

1-1-2012

Creating Regional Environmental Governance Regimes: Implications of Southeast Asian Responses to Transboundary Haze Pollution

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Recommended Citation

Roda Mushkat, *Creating Regional Environmental Governance Regimes: Implications of Southeast Asian Responses to Transboundary Haze Pollution*, 4 Wash. & Lee J. Energy, Climate & Env't. 103 (2013), <http://scholarlycommons.law.wlu.edu/jece/vol4/iss1/5>

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Creating Regional Environmental Governance Regimes: Implications of Southeast Asian Responses to Transboundary Haze Pollution

Roda Mushkat¹

Abstract

The willingness and ability of States to enter into genuinely collaborative arrangements with their counterparts in general, and regarding cross-border ecological externalities in particular, is an issue that provokes divergent responses among researchers in the field of international law. Realists/neo-realists and institutionalists, whether of the liberal or constructivist persuasion, approach it from fundamentally different angles and draw inferences that cannot be readily reconciled. The long and varied experience of the Association of Southeast Asian Nations in confronting the adverse regional consequences of forest burning may provide insights with respect to the relative importance of the competing schools of thought in this context, the limitations of these schools of thought, and possible ways of weaving them together into a coherent whole.

Table of Contents

I. Introduction.....	103
II. Overall Institutional Patterns.....	110
III. Theoretical Ramifications.....	125
IV. Combating Transboundary Haze Pollution.....	137
V. Limitations of the Realist-Institutionalist Dichotomy.....	146
VI. Conclusion.....	159

I. Introduction

The much-vaunted era of globalization has witnessed the intensification of international cooperation, but not always in forms intimately associated with this seemingly powerful economic, political, and

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social phenomenon.² Global collaboration has expanded markedly, as exemplified by the transformation of the moderately effective General Agreement on Tariffs and Trade (GATT) into the reasonably effective World Trade Organization (WTO).³ However, progress has at times been uneven, with conflicting forces generating trends and counter-trends whose consequences cannot be unambiguously interpreted as being consistent with supranational institution-building on a global scale.

For instance, in the economic domain, where centripetal influences are typically most pronounced, but centrifugal pressures are never absent, headway has often been painfully slow, and the path followed has seldom been linear. The sense of strategic frustration that this has engendered has prompted countries, particularly in the wake of Doha Round failures,⁴ to revert to bilateral accords (free trade agreements/FTAs or preferential trade agreements/FTAs) as the principal legal instrument for furthering their mutual interests.⁵ Efforts to promote regional cooperation/integration have also gathered momentum, notably in Europe (European Union/EU) and North America (North American Free Trade Agreement/NAFTA).⁶ Such developments may legitimately be portrayed as manifestations of international collaboration, but they are not necessarily always conducive to globalization, as broadly conceived.⁷

The multi-level cooperative arrangements forged, whether mutually-reinforcing or conflicting in some respects, may be conveniently portrayed as governance regimes. This term was coined nearly four decades ago⁸ when it was invoked to depict collaborative institutional mechanisms

2. See JOHN D. DANIELS, LEE H. RADEBAUGH & DANIEL P. SULLIVAN, *INTERNATIONAL BUSINESS: ENVIRONMENTS AND OPERATIONS* 284 (13th ed. 2011) (describing how globalization has led to bilateral integration, regional integration, and global integration).

3. See *id.* at 286 (discussing how the WTO “adopted the principles and trade agreements reached under the auspices of GATT,” which it succeeded).

4. See *id.* at 286–87 explaining that the Doha Round is the trade-negotiation round of the WTO that commenced in Doha, Qatar in 2001 “focused on giving a boost to developing countries on the world scene.” A dispute “over the agricultural subsidies maintained by the richer nations and the industrial subsidies enforced by developing nations has resulted in a split between developed nations and developing nations that is still ongoing. *Id.*”

5. See *id.* at 288 (noting that Brazil and the EU announced a strategic alliance between them as did South Korea and the United States which highlights “the increasing willingness of individual countries to circumvent the multilateral system and engage in bilateral agreements . . . to meet their global trade objectives”).

6. See *id.* at 316 (noting that the EU has helped abolish barriers to intrazonal trade and that NAFTA was designed to eliminate tariff barriers).

7. See *id.* at 316 (“Regional, as opposed to global, economic integration occurs because of the greater ease of promoting cooperation on a smaller scale.”).

8. See John G. Ruggie, *International Responses to Technology: Concepts and Trends*, 29 INT’L ORG. 557, 570 (1975) (“International regime [is a] set of mutual

which subsequently became equated with “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors expectations converge in a given area of international relations.”⁹ The scholar who was first to refine the concept elaborated that “[p]rinciples are beliefs of fact, causation, and rectitude . . . [n]orms are standards of behavior . . . [r]ules are specific prescriptions or proscriptions for action . . . [and] [d]ecision-making procedures are prevailing practices for making and implementing collective choice.”¹⁰

Although this carefully-devised and wide-ranging formulation reflected the emerging consensus among the growing number of researchers attracted to the notion of a governance regime, misgivings were expressed about its lack of concreteness and overly extensive scope.¹¹ It was thus noted that such entities may be flexibly depicted as “everything from a patterned set of interaction . . . to any form of multilateral coordination, cooperation, or collaboration . . . to formal machinery.”¹² It was consequently observed that they may occupy “an ontological space somewhere between the level of formal institutions . . . and systematic factors.”¹³ Paradoxically, this elasticity and fuzziness may partly explain their theoretical attractiveness because it facilitates entry into the analytical arena by scholars who address the amorphous phenomenon from fundamentally different perspectives.¹⁴

The ideological or normative underpinnings of the concept of a governance regime have been subjected to equally critical scrutiny.¹⁵ It has been emphatically argued that researchers who embrace the concept display a bias, explicit or implicit, in favor of conservative inertia. This is inevitably associated with accommodating and stability-promoting actors,

expectations, rules and regulations, plans, organizational energies and financial commitments, which have been accepted by a group of states.”)

9. Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES* 1, 2 (Stephen D. Krasner ed., 1983) [hereinafter Krasner, *Structural Causes*].

10. *Id.* at 2.

11. ROBERT M. A. CRAWFORD, *REGIME THEORY IN THE POST-COLD WAR WORLD: RETHINKING NEOLIBERAL APPROACHES TO INTERNATIONAL RELATIONS* 55 (1996) (stating that the term “regime” tends to be used “very loosely” and there is so little precision associated with the term that it “ranges from an umbrella for all international relations to little more than a synonym for international organizations”).

12. *Id.* at 55.

13. Friedrich Kratochwil & John G. Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 *INT’L ORG.* 753, 760 (1986).

14. See Susan Strange, *Cave! Hic dragones: A Critique of Regime Analysis*, in *INTERNATIONAL REGIMES*, *supra* note 9, at 337, 342–43 (stating that due to imprecision of technology, the meaning of regime is a source of discussion).

15. See CRAWFORD, *supra* note 11, at 84 (discussing how regime is not a neutral concept and the term itself is “value loaded”).

and a negative disposition toward anti-status quo and fiercely independent actors.¹⁶ Despite the recourse to scientific reasoning, “[r]egime thinking may . . . be ideology masquerading as a necessary truth.”¹⁷ It often entails the “rationalization of current policies, [with a built-in propensity] to enshrine and codify prevailing practices.”¹⁸ Order is accorded greater importance than justice¹⁹ and its maintenance is viewed as intrinsically good in that there is a “tendency to define regimes as benign, genuinely voluntarist, and legitimate entities—and assume that everyone wants them—[which] is contestable.”²⁰

Such reservations notwithstanding, the notion of a governance regime has not receded into the background. The conceptual opaqueness and the methodological difficulties to which it gives rise, in terms of meaningful operationalization, may be deemed not to be materially greater than in many other domains of socio-legal inquiry.²¹ By the same token, present-stage academic work on the subject deals with system change/dynamism, particularly of the structural variety (regime shift/transformation), rather than merely path dependence/perpetuation of existing institutional patterns.²² The problem of ideological contamination is an inescapable one but, again, it is encountered across the socio-legal landscape and may be alleviated to some extent by acknowledging that it exists and handling it in a transparent fashion.²³

While not without flaws, real or apparent, regime theory has thus continued to expand, perhaps even flourish, rather than retreat into

16. See CRAWFORD, *supra* note 11, at 84–85 (explaining how international theory has leaned in the realist direction with a strong “value-bias” towards order).

17. CRAWFORD, *supra* note 11, at 84.

18. CRAWFORD, *supra* note 11, at 84.

19. See CRAWFORD, *supra* note 11, at 85 (stating that regime literature contains a “value-bias” towards order as opposed to justice).

20. CRAWFORD, *supra* note 11, at 85; See also Strange, *supra* note 14, at 345 (noting that the word regime is value-loaded and “takes for granted that what everyone wants is more and better regimes”); James F. Keeley, *Toward a Foucauldian Analysis of International Regimes*, 44 INT’L ORG. 83, 83–84 (1990) (discussing how regime theory has been linked to a liberal regime analysis and though it’s an attractive perspective, this type of liberal approach has its problems).

21. See Strange, *supra* note 14, at 342–43 (noting that the governance regime is a “wooly” and imprecise concept, and that, like other uncertain terms, it can be more disorienting than helpful).

22. See MICHAEL HOWLETT, M. RAMESH & ANTHONY PERL, *STUDYING PUBLIC POLICY: POLICY CYCLES AND POLICY SUBSYSTEMS* 202 (3d ed. 2009) (discussing change within a policy regime that results in a fundamental transformation of policy making and changes the regimes process and ideas as opposed to changes that “involve relatively minor tinkering with policies and programs already in place”).

23. See Stephan Haggard & Beth A. Simmons, *Theories of International Regimes*, 41 INT’L ORG. 491, 499 (1987) (noting the flaws of different ideological approaches as each focuses on and addresses specific dimensions of regimes).

oblivion.²⁴ The literature on the subject is growing and has reached substantial proportions.²⁵ A significant fraction of the body of available

24. *See generally* RONALD B. MITCHELL, *INTERNATIONAL POLITICS AND THE ENVIRONMENT* (2010) (discussing the effectiveness of international environmental institutions); ORAN R. YOUNG, *INSTITUTIONAL DYNAMICS: EMERGENT PATTERNS IN INTERNATIONAL ENVIRONMENTAL GOVERNANCE* (2010) (analyzing the developmental trajectories of international environmental regimes).

25. *See generally* ORAN R. YOUNG, *RESOURCE REGIMES: NATURAL RESOURCES AND SOCIAL INSTITUTIONS* (1982) (focusing on regimes and collective decision-making involving the use of natural resources); ORAN R. YOUNG, *INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATURAL RESOURCES AND THE ENVIRONMENT* (1989) [hereinafter YOUNG, *INTERNATIONAL COOPERATION*] (discussing international regimes in theory and in practice); ANDREW HURRELL & BENEDICT KINGSBURY, *THE INTERNATIONAL POLITICS OF THE ENVIRONMENT: ACTORS, INTERESTS, AND INSTITUTIONS* (1992) (analyzing environmental issues and international environmental regimes); POLAR POLITICS: CREATING INTERNATIONAL ENVIRONMENTAL REGIMES (Oran R. Young & Gail Osherenko eds., 1993) (analyzing five comparative studies on regime formation dealing with Arctic issues to test hypotheses as to why regimes form); NEGOTIATING INTERNATIONAL REGIMES: LESSONS LEARNED FROM THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT (UNCED) (Bertram I. Spector, Gunnar Sjöstedt & I. William Zartman eds., 1994) (explaining the regime-building negotiations process that occurred at UNCED); ORAN R. YOUNG, *INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY* (1994) (discussing the negotiation of a global climate regime); REGIME THEORY AND INTERNATIONAL RELATIONS (Volker Rittberger & Peter Mayer eds., 1995) (exploring the concept of international regimes); INTERNATIONAL GOVERNANCE ON ENVIRONMENTAL ISSUES (Mats Rolén, Helen Sjöberg & U. Svedin eds., 1997) (discussing environmental affairs and governance); GLOBAL GOVERNANCE: DRAWING INSIGHTS FROM THE ENVIRONMENTAL EXPERIENCE (Oran R. Young ed., 1997) (discussing regimes as governance systems and international organization and the creation of environmental regimes); THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE (David G. Victor, Kal Raustiala & Eugene B. Skolnikoff eds., 1998) (describing implementation and review of environmental regimes); ORAN R. YOUNG, *CREATING REGIMES: ARCTIC ACCORDS AND INTERNATIONAL GOVERNANCE* (1998) (discussing the stages of international regime formation); THE POLITICS OF INTERNATIONAL ENVIRONMENTAL MANAGEMENT (Arild Underdal ed., 1998) (examining political devices used in the operation and formation of international environmental regimes); ANDREAS HASENCLEVER, PETER MAYER & VOLKER RITTBERGER, *THEORIES OF INTERNATIONAL REGIMES* (4th ed. 2001) (examining three theories of international regimes); JØRGEN WETTESTAD, *DESIGNING EFFECTIVE ENVIRONMENTAL REGIMES: THE KEY CONDITIONS* (1999) (focusing on the design and impact of international regimes); ORAN R. YOUNG, *GOVERNANCE IN WORLD AFFAIRS* (1999) (presenting a comprehensive account and future prediction of the status of regime theory); THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL REGIMES: CAUSAL CONNECTIONS AND BEHAVIORAL MECHANISMS (Oran R. Young ed., 1999) (analyzing mechanisms of how regimes influence behavior of their members and those associated with them); GABRIELA KUTTING, *ENVIRONMENT, SOCIETY AND INTERNATIONAL RELATIONS: TOWARD MORE EFFECTIVE INTERNATIONAL AGREEMENTS* (2000) (discussing current remedies and effectiveness of international agreements in solving environmental problems); JOHN VOGLER, *THE GLOBAL COMMONS: ENVIRONMENTAL AND TECHNOLOGICAL GOVERNANCE* (2d ed. 2000) (applying the tools of regime analysis to show how the oceans, Antarctica, outer space, and the atmosphere are, or fail to be, governed effectively); MARCUS

writings is devoted to the issues of environmental quality and appropriate governance mechanisms, primarily international in nature, to combat ecological degradation.²⁶ As this is an interdisciplinary endeavor, the point of departure is similar to that relied upon in other broadly similar fields of socio-legal investigation. Regimes are thus viewed as “social institutions consisting of agreed-upon principles, norms, rules, procedures, and programs that govern the interactions of actors in specific areas.”²⁷

However, given the amount of studies undertaken and the intensity of focus, there has been greater inclination than seen elsewhere to enhance the basic definition. For instance, it has been recently suggested that “operating procedures” might better capture the realities of governance

FRANDA, GOVERNING THE INTERNET: THE EMERGENCE OF AN INTERNATIONAL REGIME (2001) (discussing international regimes and internet security); GLOBAL ENVIRONMENTAL POLICIES: INSTITUTIONS AND PROCEDURES (Ho-Won Jeong ed., 2001) (examining global policy making and implementation); EDWARD L. MILES ET AL., ENVIRONMENTAL REGIME EFFECTIVENESS: CONFRONTING THEORY WITH EVIDENCE (GLOBAL ENVIRONMENTAL ACCORD: STRATEGIES FOR SUSTAINABILITY AND INSTITUTIONAL INNOVATION) (2001) (discussing why certain international regimes fail and others succeed); ORAN R. YOUNG, THE INSTITUTIONAL DIMENSIONS OF ENVIRONMENTAL CHANGE: FIT, INTERPLAY, AND SCALE (GLOBAL ENVIRONMENTAL ACCORD: STRATEGIES FOR SUSTAINABILITY AND INSTITUTIONAL INNOVATION) (2002) (discussing international institutions concerned with environmental sustainability and innovation); REGIME CONSEQUENCES: METHODOLOGICAL CHALLENGES AND RESEARCH STRATEGIES (Arild Underdal & Oran R. Young eds., 2004) (presenting studies of regime effectiveness); DENISE K. DEGARMO, INTERNATIONAL ENVIRONMENTAL TREATIES AND STATE BEHAVIOR: FACTORS INFLUENCING COOPERATION (2005) (conducting an analysis of nation-state behavior in the international environmental realm); PALGRAVE ADVANCES IN INTERNATIONAL ENVIRONMENTAL POLITICS (Michelle M. Betsill, Kathryn Hochstetler & Dimitris Stevis eds., 2005) (discussing current debates in environmental politics and evaluating international environmental politics and policies); HELMUT BREITMEIER, THE LEGITIMACY OF INTERNATIONAL REGIMES (2008) (exploring the influence that regimes have on how states comply with international norms and whether or not problem-solving in international regimes is effective); INSTITUTIONS AND ENVIRONMENTAL CHANGE: PRINCIPAL FINDINGS, APPLICATIONS, AND RESEARCH FRONTIERS (Oran R. Young, Leslie A. King & Heike Schroeder eds., 2008) (presenting an overview on how institutions matter in an effort to wrestle environmental problems); KATE O'NEILL, THE ENVIRONMENT AND INTERNATIONAL RELATIONS (2009) (discussing important themes and controversies regarding international relations and the environment); PAMELA S. CHASEK, DAVID L. DOWNIE & JANET WELSH BROWN, GLOBAL ENVIRONMENTAL POLITICS (5th ed. 2010) (providing an overview of environmental affairs and international politics, and recent perspectives on international regimes); MITCHELL, *supra* note 24 (discussing the effectiveness of international environmental institutions); YOUNG, *supra* note 24 (analyzing the developmental trajectories of international environmental regimes).

26. See *supra* note 25 and accompanying text.

27. Oran R. Young & Marc A. Levy, *The Effectiveness of International Environmental Regimes*, in THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL REGIMES: CAUSAL CONNECTIONS AND BEHAVIORAL MECHANISMS 1, 1 (Oran R. Young ed., 1999).

regimes than “decision-making procedures.”²⁸ This has resulted in the substitution of the “operating procedures” concept (e.g. “[o]perating procedures are prevailing practices for work within [a] regime, including methods for making and implementing collective choice.”) to replace the “decision-making procedures” concept (“Decision-making procedures are prevailing methods for making and implementing collective choice.”)²⁹ More affirmatively, it has been stated that governance regimes are “institutions that actors create or accept to regulate and coordinate action in a particular issue area.”³⁰

For the same reasons, scholars’ concerns with systems of international environmental management tend to decompose the multi-dimensional definition that underpins research in the field into its constituent parts (principles, norms, rules, decision-making/operational procedures, programs, actors’ expectations, interactions, institutions, regulation, and coordination) and dissect them perhaps further than is common in this type of socio-legal exploration.³¹ They also draw a number of additional distinctions that loom less large on parallel academic agendas, the one between prevailing orders and regimes being possibly the most fundamental.³²

The former are regarded as “broad, framework arrangements governing the activities of all (or almost all) the members of international society over a wide range of specific issues.”³³ The latter, on the other hand, are viewed as “more specialized agreements that pertain to well-defined activities, resources, or geographical areas and often involve only some subset of the members of international society.”³⁴ Both categories are accorded considerable analytical attention but, in the face of burgeoning symptoms of ecological deterioration and as a result of a pragmatic desire

28. See CHASEK, DOWNIE & BROWN, *supra* note 25, at 19 (“[The decision-making way of characterizing regimes] has been strongly criticized for including arrangements that are merely patterned interactions, operational frameworks, and even methods to agree to disagree with no long-term predictability or stability.”).

29. CHASEK, DOWNIE & BROWN, *supra* note 25, at 19.

30. CHASEK, DOWNIE & BROWN, *supra* note 25, at 19.

31. See YOUNG, INTERNATIONAL COOPERATION, *supra* note 25, at 15–18 (identifying and describing key components that every regime possesses, such as rights, rules, actors, and procedures).

32. See YOUNG, INTERNATIONAL COOPERATION, *supra* note 25, at 13 (“[Dividing] the category of international institution into two more or less distinct subsets: international order and international regimes.”).

33. YOUNG, INTERNATIONAL COOPERATION, *supra* note 25, at 13.

34. YOUNG, INTERNATIONAL COOPERATION, *supra* note 25, at 13.

to maintain a steadfast problem-solving orientation, the focus is increasingly shifting toward regimes, and away from prevailing orders.³⁵

However, this cannot be portrayed as an entirely balanced process. Understandably, perhaps, projects are primarily directed toward regulatory mechanisms, which are not confined to specific segments of the globe, even if they may otherwise be narrow in scope (i.e., restricted to a single issue).³⁶ With the possible exception of the EU, regional arrangements, particularly those relatively loose in nature, have not been examined in depth.³⁷ This makes ASEAN a potentially interesting case from a theoretical perspective. It is a regional regime, not a young one, but still in the intermediate stages of its evolution and with an unclear destination.

