components of the ASEAN Way and place those components in a theoretical framework by reference to relations- and rules-based governance, and to hard and soft law. I also argue that the ASEAN Way is unique only because it is a formalized commitment to otherwise commonly identified aspects of a legal regime. Further, I examine the reasons why the ASEAN Way originally emerged, and present ASEAN's modern failings as part of that historical legacy. In this way, I defend ASEAN's contemporary weaknesses as a core component of the organization's purpose, rather than a hindrance to its goals.

29. See ASEAN Charter, ch. IV, *supra* note 24 (establishing, respectively, the ASEAN Summit, ASEAN Coordinating Council, ASEAN Community Councils, ASEAN Sectoral Ministerial Bodies, Secretary-General and Secretariat, Committee of Permanent Representatives, ASEAN National Secretaries, ASEAN Human Rights Body, and the ASEAN Foundation).

30. *Id.* ch. VI (as will be discussed *infra* Part IV, these will not be an effective vehicle for ASEAN to compel member state behavior).

31. *Id.* ch. IX.

32. *Id.* ch. X.

33. *Id.* ch. XII-XIII.

In Part III, I examine ASEAN's weaknesses in pursuit of both economic integration and security cooperation. I first explore economic integration, focusing on instruments of trade integration and dispute resolution. During this discussion, I find that the member states have long been able to form coherent legal instruments in pursuit of economic integration, but remain unwilling to construct those instruments in a way that actually compels them to integrate. I argue that these weak instruments represent the adaptation of ASEAN Way principles into hard law mechanisms, and that the Charter's proponents ultimately sought a document that would dismantle the obstacles to economic integration posed by the ASEAN Way.

I then examine security cooperation, focusing on the member states' attempts to resolve the regional dilemmas posed by Myanmar. First, I discuss Indonesia's desire to act as a regional leader in its dealings with Myanmar, and explore its use of a modified conception of the ASEAN Way. Second, I argue that these efforts exposed deep fissures in the member states' conceptions of ASEAN's organizational norms, and that the ASEAN Way prevented the member states from developing coherent legal instruments to resolve these interstate issues. Third, I discuss the legal instruments that Indonesia was able to develop, and argue the Charter was conceived to enable ASEAN to pursue these goals.

In Part IV, I evaluate the Charter's shortcomings as a force for ASEAN community building with respect to economic integration and security cooperation. First, I discuss the divides among the member states when developing the Charter, and argue that their respective views represented fundamentally incompatible visions for ASEAN's role in Southeast Asia. Second, I evaluate the Charter. I find that the Charter failed to enhance ASEAN's ability to further economic integration or security cooperation, and that these failures were ultimately inevitable in light of the organization's political realities. I conclude that the Charter was bound to disappoint because it was the product of a vision of ASEAN that failed to grapple with the ASEAN Way as a corrective force.

In Part V, I evaluate ASEAN's future. I first offer two explanations as to why ASEAN has been better able to craft legal instruments of economic integration, rather than security cooperation. In this light, I critique the integrative mechanisms

that ASEAN has developed since creating the Charter. In the end, I conclude that ASEAN would be stronger and more credible if the progressive states accepted the political realities created by the ASEAN Way.

II. THE ASEAN WAY

In this section, I will discuss the ASEAN Way and explain how it functions as a check on the member states' regional ambitions. First, I will define the legal components of the ASEAN Way. Second, I will place those components in a theoretical context. Third, I will demonstrate that the dynamic that originally gave rise to the ASEAN Way continues to exist in Southeast Asia, and argue that Southeast Asia's sheer heterogeneity makes it a necessary element of ASEAN member state relations. This analysis will provide a frame through which to understand ASEAN's integrative efforts discussed in Part III of this Note.

A. *A Unique Challenge for ASEAN*

1. *The Legal Framework*

The ASEAN Way can be understood as having two primary components.³⁴ The first is a diplomatic strategy based on consultation and consensus, in which diplomatic officials initially engage in informal discussions to later facilitate a consensus-based decision at official meetings.³⁵ This process enables member states to determine areas of agreement and compartmentalize contentious issues, so that disputes do not delay entire agreements.³⁶ Accordingly, ASEAN will adopt only policies to which all member states agree, either because the policy itself has been modified, or member state positions have converged. As a result, ASEAN generally sets aside controversial issues, and its institutions have developed incrementally.³⁷

The ASEAN Way's second component is a series of six principles codified in the 1976 Treaty of Amity and Coopera-

34. Cf. SEVERINO, *supra* note 5, at 35 (summarizing the ASEAN Way).

35. Davidson, *supra* note 6, at 228.

36. See NARINE, *supra* note 1, at 31.

37. See Loke, *supra* note 6, at 5 (discussing the ASEAN Way's procedural norms).

tion: (1) respect for state sovereignty; (2) freedom from external interference; (3) non-interference in internal affairs; (4) peaceful dispute settlement; (5) renunciation of the use of force; and (6) cooperation.³⁸ In recent years, the principle of non-interference has been invoked by instruments of regional integration,³⁹ as well as by the member states themselves,⁴⁰ in order to assert the primacy of domestic interests above regional interests.

2. *The Theoretical Framework*

Although it impedes the member states' institution-building efforts, the ASEAN Way does not represent a radical approach to international relations; it is simply a formalized commitment to both relations-based governance and to soft law. In relations-based systems, actors avoid formal arrangements, preferring to construct agreements based upon mutual trust, knowledge, and familiarity.⁴¹ They must rely on the strength of interpersonal relationships to enforce any agreements.⁴² Standing in contrast to relations-based governance is rules-based governance, which utilizes formal institutions. Actors in rules-based systems engage in traditional negotiations, adhere to binding norms, and resolve disputes through formalized processes.⁴³

"Soft law" refers to one end of a spectrum that defines certain attributes about legal rules, at the other end of which is "hard law." This spectrum describes three characteristics: obligation, precision, and delegation.⁴⁴ "Obligation" is the degree to which actors are bound by particular rules. "Precision" is

38. Treaty of Amity and Cooperation, *supra* note 7, art. 2.

39. See, e.g., ASEAN Vision 2020, Dec. 15, 1997, available at <http://www.aseansec.org/1814.htm> ("We envision the Treaty of Amity and Cooperation in Southeast Asia functioning fully as a binding code of conduct for our governments . . ."); Bali Concord II, *supra* note 27, at pmbl. (reaffirming ASEAN's commitment to the TAC and non-interference).

40. The invocation of the principle of non-interference will be discussed with respect to Myanmar in Part III.2, below.

41. Davidson, *supra* note 6, at 227-28.

42. *Id.*

43. The World Trade Organization is one prominent example of rules-based governance. Davidson, *supra* note 6, at 228.

44. See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 421-22 (2000) (describing "hard" and "soft" law in terms of the binding nature of the obligations created, the pre-

the extent to which rules define the specific conduct. “Delegation” is the extent to which a third party has authority to interpret the rules and resolve disputes.⁴⁵ Accordingly, players might vary a proposed commitment along any of these dimensions when they agree over ends but are too divided to agree over specific means,⁴⁶ or when they want to grapple with uncertain outcomes by monitoring the impacts of their commitments over time.⁴⁷ We might thus expect soft law to be vaguely worded, or have weak enforcement provisions.⁴⁸

The influence of the ASEAN Way looms large in ASEAN’s history, and regional integration remains a relatively new concept.⁴⁹ Indeed, during its first twenty years, ASEAN existed primarily to improve diplomatic relations among its member states, so that they could better stand against the specter of communism.⁵⁰ Even today, the Treaty of Amity and Cooperation generally restricts the member states’ ability to hold each

cision of those obligations, and whether those obligations delegate authority to interpret and implement the law).

45. Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT’L ORG. 401, 401 (2000). Abbot et al. explain that obligation, precision, and delegation are three dimensions along which legalization can be measured. *Id.* On either end of the obligation spectrum are “expressly non-legal norm” and “binding rule.” *Id.* at 404. Precision varies between “vague principle” and “precise, highly elaborated rule.” *Id.* Delegation exists between “diplomacy” and “court system with binding decisions.” *Id.*; see also Paul J. Davidson, *The ASEAN Way and the Role of Law in ASEAN Economic Cooperation*, 8 SING. Y.B. INT’L L. 165, 169-71 (discussing the movement towards legalization through an examination of economic agreements). For charts depicting the levels of each element of legalization, see Abbott et al., *supra*, at 410, 415-16.

46. See Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 AM. J. INT’L L. 443, 443 (1983) (observing that soft law can overcome deadlocks when states refuse to bind themselves to firmer regimes); cf. Davidson, *supra* note 6, at 235 (“Soft law allows for vagueness of commitments where parties are prepared to enter into agreements but are unable to agree on the ‘exactness’ of their obligations.”).

47. Abbot & Snidal, *supra* note 44, at 423.

48. The discussion of economic integration and security cooperation in Part III.1 will illustrate this consequence in the ASEAN context.

49. This will be further discussed below in Part III.1.A.

50. See NARINE, *supra* note 1, at 33 (explaining that ASEAN’s role during the Cold War was to improve relations among the member states, so that they could be stronger in the face of “externally-sponsored communist insurgencies”).

other accountable or to intervene in each others' affairs.⁵¹ Moreover, because consensus is the basis for decision-making, the member states which seek the least-restrictive version of a particular commitment more often prevail.⁵²

B. *The Ongoing Political Dynamic*

Despite its seeming shortcomings, the ASEAN Way's role remains what it has always been: a barrier to change and a check on member state ambition. To this point, ASEAN's five original members—Indonesia, the Philippines, Singapore, Thailand, and Malaysia—created the organization to manage the regional balance of power not only with respect to the global superpowers, but also with respect to each other.⁵³ Particularly worrisome was Indonesia, which had the largest military in the Southeast Asia and which sought to limit global influence so that it might be a regional power. The ASEAN Way emerged so that the members could mutually assist each others' political, economic, and cultural development, while still avoiding dominance by any single state.⁵⁴

By impeding institutional development, the ASEAN Way plays a similar role today, although it is expressed differently in different contexts. As Thailand and Singapore push for deeper economic integration, the resultant agreements function more as coordinating mechanisms rather than policy imperatives. As Indonesia and other states seek an ASEAN that is more centralized and is a stronger force for human rights,⁵⁵

51. See, e.g., *Desperate times for Burma*, IRISH TIMES, May 22, 2008, at 19 ("But ASEAN's deep-rooted norm of non-interference in state sovereignty makes it subject to systematic delays and vetoes just when emergency flexibility is most needed."); see *Final Draft for ASEAN Human Rights Body is Ready*, MALAY. GEN. NEWS, July 18, 2009, (attributing the ASEAN Human Rights Body's inability to protect regional human rights to ASEAN's norm of non-interference).

52. Hence the critique that ASEAN's commitments tend to satisfy the "lowest common denominator." See *supra* note 8 and accompanying text.

53. See NARINE, *supra* note 1, at 15 (describing member states' reasons for joining ASEAN in terms of regional politics).

54. *Id.* at 15, 31.

55. See Jürgen Rüländ, *Deepening ASEAN Cooperation Through Democratization? The Indonesian Legislature and Foreign Policymaking*, 9 INT'L RELATIONS OF THE ASIA-PACIFIC 373, 383 (describing the Indonesian parliament's desire that the ASEAN Charter help the human rights performance of ASEAN member states); John Burton & Roel Landingin, *Rifts over Charter for ASEAN*

resort to the ASEAN Way's norm of non-interference empowers Cambodia, Laos, Vietnam, and Myanmar to jealously guard against unwanted scrutiny of domestic affairs.⁵⁶ Accordingly, the degree to which ASEAN is able to pursue progress in a particular realm depends entirely upon the extent that the member states are willing to cooperate at any particular moment. While this attribute is certainly inimical to institutional change, it is entirely consistent with ASEAN's purposes. The next section will explore the member states' attempts to confront these challenges.

III. STRUGGLING AGAINST INSTITUTIONAL NORMS

In this part, I make three main points. First, I demonstrate the different ways in which ASEAN Way functions both with respect to economic integration and security cooperation. Second, I argue that the proponents of economic integration and security cooperation sought to correct the deficiencies in each of these processes through a number of integrative instruments. Third, I argue that the progressive states wanted—

May Hit Regional Integration, FIN. TIMES, July, 31 2007, at 5 (“Richer members, including Singapore, Malaysia, Thailand, Indonesia and the Philippines, favor faster decision-making.”); Dian Triansyah Djani, *A Long Journey*, THE MAKING OF THE ASEAN CHARTER 137, 145 (Tommy Koh et al. eds., 2009) (“Some [intellectuals and think tanks] wanted to have a clear mention of a decision-making process which included voting. . . . In the HLT discussion, I was consistently reminded that the concept of ‘consultation’ and ‘consensus’ originated from Indonesia.”) (emphasis added). Note, however, that some states are pushing for a better record on human rights in part to stave off Western criticism. See Burton & Landingin, *supra* (“Alberto Romulo, the Philippines’ foreign minister, said [ASEAN’s future] human rights commission was necessary to improve international credibility and prevent meddling by [W]estern countries in the region’s domestic affairs.”) (emphasis added).

