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LEGAL AGENCY OF SMALL STATES: REGIONAL LAW COOPERATION AMID INDO-PACIFIC PRESSURES

Tan Hsien-Li*

ABSTRACT

Discussions about the Indo-Pacific contestation between China and the United States often focus on both superpowers' geopolitical strategies and economic and military might. The experiences of small and less powerful Indo-Pacific states navigating these tensions are relatively overlooked or even discounted. Yet, they are not passive bystanders in their longstanding neighborhood drama—they often seek strength in unity via their regional organizations and produce regional law to safeguard their collective interests. In short, they exercise legal agency. Using the Association of Southeast Asian Nations' ("ASEAN") experience of regional law cooperation to navigate challenges (including, but not limited to, the U.S.-China contestation), this cross-disciplinary article conceptualizes how small Indo-Pacific states have exercised legal agency amid geopolitical pressures to safeguard common security and economic interests. This has resulted in the exercise of legal agency corresponding to three distinct geopolitical environments: via realist rhetoric laws in the Cold War, constructivist cooperation laws amid globalization, and rules-based ordering in the contemporary Indo-Pacific. Through the intensification of legal agency over fifty-seven years, ASEAN has transformed from a diplomatic grouping with a basic aim of preventing inter-member aggression to promote national economic development, to a rules-based integrationist community that pursues ASEAN centrality in foreign power engagement to safeguard members' intraregional and external security and economic interests. ASEAN's experience may have generalizable lessons for how other Indo-Pacific or Global South regimes facing geopolitical pressures exercise their legal agency. As the former Singapore Prime Minister Lee Hsien Loong put it: "Small states [have] little buffer against shocks. But [we] are by no

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means without agency . . . we can make up . . . through . . . cooperation . . . and upholding the multilateral rules-based system.”¹

I. INTRODUCTION

The longstanding Indo-Pacific tensions between China and the United States and its allies—primarily over the South and East China Seas, Taiwan, and increasingly the Pacific islands—are often framed in terms of power and geopolitics, rather than international law.² The relative paucity of legal discourse is partly due to the strategic diplomacy these powers use and Indo-Pacific states’ own well-known reticence towards international law modalities.³ Professor Anne Orford’s exposition on how powerful states unceasingly jostle for regional influence among smaller and less powerful Global South states via law, pressure, and diplomacy reveals the legal lacuna (“international lawyers still largely treat . . . regionalism . . . as if it operated outside international law”) and spotlights how the U.S.-China Indo-Pacific rivalry is actually remaking international law; Professor Orford further notes that the experiences of the Global South, who live amid such pressure, should be heard.⁴ Within the practice of diplomacy and international law, Singapore Foreign Minister Vivian Balakrishnan asks the international community to look at Southeast Asian nations “on [their] own merits and not simply through a U.S. versus China lens.”⁵ What Orford and Balakrishnan highlight, in scholarship and practice, respectively, is that small states—Indo-Pacific or otherwise—have agency, and more attention should be paid to how such agency is exercised via international law.

1. PM Lee Hsien Loong at the 30th Anniversary of the Forum of Small States (FOSS), Prime Minister’s Office Singapore (Sept. 22, 2022), <http://www.pmo.gov.sg/Newsroom/PM-Lee-Hsien-Loong-at-the-30th-Anniversary-of-the-Forum-of-Small-States>.

2. This article takes “Indo-Pacific” in its geographical and geopolitical meanings. See Ass’n of S.E. Asian Nations [ASEAN], *ASEAN Outlook on the Indo-Pacific*, ¶ 1 (June 23, 2019) [hereinafter *ASEAN Outlook on the Indo-Pacific*], <http://asean.org/speechandstatement/asean-outlook-on-the-indo-pacific>.

3. See generally He & Li, *Unpacking the Strategic Dynamics of the Indo-Pacific*, 96 INT’L AFFS. 1 (2020) (discussing power and geopolitics); Simon Chesterman, *Asia’s Ambivalence about International Law and Institutions: Past, Present and Future*, 27 EUR. J. INT’L L. 945 (2016) (discussing Indo-Pacific reticence toward international law); Antony Anghie, *Asia in the History and Theory of International Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ASIA AND THE PACIFIC 68 (Simon Chesterman, Hisashi Owada, & Ben Saul eds., 2019).

4. Anne Orford, *Regional Orders, Geopolitics, and the Future of International Law*, 74 CURR. LEGAL PROBS. 149, 190–92 (2021).

5. See Transcript of Minister for Foreign Affairs Dr. Vivian Balakrishnan’s Engagement at Asia Society, 23 September 2022, Ministry of Foreign Affairs Singapore (Sept. 24, 2022), <http://www.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2022/09/20220924-Asia-Society-2022>.

Among the varieties of agency small states possess,⁶ this article focuses on their legal agency. Borrowing the UNGA High Level Forum of Small States' understanding above,⁷ this article defines the legal agency of small states as *their ability to cooperate via law in intraregional and external relations to safeguard interests amid geopolitical pressures*. Small states often cooperate via smaller-scale regional laws—but such legal agency is often overlooked amidst large multilateral rules-based cooperation. This may be because small state organizations like ASEAN, the Melanesian Spearhead Group (“MSG”), and the Pacific Islands Forum (“PIF”) seldom make regional laws that conform to the two dominant international law benchmarks of treaty and compliance. They are perceived not only to make non-binding soft laws and weak treaties, but also to comply inconsistently with both. This has led to stereotypes of these organizations being less legalized and having ineffective laws.⁸ While compliance is necessary lest disobedience and bad faith make a mockery of law, and treaties are preferred to soft laws in cementing credible commitments, geopolitical pressures may lead small states to occasionally fail to meet treaty-making and compliance benchmarks. Consequently, they adapt practices to suit regional contexts. As small state organizations produce many regional laws, exercising legal agency surely safeguards such interests to some degree.

Using ASEAN as an example, this article conceptualizes how small states exercise legal agency in regional cooperation to safeguard common security and economic interests amid Indo-Pacific geopolitical pressures—including, but not limited to, the U.S.-China factor. ASEAN is an apt study because in its fifty-seven years of exercising legal agency (1967 to 2024), it has prevented aggression and transformed from a diplomatic grouping with security and economic overtures (an inception shared by many Indo-Pacific organizations)⁹ to a rules-based integrationist community that pursues ASEAN-centrality in external power engagement. These advancements in security and economic achievement were achieved through ASEAN's cooperative exercise of legal agency.

Relatedly, there are two interesting observations on the dominant benchmarks. First, while ASEAN produces many laws (namely, binding treaties and agreements, and soft laws like declarations and work plans), soft law remains ASEAN's preferred cooperation modality.¹⁰ Sovereignty sensitivities mean that more economic than security treaties are adopted, and while

6. For a concise exposition, see Yong-Soo Eun, Amitav Acharya, & Chanintira na Thalang, *Unpacking the Dynamics of Weak States' Agency*, 35 PAC. REV. 229 (2022).

7. See PM Lee Hsien Loong at the 30th Anniversary of the FOSS, *supra* note 1.

8. See generally Tan Hsien-Li, *Regional Organizations*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ASIA AND THE PACIFIC, *supra* note 3, at 37, 37–67.

9. *Id.* at 43–44.

10. Tan Hsien-Li, *Intergovernmental Yet Dynamically Expansive: Concordance Legalization as an Alternative Regional Trading Arrangement in ASEAN and Beyond*, 33 EUR. J. INT'L L. 341, 358–61 (2022).

economic treaties are common, a significant number of soft economic laws exist.¹¹ Second, despite only thirty percent implementation of ASEAN laws prior to 2007 and compliance being still a work-in-progress, ASEAN believes in its effective legal agency despite geopolitical pressures, proclaiming itself “probably the most successful inter-governmental organization in the developing world.”¹²

	Security		Economic	
	Treaties	Soft Laws	Treaties	Soft Laws
Realist Rhetoric (1967–1991)	2 main treaties (1 accompanying treaty)	7	15 main treaties (17 accompanying treaties)	7
Constructivist Cooperation (1992–2006)	4 main treaties (2 accompanying treaties)	30	48 main treaties (44 accompanying treaties)	20
Rules-based Ordering (2007–Ongoing)	5	74	61 main treaties (42 accompanying treaties)	107

Figure 1: Table of ASEAN Laws

Note: Accompanying treaties include protocols, some memoranda of understanding, and amendments to main agreements.

Source: Tan Hsien-Li, List of ASEAN Security and Economic Laws (July 2024) (unpublished dataset) (on file with author). The author compiled the data using the following database: National University of Singapore Centre for International Law Instrument Database, <http://cil.nus.edu.sg/database-cil> (last visited June 27, 2024).

11. *Id.* at 364; see *infra* Figure 1.

12. ASEAN, *About Us*, <http://asean.org/about-us> (last visited June 27, 2024); see also Tommy Koh, Walter Woon, Andrew Tan, & Chan Sze-Wei, *Charter Makes ASEAN Stronger, More United, and Effective*, STRAITS TIMES (Aug. 8, 2007), http://lkyspp.nus.edu.sg/docs/default-source/ips/pa_tk_st_charter-makes-asean-stronger-more-united-and-effective_0808071.pdf?sfvrsn=4d43730a_2.

In conceptualizing how ASEAN states exercise legal agency, this article analyzes ASEAN law (particularly the number, form, text, and compliance mechanisms) using the methodological lenses of authoritative scholarly and practitioner-led international relations characterizations of ASEAN cooperation. The data show that ASEAN states have exercised legal agency in three broad geopolitical environments: via realist rhetoric laws in the Cold War (1967–1991), constructivist cooperation laws amid globalization (1992–2006), and rules-based ordering in the Indo-Pacific (2007–ongoing).

Part II of this article discusses how ASEAN states cooperated via realist rhetoric laws that outlined unrealistically ambitious projects with overt realist interests. Members' common understanding was that breaches would not be penalized or litigated; unsurprisingly, poor compliance resulted. While this fails dominant international law benchmarks, legal agency exercised through realist rhetoric satisfied members' cooperation interests—stabilizing regional security in the Cold War to enable realist pursuit of national economic agendas.

Part III then shows how members responded to post-Cold War globalization pressures differently. From 1992 to 2006, as unity rather than realist individualism was needed to overcome external insecurities and economic competition, ASEAN states exercised legal agency via constructivist cooperation—that is, constructing norms of unity and substantive agendas through ASEAN laws. Despite intraregional disparities and poor implementation, ASEAN members united and developed common agendas.

Part IV shows how in the incumbent legalized world order (2007 to present), ASEAN states have exercised legal agency to initiate a rules-based Indo-Pacific order. Today, ASEAN law directs intraregional integration and projects ASEAN-centrality in engagement with external powers to safeguard common interests in a fractious Indo-Pacific. Compliance is required, as results are expected. Despite considerable challenges, ASEAN states have obtained small, realistic gains.

Finally, the conclusion briefly discusses the present trajectory of ASEAN's legal agency and notes how it may prompt reflexive considerations of how similar regimes facing geopolitical pressures in the Indo-Pacific and beyond may exercise their legal agency to survive and thrive. While small states remain vulnerable to external shocks and power-plays, exercising legal agency mitigates harm and safeguards interests when navigating geopolitical pressures.

This article hopes to make several contributions. Scholastically, the study broadens the current Indo-Pacific discourse by analyzing small states' legal agency alongside large power narratives. This complements current scholarly efforts to pluralize international law while broadening dominant benchmarks on treaty-making and compliance.¹³ Further, it updates ASEAN legal scholarship—which is rich in constitutionalism, rights, trade, and

13. See generally ANNE ORFORD, *INTERNATIONAL LAW AND THE POLITICS OF HISTORY* (2021); ANTHEA ROBERTS, *IS INTERNATIONAL LAW INTERNATIONAL?* (2017); Michelle Staggs Kelsall, *Disordering International Law*, 33 *EUR. J. INT'L L.* 729 (2022).

investment—by introducing a history and theory of international law.¹⁴ Studying ASEAN’s legal agency bridges the persistent gap between international relations and international law in ASEAN studies by enriching realist and constructivist theories of ASEAN cooperation with legal and economic dimensions. Most importantly, the hope is that by better understanding how small state organizations like ASEAN navigate geopolitical pressures by exercising legal agency via regional cooperation, regional organizations of the Global South may be better evaluated on their merits.

II. LEGAL AGENCY IN THE COLD WAR: LAW AS REALIST RHETORIC (1967–1991)

International relations scholars commonly view ASEAN’s initial decades through a realist lens—a view most prominently propounded by pre-eminent ASEAN expert Michael Leifer.¹⁵ After the Second World War, it was imperative for states to stabilize their national governments and economies amid external communist threats and intraregional tensions, which led states to prioritize their national self-interest over regional cooperation.¹⁶ For ASEAN, this resulted in states’ low compliance with shared commitments.¹⁷ As Leifer explains, ASEAN did not conform to how international organizations usually behaved. Instead, ASEAN was a “quasi-corporate entity . . . where widely differing notions of [self-]interest . . . confirm[ed] . . . the precedence of state over regional identity.”¹⁸ To realist ASEAN states, regional cooperation was a means to national ends. Law, though it existed, was not part of the equation.

Despite often being overlooked by ASEAN international relations scholars, law was important to ASEAN amid Cold War pressures.¹⁹ ASEAN legal text often included rhetoric to assuage regional insecurities, while

14. See generally *Integration Through Law*, CAMBRIDGE UNIV. PRESS, <http://www.cambridge.org/sg/universitypress/subjects/law/public-international-law/series/integration-through-law-role-law-and-rule-law-asean-integration> (last visited June 27, 2024) (listing a series of nineteen books on ASEAN integration); Sungjoon Cho & Jürgen Kurtz, *Legalizing the ASEAN Way: Adapting and Reimagining the ASEAN Investment Regime*, 66 AM. J. COMPAR. L. 233 (2018); PASHA L. HSIEH, *NEW ASIAN REGIONALISM IN INTERNATIONAL ECONOMIC LAW* (2021); *ASEAN LAW AND REGIONAL INTEGRATION: GOVERNANCE AND THE RULE OF LAW IN SOUTHEAST ASIA’S SINGLE MARKET* (Diane Desierto & David Cohen eds., 2020).

15. Michael Leifer, *Conflict and Order in Southeast Asia*, 20 THE ADELPHI PAPERS 1 (1980).

16. ROBERT BECKMAN, LEONARDO BERNARD, HAO DUY PHAN, TAN HSIEN-LI, & RANYTA YUSRAN, *PROMOTING COMPLIANCE: THE ROLE OF DISPUTE SETTLEMENT AND MONITORING MECHANISMS IN ASEAN INSTRUMENTS* 37–38 (2016) [hereinafter BECKMAN ET AL.].

17. *Id.*

18. Michael Leifer, *The ASEAN Members: No Common Outlook*, 49 INT’L AFFS. 600, 607 (1973).

19. BECKMAN ET AL., *supra* note 16, at 38–40.

remaining realist in prioritizing nation-building. This article refers to such laws as “realist rhetoric” laws.

The form, text, and compliance mechanisms of ASEAN laws demonstrate the exercise of legal agency via realist rhetoric laws. Members chose soft laws for their non-justiciability. Where treaties were used, obligations were often perfunctory without expectation of compliance or enforcement. Though non-compliance was rife, no litigation ensued as members tacitly condoned breaches—national interests could be pursued without censure.²⁰ This corresponds to Leifer’s observation that ASEAN focused on “developing a culture of intramural dialogue and consultation . . . and an adherence to common norms; not through invoking formal legal mechanisms . . . A prime objective of the collective enterprise was to consolidate national sovereignty and not to supersede it.”²¹

Even if cooperation was feeble, ASEAN laws strengthened intraregional relations and overtly facilitated national governance and national economies, thus enabling members to depart the “third world” to attain middle-income status by the early 1990s.²² The remainder of this Part demonstrates how ASEAN states exercised legal agency via realist rhetoric laws to safeguard security and economic interests.

A. A ‘Non-Binding’ Realist Inception for Security

The first realist rhetoric law was ASEAN’s founding document, the ASEAN Declaration (“Bangkok Declaration”), which was adopted by Indonesia, Malaysia, Philippines, Singapore, and Thailand in 1967.²³ The Bangkok Declaration exercised legal agency to establish ASEAN with the goals of safeguarding sovereignty and national interests such as internal self-determination and economic development. It was hoped that these goals would be achieved by deescalating the intraregional aggression exhibited in the post-Second World War decolonization environment.²⁴ The United States’ and China’s involvement in the Vietnam War, the threat of communism, the aggression in the Philippine claim over North Borneo, and Indonesia’s *Konfrontasi* against Malaysia and Singapore in the mid-1960s were major impetuses for ASEAN states to pursue peace and protect sovereign independence.²⁵ Within national borders, ASEAN states also faced existential problems, namely unstable governance, racial tensions,

20. *Id.* at 42.

21. Michael Leifer, *The ASEAN Peace Process: A Category Mistake*, 12 PAC. REV. 25, 28 (1999).

22. Richard Stubbs, *Signing on to Liberalization: AFTA and the Politics of Regional Economic Co-operation*, 13 PAC. REV. 297, 297–303 (2000).

23. 1967 ASEAN Declaration, Aug. 8, 1967, 6 I.L.M. 1233 [hereinafter Bangkok Declaration].