ASEAN's institutions and performance, across the policy spectrum and in particular realms of intergovernmental initiative, have been described and analyzed carefully and on a meaningful scale.³⁸ Responses to transboundary haze pollution have not been overlooked. Indeed, a conceptually rigorous and extensive survey of experiences in this sphere has been published recently.³⁹ However, building on the available body of knowledge, there is scope to explore further the functioning of this regional entity in that specific domain, with a view to drawing additional conclusions about geographically well-defined, but not organizationally robust, environmental governance regimes. This is the aim of the present paper.

II. Overall Institutional Patterns

ASEAN is the most visible manifestation of Asian regionalism, even though it does not possess the geographical breadth of Asia-Pacific

35. See YOUNG, INTERNATIONAL COOPERATION, *supra* note 25, at 13–14 (noting that ecological and environmental problems such as “conservation of polar bears, the use of the electromagnetic spectrum, and human activities in Antarctica” are described in terms of international regimes).

36. See Young & Levy, *supra* note 27, at 7–8 (discussing an international regime that addressed problems arising from intentional discharge of oil by tankers).

37. See generally ROUTLEDGE INT'L HANDBOOKS, THE EUROPEAN UNION AND GLOBAL GOVERNANCE: A HANDBOOK (Jens-Uwe Wunderlich & David J. Bailey eds., 2011) (analyzing the role of the European Union, its function in global politics and its role as a global actor).

38. See generally ASIAN DEVELOPMENT BANK, EMERGING ASIAN REGIONALISM: A PARTNERSHIP FOR SHARED PROSPERITY (2008) (discussing Asia's regionalism and specifically ASEAN's framework for regional cooperation); MICHAEL ANTOLIK, ASEAN AND THE DIPLOMACY OF ACCOMMODATION (1990) (exploring the successes of ASEAN, compared to other regional associations that have not excelled).

39. See PARUEDEE NGUITRAGOOL, ENVIRONMENTAL COOPERATION IN SOUTHEAST ASIA: ASEAN'S REGIME FOR TRANSBOUNDARY HAZE POLLUTION 2 (2011) (discussing Southeast Asian haze and Indonesia's land and forest fires).

Economic Cooperation (APEC) and does not count any world powers among its core members.⁴⁰ It is a modestly-sized collaborative scheme consisting of countries that marginally qualify as middle powers, but it stands out in terms of the closeness of official inter-State linkages in an area where national autonomy is highly valued and where there is no strong desire for regional unification.⁴¹ Other similar organizational vehicles, such as Central Asia Regional Economic Cooperation (CAREC) and the South Asian Association for Regional Cooperation (SAARC), display less collaborative effectiveness and are not as strategically prominent.⁴²

Asian regionalism is an intricate phenomenon. It entails regional integration, which in turn leads to greater interdependence.⁴³ The former may be market-driven or policy-led.⁴⁴ The latter features interaction via economic (e.g., finance, investment, and trade) and non-economic (e.g., cultural, political, and social) channels.⁴⁵ It also involves regional cooperation in the form of official activities that are conducive to regional integration by virtue of their contribution to cross-border coordination, planning, and response to problems, which defy unilateral solutions.⁴⁶ Such activities include “intergovernmental dialogue, information exchanges, provision of regional public goods, and regional institution building.”⁴⁷

40. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 256 (noting that ASEAN’s membership only includes Asian countries whereas APEC’s membership includes countries from other continents).

41. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 18–19. “The price of cooperation is the loss of some national sovereignty and the narrowing of policy options for pursuing purely national objectives.” *Id.* “It is understandably difficult for large, successful, and independent economies to make such compromises, and ultimately to pool some sovereignty within regional institutions.” *Id.*

42. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 247, 250. The authors recognizing that SAARC has “focused principally on cooperation in agriculture, rural development, and health” while CAREC “promotes shared infrastructure projects and the improvement of policy environment in prior areas, such as transport, energy, and trade.” *Id.* While both of these groups involve Asian members and cooperation, “ASEAN is furthest along the path towards integration.” *Id.*

43. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 39 (explaining how interdependence is deepening because of regional integration, specifically among markets).

44. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 45. The authors discuss how regional integration is not alone in displaying such an increasing regional bias and how. *Id.* “Technology and policy seem to be generating new opportunities for regional integration, even in the context of a rapidly globalizing world economy.” *Id.*

45. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 42 (“[The] measure of interdependence needs to include other important channels such as direct investment, financial flows, macroeconomic links, and personal contacts.”).

46. See ASIAN DEVELOPMENT BANK, *supra* note 38, at XII (referring to the definition of “regional cooperation”).

47. ASIAN DEVELOPMENT BANK, *supra* note 38, at XII.

Given the opportunities and constraints, the dramatic rise in affluence and the persistence of nationalist sentiment, Asian regionalism has been characterized by its economic vitality. Regional production networks have proliferated, intra-regional trade has intensified, regional financial collaboration in all its shapes has deepened, and macroeconomic interdependence has become an inescapable reality, necessitating joint action on an ongoing basis.⁴⁸ However, these patterns have been amply observed throughout Asia.⁴⁹ What has distinguished ASEAN from other supranational initiatives in broadly the same geographical space is the scope and degree of regional cooperation.⁵⁰

Indeed, the process of economic integration and growing economic interdependence within ASEAN, which is currently the primary focus of academic and policy attention, had been slow to unfold and has only recently gained significant momentum.⁵¹ Nor can joint security concerns, another paramount strategic issue, be portrayed as the dominant element in the ASEAN equation.⁵² The economic and security underpinnings have played a pivotal role, but this has been a policy-inspired transformation, rather than a market-shaped one, involving collaboration on multiple fronts, beyond what has been witnessed elsewhere in Asia, even if this may not qualify as a rigorous standard.⁵³

Prior to the establishment of ASEAN, Southeast Asia “was rife with internal divisions and interference by external powers.”⁵⁴ Attempts to reduce fractures and minimize friction by formal institutional means began as early as the 1950s, with the creation of the Southeast Asian Treaty Organization (SEATO), and continued in earnest in the 1960s, when entities such as the Association of Southeast Asia (ASA) and the Asian Pacific Council (ASPAC), were established.⁵⁵ For the most part, these

48. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 57–197 (discussing the economic vitality created by Asian regionalism by detailing the following points: integrating production, integrating financial markets, and managing macroeconomic interdependence).

49. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 58 (“Asia’s economies are becoming ever more closely intertwined, particularly through trade and investment.”).

50. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 246–51 (noting that ASEAN is central to the “architecture of regional cooperation” in Asia as it is furthest along on the path toward integration).

51. See SHAUN NARINE, EXPLAINING ASEAN: REGIONALISM IN SOUTHEAST ASIA 1 (2002) (“However, even a cursory examination of ASEAN’s history and institutional development reveals that meaningful economic interaction has only recently become a significant part of the organization’s activities.”).

52. See *id.* at 1 (“ASEAN is clearly not a security alliance.”).

53. See *id.* at 3–5 (noting that the fundamental functions of ASEAN, i.e. protecting and enhancing the sovereignty of its member states, have played the largest role in its success).

54. *Id.* at 9.

55. See *id.* at 9–12 (introducing the origins of the ASEAN organization).

strategic efforts encountered insurmountable obstacles and quickly fizzled out, with SEATO proving perhaps the exception to the norm in terms of its ability to evolve into a complex structure and endure.⁵⁶

ASEAN was formed in 1967 by Indonesia, Malaysia, Singapore, Thailand, and the Philippines as a potential conflict-containment and stability-enhancing institutional mechanism against the backdrop of persistent escalation in political and territorial disputes in the region.⁵⁷ It also sought to minimize Southeast Asia's dependence on external powers, particularly in the military domain, and stifle full-blown and incipient communist insurgencies through a variety of tactics, including socio-economic development accompanied by the acquisition of capabilities equated with national and regional resilience.⁵⁸

Security challenges doubtless provided the catalyst for the organizational bridge-building as, at its inception, ASEAN was essentially a grouping of anti-communist States in a turbulent region.⁵⁹ However, the Bangkok Declaration, which laid the foundation for ASEAN's emergence, conveyed a wider sense of purpose by emphasizing a long-term commitment to economic growth, social progress, and cultural development, in addition to the quest for peace and stability.⁶⁰ The collapse of pro-Western regimes in Vietnam and Cambodia, which led to a diminished US military presence in Southeast Asia, acted as an impediment to broadening of the institutional agenda in the 1970s but, paradoxically, it also furnished additional impetus to the search for closer collaboration.⁶¹

Vietnam's invasion and occupation of Cambodia/Kampuchea, which lasted from 1978 to 1990, put the collective willingness of member

56. *See id.* at 10 ("By the time SEATO dissolved in 1977, it had developed a highly complex structure, but it was irrelevant to the security concerns or development of regionalism in Southeast Asia.").

57. *See id.* at 12–13 (noting the date of establishment, the founding members, and the founding purposes of ASEAN).

58. *See id.* at 13 ("First, the ASEAN states sought to reduce the appeal of internal Communist insurgencies by promoting domestic socio-economic development, expressing this objective in the notions of 'national' and 'regional resilience' . . . Second ASEAN sought to reduce the regional military influence of external actors.").

59. *See id.* at 9–12 (discussing the failed efforts of SEATO, ASPAC, and ASA and the necessity to develop an organization to deal with the territorial and political disputes between the nations of Southeast Asia and one that could dissolve these tensions).

60. *See* NORMAN D. PALMER, *THE NEW REGIONALISM IN ASIA AND THE PACIFIC* 65 (1991) (noting that the main purposes of ASEAN were the acceleration of economic growth, social progress and cultural development, as well as promoting regional peace and stability).

61. *See* NARINE, *supra* note 51, at 23–24 (explaining that while ASEAN began to come together as an international organization, the Bali Conference and the two agreements it produced, the Declaration of ASEAN Concord and the Treaty of Amity and Co-Operation in Southeast Asia (TAC), failed to create significant economic cooperation between its members).

States to pursue this process coherently and determinately to a stern test, and they generally rose to the challenge by playing a meaningful, albeit not decisive, role in galvanizing and sustaining opposition to Vietnamese actions.⁶² While this complex and protracted episode demonstrated the limitations of the international capabilities of a small group of countries ill-equipped (at the time) economically and militarily to influence the outcome of a large-scale regional conflict without high-level external direction and support, it also showed that, within a decade following its establishment, ASEAN was, for the most part, able to display the basic organizational competencies needed to maintain adequate strategic cohesion and focus in the face of serious adversity (which should not necessarily be equated with broad-based institution building).⁶³

Whether or not this qualifies as its ‘finest hour,’ a rather unique ASEAN approach toward conflict management (‘the ASEAN Way’) crystallized during that early phase of organizational evolution.⁶⁴ Rooted in the Malay cultural practices of *mushawarah* and *mufakat*, the ASEAN Way emphasizes consultation and consensus in group decision-making.⁶⁵ Poignant symbols are invoked and subtle, indirect tactics are relied upon in an effort to promote a stable intramural environment.⁶⁶ Problematic issues are dealt with later, rather than sooner, in order to minimize possible friction.⁶⁷ Close contact among members of national elites is encouraged with a view to fostering a sense of comfort, joint identity, mutual obligation, and shared vision.⁶⁸

62. See generally NARINE, *supra* note 51, at 39–65 (describing how Vietnam’s invasion of Cambodia contributed to the growth of ASEAN as an institution, but also how ASEAN was constrained by its own powers and its inability to call upon the help of outside support, affecting the common interest of ASEAN in opposing Vietnam).

63. See NARINE, *supra* note 51, at 58–65 (noting that while Vietnam’s invasion of Cambodia presented difficulties for ASEAN, “the organization’s institutional development was enhanced by the . . . experience with the invasion of Cambodia.”).

64. See NARINE, *supra* note 51, at 11 (describing that many observers view the “ASEAN Way’s” approach to regionalism as the core of “ASEAN’s viability”).

65. See ANTOLIK, *supra* note 38, at 99 (“Together, *musfakat* (consensus) and *mushawarah* (consultation) ground ASEAN Diplomacy in village decision making.”).

66. See ANTOLIK, *supra* note 38, at 102–03 (noting that individual members of ASEAN have developed their own views policy “nuances” or “trends” within ASEAN in attempts to avoid tension amongst members).

67. See ANTOLIK, *supra* note 38, at 100 (“ASEAN consensus has handled difficult choices by postponing difficult decisions to the future, leaving and living with the unsettled issue for the present. . . . [p]ostponement and broad decisions prevent haggling from destroying a positive mood.”).

68. See ANTOLIK, *supra* note 38, at 90 (noting that ASEAN member states send their heads of government to take part in annual visits, described as *empatmatas*, which are one-on-one meetings between these leaders intended to promote continuing ASEAN solidarity).

The final decade of the Cold War era saw an extension of the trends that emerged during the preceding decade and a half.⁶⁹ ASEAN was not transformed into a security community, a body characterized by strict and observed norms regarding non-use of force, geared toward military conflict prevention; no competitive arms races; elaborate defense policy coordination; robust institutional mechanisms, formal and informal, for pacific dispute settlement; and substantial functional integration, interdependence, and cooperation.⁷⁰ Nevertheless, collaboration on the national security front continued to expand and solidify.⁷¹

Internal disputes—primarily territorial in nature—persisted, but communication intensified and interaction became increasingly productive, to a point whereby some of the criteria for qualifying as a security community may have been satisfied.⁷² External relations with United States, a crucial pillar of the regional security structure, were handled adroitly and harmoniously.⁷³ External relations with China, which were perceived as a threat, and required more intricate, strategic planning and more prudent implementation, were also managed with adequate effectiveness and in a fairly organized manner, including with respect to the thorny issues stemming from disputes relating to the Spratly Islands' status.⁷⁴

69. See Amitav Acharya, *A Regional Security Community in Southeast Asia?*, 18 J. STRATEGIC STUD. 175, 175 (1995) [hereinafter Acharya, *Regional Security Community*] (introducing various trends that have led scholars to question whether ASEAN is a regional security community).

70. See *id.* at 180 (defining three types of regional security systems; security regime, security community, and defense community); see also AMITAV ACHARYA, *CONSTRUCTING A SECURITY COMMUNITY IN SOUTHEAST ASIA: ASEAN AND THE PROBLEM OF REGIONAL ORDER* 19–21 (2d ed. 2009) [hereinafter ACHARYA, *CONSTRUCTING A SECURITY COMMUNITY*] (discussing the difference between a security regime and security community).

71. See Acharya, *Regional Security Community*, *supra* note 69, at 186 (noting that the sturdy structure of ASEAN, involving trust, confidence, and goodwill between the member states, has led to the development of “One Southeast Asia,” focusing on various peace treaties between Southeast Asian States and admission of new members).

72. See ACHARYA, *CONSTRUCTING A SECURITY COMMUNITY*, *supra* note 70, at 181–87 (applying the four characteristics of a security community to current conditions in Southeast Asia to determine if ASEAN qualifies as a security community).

73. See Muthiah Alagappa, *U.S.-ASEAN Security Relations: Challenges and Prospects*, 11 CONTEMP. SE. ASIA 1, 3 (1989) (establishing that security relations between the United States and the ASEAN countries during the late 1970s and 1980s was modest, yet congenial, equal, and relatively low-cost, making it a more mature and mutually beneficial relationship).

74. See Chang Pao-Min, *China and Southeast Asia: The Problem of a Perceptual Gap*, 9 CONTEMP. SE. ASIA 181, 188–90 (1987) (discussing longstanding fears in Southeast Asia regarding China's communist character, imperialist nature and aggressive politics); see also Pao-Min Chang, *A New Scramble for the South China Sea Islands*, 12 CONTEMP. SE. ASIA 20, 30–31 (1990) (describing the willingness of all claimant states to settle, through peaceful means, the March 1988 clash between Vietnam and China over the Spratly Islands).

The institutional foundations built during those twenty-five years, coupled with the de-escalation of regional tensions following the end of the Cold War, have paved the way for the enlargement of ASEAN.⁷⁵ The joining of Brunei in 1984, after it gained independence over its external affairs, may be viewed as a straightforward affair.⁷⁶ However, the granting of membership to Vietnam, Laos, Burma/Myanmar, and Cambodia, former foes and uneasy partners, may be legitimately regarded as a quantum leap forward, reflecting considerable organizational capabilities, rather than simply an improved global and regional security environment.⁷⁷

The decommunization of Southeast Asia and the ongoing process of liberalization in China have not necessarily brought lingering territorial disputes to an end, and have not eliminated the residue of distrust—but they have transformed the regional landscape sufficiently to render the collective pursuit of stability a less pressing goal. The ASEAN-Plus-Three (APT) framework is a reflection of the new geostrategic realities.⁷⁸ The forum is now more than a decade old and, while it is predominantly an economic institutional vehicle, the growing cooperation with three key East Asian countries, notably China (the other two being Japan and South Korea), is indicative of the region's metamorphosis from an arena of war to one of peaceful coexistence.⁷⁹ The tentative emergence of looser structures, such as ASEAN-Plus-Six (APS; which also includes India, Australia, and New

75. See GERALD TAN, ASEAN: ECONOMIC DEVELOPMENT AND COOPERATION 31 (2003) (“With the fall of the Communism and the end of the Cold War . . . the need to maintain ASEAN’s relevance to changing regional and international condition pointed to the necessity of having a larger regional grouping . . . of the countries in Southeast Asia.”).

76. See ANTOLIK, *supra* note 38, at 83–87 (discussing the bridging that occurred between Brunei and its two large neighbors, Indonesia and Malaysia, leading to admission of Brunei to ASEAN).

77. See TAN, *supra* note 75, at 31–37 (emphasizing that the inclusion of these former Indo-Chinese states was a major turning point, as the idea of including these countries would have been “unthinkable” years ago and noting that this demonstrates ability of ASEAN to adjust and adapt).

78. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 248 (“ASEAN+3 is a powerful extension of ASEAN: it includes the region’s most dynamic economy (the PRC), its most advanced (Japan), and its largest newly industrialized economy (the Republic of Korea).”).

79. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 248 (noting that ASEAN+3, ASEAN, and other regional groups are economic in focus, they are also responsible for forging greater mutual understandings and stronger foundations for regional cooperative initiatives); Akihiko Tanaka, *The Development of the ASEAN+3 Framework*, in ADVANCING EAST ASIAN REGIONALISM 52, 59–60 (Melissa G. Curley & Nicholas Thomas eds., 2007) (discussing the ASEAN countries’ decision to accept China, Japan, and South Korea as members to ASEAN and, additionally, the member states’ changing policy stance towards these three countries).

Zealand) and ASEAN-Plus-Eight (APE; which also includes Russia and the United States) is consistent with this pattern.⁸⁰

The quest for an ASEAN security community is by no means a thing of the past. Indeed, in a 2003 summit held in Bali, leaders from member countries reaffirmed the vision and incorporated it firmly into the Declaration of ASEAN Concord II, or Bali Concord II, a comprehensive document embodying their aspirations for a regional community encompassing a wide range of economic, political, and social activities.⁸¹ Nevertheless, as the threat of military conflict has receded into the background and the forces of finance, production, trade, and investment have asserted themselves, economic cooperation has supplanted the security variant as the key factor driving ASEAN in the direction of a viable, regional community.⁸²

From the 1967 Bangkok Declaration to the 1976 Bali Conference, which produced two significant agreements, the Declaration of ASEAN Concord and the Treaty of Amity and Cooperation in Southeast Asia (TAC), the organization had consistently accorded high priority to regional economic collaboration, but with limited success.⁸³ Geographical proximity and country similarity are merely two of several variables which impinge on trade and investment decisions.⁸⁴ And, for nearly three decades, they could not offset the impact of the myriad influences, political as well as economic, which prevented ASEAN from achieving closer integration or interdependence through these vital channels.⁸⁵

80. See generally RODOLFO C. SEVERINO, *SOUTHEAST ASIA IN SEARCH OF AN ASEAN COMMUNITY: INSIGHTS FROM THE FORMER ASEAN SECRETARY-GENERAL* (2006) (providing insight on ASEAN and its relationships with member-countries).