56. See, e.g., Visa Veera, *ASEAN Community: An Idea Ahead of Its Time*, BRUNEI TIMES Apr. 14, 2010, <http://www.bt.com.bn/print/113180> (noting that Cambodia, Laos, Myanmar, and Vietnam have indicated their intention to block the initiatives of other ASEAN members in the wake of a new Human Rights Charter and the creation of the ASEAN Intergovernmental Commission on Human Rights); see also Kristina Jönsson, *Unity-in-Diversity? Regional Identity Building in Southeast Asia* 16 (Lund Univ. Ctr. for East & South-East Asian Studies, Working Paper No. 29, 2008) (“There is still a fear of being dominated by a hegemonic power, be it regional or from other parts of the world.”).

and expected—the Charter to provide a structure that would better resolve the shortcomings of ASEAN integration.⁵⁷

A. *Economic Integration*

This section argues that the ASEAN Way has served as a check against Singapore and Thailand's pursuit of deeper economic integration,⁵⁸ in light of other member states' unwillingness or inability to participate. First, I discuss the regional political dynamics that encouraged ASEAN to formally eschew the ASEAN Way in the realm of economic integration. Second, I examine the instruments of economic integration with respect to trade and dispute settlement, noting the ways in which the legal structures incorporate the ASEAN Way, and identifying the difficulties ASEAN has faced during the integrative process. Third, I discuss the mechanisms of trade integration that the member states, led by Singapore and Thailand, developed to combat these deficiencies.

1. *The Politics of Regional Trade Integration*

With the end of the Cold War, ASEAN no longer had to safeguard its member states against a global ideological cleavage. It sought renewed relevance in economic integration.⁵⁹ In 1992, Singapore and Thailand (and to a lesser extent, Malaysia) led the member states' efforts to create the ASEAN Free

57. See Cebu Declaration on the Blueprint of the ASEAN Charter, Jan. 13, 2007, available at <http://www.aseansec.org/19257.htm> (“[W]e reiterate our conviction that an ASEAN Charter will serve as a firm foundation in achieving one ASEAN Community by providing an enhanced institutional framework”); Terms of Reference of the Eminent Persons Group (EPG) on the ASEAN Charter, Dec. 13, 2005, available at <http://www.aseansec.org/18060.htm> (explaining that the ASEAN Charter will be “aimed at enabling the building of . . . [an] ASEAN Community that is cohesive, successful and progressing in the 21st century”).

58. See *More Effort Needed; Free Trade in South-East Asia*, ECONOMIST, July 31, 2004 (“Countries that already have relatively open economies, such as Singapore and Thailand, view the grouping as a means to increase the competitiveness of their exports, and so to attract more foreign investment.”).

59. In 1992, the member states agreed to create the ASEAN Free Trade Area. Singapore Declaration of 1992, Jan. 28, 1992, 31 I.L.M. 498. In 1995, they agreed on both trade in services and investment, and created a dispute settlement mechanism. Bangkok Summit Declaration of 1995, Dec. 15, 1995, 35 I.L.M. 1067.

Trade Area,⁶⁰ which until recently was one of ASEAN's primary integrative mechanisms.⁶¹ And while early efforts at economic integration initially brought the organization global renown,⁶² the Asian financial crisis exposed ASEAN's—and the region's—underlying institutional weaknesses.⁶³

The Asian financial crisis began in May 1997 when, following a prolonged investment boom in East and Southeast Asia, currency speculators began selling the Thai bhat and other local currencies.⁶⁴ In response to the rapid devaluation, Thailand, Malaysia, and Indonesia each floated their respective currencies on the international market.⁶⁵ Nevertheless, economic catastrophe struck the region as stock markets declined and debt rose dramatically. Worse, the International Monetary Fund's (IMF) proposals ultimately exacerbated the ex-

60. See SEVERINO, *supra* note 5, at 29 (recounting Singapore's herculean leadership in a variety of economic endeavors, including pushing for AFTA alongside Thailand and Malaysia).

61. See Razeen Sally, *The ASEAN Charter and the ASEAN Economic Community in LIFE AFTER THE CHARTER*, *supra* note 25, at 113, 114 (“ASEAN’s economic core is [AFTA].”), 118 (explaining that the recently enacted ASEAN Trade in Goods Agreement consolidates a number of economic instruments, including AFTA).

62. See, e.g., Peter Kenevan & Andrew Winden, *Flexible Free Trade: The ASEAN Free Trade Area*, 34 HARV. INT’L L.J. 224, 240 (1993) (describing ASEAN as “one of the developing world’s premier economic success stories”); Jörn Dosch & Manfred Mols, *Thirty years of ASEAN: Achievements and Challenges*, 11 PAC. REV. 167, 168 (1998) (characterizing ASEAN as a “weighty and influential player within the international system”); see also Greg Sheridan, *ASEAN’s Growing Web of Co-operation*, AUSTL., July 29, 1997, at 15 (expressing hope that ASEAN’s old members would be able to push the newly accepted Burma, Cambodia, Laos, and Vietnam towards democracy). But see DAVID MARTIN JONES & M.L.R. SMITH, *ASEAN AND EAST ASIAN INTERNATIONAL RELATIONS: REGIONAL DELUSION* 144 (2006) (criticizing scholarly praise of the ASEAN Way and ASEAN economic integration during the mid-1990s).

63. This Note discusses the Asian financial crisis to an extent sufficient to understand ASEAN’s response. For more expansive accounts, see generally *THE ASIAN FINANCIAL CRISIS: CAUSES, CONTAGION AND CONSEQUENCES*, (Pierre-Richard Agénor et al. eds., 1999). For a more recent overview, see SHALENDRA D. SHARMA, *THE ASIAN FINANCIAL CRISIS: CRISIS, REFORM AND RECOVERY* (2003).

64. NARINE, *supra* note 1, at 144. The influx of investment into Southeast Asia occurred as the result of: (1) domestic financial deregulation; (2) increased loan volume from Japan and the West; and (3) domestic inflation fueled by monetary arrangements with the United States. *Id.* at 141-43.

65. *Id.* at 145.

isting economic trauma.⁶⁶ Southeast Asia soon viewed the IMF's efforts as simply a strategy by the West to recover its own wealth at Asia's expense.⁶⁷

ASEAN's response exposed it as an organization unable to handle complex economic difficulties,⁶⁸ undermining its image as the source of Southeast Asia's strength. In the early months of the crisis, ASEAN regarded the attacks on the baht as simply a domestic problem, and played no role when several Asian banks provided assistance to Thailand.⁶⁹ Observers thus became skeptical that ASEAN could continue to provide effective regional leadership.⁷⁰

For many member states, the financial crisis was a learning experience. With the important exception of Myanmar, the members were united in their belief that ASEAN would have to pursue integration more aggressively if regional eco-

66. The IMF required that the Indonesian, Thai, and Philippine governments stabilize their currencies by cutting costs and raising interest rates. WEATHERBEE, *supra* note 2, at 211. Instead of engineering recovery, however, these proposals made it impossible for business to access capital. NARINE, *supra* note 1, at 158.

67. NARINE, *supra* note 1, at 158.

68. WEATHERBEE, *supra* note 2, at 211.

69. Jürgen Rüländ, *ASEAN and the Asian Crisis: Theoretical Implications and Practical Consequences for Southeast Asian Regionalism*, 13 PAC. REV. 421, 428 (2000). The only existing mechanism that might have afforded some assistance was a 1977 currency-swap agreement, but it offered only a fraction of the aid that Thailand required to weather the baht's depreciation. Compare Memorandum of Understanding on the ASEAN Swap Agreements, art. 5.1, Aug. 5, 1977, available at <http://www.aseansec.org/1388.htm> ("The maximum total amount of US dollars available for swap transactions under the Arrangement shall be . . . \$100 million.") with Fauziah Ismail et al., BUS. TIMES, Dec. 1, 1997, at 4 (noting the IMF's credit offer of \$17.2 billion to Thailand).

70. See *But Academe Says Swap Plan Makes for Good Propaganda Only*, BUS. WORLD, Mar. 19, 1998 at 2 (quoting one observer's skepticism that the new agreement was anything other than propaganda); see also Anthony Smith, *Indonesia's Role in ASEAN: The End of Leadership*, 21 CONTEMP. S.E. ASIA 238, 246 (1999) ("ASEAN has not been able to provide the solutions to the financial crisis but it has established a surveillance mechanism to monitor economic performance and policy. Given the divisions within ASEAN on how to run economic matters, such a mechanism is only going to be a 'talk shop' at best."); John Funston, *ASEAN: Out of its Depth?*, 20 CONTEMP. S.E. ASIA 22, 22-23 (1998) (noting contemporary negative public and academic opinion regarding ASEAN's handling of crises in Myanmar and Cambodia.).

conomic growth was to remain the organization's *raison d'être*.⁷¹ Implicitly, they acknowledged that economic integration would require a shift away from the ASEAN Way, as global economic forces would continue to pose a far greater threat than regional economic players.⁷² Additionally, Thailand and others decided that economic prosperity had implications for all levels of societal development.⁷³ These lessons would fuel ASEAN's integrative efforts over the next decade.

71. See Press Statement of the Second ASEAN Informal Meeting of Heads of State/Government of the Member States of ASEAN (Dec. 15, 1997), available at <http://www.aseansec.org/1816.htm> ("ASEAN nations should increase trade interactions within the region as a way to overcome the unprecedented devaluation of their currencies."); see also Joint Statement of the Heads of State/Government of the Member States of ASEAN on the Financial Situation (Dec. 15, 1997), available at <http://www.aseansec.org/5221.htm> ("[I]n view of the present situation, every effort should be made to remove barriers to trade and to promote greater intra-ASEAN trade and investment.").

72. See Goh Chok Tong, Prime Minister, Sing., Opening Remark at the Sixth ASEAN Summit in Hanoi, (Dec. 16, 1998), available at <http://www.aseansec.org/8737.htm> (emphasizing that the financial crisis has discredited ASEAN, and that the West will "turn away from Southeast Asia" if ASEAN does not "live up to international expectations"); see also Khai Keynote Address, *supra* note 18 ("[T]he current financial and monetary turmoil clearly demonstrates that in the natural process of economic globalization, every crisis today starts a chain reaction that could only be checked through concentrated efforts at all levels. . . . ASEAN [must] create a mechanism for coordination in time of crisis."); Mohamad, Opening Remark, *supra* note 18 ("We will cooperate with our ASEAN partners to strengthen and insulate the region from external disturbances as much as possible. . . . The financial turmoil has underscored the many challenges inherent in globalization."); Joseph Ejercito Estrada, President, Republic of Phil., Opening Remarks During the Opening Ceremony of the Sixth ASEAN Summit in Hanoi (Dec. 15, 1998), available at <http://www.aseansec.org/13025.htm> (emphasizing that ASEAN must steadfastly maximize the benefits of globalization while minimizing the risks by broadening, deepening, and accelerating integration) [hereinafter Estrada, Opening Remarks]. *But cf.* Shwe, Opening Remarks, *supra* note 17 (expressing confidence that the member states will recover from the financial crisis and emphasizing the ASEAN Way, but nevertheless lauding commitments on trade liberalization).

73. See, e.g., Leekpai, Opening Remarks, *supra* note 18 ("[W]hat is most essential to ASEAN's recovery and renewal is the need for us to realize that economic growth is not an end in itself. Our goal must be growth that is sustainable in terms of equitable income distribution, social justice, [and] good governance in both the public and private sector."); Estrada, Opening Remarks, *supra* note 72 (emphasizing that ASEAN must proactively reform the international financial architecture, especially with regard to the "social

More recently, Singapore, Malaysia, and Thailand have benefitted the most from regional economic integration, which likely inspires their evangelism. Indeed, in 2009, they accounted for 37 percent, 19 percent, and 15 percent of regional trade, respectively.⁷⁴ Additionally, Singapore and Thailand received 33 percent and 14 percent of regional foreign direct investment (FDI) inflow, respectively.⁷⁵ Singapore's position as shipping intermediary between the member states and the rest of the globe likely makes it a particularly enthusiastic force for economic liberalization.⁷⁶

The members also have vastly different political economies. Singapore and Malaysia both rely on exports. But while Singapore is an eager liberalizer, Malaysia—joined by Indonesia—is an economic nationalist, more interested in regional economic strength than integration into the global economy.⁷⁷ Laos and Myanmar largely trade with other member states, and Cambodia, the Philippines, and Vietnam predominantly trade outside the region.⁷⁸ Most inimical to closer economic integration, there is a vast development gap between ASEAN's richest and poorest members. Indeed, tariffs can be an important revenue source for the region's poorer economies, and without support for the less-developed economies, integration will produce definite economic winners and losers.⁷⁹ Despite these differences, the member states must work together: Southeast Asia's regional economic potential

dimension of the financial system, since it is the poor . . . who bear the brunt of any crisis").