24. BECKMAN ET AL., *supra* note 16, at 12–15.

25. Shaun Narine, *ASEAN and the Management of Regional Security*, 71 PAC. AFFS. 195, 196, 200 (1998).

communist insurgencies, and widespread poverty and unemployment.²⁶ These external and internal pressures meant that, although members exercised legal agency to form ASEAN for security, they lacked the capacity and willingness to cooperate. Hence, the Bangkok Declaration (rather than a treaty) was adopted. Members rejected being legally bound, so soft law meant breaches would certainly not be litigated.²⁷

The declaration repeated the United Nations (“UN”) Charter’s obligations of non-aggression and non-use of force as regional fundamentals.²⁸ Members then articulated realist rhetoric provisions. Alongside their warning to external powers that “all foreign bases were temporary and must not subvert ASEAN states’ autonomy or prejudice . . . national development,” members expressed their realist security and economic agenda of “peace, freedom, social justice and economic well-being [via] . . . good neighborliness and meaningful cooperation” as all members had “a primary responsibility [toward] . . . national development.”²⁹ This overt national prioritization; the provisions on economic, technical, industrial, and agricultural cooperation; and the ambiguous delegation of projects to “ad hoc committees,” to be convened whenever the need arose, highlighted ASEAN states’ legal agency in employing realist rhetoric.³⁰

B. *A Realist Regional Framework (1976)*

Although insipid, the Bangkok Declaration’s realist rhetoric enabled intraregional security.³¹ Within a decade of non-aggression, members were ready to attempt treaty-making and cooperation, while simultaneously entrenching their non-litigious preferences.³² At the inaugural summit of ASEAN heads of state in 1976 following the end of the Vietnam War, members further exercised legal agency to adopt ASEAN’s first two treaties and another soft law to frame this period’s cooperation.³³

Through ASEAN’s first treaty, the Treaty of Amity and Cooperation (“TAC”), members codified the Bangkok Declaration’s security principles as obligations and employed realist rhetoric to advance nation-building trajectories.³⁴ The preamble reiterates the non-aggression imperative—members must

26. AMITAV ACHARYA, *THE QUEST FOR IDENTITY: INTERNATIONAL RELATIONS OF SOUTHEAST ASIA* 51–60 (2000).

27. Tan, *supra* note 10, at 347–48.

28. See U.N. Charter arts. 1(1), 2(4).

29. Bangkok Declaration, *supra* note 23, pmb1.

30. *Id.* subsecs. 2, 3.

31. AMITAV ACHARYA, *CONSTRUCTING A SECURITY COMMUNITY IN SOUTHEAST ASIA: ASEAN AND THE PROBLEM OF REGIONAL ORDER* 5 (2000).

32. BECKMAN ET AL., *supra* note 16, at 23, 24, 28.

33. *Id.* at 24–26.

34. Treaty of Amity and Cooperation in Southeast Asia, 1025 U.N.T.S. 316 (1976).

avoid “negative attitudes which . . . endanger . . . cooperation.”³⁵ Article 2 reiterates the non-use of force, peaceful dispute settlement, and non-interference as compulsory practices,³⁶ while Chapter IV underscores that states’ primary dispute settlement mechanism should be mediation and negotiation rather than arbitration, even when arbitration is available.³⁷ As an afterthought, the TAC encourages cooperation on agriculture, trade, and industrialization.³⁸

Here, ASEAN members’ use of realist rhetoric is obvious. Post-TAC cooperation was underwhelming, yet non-compliance did not trigger litigation because even though the TAC created an arbitral modality, it could not be activated—the TAC’s Rules of Procedure were only adopted twenty-five years later in 2001.³⁹ The TAC’s long dormancy highlights how ASEAN states continued to exercise legal agency to safeguard interests—the TAC’s realist rhetoric united them in a non-aggression pact; however, because of ASEAN states’ continued preference for sovereignty and national interests, cooperation and dispute resolution in the event of non-compliance did not transpire.⁴⁰

The Agreement on the Establishment of the ASEAN Secretariat was also a form of realist rhetoric, as its key provisions were not upheld. This treaty empowered the secretary-general to coordinate “ASEAN organs . . . for . . . implementation of ASEAN projects,” inquire into members’ cooperation efforts, and monitor compliance with ASEAN activities.⁴¹ In practice, members were unwilling to relinquish realist nation-building agendas and be monitored on cooperation and compliance. This exercise of legal agency enabled ASEAN states to limit the secretary-general’s competences, continue nation-building, and project realist agendas through their foreign ministers.⁴²

Realist rhetoric was repeated in the Bali Concord I (1976), a non-justiciable soft law that articulated ASEAN’s inaugural security and economic cooperation goals. The Concord’s ambitious rhetoric sought to eliminate “poverty, hunger, disease, and illiteracy” via trade liberalization and cooperation in food, commodities, energy, and industry.⁴³ It is uncertain which projects were actually implemented because members tasked their economic ministers with full oversight and omitted the secretary-general from all provisions—this had the

35. *Id.* pmb. ¶4.

36. *Id.* art. 2.

37. *Id.* arts. 13–17.

38. *Id.* arts. 6–12.

39. Rules of Procedure of the High Council of the Treaty of Amity and Cooperation in Southeast Asia, July 23, 2001, <http://asean.org/rules-of-procedure-of-the-high-council-of-the-treaty-of-amity-and-cooperation-in-southeast-asia>.

40. Tan, *supra* note 10, at 348.

41. Agreement on the Establishment of the ASEAN Secretariat, pmb., arts. 1, 3, Feb. 24, 1976, <http://asean.org/agreement-on-the-establishment-of-the-asean-secretariat-bali-24-february-1976>.

42. *Id.* pmb., art. 3(2).

43. Declaration of ASEAN Concord (Bali Concord I), pmb., §§ B(1)–(4), Feb. 24, 1976, <http://asean.org/the-declaration-of-asean-concord-bali-indonesia-24-february-1976>.

unfortunate consequence of the secretary-general being unable to monitor whether members cooperated on the projects.⁴⁴ As an exercise of ASEAN states' legal agency, the Concord's realist rhetoric prompted symbolic bonding between the states but did not initiate substantive cooperation.

C. Rhetorical "Economic Cooperation" Enabling Realist Nation-Building (1976 to 1991)

ASEAN states exercised legal agency and adopted thirty-two treaties (roughly two annually between 1976 and 1991) and seven soft laws to initiate economic cooperation.⁴⁵ As will be explained below, these realist rhetoric laws often did not have a coherent regional economic strategy and even permitted members to continue focusing on national economic development. This phenomenon suggests that there was an implicit understanding among members that breaches of ASEAN economic treaties would not be censured, and this mutual accommodation of one another's nation-building priorities enhanced intraregional relations and prosperity.

Two notable treaties were adopted in this phase—the Agreement on the ASEAN Preferential Trading Arrangements ("PTA") in 1977, which was intended to facilitate intraregional trade liberalization, and the Basic Agreement on ASEAN Industrial Projects ("AIP") in 1980, which sought to industrialize member economies.⁴⁶ ASEAN's weak economic fundamentals and realist priorities relegated both treaties to overly ambitious rhetoric. For example, the PTA's obligations to reduce tariffs and non-tariff barriers in the food, energy, and industrial sectors were meant to spur intraregional trade,⁴⁷ yet they simultaneously permitted members to suspend implementation "provisionally and without discrimination" if there was threat of "serious injury to sectors" producing similar products.⁴⁸ As ASEAN states produced similar products like rubber, palm, and urea, intraregional trade was low and intra-ASEAN competition to export to global markets was stiff. Members were unwilling to lower tariffs for other ASEAN states because they wanted to protect their fledgling markets from competition. Ultimately, the PTA failed because members had long exclusion lists of "sensitive items" to block intra-ASEAN imports and protect national industries.⁴⁹

44. *Id.* § B(5).

45. *See supra* Figure 1.

46. Agreement on the ASEAN Preferential Trading Arrangements, Feb. 24, 1977 [hereinafter PTA], <http://agreement.asean.org/media/download/20140119163517.pdf>; Basic Agreement on ASEAN Industrial Projects, Mar. 6, 1980 [hereinafter AIP], <http://agreement.asean.org/media/download/20140119162416.pdf>.

47. PTA, *supra* note 46, arts. 1–4, 7.

48. *Id.* art. 12.

49. Tan Lay Hong, *Will ASEAN Economic Integration Progress Beyond a Free Trade Area?*, 53 INT'L & COMP. L.Q. 935, 937 (2004).

ASEAN industrialization also failed because of the dissonance between realist rhetoric and reality. The AIP required each member to run an industrial project to “broaden the complementarity” of ASEAN economies,⁵⁰ and cautioned that new national projects should not affect AIP projects already allocated.⁵¹ However, national industries were protected more than the AIP ones producing similar products. This was evinced in the urea industry where the AIP provisions favored the national urea plants that Indonesia, Malaysia, the Philippines, and Thailand were developing.⁵² Moreover, ASEAN states often did not have sufficient start-up capital from public sources and there was inadequate private sector engagement to get corporate funding.⁵³ The AIP required a sixty percent capital investment by the host country with other members supplying the remaining forty percent—this was beyond ASEAN members’ limited resources and tepid inclination to invest beyond national borders.⁵⁴

These conflicting fundamentals of competing products, insufficient capital, restricted intra-ASEAN market access, and protectionism (including supervision by trade and industrial committees mindful of national agendas)⁵⁵ led to insignificant economic cooperation. Yet, legal agency exercised via realist rhetoric laws achieved ASEAN members’ security needs and overriding nation-building aims.⁵⁶ Half-hearted attempts to jumpstart economic cooperation continued via realist rhetoric. For example, ASEAN states adopted the Memorandum of Understanding on Standstill and Rollback on Non-Tariff Barriers among ASEAN Countries (1987) to address the intraregional trade impasse.⁵⁷ Despite its explicit name and provisions cautioning non-regression from tariff concessions, emergency protections were condoned if intra-ASEAN imports threatened national industries.⁵⁸ The Basic Agreement on ASEAN Industrial Complementarity (“AIC”, 1981) and Basic Agreement on ASEAN Industrial Joint Ventures (“AIJV”, 1983) had similarly realist rhetoric—expressing vague desires for industrial cooperation while allowing

50. AIP, *supra* note 46, pmb1.

51. *Id.* art. 2(2).

52. See, for example, articles three and five of the Supplementary Agreements to the Basic Agreement on ASEAN Industrial Project: ASEAN Urea Project for Indonesia and Malaysia, Mar. 6, 1980, [http://arc-agreement.asean.org/file/doc/2015/01/supplementary-agreement-to-the-basic-agreement-on-asean-industrial-projects-asean-urea-project-\(malaysia\).pdf](http://arc-agreement.asean.org/file/doc/2015/01/supplementary-agreement-to-the-basic-agreement-on-asean-industrial-projects-asean-urea-project-(malaysia).pdf) (Malaysia), <http://cil.nus.edu.sg/wp-content/uploads/2019/02/1980-Supplementary-Agreement-to-the-Basic-Agreement-on-ASEAN-Industrial-Projects-Indonesia-2-1.pdf> (Indonesia).

53. Tan, *supra* note 49, at 936.

54. AIP, *supra* note 46, art. 3(3).

55. PTA, *supra* note 46, art. 13; AIP, *supra* note 46, art. 13(3).

56. BECKMAN ET AL., *supra* note 16, at 28.

57. *Memorandum of Understanding on Standstill and Rollback on Non-Tariff Barriers Among ASEAN Countries*, arts. 1–3 (Dec. 15, 1987), <http://asean.org/memorandum-of-understanding-on-standstill-and-rollback-on-non-tariff-barriers-among-the-asean-countries-manila-philippines-15-december-1987>.

58. *Id.* arts. 16–17.

national industries to be favored.⁵⁹ ASEAN states continued to exercise legal agency to enable realist rhetoric laws that were poorly implemented, weakly monitored, and unenforceable (due to the “inactivated” TAC) until the geopolitics and accelerating globalization of the 1990s—exemplified by China’s modernization and the post-Soviet states’ participation in the world economy—compelled ASEAN members to cooperate, lest they lag behind in economic development.⁶⁰

D. Significance of Realist Rhetoric

Despite ostensibly aiming for regional cooperation to complement national development, ASEAN states were unperturbed by the lapsed obligations because exercising legal agency via realist rhetoric laws averted war and enhanced neighborly relations by lowering legalistic constraints, deflecting litigation, and protecting domestic markets.⁶¹ Moreover, implementation was often beyond states’ financial resources and national agendas.⁶² The regional security established through ASEAN’s realist rhetoric enabled “strongmen” leaders including Suharto (Indonesia), Mahathir Mohamad (Malaysia), and Lee Kuan Yew (Singapore) to single-mindedly pursue nation-building and export-driven industrialization (following Japan and Korea’s successful trajectories) and gain domestic legitimacy for their “soft authoritarian governance.”⁶³ As a result, by the 1990s, ASEAN states were middle-income countries.⁶⁴

Although such exercise of legal agency benefited ASEAN states, using law as realist rhetoric unfortunately entrenched non-compliance. Non-compliance persisted even when members realized they needed to cooperate to safeguard common security and economic interests (and the national interests therein).⁶⁵ The next section demonstrates how members exercised legal agency in making ASEAN laws for constructivist cooperation under post-Cold War pressures; although compliance remained poor, ASEAN unity and common agendas were established.

59. Basic Agreement on ASEAN Industrial Complementation, art. 4(4), June 18, 1981, 22 I.L.M. 1229 [hereinafter AIC]; Basic Agreement on ASEAN Industrial Joint Ventures, art. 3(5), Nov. 7, 1983, 22 I.L.M. 1233 [hereinafter AIJV].

60. BECKMAN ET AL., *supra* note 16, at 29.

61. See *generally supra* Parts II.B, II.C.

62. See Tan, *supra* note 49, at 936–38.

63. Stubbs, *supra* note 22. For a concise overview of nation-building in ASEAN, see TAN HSIEN-LI, THE ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS: INSTITUTIONALISING HUMAN RIGHTS IN SOUTHEAST ASIA 77–135 (2011).

64. See JOSE EDGARDO CAMPOS & HILTON L. ROOT, THE KEY TO THE ASIAN MIRACLE: MAKING SHARED GROWTH CREDIBLE 3 (1996).

65. BECKMAN ET AL., *supra* note 16, at 30.

III. LEGAL AGENCY AMID GLOBALIZATION: LAW FOR CONSTRUCTIVIST COOPERATION (1992–2006)

As mentioned above, post-Cold War globalization forced ASEAN to halt realist nation-building and begin cooperating. Professor Amitav Acharya was the first international relations scholar to theorize ASEAN constructivism, with a focus on the building of ASEAN identity and norms through regular engagement.⁶⁶ For Professor Acharya and others, ASEAN constructivism manifested in intergovernmental cooperation via security platforms like the ASEAN Regional Forum (“ARF”).⁶⁷ This resulted in identity-formation and “ASEAN Way” norms encompassing peaceful dispute resolution, non-interference in domestic affairs, and decision-making by consultation and consensus.⁶⁸ Although ASEAN constructivism is depicted accurately by these scholars, they have tended to focus on ASEAN’s security arena and have not sufficiently accounted for the impact of law and economics in ASEAN regional cooperation.⁶⁹

Looking at the post-Cold War exigencies, ASEAN faced security challenges including China’s militarization in the South China Sea and the decline of U.S. troops in Asia; economic pressures such as competition with the emerging economies of China, post-Soviet states, and Eastern European states; and rampant protectionism from the North Atlantic Free Trade Area and European Community.⁷⁰ After the 1997 Asian Financial Crisis decimated ASEAN economies, members were even more anxious to cooperate—particularly given the additions of Cambodia, Laos, Myanmar, and Vietnam (“CLMV”) in the 1990s, which increased opportunities for cooperation.⁷¹ Therefore, in confronting these security and economic challenges, ASEAN states exercised legal agency to depart from the state-centric contradictions of realist rhetoric and enter into constructivist cooperation. This article refers to ASEAN’s “constructivist cooperation” frameworks as laws that enabled members to unite in a shared identity and set common security and economic agendas to safeguard collective interests.

The form, text, and compliance mechanisms of post-Cold War ASEAN laws show how members exercised legal agency for constructivist cooperation. The most obvious is their repeated resolve to unite and set common

66. See *supra* notes 26, 31; Helen E. S. Nesadurai, *ASEAN and Regional Governance After the Cold War: From Regional Order to Regional Community?*, 22 PAC. REV. 91, 97–99 (2009).

67. See generally ASEAN Regional Forum [ARF], *About ARF*, <http://aseanregionalforum.asean.org/about-arf> (last visited June 27, 2024).

68. See ACHARYA, *supra* note 31, at 47–48.

69. See Nesadurai, *supra* note 66, at 99–100.

70. K.S. Nathan, *ASEAN and the Major Powers: Adjusting to New Power Realities Towards the 21st Century*, 5 ASIAN J. POL. SCI. 102, 107–09 (1997).

71. Zakaria H. Ahmad & Baladas Ghoshal, *The Political Future of ASEAN After the Asian Crisis*, 75 INT’L AFF. 759, 761–62, 766 (1999).

agendas, resulting in the sharp increase in treaties and soft laws.⁷² Three legal frameworks were adopted in a decade⁷³—compared to only one (the Bali Concord I) in ASEAN’s initial twenty-five years. There were also approximately three times as many ASEAN laws than in the previous phase.⁷⁴ Furthermore, members were keen to cooperate on security and economic agendas. To kickstart implementation, there was the novel use of fixed-period soft laws (termed work plans or action programs) with systematic milestones and deadlines to pressure action.⁷⁵ Security and economic dispute settlement mechanisms were also introduced to enforce compliance.⁷⁶ Although compliance remained underwhelming, in exercising legal agency, members “constructed a united ASEAN with coherent cooperation agendas to counter geopolitical pressures.

A. *Three Frameworks of Constructivist Cooperation: Unity and Agendas*

Amid post-Cold War globalization, ASEAN members exercised legal agency to establish three soft law frameworks of constructivist cooperation—the Singapore Declaration (1992) after the Cold War, the ASEAN Vision 2020 (1997) following the Asian Financial Crisis, and the Bali Concord II (2003) in the wake of China joining the World Trade Organization (“WTO”). The Singapore Declaration highlighted that ASEAN security and economic cooperation was imperative for tackling post-Cold War geopolitical changes for members to continue prospering.⁷⁷ Members thus agreed to the following common agendas: conducting peaceful South China Sea territorial and resource-sharing negotiations; helping reconstruct Vietnam, Laos, and Cambodia; forming the ASEAN Free Trade Area; and enhancing economic and security relations with external powers like Europe and the United States.⁷⁸ ASEAN intergovernmental decision-making bodies—comprising the heads of government or foreign and economic ministers—would produce cooperation agendas, while the secretary-general and secretariat would be administratively strengthened.⁷⁹

When the Asian Financial Crisis severely weakened ASEAN economies, ASEAN states exercised legal agency to intensify the use of constructivist

72. Tan, *supra* note 10, at 350–52.

73. Singapore Declaration of 1992, Jan. 28, 1992, 31 I.L.M. 498; *Hanoi Plan of Action*, ¶¶ 1–2, 7–8, Dec. 15, 1998, <http://asean.org/hanoi-plan-of-action>; Declaration of ASEAN Concord II (Bali Concord II), Oct. 7, 2003, 43 I.L.M. 18.

74. See *supra* Figure 1.

75. See *infra* Part III.A.

76. See *infra* Part III.B (on peaceful conduct in the South China Sea) and Part III.C (on the 1996 and 2004 protocols on economic dispute settlement mechanisms).