81. See RODOLFO C. SEVERINO, *TOWARDS AN ASEAN SECURITY COMMUNITY 1* (2004) [Severino, *TOWARDS AN ASEAN SECURITY COMMUNITY*] (“The declaration embodied the ASEAN leaders’ decisions to establish an ASEAN Community made up of three components—the ASEAN security community, the ASEAN Economic Community, and the ASEAN Socio-Cultural Community.”).

82. See *id.* at 2 (“In substance, security is at the core of ASEAN’s existence . . . regional economic cooperation and integration is seen as part of the endeavor to bolster regional security through economic development, even as security continues to be regarded as an essential condition for development.”).

83. See *id.* at 5–6 (discussing how the focus of the organization was on security cooperation, rather than economic cooperation).

84. See DANIELS, RADEBAUGH, & SULLIVAN, *supra* note 2, at 266. The authors discuss how countries limit imports of certain foreign products and services to maintain identity. *Id.* For example, “for many years, Japan, South Korea, and China maintained an almost total ban on rice imports, largely because rice farming has been historically cohesive force in each nation.” *Id.*

85. See Amado Castro, *ASEAN Economic Co-operation*, in *UNDERSTANDING ASEAN* 70, 74 (Alison Broinowski ed., 1982) (noting that the implementation of economic cooperation was limited in these early years because of conceptualization and organization, and the involvement of foreign ministers); Richard Stubbs, *Reluctant Leader, Expectant*

Bottom-up impulses, emanating from the marketplace, have invigorated the regional economic dynamics in the past two decades.⁸⁶ The formation of cross-border production networks has played a crucial role in the process.⁸⁷ This phenomenon is attributable to advances in information technology and declining transportation costs (as well as the policy-induced lowering of barriers to the flow of goods, services, and capital).⁸⁸ It has led to product fragmentation, or the allocation of distinct, but inter-related manufacturing activities to sites in different countries.⁸⁹ The trend could have resulted in a global dispersion of production, yet it has proved more conducive to fortifying links among neighboring countries and stimulating intraregional trade, investment, and finance.⁹⁰

Interestingly, the structural economic readjustment has not materialized in a political vacuum. As the Southeast Asian developmental State (originally an East Asian blueprint) has taken shape in the region, it has turned into a determined promoter of cross-border trade, investment,

Followers: Japan and Southeast Asia, 46 INT'L J. 649, 653 (1991) (focusing on Japan's emergence as a regional leader as a variable affecting ASEAN countries and preventing them from achieving closer integration); Richard Stubbs, *Geopolitics and the Political Economy of Southeast Asia*, 44 INT'L J. 517, 517–20 (1989) (discussing how the Korean War, the Vietnam War, and Japanese Investment are regional security and geopolitical considerations that have had an impact on the region's economic development since the Second World War). See generally MARJORIE L. SURIYAMONGKOL, *POLITICS OF ASEAN ECONOMIC CO-OPERATION: THE CASE OF ASEAN INDUSTRIAL PROJECTS* (1988) (focusing on the political process by which ASEAN economic co-operation has been shaped and on large-scale industrial projects); John Ravenhill, *Economic Cooperation in Southeast Asia: Changing Incentives*, 35 ASIAN SURV. 850 (1995) (discussing AFTA and its likely success in light of ASEAN's previous record of failed integration).

86. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 242 (“Asia’s approach to regionalism is pragmatic and flexible. . . [i]t is based on a bottom-approach that supports markets and sub-regional cooperation as the building blocks for an eventual broader deeper and more unified regional architecture.”).

87. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 75 (“[C]ross-border production networks have created new opportunities for other East Asian economies to specialize in parts and components production and assembly.”).

88. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 45–46 (“The key technological explanation—the development of production networks, often described as ‘production fragmentation’ is the result of advance in information technology, trade barriers, and declining trade barriers.”).

89. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 46 (“These development have made it possible to allocate various steps of a manufacturing production process to sites in different countries.”).

90. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 45 (“Asia is not alone in displaying such an increasing regional bias; technology and policy seem to be generating new opportunities for regional integration, even in the context of a rapidly globalizing world economy.”).

and finance.⁹¹ This configuration is a variant of corporatism, but one characterized by greater government involvement (by Western standards) in the economy and enmeshment in society.⁹² It is a form of State capitalism featuring government activism geared toward furthering the interests of the corporate sector as a whole by creating conditions favorable to capital accumulation and productivity enhancement.⁹³

91. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 17–18 (“While Asia can draw on other region’s experience, Asian regionalism is ultimately likely to follow a distinctive blueprint, building on Asian economic priorities and based on an Asia vision for building a regional community.”).

92. See CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925–1975*, at 197 (1982) (“The causes of post-World War II Japanese-style “corporatism” were similar, but it’s priorities were different, and the state played a role that went beyond mediation. . . . [u]nder these circumstances the role of the state was never questioned.”).

93. See *generally id.* (attributing the unprecedented growth of Japan’s economy to the Ministry of International Trade and Industry (MITI) and emphasizing its central role in the economic and political history of modern Japan); THE POLITICAL ECONOMY OF NEW ASIAN INDUSTRIALISM (Frederic C. Deyo ed., 1987) (various articles discussing the economic organization and industrialization of Asia); ALICE H. AMSDEN, *ASIA’S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION* (1989) (examining South Korean economic growth, which is strongly based on state intervention and the government’s imposition of strict performance guidelines on the industries and companies that it supports); ROBERT WADE, *GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION* (1990) (taking aim at critics who attribute the economic success of Taiwan and other countries to government intervention and, instead, focusing on allocation decisions that were made by markets and public administration); THE WORLD BANK, *THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY* (1993) (arguing that the growth and success of East Asian economies is due to the accumulation and allocation of physical and human capital); BUSINESS AND GOVERNMENT IN INDUSTRIALISING ASIA (Andrew MacIntyre ed., 1994) (focusing on the interaction between business and government in Northeast and Southeast Asia to determine how these political arrangements, or institutions, constrain policy and performance); PETER B. EVANS, *EMBEDDED AUTONOMY: STATES AND INDUSTRIAL TRANSFORMATION* (1995) (evaluating the success and failure of state involvement in the process of industrialization by comparing state organization of a variety of countries); BEYOND THE DEVELOPMENTAL STATE: EAST ASIA’S POLITICAL ECONOMIES RECONSIDERED (Steve Chan, Cal Clark & Danny Lam eds., 1998) (critiquing the developmental state model and placing emphasis on the nature of society, culture, market, and the evolving international economy in East Asia’s developmental history); THE DEVELOPMENTAL STATE (Meredith Woo-Cumings ed., 1999) (examining the political, bureaucratic, and financial influences that have shaped the East Asian developmental state); MING XIA, *THE DUAL DEVELOPMENTAL STATE: DEVELOPMENT STRATEGY AND INSTITUTIONAL ARRANGEMENTS FOR CHINA’S TRANSITION* (2000) (contemplating the creation of a market-orientated economy in China, which can be attributed to decentralization and legislative empowerment that have led to the reduction in transaction costs and the creation of markets); CHANGING GOVERNANCE AND PUBLIC POLICY IN EAST ASIA (Ka H. Mok & Ray Forrest eds., 2009) (focusing on the impacts of liberalization and marketizing trends in Southeast Asia and how these trends affect public policy).

There is a considerable literature, revolving around Singapore and its government/Temasek-linked companies (GLCs/TLCs), which highlights the resolve that the Southeast Asian developmental State has exhibited in encouraging the corporate sector to pursue regional strategies (rather than merely following the latter).⁹⁴ This has entailed direction, persuasion, signaling, facilitation, provision of incentives, and willingness to channel substantial funds toward supporting the effort (e.g., by investing heavily in appropriate physical infrastructure).⁹⁵ Key events with broad geographical repercussions, typically exogenous shocks, such as the 1997/98 Asian financial crisis, have also had the effect of prompting governments to seek closer cross-border economic cooperation within ASEAN.⁹⁶

Perhaps the most significant initiative to that end, symbolically and practically, was the proposal, floated by Thailand at the 1991 Economic Ministers' Meeting, and endorsed at the 1992 Summit, to create an ASEAN Free Trade Area (AFTA) for manufactures.⁹⁷ The primary instrument for achieving this goal has been the Common Preferential Effective Tariff (CPET) scheme, which has reduced substantially tariffs on goods originating within ASEAN, but has stopped short of transforming the organization into a customs union adhering to a common external tariff for goods entering from other jurisdictions.⁹⁸ Over the years, this arrangement has expanded into AFTA-Plus and has featured measures to develop uniform product certification standards, eliminate non-tariff barriers, encourage region-wide joint ventures, facilitate corporate vertical integration (via industrial complementation; AIP), harmonize customs nomenclature, narrow differences in valuation procedures, promote regional

94. See FAIZAL B. YAHYA, *ECONOMIC COOPERATION BETWEEN SINGAPORE AND INDIA: AN ALLIANCE IN THE MAKING?* 17 (2008) ("The engagement of the Singaporean corporate sector with India would also include an analysis on how the state in Singapore is in the driving seat of this engagement policy called regionalization.").

95. See *id.* at 17–27 (noting that for developmental states to remain competitive they must reach a wide market and that the governments of both Singapore and India have encouraged "companies and investors to diversify and seek newly emerging economies," to "invest abroad," to develop the infrastructure of the two countries).

96. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 31–32 ("The crisis also had a silver lining . . . [i]t also highlighted Asia's growing interdependence, weaknesses in the global financial system, and thus the benefits of Asian cooperation.").

97. See Paul Bowles, *ASEAN, AFTA and the "New Regionalism"*, 70 PAC. AFFAIRS 219, 222 (1997) [hereinafter Bowles, *New Regionalism*] ("A mere five years later, however, with intra-ASEAN trade even lower, Thailand's proposal for an ASEAN Free Trade Area was unanimously adopted.").

98. See Hadi Soesastro, *ASEAN Economic Cooperation: The Long Journey to AFTA*, 23 *INDONESIAN Q.* 25, 34 (1995) ("The mechanism to achieve a free trade area is the Common Effective Preferential Tariff (CEPT) scheme. . . . whereas under CEPT there is reciprocity in that once the good is accepted to be under CEPT all countries must give the preferential tariff.").

industrial projects (AIPs), stimulate regional investment, and tighten intra-sector collaboration (in communications, financial services, natural resources, tourism, and transportation).⁹⁹ Like the ASEAN Regional Forum, its security equivalent or near equivalent,¹⁰⁰ AFTA has been underpinned

99. See TAN, *supra* note 75, at 234–76 (discussing the evolution of ASEAN from a regional organization designed to promote political stability to its increasing role in world trade). See generally Ravenhill, *supra* note 85 (discussing AFTA and its likely success in light of ASEAN's previous record of failed attempts at integration); Soesastro, *supra* note 98 (reviewing the evolution of the ASEAN Economic Cooperation (AEC) scheme and its contribution to the development of AFTA); Paul Bowles & Brian MacLean, *Understanding Trade Bloc Formation: The Case of the ASEAN Free Trade Area*, 3 REV. INT'L POL. ECON. 319 (1996) (concluding that mainstream economic approaches do not provide a satisfactory explanation for the formation of AFTA and demanding an analysis of the political economy of ASEAN states); JAYANT MENON, ADJUSTING TOWARD AFTA (1996) (analyzing the dynamics of trade in the ASEAN countries and identifying the likely cost adjustments associated with liberalization of trade); AFTA IN THE CHANGING INTERNATIONAL ECONOMY (Joseph L. H. Tan ed., 1996) (examining trade, the ASEAN regional grouping, and the relationships between ASEAN, the United States, Japan, and the European Union as trade partners); ASEAN SECRETARIAT, ASEAN ECONOMIC COOPERATION: TRANSITION AND TRANSFORMATION (1997) (discussing the significant changes that have taken place in ASEAN economic cooperation); Bowles, *New Regionalism*, *supra* note 97 (considering why ASEAN chose to form AFTA in 1993 after previous economic schemes of limited scope, and how the formation of AFTA relates to the latest wave of regionalism in the world economy); Chia Siow Yue, *The ASEAN Free Trade Area*, 11 PAC. REV. 213 (1998) (discussing the formation of the ASEAN Free Trade Area, improvements to AFTA since its inception, and the complications that the enlargement of AFTA membership has had on the market integration process); Richard Stubbs, *Signing On to Liberalization: AFTA and the Politics of Regional Economic Cooperation*, 13 PAC. REV. 297 (2000) (noting that the success of AFTA may be attributed to a shift in the domestic balance of power in Indonesia, Malaysia, the Philippines, and Thailand, and to the regional cooperation that has developed among the ASEAN members); Nattapong Thongpakde, *ASEAN Free Trade Area: Progress and Challenges*, in ASEAN BEYOND THE REGIONAL CRISIS: CHALLENGES AND INITIATIVES 48 (Mya Than ed., 2001) (taking a retrospective view on the development of the ASEAN Free Trade Area); Nick J. Freeman, *ASEAN Investment Area: Progress and Challenges*, in ASEAN BEYOND THE REGIONAL CRISIS: CHALLENGES AND INITIATIVES 80 (Mya Than ed., 2001) (discussing the ASEAN Investment Area initiative); GLOBALISATION, DOMESTIC POLITICS AND REGIONALISM: THE ASEAN FREE TRADE AREA (Helen E.S. Nesadurai ed., 2003) [hereinafter GLOBALISATION, DOMESTIC POLITICS AND REGIONALISM] (analyzing the relationship between globalization and regionalism through an examination of the ASEAN Free Trade Area (AFTA) project); ASEAN FREE TRADE AREA: SOURCE BOOK (Donald Howell Miller ed., 2003) (providing business managers with a source for how AFTA will work, addressing the benefits they can derive from AFTA, and summarizing important facts as a starting point for research in developing their business plans).

100. See generally MICHAEL LEIFER, THE ASEAN REGIONAL FORUM: EXTENDING ASEAN'S MODEL OF REGIONAL SECURITY 3 (1996) ("This Paper examines the province and so-far limited experience of the ARF as an extension of ASEAN's model of regional security and assesses its suitability for its declared purpose of enhancing political and security cooperation within the wider Asia-Pacific region."); RODOLFO C. SEVERINO, THE ASEAN REGIONAL FORUM (2009) [hereinafter Severino, THE ASEAN REGIONAL FORUM] (discussing the development of the ASEAN Regional Forum and characterizing the ARF as a

by genuinely-shared interests.¹⁰¹ Individually, member States have lacked sufficient economies of scale and leverage to counter trends toward regionalization of business activity in other parts of the world and to participate effectively in international economic negotiations.¹⁰² The emergence of China as a magnet for trade and investment has posed a particular challenge from the 1990s onward and called for a strategic response designed to minimize the adverse consequences of its inherent attractions to exporters, importers, and purveyors of foreign capital.¹⁰³ In the liberal climate prevailing in the past two decades, pursuing this tack has been a relatively low-cost political proposition.¹⁰⁴

AFTA is often portrayed as the cornerstone of the evolving ASEAN economic community (AEC), complementing the corresponding security structure, which was historically more deep-rooted, but which in the current circumstances is perhaps exerting less influence on institutional dynamics.¹⁰⁵ Indeed, an ambitious blueprint was designed in 2003, and refined in 2007, to fulfill the vision of a truly integrated economic community by as early as 2015 (initially 2020).¹⁰⁶ It envisages the transformation of ASEAN into an entity characterized by a completely unfettered flow of goods, services, investment, capital, and skilled labor.¹⁰⁷

mechanism for consultation and dialogue among states in East Asia with interests in political and security issues in the Asia-Pacific region).

101. See Seiji Naya & Pearl Imada, *Implementing AFTA, 1992–2007*, in THE ASEAN READER 513, 513–15 (K.S. Sandhu et al. eds., 1992) (discussing the shared interests that lead to the creation of AFTA, specifically the pooling of resources and sharing of markets).

102. See GLOBALISATION, DOMESTIC POLITICS AND REGIONALISM, *supra* note 99, at 6 (“[S]ome dynamic gains from exploiting scale economies in AFTA were expected to boost the project’s overall welfare gains . . .”).

103. See Bowles, *New Regionalism*, *supra* note 97, at 223–24 (explaining that the risk of diverting investment away from other Asian countries, as a result of increased competition from China, is one of the driving forces behind the creation of the AFTA).

104. See GLOBALISATION, DOMESTIC POLITICS AND REGIONALISM, *supra* note 99, at 172–74 (stating that the diversion of investment to other parts of the world, most notably to China, was the motivation for adopting and sustaining AFTA as a project of open regionalism).

105. See Severino, *The ASEAN REGIONAL FORUM*, *supra* 100, at 1–3 (discussing the importance of security as a policy goal to the ASEAN economic community).

106. See Institute of Southeast Asian Studies, *ASEAN Roundtable 2008: ASEAN Economic Community Blueprint*, in 4 ASEAN ECONOMIC COMMUNITY BLUEPRINT 1, 4 (2009) (“In 2003, ASEAN embarked on a bold project to accelerate the integration of the regional economy and establish an ASEAN Economic Community by 2020 . . . [l]ater, that deadline was brought forward to 2015.”).

107. See *id.* (“The AEC envisages ASEAN as a single market and production base with free flow of goods, services, investments, capital and skilled labour.”). See generally INSTITUTE OF SOUTHEAST ASIAN STUDIES, 1 THE ASEAN COMMUNITY: UNBLOCKING THE ROADBLOCKS (2008) (beginning with a brief account of the important points raised during a workshop on “The ASEAN Community: Unblocking Roadblocks” and followed by short papers, both of which aid in appreciating the benefits of a comprehensive regional

Evidence regarding progress on the socio-cultural front is less apparent but not altogether absent.¹⁰⁸ On socio-cultural matters, regional cooperation has manifested itself, albeit not decisively, in efforts to boost education (including literacy),¹⁰⁹ to contain ethnic and religious conflicts,¹¹⁰ to preserve indigenous traditions in the face of the encroaching forces of modernization, rather than embrace the melting-pot model,¹¹¹ and to support social equality and justice.¹¹² While the impact may have been modest thus far, to the extent that ASEAN is a dynamic entity, it is noteworthy that a socio-cultural component is an integral part of the multi-dimensional blueprint outlining in strategic terms a vision of a genuine ASEAN community spanning all key policy domains.¹¹³

community); INSTITUTE OF SOUTHEAST ASIAN STUDIES, *REALIZING THE ASEAN ECONOMIC COMMUNITY: A COMPREHENSIVE ASSESSMENT* (Michael G. Plummer & Chia Siow Yue eds., 2009) (commenting on ASEAN's decision to create the ASEAN Economic Community to promote deeper economic integration and discussing the benefits and costs of the AEC).

108. See Carolina S. Guina, *The ASEAN Socio-Cultural Community*, in 1 *THE ASEAN COMMUNITY: UNBLOCKING THE ROADBLOCKS* 65 (2008) (“While the blueprint of the ASEAN Economic Community has been completed, that of the ASCC [ASEAN Socio-Cultural Community] is still a work in progress . . .”).

109. See Aline K. Wong & Paul P. L. Cheung, *Demographic and Social Development: Taking Stock for the Morrow*, in *THE ASEAN READER* 145, 148 (K.S. Sandhu et al. eds., 1992) (“Another major aspect of ASEAN's social development is its educational transformation. . . . [t]he trend toward broad-based and longer formal education is clearly evident in all ASEAN countries.”); Ungku A. Aziz, *Co-operation on Education in ASEAN*, in *THE ASEAN READER* 167, 167–68 (K.S. Sandhu et al. eds., 1992) (discussing the connection between ASEAN education and ASEAN awareness, and pointing out that cooperation on education in the ASEAN region has been successful).

110. See Wang Gungwu, *Ethnicity and Religion in Social Development*, in *THE ASEAN READER* 175, 175–77 (K.S. Sandhu et al. eds., 1992) (discussing three historical phases in the ASEAN region and considering the political implications of religion and ethnicity in ASEAN).

111. See Lau Teik Soon, *Cultural Co-operation Between the ASEAN States*, in *THE ASEAN READER* 141, 141–44 (K.S. Sandhu et al. eds., 1992) (“As urbanization is proceeding, there is in ASEAN today a great concern for the preservation and development of the various cultures.”).

112. See John E. Walsh, *Cultural Components of the Search for Social Justice in ASEAN: A Westerner's View*, in *THE ASEAN READER* 161, 161 (K.S. Sandhu et al. eds., 1992) (“One of the many impressive and distinctive things about ASEAN . . . is that it may be the only regional organization or association that has made a formal commitment to the achieving of social justice at the regional level.”).