74. ASEAN, ASEAN COMMUNITY IN FIGURES—2009, 18 tbl. 18 (2010) [hereinafter ASEAN FIGURES].

75. *Id.* at 36 tbl. 31.

76. NARINE, *supra* note 1, at 132-33 (explaining that the bulk of intra-ASEAN trade is between Singapore and the rest of the region).

77. WEATHERBEE, *supra* note 2, at 218.

78. U.N. ECON. & SOC. COMM'N FOR ASIA & PAC. [ESCAP], TEN AS ONE: CHALLENGES & OPPORTUNITIES FOR ASEAN INTEGRATION 14 (2007).

79. *Id.* at 35; *cf.* SEVERINO, *supra* note 5, at 226 (2006) (“[W]hen I asked Vietnamese and Cambodian authorities why they insisted on the time lag [to delay the reduction of their tariffs] the responses indicated more than the concern over the loss of revenue from customs duties; it was the uncertainty over the potential. . . economic[] impact.”).

lies in the economies of scale that a unified area might offer to investors,⁸⁰ and China looms as a powerful competitor.⁸¹

2. *Economic Integration and the ASEAN Way*

Although the ASEAN Free Trade Area formally established a rules-based commitment to lower tariffs, it accommodated those states which did not have Singapore's or Thailand's zeal for integration by incorporating elements of soft law and relations-based governance. The reduction timelines were so lengthy that they were tantamount to having no timelines at all⁸²: a fast-track provision allowed member states ten years to eliminate tariffs for products with current tariff rates under 20 percent,⁸³ and a two-step process covering remaining products.⁸⁴ It also enabled states to either temporarily or permanently opt-out of tariff reductions for specific product lines, anticipating that not all members would be ready or willing to implement common tariff reductions at the same time.⁸⁵ This mechanism highlighted ASEAN's focus on relations-based governance, as the member states anticipated that those among them which upheld the tariff commitments would pressure po-

80. Cf. David Martin Jones & Michael L.R. Smith, *Making Process, Not Progress*, 31 INT'L SECURITY 148, 166 (2007) (noting that, despite potential for beneficial economies of scale, ASEAN governments remain "intransigently protectionist"); Mia Mikic, *ASEAN and Trade Integration 25* (ESCAP Trade & Investment Div. Working Paper 01/09, 2009), available at <http://www.unescap.org/tid/publication/swp109.pdf> ("ASEAN is now an indispensable building block for what in the literature is known as 'Asia's Factory[.]'").

81. WEATHERBEE, *supra* note 2, at 214.

82. See economic analysis of tariff reductions, discussed *infra*.

83. *Questions and Answers on the CEPT*, ASEAN, at Q5, <http://www.aseansec.org/10153.htm> (last visited Oct. 8, 2010).

84. Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area art. 4, Jan. 28, 1992, available at <http://www.aseansec.org/12375.htm> [hereinafter CEPT Scheme]. By contrast, NAFTA anticipated a much more rapid process of tariff reduction with five product categories, including an immediate tariff reduction for the least sensitive category, and a fourteen-year implementation for the most sensitive. North American Free Trade Agreement annex 302.2, Dec. 17, 1992, 32 I.L.M. 289, 309 (1993). Moreover, each product category specified the particular reduction levels each year. *Id.*

85. CEPT Scheme, *supra* note 84, at art. 6.

tential defectors not to opt-out.⁸⁶ Moreover, when Cambodia, Laos, Myanmar, and Vietnam joined ASEAN, their tariff reduction timelines accommodated their lesser willingness or ability to pursue economic integration.⁸⁷ Indeed, the entire structure enabled, rather than compelled, economic integration.⁸⁸

ASEAN's dispute settlement mechanism (DSM) for economic agreements also demonstrates an effort to construct economic integration around the ASEAN Way's principles. To wit, the member states avoided a formalized dispute resolution mechanism for over a decade.⁸⁹ Demonstrating their gradual acceptance of rules-based economic integration, the members crafted a DSM in 2004, but it nevertheless remains an option rather than a mandate,⁹⁰ and permits member states at any time to engage in conciliation or mediation.⁹¹ Thus, it is expressly a nonobligatory instrument. Additionally, the entire process is administered by a group of political representatives from each member state,⁹² which would likely make decisions

86. See Kenevan & Winden, *supra* note 62, at 228-29 (the CEPT Scheme is "crafted to encourage peer pressure to expedite economic integration. Those lagging behind are pressured to abandon their excuses and move forward with the group, while more aggressive free traders are encouraged to forge ahead and pull the remaining ASEAN countries with them.").

87. See Protocol on the Special Arrangement for Sensitive and Highly Sensitive Products, ¶¶ 10-12, Sept. 30, 1999, available at <http://www.aseansec.org/1207.htm> (affording the CLMV states three to seven years more time to begin implementing border reductions).

88. See Richard Stubbs, *Signing on to Liberalization: AFTA and the Politics of Regional Economic Cooperation*, 13 PAC. REV. 297, 313 (2000) ("The strategy of developing a vaguely worded statement . . . allowed AFTA to move forward at a pace with which all governments felt comfortable.").

89. The CEPT Scheme's original dispute settlement mechanism differed little from the ASEAN Way, providing only that member states afford each other opportunities for consultation. CEPT Scheme, *supra* note 84, art. 8(1).

90. See ASEAN Protocol on Enhanced Dispute Settlement Mechanism art. 1(3), Nov. 29, 2004, 2004 ASEAN DOCUMENT SERIES 151 [hereinafter 2004 DSM] (explaining that member states may "resort to other fora at any stage before a party has made a request to . . . establish a panel").

91. *Id.* art. 4(1).

92. See *id.* at art. 1(3), 5(1) (discussing the Senior Economic Officials Meeting); cf. Ong Keng Yong, *ASEAN and the 3 L's: Leaders, Laymen and Lawyers*, ASEAN, (Mar. 2005), <http://www.aseansec.org/17356.htm> (explaining that the involvement of government ministers in the dispute settlement process can lead to some level of bureaucratic negotiation).

by consensus.⁹³ Still, no dispute has yet been brought to the DSM,⁹⁴ so member states continue to rely on relations-based dispute settlement. As a result, member states simply renegotiate agreements when they are unable or unwilling to implement earlier ones.⁹⁵

As a result of these loose instruments, the process of regional economic integration has suffered gaping problems. AFTA has only been a minor success.⁹⁶ Lengthy reduction timelines mean that progress has been slow,⁹⁷ as nearly all the member states—with the notable exception of Singapore⁹⁸—have used the exception provisions for protectionist purposes.⁹⁹ For example, Malaysia has long maintained protec-

93. See John Ravenhill, *Fighting Irrelevance: An Economic Community 'with ASEAN Characteristics'*, 21 PAC. REV. 469, 480 (2008) (“[T]he new mechanism appears to assume that the Senior Economic Officials, who have responsibility for adopting a dispute panel report, will do so only if they reach consensus (a requirement that undermined GATT’s dispute-settlement procedures).”).

94. The 2004 DSM applies to forty-six economic agreements. 2004 DSM, *supra* note 90, at app. I. The ASEAN Charter establishes it as the default agreement for resolving all economic disputes. ASEAN Charter, *supra* note 24, art. 24(3).

95. See John Ravenhill, *East Asian Regionalism: Much Ado about Nothing?*, REV. INT’L STUD., Feb. 2009, at 215, 227 (noting that in cases of disagreement over ASEAN rules, states were able to negotiate, but that the outcome was a downward departure from the prior norm).

96. See Vinod K. Aggarwal & Jonathan T. Chow, *The Perils of Consensus: How ASEAN’s Meta-Regime Undermines Economic and Environmental Cooperation*, 17 REV. INT’L POL. ECON. 262, 272, 275 (2010) (noting that AFTA has produced a statistically significant increase in ASEAN trade prior to the onset of the financial crisis in the late 1990s, but that “intra-regional trade remains low compared to other regions”).

97. Ravenhill, *supra* note 95, at 226 (noting that only Brunei, Malaysia, and Singapore achieved the 2003 tariff reduction goal, and as 2006 ended, only 65 percent of products included in the free trade area had zero tariffs).

98. Singapore maintains an average of zero tariffs on all goods as a matter of policy. See Ravenhill, *supra* note 93, at 477 (discussing Singapore’s zero tariffs in light of its dependence on being integrated into the global economy).

99. See Teofilo C. Daquila & Le Huu Huy, *Singapore and ASEAN in the Global Economy: The Case of Free Trade Agreements*, 43 ASIAN SURV. 908, 923 (2003) (recounting delays by Malaysia, the Philippines, and Indonesia); Jones & Smith, *supra* note 80, at 165-66 (explaining that Indonesia and Thailand continuously seek to renegotiate their commitments); Lay Hong Tan, *Will ASEAN Economic Integration Progress Beyond a Free-Trade Area?*, 53 INT’L &

tions on its auto industry,¹⁰⁰ and member states maintain elaborate protections on rice.¹⁰¹ Meanwhile, tariff reductions have not run deeply or expansively enough to provide benefits significantly greater than WTO tariff rates, so many firms simply avoid utilizing the AFTA scheme altogether.¹⁰² Further undermining the effectiveness of economic integration, ASEAN's more enthusiastic liberalizers—Singapore and Thailand—are turning to extra-regional bilateral agreements, which often provide for greater trade benefits than those which appear in AFTA.¹⁰³

Perhaps most importantly, tariff reductions under AFTA have largely been driven by market forces, rather than by AFTA itself.¹⁰⁴ Moreover, non-tariff barriers remain the primary obstacles to regional integration.¹⁰⁵ These can include inconsistent domestic policies, complex rules of origin, and conflicting customs laws, among others. Accordingly, deeper integration requires a regional economic policy which embraces mechanisms that both compel liberalization for politi-

COMP. L.Q. 935, 940-41 (2004) (discussing protectionist moves by Vietnam, Laos, Malaysia, and the Philippines).

100. See, e.g., *Government Rethinks Autos Protectionism*, BMI ASIA PAC. AUTOMOTIVE INSIGHTS, July 1, 2009.

101. Under AFTA, Indonesia, Malaysia, and the Philippines excluded rice from their tariff-reduction obligations. See Protocol on the Special Arrangement for Sensitive and Highly Sensitive Products, *supra* note 87, at Annex 1: List of Highly Sensitive Products. Also, a treaty that allows member states to exempt rice from their current tariff obligations continues to apply. See Protocol to Provide Special Consideration for Rice and Sugar, Aug. 23, 2007, available at <http://www.aseansec.org/22975.pdf>; see also ASEAN Trade in Goods Agreement, art. 24, Feb. 26, 2009 [hereinafter ATIGA], available at <http://www.aseansec.org/22223.pdf>.

102. Some estimate that a mere 5 percent of players in Southeast Asia actually utilize the AFTA rates. See, e.g., Aggarwal & Chow, *supra* note 96, at 272.

103. Ravenhill, *supra* note 93, at 474; see also Jones & Smith, *supra* note 80, at 167 (highlighting Singapore's trade agreements with Japan, New Zealand, and Australia, as well as an agreement between Thailand and Australia).

104. See U.N. Econ. & Soc. Comm'n for Asia & the Pac. [ESCAP], *Ten as One: Challenges & Opportunities for ASEAN Integration*, 34 (2007), available at <http://www.unescap.org/unis/asean/ten@one.pdf> (“[E]xpansion of trade and FDI has mostly been market-driven”); see also Jones & Smith, *supra* note 80, at 166 (noting that the increase in the ASEAN economies since 2002 is due to China's growth).

105. Mikic, *supra* note 80, at 16.

cally sensitive industries and which unifies the policy inconsistencies among the member states.¹⁰⁶

Despite these deficiencies, it is simply not enough to say that the ASEAN Way prevents deeper economic integration.¹⁰⁷ As discussed earlier, ASEAN was created in part to maintain the regional balance of power, and the ASEAN Way emerged to ensure that no course pursued would threaten the internal stability of any single member.¹⁰⁸ Accordingly, the aforementioned weaknesses of regional economic integration were the result of an organizational norm which emerged to ensure that no single state could gain at the others' expense.