77. Singapore Declaration, *supra* note 73, ¶ 2

78. *Id.* ¶¶ 3–7.

79. *Id.* ¶ 8.

cooperation laws. Through the Vision 2020 and its fixed-period soft law, the Hanoi Plan of Action (1999–2004),⁸⁰ member states constructed a sense of ASEAN unity with intertwining histories (despite the reality of diverse experiences). Faced with global protectionism and competition, members sought to strengthen financial markets and pledged to ensure that world trade remained “fair and open” while fully implementing the ASEAN Free Trade Area and the ASEAN Investment Area.⁸¹ On security agendas, members affirmed the rule of law and the TAC as a “binding code of conduct” for ASEAN and external partners,⁸² while the ARF would be the primary driving force for regional peace.⁸³

Constructivist cooperation culminated in the Bali Concord II, in which members exercised legal agency to begin ASEAN’s transformation into an intergovernmental community based on the three pillars of security, economic, and socio-cultural cooperation.⁸⁴ Members reinforced ASEAN unity—as well as its security and economic agendas—by pledging to uphold the ASEAN Way norms of non-interference, consultation, and consensus in decision-making, to use the TAC to resolve disputes peacefully, to improve intraregional and external security relations via the ARF, and to achieve the ASEAN Free Trade Area.⁸⁵ The Vientiane Action Programme (2004–2010) detailed the technical steps and timeline to implement the Concord.⁸⁶

As seen, ASEAN states exercised their legal agency via the three frameworks to foster cooperation and substantiate ASEAN security and economic agendas to overcome geopolitical pressures. However, this was unfruitful. Weak implementation was not just a result of the secretary-general’s stymied monitoring powers or dormant arbitral mechanisms.⁸⁷ ASEAN’s longstanding compliance problems were also due to its institutional limitations at the regional and national levels to cooperate effectively after years of realist practices.⁸⁸ These coordination and capacity challenges were compounded by the CLMV membership that added even more diverse political, legal, and bureaucratic systems and financial stressors to the cooperation endeavor.⁸⁹ Ultimately, these

80. *Hanoi Plan of Action*, *supra* note 73, ¶¶ 1–2, 7–8.

81. *ASEAN Vision 2020*, ¶ 21 (Dec. 15, 1997), <http://asean.org/asean-vision-2020>.

82. *Id.* ¶ 10.

83. *Hanoi Plan of Action*, *supra* note 73, ¶ 8.2.

84. Bali Concord II, *supra* note 73, ¶ 1.

85. *Id.* ¶¶ 4–7.

86. ASEAN, *Vientiane Action Programme*, annex 1–4 (Nov. 29, 2004), <http://asean.org/wp-content/uploads/images/archive/VAP-10th%20ASEAN%20Summit.pdf>.

87. BECKMAN ET AL., *supra* note 16, at 81–86, 113–29.

88. This was alluded to by the Eminent Persons Group on the ASEAN Charter that advocated an ASEAN-wide institutional overhaul. See *Report of the Eminent Persons Group on the ASEAN Charter*, Executive Summary, ¶¶ 2–7, Main Report, ¶¶ 27, 36–39, 43–47 (Dec. 2006), <http://asean.org/book/report-of-the-eminent-persons-group-on-the-asean-charter>.

89. Ahmad & Ghoshal, *supra* note 71, at 771.

constructivist cooperation frameworks were useful in that they formed ASEAN unity and crystallized common security and economic agendas.

B. Security Constructivist Cooperation

ASEAN members also exercised legal agency by adopting security cooperation laws corresponding to the constructivist cooperation frameworks. Transitioning from realist rhetoric practices was difficult as members were undecided on how to conduct security cooperation, apart from being opposed to copying Western institutions like the Conference on Security and Cooperation in Europe.⁹⁰ Hence, ASEAN's security constructivist cooperation laws initially reiterated common norms on non-use of force and peaceful settlement of disputes, as exemplified in the Treaty on the Southeast Asia Nuclear Weapon Free Zone ("SEANWFZ", 1995).⁹¹ More substantively, members shaped their common security agenda at annual ASEAN summits, foreign ministerial meetings, and the ARF's multilateral external engagement platform.⁹² The ARF discussions were integral in catalyzing ASEAN unity and agendas as ASEAN had to promote its own agenda amid the competing interests of external partners (notably the United States and China).⁹³ Although a soft law, the ARF Concept Paper (1995) firmly reminded ASEAN members of their unity and warned external partners against confrontational behavior. The Paper emphasized how past conflicts had destabilized the region, thus upholding ASEAN as the "primary driving force of the ARF" which would provide a vital opportunity to improve regional security.⁹⁴ Accordingly, ASEAN would respect all ARF participants' sovereignty by operating through consensus.⁹⁵

Subsequently, members exercised legal agency via security constructivist cooperation laws (mostly soft declarations and statements) to reinforce ASEAN's unity and crystallize three substantive agendas: strengthening military security (including South China Sea engagement and anti-piracy), countering terrorism and transnational crime, and disaster management. Within a decade of intraregional engagement, ASEAN members began exercising

90. Hiro Katsumata, *Establishment of the ASEAN Regional Forum: Constructing a 'Talking Shop' or a 'Norm Brewery'?*, 19 PAC. REV. 181, 191 (2006).

91. Treaty on the Southeast Asia Nuclear Weapon-Free Zone, Dec. 15, 1995, 1981 U.N.T.S. 129.

92. Tan See Seng, *Is ASEAN Finally Getting Multilateralism Right? From ARF to ADMM+*, 44 ASIAN STUD. REV. 28, 31–33 (2020).

93. The ARF comprises: 10 ASEAN member states (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam); 10 ASEAN dialogue partners (Australia, Canada, China, the European Union ("EU"), India, Japan, New Zealand, South Korea, Russia, and the United States); Bangladesh, North Korea, Mongolia, Pakistan, Sri Lanka, Papua New Guinea, and Timor-Leste. See ARF, *supra* note 67.

94. *The ASEAN Regional Forum: A Concept Paper*, ¶¶ 1–4 (Aug. 1, 1995), <http://cil.nus.edu.sg/databasecil/1995-the-asean-regional-forum-a-concept-paper>.

95. *Id.* ¶ 5.

legal agency in curbing transnational crimes (notably, human and drug trafficking) through the ASEAN Declaration on Transnational Crime (1997), Joint Declaration for a Drug-Free ASEAN (1998), ASEAN Plan of Action to Combat Transnational Crime (1999), and the Work Programme to Implement the ASEAN Plan of Action to Combat Transnational Crime (2002).⁹⁶ After the September 11, 2001 attacks and the 2002 Bali bombings (by the Al Qaeda-linked Southeast Asia-based Jemaah Islamiyah), members adopted the ASEAN Declaration on Joint Action to Counter Terrorism (2001) and the Declaration on Terrorism (2002) to share information, combat money laundering and terrorist financing, and support national law enforcement agencies in arresting terrorists.⁹⁷ Post-Bali Concord II, ASEAN unity had strengthened such that members signed major declarations against human trafficking (2004) and gender violence (2004);⁹⁸ strong cooperation in the fight against transnational crime culminated in the Treaty on Mutual Legal Assistance in Criminal Matters (2004).⁹⁹ Meanwhile, the devastation to many ASEAN coastal communities caused by 2004 Indian Ocean tsunami spurred the conclusion of the ASEAN Agreement on Disaster Management and Emergency Response (2005) to improve humanitarian assistance.¹⁰⁰ By exercising legal agency to launch intraregional security cooperation, constructivist cooperation laws forged ASEAN unity and common agendas.

In external security relations, ASEAN members exercised legal agency via the ARF's soft laws to propel ASEAN unity and agendas. Within a decade, ASEAN and external partners had cultivated sufficient mutual trust on military security, terrorism, and transnational crime for the ARF to begin discussing sensitive military policy.¹⁰¹ Although the ARF could not defuse

96. *Declaration on Transnational Crime* (Dec. 20, 1997), <http://asean.org/wp-content/uploads/2012/05/ASEAN-Declaration-on-Transnational-Crime-1997.pdf>; *Joint Declaration for a Drug-Free ASEAN* (July 25, 1998), <http://asean.org/wp-content/uploads/2016/10/Doc2-D-437-Joint-Declaration-for-a-Drug-Free-ASEAN-1988.pdf>; *ASEAN Plan of Action to Combat Transnational Crime* (June 6, 1999), <http://cil.nus.edu.sg/databasecil/1999-asean-plan-of-action-to-combat-transnational-crime>; *Work Programme to Implement the ASEAN Plan of Action to Combat Transnational Crime* (May 5, 2002), <http://asean.org/work-programme-to-implement-the-asean-plan-of-action-to-combat-transnational-crime-kuala-lumpur-17-may-2002>.

97. *Declaration on Joint Action to Counter Terrorism* (Nov. 5, 2001), <http://asean.org/wp-content/uploads/2012/05/2001-ASEAN-Declaration-on-Joint-Action-to-Counter-Terrorism.pdf>; *Declaration on Terrorism* arts. 2-3 (Nov. 3, 2002), <http://asean.org/declaration-on-terrorism-by-the-8th-asean-summit-phnom-penh-3-november-2002>.

98. See *Declaration Against Trafficking in Persons Particularly Women and Children* (Nov. 29, 2004), <http://asean.org/asean-declaration-against-trafficking-in-persons-particularly-women-and-children>; *Declaration on the Elimination of Violence Against Women in the ASEAN Region* (June 30, 2004), <http://cil.nus.edu.sg/databasecil/2004-the-declaration-on-the-elimination-of-violence-against-women-in-the-asean-region>.

99. Treaty on Mutual Legal Assistance in Criminal Matters, 2336 U.N.T.S. 271 (2004).

100. Agreement on Disaster Management and Emergency Response, July 26, 2005, <http://agreement.asean.org/media/download/20220330063139.pdf>.

101. Jürgen Haacke, *The ASEAN Regional Forum: From Dialogue to Practical Security Cooperation?*, 22 CAMB. REV. INT'L AFFS. 427, 437, 442–43 (2009) (“On how engagement on

regional conflicts such as the South China Sea tensions—the differences between the more “activist” participants like the United States, Japan, and Australia versus the more conservative ones like China and Vietnam prevented the ARF from progressing towards substantive preventive diplomacy initiatives¹⁰²—the ARF’s ASEAN-centered multilateral strategic statements encompassed anti-piracy and maritime security (2003), counterterrorism (2002, 2003, 2004, 2006), and disaster management (2006).¹⁰³ Furthermore, between 2003 and 2005, ASEAN signed bilateral counterterrorism pacts with external ARF members (for example, the European Union (“EU”), India, Australia, Russia, New Zealand, Pakistan, and Korea).¹⁰⁴

While these soft laws may seem inconsequential, repeated exercises of legal agency not only reinforced the belief that ASEAN unity was important for intraregional identity but also projected ASEAN-centered norms and agendas externally, thereby aiding ASEAN’s navigation of geopolitical pressures and contributing to overall transparency and mutual confidence among regional security participants.¹⁰⁵ Such peace-engendering outcomes are vital in stabilizing the South China Sea environment, as many ASEAN members (namely, Brunei, Indonesia, Malaysia, the Philippines, and Vietnam) and China hold competing claims.¹⁰⁶ The ASEAN Declaration on the South China Sea (1992)—emphasizing ASEAN’s historic ties and peaceful cooperation “without prejudicing the sovereignty and jurisdiction” of members with direct

terrorism, maritime security, and disaster relief paved the way towards table-top exercises among military personnel”).

102. Tan See Seng, *A Tale of Two Institutions: The ARF, ADMM-Plus and Security Regionalism in the Asia Pacific*, 39 CONTEMP. SE. ASIA 259, 261 (2017).

103. See ARF, *Statement on Promoting a People-Centred Approach to Counter Terrorism* (July 28, 2006), <http://cil.nus.edu.sg/databasecil/2006-asean-regional-forum-statement-on-promoting-a-people-centred-approach-to-counter-terrorism>; ARF, *Statement on Cooperation Against Piracy and Other Threats to Security* (June 18, 2003) <http://asean.org/arf-statement-on-cooperation-against-piracy-and-other-threats-to-security>; ARF, *Statement on Disaster Management and Emergency Response* (July 28, 2006), <http://cil.nus.edu.sg/databasecil/2006-asean-regional-forum-statement-on-disaster-management-and-emergency-response>.

104. See Joint Declaration on Cooperation to Combat Terrorism, ASEAN-EU, Jan. 28, 2003, <http://cil.nus.edu.sg/databasecil/2003-joint-declaration-on-cooperation-to-combat-terrorism>; Joint Declaration for Cooperation to Combat International Terrorism, ASEAN-India, Oct. 8, 2003, <http://asean.org/asean-india-joint-declaration-for-cooperation-to-combat-international-terrorism>; Joint Declaration for Cooperation to Combat International Terrorism, ASEAN-Austl., Feb. 7, 2004, <http://asean.org/asean-australia-joint-declaration-for-cooperation-to-combat-international-terrorism-2>; Joint Declaration for Cooperation to Combat International Terrorism, ASEAN-Russ., July 2, 2004, <http://asean.org/asean-russia-joint-declaration-for-cooperation-to-combat-international-terrorism-2>.

105. Amitav Acharya, *Do Norms and Identity Matter? Community and Power in Southeast Asia’s Regional Order*, 18 PAC. REV. 95, 110–11 (2005); Amitav Acharya, *How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism*, 58 INT’L ORG. 239, 259–60 (2004).

106. For a succinct exposition on the competing claims, see Robert Beckman, *The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea*, 107 AM. J. INT’L L. 142 (2013).

South China Sea interests—and the watershed Declaration on the Conduct of Parties in the South China Sea (“DOC”) signed between ASEAN and China in 2002 concretized ASEAN’s unity and common security agenda vis-à-vis China’s claims.¹⁰⁷ Through the DOC, ASEAN members and China pledge unequivocally to settle disputes peacefully by respecting the UN Charter, UN Convention on the Law of the Sea (“UNCLOS”), and the TAC.¹⁰⁸ More importantly, the DOC lays out how signatories must “exercise self-restraint” and not “escalate disputes” or inhabit “the presently uninhabited islands . . . and to handle their differences in a constructive manner.”¹⁰⁹

Although security cooperation progressed gradually, exercising legal agency through constructivist cooperation laws, notably through the ARF platform, galvanized ASEAN unity and crystallized common security agendas amid diverse geopolitical challenges.¹¹⁰ As the Chair of the tenth ARF meeting, Hor Namhong (Senior Minister of Foreign Affairs and International Cooperation of Cambodia) pronounced, despite the diversity among ARF members, the ARF contributed significantly to regional peace and security, especially as “a venue for multilateral and bilateral dialogue . . . [on] a wide range of security issues . . . [including] information relating to defense policy and the publication of defense white papers; and of ARF participants.”¹¹¹ In 2006, ASEAN states were ready for intensifying cooperation beyond the ARF and, again exercising legal agency, established the ASEAN Defence Ministers’ Meeting (“ADMM”) as the highest defense cooperation mechanism for intraregional and external relations.¹¹²

C. Economic Constructivist Cooperation

As with security, exercising legal agency to transition to economic constructivist cooperation was challenging for ASEAN members as they needed to unite and form clear economic agendas amid geopolitical pressures. Echoing the Singapore Declaration, the Framework Agreement on Enhancing ASEAN Economic Cooperation (1992) stressed how the “pervasive changes in the international political and economic landscape” demanded “cohesive

107. *Declaration on the South China Sea*, pmbl., ¶¶ 3–4 (July 22, 1992), <http://cil.nus.edu.sg/databasecil/1992-asean-declaration-on-the-south-china-sea>; *Declaration on the Conduct of Parties in the South China Sea* (Apr. 11, 2002), <http://cil.nus.edu.sg/databasecil/2002-declaration-on-the-conduct-of-parties-in-the-south-china-sea>.

108. *Id.* ¶¶ 1, 4.

109. *Id.* ¶ 5.

110. AMITAV ACHARYA, *ASEAN AND REGIONAL ORDER: REVISITING SECURITY COMMUNITY IN SOUTHEAST ASIA* 104–06 (2021).

111. Chairman’s Statement at the Tenth Meeting of ASEAN Regional Forum, ¶ 3 (June 18, 2003), <http://asean.org/speechandstatement/chairmans-statement-the-tenth-meeting-of-asean-regional-forum>.

112. *ASEAN Defence Ministers’ Meeting [ADMM] Concept Paper*, ¶¶ 9–10 (May 9, 2006), <http://cil.nus.edu.sg/wp-content/uploads/2019/02/2006-ASEAN-Defence-Ministers-Meeting-Concept-Paper.pdf>.

and effective . . . intra-ASEAN economic cooperation.”¹¹³ Hence, ASEAN members adopted the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (“CEPT-AFTA,” 1992) and set their primary agenda of working to establish a free trade area.¹¹⁴ To flesh out the free trade area, members adopted a raft of other treaties with complementary economic agendas on trade in services, customs facilitation, intellectual property, and industrial cooperation.¹¹⁵ Compliance and enforcement were emphasized by adopting the Protocol of Dispute Settlement Mechanism (1996).¹¹⁶ Though it remained unused, the protocol signaled that members possessed sufficient unity to attempt intraregional arbitral dispute resolution as facilitated by the Senior Economic Officials Meeting (“SEOM”) and ASEAN economic ministers—and that non-compliance with the arbitral decision could trigger cessation of concessions and damages.¹¹⁷

Before these treaties could be implemented, the 1997 Asian Financial Crisis occurred, and ASEAN members realized how vital cooperation was for overcoming the geopolitical shocks that individual governments were powerless against.¹¹⁸ Exercising legal agency again by adopting the Vision 2020 framework, members rapidly produced more economic laws to reinforce unity and concretize their free trade area agenda such as the ASEAN Agreement on Customs (1997) and its work program (1999) to lower tariffs; the ASEAN Framework Agreement on the Facilitation of Goods in Transit

113. Singapore Declaration, *supra* note 73; *see also* Framework Agreement on Enhancing ASEAN Economic Cooperation, pmbl., Jan. 28, 1992, <http://agreement.asean.org/media/download/20140119154919.pdf>.

114. Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, art. 4(1), Jan. 28, 1992, [hereinafter CEPT-AFTA], <http://asean.org/agreement-on-the-common-effective-preferential-tariff-cept-scheme-for-the-asean-free-trade-area-afta>; Protocol to Amend the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area for the Elimination of Import Duties, art. 1, Jan. 31, 2003, <http://cil.nus.edu.sg/databasecil/2003-protocol-to-amend-the-agreement-on-the-common-effective-preferential-tariff-scheme-for-the-asean-free-trade-area-for-the-elimination-of-import-duties>.

115. *See* ASEAN Framework Agreement on Services, Dec. 15, 1995, <http://asean.org/wp-content/uploads/2021/08/ASEAN-Framework-Agreement-on-Services-AFAS.pdf>; ASEAN Framework Agreement on Intellectual Property Cooperation, Dec. 15, 1995, <http://asean.org/asean-framework-agreement-on-intellectual-property-cooperation-bangkok-thailand-15-december-1995>; Basic Agreement on the ASEAN Industrial Cooperation Scheme, Apr. 27, 1996, <http://agreement.asean.org/media/download/20140421151331.pdf>; ASEAN Agreement on Customs, Mar. 1, 1997, <http://asean.org/wp-content/uploads/2020/12/ASEAN-Agreement-on-Customs-2.pdf>.

116. Protocol on Dispute Settlement Mechanism, Nov. 20, 1996, <http://agreement.asean.org/media/download/20140119110714.pdf>.

117. *Id.* arts. 4–5, 8–9; BECKMAN ET AL., *supra* note 16, at 64–66.

118. The Asian Financial Crisis began in Thailand in mid-1997 and spread to other East and Southeast Asian countries, notably, Korea, Indonesia, Malaysia, and the Philippines. The crisis was largely believed to have been due to global speculative pressures on Asian currencies. Asian economies were seriously affected with decimation of currencies and the danger of default. *See* Michael Carson & John Clark, *Asian Financial Crisis*, FED. RSRV. BANK OF N.Y. (Nov. 2013), <http://www.federalreservehistory.org/essays/asian-financial-crisis>.

(1998), ASEAN Framework Agreement on Mutual Recognition Arrangements (1998), and the ASEAN Memorandum of Understanding on Air Freight Services (2002) to facilitate the intra-ASEAN movement of goods; the Framework Agreement on the ASEAN Investment Area (1998) to attract foreign capital; the e-ASEAN Framework Agreement (2000) to develop the digital economy; and the ASEAN Tourism Agreement (2002) to make travel a regional economic driver.¹¹⁹

Additionally, these constructivist cooperation laws had an integrationist developmental agenda—namely, supporting the CLMV members in their modernization process and, in turn, fostering their buy-in to ASEAN unity and agendas. This rationale was explicit in the Chairman’s press statement during the Fourth ASEAN Informal Summit (2000), which expressed that ASEAN leaders “had agreed to launch an Initiative for ASEAN Integration . . . to narrow the divide within ASEAN . . . [whereby] the more developed ASEAN members could help those member countries that most need it,” with Singapore providing the inaugural technical assistance program to the CLMV members.¹²⁰ Additionally, the ASEAN leaders underscored “the fundamental importance of political unity within ASEAN” such that all ten members needed to co-operate on regional economic initiatives.¹²¹ Consequently, ASEAN adopted laws such as the Hanoi Declaration on Narrowing Development Gap for Closer ASEAN Integration (2001) and the Initiative for ASEAN Integration Work Plan (“IAI,” 2002–2008) implementing infra-structural and technological programs.¹²²

Constructivist cooperation reached its apex in the Bali Concord II’s agenda of forming an ASEAN Community. Members exercised legal agency to extend economic agendas beyond establishing a free trade area—ASEAN

119. ASEAN Agreement on Customs, *supra* note 115; 1999 ASEAN Customs Policy Implementation and Work Programme (July 14, 1999), <http://cil.nus.edu.sg/wp-content/uploads/2017/07/1999-ASEAN-Customs-Policy-Implementation-and-Work-Programme.pdf>; ASEAN Framework Agreement on the Facilitation of Goods in Transit (Dec. 16, 1998), <http://acts.asean.org/file/527/download?token=mXjD6ok5>; 1998 ASEAN Framework Agreement on Mutual Recognition Arrangements (Dec. 16, 1998), <http://cil.nus.edu.sg/wp-content/uploads/2019/02/1998-FA-on-MRAs-1.pdf>; ASEAN Memorandum of Understanding on Air Freight Services (Sept. 19, 2002), <http://agreement.asean.org/media/download/20140119023012.pdf>; Framework Agreement on the ASEAN Investment Area (July 10, 1998), <http://asean.org/wp-content/uploads/2020/12/Framework-Agreement-on-the-ASEAN-Investment-Area.pdf>; e-ASEAN Framework Agreement (Nov. 4, 2000), <http://agreement.asean.org/media/download/20140119121135.pdf>; ASEAN Tourism Agreement (Nov. 4, 2002), <http://agreement.asean.org/media/download/20140119115530.pdf>.

120. Press Release, ASEAN Secretariat, Chairman’s Press Statement at the Fourth ASEAN Informal Summit, ¶¶ 1, 3 (Nov. 25, 2000), <http://asean.org/the-fourth-asean-informal-summit-22-25-november-2000-singapore>.

121. *Id.* ¶ 10.

122. Hanoi Declaration on Narrowing Development Gap for Closer ASEAN Integration, arts. 3, 7 (July 23, 2001), <http://asean.org/ha-noi-declaration-on-narrowing-development-gap-for-closer-asean-integration-hanoi-vietnam23-july-2001>; Initiative for ASEAN Integration Work Plan, §§ I–IV (July 29, 2002), <http://asean.org/iai-work-plan-i-2002-2008>.

was also to be a manufacturing hub.¹²³ These laws covered the industrialization of priority sectors like fisheries, electronics, and rubber-based products; they also introduced technical manufacturing specifications like cosmetics production safety standards.¹²⁴ ASEAN also overcame some intraregional labor sensitivities to liberalize trade in services for the engineering and nursing professions.¹²⁵ Laws were also adopted to expand ASEAN's tourism industry with visa-exempt travel, to ease the movement of goods by streamlining customs procedures through the ASEAN Single Window program, and to enlarge transportation networks to improve regional connectivity.¹²⁶ ASEAN states tasked the SEOM with fulfilling the free trade area agenda,¹²⁷ but compliance remained poor as they were reluctant to simultaneously strengthen the secretary-general's monitoring powers.¹²⁸ Moreover, although members replaced the 1996 protocol with the Protocol on Enhanced Dispute Settlement Mechanism ("EDSM," 2004) that adapted the WTO dispute settlement procedure members were familiar with, the 2004 EDSM remained unused as members were averse to intra-ASEAN litigation.¹²⁹ Unsurprisingly, weak compliance of ASEAN economic laws persisted.¹³⁰

Post-Bali Concord II, ASEAN corrected its previously patchy external economic engagement.¹³¹ By adopting the Comprehensive Economic

123. See discussion of the Bali Concord II *supra* notes 84–86 and accompanying text.

124. See, e.g., ASEAN Framework Agreement for the Integration of Priority Sectors, Nov. 29, 2004, <http://asean.org/asean-framework-agreement-for-the-integration-of-priority-sectors-vientiane-29th-november-2004>; *ASEAN Sectoral Integration Protocol for Rubber-based Products* (Nov. 29, 2004), <http://agreement.asean.org/media/download/20140119111916.pdf>; Agreement on the ASEAN Harmonized Cosmetic Regulatory Scheme, Sept. 2, 2003, <http://cil.nus.edu.sg/wp-content/uploads/2019/02/2003-Agreement-on-the-ASEAN-Harmonized-Cosmetic-Regulatory-Scheme-1.pdf>.

125. ASEAN Mutual Recognition Arrangement on Engineering Services, Dec. 9, 2005, <http://asean.org/asean-mutual-recognition-arrangement-on-engineering-services-kuala-lumpur-9-december-2005>; ASEAN Mutual Recognition Arrangement on Nursing Services, Dec. 8, 2006, http://asean.org/wp-content/uploads/images/2015/april/mra_nursing/MRA%20Nursing%20signed.pdf.

126. ASEAN Framework Agreement on Visa Exemption, July 26, 2006, <http://agreement.asean.org/media/download/20160831072909.pdf>; Agreement to Establish and Implement the ASEAN Single Window, Dec. 9, 2005, <http://asean.org/wp-content/uploads/2020/12/Agreement-to-Establish-and-Implement-the-ASEAN-Single-Window-ASW-Agreement-1.pdf>; *ASEAN Transport Action Plan 2005–2010* (Nov. 23, 2004), <http://asean.org/asean-transport-action-plan-2005-2010>.

127. CEPT-AFTA, *supra* note 114, art. 7.

128. BECKMAN ET AL., *supra* note 16, at 79–80.

129. *ASEAN Protocol on Enhanced Dispute Settlement Mechanism* (Nov. 29, 2004), <http://cil.nus.edu.sg/wp-content/uploads/2019/02/2004-ASEAN-Protocol-on-Enhanced-Dispute-Settlement-Mechanism-1.pdf>; BECKMAN ET AL., *supra* note 16, at 67–68, 76–80.

130. *Report of the Eminent Persons Group on the ASEAN Charter*, *supra* note 88, Main Report, ¶¶ 44–45.

131. On the challenging ASEAN external agreement landscape, see generally MARISE CREMONA, DAVID KLEIMANN, JORIS LARIK, RENA LEE, & PASCAL VENNESSON, *ASEAN'S EXTERNAL AGREEMENTS: LAW, PRACTICE AND THE QUEST FOR COLLECTIVE ACTION*, 87–90,

Cooperation Frameworks with China (2002), India (2003), Japan (2003), and Korea (2005) to initiate treaty negotiations covering free trade in goods and services and investment,¹³² ASEAN exercised legal agency to demonstrate its unity and coherent agenda—and its potential economic advantages—to its large Indo-Pacific neighbors.

D. *Significance of Constructivist Cooperation*

Despite ASEAN members' realization that cooperation was imperative to overcoming the challenges of post-Cold War globalization and the Asian Financial Crisis, their adoption of time-limited soft laws and dispute settlement mechanisms to pressure implementation had limited effect.¹³³ While the unmet international law benchmarks—non-compliance, unenforceable soft laws, and non-litigation of treaties—signify ASEAN laws' weakness and members' reluctance to truly cooperate, exercising legal agency procured small but significant outcomes. For example, ASEAN's constructivist cooperation laws helped members transit out of state-centric outlooks to build regional unity. The ASEAN identity became more distinct over this fifteen-year period, and the increasingly substantive security and economic agendas demonstrated members' growing awareness that substantive action was needed to build an ASEAN security arrangement and free trade area amid geopolitical pressures. This correlates with Professor Acharya's observations that even if outcomes were not immediately achieved, the initiation into ASEAN relationships and engaging regularly with other non-ASEAN powers via ASEAN security and economic platforms such as the ARF and the East Asia Summit was a key draw for ASEAN's external partners.¹³⁴ All this laid the foundations for ASEAN's next phase—a rules-based order where implemented ASEAN laws could better manage geopolitical challenges to

134–235 (2015); PIETER JAN KUIJPER, JAMES H. MATHIS, & NATALIE Y. MORRIS-SHARMA, FROM TREATY-MAKING TO TREATY-BREAKING: MODELS FOR ASEAN EXTERNAL TRADE AGREEMENTS, 11–20 (2015); INGO VENZKE & THIO LI-ANN, THE INTERNAL EFFECTS OF ASEAN EXTERNAL RELATIONS, 40–70, 180–87 (2016).

132. See, e.g., Framework for Comprehensive Economic Partnership Between the Association of Southeast Asian Nations and Japan, ASEAN-Japan, Oct. 8, 2003, <http://asean.org/wp-content/uploads/2021/09/1-2003-Framework-for-CEP-between-ASEAN-and-Japan.pdf>; Framework Agreement on Comprehensive Economic Co-operation Between ASEAN and the People's Republic of China, ASEAN-China, Nov. 4, 2002, <http://asean.org/framework-agreement-on-comprehensive-economic-co-operation-between-asean-and-the-peoples-republic-of-china-phnom-penh-4-november-2002-2>; Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation Between the Association of Southeast Asian Nations and the People's Republic of China, ASEAN-China, Nov. 29, 2004, http://asean.org/wp-content/uploads/2021/09/Copy-of-ACFTA-TIG-Agreement-_Body-Agreement_.doc.pdf; Framework Agreement on Comprehensive Economic Cooperation Between the Republic of India and the Association of Southeast Asian Nations, ASEAN-India, Oct. 8, 2003, <http://asean.org/wp-content/uploads/2012/05/2003-Framework-Agreement-signed-copy.pdf>.

133. Helen E.S. Nesadurai, *Attempting Developmental Regionalism Through AFTA: The Domestic Sources of Regional Governance*, 24 THIRD WORLD Q. 235, 242–48 (2003).

134. ACHARYA, *supra* note 110, at 108.

safeguard members' interests and where, increasingly, law and its compliance were emphasized over self-interest and sovereignty.

IV. LEGAL AGENCY AMID INDO-PACIFIC CONTESTATION: LAW FOR RULES-BASED ORDERING (2007–ONGOING)

With its intensification of multilateral agreements and international adjudication, the legalized world order of the twenty-first century has forced ASEAN to keep up.¹³⁵ Constructivist cooperation laws that merely build unity and agendas are inadequate, as laws must direct state behavior. Since 2007, ASEAN has exercised legal agency through a proliferation of laws to manage its security environment and economic integration, thereby creating ASEAN's rules-based order.¹³⁶

In contrast with the scholarly theories of realism and constructivism, the “rules-based order” is a practitioner-led concept on who sets what rules of engagement in Indo-Pacific geopolitics and how these rules uphold international law.¹³⁷ The catchphrase has caught on with external powers—the Quadrilateral Security Dialogue (the “Quad” comprising the United States, Australia, India, and Japan) emphasizes a “rules-based order” based on international law, as well as support for ASEAN centrality.¹³⁸ The United States has also launched the Indo-Pacific Economic Framework for Prosperity (“IPEF”) to counter China's Belt and Road Initiative (“BRI”).¹³⁹ Concomitantly, China opposes a global order “advocated by a handful of countries,”

135. Judith Goldstein, Miles Kahler, Robert Keohane, & Anne-Marie Slaughter, *Introduction: Legalization and World Politics*, 54 INT'L ORG. 385 (2000).

136. See *supra* Figure 1.

137. Stephen M. Walt, *China Wants a 'Rules-Based International Order', Too*, FOREIGN POL'Y (Mar. 31, 2021), <http://foreignpolicy.com/2021/03/31/china-wants-a-rules-based-international-order-too>; Malcolm Jorgensen, *The Jurisprudence of the Rules-Based Order: The Power of Rules Consistent with but Not Binding Under International Law*, 22 MELB. J. INT'L L. 221, 236–37, 245–47, 251–56 (2021); John Dugard S.C., *The Choice Before Us: International Law or a "Rules-based International Order"?*, 36 LEIDEN J. INT'L L. 223, 223–24 (2023).

138. *Quad Leaders' Joint Statement: "The Spirit of the Quad"*, THE WHITE HOUSE (Mar. 12, 2021), ¶¶ 1–2, <http://www.whitehouse.gov/briefing-room/statements-releases/2021/03/12/quad-leaders-joint-statement-the-spirit-of-the-quad>.

139. *Fact Sheet: In Asia, President Biden and a Dozen Indo-Pacific Partners Launch the Indo-Pacific Economic Framework for Prosperity*, THE WHITE HOUSE (May 23, 2022), <http://www.whitehouse.gov/briefing-room/statements-releases/2022/05/23/fact-sheet-in-asia-president-biden-and-a-dozen-indo-pacific-partners-launch-the-indo-pacific-economic-framework-for-prosperity>; see also Kevin Chan, *Commentary: US Will Only Have Itself to Blame if China's Economic Influence in Asia Grows*, CHANNEL NEWS ASIA (Nov. 22, 2022), <http://www.channelnewsasia.com/commentary/us-china-trade-ipef-indo-pacific-economic-failure-3936531>.

while it expands BRI-ASEAN partnerships and professes ASEAN centrality in South China Sea negotiations.¹⁴⁰

Given the rules-based order's conceptual ambiguity amid Indo-Pacific contestation, and with its own welfare at stake, ASEAN exercises legal agency to define and promulgate a rules-based order to safeguard its security and economic interests and "continue being an honest broker," all whilst projecting ASEAN centrality amid competing powers.¹⁴¹ In implementing this rules-based order, ASEAN's law-making patterns are unchanged—treaties that members agree to be bound to continue to be adopted for fundamental security and economic issues, and soft law remains the modality for sensitive security issues and complex economic goals requiring more time and resources for realization.¹⁴² However, to correct non-compliance, fixed-period soft laws, like the community blueprints or work plans, rigorously specify interim milestones, final deadlines, and built-in monitoring mechanisms to pressure implementation.¹⁴³ Members' continued avoidance of litigation for treaty violations and prevalent soft law-usage means rules are primarily enforced through monitoring, even though dispute settlement mechanisms remain available and would likely be used for external economic treaties.¹⁴⁴ Although ASEAN laws may still deviate from the dominant benchmarks of treaty-making and compliance, there is now increased focus on compliance and implementation. Lacking military and economic might, exercising legal agency through its rules-based order is ASEAN's existential strategy to manage intraregional and external relations and safeguard security and economic interests amid heightening geopolitical pressures.¹⁴⁵

140. *International Order is Not Based on a So-called System and Order Advocated by a Handful of Countries: Chinese Embassy in the UK*, GLOBAL TIMES (June 12, 2021), <http://www.globaltimes.cn/page/202106/1226037.shtml>; see ASEAN-China Joint Statement on Synergising the Master Plan on ASEAN Connectivity (MPAC) 2025 and the Belt and Road Initiative (BRI), ASEAN-China, Nov. 3, 2019, <http://asean.org/asean-china-joint-statement-on-synergising-the-master-plan-on-asean-connectivity-mpac-2025-and-the-belt-and-road-initiative-bri>; Robert D. Williams, *International Law with Chinese Characteristics: Beijing and the "Rules-based" Global Order*, BROOKINGS INST. (Oct. 2020), <http://www.brookings.edu/research/international-law-with-chinese-characteristics-beijing-and-the-rules-based-global-order>; Sebastian Strangio, *Chinese FM Pledges Progress on South China Sea Code of Conduct*, THE DIPLOMAT (July 13, 2022), <http://thediplomat.com/2022/07/chinese-fm-pledges-progress-on-south-china-sea-code-of-conduct>.