113. See Severino, *The ASEAN REGIONAL FORUM*, *supra* 100, at 368–70 (arguing that the development of a socio-cultural community is necessary for ASEAN to develop an ASEAN Community); Severino, *TOWARDS AN ASEAN SECURITY COMMUNITY*, *supra* note 81, at 1–3 (pointing out the creation of the ASEAN Socio-Cultural Community as critical to economic, social, and cultural cooperation); Guina, *supra* note 108, at 65–70 (describing the ASCC as a “work-in-progress” and providing suggestions to move the ASCC towards its aspiration of fostering a shared cultural identity).

Although a regional entity and its institutions (i.e., a regime) should not be identified solely with formal instruments, having adopted a charter and constitution in 2007 (ratified by members by late 2008),¹¹⁴ ASEAN may now be viewed as a broad-based legal community as well.¹¹⁵ For the first four decades of its existence, the organization had primarily relied on tacit understandings (e.g., the ‘ASEAN Way’) and a few technically binding accords (e.g., AFTA), whose implementation had largely depended on members’ voluntary compliance.¹¹⁶ By the same token, ASEAN’s institutional foundations (e.g., the Secretariat, its de facto executive arm) had remained weak despite periodic attempts to fortify them.¹¹⁷ The adoption of a charter may thus be viewed as a crucial step in the evolution toward a comprehensive and viable regional community.¹¹⁸

114. See Mely Caballero-Anthony, *The ASEAN Charter: Making Sense Out of Mixed Responses*, in *THE ASEAN COMMUNITY: UNBLOCKING THE ROADBLOCKS*, *supra* note 109, at 84 (“The ASEAN Charter was formally adopted by ASEAN’s leaders on 20 November 2007.”).

115. See Mely Caballero-Anthony, *The ASEAN Charter: Making Sense Out of Mixed Responses*, in *THE ASEAN COMMUNITY: UNBLOCKING THE ROADBLOCKS*, *supra* note 109, at 85 (“ASEAN officials have explained that the Charter would establish the association as a ‘jurisdictional personality and a legal entity . . .’”).

116. See Mely Caballero-Anthony, *The ASEAN Charter: Making Sense Out of Mixed Responses*, in *THE ASEAN COMMUNITY: UNBLOCKING THE ROADBLOCKS*, *supra* note 109, at 87 (“We also note that the ASEAN practice of compliance has, so far, been largely voluntary in nature.”).

117. See Rodolfo C. Severino, *ASEAN Beyond Forty: Towards Political and Economic Integration*, 29 *CONTEMP. SE. ASIA* 406, 420 (2007) (“[T]he status and authority of the Secretary-General were significantly enhanced in 1992. . . . Nevertheless, partly for budgetary reasons and partly as a result of deliberate policy, the Secretariat remains circumscribed in its ability to propose intellectual positions and take substantial initiatives.”).

118. See generally Locknie Hsu, *The ASEAN Charter and a Legal Identity for ASEAN*, in *THE ASEAN COMMUNITY: UNBLOCKING THE ROADBLOCKS* 71, 74–75 (2008) (explaining that the ASEAN charter provides direction and symbolism to the group’s effort to become a more cohesive and orderly institution); Mely Caballero-Anthony, *The ASEAN Charter: Making Sense Out of Mixed Responses*, in *THE ASEAN COMMUNITY: UNBLOCKING THE ROADBLOCKS*, 84, 84–95 (2008) (commenting on the ASEAN charter’s ability to accord ASEAN legal personality, to establish accountability and compliance, and to reinforce the perception of ASEAN as a serious regional player); RODOLFO C. SEVERINO, *FRAMING THE ASEAN CHARTER: AN ISEAS PERSPECTIVE* 1–3 (2005) (highlighting proposed ideas for the adoption of the ASEAN charter, such as giving ASEAN a legal personality and making ASEAN a more responsive, dynamic and integrated regional organization).

III. Theoretical Ramifications

Since its establishment in 1967, ASEAN has grown in size and stature, and has overcome manifold strains, both external and internal.¹¹⁹ It has experienced setbacks and long periods marked by institutional inertia, but it has adapted and has continued to expand its strategic agenda.¹²⁰ Despite the pull of globalization and the trend toward broader East Asian integration, at least in the economic sense of the term, ASEAN has not seen an erosion of its Southeast Asian geographical boundaries—and its distinct aspirations have turned increasingly lofty. To all appearances, it is now on the verge of becoming a full-fledged regional community.¹²¹

Indeed, some academic observers assert that, for all intents and purposes, ASEAN already qualifies as such.¹²² They employ sociological tools to advance the proposition that the organization's extensive and increasingly complex operations have transformed it into a cohesive entity which, in constructivist terms, displays a strong regional identity.¹²³ From a regime perspective, ASEAN shares common norms and practices, underpinned by a bond of belonging or a sense of 'we feeling' which ties members closely together.¹²⁴ The group-wide principles and psychological attachments override individual interests and identities.¹²⁵

119. See ACHARYA, *CONSTRUCTING A SECURITY COMMUNITY*, *supra* note 70, at 5–6 (“Since its formation in 1967, ASEAN has lived through a major shift in the regional strategic environment of Southeast Asia. . . . by the early 1990s its members could claim their grouping to be one of the most successful experiments in regional cooperation in the developing world.”).

120. See ACHARYA, *CONSTRUCTING A SECURITY COMMUNITY*, *supra* note 70, at 6–7 (commenting on ASEAN reform efforts in response to criticism and perceived shortcomings including a vision to build an ASEAN community by 2020).

121. See Chin Kin Wah, *ASEAN: The Long Road to “One Southeast Asia”*, 5 *ASIAN J. OF POL. SCI.* 1, 2 (1997) (“Over the years, ASEAN . . . has acquired a reputation as a successful regional community . . .”).

122. See *id.* (claiming ASEAN has developed a reputation as a successful regional community).

123. See Nikolas Busse, *Constructivism and Southeast Asian Security*, 12 *PAC. REV.* 39, 53–55 (1999) (indicating the growing empathy among the foreign policies of the ASEAN states, the increased assertiveness of its dealings with the outside world, and the unlikelihood of war among founding members which indicate the emergence of a collective identity).

124. See *id.* at 53 (“The States involved develop a feeling of togetherness because norms are shared and not held individually . . . such a process took place among the founding members of ASEAN.”).

125. See generally ACHARYA, *CONSTRUCTING A SECURITY COMMUNITY*, *supra* note 70 (examining ASEAN's record in managing regional order by focusing on both its accomplishments and its failures and making a case for adopting a sociological approach to the study of regionalism); *THE ASEAN SUCCESS STORY: SOCIAL, ECONOMIC, AND POLITICAL DIMENSIONS* (Linda G. Martin ed., 1987) (examining from several perspectives the factors underlying ASEAN success as well as documenting its failures); Chin Kin Wah, *supra* note

Norms vary in their institutional impact. Some lack substantial depth in that they merely specify the rules according to which States may pursue their preferences.¹²⁶ Others extend further by defining the roles that determine how States come to understand those preferences.¹²⁷ The former are referred to as ‘regulatory’ and the latter as ‘constitutive.’¹²⁸ It is assumed that, as a regime, ASEAN has progressed beyond the regulatory level and functions as a constitutive body (Figure 1).¹²⁹ This position has been expressed with respect to patterns seen in the security domain,¹³⁰ but it has been implicitly invoked in studies focusing on economic integration, interdependence, and cooperation.¹³¹

121, at 1–19 (discussing the expansion of ASEAN and the move towards “One Southeast Asia”); Busse, *supra* note 123, at 53–55 (providing examples which highlight the development of ASEAN’s collective identity).

126. See ACHARYA, CONSTRUCTING A SECURITY COMMUNITY, *supra* note 70, at 26 (describing regulatory norms as only proscribing and regulating behavior).

127. See ACHARYA, CONSTRUCTING A SECURITY COMMUNITY, *supra* note 70, at 26 (describing constitutive norms as defining and constituting identities).

128. See ACHARYA, CONSTRUCTING A SECURITY COMMUNITY, *supra* note 70, at 26 (“Norms not only proscribe and regulate behavior [the regulatory effect], they also define and constitute identities [the constitutive effect].”).

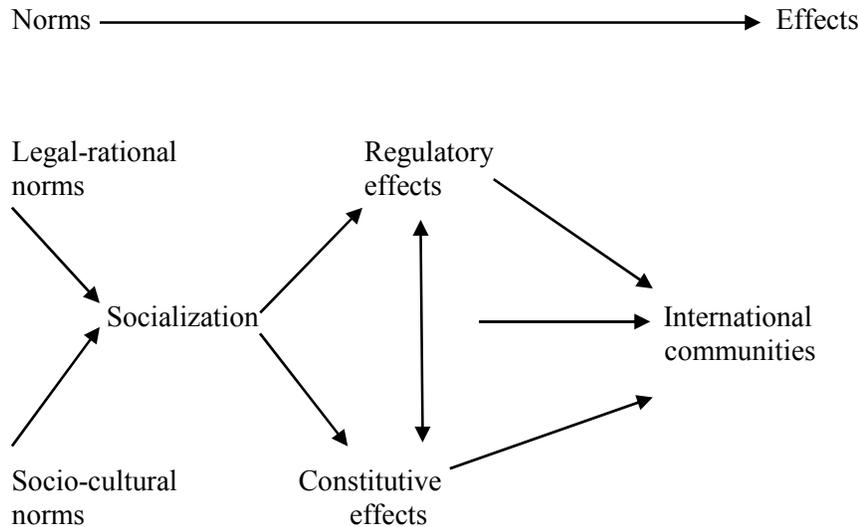
129. See generally ACHARYA, CONSTRUCTING A SECURITY COMMUNITY, *supra* note 70 (assessing whether the norms of ASEAN have had a regulatory impact and whether they might have created a sense of regional community).

130. See ACHARYA, CONSTRUCTING A SECURITY COMMUNITY, *supra* note 70, at 25–29 (explaining that, in security communities, states develop a sense of we feeling from repeated adherence to norms can be seen in the ASEAN context through the expression of the “ASEAN Way”).

131. See generally ASIAN DEVELOPMENT BANK, *supra* note 38, at 244–49 (characterizing the development towards Asian regionalism as a gradual process complicated by broad, varied and overlapping regional institutions); Alfredo C. Robles, Jr., *The ASEAN Free Trade Area and the Construction of a Southeast Asian Economic Community in East Asia*, 12 ASIAN J. POL. SCI. 78, 89–96 (2004) (commenting on the desire of ASEAN to have foreign markets perceive Southeast Asia as a single region rather than a collection of different investment locations); Severino, *The ASEAN REGIONAL FORUM*, *supra* 100, at 422 (“It [ASEAN] has fostered a certain level of regional affinity among certain sectors of the region’s elites.”).

Figure 1¹³²

Model of International Community Formation



However, that view is not universally held. A considerable number of scholars harbor skepticism regarding the notion that the decades-long ASEAN experience has socialized members into acquiring a meaningful sense of regional identity and that this identity has significantly impinged on their behavior vis-a-vis each other and non-members.¹³³ They claim that the organization has been designed as an instrument to enable members to pursue their narrow interests and has consistently served as such.¹³⁴ Its institutional foundations have been weak and incapable of effectively supporting multilateral endeavors, which, in any event, have generated little

132. Adapted from: ACHARYA, CONSTRUCTING A SECURITY COMMUNITY, *supra* note 70, at 31.

133. See MICHAEL LEIFER, ASEAN AND THE SECURITY OF SOUTH-EAST ASIA 153–59 (1989) (arguing that while ASEAN has developed some sense of regional identity it has yet to transcend the pull of more narrow state interest).

134. See *id.* at 153 (“Member governments have viewed their participation in terms of how their separate interests might best be served.”).

enthusiasm in policy circles.¹³⁵ ASEAN has proved useful to members at various junctures, individually and collectively, but it has not exhibited the strategic and psychological attributes of a genuine regional community.¹³⁶

The absence of an overarching purpose and the fragility of attitudinal bonds have apparently become evident on several occasions, notably during the 1997–1998 Asian financial crisis.¹³⁷ This severely disruptive event harshly exposed ASEAN'S limitations and vulnerabilities as a player in the global and regional arenas.¹³⁸ It also brought into sharp focus deep-seated organizational fissures, which may have been conveniently concealed behind a shallow facade of symbolic institutional unity.¹³⁹ A legitimate reading of the situation was that, in the face of intense politico-economic pressures, member States promptly turned inward and abandoned any efforts to formulate a coherent and productive regional response.¹⁴⁰

135. See Ralf Emmers, *International Regime-Building in ASEAN: Cooperation Against the Illicit Trafficking and Abuse of Drugs*, 29 CONTEMP. SE. ASIA 506, 519 (2007) (“Instead, most of the action adopted by the ten ASEAN countries . . . has primarily taken place at a unilateral and bilateral level rather than multilaterally.”).

136. See generally LEIFER, *supra* note 133 (outlining the issues involved in the formation of ASEAN and summarizing the events that have shaped the organization's development); JEANNIE HENDERSON, REASSESSING ASEAN (1999) (discussing how ASEAN's expansion has resulted in numerous challenges which threaten to undermine the group's ability to establish an integrated regional identity); Jürgen Rüländ, *ASEAN and the Asian Crisis: Theoretical Implications and Practical Consequences for Southeast Asian Regionalism*, 13 PAC. REV. 421, 443 (2000) [hereinafter Rüländ, *Asian Crisis*] (“The norms constituting ASEAN's collective identity still produce only a thin layer of institutionalism cast over essentially realist behavior.”); Emmers, *supra* note 138, at 519–22 (arguing that the failures in the war on drugs in Southeast Asia are due in large part to the inability of ASEAN to establish a genuine regional community); Donald K. Emmerson, *Challenging ASEAN: A “Topological” View*, 29 CONTEMP. SE. ASIA 424, 429–31 (2007) (arguing that in order for ASEAN to become a regional community it must democratize its decision making process); Jürgen Rüländ, *Deepening ASEAN Cooperation Through Democratization? The Indonesian Legislature and Foreign Policymaking*, 9 INT'L REL. ASIA-PAC. 373, 373–402 (2009) (questioning whether recent reforms by ASEAN have actually furthered regional integration, and arguing that the causal relationship between democracy and regional integration is more complex).

137. See Rüländ, *Asian Crisis*, *supra* note 136, at 424 (“Yet, the crisis has exacerbated contradictions in ASEAN cooperation and exposed institutional which were previously swept under the carpet.”).

138. See HENDERSON, *supra* note 136, at 42 (“ASEAN had no effective response to the economic crisis.”).

139. See Rüländ, *Asian Crisis*, *supra* note 136, at 428 (“[A] closer look [at the response to the 1997/1998 crisis] reveals a strong dose of realist thinking behind the façade of ASEAN solidarity.”).

140. See generally Rüländ, *Asian Crisis*, *supra* note 136 (arguing that the Asian crisis has thrown the collective identity of ASEAN into disarray, which calls into question constructivist approaches); SOUTHEAST ASIA'S ECONOMIC CRISIS: ORIGINS, LESSONS, AND THE WAY FORWARD (H.W. Arndt & Hal Hill eds., 1999) (discussing the difficulties that

This abrupt retreat into neo-isolationism and the politics of self-interest has re-opened the theoretical debate about the essence of international cooperation in Southeast Asia.¹⁴¹ Before States in the region began to engage in meaningful cross-border bridge-building, their external maneuvers were viewed primarily through a realist lens.¹⁴² In the anarchic post-Second World War environment, characterized by a precarious balance of power between the United States and the Soviet Union, with China looming in the shadows and ideological conflicts abounding across a volatile Asian continent, the development of capabilities geared toward survival was seen as the dominant motive shaping State conduct.¹⁴³ International interaction was regarded as a zero-sum game, leaving virtually no scope for genuine collaboration, other than for purely instrumental purposes.¹⁴⁴

As the Cold War has fizzled out, regional conflicts have subsided, and ASEAN has started to display signs of cohesion—at least periodically and selectively, realist approaches have receded into the background.¹⁴⁵ Liberal institutionalism and institutional constructivism have come into

ASEAN had in conducting an effective regional response to the Asian financial crisis); Chang Li Lin & Ramkishan S. Rajan, *Regional Responses to the Southeast Asian Financial Crisis: A Case of Self-Help or No Help?*, 53 AUSTL. J. INT'L AFF. 261, 261 (1999) (“The crisis and the responses to it have revealed that unless there is greater institutionalism, ASEAN countries would continue to look outside the region for assistance to facilitate their recovery.”); Michael Wesley, *The Asian Crisis and the Adequacy of Regional Institutions*, 21 CONTEMP. SE. ASIA 54 (1999) (explaining that the regional response to the Asian financial crisis was ineffective and regional reform efforts are needed to protect against financial instability); Stuart Harris, *Asian Multilateral Institutions and their Response to the Asian Economic Crisis: The Regional and Global Implications*, 13 PAC. REV. 495 (2000) (arguing that the Asian economic crisis revealed weaknesses of regional multilateral institutions but that, despite the inadequacy of the response by those institutions, it was far from negligible).

141. See Rüländ, *Asian Crisis*, *supra* note 136, at 423 (“The Asian crisis is an invitation to revisit the theoretical arguments exchanged in the last decade . . . [some argue] that the institutional and constructivist requiems for realism were premature . . . for instance [a study] has shown that under adverse conditions integration may recede through retrenchment and spillback.”).

142. See Rüländ, *Asian Crisis*, *supra* note 136, at 421–22 (explaining that until the 1990s Southeast Asia was viewed primarily through the realist paradigm).

143. See Severino, *The ASEAN REGIONAL FORUM*, *supra* 100, at 408 (“The antagonistic relations among China, the Soviet Union and the United States and its Asian allies, including Japan, made for great instability and insecurity in East Asia.”).

144. See Rüländ, *Asian Crisis*, *supra* note 136, at 422 (“In the zero-sum nature of international relations, the behavior of states was guided by a primacy of relative over absolute gains.”).

145. See Rüländ, *Asian Crisis*, *supra* note 136, at 422 (“In post-Cold War Southeast Asia, one argument goes, the danger of wars has markedly declined . . . [c]onfidence-building measures, preventative diplomacy and other institutional strategies have now entered the security agenda.”).

vogue as analytical vehicles for interpreting State behavior in general, and in the Southeast Asian context in particular.¹⁴⁶ While not consigning self-interest to intellectual oblivion, liberal institutionalism lays emphasis on the concrete benefits derived from cooperation (notably in enduring relationships, as distinct from one-off relationships), and the interdependencies among players in the global arena, portraying international interaction as mostly a positive-sum game.¹⁴⁷

Institutional constructivism differs from realism and liberal institutionalism in that it relaxes, even jettisons, the assumption that States are rational entities that weigh systematically the advantages and disadvantages of competing strategies.¹⁴⁸ Rather, institutional constructivism embraces a reflexivist perspective by positing that the factors (including material interests) that influence State conduct are not exogenously given, but emerge as the product of ongoing involvement in international processes and structural adaptation.¹⁴⁹ Collective identities, such as those apparently observed in Southeast Asia, play a crucial role in this form of social evolution and the experience of the ASEAN regional community, increasingly a psychological construct exhibiting non-instrumental features, lends solid support to this conception of interstate collaboration.¹⁵⁰

The 1997–1998 Asian financial crisis has seriously dented, although has not necessarily eliminated, the credibility of those two theoretical frameworks.¹⁵¹ The crisis unambiguously demonstrated that the

146. See Rüländ, *Asian Crisis*, *supra* note 136, at 422 (“For liberal institutionalists cooperation and institution-building thus became the new paradigms in the study of international relations in Southeast Asia.”).

147. See Rüländ, *Asian Crisis*, *supra* note 136, at 422–23 (arguing the economic boom and the end of the cold war has generated new opportunities for cooperation in Southeast Asia).

148. See Rüländ, *Asian Crisis*, *supra* note 136, at 423 (“While realism and institutionalism are committed to rationalism, constructivists share a reflexivist concept of science . . . [t]heir key concern is the relationship between ideas, identities, and material interests, which change through interaction of agents (states) and structure.”).

149. See Rüländ, *Asian Crisis*, *supra* note 136, at 423 (discussing how constructivists are concerned with internal rather than external processes).

150. See Rüländ, *Asian Crisis*, *supra* note 136, at 422 (“It was believed that commonly accepted principles and norms in security cooperation, growing market-driven economic interdependencies, and the rise of epistemic communities created favorable conditions for spillovers into new areas of cooperation.”).