The organization's economic leaders did not share this view. As the next section will demonstrate, Singapore and Thailand pushed ASEAN to espouse goals and values that not all states in the region necessarily shared. Ultimately, this would set up ASEAN to disappoint; the organization is only capable of implementing goals that are truly shared by all of its members.¹⁰⁹

3. *Instruments of Economic Integration*

By 2003, some academics in Singapore were fearful that the slow pace of integration had caused ASEAN to fall behind with respect to its global share of FDI.¹¹⁰ That year, Singapore joined with Thailand to propose the ASEAN Economic Community,¹¹¹ which the member states accepted in the Bali Concord II and later refined in 2004's Vientiane Action Program,

106. See *id.* (explaining that non-tariff barriers are central obstacles to integration, and that there remain wide variations in these costs to trade); see also Jones, *supra* note 80, at 165-66 (discussing that myriad non-tariff barriers remain in place, and that major regional players freely utilize the exceptions protocol to protect important domestic industries).

107. For scholarship arguing that the ASEAN Way is an impediment to economic integration, see JONES & SMITH, *supra* note 52, at 19, and WEATHERBEE, *supra* note 2, at 302.

108. See NARINE, *supra* note 1, at 15, 32-33; WEATHERBEE, *supra* note 2, at 92-93.

109. See Part V for a discussion of why the members may have agreed to the integrative instruments, despite internal inability or unwillingness to actually fulfill the commitments.

110. SEVERINO, *supra* note 5, at 250-251.

111. See Lydia Lim, *ASEAN Heads Commit to Action Plan*, STRAITS TIMES, Oct. 8, 2003 ("Singapore and Thailand, the key drivers of this process, are keen to speed up the [economic] integration process even more.").

an agreement designed to implement the Bali Concord II. The plans primarily involved “establishing ASEAN as a single market and production base,” which would entail a free flow of goods, labor, and capital.¹¹² Accordingly, they sought to pursue a number of subsidiary goals.

First, the agreements articulated the need to improve the existing ASEAN Dispute Settlement Mechanism (DSM).¹¹³ As noted above, the pre-2004 DSM was little more than an agreement to engage in consensus.¹¹⁴ Thus the Bali Concord II and the High-Level Task Force sought to ensure that dispute resolution remained binding and non-political, and followed strict timelines.¹¹⁵ ASEAN had adopted the 2004 DSM by the time it created the Vientiane Action Program (VAP), so the VAP called simply for a DSM that would ensure the implementation of all economic agreements.¹¹⁶ But the member states avoid using the 2004 DSM, thus calling into question whether it actually ensures that member states will implement agreements.

Second, the agreements discussed the necessity of lowering non-tariff barriers to trade. In the High-Level Task Force’s recommendations, these included measures such as standardizing the rules of origin, simplifying regional customs procedures, and identifying and removing all non-tariff barriers by 2005.¹¹⁷ The following year, the VAP reiterated the need to eliminate non-tariff barriers to trade, set forth specific plans to integrate and modernize customs procedures, and developed plans to harmonize national rules of origin.¹¹⁸

Third, the agreements recognized the need to narrow the development gap. Accordingly, the Bali Concord II announced that member states should ensure that Cambodia, Laos, Myanmar, and Vietnam (CLMV) and their people par-

112. This would specifically mean the “free flow of goods, services, investment and skilled labour, and freer flow of capital.” ASEAN, High-Level Task Force, *Recommendations of the High-Level Task Force on ASEAN Economic Integration*, ¶ 3 (Oct. 7, 2003), available at <http://www.aseansec.org/hlhf.htm> [hereinafter *HLTF Recommendations*].

113. It is important to note that the 2004 DSM was established *after* the Bali Concord II, but *before* the Vientiane Action Program.

114. See *supra* note 89 and accompanying text.

115. *HLTF Recommendations*, *supra* note 112, Annex 1.

116. Vientiane Action Program, *supra* note 27, ¶ 2.11.

117. *HLTF Recommendations*, *supra* note 112, ¶¶ 5, 11.

118. Vientiane Action Program, *supra* note 27 ¶¶ 2.3.5.1, 2.3.5.2.

anticipated equitably in economic integration.¹¹⁹ To this end, the VAP articulated that the member states would help the CLMV states to remove barriers to trade, and ensure that both the costs and benefits of economic integration were evenly distributed.¹²⁰ Moreover, in order to facilitate inter-ASEAN aid, the VAP announced that the organization create an ASEAN Development Fund.

Throughout the process of economic integration, the ASEAN Way has served as a check on Singapore and Thailand's ambitions. Although the member states are willing to pursue economic integration to some extent, they use agreements that employ soft law and relations-based governance, enabling them to place national interests above regional interests and demonstrating an underlying disconnect with Singapore and Thailand's abilities and goals. Indeed, the member states' ultimate unwillingness to cede the necessary authority to ASEAN via the Charter belies the claim that they wholly accepted the idea of an ASEAN Economic Community.

B. *Security Cooperation*

In this section, I argue that the ASEAN Way has served as a check on Indonesia's ability to impose norms and binding mechanisms on other member states. First, I discuss regional problems posed by Myanmar, as well as Indonesia's efforts to resolve those difficulties. I argue that the ASEAN Way so limited ASEAN's options toward Myanmar that Indonesia and other progressive members employed a modified form of non-interference, using it as a sword rather than a shield. Second, I identify instruments in the Indonesian-proposed ASEAN Security Community, which the progressive states anticipated would improve their ability to deal with Myanmar. Ultimately, these states hoped that a Charter would provide the legal and structural framework necessary to implement these instruments.

1. *One Bad Apple*

Myanmar's repressive junta divided and tested ASEAN. In 2003, the country's government banned the major opposition

119. Bali Concord II, *supra* note 20, at B.4.

120. Vientiane Action Program, *supra* note 27, at 4.2.

party, the National League for Democracy (NLD), and arrested its leader, Aung San Suu Kyi.¹²¹ Indonesia led the effort to resolve the crisis, both out of fear that ASEAN would become irrelevant,¹²² and in order to regain its position as regional leader.¹²³ And just as Indonesia's hegemonic ambitions met resistance from its peer member states in ASEAN's early years, so now would Myanmar, Cambodia, and Laos resist an ASEAN that could intervene in their internal affairs.

Indonesia's goals far overstretched ASEAN's institutional capacity. Initially, Indonesia, the Philippines, and Malaysia tried to engage Myanmar via the ASEAN Troika,¹²⁴ a dispute resolution instrument that could make findings and recommendations to ASEAN governmental officials.¹²⁵ However, consistent with the ASEAN Way, the mechanism was voluntary, and Myanmar refused to participate in its processes. But even if Myanmar had participated, the process would have been little different from consultation since the Troika could neither make binding decisions nor address the member states' internal affairs.¹²⁶ It instead was a mechanism by which to engage in relations-based dispute resolution.

Ultimately, the older members adopted a principle of "enhanced interaction." This permitted individual states to pub-

121. Sheldon Simon, *ASEAN and Multilateralism: The Long Bumpy Road to Community*, 30 CONTEMP. S.E. ASIA 264, 272-73 (2008).

122. Tomotaka Shoji, *ASEAN Security Community: An Initiative for Peace and Security*, 17, 23, 24 (Nat'l Inst. Def. Stud. 2008) (explaining that Indonesia sought to "avoid a situation like that in Iraq, where the failure to establish a regional mechanism for political cooperation had brought on intervention by third-party countries"). See also Ruukun Katanyuu, *Beyond Non-Interference in ASEAN: The Association's Role in Myanmar's National Reconciliation and Democratization*, 46 ASIAN SURV. 825, 842-43 (2006) (explaining that the United States and the European Union responded to the Myanmar crisis by suspending diplomatic and trade relationships with ASEAN).

123. Indonesia collapsed after the 1997 financial crisis. Shoji, *supra* note 122, at 23, 24 (Nat'l Inst. Def. Stud. 2008).

124. Jürgen Haacke, "Enhanced Interaction" with Myanmar and the Project of a Security Community: Is ASEAN Refining or Breaking with its Diplomatic and Security Culture?, 27 CONTEMP. S.E. ASIA 188, 193 (2005).

125. ASEAN Troika, Terms of Reference Adopted at the 33rd AMM, art. 2.1, 3.3.2, (July 24-25, 2000). The ASEAN Troika was itself the product of the member states' inability to develop stronger institutional mechanisms, as Thailand had initially advocated for a more binding form of dispute resolution. See Loke, *supra* note 6, at 10-11 (describing the ASEAN Troika).

126. ASEAN Troika, Terms of Reference, *supra* note 125, at 3.3.2.

licly comment on Myanmar, although they could not present articulate specific timelines for progress.¹²⁷ This was nevertheless an important shift in the non-interference component of ASEAN Way: traditionally, non-interference forbade public discussion of domestic affairs. Indeed, Myanmar, Cambodia, and Laos all maintained that the ASEAN Way's primary function was to shield against external intervention.¹²⁸ With enhanced interaction, the older members now claimed that non-interference permitted them to engage a member whose policies had external adverse consequences.¹²⁹ The irony was that these original members initially developed the ASEAN Way to stave off Indonesian dominance; they were now adapting it to assist Indonesia's renewed efforts to dominate. It justified the very political pressure it once guarded against.

But Myanmar never responded to enhanced interaction. Although the state did not claim that the new diplomatic strategy imposed upon its sovereignty, it never needed to; Myanmar consistently acted in bad faith¹³⁰ and faced no formal consequences for its behavior.¹³¹ The U.N. has taken over efforts to promote Myanmar democratization, and ASEAN has been relegated to a secondary role.¹³² Worse, Cambodian and

127. Katanyuu, *supra* note 122, at 830.

128. See *supra* note 17 and accompanying text.

129. *Id.*

130. While insisting that Suu Kyi's house arrest would not persist indefinitely, Myanmar nevertheless refused to provide a timetable for her release. *Id.* at 831. It later accepted a timetable proposed by the Thai government that would include Suu Kyi's release, confidence building between the junta and the NLD, and the drafting of a democratic constitution. *Id.* However, it soon reneged on the agreement, and presented its own seven-step plan that offered no hard timetable for implementation. *Id.* By 2004, Myanmar had announced the re-launch of the National Convention. *Id.* at 832. Suu Kyi was released in 2010.

131. When Myanmar was scheduled to take ASEAN's rotating Chair, the older members wanted to deny Myanmar the position, while Cambodia and Laos favored a more tempered approach. Haacke, *supra* note 124, at 195-96. *Id.* Ultimately, the member states presented Myanmar with an option to forgo its turn, which it accepted. *Id.* at 196. Although Myanmar's intransigent attitude did force it to give up the opportunity for regional leadership, this consequence was the result of informal diplomatic pressure, rather than official ASEAN processes.

132. Joint Communiqué of the 42d ASEAN Foreign Ministers Meeting at the ASEAN Foreign Ministers Meeting, ¶¶ 68-69 (July 20, 2009), available at <http://www.aseansec.org/PR-42AMM-JC.pdf>; Chairman, ASEAN, Statement

Laotian sympathies towards Myanmar demonstrated fundamental philosophical divisions within ASEAN concerning regional responsibility for basic norms of governance.

The entire crisis demonstrated how thickly the ASEAN Way regulates member state behavior. Indeed, the members were unable to resolve regional tensions using ASEAN's existing instruments, and would only have been able to depart from those instruments through unanimous agreement. Even under enhanced interaction, the members were still unable to engage Myanmar as forcefully as non-ASEAN members (such as the U.N.) could. But the member states probably could not have strengthened their critique of Myanmar. Enhanced interaction remains vague and highly politicized,¹³³ and any expansion of its application might have destabilized the region.¹³⁴

Ultimately, the Myanmar crisis divided Southeast Asia between those states which wanted to maintain a strong norm of non-interference, and those which attempted to compel Myanmar to accede to international norms of good governance. The failures of the latter group exposed ASEAN as an organization lacking the institutional strength necessary to resolve major regional security crises. But the member states originally developed ASEAN in part to mediate regional tensions, and developed the ASEAN Way precisely so that the group could not interfere in any single member's domestic affairs. In that regard, the ASEAN Way served its function, even if the result meant that the member states could not reform Myanmar's unabashedly ferocious junta.

on Myanmar (Nov. 20, 2007), *available at* <http://www.aseansec.org/21057.htm>.

133. Underscoring the unwillingness to introduce coercion into ASEAN diplomacy, the member states previously rejected a Thai proposal to impose a mandatory timeline as a potential violation of the non-interference norm. Katanyuu, *supra* note 122, at 830.

134. Notably, this was the second time that member states employed enhanced interaction. In the late 1990s, Thailand and the Philippines applied enhanced interaction against Malaysia. Eventually, leaders from all three countries began making personal attacks against each other, straining diplomatic relations. See Jürgen Haacke, *The Concept of Flexible Engagement and the Practice of Enhanced Interaction: Intramural Challenges to the "ASEAN Way"*, 12 PAC. REV. 581, 599-603 (1999) (discussing the first iteration of enhanced interaction).