141. *ASEAN Outlook on the Indo-Pacific*, *supra* note 2, ¶ 3.

142. See *infra* Parts IV.B–C.

143. Tan, *supra* note 10, at 359–68.

144. *Id.* at 375–78.

145. Abdulla Shahid, President of the U.N. Gen. Assembly, Remarks at the Informal High-level Roundtable on "Small States, Multilateralism and International Law", (Apr. 28, 2022), <http://www.un.org/pga/76/2022/04/28/informal-high-level-roundtable-on-small-states-multilateralism-and-international-law>.

A. *The Rules-Based Order's Framework*

The rationale for ASEAN exercising legal agency for rules-based ordering was articulated by the Eminent Persons Group (“EPG”).¹⁴⁶ The EPG’s mandate was to thoroughly examine ASEAN’s “achievements and shortcomings” and propose “visionary recommendations” for the drafting of the ASEAN Charter such that ASEAN could overcome contemporary geopolitical pressures and build a successful ASEAN Community for the twenty-first century.¹⁴⁷ The EPG was candid. It articulated that although ASEAN had achieved unity and fostered security and economic cooperation, it was unlikely to continue as the central “driving force” of external relations unless it could demonstrate its relevance to external partners and compete economically with China and India.¹⁴⁸ The EPG criticized past non-compliance and proposed a rules-based regional order where ASEAN would be a “structured Intergovernmental Organization . . . [with] legally-binding rules. . . .”¹⁴⁹ The ASEAN rules-based order would be the realization of the Bali Concord II’s goal of an integrated ASEAN Community—comprising the ASEAN Political-Security Community (“APSC”), ASEAN Economic Community (“AEC”), and ASEAN Socio-Cultural Community (“ASCC”) with ASEAN centrality in external relations—under a Charter framework that “codif[ie]d . . . ASEAN’s milestone declarations . . . and treaties.”¹⁵⁰ To enforce compliance, the EPG advised that dispute settlement and monitoring mechanisms be instituted for all ASEAN activities.¹⁵¹

In line with the EPG’s recommendations, ASEAN states exercised legal agency in adopting the Charter of the Association of Southeast Asian Nations (“Charter”) in 2007 as the “legal and institutional framework” of their rules-based order to pursue common security and economic interests within the region (for community integration) and externally (projecting ASEAN centrality to external partners).¹⁵² The community was set to be established by 2015.¹⁵³ Regional and international laws are important in ASEAN’s rules-based order. Article 2 of the Charter affirms “the declarations . . . treaties, and

146. The Eminent Persons Group (EPG) was an elite committee comprising ten “highly distinguished and well-respected citizens,” one from each member state, that was convened by the ASEAN leaders “to examine and provide practical recommendations on the directions and nature of the ASEAN Charter.” Eleventh ASEAN Summit, Terms of Reference of the Eminent Persons Group on the ASEAN Charter, ¶¶ 2, 5 (Dec. 12, 2005).

147. *Id.* ¶¶ 3–4.

148. *Report of the Eminent Persons Group on the ASEAN Charter*, *supra* note 88, ¶ 2.

149. *Id.* ¶ 43.

150. *Id.* ¶¶ 11, 57.

151. *Id.* ¶ 64.

152. Charter of the Association of Southeast Asian Nations pmbl., arts. 1, 2, 41, Nov. 20, 2007, 2624 U.N.T.S. 223 [hereinafter ASEAN Charter].

153. Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015, 12th ASEAN Summit, held in Cebu, Philippines, Jan. 13, 2007, <http://asean.org/cebu-declaration-on-the-acceleration-of-the-establishment-of-an-asean-community-by-2015>.

other instruments of ASEAN”; and Article 52 reiterates: “All treaties [and] . . . declarations . . . in effect before the entry into force of this Charter shall continue to be valid.”¹⁵⁴ Additionally, the Charter endorses the WTO regime and other existing international economic laws by pledging “adherence to multilateral trade rules and ASEAN’s rules-based regimes . . . “ as well as the non-use of force per the UN Charter and TAC.¹⁵⁵ As all rules—treaty and soft law alike—are intended to be implemented and procure results, Article 5 obligates members to take “all necessary measures to implement the Charter,” and Article 11 tasks the secretary-general with monitoring ASEAN cooperation and reporting it to the ASEAN Summit annually.¹⁵⁶ Arbitral mechanisms are available for rule enforcement or dispute settlement—political-security disputes are dealt with under the TAC,¹⁵⁷ while economic issues should be resolved either by using the mechanism specified in the disputed treaty or the EDSM (2004).¹⁵⁸

As implementing a rules-based order was challenging given the pre-2007 non-compliant habits, members further exercised legal agency to detail systematic steps in the political-security, economic, and socio-cultural community blueprints—the Charter’s fixed-period soft laws—that must be implemented to fulfill the Charter.¹⁵⁹ Despite challenges, members hit sufficient targets (especially the economic ones) in the first set of blueprints (2009–2015) to launch the ASEAN Community in 2015.¹⁶⁰ Members adopted successor blueprints (2016–2025) and established monitoring units in all three communities to improve implementation and monitoring of the “rules-based . . . ASEAN Community” and uphold ASEAN centrality in an “outward-looking region.”¹⁶¹ How ASEAN’s security and economic laws build its rules-based order is examined below.

154. ASEAN Charter, *supra* note 152, arts. 2, 52.

155. *Id.* art. 22, 22.

156. *Id.* arts. 5, 11(2)(b), 11(3).

157. *Id.* art. 24(2).

158. *Id.* art. 24(1, 3).

159. *ASEAN Political-Security Community (APSC) Blueprint (2009)* [hereinafter APSC Blueprint (2009–2015)], http://asean.org/wp-content/uploads/2021/03/APSC_BluePrint.pdf; *ASEAN Economic Community [AEC] Blueprint (2008)* [hereinafter AEC Blueprint (2007–2015)], <http://www.asean.org/wp-content/uploads/images/archive/5187-10.pdf>; *ASEAN Socio-Cultural Community (ASCC) Blueprint (2007)*, <http://cil.nus.edu.sg/wp-content/uploads/2019/02/2007-ASEAN-ECONOMIC-COMMUNITY-BLUEPRINT-1.pdf>.

160. On target fulfilment, see generally *infra* note 224 and accompanying text. For an incisive exposition on the challenges, For an incisive exposition on the challenges of target fulfillment, especially for the AEC, see Lee Jones, *Explaining the Failure of the ASEAN Economic Community: The Primacy of Domestic Political Economy*, 29 PAC. REV. 647 (2016).

161. *ASEAN Community Vision 2025*, ¶¶ 4–5, 8, 10, 12 (2015), <http://www.asean.org/wp-content/uploads/images/2015/November/aec-page/ASEAN-Community-Vision-2025.pdf>.

B. Rules-Based Security Ordering

Under the Charter's framework, members exercise legal agency in producing laws that direct state behavior in ASEAN's rules-based order within the region and externally. To uphold the Charter and build the rules-based order, the APSC blueprints (2009–2015; 2016–2025) develop ASEAN's three agendas of military security, countering terrorism and transnational crime, and disaster relief.¹⁶² The blueprint (2009–2015)—the “roadmap and timetable” to establish the APSC by 2015—required members to incorporate provisions into their “national development plans,” while the APSC Council would oversee implementation, and the secretary-general would monitor and report annual progress to the Summit.¹⁶³ Members aspired to prove progress including national defense agencies conducting ADMM activities and negotiating the binding Code of Conduct in the South China Sea (“COC”) with China.¹⁶⁴

Members are realistic about developing and complying with security agendas.¹⁶⁵ Thus, they exercise legal agency to instill open-ended implementation in the blueprint (2009–2015). For example, measures could “continue . . . beyond 2015 . . . to . . . have an enduring quality.”¹⁶⁶ Compliance pressure increased in the successor blueprint (2016–2025)—the rollover clause was replaced by expectations for “seamless implementation” to be achieved by improving coordination between the APSC Council, security-sectoral ministerial bodies, and the secretariat—and the APSC Council would report annual progress to the Summit.¹⁶⁷ These measures strengthened ASEAN's rules-based security order, with substantially enhanced cooperation, as seen in the ADMM-Plus exercises for field-training, counterterrorism, and disaster management and maritime security table-top exercises after the ASEAN Community's 2015 establishment.¹⁶⁸

162. APSC Blueprint (2009–2015), *supra* note 159, ¶¶ B.1–B.6, ¶¶ C.1–C.2; ASEAN Political-Security Community Blueprint (2016–2025), ¶¶ 3, 8, 10 (Mar. 2016) [hereinafter APSC Blueprint (2016–2025)], <http://www.asean.org/wp-content/uploads/2012/05/ASEAN-APSC-Blueprint-2025.pdf>.

163. APSC Blueprint (2009–2015), *supra* note 159, ¶¶ 5, 28, 32; APSC Blueprint (2016–2025), *supra* note 162, ¶¶ 14(A), 14(D).

164. APSC Blueprint (2009–2015), *supra* note 159, ¶¶ 16 A.2.2.–A.2.3; APSC Blueprint (2016–2025), *supra* note 162, ¶¶ A.1.1–A.1.5, B.1.2–B.6.1.

165. Tan, *supra* note 10, at 364–66.

166. APSC Blueprint (2009–2015), *supra* note 159, ¶ 5.

167. APSC Blueprint (2016–2025), *supra* note 162, ¶ 14(A).

168. ADMM, *About the ASEAN Defence Ministers' Meeting Plus* (Jan. 10, 2023) [hereinafter ADMM, *About the ASEAN Defence Ministers' Meeting Plus*], <http://admm.asean.org/index.php/about-admm/about-admm-plus.html>.

1. Military Security

Beyond the Charter and blueprints, ASEAN members exercise legal agency in developing security laws for the three agendas: military security, counterterrorism and transnational crime, and disaster relief.¹⁶⁹ Keeping with ASEAN's longstanding purpose of maintaining regional peace and security and conflict prevention, much emphasis is given to military security where intraregional and external cooperation occur mainly via ASEAN's security platforms—the ADMM (employing dialogue- and action-oriented modalities) and ARF (primarily a trust-building dialogue forum). As the highest intra-ASEAN defense and military cooperation platform, the ADMM oversees all rules-based interactions for, *inter alia*, the chiefs of defense forces, air force chiefs, navy chiefs, and military intelligence agencies.¹⁷⁰ The ADMM's 2007–2010 soft law directive—to uphold the Charter and security laws (including the TAC, SEANWFZ Treaty, and DOC); to persevere in negotiating the COC; and to cooperate substantively on counterterrorism, disaster relief, and conflict resolution—enunciates ASEAN's rules-based security order.¹⁷¹ The ADMM work program (2011–2013) expands these initiatives (for example, information-sharing on maritime security and peacekeeping), and its clear deadlines press ASEAN members into implementation.¹⁷²

ASEAN members exercised legal agency to intensify the rules-based intraregional security order as the 2015 launch of the ASEAN Community loomed. They adopted the ADMM Concept Paper on Establishing a Direct Communications Link (2014), enabling any two ASEAN Defense Ministers a confidential decision-making channel to handle “emergency situations . . . [especially in] maritime security” to prevent crisis escalation.¹⁷³ This soft law was a significant first step in boosting intra-ASEAN conflict management—as Professor Kei Koga notes, this direct communications link was the ADMM's “foremost contribution” and, thereafter, the ADMM sustained its “cautious institutional balancing” and relatively “advocative posture” (notably on South China Sea issues).¹⁷⁴ Consequently, ASEAN members

169. The discussion in this section will focus on and after events from 2007 onward. For discussion of these areas in the post-communist period prior to 2007, *see supra* Part III.B.

170. *Protocol to the Concept Paper for the Establishment of the ADMM*, ¶¶ 7, 8 (2007), <http://cil.nus.edu.sg/wp-content/uploads/2019/02/2007-Protocol-to-the-ADMM-Concept-Paper.pdf>.

171. ADMM, *Work Programme (2008–2010)*, §§ 2–4, http://admm.asean.org/dmdocuments/3.%20Annex%20F_ADMM%203-Year%20Work%20Programme.pdf.

172. ADMM, *Three-Year Work Program (2011–2013)*, ¶¶ 2.1.3, 3.2.1, <http://admm.asean.org/dmdocuments/11.%20ANNEX%208-%20ADMM-3-Year-Work-Program%202010-2013.pdf>.

173. ADMM, *Concept Paper on Establishing a Direct Communications Link in the ADMM Process*, ¶¶ 5, 10.1 (May 21, 2014), [http://admm.asean.org/dmdocuments/Concept%20Paper%20on%20Establishing%20a%20DCL%20in%20the%20ADMM%20Process%20\(Final\).pdf](http://admm.asean.org/dmdocuments/Concept%20Paper%20on%20Establishing%20a%20DCL%20in%20the%20ADMM%20Process%20(Final).pdf).

174. Kei Koga, *ASEAN's Evolving Institutional Strategy: Managing Great Power Politics in South China Sea Disputes*, 11 CHINESE J. INT'L POL. 49, 75 (2018).

further exercised their legal agency to strengthen rules-based ordering in aerial and naval security. Notably, the ADMM Guidelines for Air Military Encounters (2018) underscored the non-use of force in the ASEAN Charter and international law and stipulated how military aircrew should prevent interpersonal incidents from “spiralling [sic] into conflict.”¹⁷⁵ For example, pilots should not use uncivil language and gestures and should not endanger the safety of other aircraft by flying closely or using lasers.¹⁷⁶ Similarly, rules were adopted for maritime interaction (2019), which forbid the use of force and encourage peaceful conflict resolution according to ASEAN laws and international laws like UNCLOS.¹⁷⁷ Compliance would be monitored by the ASEAN naval chiefs and reported to the ADMM.¹⁷⁸ Additionally, for amicable rules-based border management, the ADMM adopted a concept paper (2019) that reiterated the ASEAN Charter’s obligation to respect territorial integrity and non-interference while reinforcing the blueprint’s (2016–2025) commitment to cooperation against transnational crime.¹⁷⁹ Despite being soft laws, the exercise of legal agency through these rules to co-operate on substantive security issues propelled the growth of ASEAN’s intraregional security order.¹⁸⁰

ASEAN members also exercised legal agency for rules-based ordering of external security relations and to project ASEAN centrality. They adopted the ADMM-Plus Concept Paper (2007) that acknowledged the goal of engaging foreign powers for their “expertise, perspectives and resources.”¹⁸¹ The ADMM-Plus was formed in 2010 between ASEAN and eight of its dialogue partners (Australia, China, India, Japan, New Zealand, Korea, Russia, and the United States; collectively, “Plus Countries”) to increase transparent defense engagement whilst anchoring ASEAN centrality amid intensifying geopolitical pressures.¹⁸² The ADMM-Plus has enabled ASEAN to exercise agency within its rules-based order, steering its interests amid external powers’

175. ADMM, *Guidelines for Air Military Encounters*, ¶¶ 3, 7–11 (Oct. 19, 2018), [http://admm.asean.org/dmdocuments/2018_Oct_12th%20ADMM_Singapore,%2019%20October%202018_\[Final\]%20Guidelines%20for%20Air%20Military%20Encounters.pdf](http://admm.asean.org/dmdocuments/2018_Oct_12th%20ADMM_Singapore,%2019%20October%202018_[Final]%20Guidelines%20for%20Air%20Military%20Encounters.pdf).

176. *Id.* annex, B4, D3.

177. ADMM *Guidelines for Maritime Interaction*, ¶¶ 4.4, 13 (July 11, 2019), [http://admm.asean.org/dmdocuments/2019_July_13th%20ADMM_Bangkok,%2011%20July%202019_6.%20\(Final\)%20ADMM%20Guidelines%20for%20Maritime%20Interaction.pdf](http://admm.asean.org/dmdocuments/2019_July_13th%20ADMM_Bangkok,%2011%20July%202019_6.%20(Final)%20ADMM%20Guidelines%20for%20Maritime%20Interaction.pdf).

178. *Id.* ¶¶ 40–43.

179. ADMM, *Concept Paper on the Role of ASEAN Defence Establishments in Supporting Border Management*, ¶¶ 3, 4(c), 5 (July 11, 2019), [http://admm.asean.org/dmdocuments/2019_July_13th%20ADMM_Bangkok,%2011%20July%202019_2.%20\(Final\)%20Border%20Management.pdf](http://admm.asean.org/dmdocuments/2019_July_13th%20ADMM_Bangkok,%2011%20July%202019_2.%20(Final)%20Border%20Management.pdf).

180. See, e.g., Koga, *supra* note 174, at 75 (discussing how regional soft law expressions on the South China Sea via the ADMM platform enabled a mechanism of “institutional balancing” vis-à-vis China).

181. ADMM-Plus, *Concept Paper*, ¶¶ 3, 4 (Nov. 14, 2007), <http://cil.nus.edu.sg/wp-content/uploads/2020/10/2007-ADMM-Plus-Concept-Paper-1.pdf>.

182. See ADMM, *About the ASEAN Defence Ministers’ Meeting Plus*, *supra* note 168.

competing interests.¹⁸³ Since 2011, the ADMM-Plus has expanded rules-based ordering to cover field training and “table-top” exercises on maritime security, counterterrorism, disaster management, peacekeeping, military medicine, humanitarian action, and cyber security.¹⁸⁴ These efforts culminated in the ADMM-Plus Declaration (2021), which upheld the ADMM-Plus as the “main” ASEAN-centered defense cooperation mechanism and external partners committed to further military exercises on Indo-Pacific challenges.¹⁸⁵ Even acknowledging that external powers—notably the United States and China—exert pressure on ASEAN, the effectiveness of ASEAN’s rules-based order is evidenced by the fact that both countries enunciate respect for ASEAN centrality.¹⁸⁶

The ARF continues to be important to ASEAN’s rules-based ordering of external security relations. Unlike the more action-focused ADMM-Plus, the ARF conducts shallower, dialogue-centric engagement given its bigger pool of participants.¹⁸⁷ The ARF Vision Statement (2009) sets out rules reiterating the non-use of force in the ASEAN and UN Charters and expresses the ARF’s goal to develop preventive diplomacy, “action-oriented” mechanisms, and conflict resolution modalities.¹⁸⁸ ARF members have implemented soft laws encouraging, *inter alia*, preventive diplomacy discussions (2011, 2013); workshops on non-proliferation, disarmament, and peaceful use of nuclear technology (2012); and field and table-top exercises for maritime security (2015–2017).¹⁸⁹ The ARF has also broached new rules-based dialogue agendas like aviation (2019) and infectious diseases (2020).¹⁹⁰ Most prominently,

183. See Margaryta Rymarenko, *Institutional Strategies in Regional Role Location Process: ASEAN, China, and Great Power Management in ADMM Plus*, 59 INT’L POL. 577–96 (2022).