151. See Rüländ, *Asian Crisis*, *supra* note 136, at 422–23 (arguing that the Asian financial crisis casts doubt on institutionalism frameworks, but that it did not render them irrelevant).

obituaries for realism have been premature.¹⁵² The crisis has also vividly shown that liberal institutionalism and its constructivist counterpart have failed to take proper account of reversals in integration, and in community-formation, due to cross-border cooperation often being a non-linear process, or one prone to symptoms of decay, retrenchment, and spillback (the term Eursosclerosis has been invoked to epitomize this phenomenon).¹⁵³

The crisis, which was an analytically telling politico-economic episode, has not led to an unqualified revival of realist thought and the demise of institutionalist formulations.¹⁵⁴ Instead, when the events of the previous three decades have been reassessed, a tenuous compromise has emerged, stipulating that the various schools “not only coexist in a *dual-track strategy*, but in many instances are closely intertwined.”¹⁵⁵ The corollary is that the “[f]oreign policy of ASEAN [S]tates must . . . be understood as a mix of realist and institutionalist elements changing according to circumstances,”¹⁵⁶ although the uncertainty regarding the properties of the underlying dynamics has not been dispelled.¹⁵⁷

Such theoretical soul-searching, which is ongoing and inconclusive, is not confined to the Southeast Asian space. It has been witnessed in the field of international law at least since Henkin addressed comprehensively the issue of how nations behave or, to express it differently, why they create and maintain international legal regimes.¹⁵⁸ The particular explanation he offered, which reflected a benign view of State conduct and the prevailing world order, has not been embraced by all students of international law.¹⁵⁹ Some have shared his sanguine outlook, typically those on the normative

152. See Rüländ, *Asian Crisis*, *supra* note 136, at 423 (“The Asian crisis is an invitation to revisit the theoretical arguments exchanged in the last decade . . . [some argue] that the institutional and constructivist requiems for realism were premature.”).

153. See Rüländ, *Asian Crisis*, *supra* note 136, at 423 (“Institutional approaches, for instance, have failed to take into account integration reversals.”).

154. See Rüländ, *Asian Crisis*, *supra* note 136, at 424 (“Foreign policy of ASEAN states must thus be understood as a mix of realist and institutionalist elements changing according to the circumstances.”).

155. Rüländ, *Asian Crisis*, *supra* note 136, at 424.

156. Rüländ, *Asian Crisis*, *supra* note 136, at 424.

157. See Rüländ, *Asian Crisis*, *supra* note 136, at 424 (discussing how the Asian financial crisis has stirred up debate for new institutionalist policies and created uncertainty over where the balance between realist and institutionalist frameworks currently stands).

158. See generally LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 10–11 (2d ed. 1979) (arguing that compliance with international law is the result of nations observing norms in support of an orderly society).

159. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935, 2025 (2002) (acknowledging that the human rights treaty compliance is dependent on self-reporting and threats to reputation; however, these monitoring systems have proven woefully ineffective).

side of the analytical divide, but others have adopted a more skeptical stance.¹⁶⁰

The latter, primarily scholars of a realist/neo-realist persuasion, have not been driven to the sidelines in the post-Cold War era and have gained further prominence following the publication of Goldsmith's and Posner's seminal treatise on the fragile underpinnings of international legal regimes (specifically the issue of compliance, which is the principal focus of the work surveyed here).¹⁶¹ They have argued emphatically that "international law emerges from [S]tates acting rationally to maximize their interests, given their perceptions of the interests of other [S]tates and the distribution of [S]tate power"¹⁶² and have sought to demonstrate conceptually, as well as empirically (by providing relevant illustrations), the validity of this assertion.¹⁶³

International collaboration, to the extent that it materializes and possesses legal attributes, thus inevitably rests on modest foundations. It is commonly the product of a narrow coincidence of interests, coordination patterns marked by higher payoffs from identical or symmetrical strategies than from any alternatives, and willingness to sacrifice short-term benefits

160. See generally *id.* (concluding that ratification of the treaties by individual countries is more commonly used to offset pressure for change in human rights practice than to augment it); Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387, 439–40 (2000) (concluding that one must look beyond compliance to see the benefits of international law); Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS 538, 538–58 (Walter Carlsnaes et al. eds., 2002) (surveying the study of compliance in international relations and international law); William C. Bradford, *International Legal Compliance: Surveying the Field*, 36 GEO. J. INT'L L. 495, 495–536 (2005) (annotating the legal debate between legalization theorists who believe that international law, on its own, affects states and their critics who believe that international law remains purely aspirational); JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 225 (2005) (arguing that compliance with international law is a result of states pursuing their own self interest); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 211–18 (2008) (arguing that an international law violation can generate costs for states in three ways: reputation, reciprocity, and retaliation); JOEL P. TRACHTMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* 11 (2008) (“[I]nternational law is produced in order to allow states to achieve their preferences with greater effectiveness through exchanges of authority . . .”).

161. See GOLDSMITH & POSNER, *supra* note 160, at 225 (“International law is a real phenomenon but international law scholars exaggerate its power and significance . . . the best explanation for when and why states comply with international law is . . . simply that states act out of self-interest.”).

162. GOLDSMITH & POSNER, *supra* note 160, at 3.

163. See GOLDSMITH & POSNER, *supra* note 160, at 13–14 (explaining that international law emerges from states acting rationally to maximize their interest and that it can be understood through the analysis of customary international law, treaties, and challenges to the authors' theory).

in order to realize long-term advantages.¹⁶⁴ Moreover, regimes are not always the outcome of free initiative by the parties involved and may be the result of coercion, which takes place “when a powerful [S]tate (or coalition of [S]tates with convergent interests) forces weaker [S]tates to engage in acts that are contrary to their interests (defined independently of the coercion).”¹⁶⁵

As indicated, the theoretical soundness and empirical robustness of this portrayal is challenged by liberal institutionalists, international law researchers, as well as certain students of international relations.¹⁶⁶ They do not question the assumption that States may be conveniently regarded as single entities and rational players that are attentive to the logic of self-centered cost-benefit calculus.¹⁶⁷ However, these challengers place greater emphasis on interdependence among States in general, and in today’s global environment in particular (given the prevalence of blurred roles and permeable boundaries), highlighting the fact that choices by one party are often contingent on those made by another and that this almost invariably is the case in social settings characterized by strong inter-actor linkages (e.g., game of chicken and prisoner’s dilemma).¹⁶⁸ Overlooking the welfare of foreign States may consequently be a strategy detrimental to the interests of players contently pursuing it, notably if the relationship is long-lasting in nature (i.e., akin to a repeated game).¹⁶⁹ By contrast, entering into cooperative arrangements and sustaining them may be a relatively low-cost proposition.¹⁷⁰

The advantages and disadvantages of international cooperation are balanced differently in liberal institutionalist accounts than in realist/neo-realist ones.¹⁷¹ The absence of an overarching sovereign authority, posing

164. See GOLDSMITH & POSNER, *supra* note 160, at 11–12 (arguing that state behavior associated with international law can be explained by one of the four models including coincidence of interest, coordination, cooperation, or coercion).

165. GOLDSMITH & POSNER, *supra* note 160, at 12.

166. See GOLDSMITH & POSNER, *supra* note 160, at 8–9 (discussing the critiques of rational choice theory by an array of scholars in related fields).

167. See ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE* 3–19 (3d ed. 2001) (explaining the theoretical frameworks of realism and institutionalism, and discussing the relevance of rational players in a world increasingly influenced by non-governmental actors).

168. See *id.* at 7 (“Interdependence in world politics refers to situations characterized by reciprocal effects among countries or among actors in different countries.”).

169. See Krasner, *Structural Causes*, *supra* note 9, at 11–12 (citing egoistic self-interest as the most widely-accepted explanation underlying international regime theory).

170. See Krasner, *Structural Causes*, *supra* note 9, at 11–12 (discussing two circumstances where freedom of choice provides an incentive to cooperate).

171. See Stephen Krasner, *International Law and International Relations: Together, Apart, Together?*, 1 *CHL. J. INT’L L.* 93 (2000) (highlighting the differences between liberalism and realism in the context of international regime theory).

the risk of anarchy, is a theme pervading both schools of thought.¹⁷² The highly decentralized world order makes it attractive and easy for States to refrain from undertaking collective obligations and not to respect their commitments.¹⁷³ To make matters worse, a single State may free-ride on international accords, obtaining the benefits generated in the process without incurring any material costs.¹⁷⁴ Realists/neo-realists aim to counter this propensity through power politics, but within the liberal institutionalist framework the appreciation of the implications of interdependencies in a loosely-structured and volatile global system prompts States to collaborate with a view to maximizing mutual gains and minimizing the fallout from self-centered adaptation.¹⁷⁵

ASEAN-style cross-border bridge-building is a key tool employed to that end. Intricate organizational mechanisms are devised to perform a range of stability-promoting functions such as increasing transparency, reducing the transaction costs of cooperation, monitoring compliance, pursuing enforcement, and preventing deception.¹⁷⁶ The institutions that result from this collective endeavor are “social practices consisting of easily recognized roles coupled with clusters of rules or conventions governing relations among the occupants of these roles.”¹⁷⁷ The rules that link the latter “encompass sets of rights or entitlements . . . as well as sets of behavioral prescriptions.”¹⁷⁸

International law scholars typically provide generalizations about State conduct predicated on the premise that it is driven by deliberate choices inspired by either normative or utilitarian considerations.¹⁷⁹ The difference between the rationalist perspectives of realists/neo-realists and liberal institutionalists lies not in the willingness, or lack thereof, to

172. See generally *id.* (comparing the realist focus on anarchical power relations with the liberal drive towards institutionalism).

173. See *id.* at 94 (explaining the importance of unequal bargaining power between states to both realist and liberal philosophies).

174. See KATE O'NEILL, *THE ENVIRONMENT AND INTERNATIONAL RELATIONS* 10 (2009) (“Thus, a single state can free-ride on an international agreement, and receive the benefits from it without paying any costs of adjustment.”).

175. See GERRY NAGTZAAM, *THE MAKING OF INTERNATIONAL ENVIRONMENTAL TREATIES: NEOLIBERAL AND CONSTRUCTIVIST ANALYSES OF NORMATIVE EVOLUTION* 30 (2009) (“States are ‘rational egoists’, who generally wish to maximize their gains from any transaction, while minimizing costs.”).

176. See YOUNG, *INTERNATIONAL COOPERATION*, *supra* note 25, at 11 (discussing various predominant types of international regimes).

177. YOUNG, *INTERNATIONAL COOPERATION*, *supra* note 25, at 5.

178. YOUNG, *INTERNATIONAL COOPERATION*, *supra* note 25, at 5.

179. Such choices may of course be subject to various constraints. See generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995) (explaining the propensity of states to comply with international obligations).

embrace economic-style reasoning but in the value attached to collaboration.¹⁸⁰ Normative approaches, which are less relevant in the ASEAN context, deny the merits of utilitarian reasoning, but do not necessarily reject the hypothesis that, for all intents and purposes, States operate as unitary actors.¹⁸¹

Transnational legal process theory (TLPT), a distinctly constructivist analytical strand in the conceptually fragmented international law space, is not wedded to the notion of methodical deliberation or the idea of State centrality/cohesion.¹⁸² According to this school of thought, the creation and maintenance of an international legal regime is not the product of static adaptation to prevailing norms or the mechanistic application of cost-benefit calculus but the result of ongoing interaction among a multiplicity of players, some public/State and some private/non-State (e.g., Southeast Asian non-governmental organizations/NGOs),¹⁸³ some country-specific and some international (e.g., ASEAN Secretariat).¹⁸⁴

180. See Krasner, *supra* note 171, at 95 (citing cooperation as the defining core of liberalism).

181. See NAGTZAAM, *supra* note 255, at 30 (discussing the normative approach).

182. See Harold H. Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 181–83 (1996) [hereinafter Koh, *Transnational*] (“[Transnational legal process] is nonstatist: the actors in this process are not just, or even primarily, nation-states, but include nonstate actors as well.”).

183. See JoAnn Fagot Aviel, *Placing Human Rights and Environmental Issues on ASEAN’s Agenda: The Role of Non-Governmental Organizations*, 8 ASIAN J. POL. SCI. 17, 17 (2000) (“However, [NGO] success in forming both domestic and regional networks, some of which have even included government officials, has enabled them to successfully place human rights and environmental issues on the agenda of the Association of Southeast Asian Nations (ASEAN).”); PETER BOOMGAARD, *SOUTHEAST ASIA: AN ENVIRONMENTAL HISTORY* 325–26 (2007) (“For various reasons, environmental NGOs have often enjoyed greater latitude under the autocratic regimes of Southeast Asia than other organizations with critical views, partly because even dictatorial regimes wanted to look ‘modern’ in the eyes of the world by appearing to be alive to environmental concerns.”).

184. See generally Koh, *Transnational*, *supra* note 182 (arguing that transnational legal process has been the dominant mode of international legal scholarship for the past few decades); Harold H. Koh, *Why Do Nations Obey International Law*, 106 YALE L.J. 2599 (1997) [hereinafter Koh, *Why Do Nations Obey*] (asserting that incorporation of international norms into domestic legal systems is key to understanding why nations obey international law); Harold H. Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999) [hereinafter Koh, *International Human Rights*] (arguing that human rights law is enforced by individual interaction, interpretation, and internationalization in the transnational context); Mary E. O’Connell, *New International Legal Process*, 93 AM. J. INT’L L. 334, 339 (1999) (“The resulting new ILP, therefore, would advocate knowledge of the legal system and valuing institutional settlement in line with international society’s values, to resolve society’s rapidly expanding issues.”); Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT’L L. 19 (2000) (positing that international law is more widely accepted when it is created through interactions among a wide range of state participants);

From that standpoint, participation in a complex, demanding, and lengthy process such as the formation of a regional community is a learning experience, or a type of socialization undergone by the actors involved, during which their identities are reconfigured and they internalize and implement collective values such as those underpinning the ASEAN Way.¹⁸⁵ This is not a symmetric pattern. The causal impulses tend to travel through channels that link international sources with domestic targets, not the other way around.¹⁸⁶ A number of socialization agents play a key role in this apparently productive and essentially open-ended cognitive and behavioral adjustment (e.g., bureaucratic procedures, governmental norm sponsors, issue linkages, interpretive communities, law-declaring forums, transnational issue networks, and transnational norms entrepreneurs).¹⁸⁷

As noted, constructivist frameworks such as TLPT hold considerable appeal for researchers who dissect ASEAN's evolution.¹⁸⁸ The

TRANSNATIONAL LEGAL PROCESSES: GLOBALISATION AND POWER DISPARITIES (Michael Likosky ed., 2002) ("Few would dispute that many of the legal relationships and processes occur within a transnational social context marked by power disparities—inequalities among states, international institutions, transnational corporations, non-governmental organizations, peoples, persons . . ."); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004) (arguing for the efficacy of international government networks); HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 5 (Richard P. Claude & Burns H. Weston eds., 2006) ("The field of international human rights has achieved a comprehensive and elevated global quality of preferred world public policy . . . [i]t supplies a framework for a world order of human dignity."); Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64 (2006) (arguing that international legal process is best viewed as a non-empirical framework).

185. See YOUNG, INTERNATIONAL COOPERATION, *supra* note 25, at 5 (discussing the socializing effects of international cooperation).

186. See Koh, *Transnational*, *supra* note 182, at 183 ("Transnational legal process describes the theory and practice of how public and private actors . . . interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of rules of transnational law.").

187. See Koh, *Transnational*, *supra* note 182, at 183 (discussing how transnational legal process forces states to internalize rules of transnational law); Koh, *Why Do Nations Obey*, *supra* note 184, at 2599 ("A transnational actor's moral obligation to obey an international norm becomes an internally binding domestic legal obligation when that norm has been interpreted and internalized into its domestic legal system."); Koh, *International Human Rights*, *supra* note 184, at 1399 (arguing that transnational legal process involves interaction, interpretation, and internalization); SLAUGHTER, *supra* note 184, at 1–35 (arguing that traditional state institutions have become more international in nature); ACHARYA, CONSTRUCTING A SECURITY COMMUNITY, *supra* note 70, at 17–53 (discussing constructivist notions regarding the interplay of norms and identities in the development of security communities); NGUITRAGOOL, *supra* note 39, at 152 (discussing the influence of ASEAN'S haze regime on domestic legal institutions).

188. See ACHARYA, CONSTRUCTING A SECURITY COMMUNITY, *supra* note 70, at 26 ("While all theories of international organization, including neo-liberal institutionalism, recognize the importance of norms, constructivism allows for a much deeper understanding of norms in shaping international relations.").

organization has overcome several challenges and has proceeded to develop new capabilities.¹⁸⁹ It is tempting to argue that it is more than a narrow instrumental vehicle and that it possesses an identity which transcends national boundaries. The process of cognitive transformation is ongoing, but it seems to be in advanced stages.¹⁹⁰ However, this favorable assessment continues to be questioned and realist/neo-realist skepticism keeps on resurfacing.¹⁹¹ Additional theoretical insights, ASEAN-related and broader in scope, may thus be generated by exploring relevant trends in specific domains such as cross-border ecological cooperation.

IV. Combating Transboundary Haze Pollution

Asia has made enormous economic strides in the post-Second World War era, albeit not uniformly so, and the Southeast Asian core has been no exception to the rule.¹⁹² Yet, as the Asian Development Bank (ADB) observes in its incisive and wide-ranging survey, the modernization process has proceeded in an uneven fashion.¹⁹³ Large-scale wealth creation has been accompanied by heightened inequalities and worrisome persistence of poverty.¹⁹⁴ Unemployment and underemployment have also remained relatively elevated in the wake of the 1997/98 financial crisis and subsequent exogenous shocks.¹⁹⁵ Last but not least, the negative externalities stemming from unfettered output expansion, notably in the form of environmental degradation, have proved costly.¹⁹⁶ To express it differently, economic growth has been generally impressive, but not sufficiently inclusive.¹⁹⁷

189. See ACHARYA, *CONSTRUCTING A SECURITY COMMUNITY*, *supra* note 70, at 5 (pinpointing to a number of major crises that ASEAN has overcome since its formation in 1967).

190. See ACHARYA, *CONSTRUCTING A SECURITY COMMUNITY*, *supra* note 70, at 7 (discussing continued ASEAN efforts to reform itself and bring nations like China and India into its normative framework for regional order).

191. See Rüländ, *Asian Crisis*, *supra* note 136, at 443 (arguing that ASEAN's policy actions skew closer to realist theories than other competing theories).

192. See ASIAN DEVELOPMENT BANK, *supra* note 38, at v–vii (explaining the importance of subregional cooperation in the creation of an Asian economic superpower).

193. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 200–33 (highlighting the slow drive of modernization in some areas).

194. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 200–33 (outlining the persistence of poverty in some subregions despite overall economic growth).

195. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 200–33 (discussing the persistence of unemployment following the financial crisis of 1997/98).

196. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 200–33 (elaborating on the continued environmental degradation in the face of economic expansion).

197. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 200–33 (detailing the persistence of poverty in some subregions despite overall economic growth).

Southeast Asia has long confronted a plethora of ecological problems to which policy responses have traditionally been marked by inertia and reticence.¹⁹⁸ This pattern has been attributed to the priority structure highlighted earlier (i.e., strong bias toward national security and material well-being) and the tendency of the region's developmental States to ally themselves closely with corporate interests, also outlined previously.¹⁹⁹ However, governments have reacted, belatedly and selectively, but neither fleetingly nor superficially, as crises erupted and environmental consciousness has intensified.²⁰⁰ Their responses have commonly followed a wave-like pattern.²⁰¹

The first significant wave materialized in the early 1970s shortly following the establishment of ASEAN, coinciding with the 1972 Stockholm United Nations Conference on the Environment, which may have served as an attitudinal change agent and a catalyst for policy reorientation, at least at the margin.²⁰² The most palpable manifestation of a growing sense of ecological urgency was the formation of ministries for the environment at the central and, in some cases, sub-national government level (in federal States such as Malaysia).²⁰³ Subsequent waves have ensued, reflecting an increasing appreciation of the trade-offs between wealth maximization and ecological preservation.²⁰⁴

It may thus be argued that the evolution of ASEAN has taken place against the backdrop of progressively greater environmental activism both on the domestic front and in the global arena, the emergence of strong ecological protagonists (e.g., the ADB and the World Bank), and broad cognitive readjustment conducive to a rebalancing of priorities, however

198. See James Clad & Aurora Medina Siy, *The Emergence of Ecological Issues in Southeast Asia*, in *SOUTHEAST ASIA IN THE NEW WORLD ORDER: THE POLITICAL ECONOMY OF A DYNAMIC REGION* 52, 52 (David Wurfel & Bruce Burton eds., 1996) [hereinafter Clad & Siy] ("Much analysis of the environmental issues confronting Southeast Asia turns on the apparent intractability of political and economic elites reacting to the new environmental agenda.").