2. *Developing Norms from the Top Down*

The ASEAN Security Community (ASC) was Indonesia's attempt to inject norms and instruments into ASEAN, anticipating that they would make ASEAN better able to grapple with Myanmar, in addition to resolving other regional crises. The ASC thus first appeared in skeletal form in the 2003 Bali Concord II. The ASC Plan of Action, adopted in the 2005 Vientiane Action Program (VAP), described how to implement the ASC. Both documents demonstrated a number of important shifts in ASEAN's security functions, which the Charter failed to meaningfully advance.

The first shift was the emergence of security cooperation in the VAP as an independent goal of ASEAN cooperation.¹³⁵ Prior instruments, such as the Bali Concord II, offered economic integration as the primary justification for ASEAN security cooperation.¹³⁶ Announcing security cooperation as an independent goal, however, suggested that the members would be prepared to develop a more rules-based security community, as they had done when pursuing ASEAN's economic goals. Such an attitude would have been a profound development, as the ambiguity and limitations of relations-based norms was the primary check on the member states' ability to influence Myanmar's domestic affairs.

The second shift was the ASC's redefinition of the scope of security cooperation. Indeed, the primary expression of ASEAN's security goals for the organization's first twenty years was the Treaty of Amity and Cooperation; ASEAN was thus little more than a defense pact. However, the Bali Concord II expanded "security" to include "broad political, economic, social and cultural aspects."¹³⁷ It also announced that ASEAN must be a community of shared values, which would require

135. Vientiane Action Program, *supra* note 27, at art. II.1.

136. The ninth preambular paragraph of the Bali Concord II, for example, describes political cooperation and solidarity as a necessary means to achieve economic prosperity. Bali Concord II, *supra* note 27, at pmb. 9; *accord* Press Statement by the Chairperson of the Ninth ASEAN Summit and the Seventh ASEAN +3 Summit, ¶ 7 (Oct. 7, 2003), *available at* <http://www.aseansec.org/15259.htm> ("For the sustainability of our region's economic development, we affirmed the need for a secure political environment based on a strong foundation of mutual interests generated by economic cooperation.").

137. Bali Concord II, *supra* note 27, at Art. A(2).

that the member states evolve the region's political culture, develop shared norms, and construct conflict-prevention and resolution mechanisms.¹³⁸

The subsequent Plan of Action was a vehicle to further implement Indonesia's political goals. For example, the Plan articulated that the goal of developing the political culture would include establishing democracy in Southeast Asia, promoting human rights, strengthening rule of law and good governance, and increasing the participation of nongovernmental organizations in ASEAN's activities.¹³⁹ It also announced that, while the greater transparency and the Treaty of Amity and Cooperation would remain the primary tools for conflict prevention, ASEAN would build additional mechanisms of conflict resolution.¹⁴⁰ Last, it provided for the members to adopt a Charter that would enable ASEAN to develop shared norms and strengthen its institutional structure.¹⁴¹

Indonesia's efforts to develop the ASEAN Security Community represented another attempt to reform ASEAN from the top down. The ASC's articulated goals—spreading democracy and good governance and building better mechanisms of dispute resolution—seemed quixotic at best, particularly in light of the ASEAN Way. But ASEAN committed itself to these goals nonetheless, and proposed a Charter to help develop the appropriate institutional structures. In the next section, I explore the specific changes that ASEAN anticipated.

C. *Blueprint for a New ASEAN*

ASEAN pronounced its own goals for the Charter—and more specifically, the goals of the most progressive member states—in the Report of the Eminent Persons Group (EPG Report). In this section, I will examine the EPG Report in light of respective visions for ASEAN's Economic and Security Communities, identifying those proposals which would have better equipped ASEAN to resolve the issues discussed above. First, I will demonstrate that the EPG's mandate was to propose a Charter that would enable ASEAN to fulfill its integrative goals. Second, I examine the proposals to enable ASEAN to

138. *Id.* art. A(12).

139. Vientiane Action Program, *supra* note 27, ¶ II.1.1(ii), (iv), (v).

140. *Id.* ¶ II.1.4.

141. *Id.* ¶¶ II.1.2(i), 1.3, 1.5.

fulfill those goals articulated in the VAP. Third, I will argue that the EPG recommendations ultimately did set out a Charter that balanced ASEAN's articulated goals for integration with political realities, but that the balance was unrealistic because it sought to construct an ASEAN that reflected the desires of particular member states, without regard for ASEAN's own institutional capacity for reform.

1. *Mandate to Build a Charter*

ASEAN formally announced its commitment to establish a Charter in the Kuala Lumpur Declaration. According to the Declaration, the Charter would fulfill the vision of ASEAN set out in the Bali Concord II and subsequent Action Plans.¹⁴² It also emphasized that the Charter would be a legal and institutional framework that would help ASEAN¹⁴³ strengthen internal economic linkages, ensure the implementation of agreements, promote human rights and democracy, and promote regional cooperation,¹⁴⁴ among other activities.¹⁴⁵ Last, it delegated to an Eminent Persons Group (EPG) the task of offering practical recommendations for the Charter, specifying that the EPG would be a group of "highly distinguished and well respected citizens from ASEAN member countries."¹⁴⁶ They were to construct a document that would balance the practical with the visionary.¹⁴⁷

Thus, the EPG was ordered to create a Charter that could fulfill the vision laid out by the previous integrative mecha-

142. See Kuala Lumpur Declaration, *supra* note 23 ("examin[ing] and provid[ing] practical recommendations on the directions and nature of the ASEAN Charter relevant to the ASEAN Community as envisaged in the Bali Concord II and beyond . . .").

143. *Id.* para. 2 ("[T]he ASEAN Charter will serve as a legal and institutional framework of ASEAN to support the realisation of its goals and objectives.").

144. See *id.* para. 4 (listing ASEAN's goals and objectives).

145. Paragraph four of the Kuala Lumpur Declaration is a list of eighteen goals and principles articulated in previous ASEAN agreements. *Id.*

146. Terms of Reference of the Eminent Persons Group, *supra* note 57.

147. Compare *id.* ¶ 2 (the EPG will "provide practical recommendations") with *id.* ¶ 3 ("[The EPG] will put forth bold and visionary recommendations on the drafting of an ASEAN Charter."). Accord Shoeb Kagda In Denpasar, *Integration Crucial to Future of ASEAN: Jaya; A Different Paradigm with both Bold and Practical Ideas is Needed*, THE BUSINESS TIMES, Apr. 20, 2006. ("[W]e have to balance the bold and visionary ideas with what is practical.").

nisms, while still attempting to ground its recommendations in political reality. The irony of this exercise was that the mechanisms of integration were, as discussed above, themselves disconnected from ASEAN's political realities.

2. *Economic Integration*

Despite emphasizing that economic integration is “the cornerstone of ASEAN’s integration efforts”¹⁴⁸ and that ASEAN’s ultimate goal is to achieve a single market,¹⁴⁹ the EPG’s proposals for economic integration remained modest. Indeed, although it identified that ASEAN was plagued by fragmented markets, high transaction costs, and an unpredictable policy environment,¹⁵⁰ the EPG simply urged for ASEAN to “step up its integration efforts” and proposed few structural reforms specifically targeted towards this goal.¹⁵¹

To be sure, the EPG did recommend institutionalizing a number of existing practices. It sought to apply the 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism to all disputes pertaining to economic agreements,¹⁵² and it recommended that economic agreements employ an opt-out mechanism to engender greater flexibility in implementation.¹⁵³ But if implemented in the Charter (as they later would be), these were not the kind of structural reforms that would push the ASEAN Economic Community into the twenty-first century. The member states continued to avoid the DSM, and expanding its potential use to all economic disputes would not substantially remedy that deficiency. Similarly, the opt-out mechanism was of mixed utility—while it did help members to construct economic agreements with which not all

148. REPORT OF THE EMINENT PERSONS GROUP ON THE ASEAN CHARTER ¶ 14 (Dec. 2006), *available at* <http://www.aseansec.org/19247.pdf> [hereinafter EPG REPORT].

149. *Id.* ¶ 58.

150. *Id.* ¶ 14.

151. Instead, the EPG noted that ASEAN was in the process of implementing the recommendations of a recent McKinsey & Co. study regarding ASEAN competitiveness, specifically the liberalization of eleven priority sectors begun three years earlier. *Id.* ¶ 15. The EPG thus seemed satisfied that the Charter could embark on no structural improvements to facilitate the “stepped-up” integration which it insisted ASEAN required. *See Id.* at ¶ 14 (encouraging the organization to “step up” integration efforts).

152. *Id.* ¶ 64.

153. *Id.* ¶ 30.

states could comply, it limited ASEAN's ability to pursue integration uniformly.

But the EPG also proposed two groundbreaking reforms for economic integration. First, it suggested that member states should utilize a majority-vote process when consensus could not be achieved.¹⁵⁴ This would have directly contravened consensus—a core component of the ASEAN Way. The instrument would have streamlined decision-making and might have been a vehicle through which the member states would develop a deeper regional identity, as a voting mechanism would almost necessarily require that members subordinate national interests to regional interests.

Second, the EPG recommended that ASEAN develop a Special Fund to help support development efforts.¹⁵⁵ This Fund would have drawn resources from member states through voluntary contributions, and from the business sector through special taxes or fees.¹⁵⁶ An ASEAN Special Fund would have been an indispensable mechanism, as much of the CLMV states' inability (as opposed to unwillingness) to pursue integration as quickly as the older member states was due to their lack of resources and infrastructure. Accordingly, a Fund not only would have begun to address a core deficiency in ASEAN's integrative efforts, but may have strengthened ties between recipient and donor states.

3. *Security Cooperation*

Compared to its proposals for economic integration, the EPG's suggestions for security cooperation were far more creative. Reflecting the rhetoric of previous instruments, the EPG foresaw an ASEAN that would protect and promote human rights, reject unconstitutional changes in government, and commit to the development of democracy and the rule of law in Southeast Asia.¹⁵⁷ To support these functions, the EPG sug-

154. *See id.* ¶ 63 (“[I]f consensus cannot be achieved [on areas other than security and foreign policy], decisions may be taken through voting.”).

155. *Id.* ¶ 34.

156. *Id.* ¶ 65.

157. *Id.* ¶ 60. The EPG also proposed that ASEAN's purposes include enhancing democracy and good governance in Southeast Asia. *Id.* ¶ 60.

gested that ASEAN explore the establishment of a human rights mechanism.¹⁵⁸

The EPG also proposed a solution for member state discipline, recommending that ASEAN discipline states upon a unanimous vote, discounting the state subject to the proceeding.¹⁵⁹ With this provision, the member states would have a mechanism by which they could decide that a peer state's actions violated certain basic regional norms. Although it is unlikely that the CLMV states would ever vote to discipline one another,¹⁶⁰ establishing the mechanism would have been an important first step.

The EPG's recommendations for security cooperation nevertheless also remained bound to political realities. For example, it announced that all political and security disputes should be resolved under the High Council of the Treaty of Amity and Cooperation,¹⁶¹ an instrument that, much like the ASEAN Troika, would only convene if all parties agreed.¹⁶² It also explicitly maintained a consensus requirement for decisions regarding security matters.¹⁶³ Last, the EPG subordinated ASEAN's security concerns to its economic goals, returning to a pre-Vientiane Action Program relationship between economic integration and security cooperation.¹⁶⁴

The EPG Report offers an important glimpse into the politics of ASEAN regional integration. It continued to reiterate the importance of both economic integration and security cooperation, and presented some basic innovations to pursue those goals. However, the innovations were few in number. Even in the area of economic integration, presumably the driving force behind regional integration, it is unclear whether the

158. *Id.* ¶¶ 47, 60.

159. *Id.* ¶ 61.

160. See *supra* note 127 and accompanying text.

161. EPG REPORT, *supra* note 148, ¶ 64.

162. Rules of Procedure of the High Council of the Treaty of Amity and Cooperation in Southeast Asia, r. 9 (July 23, 2001), available at <http://www.aseansec.org/3718.htm>.

163. EPG REPORT, *supra* note 131, ¶ 63.

164. Compare *id.* ¶ 12 ("The security pillar is becoming more important given the growing need for a stable region for economic growth.") and Bali Concord II, *supra* note 27, at pmb. 9 (describing political cooperation as a *necessary means to achieve economic prosperity*) (emphasis added), with Vientiane Action Program, *supra* note 27, at art. II.1 (identifying comprehensive security and economic integration as two foundations of an ASEAN Community).

EPG believed that the organization's current decentralized regime was appropriate, or that ASEAN could not sustain stronger institutions. With respect to security cooperation, the EPG maintained mechanisms that would not have solved the Myanmar crisis, suggesting continued unease with a more monolithic regional organization.