184. See ADMM, *About the ASEAN Defence Ministers’ Meeting Plus*, *supra* note 168.

185. *Bandar Seri Begawan Declaration by the ADMM-Plus in Commemoration of the 15th Anniversary of the ADMM on Promoting a Future-Ready, Peaceful and Prosperous ASEAN*, ¶¶ 1, 2, 3, 9, 10 (June 16, 2021), <http://asean.org/wp-content/uploads/BANDAR-SERI-BEGAWAN-DECLARATION-BY-THE-ADMM-PLUS.pdf>.

186. See *supra* notes 138 and 140 and the accompanying text.

187. Tan, *supra* note 102, at 264–65.

188. ARF, *ASEAN Regional Forum Vision Statement*, ¶¶ 5, 7 (July 23, 2009), <http://aseanregionalforum.asean.org/wp-content/uploads/2018/07/ARF-Vision-Statement-2009.pdf>.

189. ARF, *Preventive Diplomacy Work Plan* (July 23, 2011), http://aseanregionalforum.asean.org/wp-content/uploads/2019/02/DOC.6_ARF-Work-Plan-on-Preventive-Diplomacy.pdf; ARF, *Concept Paper on Moving Towards Preventive Diplomacy* (July 2, 2013), <http://aseanregionalforum.asean.org/wp-content/uploads/2019/01/ARF-Concept-Paper-of-Preventive-Diplomacy.pdf>; ARF, *Non-Proliferation and Disarmament Work Plan*, at 4–7 (July 12, 2012), <http://aseanregionalforum.asean.org/wp-content/uploads/2023/05/ARF-ISM-NPD-Work-Plan-final-version-for-circulation-and-consideration-at-ISG.pdf>; ARF, *Work Plan for Maritime Security 2015-2017* (June 8, 2015), <http://aseanregionalforum.asean.org/wp-content/uploads/2018/07/ARF-Work-Plan-on-Maritime-Security-2015-2017.pdf>.

190. ARF, *Statement on Aviation Partnership: Soaring Ahead Together* (Aug. 2, 2019), <http://aseanregionalforum.asean.org/wp-content/uploads/2019/08/ARF-Aviation->

given the rising Indo-Pacific tensions, the ARF has reaffirmed the importance of the UN Charter and the TAC and calls on all states to “exercise self-restraint [and] . . . refrain from the threat or use of force, . . . and to resolve differences and disputes by peaceful means in accordance with international law.”¹⁹¹ Although these professions do not quell frictions, ASEAN’s ability to exercise its legal agency to act through the ARF—including ensuring that every participant publicly commits to upholding Indo-Pacific amicability—signifies some buy-in to ASEAN’s centrality and rules-based order.

2. Countering Terrorism and Transnational Crime

ASEAN exercises legal agency to counter terrorism and transnational crime (including radicalization, human and drug trafficking, and money laundering). The strong common interest in tackling terror operatives has resulted in the agreement to be legally-bound to one another through two treaties—the ASEAN Convention on Counter Terrorism (2007) and ASEAN Convention against Trafficking in Persons, Especially Women and Children (“ACTIP”, 2015).¹⁹² Rules-based implementation remains guided by time-limited soft laws combatting: terrorism (2009, 2017), radicalization and violent extremism (2019–2025), human trafficking (2015, 2017–2020), drug trafficking (2009–2015, 2016–2025), and transnational crime (2016–2025).¹⁹³ These rules are comprehensive and holistic, as they not only address typical security concerns, but also target root causes (such as unemployment and lack of education),¹⁹⁴ encourage national agencies (including health, social matters, education, and home affairs) to protect and forewarn at-risk persons,¹⁹⁵ and

Statement_FINAL.pdf; *Strengthening ASEAN’s Economic Resilience in Response to the Outbreak of the Coronavirus Disease (Covid-19)* (Mar. 10, 2020), <http://asean.org/strengthening-aseans-economic-resilience-in-response-to-the-outbreak-of-the-coronavirus-disease-covid-19>.

191. ARF, *Statement to Promote Peace, Stability, and Prosperity Through Confidence Building Measures and Preventive Diplomacy*, ¶ 5 (Aug. 5, 2022), http://aseanregionalforum.asean.org/wp-content/uploads/2022/09/Final_ASEAN_Regional_Forum_Statement_to_Promote_Peace_Stability.pdf.

192. Convention on Counter Terrorism (Jan. 13, 2007), <http://asean.org/wp-content/uploads/2021/01/ACCT.pdf>; Convention Against Trafficking in Persons, Especially Women and Children (Nov. 21, 2015), <http://www.asean.org/wp-content/uploads/2015/12/ACTIP.pdf>.

193. See, e.g., *Comprehensive Plan of Action on Counter Terrorism* (Sept. 20, 2017), <http://asean.org/wp-content/uploads/2012/05/ACPoA-on-CT-Adopted-by-11th-AMMTC.pdf>; *Plan of Action to Prevent and Counter the Rise of Radicalization and Violent Extremism* (2018–2025) (Oct. 31, 2018), <http://asean.org/wp-content/uploads/2021/01/Adopted-ASEAN-PoA-to-Prevent-and-Counter-PCVE-1.pdf>; *Plan of Action in Combating Transnational Crime* (2016–2025) (Sept. 20, 2017), http://asean.org/wp-content/uploads/2021/01/ASEAN-Plan-of-Action-in-Combating-TC_Adopted-by-11th-AMMTC-on-20Sept17-3.pdf.

194. See, e.g., *Plan of Action to Prevent and Counter the Rise of Radicalization and Violent Extremism* (2018–2025), *supra* note 193, § III(d).

195. See, e.g., *Bohol Trafficking in Persons Work Plan 2017–2020*, §§ A(a), (b), (e) (Nov. 13, 2017), http://asean.org/wp-content/uploads/2021/01/Final-Version-of-Bohol-TIP-Work-Plan-2017-2020_13Nov2017.pdf.

highlight remedies and repatriation for victims.¹⁹⁶ Above all, rules-based ordering requires implementation and compliance monitoring.¹⁹⁷

Additionally, apart from ARF aspirations to expand ASEAN's rules-based order guiding cooperation on, *inter alia*, cybersecurity (2012), drug trafficking (2017), illegal fishing (2017), and violent extremism (2019),¹⁹⁸ more substantive external cooperation to counter terrorism and transnational crime occurs through smaller multilateral initiatives. ASEAN and eight dialogue partners (Australia, China, India, Japan, New Zealand, Korea, Russia, and the United States) have adopted the East Asia Summit ("EAS") declarations against wildlife trafficking (2014), human trafficking (2016), and money laundering and terrorist financing (2017).¹⁹⁹ Notably, it is significant in respect of ASEAN's rules-based security order that these laws emphasize respect for international and ASEAN laws—for instance, the EAS declaration against human trafficking (2016) urged the "full implementation" of the ACTIP and the United Nations Convention against Transnational Organized Crime, other ASEAN and international laws, and the institutional frameworks already in operation.²⁰⁰ Moreover, ASEAN and Australia have signed a counterterrorism declaration (2016) that was reinforced by a binding

196. *Id.* §§ B(c), (e), (f).

197. *See, e.g., The ASEAN Work Plan on Securing Communities Against Illicit Drugs 2016–2025*, § V, <http://asean.org/wp-content/uploads/2017/07/Doc-2-Publication-ASEAN-WP-on-Securing-Communities-Against-Illicit-Drugs-2016-2025.pdf>.

198. *See, e.g., ARF, Statement by the Ministers of Foreign Affairs on Cooperation in Ensuring Cyber Security* (July 12, 2012), <http://aseanregionalforum.asean.org/wp-content/uploads/2019/01/ARF-Statement-on-Cooperation-in-Ensuring-Cyber-Security.pdf>; ARF, *Statement on Enhancing Co-operation in Addressing and Countering the Drug Problem* (Aug. 7, 2017), <http://aseanregionalforum.asean.org/wp-content/uploads/2019/01/ARF-Statement-on-Enhancing-Cooperation-in-Addressing-and-Countering-the-Drug-Problem-Manila-the-Philippines-7-August-2017.pdf>; ARF, *Statement on Co-operation to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing* (Aug. 7, 2017), <http://aseanregionalforum.asean.org/wp-content/uploads/2019/01/ARF-Statement-on-Cooperation-to-Prevent-Deter-and-Eliminate-Illegal-Unreported-and-Unregulated-Fishing-Manila-the-Philippines-7-August-2017.pdf>; ARF, *Statement on Preventing and Countering Terrorism and Violent Extremism Conducive to Terrorism* (Aug. 2, 2019), http://aseanregionalforum.asean.org/wp-content/uploads/2019/08/ARF-Statement-on-Counter-Terrorism-and-VECT_FINAL.pdf.

199. *See, e.g., East Asia Summit [EAS], Declaration on Anti-Money Laundering and Countering the Financing of Terrorism* (Nov. 14, 2017), http://asean.org/wp-content/uploads/2017/11/1.-FINAL_EAS-AML-and-CFT-Leaders-Statement-14-Nov-2017.pdf; EAS, *Declaration on Strengthening Responses to Migrants in Crisis and Trafficking in Persons* (Sept. 8, 2016), <http://asean.org/wp-content/uploads/2016/09/EAS-Declaration-on-Strengthening-Responses-to-Migrants-in-Crisis-and-TIP1.pdf>; EAS, *Declaration on Combating Wildlife Trafficking* (Nov. 13, 2014), <http://asean.org/wp-content/uploads/2012/05/25th-EAS-declaration-on-combating-wldlife-trafficking.pdf>.

200. EAS, *Declaration on Strengthening Responses to Migrants in Crisis and Trafficking in Persons*, ¶¶ 3–7 (Sept. 8, 2016), <http://asean.org/wp-content/uploads/2016/09/EAS-Declaration-on-Strengthening-Responses-to-Migrants-in-Crisis-and-TIP1.pdf>.

memorandum of understanding (2018).²⁰¹ While admittedly small, these examples indicate that ASEAN's exercise of legal agency has some impact on safeguarding common interests.

3. Disaster Relief and Humanitarian Assistance

Cooperating on disaster relief and humanitarian assistance is the ASEAN rules-based security order's third main agenda. ASEAN states exercised their legal agency to bolster the 2005 Agreement on Disaster Management and Emergency Response with the treaty establishing the ASEAN Coordinating Centre for Humanitarian Assistance on Disaster Management (2011; commonly known as the "AHA Centre")—adopting declarations (2013, 2015, 2016, 2017) and work plans (2010–2015, 2016–2020, 2021–2025) that articulate crisis management rules on risk assessment, prevention and mitigation, and compliance monitoring.²⁰² Guided by these rules, the AHA Centre has carried out important activities, including the ground-breaking mission to Rakhine State in 2019 to assess the violence against and displacement of the Rohingya, the delivery of medical supplies to the Myanmar Red Cross Society to tackle COVID-19 in 2021, and the EU-supported program to strengthen ASEAN's overall capacity in disaster monitoring and emergency response.²⁰³

In conclusion, while ASEAN's intensive exercise of legal agency to build its rules-based security order through a proliferation of laws and activities may seem impotent—especially in the face of U.S.-China pressures and given that cessation of violence and restoration of democracy in post-2021 coup Myanmar remains challenging—there is progress relative to pre-2007. Compliance is gradually improving, and the laws build and reinforce ASEAN's

201. Joint Declaration for Cooperation to Combat International Terrorism, ASEAN-Austl., Sept. 7, 2016, <http://asean.org/asean-australia-joint-declaration-for-cooperation-to-combat-international-terrorism>; Memorandum of Understanding Between the Association of Southeast Asian Nations and the Government of Australia on Cooperation to Counter Terrorism, ASEAN-Austl., Mar. 17, 2018, <http://cil.nus.edu.sg/wp-content/uploads/2019/10/2018-ASEAN-AUSTRALIA-MOU-ON-COOPERATION-TO-COUNTER-INTERNATIONAL-TERRORISM.docx>.

202. See, e.g., *Agreement on the Establishment of the ASEAN Co-ordinating Centre for Humanitarian Assistance on Disaster Management* (Nov. 17, 2011), <http://agreement.asean.org/media/download/20220330063452.pdf>; *ASEAN Agreement on Disaster Management and Emergency Response Work Programme 2021–2025*, at 27–35, 77–99, (2020), <http://asean.org/wp-content/uploads/2021/08/AADMER-Work-Programme-2021-2025.pdf>.

203. *ASEAN SecGen Briefs Diplomatic Corps on the Preliminary Needs Assessment for Repatriation in Rakhine State, Myanmar*, ASEAN NEWS (June 14, 2019), <http://asean.org/asean-secgen-briefs-diplomatic-corps-on-the-preliminary-needs-assessment-for-repatriation-in-rakhine-state-myanmar>; *ASEAN Delivers Medical Support for COVID-19 Response to the People of Myanmar*, ASEAN NEWS (Sept. 15, 2021), <http://asean.org/asean-delivers-medical-support-to-myanmars-response-to-covid-19>; *EU Announces Support to Humanitarian and Emergency Response in ASEAN*, ASEAN COORDINATING CENTRE FOR HUMANITARIAN ASSISTANCE ON DISASTER MGMT. (Jan. 27, 2020), <http://ahacentre.org/press-release/eu-saha-programme-launch/#:~:text=Jakarta%2C%2027%20January%202020%2CTo,to%20start%20in%20early%202020>.

rules-based security order to strengthen intraregional relations and signal to Indo-Pacific partners that ASEAN centrality and its rules—especially the prohibition on the use of force and respect for ASEAN and international laws—must be respected. Within the region, although the Myanmar crisis appears intractable, ASEAN remains cognizant that the crisis must be alleviated, tasking their foreign ministers with ensuring the Myanmar Armed Forces comply with their express commitment to restoring peace and calling upon all Myanmar parties to support the secretary-general and AHA Centre in humanitarian missions.²⁰⁴ Similarly, in external relations, while the goal of adopting a legally-binding COC with China remains elusive given the overlapping demands by claimant states and big power tensions,²⁰⁵ the implicit understanding among stakeholders that a treaty codifying peaceful engagement is beneficial (despite obvious negotiation difficulties)²⁰⁶ contrasts with the past where parties rejected multilateral negotiations and being bound to shared goals.²⁰⁷ The fact that the COC negotiations continue to center around international law, especially UNCLOS, makes it very clear that international law is now an indelible part of ASEAN’s rules-based security order and that larger powers—whether China, the United States, or anyone else—should not think they can easily trump ASEAN’s legal agency.²⁰⁸

C. Rules-Based Economic Ordering

As in the security order, ASEAN states exercised legal agency to form their rules-based economic order guided by the Charter, the two AEC blueprints (2007–2015; 2016–2025), and economic treaties and soft laws. ASEAN’s rules-based economic order is a straightforward agenda—integrate within the region to enable ASEAN’s “single market and production base” to attract external partners to invest and build global supply chain connectivity,²⁰⁹ thereby enabling ASEAN to retain “centrality in global and regional

204. ASEAN Foreign Ministers’ Statement on the Escalation of Conflicts in Myanmar (Apr. 18, 2024), <http://asean.org/wp-content/uploads/2024/04/Final-ASEAN-FM-Statement-on-the-Escalation-of-Conflicts-in-Myanmar-1.pdf>; ASEAN Leaders’ Review and Decision on the Implementation of the Five-Point Consensus, ¶¶ 5–12 (Nov. 11, 2022), http://asean.org/wp-content/uploads/2022/11/06-ASEAN-Leaders-Review-and-Decision-on-the-Implementation-of-the-Five-Point-Consensus_fin.pdf.

205. Jorgensen, *supra* note 137, at 243–58.

206. See Arlina Arshad, *China Promises to Work with ASEAN for Peace and Stability in South China Sea*, STRAITS TIMES (Feb. 22, 2023), <http://www.straitstimes.com/asia/se-asia/china-promises-to-work-with-asean-for-peace-and-stability-in-south-china-sea>.

207. Viet Hoang, *The Code of Conduct for the South China Sea: A Long and Bumpy Road*, THE DIPLOMAT (Sept. 28, 2020), <http://thediplomat.com/2020/09/the-code-of-conduct-for-the-south-china-sea-a-long-and-bumpy-road>.

208. See Chairman’s Statement of the Forty-third ASEAN Summit ¶¶ 3–5, 48, 137, 157 (Sept. 5, 2023), http://www.asean2023.id/storage/news/CHAIRMAN-STATEMENT_43rd_ASEAN-SUMMIT_FIN.pdf.

209. AEC Blueprint (2007–2015), *supra* note 159, ¶¶ 5–8, 64.

engagements.”²¹⁰ The metamorphosis into an ASEAN rules-based economic order encompassing intraregional integration and projecting ASEAN centrality in external cooperation—while still maintaining intergovernmental modes of cooperation and avoiding litigation for dispute settlement²¹¹—is explained below.

Through the first blueprint (2007–2015), ASEAN members exercised legal agency to lay out how rules-based economic integration should form the AEC by 2015.²¹² They entrenched rules for an effective and comprehensive ASEAN Free Trade Area by removing tariffs and non-tariff barriers,²¹³ harmonizing customs procedures and rules of origin certification (especially encouraging usage of the ASEAN Single Window to reduce time and costs for cargo clearance),²¹⁴ easing labor movements for professionals,²¹⁵ building transport networks and infrastructure,²¹⁶ and attracting foreign investment by improving application procedures and investor protections.²¹⁷ In exercising legal agency for rules-based ordering of external economic relations, ASEAN seeks centrality as it strengthens its presence in the global economy and supply chains.²¹⁸

While the blueprint is soft law, rules-based ordering requires compliance. Thus, members exercise legal agency in the blueprints by using treaty-like language and imposing a strategic schedule with annual targets covering all related economic treaties and soft laws to direct state behavior. For example, the first blueprint (2007–2015) states that all members “will” eliminate import duties on non-sensitive products by 2010,²¹⁹ and it provides that all national customs processes are required to incorporate the ASEAN Single Window “by 2008 at the latest.”²²⁰ Furthermore, to uphold ASEAN Framework Agreement on Services (“AFAS”) obligations, the progressive services liberalization of priority sectors such as tourism and logistics is laid out.²²¹ ASEAN economic ministers must review the implementation of the blueprint and its strategic schedule, while the secretary-general must monitor compliance, and arbitration via the EDSM may be used to promote compliance in “a rules-based community.”²²²

210. ASEAN Economic Community Blueprint 2025, ¶ 79 (2015) [hereinafter AEC Blueprint (2016–2025)], http://asean.org/wp-content/uploads/2021/08/AECBP_2025r_FINAL.pdf.