199. See *id.* at 53 (explaining the prevalent theories of elite-driven resource exploitation).

200. See *id.* at 54–55 (discussing the episodic, crisis-based nature of Southeast Asian environmental response).

201. See *id.* at 60–65 (detailing the various waves of environmental awareness in Southeast Asia).

202. See *id.* at 61 ("The first wave of environmental awareness in Southeast Asia crested in the 1970s, following the 1972 Stockholm UN Conference on the Environment.").

203. See *id.* at 61 ("Nearly all the current member of the Association of Southeast Asian Nations (ASEAN) created ministries of the environment at the central and, as within the Malaysian federation, at the state level as well.").

204. See *id.* at 60–65 (discussing subsequent waves of environmentalism, and the shift in perception evidenced therein).

modest, in favor of environmental preservation.²⁰⁵ The confluence of these mutually-reinforcing factors has inevitably shifted the organization in a more ecologically-friendly direction that had been the case before the 1970s/1980s (1980s being more important in this respect in that the extent and strength of the second wave, which gathered momentum during this period, exceeded that of the 1970s).²⁰⁶

Policy adaptation, on a limited scale and with a lag, to such exogenous trends has been most noticeable and productive within, rather than across, national boundaries.²⁰⁷ The decision to address ecological strains through ministerial-level organizational structures, referred to above, is merely one example of the steps taken by individual ASEAN members to arrest environmental degradation.²⁰⁸ From the 1970s/1980s onward, they have proceeded in a generally incremental and patch-like fashion, but some more decisively and swiftly than others, to enact an array of laws pertaining to ecological preservation and natural resource management, to enhance institutional capabilities necessary to support balanced development, and to ratify relevant international conventions.²⁰⁹

However, this has not been a purely national endeavor. As amply documented, collective initiatives have not been lacking, although again they may have been the product of incremental and patch-like build-up.²¹⁰ For instance, region-wide organizational mechanisms such as the ASEAN Expert Group on the Environment (AEGE) and ASEAN Senior Officials on the Environment (ASOEN) have been created.²¹¹ The latter, which has

205. See *id.* at 66 (detailing efforts made by the World Bank and ADB to introduce green initiatives in its project-funding).

206. See *id.* at 61 (“The second wave of environmentalism, stronger than its antecedent, emerged during the 1980s and continues today.”).

207. See *id.* at 70 (“Nevertheless, a domestic political commitment to environmental protection is increasing in the region, largely an aggregate of a myriad of incremental responses to local controversies and complaints.”).

208. See *id.* at 61 (discussing the creation of ministries in the overall context of regional environmental efforts).

209. See Alan K. J. Tan, *Environmental Laws and Institutions in Southeast Asia: A Review of Recent Developments*, 8 SING. Y.B. OF INT’L L. 177, 177 (2004) (“In Southeast Asia, as elsewhere, national governments have sought to meet such challenges by . . . enacting new laws on natural resource management and environmental protection, ratifying relevant international conventions as well as establishing and strengthening the requisite institutions for ecological governance.”).

210. See generally SELECTED ASEAN DOCUMENTS ON THE ENVIRONMENT (K.L. Koh, ed., 1996) (providing a number of environmental accords, agreements, and plans of action); 1 ASEAN ENVIRONMENTAL LAW, POLICY, AND GOVERNANCE: SELECTED DOCUMENTS (K.L. Koh ed., 2009) (submitting a chronological selection of ASEAN environmental documents trending towards regional integration).

211. See ESCAP Virtual Conference, *Regional/Sub-regional Coordination Related to the Environment*, http://www.unescap.org/drpad/vc/orientation/m3anx_asean_int.htm (last visited Oct. 14, 2012) (describing the establishment and operation of ASEAN’s institutional

succeeded the former, meets annually and is responsible for the formulation, implementation, and monitoring of programs geared toward ecological preservation.²¹² It pursues its mission through Working Groups on Nature Conservation and Biodiversity (AWGNCB), Coastal and Marine Environment (AWGCME), and Multilateral Environmental Agreements (AWGMEA), as well as a Haze Technical Task Force (HTTF).²¹³ A formal thrice-yearly ASEAN Ministerial Meeting on the Environment (AMME) serves a broadly similar function at more strategic level (informal meetings are typically held on an annual basis).²¹⁴ In addition, the ASEAN Secretariat is engaged in cross-border coordination in an ongoing manner.²¹⁵

Through these and parallel channels (e.g., ASEAN Heads of Government/AHG), several ecologically-oriented collective plans have been devised.²¹⁶ They include regional and sub-regional blueprints/tools such as a Policy Framework for Environmental Cooperation in ASEAN, Environmental Objectives and Strategies in ASEAN, Environmental Programs and Activities in ASEAN, Ministerial Declaration on the Environment, ASEAN Environmental Programs, ASEAN Strategic Plan of Action on the Environment, Hanoi Plan of Action, ASEAN Cooperative Plan on Transboundary Pollution, ASEAN Regional Haze Plan, and ASEAN Plan of Action for Energy Cooperation.²¹⁷

However, that is another policy domain where the depth of cross-border cooperation and its effectiveness is shrouded in controversy. An elaborate institutional infrastructure appears to have been constructed and it seems to be functioning adequately, as evidenced by the range of outputs consistently produced. Nevertheless, doubts continue to be expressed about members' strategic commitment, organizational robustness, and policy impact (a broader and more meaningful criterion than output).²¹⁸ There is a need for additional research in order to obtain a clearer picture of ASEAN realities in this particular sphere and their theoretical ramifications.

environmental structure) (on file with the Washington and Lee Journal of Energy, Climate and the Environment).

212. *See id.* (detailing the annual meeting protocol of ASOEN).

213. *See id.* (outlining the three Working Groups established under ASOEN).

214. *See id.* (explaining the purpose and meeting protocol of AMME).

215. *See id.* (mapping out an organizational structure of involved parties).

216. *See id.* (listing the major established ASEAN policies and programs on the environment).

217. *See id.* (describing the establishment and operation of ASEAN's institutional environmental structure).

218. *See generally* Lorraine Elliott, *ASEAN and Environmental Cooperation: Norms, Interests and Identity*, 16 PAC. REV. 29 (2003) (arguing against the effectiveness of ASEAN environmental initiatives).

Relevant academic work offering considerable analytical potential and policy lessons has focused primarily on the massive Southeast Asian forest fires and the severe haze accompanying them.²¹⁹ The problem is decades-old and has Indonesian origins, but it has escalated dramatically and has assumed regional proportions in the 1990s and beyond.²²⁰ It mostly stems from the practice of large businesses, in two agro industries, palm oil and timber, to clear land by fire rather than rely on cheaper and less ecologically disruptive alternatives.²²¹ The tendency of small-scale indigenous farmers to resort to traditional slash-and-burn methods for similar purposes, coupled with land development schemes and weather-related phenomena such as El Nino, has aggravated the situation.²²²

The physical and economic consequences of these persistent patterns of activity have been decidedly adverse.²²³ They have led to vast deforestation; haze-induced (predominantly respiratory, but also cardiovascular and dermatological) ailments, both short- and long-term (potentially terminal); serious famine, which has resulted in malnourishment and even death; widespread damage to biodiversity; and significant acceleration/ deterioration in climate change and global warming.²²⁴ Paradoxically, given the underlying causes, the economic costs have been enormous, not merely due to the harm to the environment and

219. See generally Simon S.C. Tay, *South East Asian Forest Fires: Haze over ASEAN and International Environmental Law*, 7 REV. OF EUR. CMTY. & INT'L ENVTL. L. 202 (1998) [hereinafter Tay] (arguing for a more coordinated international effort to secure a sustainable future); Alan K.J. Tan, *Forest Fires of Indonesia: State Responsibility and International Liability*, 48 INT'L & COMP. L.Q. 826 (1999) (arguing that Indonesia should be held responsible for the forest fires of 1997); James Cotton, *The "Haze" Over Southeast Asia: Challenging the ASEAN Mode of Regional Engagement*, 72 PAC. AFF. 331 (1999) (citing the haze crisis as evidence of ASEAN's structural failings); Simon S.C. Tay, *Southeast Asian Fires: The Challenge for International Environmental Law and Sustainable Development*, 11 GEO. J. INT'L L. 241 (1999) [hereinafter Tay, *Southeast Asian Fires*] (proffering international sustainable development solutions as the most important way forward following the fires); David S. Jones, *ASEAN Initiatives to Combat Haze Pollution: An Assessment of Regional Cooperation in Public Policy-Making*, 12 ASIAN J. POL. SCI. 59 (2004) (arguing for more accountability and regional oversight in Southeast Asia).

220. See Alan K. J. Tan, *supra* note 219, at 826 (discussing the region-wide spread of haze in the 1990s).

221. See Alan K. J. Tan, *supra* note 219, at 854 (criticizing Indonesia's failure to regulate the actions of its citizens burning forests for profit).

222. See Alan K. J. Tan, *supra* note 219, at 842 ("The cumulative force of Indonesia's knowledge . . . relating to the deliberate burning practices of large commercial concerns . . . established a clear obligation on Indonesia's part to take concrete and effective measures to prevent transboundary harm before this was occasioned.")

223. See Alan K. J. Tan, *supra* note 219, at 826–28 (discussing the consequences, both physical and economical, of the 'slash-and-burn' method).

224. See Alan K. J. Tan, *supra* note 219, at 827 (detailing the many adverse effects of the 'slash-and-burn' method).

human health/life, but also on account of the dislocation experienced by industries such as farming, food, forestry, construction, air travel, and tourism.²²⁵

Inevitably, Indonesian society—the principal source of these ecological malpractices and shocks—has borne the brunt of the physical devastation and has paid the heaviest economic price.²²⁶ However, given its geographical scale and the force of its impact, the problem has had substantial regional, and even international, repercussions.²²⁷ Neighboring countries, such as Malaysia and Singapore, may have suffered most, but the reverberations have been felt throughout Southeast Asia, adjacent areas, and further afield (e.g., the late 1990s Indonesian eruption is estimated to have released more carbon dioxide into the atmosphere than the emissions from the whole of Western Europe during the same period).²²⁸

ASEAN members indicated their awareness of the regional spillovers already in the early 1990s.²²⁹ They initially conveyed their broad concerns in the 1990 Kuala Lumpur Accord on the Environment and Development, and subsequently proceeded to signal their commitment to earnestly address cross-border ecological risks at meetings held in 1992 in Singapore and in 1994 in Brunei and Malaysia.²³⁰ The last of these

225. See Tay, *supra* note 219, at 202–03 (describing the affects of the 1997 forest fires on the country of Indonesia); Alan K. J. Tan, *supra* note 219, at 826–27 (discussing the adverse affects on Indonesia and surrounding countries caused by the forest fires); Cotton, *supra* note 219, at 331–33 (describing the affects of the 1997 forest fires on the Asian community); Tay, *Southeast Asian Fires*, *supra* note 219, at 245–47 (describing the cost and consequences of the forest fires of 1997); Jones, *supra* note 219, at 60–62 (describing the extent and effect of forest burning in Indonesia); INDONESIA'S FIRES AND HAZE: THE COST OF CATASTROPHE 7–12 (David Glover & Timothy Jessup eds., 2006) (describing the impact of the 1997 fires on wildlife, people, land, etc.); ASIAN DEVELOPMENT BANK, FIRE, SMOKE, AND HAZE: THE ASEAN RESPONSE STRATEGY 44–54 (S. Tahir Qadri ed., 2001) (describing in detail the effects of the 1997 forest fires on Indonesia); Miroslav Radojevic, *Introduction to FOREST FIRES AND REGIONAL HAZE IN SOUTHEAST ASIA* 4–6 (Peter Eaton & Miroslav Radojevic eds., 2001) (describing the effects of fires and haze); Graham Applegate et al., *Forest Fires in Indonesia: Impacts and Solutions*, in WHICH WAY FORWARD?: PEOPLE, FORESTS, AND POLICYMAKING IN INDONESIA 293–308 (Carol J. Pierce & Ida A.P. Resosudarmo eds., 2002) (describing the impact of the 1997 forest fires on Indonesia).

226. See Tay, *supra* note 219, at 203 (describing the effects of the 1997 forest fires on the country of Indonesia).

227. See Tay, *supra* note 219, at 203 (describing the effects of the 1997 forest fires on nearby countries).

228. See Tay, *supra* note 219, at 203 (discussing carbon dioxide emissions from 1997 forest fires in Indonesia); Tay, *Southeast Asian Fires*, *supra* note 219, at 247 (detailing the impact of the 1997 forest fires).

229. See Jones, *supra* note 219, at 64 (showing the awareness of the problem by regional leaders).

230. See Jones, *supra* note 219, at 64 (describing the leaders first meeting to discuss this issue).

meetings laid a foundation for the development of concrete monitoring and response mechanisms, institutional and technical, for enhancing the effectiveness of collective decision-making on that front, a process extended further at a meeting specifically focused on the Management of Transboundary Pollution which took place in 1995 and culminated in the adoption of an ASEAN Cooperation Plan to tackle the problem.²³¹

In the wake of the widespread forest burning and land destruction in 1997, which severely aggravated haze conditions and side effects of atmospheric pollution, ASEAN ministers of the environment formulated a three-pronged strategy to intensify efforts to alleviate cross-border ecological challenges.²³² One element consisted of requirements to implement, at the national level, specific measures to increase prevention, surveillance, and mitigation of forest burning.²³³ The second aimed at boosting the capacity of the ASEAN Meteorological Center, a technically critical ingredient of the blueprint.²³⁴ The third was also geared toward improving problem management, but through better transparency rather upgrading of the scientific infrastructure.²³⁵ This was to be achieved by providing a detailed inventory of resources available for fire-fighting purposes.²³⁶

The Regional Action Plan (RAP) was not without concrete benefits.²³⁷ It furnished a conceptual framework for combating transboundary pollution by identifying the institutional and technical inputs needed to be acquired methodically and activated collectively to that end and the interrelationships among them.²³⁸ However, it constituted merely a set of recommendations, not always detailed and unambiguous, to member

231. See Jones, *supra* note 219, at 64 (discussing the foundation of the meeting and their successes).

232. See Jones, *supra* note 219, at 64–65 (illustrating the three part plan to combat transboundary pollution from the Indonesian fires).

233. See Jones, *supra* note 219, at 64–65 (explaining how the first part of the plan requires member states to draw up national plans to monitor, prevent, deter and mitigate forest burning).

234. See Jones, *supra* note 219, at 65 (describing the second part of the plan which sought to strengthen the monitoring system for land fires and increased pollution levels).

235. See Jones, *supra* note 219, at 65 (providing a description of the third part of the plan).

236. See Jones, *supra* note 219, at 65 (examining in detail the third part of the plan which required nations to codify a list of resources, expertise, and procedures for firefighting).

237. See Jones, *supra* note 219, at 65 (discussing the contributions of the plan, for example the establishment of Sub-regional Fire Fighting Arrangement (SRFAS) for Borneo and Sumatra, the creation of a SRFAS Legal Group, expanding the monitoring system at the regional level, and providing a useful blueprint for prevention, enforcement, and mitigation).

238. See Jones, *supra* note 219, at 65 (describing the arrangements set up to increase communication and collaboration between the ASEAN countries).

States, leaving it to national governments to decide whether to embrace them, to what extent, and at what pace.²³⁹ RAP thus had no material impact on the frequency, scale, and consequences of major subsequent forest burning episodes.²⁴⁰

Its limitations and the modest dimensions of preceding initiatives notwithstanding, RAP and related steps can be said to have paved the way for the ASEAN Agreement on Transboundary Haze Pollution (AATHP), which was signed by relevant parties in 2002 and came into effect in the following year.²⁴¹ Unlike previous policy statements and actions, AATHP is a formal international treaty.²⁴² As such, it is characterized by greater breadth, definitional clarity, elaboration, and structural coherence than high-level informal understandings.²⁴³ By the same token, AATHP's viability does not hinge on the goodwill, or voluntary adherence, of States because, by virtue of its legal status, it imposes specific obligations on signatories and requires them to scrupulously comply with its provisions.²⁴⁴

The adoption of AATHP has been hailed as a manifestation of ASEAN's determination to confront cross-border pollution in a significantly more organized and productive fashion than in the past.²⁴⁵ The willingness to resort to an international treaty for this purpose has been viewed as particularly noteworthy, given members' traditionally deep aversion to any dilution of sovereign power and binding dispute settlement mechanisms.²⁴⁶ The adoption of AATHP could thus be seen as ushering in a new era, marked by "the assertion of legal rights in place of mere persuasion and consultation . . ." especially in circumstances where "the interests of [S]tates are materially damaged."²⁴⁷

239. See Jones, *supra* note 219, at 65 (explaining that countries could choose to opt out of any of the regulations in the plan and there was no deadline for implementation).

240. See Jones, *supra* note 219, at 65 (pinpointing to the widespread forest and land fires that took place even after the plan was in place).

241. See Jones, *supra* note 219, at 66 (discussing how the culmination of the previous plan helped create the ASEAN Agreement on Transboundary Haze Pollution which extends the reach of previous measures and gives legal force under international law).

242. See Jones, *supra* note 219, at 66 (examining the international legal nature of the document).

243. See Jones, *supra* note 219, at 66 (illustrating the fact that the treaty is a huge improvement on previous informal agreements).

244. See generally Alan K. J. Tan, *The ASEAN Agreement on Transboundary Haze Pollution: Prospects for Compliance and Effectiveness in Post-Suharto Indonesia*, 13 N.Y.U. ENVTL. L.J. 647, 649 (2005) [hereinafter Tan, *The ASEAN Agreement*] (describing the optimists view of the treaty).

245. See *id.* (elaborating on the adoption of the new treaty).

246. See *id.* (indicating the previously adverse attitude of the Asian countries to the idea of an international treaty).

247. *Id.* (explaining that the treaty is a significant improvement from previous agreements in the Asian region).

However, again, this apparent institutional leap forward has fallen well short of delivering a collective platform for genuinely effective problem alleviation.²⁴⁸ Importantly, not all ASEAN members have chosen to ratify the Agreement.²⁴⁹ Indonesia has been the most glaring absentee in that, without its active participation, the new governance regime could not function adequately.²⁵⁰ What amounted to foot-dragging (by Cambodia and the Philippines as well) was initially attributed to bottlenecks and inefficiencies in the executive and legislative processes in the countries involved.²⁵¹ The issue of capacity constraints has also been invoked, and to some extent legitimately so, since implementing AATHP in its entirety may have been, organizationally and technically, beyond the ability of resource-poor and severely challenged countries.²⁵²

A case in point, which lends support to the second argument, is the pervasive fragmentation of the environmental management system in Indonesia.²⁵³ The problem has two principal dimensions.²⁵⁴ At the central government level, multiple bureaucratic entities perform vaguely delineated and overlapping functions with virtually no coordination and synchronized planning.²⁵⁵ In addition, far-reaching administrative decentralization has rendered them effectively impotent vis-a-vis the plethora of largely autonomous sub-national units engaged in activities which impinge on ecological governance.²⁵⁶ The corollary is that the country may not be in a

248. *See id.* (describing the shortfalls of the agreement such as the lack of state accountability and enforceable provisions).

249. *See id.* at 648 (discussing the original members of the treaty such as Singapore, Malaysia, Myanmar, Brunei, Vietnam, Thailand, and the Lao People's Democratic Republic).

250. *See id.* (examining the noticeable absence of Indonesia from the treaty, who is the largest source of the forest fires).

251. *See Jones, supra* note 219, at 68 (providing a detailed explanation of the agreement's formation).

252. *See Jones, supra* note 219, at 69 (describing the difficulty of implementing policy and the deficiencies of the Indonesian environmental controls); Tan, *The ASEAN Agreement, supra* note 244, at 657 (discussing the effectiveness in implementing the treaty).

253. *See Jones, supra* note 219, at 69–70 (examining the environmental agencies in Indonesia); Alan K. J. Tan, *supra* note 219, at 671–75 (providing an overview of the deficient institutional structure of Indonesia).

254. *See Tan, The ASEAN Agreement, supra* note 244, at 672 (illustrating the problems with Indonesia's institutional structure).