The report also raises a number of questions. Did the dearth of innovation represent fidelity to the mandate of balancing the innovative with the practical? Or was the mandate itself too self-contradictory to be meaningful? More "visionary" proposals would necessarily entail a more centralized and powerful regional organization. But the organization's membership remains divided on whether—much less how—to move forward. Ultimately, the Charter ultimately eschewed all EPG innovation, effectively admitting that Southeast Asian politics would not sustain the visionary communitarian goals sought by the progressive members throughout the previous decade.

IV. THE ASEAN CHARTER: NEW, NOT PROGRESSIVE

In this Part, I argue that the progressive member states failed to develop a Charter that would further their goals of regional community building.¹⁶⁵ But failure was inevitable.¹⁶⁶ I first assess the member state divides when crafting the Charter, and argue that the disagreements pointed to a fundamental difference over the members' respective goals for the Charter. I then examine the sections of the Charter pertinent to economic integration and security cooperation, and compare those sections to the relevant components of the EPG Report. I conclude that the Charter's failure to incorporate the EPG's innovations demonstrated that the progressive goal of regional integration was ultimately too ambitious.

165. Cf. Kuala Lumpur Declaration, *supra* note 23, *passim* (discussing the continued need to develop the ASEAN community).

166. I will discuss the tension between regional stability and regional community building *infra*.

A. Member State Divides

The member states were now deeply divided over their vision for ASEAN's future.¹⁶⁷ The founding member states sought a more cohesive regional organization, and supported an ASEAN that could make and implement decisions more efficiently.¹⁶⁸ The CLMV states, by contrast, preferred to maintain ASEAN as a mediator between Southeast Asian governments.¹⁶⁹ Additionally, while Indonesia, Thailand, and the Philippines all supported an ASEAN that better protected human rights and democratic values, Singapore, Malaysia, and the CLMV states wanted to maintain greater control over dissident voices in their respective countries.¹⁷⁰

167. Rosario Gonzalez-Manalo, Chair of the High-Level Task Force (HLTF) charged with drafting the Charter, emphasized this point by explaining that "there had been a general tendency to create a Charter that will keep the inter-governmental character of ASEAN and dispel any suggestion of creating a supra-national body. This is immediately evident in the nomenclature: the name ASEAN Summit was kept *in lieu* of ASEAN Council, as the EPG has suggested. Any mention of an ASEAN Union—suggested in the EPG Report—was absent in the final Charter." *Drafting ASEAN's Tomorrow: The EPG and the ASEAN Charter*, in *THE MAKING OF THE ASEAN CHARTER*, *supra* note 55, at 37, 44.

168. See John Burton & Roel Landingin, *Rifts over Charter for ASEAN may hit regional integration*, *FIN. TIMES*, July 31, 2007 at 5 ("Richer members, including Singapore, Malaysia, Thailand, Indonesia and the Philippines, favour faster decision-making.").

169. Compare Pradap Pibulsonggram, *The Thai Perspective*, in *THE MAKING OF THE ASEAN CHARTER*, *supra* note 55, at 85, and Djani, *supra* note 55, at 145, with Aung Bwa, *The Jewel in My Crown*, in *THE MAKING OF THE ASEAN CHARTER*, *supra* note 55, at 31 (explaining that he, the HLTF member from Burma, "got along very well" with the representatives from Cambodia, Laos PDR, and Vietnam, while one of his "main adversaries" was the representative from Indonesia). The adversarial relationship between the representatives from Indonesia and Myanmar may suggest that the pressure Indonesia exerted on Myanmar in years prior affected their views about ASEAN's future, and the relationship between their respective representatives.

170. Djani, *supra* note 55, at 142; Pibulsonggram, *supra* note 55, at 85; Nicholas Thomas, *Understanding regional governance in Asia*, in *GOVERNANCE AND REGIONALISM IN ASIA*, *supra* note 6, at 17; see also Khalik, *supra* note 21 (explaining the steps taken by the Philippines and Indonesia to push ASEAN towards democracy and greater protection of human rights). Nevertheless, Singapore experienced an internal debate on this issue, as high-profile opposition political leaders pushed for the creation of an ASEAN human rights body. They were not invited, however, to a regional meeting discussing a human rights body. See Marwaan Macan-Markar, *South-East Asian Governments Want to Strengthen Human Rights Across the Region*, *NOTICIAS FINANCIERAS*

These divergent views roughly corresponded to the members' differing conceptions of the ASEAN Way. As mentioned earlier, the older member states generally saw the ASEAN Way as a norm to facilitate cooperation.¹⁷¹ Accordingly, they sought to develop a Charter that facilitated ASEAN's ability to achieve common goals. By contrast, the newer members saw the ASEAN Way as a norm of non-interference,¹⁷² and they wanted a Charter that would retain ASEAN's character as a relations-based organization. Thus the Charter represented a conversation among the member states not only about ASEAN's direction, but about its purpose.

B. *Stagnated Integration*

The Charter does little to advance economic integration. Its primary innovation is a declaration that economic arrangements will now be governed by a rules-based regime.¹⁷³ While this may represent a formal legal victory for ASEAN, it does not address the form of the economic agreements, crafted to enable member states to shirk duties or avoid commitments

(Miami) Aug. 1, 2007. The Global Information Network reported that "Indonesian Foreign Minister Hassan Wirayuda said during meetings with ASEAN officials in late December 2006 that human rights issues need to be addressed to strengthen the bloc's credentials." Marwaan Macan-Markar, *Southeast Asia: Rights Issues Loom over ASEAN Summit*, THE GLOBAL INFORMATION NETWORK (New York) Jan. 10, 2007 at 1; see also Ong Keng Yong, *At Close Quarter with the Drafting of the ASEAN Charter*, in THE MAKING OF THE ASEAN CHARTER *supra* note 55, at 113 (explaining that the CLMV HLTF members were "proactive and, occasionally, competitive," and "clearly impressed all involved in the process that ASEAN is a collective body where each and every member state has a stake"); see also Bwa, *supra* note 55. Highlighting this division, Indonesia, Philippines, and Thailand, the same states that sought to shape the body as a rules-based organization that could make quick decisions, now wanted to create a body that *protected* rights. See Kavi Chongkittavorn, *Opinion, Asean human rights body: taking the slow boat*, THE NATION, Feb. 23, 2009, available at http://www.nationmultimedia.com/2009/02/23/opinion/opinion_30096348.php (arguing that Indonesia, Philippines, and Thailand are "fearlessly promoting and protecting their citizens' rights"). By contrast, the newer states, more dedicated to a deliberative and less interventionist body, pushed for a weaker body which would only *promote* human rights. See *id.* (noting that less-developed ASEAN nations have a "high level of distrust between the officials and their civil groups and citizens).

171. See *supra* note 18 and accompanying text.

172. See *supra* note 17 and accompanying text.

173. ASEAN Charter, *supra* note 24, Art. 2.2(n).

when inconvenient or inconsistent with domestic pressures.¹⁷⁴ Moreover, any added benefit of an ostensibly rules-based regime is undermined by failings in other areas.

Indeed, the Charter simply retains the existing infrastructure for economic integration. First, the body overseeing the integrative process differs little from the structure and function of the old oversight body.¹⁷⁵ Second, dispute resolution for economic issues, as per the EPG's suggestion, must now be consistent with the 2004 Protocol on Enhanced Dispute Settlement Mechanism.¹⁷⁶ But as discussed above, the 2004 DSM is by its own terms a voluntary process, and member states remain unwilling to utilize its mechanisms.¹⁷⁷ Third, the Charter permits individual member states to opt-out of economic commitments only when there is an initial consensus to invoke the opt-out arrangement.¹⁷⁸ It subtly changes the EPG's recommendation—which incorporated no consensus requirement—and requires more discussion.

The new opt-out mechanism will have an uncertain effect on the implementation of economic agreements. Indeed, the mechanism does not function as a "peer pressure" device as originally intended,¹⁷⁹ and members freely avoid commitments.¹⁸⁰ Moreover, while a new consensus requirement does increase the difficulty of opting-out, the likely result will be one of three outcomes: (1) fewer new economic arrangements because no member state will be able to delay or rescind implementation without violating the Charter;¹⁸¹ (2) even more relaxed economic agreements, for the same reason; or (3) the continuation of a culture in which members freely avoid eco-

174. See *supra* note 95 and accompanying text; see also Jones & Smith, *supra* note 80 (describing economic protectionist tendencies by ASEAN states in relation to domestic industry); Hidetaka Yoshimatsu, *Collective Action Problems and Regional Integration in ASEAN*, 28 CONTEMP. S.E. ASIA 115, 123 ("AFTA's non-binding, flexible character allowed a member to defect from an agreement when she was forced to protect the interests of major domestic industries.").

175. ASEAN Charter, *supra* note 24, art. 9.1. The Charter requires that member states appoint their representatives to the Council. *Id.* art. 9.3.

176. *Id.* art. 24.3.

177. *Id.* art. 24.

178. *Id.* art. 21.2.

179. Yoshimatsu, *supra* note 174, at 123.

180. See *supra* notes 99-101 and accompanying text.

181. See Desker, *supra* note 8.

conomic commitments, because they will not want to impose unwanted commitments on each other.

The Charter also failed to implement the EPG's only innovations for economic integration. It eschewed the EPG's suggestion to codify when majority vote would suffice,¹⁸² retaining consultation and consensus as a default rule.¹⁸³ Additionally, the Charter did not include an ASEAN Special Fund to help develop the CLMV states. Thus, even though ASEAN purported to now be an organization which sought to create a single market and employ rules-based integration, the member states were ultimately unwilling to incorporate the structural changes needed to achieve that goal.

C. *Setting Back Security Cooperation*

The Charter also fails to meet the expectations and goals of the progressive states by establishing an unenforceable regime for security cooperation. Perhaps most prominently, it establishes a human rights body that has neither a structure nor a function.¹⁸⁴ At even a more fundamental level, the Charter simply enshrines the debates among the member states. It emphasizes that ASEAN should promote human rights in Southeast Asia,¹⁸⁵ but only to the extent that ASEAN can maintain due regard for member states' rights.¹⁸⁶ Additionally, while it affirms that member states must respect human rights and democratic principles,¹⁸⁷ it also maintains that the member states must respect each others' independence and sovereignty and refrain from interfering in each others' internal affairs.¹⁸⁸

The Charter's scheme for dispute resolution rejects the EPG's advocacy for a single High Council, relying instead on mechanisms developed on an *ad hoc* basis. First, the Charter authorizes member states to engage in "enhanced consulta-

182. EPG Report, *supra* note 131, at 42.

183. ASEAN Charter, *supra* note 24, art. 20.1.

184. *See id.* art. 14.1, .2 ("This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting."). The deficiencies of the current human rights mechanism will be discussed below in Part V.

185. *Id.* art. 1.7.

186. *Id.* art. 1.7.

187. *Id.* art. 2.2(h), (i).

188. *Id.* art. 2.2(a), (e), (k); *see also id.* art. 2.2(f).

tions” on matters which seriously affect ASEAN’s common interest.¹⁸⁹ But the relationship between “enhanced consultations” and the previously discussed “enhanced interactions” is left unclear,¹⁹⁰ introducing ambiguity where member states had previously desired greater authority to take more direct action. When non-economic disputes pertain to the text or implementation of an instrument, members must abide by the processes set forth in that instrument.¹⁹¹ In all other cases, it directs parties to the ASEAN Summit—a committee that meets regularly and is composed of the member states’ heads of state or government.¹⁹² Moreover, at any time during the process, members may resort to good offices, conciliation, or mediation.¹⁹³

Additionally, the Charter delegates to the ASEAN Summit a number of functions for which the EPG envisioned an independent institution. For example, it provides for the Summit to handle and provide relief for wronged members in all instances of noncompliance.¹⁹⁴ Additionally, while the Summit has authority to develop a procedure for decision-making when consensus is not feasible, it may only do so on a case-by-case basis.¹⁹⁵ This represents another failure for the progres-

189. *Id.* art. 2.2(g).

190. There exist myriad interpretive difficulties. First, member states have no way to determine whether a matter “affects the common interest of ASEAN.” Must an actor violate the express terms of the Charter? Or may a challenged action simply violate the spirit of the Charter? Second, the member states must be able to determine whether a matter *seriously* affects the common interest. This difficulty will likely be resolved, since the Charter provides that interpretive issues will be resolved by the ASEAN Secretariat. *Id.* art. 51. Nevertheless, “enhanced consultations” will likely remain a weak mechanism for conflict resolution.

191. *Id.* art. 24.1.

192. *Id.* art. 26. The ASEAN Summit would be composed of the heads of state or government of the member states. *Id.* art. 7.1.