211. Tan, *supra* note 10, 369–78.

212. AEC Blueprint (2007–2015), *supra* note 159, ¶ 3.

213. *Id.* ¶ 11.

214. *Id.* ¶¶ 11–15, 18.

215. *Id.* ¶¶ 20–21.

216. *Id.* ¶¶ 46–48.

217. *Id.* ¶¶ 26–27.

218. *Id.* ¶¶ 64–65.

219. The CLMV had until 2015 to eliminate such duties. *Id.* ¶¶ 13(i).

220. The CLMV was required to comply by “no later than 2012.” *Id.* ¶ 18(i)–(ii).

221. *Id.* at ¶ 21(i), p. 37.

222. *Id.* ¶¶ 67, 70–73.

Exercising legal agency to build a rules-based economic order entails significant perseverance. It was only after the blueprint was largely on track (92.7% implementation in October 2015) that members felt confident in launching the ASEAN Community.²²³ As unfulfilled targets remained, the successor blueprint's (2016–2025) “immediate priority” was its predecessor's completion by the end of 2016.²²⁴ Additionally, to deepen ASEAN's rules-based economic order, the blueprint (2016–2025) prioritizes enhancing production networks and supply chains, enlarging the ASEAN Single Window's coverage to include more types of goods; streamlining customs procedures further; reducing non-tariff barriers by harmonizing standards and implementing mutual recognition arrangements; and boosting public-private sector partnerships for equitable development.²²⁵

Other features of the second blueprint (2016–2025) include that members also pursue ASEAN centrality in external economic cooperation with key Indo-Pacific partners—notably China, Japan, Australia, India, and the United States.²²⁶ To heighten ASEAN's legal agency and entrench the influence of its rules-based economic order, members should support the multilateral trading system and develop a common external economic strategy.²²⁷ To ensure the rules-based economic order's efficacy, ASEAN economic ministers pledged to “monitor and enforce compliance of all [its] measures” and resolve non-compliance, the secretary-general and secretariat were expected to track implementation using detailed methodologies, and the EDSM could be activated for dispute settlement.²²⁸ Such emphasis on monitoring and enforcement signifies a move to emphasizing law's compliance dimensions.

1. Intraregional Integration

Beyond the Charter and its economic blueprints, ASEAN members exercise legal agency by adopting treaties for fundamental trade and investment interests, as well as soft laws to implement these treaties or to pursue complex, long-term trade and investment goals to further the intraregional integration and external cooperation agendas of their rules-based economic order. Besides the major treaties establishing trade and investment fundamentals, such as the ASEAN Comprehensive Investment Agreement (2009) and ASEAN Trade in Goods Agreement (2009),²²⁹ many treaties were adopted to

223. ASEAN Secretariat, *ASEAN Economic Community 2015: Progress and Key Achievements*, at 17 (2015), http://asean.org/wp-content/uploads/2021/09/1.-AEC-2015-Progress-and-Key-Achievements_04.11.2015.pdf.

224. AEC Blueprint (2016–2025), *supra* note 210, ¶¶ 3–4.

225. *See* AEC Blueprint (2016–2025), *supra* note 210, ¶ 10.

226. *See id.* ¶ 79.

227. *See id.* ¶ 80.

228. *See id.* ¶ 82.

229. *See, e.g.*, ASEAN Comprehensive Investment Agreement, Feb. 26, 2009, <http://agreement.asean.org/media/download/20140119035519.pdf>; ASEAN Trade in Goods

improve transportation links in supply chains and tourism,²³⁰ streamline customs protocols (notably the ASEAN Single Window project) and facilitate free movement of goods,²³¹ and implement the AFAS on labor movements (including expanding mutual recognition arrangements for medical, tourism, and other professionals).²³² ASEAN members also adopted many fixed-period soft laws with implementation and monitoring schedules that embarked on large-scale, long-term projects on energy and telecommunications,²³³ transportation network expansion (covering maritime and aviation markets),²³⁴ deeper customs harmonization,²³⁵ and financial market harmonization on capital markets, debt, and equities.²³⁶

After the AEC's 2015 establishment, ASEAN members exercised their legal agency to enlarge their rules-based economic order with treaties for, *inter alia*, accelerating electronic commerce;²³⁷ increasing mutual recognition

Agreement, Feb. 26, 2009, <http://asean.org/asean2020/wp-content/uploads/2020/12/ASEAN-Trade-in-Goods-Agreement.pdf>.

230. See, e.g., ASEAN Framework Agreement on the Facilitation of Inter-State Transport Dec. 10, 2009, <http://asean.org/wp-content/uploads/images/archive/documents/Inter-State%20Transport%20Agreement.pdf>; *ASEAN Multilateral Agreement on Air Services* (May 20, 2009), <http://agreement.asean.org/media/download/20140119030138.pdf>.

231. See, e.g., *Protocol on the Legal Framework to Implement the ASEAN Single Window* (Sept. 4, 2015), <http://agreement.asean.org/media/download/20150915020056.pdf>; ASEAN Agreement on Customs, Mar. 30, 2012, <http://asean.org/wp-content/uploads/2020/12/ASEAN-Agreement-on-Customs-3.pdf>.

232. See, e.g., ASEAN Agreement on the Movement of Natural Persons, Nov. 19, 2012, <http://agreement.asean.org/media/download/20140117162554.pdf>; ASEAN Mutual Recognition Arrangement on Medical Practitioners, Feb. 26, 2009, <http://asean.org/asean-mutual-recognition-arrangement-on-medical-practitioners>; *Guide to ASEAN Mutual Recognition Arrangement on Tourism Professionals* (Dec. 28, 2012), <http://www.asean.org/wp-content/uploads/images/2013/economic/MRA%20GUIDE%20for%20Tourism%20Professionals.pdf>.

233. See, e.g., *ASEAN Plan of Action for Energy Cooperation (2010-2015)* (Dec. 14, 2010), <http://asean.org/wp-content/uploads/2022/12/APAEC-2010-2015.pdf>; *ASEAN ICT Masterplan 2015* (2015), http://asean.org/wp-content/uploads/2021/09/1.-AEC-2015-Progress-and-Key-Achievements_04.11.2015.pdf.

234. See, e.g., Econ. Rsch. Inst. For ASEAN and E. Asia [ERIA] Study Team, *ASEAN Strategic Transport Plan (2011-2015)* (Oct. 2010), <http://www.eria.org/ASEAN%20Strategic%20Transport%20Plan.pdf>.

235. See, e.g., *Strategic Plan of Customs Development 2011-2015* (June 9, 2011), http://asean.org/wp-content/uploads/images/archive/SPCD%202011_2015%20Policy%20Document%202.pdf.

236. See, e.g., ASEAN Cap. Mkts. F. [ACMF], *2009-2015 Implementation Plan for ASEAN Capital Markets Integration* (Sept. 4, 2009), <http://www.theacmf.org/images/downloads/pdf/ACMF%20Implementation%20Plan%202009-2015.pdf>; ACMF, *ASEAN Debt Securities Disclosure Standards* (Apr. 1, 2013), <http://www.theacmf.org/images/downloads/pdf/ACMF%20Implementation%20Plan%202009-2015.pdf>.

237. See, e.g., ASEAN Agreement on Electronic Commerce, Jan. 22, 2019, <http://agreement.asean.org/media/download/20190306035048.pdf>.

of medicinal products,²³⁸ food safety,²³⁹ and flight crew licensing;²⁴⁰ and liberalizing services further with the 2020 ASEAN Trade in Services Agreement (“ATISA”).²⁴¹ Strongly pushing for future arbitral enforcement, the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (2019) was adopted with more realistic decision-making timeframes than the EDSM (2004). For instance, Article 10(2) allows the arbitral panel six months to issue its report (up from sixty days),²⁴² and Article 14(5) allows the appellate body sixty days to issue its report (up from thirty days).²⁴³ Members also adopted many fixed-period soft laws to initiate or deepen integration on complex sectors like competition,²⁴⁴ intellectual property,²⁴⁵ financial and capital markets,²⁴⁶ consumer protection,²⁴⁷ energy,²⁴⁸ transport,²⁴⁹ and the digital

238. See, e.g., ASEAN Mutual Recognition Arrangement for Bioequivalence Study Reports of Generic Medicinal Products, Nov. 2, 2017, <http://agreement.asean.org/media/download/20171122163335.pdf>.

239. See, e.g., ASEAN Sectoral Mutual Recognition Arrangement for Inspection and Certification Systems on Food Hygiene for Prepared Foodstuff Products, Apr. 27, 2018, <http://agreement.asean.org/media/download/20180522045752.pdf>.

240. See, e.g., ASEAN Mutual Recognition Arrangement on Flight Crew Licensing, Oct. 13, 2017, <http://agreement.asean.org/media/download/20180223163247.pdf>.

241. See, e.g., ASEAN Trade in Services Agreement, Oct. 7, 2020, <http://agreement.asean.org/media/download/20201111041414.pdf>.

242. ASEAN Protocol on Enhanced Dispute Settlement Mechanism art. 10, ¶ 2, Dec. 20, 2019, <http://agreement.asean.org/media/download/20200128120825.pdf>; see also EDSM, *supra* note 129, art. 8, ¶ 2.

243. ASEAN Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 242, art. 14, ¶ 5; see also EDSM, *supra* note 129, art. 9, ¶ 1.

244. See, e.g., *ASEAN Competition Action Plan (2016–2025)*, <http://asean.org/asean2020/wp-content/uploads/2021/01/ASEAN-Competition-Action-Plan-ACAP-2016-2025.pdf>.

245. See, e.g., *ASEAN Intellectual Property Rights Action Plan (2016–2025)*, <http://asean.org/wp-content/uploads/2021/01/ASEAN-INTELLECTUAL-PROPERTY-RIGHTS-ACTION-PLAN-2016-2025.pdf>.

246. See, e.g., *ASEAN Tourism Strategic Plan (2016–2025)*, <http://asean.org/wp-content/uploads/2012/05/ATSP-2016-2025.pdf>; ACMF, *ASEAN Capital Markets Forum Action Plan (2016–2020)*, <http://www.theacmf.org/images/downloads/pdf/acmfactionplan2016-2020.pdf>; *ASEAN Economic Community 2025 Strategic Action Plans (SAP) for Financial Integration (2016–2025)* (Apr. 4, 2016), <http://cil.nus.edu.sg/wp-content/uploads/2019/02/2016-2025-SAP-for-Financial-Integration.pdf>.

247. See, e.g., *ASEAN Food Safety Regulatory Framework* (Aug. 3, 2016), <http://asean.org/wp-content/uploads/2016/08/ASEAN-Food-Safety-Regulatory-Framework.pdf>.

248. See, e.g., *ASEAN Plan of Action for Energy Cooperation (2016–2025)* (2015), <http://cil.nus.edu.sg/wp-content/uploads/2019/02/2016-2025-ASEAN-Plan-of-Action-for-Energy-Cooperation.pdf>.

249. See, e.g., *Kuala Lumpur Transport Strategic Plan (2016–2025)* (Dec. 2015), <http://cil.nus.edu.sg/wp-content/uploads/2019/02/2016-2025-Kuala-Lumpur-Transport-Strategic-Plan-1.pdf>.

economy,²⁵⁰ as well as supporting small and medium enterprise participation in the ASEAN Free Trade Area.²⁵¹ Notably, when the COVID-19 pandemic disrupted supply chains with a severe impact on health and the economy, ASEAN members swiftly exercised legal agency to adopt a memorandum of understanding and an implementation plan to quell protectionism.²⁵²

Exercising legal agency in the incumbent age of rules-based ordering necessitates laws to be implemented and produce outcomes so that members' interests may be upheld. Despite the various methods members have used—treaty obligations, treaty-like language and implementation deadlines in time-limited soft laws, and institutional mechanisms for monitoring and dispute settlement—strengthening implementation and compliance was challenging.²⁵³ With members' continued hesitance to use arbitration to enforce compliance or settle disputes, monitoring has gradually emerged as the leading compliance enforcement mechanism.²⁵⁴ Up until the end of 2015, the ASEAN Economic Community Scorecard was used to measure compliance annually, but it only yielded two scorecards (2008, 2011).²⁵⁵ More troublingly, members' self-reported data omitted meaningful statistics as only three categories comprising “all,” “more than half,” or “less than half” of measures implemented existed, and there was no requirement to elaborate on the specific actions executed, which resulted in members portraying themselves as overwhelmingly compliant.²⁵⁶ The AEC's rules-based implementation only accelerated when the World Bank and Australia Development Cooperation Programme

250. See, e.g., *ASEAN Work Programme on Electronic Commerce* (Sept. 7, 2017), http://asean.org/wp-content/uploads/2021/09/ASEAN-Work-Programme-on-Electronic-Commerce_published.pdf.

251. See, e.g., *ASEAN Institutional Framework on Access to Finance for Micro, Small and Medium Enterprises* (Aug. 3, 2016), <http://asean.org/wp-content/uploads/2016/08/ASEAN-Institutional-Framework-on-MSME-Access-to-Finance.pdf>.

252. See *Memorandum of Understanding on the Implementation of Non-Tariff Measures on Essential Goods Under the Hanoi Plan of Action on Strengthening ASEAN Economic Cooperation and Supply Chain Connectivity in Response to the Covid-19 Pandemic* (Nov. 13, 2020), <http://asean.org/wp-content/uploads/2021/09/5.-MOU-on-NTMs-on-Essential-Goods-for-upload.pdf>; *Hanoi Plan of Action on Strengthening ASEAN Economic Co-operation and Supply Chain Connectivity in Response to the COVID-19 Pandemic* (June 19, 2020), <http://asean.org/wp-content/uploads/2020/06/Hanoi-POA.pdf>.

253. See, e.g., Jayant Menon, *Moving Too Slowly Towards an ASEAN Economic Community*, E. ASIA F. (Oct. 10, 2014), <http://www.eastasiaforum.org/2014/10/14/moving-too-slowly-towards-an-asean-economic-community>; Jayant Menon & Anna Cassandra Melendez, *Realizing an ASEAN Economic Community: Progress and Remaining Challenges* 1–3, 6–7, 15 (Asian Dev. Bank Econ. Working Paper Series, No. 432, 2015), <http://www.adb.org/publications/realizing-asean-economic-community-progress-and-remaining-challenges>.

254. See Tan, *supra* note 10, at 373–78.

255. See *ASEAN Economic Community Scorecard: Charting Progress Toward Regional Economic Integration*, annex 2 (2012), http://www.asean.org/wp-content/uploads/images/documents/scorecard_final.pdf.

256. See CHIA SIOW YUE & MICHAEL G. PLUMMER, *ASEAN ECONOMIC COOPERATION, AND INTEGRATION: PROGRESS, CHALLENGES AND FUTURE DIRECTIONS* 135 (2015).

supported the ASEAN Monitoring and Evaluation (“M&E”) exercise in 2013, introducing internationally-recognized assessment standards with statistical data on compliance.²⁵⁷ This transparency, in turn, spurred ASEAN members to intensify intraregional integration for the AEC’s 2015 establishment and to endorse the importance of monitoring the AEC’s progress in the next phase of 2016–2025.²⁵⁸

In 2016, the M&E framework replaced the scorecard, and it is now administered by the ASEAN Integration Monitoring Directorate (“AIMD”) within the secretariat.²⁵⁹ The M&E demands rules-based compliance in three ways. First, it monitors implementation by collecting quantitative and qualitative data from ASEAN members and sectoral bodies, while country visits are now part of the protocol.²⁶⁰ Additionally, performative “window-dressing” (for example, merely enacting national legislation without follow-up) does not prove compliance—actual programmatic implementation must be demonstrated.²⁶¹ Second, the M&E monitors outcomes by measuring real results and economic indicators arising from implementation.²⁶² Lastly, it evaluates human impact by scrutinizing the positive and negative integration effects and equitable development in ASEAN societies.²⁶³ With these measures, the AIMD thus closely monitors the rules-based economic order to recalibrate and reinforce integration efforts.

Building close monitoring and programmatic deadlines into the time-limited soft laws has helped ASEAN’s exercise of legal agency be more effective in maintaining its rules-based economic order, even if its law-making patterns do not conform to dominant benchmarks. The blueprint’s midterm review (2021) has shown encouraging results—ASEAN members had implemented 54.1% of the blueprint (2016–2025).²⁶⁴ However, given the serious setbacks of the COVID-19 pandemic—the first half of 2020 experienced contractions for trade (7.4%), foreign investment (33.2%), international visitor arrivals (81.8%), and gross domestic product (3.3%)—ASEAN states must persevere with rules-based ordering by continuing to implement the blueprint, monitoring compliance, building supply chains, growing technology and the digital economy, and strengthening ASEAN centrality amid heightening

257. See Tan, *supra* note 10, at 376–78.

258. See ASEAN Secretariat, *Overview of the AEC Monitoring* (2020), <http://asean.org/our-communities/economic-community/monitoring-regional-economic-integration/aec-monitoring>.

259. See *Towards ASEAN Economic Community 2025: Monitoring ASEAN Economic Integration*, at 7 (Feb. 2017), <http://asean.org/wp-content/uploads/2018/10/Towards-AEC-2025-Monitoring-ASEAN-Economic-Integration.pdf>.

260. See *id.* at 11, 13.

261. See *id.* at 10.

262. *Id.* at 12.

263. See ASEAN Secretariat, *ASEAN Integration Report*, at 116–24, 164–65 (2019), <http://asean.org/wp-content/uploads/2019/11/ASEAN-integration-report-2019.pdf>.

264. ASEAN Secretariat, *Midterm Review: ASEAN Economic Community Blueprint 2025*, at 1 (2021), <http://asean.org/wp-content/uploads/2021/04/mid-term-review-report.pdf>.

geopolitical pressures.²⁶⁵ Only then can the exercise of legal agency procure sustained results.