255. *See Jones, supra* note 219, at 70 (discussing the numerous organizations in charge of similar activities with no chain of command or accountability); Tan, *The ASEAN Agreement, supra* note 244, at 672–75 (examining the inadequate coordinate between institutions).

256. *See Jones, supra* note 219, at 69–70 (pinpointing to the decentralization of government in Indonesia that backfired because it made enforcement more difficult); Tan, *The ASEAN Agreement, supra* note 244, at 675 (showing the lack of coordination between local and national environmental organizations).

position to cooperate meaningfully with its neighbors in the environmental domain, whatever its international commitments.²⁵⁷

However, it would be inappropriate to ascribe institutional delays, inertia, and reticence to structural impediments and inadequate capabilities alone. A detailed dissection of the AATHP reveals features indicative of a “half-empty” legal “glass,” a pattern which may reflect a residual reluctance on the part of ASEAN members to undertake obligations that would substantially circumscribe their individual room for maneuver.²⁵⁸ An elaborate examination is beyond the scope of this paper, but attention may be drawn to concessions to State sovereignty, insufficient terminological precision, non-binding elements, and weakness of provisions relating to deterrence and enforcement (including dispute resolution).²⁵⁹ While by no means a failure, the fact that the regime still cannot be portrayed as a fully collaborative venture arguably calls for a recalibration of competing theoretical models widely relied upon to explain the creation and development of international governance systems, in general and in the ecological realm in particular.²⁶⁰

V. *Limitations of the Realist-Institutionalist Dichotomy*

In endeavoring to come to grips with complex ASEAN realities, it is common to highlight the differences between this partially-integrated regional grouping and the EU. It is said that the latter’s inherently supranational, rule-based structure is a configuration which the former may

257. See Jones, *supra* note 219, at 69–70 (concluding that Indonesia may not be in a place to help itself, let alone other countries).

258. See Jones, *supra* note 219, at 67–68 (analyzing the agreement and discussing the shortfalls such as the imprecise language which may lead to differences of interpretation and allow parties to defeat the intent underlying those provisions); Tan, *The ASEAN Agreement*, *supra* note 244, at 663–64 (discussing the general obligations of the treaty and although no penalties are listed the provisions are broad and should encourage enforcement); see also Md. Saiful Karim, *Future of the Haze Agreement—Is the Glass Half Empty or Half Full?*, 38 ENVTL. POL’Y & L. 328, 329–31 (2008) (discussing the future of the agreement and how it can be successfully implemented); Koh Kheng-Lian, *A Breakthrough in Solving the Indonesian Haze?*, in *SHARED RESOURCES: ISSUES OF GOVERNANCE* 225, 231–35 (Sharelle Hart ed., 2008) (evaluating the AATHP); Ebinezer R. Florano, *Assessment of the “Strengths” of the New ASEAN Agreement on Transboundary Haze Pollution*, 4 INT’L REV. FOR ENVTL. STRATEGIES 127, 142 (2003) (comparing the AATHP with other environmental treaties).

259. See Jones, *supra* note 219, at 67–68 (examining the weaknesses of the AATHP); Tan, *The ASEAN Agreement*, *supra* note 244, at 663–70 (discussing extensively the failures of the treaty).

260. See Florano, *supra* note 258, at 143 (concluding that if the AATHP is not effective, it must be redone).

not be able to emulate.²⁶¹ The reason is that divergent historical circumstances (the Second World War) have undermined nationalism in Europe, but decolonization has reinforced it in Southeast Asia, and socioeconomic conditions militate against fusion on a similar scale.²⁶² Indeed, building a truly united Europe is an EU strategic goal, whereas ASEAN objectives are not as lofty.²⁶³

Nevertheless, regional cooperation in Southeast Asia cannot be portrayed as a trivial phenomenon, whether from a longitudinal or a cross-sectional perspective.²⁶⁴ There can be little doubt that ASEAN has matured into a broad-based, strategically meaningful, and well-defined organization.²⁶⁵ While it remains to be seen whether it fulfills its ambitious collective agenda, ASEAN evidently seeks to transform itself into a comprehensive regional community (but not a political union) and may possibly realize its aspirations, albeit perhaps later rather than sooner.²⁶⁶ Moreover, while comparisons with the EU may be unflattering in this respect, those with other regional groupings may paint a more favorable picture.²⁶⁷

It is thus disconcerting that, following four and a half decades of persistent institution building, and repeated attempts to jointly address acute environmental problems, the proverbial ASEAN ecological glass is at best half-full, or that the underpinnings of the governance regime do not qualify as robust.²⁶⁸ On the face of it, the pattern observed is highly consistent with realist/neo-realist perceptions of international legal behavior, and even compellingly so because a small regional entity such as ASEAN should provide a setting more conducive to collaboration/less favorable to shirking

261. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 241 (comparing ASEAN to the EU).

262. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 241 (examining Europe and Asia's different approaches to regionalism).

263. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 240–42 (discussing the ASEAN and EU structures and comparing the two); see also REGIONAL INTEGRATION—EUROPE AND ASIA COMPARED 28–45 (Woosik Moon & Bernadette Andreosso O'Callaghan eds., 2005) (examining both the Asian and European experiences and comparing their integration processes).

264. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 243 (detailing the Asian model or approach to regionalism).

265. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 244 (illustrating the strengths of the Asian community).

266. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 245 (examining the relationships between ASEAN countries and their model of a regional community).

267. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 245 (evaluating the growing ASEAN region and their importance to the world economy and future).

268. See Tan, The ASEAN Agreement, *supra* note 244, at 672 (pinpointing to the problems with Indonesia's institutional structure and difficulty implementing the treaty).

than larger ones.²⁶⁹ By the same token, environmental cooperation is normally a moderate-cost/feasible proposition, at least in relative terms (e.g., compared with the difficulties witnessed in the national security domain).²⁷⁰

Normatively-inclined proponents of the managerial thesis might argue that States such as Indonesia recognize the virtues of ecological collaboration with their regional partners and are willing to assume the necessary obligations, but that they refrain from proceeding decisively in this direction because of organizational and technical frailties.²⁷¹ However, such claims are not entirely valid since the analytical practice of decoupling government capacity from policy intention is somewhat questionable. The former is a function of the latter, rather than a wholly independent factor.²⁷² For example, there is nothing to prevent the Indonesian authorities from confronting with greater determination the causes and symptoms of excessive horizontal and vertical fragmentation of the country's sprawling bureaucratic apparatus.

The conceptual difficulties to which the realist/neo-realist approach gives rise do not stem from the rationalism attributed to players in the global arena as such, but from the assumption that States are unitary actors driven by a coherent set of interests which are shared by those who control the government machinery (which may diverge from the national interest, public interest, and the like).²⁷³ Despite an acknowledgement that this involves a degree of oversimplification, it is thus emphatically conveyed

269. See GOLDSMITH & POSNER, *supra* note 160, at 23–43 (discussing the theory of customary international law and the expressed skepticism about how often such cooperation or coordination by custom really occurs, especially as the number of states increases).

270. See GOLDSMITH & POSNER, *supra* note 160, at 85–88 (describing the logic of international agreements specifically multilateral treaties and international organisations). See generally George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379, 379–406 (1996) (arguing that international treaty compliance is high and enforcement of the agreement plays little or no part in achieving that end); Michael J. Gilligan, *Is There a Broader-Deeper Trade-Off in International Multilateral Agreements?*, 58 INT'L ORG. 459, 459–84 (2004) (explaining that treaties with a small number of members can have greater cooperation and integration than those with a large number of members and argues that a new way of treaty making can solve that by having States set their policies at different levels).

271. See CHAYES & CHAYES, *supra* note 179, at 14–15, 25 (explaining that one of the difficulties of implementing environmental treaties in developing countries is the lack of capacity).

272. See Roda Mushkat, *Implementing Environmental Law in Transitional Settings: The Chinese Experience*, 18 S. CAL. INTERDISC. L.J. 45, 92–94 (2008) (discussing the idea that capacity issues is an obstacle in carrying out treaty obligations).

273. See GOLDSMITH & POSNER, *supra* note 160, at 4 (explaining that States interests are carried out by the political sphere).

that “we give the [S]tate the starring role in our drama.”²⁷⁴ The reason lies in the fact that “international law addresses itself to [S]tates and, for the most part, not to individuals or other [similar] entities”²⁷⁵

This logic extends to the notion of interests which are equated with “[S]tate preferences about outcomes.”²⁷⁶ It is recognized that these “are not always easy to determine, because the [S]tate subsumes many institutions and individuals that obviously do not share identical preferences about outcomes.”²⁷⁷ Be that as it may, one may conveniently posit that “a [S]tate—especially one with well-ordered political institutions—can make coherent decisions based upon identifiable preferences, or interests, and it is natural and common to explain [S]tate action on the international plane in terms of the primary goal or goals the [S]tate seeks to achieve.”²⁷⁸ Given the appeal of this reasoning, it is appropriate to equate “[S]tate interests in connection with particular legal regimes by looking, based on many types of evidence, to the preferences of the [S]tate’s political leadership.”²⁷⁹

However, the Indonesian experience as a participant in the fledgling ASEAN environmental governance regime clearly suggests that pursuing such a theoretical path may lead to a loss of valuable information and may not be an entirely productive strategy.²⁸⁰ Treating domestic politics, to all appearances the principal determinant of policy outcomes in this case, including in the ecological domain, as the equivalent of a black box is a methodological approach likely to yield partial and unsatisfactory explanations.²⁸¹ Indeed, one may legitimately contend that Indonesian reluctance to engage fully in regional efforts to combat transboundary haze pollution has not reflected the preferences of the country’s political

274. GOLDSMITH & POSNER, *supra* note 160, at 4 (describing the notion that individual State interests influence treaty creation and negotiation).

275. GOLDSMITH & POSNER, *supra* note 160, at 5 (citing the entities that are involved in treaty making).

276. GOLDSMITH & POSNER, *supra* note 160, at 6 (explaining how State interest is a large factor during treaty development).

277. GOLDSMITH & POSNER, *supra* note 160, at 6 (highlighting that finding common goals in a State with many institutions and views can be difficult).

278. GOLDSMITH & POSNER, *supra* note 160, at 6 (discussing the idea of finding a common goal or goals can be difficult in States with many institutions, however, if the country has strong political leadership this will help).

279. GOLDSMITH & POSNER, *supra* note 160, at 6 (illustrating that a State’s political leadership, influenced by many opinions, makes the decision about international law).

280. *See* Cotton, *supra* note 219, at 342 (examining how Indonesia relied to heavily on their domestic needs and not on the needs of the region).

281. *See* Cotton, *supra* note 219, at 342 (demonstrating that domestic priorities have prevailed over the needs of the region with drastic consequences).

leadership in the narrow sense of the term, but has been the product of forces at home which have impeded closer cross-border cooperation.²⁸²

Indonesian domestic politics is a highly intricate affair.²⁸³ In the environmental realm, the patrimonial, or patron-client model, has been invoked to account for seriously deficient forestry practices.²⁸⁴ According to this analytical construct, timber concessionaires have been holders of benefices from the ruler, a type of transaction that has been the source of complementary power, inevitably to the detriment of the general population.²⁸⁵ Initially, this configuration deprived “the indigenes of the use and enjoyment of the forest, and ordinary citizens of any revenues or income from the timber trade, while creating an extralegal sphere beyond the reach of normal [S]tate regulation.”²⁸⁶ Subsequently, “[t]he forestry practices that arose in these circumstances . . . generated additional expenses, in the form of haze and environmental degradation.”²⁸⁷

282. See Cotton, *supra* note 219, at 342 (elaborating on the lack of cooperation between Indonesia and their fellow ASEAN members in combating haze from the 1997 fires).

283. See generally SAYED F. ALATAS, *DEMOCRACY AND AUTHORITARIANISM IN INDONESIA AND MALAYSIA: THE RISE OF THE POST-COLONIAL STATE* (1997) (examining the development of Mylaysia as a democratic state with a authoritarian regime next door in Indonesia); INST. OF SE. ASIAN STUD., *PROBLEMS OF DEMOCRATISATION IN INDONESIA: ELECTIONS, INSTITUTIONS AND SOCIETY* (Edward Aspinall & Marcus Mietzner eds., 2010) (presenting a study of the post authoritarian State of Indonesia); HAROLD CROUCH, *POLITICAL REFORM IN INDONESIA AFTER SOEHARTO* (2010) (discussing the success of Indonesia in transitioning from the Soeharto regime to democracy).

284. See Cotton, *supra* note 219, at 339–40 (describing the patrimonial model used in the timber industry which contributed to the failing environmental system).

285. See Cotton, *supra* note 219, at 340 (detailing the effects on the public due to timber concessions).

286. Cotton, *supra* note 219, at 340.

287. Cotton, *supra* note 219, at 340. For additional insights see Anne Casson, *The Political Economy of Indonesia's Oil Palm Subsector, in WHICH WAY FORWARD?: PEOPLE, FORESTS, AND POLICYMAKING IN INDONESIA* 221–45 (Carol J. Pierce & Ida A.P. Resosudarmo eds., 2002) (recounting the responsibility of oil palm production for forest fires and resulting haze, and the political incentives for expanding the sector in the future); Richard G. Dudley, *Dynamics of Illegal Logging in Indonesia, in WHICH WAY FORWARD?: PEOPLE, FORESTS, AND POLICYMAKING IN INDONESIA* 358–82 (Carol J. Pierce & Ida A.P. Resosudarmo eds., 2002) (applying system dynamics modeling to analyze illegal logging practices); NANCY LEE PELUSO, *RICH FORESTS, POOR PEOPLE: RESOURCE CONTROL AND RESISTANCE IN JAVA* (1992) (chronicling the development of state forestry policy in Java and attendant political and policy developments); Colin MacAndrews, *Politics of the Environment in Indonesia*, 34 *ASIAN SURV.* 369, 369–80 (1994) (examining political and interest groups' uses of environmental issues in Indonesian politics); Mark Poffenberger, *Rethinking Indonesian Forest Policy: Beyond the Timber Barons*, 37 *ASIAN SURV.* 453, 453–69 (1997) (discussing the long-term political and ecological consequences of Indonesia's exploitative forest policies); Robert Cribb, *Environmental Policy and Politics in Indonesia, in ECOLOGICAL POLICY AND POLITICS IN DEVELOPING COUNTRIES: ECONOMIC GROWTH, DEMOCRACY, AND ENVIRONMENT* 65, 65–85 (Uday Desai ed., 1998) (discussing the environmental and policy consequences resulting from population pressure and postcolonial

The ruler-centered patrimonial structure, exploited by timber concessionaires by virtue of their ties with members of the president's family and the military, has given way in recent years to a more open and transparent system.²⁸⁸ However, State capture by private interests is not a thing of the past and remains a widespread phenomenon²⁸⁹ (manifesting itself even in institutionally more-robust Asian settings).²⁹⁰ Gaining a proper understanding of how these interests are organized, function, and affect policy outcomes must be the first step in the conceptual process of constructing a credible account of the evolution of the Indonesian ecological governance regime and its relationships with its ASEAN counterparts. Focusing on the State as an autonomous entity and the preferences of its political leadership may not yield sufficiently illuminating insights.

economic development); Euston Quah, *Transboundary Pollution in Southeast Asia: The Indonesian Fires*, 30 *WORLD DEV.* 429, 429–41 (2002) (discussing the costs of transboundary seasonal haze in southeast Asia and various potential policy responses); Michael R. Dove, *Forest Discourses in South and Southeast Asia: A Comparison with Global Discourses*, in *NATURE IN THE GLOBAL SOUTH: ENVIRONMENTAL PROJECTS IN SOUTH AND SOUTHEAST ASIA* 103, 103–23 (Paul Greenough & Anna L. Tsing eds., 2003) (comparing critically linguistic and cultural conceptions of forests in Pakistan and Indonesia); *THE POLITICS AND ECONOMICS OF INDONESIA'S NATURAL RESOURCES* (Budy P. Resosudarmo ed., 2005) (reviewing Indonesia's various environmental challenges in the context of its political reforms); *THE DECENTRALIZATION OF FOREST GOVERNANCE: POLITICS, ECONOMICS AND THE FIGHT FOR CONTROL OF FORESTS IN INDONESIAN BORNEO* (Moir Moeliono, Godwin Limberg & Eva Wollenberg eds., 2009) (collecting of essays on the environmental effects of government decentralization and democratization reforms in Indonesia); Hidayat Alhamid, Chris Ballard & Peter Kanowski, *Forests for the People? Special Autonomy, Community Forestry Cooperatives and the Apparent Return of Customary Rights in Papua*, in *COMMUNITY, ENVIRONMENT AND LOCAL GOVERNANCE IN INDONESIA: LOCATING THE COMMONWEAL* 145, 145–65 (Carol Warren & John F. McCarthy eds., 2009) (reviewing forest management under indigenous customary authority in Papua after the Indonesian government granted the province autonomy, and potential threats to community sustainability that result).

288. See Budy P. Resosudarmo, *Introduction to THE POLITICS AND ECONOMICS OF INDONESIA'S NATURAL RESOURCES*, *supra* note 287, at 3–4 (describing Indonesia's political evolution and rights to natural resources).

289. See Transparency Int'l, *Money Politics and State Capture* (Nov. 11, 2010), <http://www.ti.or.id/en/index.php/press-release/2010/11/11/money-politics-and-state-capture> (last visited Sept. 16, 2012) (reporting that 150 regents and mayors, and seventeen governors, were jailed in Indonesia from 2005-2010 as a result of corruption) (on file with the Washington and Lee Journal of Energy, Climate and the Environment).

290. See Miron Mushkat & Roda Mushkat, *The Political Economy of Hong Kong's "Open Skies" Legal Regime: An Empirical and Theoretical Exploration*, 10 *SAN DIEGO INT'L L.J.* 381, 413–14 (2009) (discussing the ways regulation becomes skewed in favor of private interests, with regulators coming to act as cartels or captured entities for private interests' benefit).

The realization that diversity/heterogeneity, at home and abroad, plays a key role in determining the development of international legal systems is of course at the heart of TLPT.²⁹¹ However, this theoretical perspective does not delve deeply into domestic political territory and pays scant attention to private interests.²⁹² The crucial importance of those factors is duly acknowledged elsewhere in the institutionalist space, and attempts have been made to model their operation with a considerable degree of precision.²⁹³ However, the tools proposed for this purpose are better suited to dissecting specific decisions than complex processes that extend over a long period of time,²⁹⁴ such as multi-year collaboration within ASEAN.²⁹⁵

Indeed, it remains to be seen whether a single model may be formulated to reflect the operation of domestic political forces and their impact on international cooperation. Public choice theorists aspire to achieve this objective and have made some progress on that front.²⁹⁶

291. See Koh, *Transnational*, *supra* note 182, at 184 (describing transnational legal process as a dynamic activity that involves a broad group of actors, state and nonstate, to produce new policy).

292. See Koh, *Transnational*, *supra* note 182, at 184 (noting that TLPT intentionally mixes the domestic with the international, and the private with the public).

293. See generally Joel P. Trachtman, *International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law*, 11 CHI. J. INT'L L. 127, 127–58 (2010) (discussing the conditions in which domestic political coalitions may form to produce compliance with international law); THE INTERNATIONALIZATION OF ENVIRONMENTAL PROTECTION (Miranda A. Schreurs & Elizabeth Economy eds., 1997) (collecting case studies from various regions analyzing the effects of new transnational political relationships on environmental policymaking). For additional insights, see TRACHTMAN, *supra* note 162, at 22–24 (outlining various modeling approaches as applied to analyze particular international law problems); Michael Zurn, *Bringing the Second Image (Back) In: About the Domestic Sources of Regime Formation*, in REGIME THEORY AND INTERNATIONAL RELATIONS, *supra* note 25, at 282–311 (using the internal characteristics and domestic politics of state actors to explain international regime formation).

294. See generally Miron Mushkat & Roda Mushkat, *The Political Economy of State Accession to International Legal Regimes: A Re-Assessment of the China-World Trade Organization Nexus*, 10 J. INT'L TRADE L. & POL'Y 5, 5–28 (2011) (contrasting trade and investment-based analyses with realist, institutionalist, and constructivist analyses, and concluding that these approaches “are selectively rather than invariably relevant”).