193. Member states remain reluctant to utilize ASEAN dispute resolution mechanisms. The 2000s have seen a number of territorial disputes among ASEAN states, all of which have been resolved using the ASEAN Way or by resort to the International Court of Justice. For a summary of this history, see generally Lilian Budianto, *Members Look Beyond Blocs for Solutions*, JAKARTA POST, Feb. 26, 2009, at 11.

194. ASEAN Charter, *supra* note 24, arts. 5.3 & 20.3 (grave-breach regime); *id.* art. 26-27 (general dispute resolution).

195. *See id.* art. 20.4 (“When consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made.”).

sive states¹⁹⁶ because the ASEAN Summit is an inappropriate body to resolve otherwise unresolved disputes, if the goal is to make members more accountable to ASEAN's mandates. The ASEAN Summit would likely be simply another forum for further negotiation and consultation. As history has demonstrated, this strategy results in inaction.

D. *A Rejection of Ambitious Goals*

The ASEAN Charter failed to meet the expectations and ambitions of the progressive members both with respect to economic integration and security cooperation, disappointing those who hoped ASEAN could be a stronger force for human rights and an engine for regional economic growth. It made no structural improvements to address concerns about the inability to implement agreements, the construction of agreements with lengthy timelines and broad exceptions, and the omnipresent threat of the development gap. The Charter's changes either restated existing practices, or further entrenched the organization's problems. Similarly, it failed to develop mechanisms better equipped to resolve interstate conflict than those mechanisms which existed before the Charter. Moreover, the Charter's mechanisms of decision-making, dispute resolution, and human rights all defer authority to make decisions that the Charter's drafters themselves were unable to make.

But the resulting document should not have been a surprise. Indeed, the fight over the Charter was about whether ASEAN should be a force for regional integration. That the Charter was only able to make non-binding pronouncements about ASEAN's purposes and principles, as well as make minor changes in ASEAN's structure, reflected the ASEAN Way's continued function as a force for the status quo in Southeast Asia, and ASEAN as an organization ultimately conceived to do the same. But the member states do not see eye to eye on that point.

196. *But cf.* Tay, *supra* note 4, at 161 (explaining that the delegation of decision-making to the ASEAN Summit is a step forward because it formalizes a previous informal gathering).

V. THE WAY FORWARD

The Southeast Asian states are in a bind. As the Charter demonstrates, the gap between member states' respective ideas for Southeast Asia's future may be so vast that ASEAN can no longer achieve the goals it sets for itself, much less accommodate the member states' more ambitious desires for the region. But ASEAN may be changing. In this section, I examine the nature of the organization's potential changes by first analyzing why the member states have generally had a more stable consensus about economic integration than about security cooperation. I then assess new mechanisms in the realms of economic integration and security cooperation, and use them to predict ASEAN's future.

A. *Core Differences*

ASEAN's ability to build institutions relies upon the member states' willingness to agree upon and prioritize regional goals over domestic concerns. In order to prepare for an assessment of the member states' future ability to cooperate, I will analyze why ASEAN's capacity to develop economic institutions is radically greater than its ability to develop institutions of security cooperation. Whether ASEAN will have a future depends upon why it had a past.

1. *Historical Contrasts*¹⁹⁷

The first explanation between economic integration and security cooperation is that CLMV states encountered each goal under different circumstances. When Vietnam, Myanmar, Laos, and Cambodia each joined ASEAN, the organization's primary goal was economic integration.¹⁹⁸ Upon entry to ASEAN, the CLMV states may have implicitly accepted the fact that membership would entail some level of economic integration, a goal which they may have even shared.¹⁹⁹ Moreo-

197. This explanation may parallel the concept of constructivism found in international relations.

198. The reader will recall that ASEAN was largely considered an economic success story between 1992 and 1997. *See supra* text accompanying note 62.

199. For example, while Vietnam joined ASEAN largely to protect itself against China's influence, it did so during ASEAN's boom years, and soon made clear its intentions to participate in ASEAN's economic arrangements.

ver, they may have counted on the ASEAN Way as an assurance that any subsequent economic agreements would be consistent with their own domestic goals and abilities, and that they would not be bound to economic arrangements without their explicit consent.

By contrast, Indonesia began to emphasize conflict resolution and human rights partly as a way to encourage Myanmar to be more receptive to regional behavioral norms.²⁰⁰ The CLMV states might have seen this as an imposition, since the goals themselves had a remedial purpose.²⁰¹ But while the CLMV states have signed onto instruments such as the Charter that espouse these shared norms,²⁰² they seem unwilling or unable to actually implement the commitments.²⁰³ In this context, they may see the ASEAN Way as a countervailing norm that excuses any implementation obligations.

Under this view, what value does the Charter add? It certainly will not generate binding obligations and streamlined decision-making, as the more progressive states might have wanted. Nevertheless, Simon Tay argues that the instrument may represent a “Constitutional Moment.”²⁰⁴ By espousing ASEAN’s specific purposes and rearranging the organization’s institutional structure, he explains, ASEAN may be better equipped to generate “legitimate expectations that arise from repeated interactions” from the member states.²⁰⁵

At best, ASEAN’s purposes and principles as set forth in the Charter may indeed provide a framework under which the organization generates “legitimate expectations” beyond the

See generally Vo Van Kiet, Prime Minister, Socialist Republic of Viet., Opening Statement at Fifth ASEAN Summit (Dec. 14, 1995), available at <http://www.aseansec.org/5137.htm> (expressing Vietnam’s enthusiasm for accession to AFTA, and Vietnam’s eagerness to participate in regional economic growth); Protocol for the Accession of the Socialist Republic of Vietnam to the Agreement on the Common Effective Preferential Tariff Scheme for Southeast Asia, Dec. 15, 1995, <http://www.aseansec.org/5173.htm>; *see also* WEATHERBEE, *supra* note 2, at 44 (discussing Vietnam’s fears of China).

200. *See supra* note 123 and accompanying text.

201. *See supra* Part III.1.a.

202. *See, e.g.*, ASEAN Charter, *supra* note 24, art. 2(h)-(j) (committing ASEAN and the member states to act in accordance with *inter alia* principles of human rights, social justice, and democracy).

203. *See infra* Part V.4.b.

204. *See* Tay, *supra* note 4.

205. *Id.* at 169.

ASEAN Way.²⁰⁶ But ultimately the expectations may not be terribly demanding because they will depend upon repeated state behavior. And in a post-Charter ASEAN, states will probably justify their behavior in the context of the organization's stated principles,²⁰⁷ rather than change their behavior to conform to some outside interpretation of those principles. Accordingly, while the Charter may not significantly change member state behavior in the short term, it may provide more predictability in the long term.

2. *Practical Contrasts*²⁰⁸

The second explanation for the members' greater openness to economic integration than to security cooperation is that the members are concerned about power. The CLMV governments may perceive that engaging in trade and economic liberalization does not necessarily threaten their grip on power, because they can structure economic integration so that the benefits primarily accrue to those already in power. Singapore's economic success²⁰⁹ and Vietnam's economic growth underscore this point.²¹⁰ This explanation suggests that member states avoid economic commitments which impinge on domestic power relationships, such as those requiring economic liberalization of a politically powerful industry, or which contradict domestic economic policy.²¹¹

In contrast to their view on economic commitments, the CLMV states likely view good-governance norms as necessarily entailing a requirement to alter domestic governance in a way that shifts power to other sectors of society. Myanmar is one example: the hd junta refused to release Suu Kyi from house

206. See Eugene K.B. Tan, *The ASEAN Charter as "Legs to Go Places": Ideational Norms and Pragmatic Legalism in Community Building in Southeast Asia*, 12 SING. Y.B. INT'L L. 171 (2008) (noting that the Charter provides a structure under which the member states may further refine certain norms).

207. See *supra* note 24, art. 2 for ASEAN's principles.

208. This explanation may echo the concept of realism found in international relations.

209. See *supra* Part III for a discussion of Singapore's vast economic wealth.

210. Vietnam has received 12 percent of all ASEAN FDI. ASEAN FIGURES, *supra* note 74, at 36 tbl. 31.

211. See, e.g., SEVERINO, *supra* note 61, at 226 (discussing Cambodia's hesitancy regarding implementing economic agreements).

arrest precisely because she is their main domestic political opposition, and represents a threat to their grip over the country. Under this view of ASEAN, the CLMV states are willing to sign on to instruments entailing security cooperation as long as the implementation obligations remain weak. The ASEAN Way ensures this weakness.

The Charter adds little under this second approach. Even Tay admits that, for observers interested in power, the Charter will seem ineffectual because it lacks teeth.²¹² Indeed, the Charter did not develop instruments that might have shifted the regional balance of power towards those states interested in maintaining a more legalized Southeast Asia. ASEAN's continued disconnect between its pronouncements and its capabilities may call into question the document's validity as anything more than another aspirational announcement.

Neither perspective can fully capture or explain ASEAN. Ultimately, economic integration is either more convincing or more useful to the members than security cooperation. Moreover, under both views of the Charter, the ASEAN Way will continue to ensure that regional concerns do not supersede domestic concerns. Despite this setback for the progressive states, more recent instruments suggest that the members continue to use ASEAN as a tool to pursue their economic and political goals for the region.

B. *Cooperation Without Obligation*

Recent instruments demonstrate that the ASEAN Way continues to underlie economic integration. For example, the ASEAN Economic Community Blueprint²¹³ represents a plan for ASEAN to achieve the ASEAN Economic Community by 2015 and reiterates many of the steps identified by the Charter's Eminent Persons Group, discussed above in Part III.3, as necessary to attain an economic community.²¹⁴ That the member states chose to present those steps in a binding but

212. Tay, *supra* note 4, at 163.

213. Declaration on the ASEAN Economic Community Blueprint (Nov. 20, 2007), *available at* <http://www.aseansec.org/21081.htm>.

214. These include eliminating non-tariff barriers to trade, improving ASEAN's rules of origin, and developing a single process for trade and customs. *See* ASEAN Economic Community Blueprint, ¶¶ 14, 15, 18, Nov. 20, 2007, *available at* <http://www.aseansec.org/21083.pdf>.

“flexible” roadmap, rather than in the Charter,²¹⁵ suggests an underlying hesitancy to commit to certain economic goals, mutual as they may be. The result is another economic instrument that makes bold proclamations, but leaves significant room for states uncertain about their future to deviate from the necessary steps.

Similarly, the recently ratified ASEAN Trade in Goods Agreement (ATIGA) portends that the future of ASEAN trade integration will continue to emphasize flexible implementation, departing little from the past. Underscoring this point, the agreement itself is simply an amalgam of previous trade instruments, and establishes no new commitments.²¹⁶ Thus, despite the instrument’s objective to establish a single trade area by 2015,²¹⁷ it affords the CLMV states significant flexibility regarding tariff reductions, extending commitments to 2018 and beyond in some cases.²¹⁸ Moreover, the agreement maintains ASEAN’s weak implementation mechanisms, enabling member states to modify or suspend their tariff commitments provided that they notify the ASEAN Council and negotiate with the member states affected by reductions.²¹⁹

215. See Hadi Soesastro, *Implementing the ASEAN Economic Community (AEC) Blueprint*, in DEEPENING ECONOMIC INTEGRATION IN EAST ASIA—THE ASEAN ECONOMIC COMMUNITY AND BEYOND 47 (Hadi Soesastro ed., 2007), available at <http://www.eria.org/research/images/pdf/PDF%20No.1-2/No.1-2-part2-3.pdf>.

216. See Noel Adlai O. Velasco, *ASEAN Jobs for RP Professionals*, PHILIPPINE DAILY INQUIRER, MAR. 1, 2009, <http://globalnation.inquirer.net/news/news/view/20090301-191676/ASE> (“The ATIGA integrates all existing and new ASEAN commitments and initiatives related to trade in goods in one comprehensive framework.”); see also Mikic, *supra* note 80 (“ATIGA integrates all existing ASEAN initiatives related to trade in goods into one comprehensive framework, ensuring synergies and consistencies among those various initiatives.”).

217. ATIGA, *supra* note 101, art. 1.

218. See *id.* art. 19(1)-(2) (articulating different tariff reduction timelines for the CLMV states); see also *Free Flow of Goods by 2015 for ASEAN Community*, VOV NEWS, Sept. 11, 2010, <http://english.vovnews.vn/Home/Free-flow-of-goods-by-2015-for-ASEAN-community/20109/119463.vov> (explaining that Vietnam will maintain protections on some products even beyond 2018). It indeed may be unfair to expect the CLMV states to have the capacity or willingness to open their economies as rapidly as the newer states. In this light, however, it is unclear what the vision of a single market and production base by 2015 would actually entail.

219. ATIGA, *supra* note 101, art. 23(1)-(2), (4). Moreover, the agreement eventually incorporated a side deal regarding rice and sugar. *Id.* at art. 24.