2. ASEAN Centrality in External Cooperation

Since 2007, ASEAN's allure as an economic bloc arising from intraregional integration has enabled it to consistently exercise legal agency to strengthen external economic relations and promote its centrality with key Indo-Pacific partners. Apart from ASEAN members bringing to fruition the Comprehensive Economic Cooperation Frameworks signed pre-2007 with China, India, Japan, and Korea (by concluding agreements covering, *inter alia*, trade in goods and services, investment, technical standards, intellectual property with the external partners),²⁶⁶ they also signed a free trade agreement ("FTA") with Australia and New Zealand (2009) and free trade and investment agreements with Hong Kong (2018).²⁶⁷

265. *Id.* at 8–9, 31–33.

266. See Memorandum of Understanding Between the Governments of the Member States of the Association of Southeast Asian Nations and the Government of the People's Republic of China on Cooperation in the Field of Intellectual Property, ASEAN-China, Dec. 21, 2009, <http://asean.org/wp-content/uploads/2021/09/MoU-China-IP-Eng.pdf>; Memorandum of Understanding Between the Governments of Member States of the Association of Southeast Asian Nations and the Government of the People's Republic of China on Strengthening Cooperation in the Field of Standards, Technical Regulations and Conformity Assessment, ASEAN-China, Oct. 25, 2009, <http://asean.org/wp-content/uploads/2021/09/MoU-Strengthening-Cooperation-in-the-Field-of-Standards-2.pdf>; Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation Between the People's Republic of China and the Association of Southeast Asian Nations, ASEAN-China, Aug. 15, 2009, <http://asean.org/wp-content/uploads/images/archive/22974.pdf>; Agreement on Trade in Services Under the Framework Agreement on Comprehensive Economic Cooperation Between the Association of Southeast Asian Nations and the Republic of India, ASEAN-India, Nov. 13, 2014, <http://www.asean.org/wp-content/uploads/2016/04/AI-TISA-Agreement-ASEAN-FINAL.pdf>; Agreement on Investment Under the Framework Agreement on Comprehensive Economic Cooperation Between the Association of Southeast Asian Nations and the Republic of India, ASEAN-India, Nov. 12, 2014, <http://www.asean.org/wp-content/uploads/2016/04/ASEAN-India-Investment-Agreement-ASEAN-version.pdf>; Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Cooperation Between the Association of Southeast Asian Nations and the Republic of India, ASEAN-India, Aug. 13, 2009, http://commerce.gov.in/wp-content/uploads/2020/06/MOC_636205354502532516_ASEAN-India_Trade_Goods_Agreement.pdf; Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea, ASEAN-S.Kor. June 2, 2009, [http://arc-agreement.asean.org/file/doc/2015/02/agreement-on-investment-under-the-framework-agreement-on-comprehensive-economic-cooperation-among-the-governments-of-the-member-countries-of-the-association-of-southeast-asian-nations-and-the-republic-of-korea-\(ia-korea\).pdf](http://arc-agreement.asean.org/file/doc/2015/02/agreement-on-investment-under-the-framework-agreement-on-comprehensive-economic-cooperation-among-the-governments-of-the-member-countries-of-the-association-of-southeast-asian-nations-and-the-republic-of-korea-(ia-korea).pdf); Agreement on Comprehensive Economic Partnership Among Member States of ASEAN and Japan, ASEAN-Japan, Mar.-Apr. 2008, <http://asean.org/wp-content/uploads/2021/08/Agreement.pdf>.

267. Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, ASEAN-N.Z., Feb. 27, 2009, <http://aanzfta.asean.org/uploads/2016/09/AANZFTA-legal-text-PRINTED-Signed.pdf>; ASEAN-Hong Kong, China Free Trade Agreement, ASEAN-H.K., Mar. 28, 2018, <http://asean.org/wp-content/uploads/2021/08/AHKFTA-compressed.pdf>;

These laws have drawn ASEAN closer to its external partners—notably, China, Australia, and New Zealand. Since 2009, China has been ASEAN’s largest trading partner, and since 2020, ASEAN has become China’s largest trading partner—the cumulative trade and investment between both parties totaled \$545 billion U.S. dollars in trade and \$340 billion U.S. dollars in investment in the first half of 2022.²⁶⁸ These mutual gains led to the November 2022 launch of negotiations to upgrade the ASEAN-China FTA to further customs cooperation and dismantle technical barriers to trade.²⁶⁹ Meanwhile, the ASEAN-Australia-New Zealand FTA was successfully upgraded in November 2022 to include, *inter alia*, protection of supply chains for essential goods during crises, deeper services and investment liberalization, support for e-commerce and digital transformation, and sustainable development.²⁷⁰ This upgrade promises to increase ASEAN-Australia-New Zealand trade and investment flows beyond the 2021 figures where trade between ASEAN and Australia reached \$81.6 billion USD (almost fifty percent higher than pre-COVID-19), trade between ASEAN and New Zealand reached \$11 billion USD (almost twenty-three percent more than 2020), and investment flows from Australia and New Zealand to ASEAN reached almost \$600 million USD.²⁷¹

Legal agency exercised vis-à-vis the bilateral FTAs with the six Indo-Pacific partners strengthened ASEAN centrality such that ASEAN initiated negotiations for the Regional Comprehensive Economic Partnership Agreement (“RCEP”) and concluded it in 2020 with five partners—Australia, China, Japan, Korea, and New Zealand.²⁷² India withdrew from the RCEP negotiations “to protect its domestic market from flooding of imports with no

Agreement on Investment Among the Governments of the Hong Kong Special Administrative Region of the People’s Republic of China and the Member States of the Association of Southeast Asian Nations, ASEAN-H.K., May 18, 2018, <http://asean.org/wp-content/uploads/2021/08/AHKIA.pdf>.

268. *China Remains ASEAN’s Largest Trading Partner*, XINHUA (Aug. 30, 2022), <http://english.news.cn/20220829/fe29c794dd9e435db42925f4f718c014/c.html>; Ayman Falak Medina, *ASEAN’s Free Trade Agreements: An Overview*, ASEAN BRIEFING (Jan. 21, 2021), <http://www.aseanbriefing.com/news/aseans-free-trade-agreements-an-overview>.

269. ASEAN Secretariat, *ASEAN-China Joint Statement on Strengthening Common and Sustainable Development*, ¶ 9 (Nov. 12, 2022), <http://asean.org/wp-content/uploads/2022/11/FINAL-ASEAN-China-Joint-Statement-on-Strengthening-Common-and-Sustainable-Development.pdf>.

270. ASEAN Secretariat, *Joint Statement on the Substantial Conclusion of the ASEAN-Australia-New Zealand Free Trade Area Upgrade Negotiations*, ¶ 3 (Nov. 13, 2022), <http://asean.org/wp-content/uploads/2022/11/04-Special-AEM-CER-Joint-Statement-Substantial-Conclusion-ADOPTED.pdf>.

271. ASEAN Secretariat, *ASEAN-Australia-New Zealand Free Trade Area Upgraded* (Nov. 13, 2022), <http://asean.org/asean-australia-new-zealand-free-trade-area-upgraded>.

272. Regional Comprehensive Economic Partnership Agreement, Nov. 15, 2020, <http://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/4935/rcep-2020>.

gains in services.”²⁷³ Although the RCEP is less ambitious in dismantling trade barriers and protecting labor and environmental standards than the Comprehensive and Progressive Trans-Pacific Partnership (“CPTPP”)—the other mega-multilateral economic treaty the RCEP is often compared to—and continues to exist alongside the bilateral ASEAN FTAs (thus further obfuscating the global FTA landscape), this world’s largest FTA (by share of global GDP)²⁷⁴ will shift global supply chains to the Indo-Pacific. The RCEP could also increase ASEAN’s real gross domestic product by \$160 billion USD by 2035 if tariff reductions, services trade liberalization, logistic improvements, and investment commitments are fully implemented.²⁷⁵ It is important to note that trade experts in academia and practice acknowledge the RCEP’s emphasis on WTO-plus rules and evolutionary treaty upgrades are law-making modalities Indo-Pacific developing economies prefer.²⁷⁶ This is a testament to ASEAN states’ legal agency—despite their relatively smaller size and power—and reinforces ASEAN centrality in external economic cooperation to entrench an ASEAN rules-based economic order.

D. *Significance of Rules-Based Ordering*

Since 2007, exercising legal agency within ASEAN and its wider Indo-Pacific vicinity has indubitably created a rules-based order that directs both intraregional and external relations more effectively, despite the numerous soft laws, non-recourse to arbitral resolution of disputes, and constant geopolitical pressures. More importantly, it also signifies a change in approach towards law in emphasizing its compliance dimension. Within ASEAN’s rules-based economic order, the ongoing intraregional integration has developed the AEC into a functional trade and investment bloc as members intended.²⁷⁷ This has, in turn, enabled ASEAN to conclude important external economic treaties, notably the RCEP, to anchor its centrality and safeguard its prosperity.²⁷⁸ In its rules-based security order, ASEAN members are cognizant of the laws that prohibit aggression and the use of force. Violators of these obligations, such as the Myanmar junta, are rebuked and know they cannot whitewash atrocities. These laws ultimately foster the three security agendas of military security, countering terrorism and transnational

273. Pankhuri Gaur, *India’s Withdrawal from RCEP: Neutralising National Trade Concerns*, 27 J. ASIA PAC. ECON. 270, 277 (2022).

274. HSIEH, *supra* note 14, at 67–70.

275. Ken Itakura, *Impact of the Regional Comprehensive Economic Partnership: A Global Computable General Equilibrium Simulation 3* (ERIA Discussion Paper Series, No. 451, 2022).

276. See, e.g., HSIEH, *supra* note 14, at 70; Deborah Elms, *An Expert Explains: What is RCEP, the World’s Biggest Trade Deal?*, WORLD ECON. F. (May 18, 2022) <http://www.weforum.org/agenda/2021/05/rcep-world-biggest-trade-deal>.

277. See discussion *supra* Part IV.C.1.

278. See discussion *supra* Part IV.C.2.

crime, and disaster relief.²⁷⁹ Therefore, without condoning the humanitarian tragedies arising from protracted intraregional crises, it is important to note that ASEAN is committed to conflict resolution and peacebuilding, even if it appears slow and impotent.²⁸⁰ Outside of the region, ASEAN's continued projection of its centrality and mainstreaming of its Indo-Pacific outlook on maritime cooperation (especially regarding the South China Sea), connectivity, and socio-economic development deepens the impact of ASEAN's legal agency and rules-based order.²⁸¹

V. CONCLUSION

As evidenced by ASEAN's history, a union composed of small states with less military and economic might can still collectively exercise legal agency via regional cooperation to safeguard common security and economic interests, both within its region and externally. Conversely, ASEAN's inherent vulnerability to geopolitical exigencies and large power pressures—with its well-being depending on a peaceful South China Sea and global trade and investment—has intensified ASEAN members' exercise of legal agency. First, ASEAN treaties and soft laws employed as realist rhetoric in the Cold War stabilized regional security and enabled pursuit of national economic agendas. Next, constructivist cooperation amid post-Cold War globalization created norms of unity and substantive agendas despite poor implementation. And today, the incumbent rules-based Indo-Pacific order directs intraregional integration and projects ASEAN centrality in external relations to whatever degree possible. As to how these ASEAN laws conform to the dominant benchmarks of treaty and compliance: We see that despite the weak treaties, a proliferation of soft laws, and low compliance pre-2007, the legal agency exercised nonetheless safeguarded ASEAN interests. Post-2007, an updated understanding of ASEAN laws must however be made as ASEAN treaties and soft laws are now increasingly implemented—compliance is unequivocally expected—in the rules-based Indo-Pacific.

There are signs that ASEAN's stature, gained by exercising legal agency, will bear further fruit. Over 2021 and 2022, ASEAN forged comprehensive and strategic partnerships with China, Australia, the United States, and India, with the soft laws expanding security and economic cooperation.²⁸² With the

279. See discussion *supra* Part IV.B.

280. See *id.*

281. ASEAN Leaders' Declaration on Mainstreaming Four Priority Areas of the AOIP Within ASEAN-led Mechanisms, ¶ 1 (Nov. 11, 2022), <http://asean.org/wp-content/uploads/2022/11/25-ASEAN-Leaders-Declaration-on-Mainstreaming-Four-Priority-Areas-of-the-ASEAN-Outlook-on-the-Indo-Pacific-within-ASEAN-led-Mechanisms.pdf>. See also *supra* text accompanying notes 139.

282. See, e.g., 2021 Joint Statement of the ASEAN-China Special Summit to Commemorate the 30th Anniversary of ASEAN-China Dialogue Relations: Comprehensive Strategic Partnership for Peace, Security, Prosperity and Sustainable Development, ASEAN-China, Nov. 22, 2021, <http://asean.org/wp-content/uploads/2021/11/Joint-Statement-30th->

EU's attention on the Indo-Pacific, there remains hope for the eventual conclusion of ASEAN-EU FTA, with the EU-ASEAN dialogue partnership celebrating its forty-fifth anniversary in 2022.²⁸³ These relationships give ASEAN control over its well-being and greater leverage vis-à-vis (as well as relief from pressure from) external powers.

More broadly, ASEAN's longstanding exercise of legal agency via treaty and soft law is crystallizing its own way of dealing with security and economic issues to avoid being divided and "conquered." In the security arena, Professor Acharya, the ASEAN constructivism scholar, notes that criticism of ASEAN for not acting more decisively against larger powers or compelling conflict resolution "misses the point" as this is not how ASEAN sees itself and "is not what ASEAN is nor what it will ever be."²⁸⁴ Instead, ASEAN is cognizant of its constraints and exercises legal agency accordingly in regional law cooperation. Thus, researchers Hervé Lemahieu and Aaron Connelly contend that ASEAN is not as "dysfunctional" as believed—more than ever, ASEAN acts determinedly to preserve centrality and safeguard common interests.²⁸⁵ A similar phenomenon is unfolding in the economic arena, where former Asian Development Bank economist Jayant Menon notes ASEAN has consistently cooperated according to its own dictates to ensure it connects to global markets.²⁸⁶ Going further, Pasha Hsieh observes that the trend of contemporary trade agreements such as the RCEP, CPTPP, and potential ASEAN-EU FTA indicates a "new Asian regionalism" is emerging with ASEAN as a vital part of this global economic architecture.²⁸⁷

Anniversary-of-ASEAN-China-Dialogue-Relations-Final.pdf; ASEAN-U.S. Leaders' Statement on the Establishment of the ASEAN-US Comprehensive Strategic Partnership, ASEAN-U.S., Nov. 12, 2022, <http://asean.org/wp-content/uploads/2022/11/ASEAN-US-Leaders-Statement-on-CSP-final-1.pdf>.

283. *Trade Negotiations Between the EU and ASEAN Member States*, EUR. PARLIAMENT RSCH. SERV. (2023), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754629/EPRS_BRI\(2023\)754629_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754629/EPRS_BRI(2023)754629_EN.pdf) (calling "a region-to-region FTA" with ASEAN "the EU's ultimate ambition"); Zhao Yifan & Goh Ruoxue, *Despite Setbacks, EU-Asean Free Trade Deal Can Still Be Realised: Analysts*, THE BUS. TIMES, <http://www.businesstimes.com.sg/international/asean/despite-setbacks-eu-asean-free-trade-deal-can-still-be-realised-analysts>; see also HSIEH, *supra* note 14, at 101–62.

284. Amitav Acharya, *Why ASEAN's Indo-Pacific Outlook Matters*, E. ASIA F. (Aug. 11, 2019), <http://www.eastasiaforum.org/2019/08/11/why-aseans-indo-pacific-outlook-matters>. See generally HITOSHI NASU, ROB MCLAUGHLIN, DONALD R. ROTHWELL, & TAN SEE SENG, *THE LEGAL AUTHORITY OF ASEAN AS A SECURITY INSTITUTION* (J. H. H. Weiler & Tan Hsien-Li eds., 2019).

285. Hervé Lemahieu & Aaron L. Connelly, *ASEAN Is Less Dysfunctional on Geopolitics Than It Seems*, LOWY INST. (Nov. 16, 2022), <http://www.lowyinstitute.org/publications/asean-less-dysfunctional-geopolitics-it-seems>.

286. Jayant Menon, *Using Regionalism for Globalisation: The ASEAN Way 2*, (Yusok Ishak Inst. of Se. Asian Stud. Econ. Working Paper Series, No. 2021-2, 2021), <http://www.iseas.edu.sg/wp-content/uploads/2021/01/ISEASEWP2021-2Menon.pdf>.

287. HSIEH, *supra* note 14, at 12–14.

It is important to understand that while the legal agency of small states and their organizations cannot completely counter geopolitical pressures, it at least empowers them to mitigate harm and navigate a long-term path for survival and prosperity. ASEAN's experience may have generalizable lessons for how other Indo-Pacific or Global South regimes facing geopolitical pressures exercise their legal agency.²⁸⁸ For example, the MSG and PIF have for some time been co-operating through regional laws to integrate economically,²⁸⁹ as well as to pursue regional peace and security and combat climate change vis-à-vis external partners.²⁹⁰ Given the increasingly pluralistic international order, it is important to recognize that while small states remain vulnerable to geopolitical pressures, they continue to exercise legal agency to enhance regional security, build solidarity and identity, and ensure compliance with and protection of values and interests.

288. See, e.g., Alison Duxbury, *Rewriting the Law of International Organizations: Whither the Asia Pacific?*, LEIDEN J. INT'L L. (forthcoming) (on how Asia-Pacific states and organizations are slowly reshaping international law).

289. Melanesian Spearhead Group, *Melanesian Spearhead Group Trade Agreement* (2005), <http://wits.worldbank.org/GPTAD/PDF/archive/MSG.pdf>; *Trade Advisers Deployed to Boost Pacific Exports*, PAC. ISLANDS F. SECRETARIAT (June 6, 2022), <http://www.forumsec.org/2022/06/06/eu-funded-trade-advisers-deployed-to-boost-pacific-exports>.

290. *U.S.-Pacific Islands Forum Leaders Dialogue in Papua New Guinea*, U.S. DEP'T OF STATE (May 22, 2023), <http://www.state.gov/u-s-pacific-islands-forum-leaders-dialogue-in-papua-new-guinea>; *Chinese Ambassador Li Minggang Attends 22nd Melanesian Spearhead Group Leaders' Summit*, EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE REPUBLIC OF VANUATU (Aug. 24, 2023), http://vu.china-embassy.gov.cn/eng/sgdt/202308/t20230824_11131295.htm.