295. See Yuen Foong Khong & Helen E. S. Nesadurai, *Hanging Together, Institutional Design, and Cooperation in Southeast Asia: AFTA and the ARF*, in CRAFTING COOPERATION: REGIONAL INTERNATIONAL INSTITUTIONS IN COMPARATIVE PERSPECTIVE 32, 32–34 (Amitav Acharya & Alastair I. Johnston eds., 2007) (describing the extensive process of ASEAN nations’ institutional evolution to cooperate more effectively).

296. See generally Jonathan R. Macey & Enrico Colombatto, *The Decline of the Nation State and its Effect on Constitutional and International Economic Law: A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 CARDOZO L. REV. 925, 925–56 (1996) (applying public choice theory to explain international agreements on insider trading and capital requirements for banks); Philip Jones,

However, their parsimonious/stylized constructs may not be rich and versatile enough to accommodate comfortably the diversity/heterogeneity of the patterns dissected by students of comparative politics across the globe (e.g., divergent domestic influences on regional collaboration in Indonesia and Singapore).²⁹⁷ The ASEAN record highlights the significance of the input into the environmental policy process of private interests firmly entrenched in the corridors of power, as well as the need for further research on the subject in order to do justice to the intricacies involved, but without offering any broad and definitive answers.²⁹⁸ This is due to the fact that the situation in Indonesia, the obvious regional outlier, has been explored more intensively and methodically than in neighboring countries, hampering across-the-board generalizations and production of typologies.²⁹⁹

The emphasis on domestic private interests should not obscure the enduring relevance of State-centered realist/neo-realist models, at least in this geographical context.³⁰⁰ It is apparent that ASEAN members (developmental States) and political leaders throughout the region share a common set of preferences that revolves around economic growth.³⁰¹ The consistent pursuit of this overarching goal yields an array of benefits for elites, pivotal non-elite groups, and the masses.³⁰² Environmental preservation is looming larger on the policy agenda than during previous phases of modernization, but its importance cannot be equated with that of

Taking Self-Interest into Account: A Public Choice Analysis of International Cooperation, in THE NEW PUBLIC FINANCE: RESPONDING TO GLOBAL CHALLENGES 303, 304–24 (Inge Kaul & Pedro Conceição eds., 2006) (analyzing the preferences of voters, lobbyists, politicians, and bureaucrats to determine the effect of those preferences on international cooperation).

297. See NGUITRAGOOL, *supra* note 39, at 21 (noting Indonesia's shift toward regional cooperation after the military coup in 1965 and its fissure with Singapore due to Singapore's separation from Malaysia).

298. See generally Paul K. Gellert, *Oligarchy in the Timber Markets of Indonesia: From Apkindo to IBRA to the Future of the Forests*, in THE POLITICS AND ECONOMICS OF INDONESIA'S NATURAL RESOURCES, *supra* note 287, at 145–61 (describing the “capitalist oligarchy” that arose from government patronage following Indonesia's military coup).

299. See generally THE DECENTRALIZATION OF FOREST GOVERNANCE: POLITICS, ECONOMICS AND THE FIGHT FOR CONTROL OF FORESTS IN INDONESIAN BORNEO, *supra* note 287, at 3–298 (providing one collection of such analyses regarding Indonesia).

300. See Mushkat & Mushkat, *supra* note 294, at 15–16 (discussing the relevance of realist theories in the context of Chinese cooperation with international trade organizations).

301. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 17–21 (“Asian opinion leaders see regional economic relations as strongest in trade and investment . . . [but] believe that governments are not sufficiently active in developing regional mechanisms for coping with health, environmental, and other cross-border challenges.”).

302. See Nesadurai, *supra* note 295, at 43–46 (noting that elites depended on economic growth and distribution to maintain popular support, and on economic privileges for allies to maintain political harmony).

wealth maximization.³⁰³ This partly (and *only* partly, not uniformly) explains the persistent reluctance to countenance the prospect of a tight region-wide regulatory regime for cross-border haze pollution.³⁰⁴

Macro-level, country-specific realist/neo-realist considerations may have also exerted influence on that front, without necessarily qualifying as the sole, or even dominant, factor in the equation.³⁰⁵ For instance, Indonesia's loss of two islands (Ligitan and Sipidan) to Malaysia in 2004, coupled with the country's desire to regain its status as a regional leader in a nationalistic climate, may have been one of the reasons for a posture entailing distance from ASEAN partners (while Indonesia, at the same time, displayed a spirit of international collaboration by signaling a willingness to ratify the Cartagena and Kyoto Protocols) and muscle-flexing vis-a-vis Malaysia.³⁰⁶ This may be construed as an exercise in power politics by a State driven by strategic interests.

The fundamentally realist/neo-realist interpretation of the evolution of the ASEAN regime for transboundary haze pollution has recently been challenged by an institutionalist scholar, who has skillfully highlighted the liberal and constructivist dimensions of the picture.³⁰⁷ One argument put forward is that the lack of a hegemonic power such as the U.S. in the creation and maintenance of the system, which would ensure its stability, implies that realist/neo-realist accounts are incomplete.³⁰⁸ However, the notion of hegemonic governance is no longer an essential component of realist/neo-realist formulations.³⁰⁹ Further, as the author concedes, and as the above example illustrates, power politics has not been absent from

303. See NGUITRAGOOL, *supra* note 39, at 43–47 (contrasting the rise of sustainable development as an ASEAN policy objective with the economic realities of resource development).

304. See Jones, *supra* note 219, at 68–72 (blaming enforcement failures on a lack of capacity in regulatory institutions and official corruption by business interests).

305. See NGUITRAGOOL, *supra* note 39, at 97–98 (describing several factors affecting regional cooperation and noting that economic interests militated against Indonesian involvement in a binding cooperative scheme).

306. See NGUITRAGOOL, *supra* note 39, at 95–96 (sketching the broader political context in which decisions on ASEAN cooperation were made).

307. See NGUITRAGOOL, *supra* note 39, at 5–8 (outlining the book's use of regime theory, grounded in game theory and liberal international relations, and analysis of normative structures, based on a constructivist approach to the "ASEAN way" principle).

308. See NGUITRAGOOL, *supra* note 39, at 6 ("Because a hegemonic power is absent from ASEAN cooperation on the haze, the realist assumptions based on power-configuration are irrelevant in this study.").

309. See John M. Hobson, *The 'Second State Debate' in International Relations: Theory Turned Upside Down*, 27 REV. OF INT'L STUD. 395, 405–06 (2001) (discussing Robert Keohane's treatment of hegemons as unnecessary preconditions for international institutions).

ASEAN's quest for a regional mechanism to minimize the impact of forest burning.³¹⁰

This is a minor quibble, as the author amply documents the rise of a system with many of the normative, legal, organizational, cognitive, and behavioral attributes of a regime.³¹¹ ASEAN members seem to have developed shared values, embraced common principles, formalized their vision by incorporating it into binding instruments, engaged in serious institution building, interacted intensively and productively (a process featuring TLPT-style learning and socialization), joined together to a point whereby their separate identities have become somewhat blurred, and gone to considerable lengths to observe the rules that they have adopted; and their efforts have not been in vain.³¹² This elaborate historical and analytical exploration has solid liberal (a subtle appreciation of the benefits of cooperation) and constructivist (a sense of group belonging) underpinnings.³¹³

None of the above assertions is in dispute. It is merely a matter of proportions, or relative significance, and timing, or implementation lags (whereby ambitious blueprints are distinctly slow in affecting ground-level realities).³¹⁴ As demonstrated here, the proverbial glass may be half-empty or half-full, but it is clearly not overflowing.³¹⁵ Indeed, the picture painted in the institutionalist survey is a mixed one, in that the narrative is interspersed with complementary realist/neo-realist insights.³¹⁶ The long lags between idea incubation and execution are also brought into focus (e.g., two decades following its emergence, "the ASEAN haze regime has . . . started to have effects on member [S]tates' behaviors, particularly in terms of the translation of regional policies into domestic systems

310. See NGUITRAGOOL, *supra* note 39, at 6–7 ("Even without a hegemon's material power, Indonesia still had insurmountable power in the negotiation for the haze treaty.")

311. See NGUITRAGOOL, *supra* note 39, at 8–10 (recounting the characteristics of regimes in regime theory and outlining ASEAN cooperation in this framework).

312. See NGUITRAGOOL, *supra* note 39, at 57–76, 123–44 (detailing the history of Indonesian fires, the procedures established to regulate them, and the agreement's implementation as representative of the steps of regime formation).

313. See NGUITRAGOOL, *supra* note 39, at 97–98 (describing several factors affecting regional cooperation and noting that economic interests militated against Indonesian involvement in a binding cooperative scheme).

314. See NGUITRAGOOL, *supra* note 39, at 139–42 (advancing a collection of concerns about implementation).

315. See NGUITRAGOOL, *supra* note 39, at 142 ("Although the regime has had some effects on the state level, the ultimate objective of the regime is to solve the problem of land and forest fires and its associated haze . . . [u]nfortunately, this goal has not yet been achieved.")

316. See NGUITRAGOOL, *supra* note 39, at 140 (discussing official concerns over maintaining national sovereignty in light of the agreement's intervention provisions).

resulting from the ratification of the treaty, enactment of new laws and regulations, and the creation of national plans").³¹⁷

Despite its longevity and progress, ASEAN is still often portrayed as an organization which is capable of "big talk" but delivers "modest actions".³¹⁸ It is noteworthy that a recent empirical study has found that the level of trust between ASEAN States and societies, while not unimpressive, given the organization's humble origins, remains well below levels that would be consistent with its avowed aim to transform itself soon into a multi-dimensional and viable regional community.³¹⁹ The interplay between realist/neo-realist and liberal/constructivist forces is evident in the summary offered by the institutionalist researcher who has painstakingly dissected the regional governance system for the cross-border pollution:

The construction of an ASEAN haze regime is a result of a complex rationality of the member [S]tates influenced by both material and ideational factors at the domestic, regional, and international levels. It is also an example *par excellence* of a regional organization struggling to cope with a complex unconventional threat in a globalized era. Despite the contextual and structural constraints, the regime has emerged and had an effect on member [S]tates, particularly on the domestic political institutions. Besides, it has also provided an arena whereby member [S]tates can discuss, understand and learn how to cope with the issues of common aversion.³²⁰

The summary incorporates additional competing/complementary elements into the explanatory structure:

The construction of the haze regime is also a result of a complex interplay of [the member States'] perceived interest and ideas about the problem, the communicative action and extensive negotiations at both the domestic and regional levels. Other cross-cutting factors also impinged

317. NGUITRAGOOL, *supra* note 39, at 142.

318. Hiro Katsuma, *The ASEAN Charter Controversy: Between Big Talk and Modest Actions*, in STRATEGIC CURRENTS: EMERGING TRENDS IN SOUTHEAST ASIA 11, 11–14 (Yang Razali Kassim ed., 2009).

319. See Christopher B. Roberts, *The ASEAN Community: Trusting thy Neighbor*, in STRATEGIC CURRENTS: EMERGING TRENDS IN SOUTHEAST ASIA, *supra* note 318, at 15, 15–20 (noting that regional interaction has not created adequate trust among nations, undermining the notion of an ASEAN Community).

320. NGUITRAGOOL, *supra* note 39, at 152. For broadly similar insights regarding developments on parallel fronts see Khong & Nesadurai, *supra* note 295, at 32–81 (analyzing the institutional design of the ASEAN Regional Forum and ASEAN plus three forum in the context of ASEAN's realist culture of noninterference with domestic issues and consensus decision-making).

on the process of regime formation in various ways and at different degrees. The regional politics and ASEAN institutional norms or the ASEAN Way, such as the norm of non-intervention, quiet diplomacy consultation and consensus, shaped the way ASEAN leaders approached the issues at different stages of regime formation. Domestic politics including the political structures of ASEAN members, insurgencies and even changes in domestic leaderships affected the ability of each country to concentrate in coping with the issue as well as the direction in which they cooperate. Economic factors, namely the economic crisis of 1997, closer economic ties within and between Southeast Asia and other regions, and the increasing demands of palm oil that is in part a result of the diffusion of the environmental norms in other related issue areas all had an impact on the regime formation process and regime's effectiveness in this case.³²¹

This is an elaborate, balanced, and illuminating account. Realist/neo-realist and institutionalist perspectives are brought to bear on an intricate conceptual problem which may not be amenable to mono-causal diagnosis.³²² However, as is common in socio-legal work on governance regimes, the effort yields a rich theoretical tapestry, but no structured synthesis; the competing/complementary elements coexist side by side, yet they do not coalesce.³²³ One of the important lessons of this survey is that they may have to be combined into an organized analytical framework that links them less unambiguously and more tightly together.

In light of the preceding discussion, it may be reasonable to suggest that two forces, domestic political constellations/private interests and State interests/leadership preferences, have been sufficiently potent to qualify as exogenous/independent variables driving the system.³²⁴ Institutional factors such as an appreciation of the benefits of cooperation and a sense of group belonging should perhaps be accorded the status of

321. NGUITRAGOOL, *supra* note 39, at 152–53.

322. *See* NGUITRAGOOL, *supra* note 39, at 4 (“Indeed, what is needed is a larger approach to examine the reality of cooperation, the processes influencing cooperation and how this cooperation could contribute to problem solving.”).

323. *See* NGUITRAGOOL, *supra* note 39, at 145–53 (cataloging various disparate perspectives on and aspects of the haze regime, including interest-based rationalist regime theory, liberal accounts, cognitivist analysis, ideational factors, geography, and domestic institutional design).

324. *See* DAVID W. BRITT, A CONCEPTUAL INTRODUCTION TO MODELING: QUALITATIVE AND QUANTITATIVE PERSPECTIVES 57–60 (1997) (describing exogenous variables as those sources of influence that are never acted upon by other influences in a model).

intervening/mediating variables that may reinforce or moderate the impact of the key drivers.³²⁵ The impression is that they have generally blunted/moderated the effects of the more parochial influences.³²⁶

The model is not necessarily universally valid. Rather, it may reflect the unique characteristics of East Asian/Southeast Asian regionalism.³²⁷ By the same token, the structure need not be stable. For instance, leadership preferences may not be static but change due to learning, whether exogenous (i.e., TLPT-style, or a product of socialization) or endogenous (i.e., rationalist-type, whereby agents deliberately fine-tune their preferences as they acquire new information) in nature.³²⁸ Feedback is an integral part of social adaptation, routinely incorporated into non-recursive models of human behavior,³²⁹ but it is seldom invoked in studies addressing the evolution of governance regimes.³³⁰ The growing appeal of institutionalist approaches is not a random event.³³¹ Today's ASEAN may be meaningfully, albeit selectively, examined through liberal/constructivist lens,³³² whereas that was not the case in the more distant past.³³³ This is

325. See *id.* at 84–90 (advancing mediating variables as a method of showing the path by which a cause produces an effect, and of modeling more complicated relationships that include complementary or antagonistic mediating variables).

326. See Khong & Nesadurai, *supra* note 295, at 50–51 (describing how the need for cooperation to maintain the viability of the ASEAN Free Trade Area led states to relax their insistence on nonintervention policy within ASEAN).

327. See Shaun Breslin, *Theorizing East Asian Regionalism(s): New Regionalism and Asia's Future*, in *ADVANCING EAST ASIAN REGIONALISM*, *supra* note 79, at 26–51 (noting that Asian regionalism tends to be less formally institutionalized, as are most other regional organizations except the European Union, and influenced in important ways by nonstate actors and state responses to global trade).

328. See HOWLETT, RAMESH & PERL, *supra* note 22, at 180 (contrasting conceptions of policy learning as deliberate adjustments to past results or less conscious responses to changes in the policy environment).

329. See BRITT, *supra* note 324, at 57–63, 94–110 (describing feedback effects in the context of directionality, polarity, indirect effects, and unanticipated consequences as modeling tools).

330. See BRITT, *supra* note 324, at 60 (noting that qualitative researchers are “somewhat ambivalent” about feedback representations in research, preferring to use a “richer vocabulary” to capture relationships).

331. See B. GUY PETERS, *INSTITUTIONAL THEORY: PROBLEMS AND PROSPECTS* 1, 14 (2000) (noting the renewed reliance on institutional theories in modern political science scholarship, and describing the advantages of institutionalism for conceptualizing political agents and predicting behavior).

332. See NGUITRAGOOL, *supra* note 39, at 97–98 (describing several factors affecting regional cooperation and noting that economic interests militated against Indonesian involvement in a binding cooperative scheme).

333. See NGUITRAGOOL, *supra* note 39, at 38 (describing realist pessimism about the existence of an ASEAN community, and the confirming regional disunity resulting from crises during the 1990s).

another lesson that may be drawn by scrutinizing its performance in the ecological domain.

VI. Conclusion

ASEAN consists of a small number of countries, most of which lack substantial economic and military power.³³⁴ Even collectively, it enjoys limited leverage as a player in the global arena.³³⁵ Nevertheless, ASEAN is arguably the world's second most vibrant and visible regional grouping, after the EU.³³⁶ It has lofty aspirations which may not be fulfilled entirely and soon, but it has traveled a long way since its establishment in 1967, both in the instrumental and psychological sense of the term.³³⁷ In an international setting marked by a scarcity of truly successful regional organizations, ASEAN merits scholarly attention in its own right and as a manifestation of a broader phenomenon.

ASEAN has been primarily concerned with national security and economic issues.³³⁸ However, socio-cultural questions have also loomed on its agenda, and it has started to display an increasing awareness of the inherent tension between a relentless pursuit of wealth maximization and environmental preservation.³³⁹ Over time, ASEAN has undertaken various initiatives that, in conjunction with other inputs, have propelled it to a level whereby it can be said to possess an elaborate infrastructure for alleviating ecological strains, including those stemming from cross-border externalities.³⁴⁰

334. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 244–45 (describing ASEAN's substantial, but comparatively modest, stake as a regional actor).

335. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 239 (stating that cooperation is needed to organize regional economic development and put Asia into a constructive position on the world stage).

336. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 38 (comparing current and projected GDP for an integrated Asia and the EU).

337. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 26–54 (chronicling the rise of Asian regionalism).

338. See ASIAN DEVELOPMENT BANK, *supra* note 38, at 256–57 (listing areas of focus and major initiatives pursued by Asian regional groupings).

339. See NGUITRAGOOL, *supra* note 39, at 43–47 (contrasting the rise of sustainable development as an ASEAN policy objective with the economic realities of resource development).

340. See Clad & Siy, *supra* note 198, at 52–73 (noting the variety of ASEAN initiatives on the books, the creation of state environmental ministries in response to regional pressure, and the variety of domestic nongovernmental organizations and international groups influencing environmental policy).

While extensive, this system exhibits notable weaknesses as well as strengths.³⁴¹ Precisely for that reason, the ASEAN experience may be explored from multiple perspectives and employed as a basis for assessing their effectiveness.³⁴² It is apparent that realist/neo-realist constructs should not be consigned to oblivion.³⁴³ It is equally clear that they cannot provide satisfactory explanations of environmental/international governance regime dynamics without insights derived from other sources.³⁴⁴ Somehow, a way needs to be found to integrate approaches that generate different images of regional/international collaboration.

However, acknowledging the importance of a theoretical synthesis is merely a first step in the process. ASEAN's ecological history and its efforts to tackle transboundary haze pollution inevitably produce many divergent observations about the functioning of environmental/international governance regimes.³⁴⁵ Identifying all the relevant influences, realist/neo-realist and institutionalist alike, enriches understanding of a complex phenomenon but does not ensure sufficient clarity.³⁴⁶ Socio-legal model-building is incomplete unless relationships among variables are duly specified within a context-sensitive and time-elastic framework.

341. See NARINE, *supra* note 51, at 170–72 (pointing out that despite the involvement of environment ministers from throughout the region, the haze agreement was poorly implemented due to partisan interests, weak regional institutions, and ASEAN's tendency to avoid domestic intervention).

342. See generally Macey & Colombatto, *supra* note 296, at 925–56 (providing a public choice approach); NGUITRAGOOL, *supra* note 39, at 5–8 (providing a regime theory approach).

343. See Mushkat & Mushkat, *supra* note 294, at 15–16 (discussing the importance of realist constructs).

344. See NGUITRAGOOL, *supra* note 39, at 6 (“Because a hegemonic power is absent from ASEAN cooperation on the haze, the realist assumptions based on power-configuration are irrelevant in this study.”).

345. Compare Quah, *supra* note 287, at 429–41 (focusing on regulatory costs and policy responses), with Jones, *supra* note 219, at 59–77 (focusing on design and impact of the transboundary haze agreement).

346. See NGUITRAGOOL, *supra* note 39, at 145–53 (cataloging disparate perspectives on and aspects of the haze regime).