C. *Fortification or Fragmentation?*

In security cooperation, ASEAN has at least shown rhetorical progress. In March 2009, it adopted a Blueprint for the ASEAN Political-Security Community (APSC), which announces ASEAN's aspiration to establish the APSC by 2015, but the Blueprint acknowledges that such a date may be too ambitious and thus imposes no firm commitment.²²⁰ Importantly, the document represents a rhetorical victory for those member states that want ASEAN to be a stronger security presence in Southeast Asia: the Blueprint both expresses the goal of a rules-based security community and promises to establish arbitration as a dispute settlement mechanism.²²¹ Accordingly, the document may foretell an eventual shift in the expression of the ASEAN Way in the security arena. But more rules and stronger norms may simply lead to fragmentation.

At first blush, the ASEAN Intergovernmental Commission on Human Rights (AICHR) would not seem to be a potential source of tension.²²² The organ will be bound by the ASEAN Way norms, including non-interference and consensus-based decision-making.²²³ And although the organ's mandate does provide for functions that both promote and protect human rights, the former far outnumber the latter.²²⁴ The resultant

For the provisions governing rice and sugar, see Protocol to Provide Special Consideration for Rice and Sugar, *supra* note 101. Thailand is one of the world's largest rice exporters, while the Philippines is one of the largest importers. *Id.*

220. See ASEAN, ASEAN POLITICAL-SECURITY COMMUNITY BLUEPRINT (2009) ¶ 12, available at <http://www.aseansec.org/18741.htm> ("ASEAN's cooperation in political development seeks to . . . ultimately create a rules-based community of shared values and norms.").

221. *Id.* ¶¶ 12, 22.B.2.1.

222. See ASEAN Charter, *supra* note 24, art. 14 (mandating the creation of an ASEAN human rights body). For a description of the ASEAN human rights process, see generally *About Us: Who We Are*, WORKING GROUP FOR AN ASEAN HUMAN RIGHTS MECHANISM, <http://www.aseanhrmech.org/> (last visited Oct. 13, 2010).

223. See AICHR Terms of Reference, *supra* note 226, ¶¶ 1.1, 2.1 (articulating the tenets of the ASEAN Way in the organization's principles).

224. Compare *id.* ¶¶ 4.4, 4.8, 4.9 (setting forth functions that may potentially protect human rights) with *id.* ¶¶ 4.2, 4.3, 4.5, 4.6, 4.7, 4.10, 4.12, 4.13 (setting forth functions that would promote human rights).

body will likely affect human rights conditions only to the extent that each member government will allow.²²⁵

But that may itself be a source of tension. The body itself is a watered-down version of Indonesia and Thailand's original vision of an organ that would coordinate country visits and investigate regional human rights abuses.²²⁶ Within those states that seek to promote regional human rights, it may indeed serve awareness-raising and advocacy functions. Otherwise, it may only be a talk shop. Given the vast gulf among the member states' human rights policies,²²⁷ internal conditions may diverge even farther from where they currently are.

225. See Wigberto Tanada, *The Operationalization of the AHRB's Promotion and Protection Functions: an Outlook*, Eighth Workshop on the ASEAN Regional Mechanism on Human Rights (July 14-15, 2009), available at <http://www.aseanhrmech.org/downloads/Mr.%20Wigberto%20E.%20Ta%20Flada.pdf> (explaining that the individual members will determine the consensus-based organization's ability to function); Opinion, *ASEAN's Toothless Council*, WALL ST. J. ASIA, July 24, 2009, at 10 (anticipating that consensus-based decision-making will render the body meaningless because rights-violating states will wield an effective veto).

226. See Kavi Chongkittavorn, *Enforcing the charter against rogue members*, THE NATION, June 15, 2009, http://www.nationmultimedia.com/2009/06/15/opinion/opinion_30105154.php. By contrast, some member states resisted a body that would allow the West and NGOs to intervene in domestic politics. Chesterman, *supra* note 25, at 31. Possibly to allay this fear, the agreement denies non-ASEAN sources the ability to fund the protection (as opposed to the promotion) of human rights. See Terms of Reference of ASEAN Intergovernmental Commission on Human Rights, ¶ 8.6, Oct. 2009 [hereinafter AICHR Terms of Reference]. Although the Terms of Reference is silent regarding the distinction between "promoting" and "protecting" human rights, scholarship suggests that "promoting" refers to advisory, educative, and investigatory activities, while "protecting" may refer to rights vindication through a judicial body. Cf. Li-ann Thio, *Panacea, Placebo, or Pawn? The Teething Problems of the Human Rights Commission of Malaysia*, 40 GEO. WASH. INT'L L. REV. 1271, 1284, 1291 (discussing the promotion and protection of human rights in Malaysia).

227. Mustaqim Adamrah, *RI Seeks to Strengthen ASEAN Human Rights Stance*, JAKARTA POST, June 25, 2010 (noting that the member states have different definitions of human rights and remain reluctant to criticize each others' internal violations). Currently, only the Philippines, Indonesia, Malaysia, and Thailand have national human rights institutions. *About Us: Who We Are*, WORKING GROUP FOR AN ASEAN HUMAN RIGHTS MECHANISM, <http://www.aseanhrmech.org/aboutus.html> (last visited Oct. 13, 2010). Member states such as Myanmar continue to resist the possible imposition of further human rights obligations. See Bandar Seri Begawan, Op-Ed., *Brunei: ASEAN Turf War Hinders Rights Protection*, NATION (Bangkok), Apr. 8, 2010 (noting that Myanmar and the Philippines each want the ASEAN Commission for

D. *The Future*

1. *Cooperation Without Obligation*

The degree to which the member states will integrate remains ambiguous. A recent report on the members' progress towards achieving the Economic Community notes that, while implementation is generally on schedule, the members have fallen behind on several important measures, including developing a unified customs protocol²²⁸—one of the most important goals of integration.²²⁹ Moreover, ASEAN has begun to hint that the developmental divide may be too insurmountable a barrier to achieve a single market by 2015.²³⁰

Nevertheless, the members' willingness to pursue economic integration largely depends on the perceived usefulness of integration. And since Southeast Asian economic prosperity depends upon its ability to compete with China as an investment and production base,²³¹ the members may indeed have sufficient motivation to integrate. Accordingly, despite ASEAN's flexible implementation mechanisms, China's regional dominance might be a sufficient threat to compel real economic cooperation even among the most reluctant states.

the Protection of Women and Children to be subsumed under the AICHR, rather than being its own organization with its own funding).

228. ASEAN, ASEAN ECONOMIC COMMUNITY SCORECARD, 17 (The ASEAN Secretariat 2010), available at <http://www.asean.org/publications/AEC%20Scorecard>.

229. *Id.* at 5 (explaining that a unified customs procedure is necessary to reduce the transaction costs associated with trade); VU HUY HOANG, MINISTER, INDUSTRY AND TRADE OF VIET NAM, MESSAGE FROM MINISTER OF INDUSTRY AND TRADE VU HUY HOANG, (JAN. 26, 2010), available at <http://aem42.org.vn/Show.aspx?newsid=514&catid=047001> (specifically mentioning the customs goals as a core component of trade facilitation).

230. See Kyaw Hsu Mon, *Myanmar Urged by ASEAN Member to Open Market*, MYAN. TIMES, Aug. 30 – Sept. 5, 2010, <http://www.mmtimes.com/2010/business/538/buiiz008.html> (explaining that Malaysia, Indonesia, the Philippines, Brunei, Thailand and Singapore have already reached the level of economic development required for the single market, but the CLMV states would have to build capacity in the administration of customs, the harmonization of standards, and the improvement of infrastructure, including electricity supply, in order to participate in the regional single market by 2015).

231. See, e.g., Patrick Barta & Alex Frangos, *Southeast Asia Linking Up to Compete with China*, WALL ST. J., Aug. 23, 2010.

2. "Regional" Norms?

The prospects for security cooperation are mixed. The AICHR may be a vehicle by which pro-human rights states can openly discuss the domestic human rights abuses in member states. It might also provide a forum for collaboration among the region's human rights proponents within ASEAN. By opening up new avenues for communication and cooperation, the body might indeed strengthen regional human rights norms. But there will be a cost. Frank discussion may simply be a new source of regional tension, and cooperation among some but not all may simply deepen existing divisions. While enhanced human rights protections in some states are certainly worth the sacrifice of regional cohesion, it remains possible that deeper tensions over human rights will diminish whatever persuasive power the progressive states currently have.

The ASEAN Way as a mechanism of dispute settlement will continue to be a problem. Indeed, because the ASEAN Way is a norm of relations-based behavior, all member state relations continue to fall into ASEAN's purview. And because consensus remains the basis for decision-making, ASEAN effectively serves as an impediment to member states' foreign policy goals, to the extent that those goals require critique of or pressure on neighboring states. Unless ASEAN develops a mechanism by which member states can channel regional tensions, the organization's security function may be lost.

In the end, the future remains complex. ASEAN might help Southeast Asia become a viable competitor to China's economic might. Moreover, the region's more democratic states have begun to build the AICHR. Nevertheless, the wealthier economies may integrate with each other, as well as into the global economy, on their own,²³² and the region might be-

232. See List of Singapore's Free Trade Agreements, SINGAPORE FTA NETWORK, http://www.fta.gov.sg/sg_fta.asp (listing Singapore's twelve extra-ASEAN free trade agreements) (last visited Oct. 13, 2010); List of Singapore's As-Yet Unimplemented Free Trade Agreements, SINGAPORE FTA NETWORK, http://www.fta.gov.sg/fta_concluded.asp (last visited Oct. 13, 2010); List of Singapore's Ongoing Free Trade Negotiations, SINGAPORE FTA NETWORK, http://www.fta.gov.sg/fta_ongoingneg.asp (last reviewed Jan. 18, 2010) (listing four free trade negotiations).

come divided with respect to human rights norms. Ultimately, ASEAN will only be as strong as the CLMV states allow.

VI. CONCLUSION

As the experience of the Charter demonstrates, ASEAN is both strengthened and constrained by the ASEAN Way. Indeed, it continues to do exactly what soft law and relations-based governance is supposed to do: it ensures that ASEAN develops only those instruments with which all member states are comfortable, and it quarantines disagreements so that states may focus their energies on mutually agreeable commitments. Still, ASEAN's power as a regional organization with independent clout is weakened when it permits member states to implement agreements "flexibly," so that every state may move forward at its own pace. The result is an organization that becomes a vehicle for economic, social, and political divergence on myriad issues. In the end, rather than strengthening member state solidarity, it enables them to drift further apart.

But should it be enforcing homogeneity? ASEAN was formed partially as a restraint against member state ambition. While that initially was meant to constrain Indonesia's military ambition, it now refers to the evangelical spread of goals—such as economic integration and rule of law—into countries which appear to prefer to remain isolated from the global community. Indeed, ASEAN remains unable to pursue its own stated goals only because the member states each have a different conception about why and how to implement any one goal in particular.

The Charter ultimately failed to live up to the expectations of the most progressive states because those members overestimated their ability to implement their vision for the region in light of one of ASEAN's most central tenets. Proponents for a stronger ASEAN overlooked the fact that the organization's weaknesses in the realm of economic integration and security cooperation represented more than simply institutional deficiencies: they were the inevitable outcome of an organization specifically designed to keep the status quo. The Charter could never have been "bold and visionary" because ASEAN is meant to counter those precise impulses.

Also problematic is the progressive members' legal strategy. Indeed, they have historically been more successful at changing the rhetoric of regional integration, rather than the actual means or methods of implementation. While rhetorical change is important for norm-generation, ASEAN's credibility diminishes when it is wholly incapable of implementing supposedly common norms. Similarly, the unclear relationship and ambiguous legal authority of ASEAN's various instruments, including the various Declarations, Framework Agreements, Action Plans, and Blueprints, consistently generates uncertainty about the members' legal and political obligations to the organization and to each other. Both of these difficulties may indeed be a purpose of soft law, but ASEAN nevertheless loses credibility with each promise delayed, and with each unsatisfactory consensus.

ASEAN's members must come to terms with their organization's limitations. When it fails to live up to the expectations of its older, more progressive, and most outspoken members, it appears unable to fulfill its own commitments. If their aim is for ASEAN to be accepted as an international player, then setting realistic, achievable goals will be more valuable than setting ambitious-yet-impossible trials. In this regard, they may have set expectations too high when creating the Charter. Instead of covering contentious issues and being a vehicle to resolve all of the organization's problems, the progressive states might have been better served by facing ASEAN's political situation honestly, treating the Charter as a minor reorganization, and moving forward. Indeed, the member states must pursue this strategy, because undermining every tectonic shift and visionary proposal will be the ASEAN Way, ever countering member state ambition.