Informal International Law-Making in the ASEAN: Consensus, Informality and Accountability

*Winfried Huck**

* The author is Professor for International and European Economic Law at the Brunswick European Law School (BELS) of Ostfalia University of Applied Sciences, Germany. He is at the same time Professor at the Chinese-German College (CDHK) at the Tongji University in Shanghai. He is Fellow at the Cambridge Centre for Environment, Energy and Natural Resources and Governance (C-EERNG) at the University of Cambridge and Visiting Fellow at the Lauterpacht Centre for International Law at the University of Cambridge as well. Email: <w.huck@ostfalia.de>.

ZaöRV 80 (2020), 101-138

Abstract

Informal international public policy-making shines a light on the evolutionary flows of law under the onslaught of globalisation. The term International Law-Making (IN-LAW), profoundly elaborated by *Pauwelyn*, *Wessel*, and *Wouters*, is used in contrast and opposition to "traditional" international law-making. This contribution scrutinises, from an IN-LAW perspective, the Association of Southeast Asian Nations (ASEAN) and the ASEAN Community Vision 2025 as it relates to the ASEAN Economic Community (AEC) Blueprint 2025. ASEAN as an international legal person, and as grounded in the ASEAN Charter since 2008, relies on dialogue and consensus and widely on non-binding and informal regulations. Analysing ASEAN via the methodical framework of IN-LAW unveils a normative core in the fluidity of informality. This core gives a clear view of the deeper integrated nucleus of informal law. But what is the glue that binds consensus, what power does informality yield to when it comes to the substantive core of law? Therefore ASEAN will be situated in terms of its history, composition and principles regarding informality as one of its constitutive elements. Dialogue and consensus-seeking in ASEAN can be recognised as a dominant feature which, in general, fits within IN-LAW. The AEC, as one of three pillars of ASEAN Community Vision 2025, allows insights into how a blueprint can be the basis for an integrational and transformative concept for Member States. Informal processes can be detected in great variety on nearly every political level, but there are exceptions in the form of binding treaties on trade such as the forthcoming Regional Comprehensive Partnership (RCEP) or ASEAN Trade in Goods Agreement (ATIGA).

I. Introduction

Different types of informal normative output within the continuous and unprecedented stream of globalisation create concerns regarding whether this output matches up with traditional concepts related to the general sources of law. Or is the informality a new normative expression which should be added to the classic sources? Although this will be answered in the future, for today, it remains an open question as to how to capture modern informal processes with a methodological framework to dismantle the perhaps normative core of the binding power of an informal goal. When current expressions in international law, such as the use of global indicators,

call for a revitalised global partnership of the Sustainable Development Goals (SDGs)[1] framed by the Global Agenda 2030 of the United Nations (UN) or when organizations such as the Group of Twenty (G-20),[2] Organisation for Security and Co-operation in Europe (OSCE)[3] and Asia-Pacific Economic Co-Operation (APEC)[4] confront lawyers with certain degrees of discomfort regarding the sources and processes and their respective normative expressions, this somehow veiled normativity is exposed, pointing to the question of whether informal agreements and so on are already contained within the law, in particular, when informality provides direct and detectable indirect vertical and horizontal legal effects in a normative matrix. Therefore, it is correct to confront the classical distinction between soft and hard law[5] with a new methodological framework that allows "non-traditional normative output" to be captured with a systematic approach based on the observation of various manifestations of informality. Informal international public policy-making, renamed as informal international law-making,[6] is different from other projects,[7] such as the Global Administrative Law project, and shines a light on the evolutionary flows of the (de-) formation of law under the onslaught of globalisation.[8] It should be noted that the legislative angle points to the Association of Southeast Asian Nations' unique, and distinctively low degree of, legalisation as a different type of legalisation, not necessarily as a failed or flawed model based on a

[1] SDG 17; see, in particular, *D. N. French/N. J. Cooper*, SDG 17: Partnership for the Goals – Cooperation within the Context of a Voluntarist Framework, in: D. N. French/L. J. Kotzé (eds.), Sustainable Development Goals, Law, Theory and Implementation, 2018, 271 et seq.

[2] *J. Wouters/D. Geraets*, The G20 and Informal International Lawmaking, Leuven Center for Global Governance Studies, Working Paper No. 86; *A. Berman/S. Duquet/J. Pauwelyn/R. A. Wessel/J. Wouters* (eds.), Informal International Lawmaking: Case Studies, 2012, 19 et seq.

[3] O. *Herman/J. Wouters*, The OSCE as a Case of Informal International Lawmaking?, in: M. Steinbrück Platise/C. Moser/A. Peters (eds.), The Legal Framework of the OSCE, 2019. Available at SSRN: <https://ssrn.com/abstract=3179528>.

[4] *T. Suami*, Informal International Lawmaking in East Asia – An Examination of APEC, in: A. Berman/S. Duquet/J. Pauwelyn/R. A. Wessel/J. Wouters (note 2), 55 et seq.

[5] *D. Shelton*, Law, Non-Law and the Problem of "Soft Law", in: D. Shelton (ed.), Commitment and Compliance, 2007 (Reprint from 2000), 10 et seq.

[6] *J. Pauwelyn,* Informal International Lawmaking: Framing the Concept and Research Questions, in: J. Pauwelyn/R. A. Wessel/J. Wouters (eds.), Informal International Lawmaking, 2012, 13.

[7] See, in particular, the Global Administrative Law (GAL) Project, NYU Law School, <https://www.iilj.org>. For this and further projects, see *J. Pauwelyn* (note 6), 31 et seq., and *P. Dann/M. von Engelhardt*, Legal Approaches to Global Governance and Accountability: Informal Lawmaking, International Public Authority, and Global Administrative Law Compared, in: J. Pauwelyn/R. A. Wessel/J. Wouters (note 6), 106 et seq.

[8] *P. Dann/M. von Engelhardt* (note 7), 106.

metanarrative on global legal culture.[9] Because the fluidity of globalisation creates a reflective and presumably neoliberal framework, in recent years, informal law-making has become a pivotal topic.[10] The term IN-LAW, profoundly elaborated by *Pauwelyn*, *Wessel*, and *Wouters*,[11] is used in contrast and opposition to "traditional" international law-making. Concretely, the theoretical approaches of IN-LAW acknowledge the existence of (substantive but) informal law under the provision of certain formalities. These formalities have to do with the *process, actors and output*.[12]

This contribution scrutinises, from an IN-LAW perspective, the intergovernmental ASEAN and the ASEAN Community Vision 2025 as it relates to the ASEAN Economic Community Blueprint 2025. ASEAN as a legal person, and as grounded in the ASEAN Charter since 2008, relies on dialogue and consensus and widely on non-binding and informal regulations, although in ASEAN external relations, a small number of binding rules can be observed.[13] Analysing ASEAN via the methodical framework of IN-LAW unveils a normative core in the fluidity of informality. This core gives a clear view of the deeper integrated nucleus of informal law resting on the "consensus on the best available knowledge and expertise", which should be established in an ideal manner openly and transparently and therefore allow for input from all affected stakeholders.[14] But what is the glue that binds consensus, what power does informality yield to when it comes to the substantive core of law? What is the legal formula that helps to pave the way grounded in consensus? Is there any other fundament on

[9] *S. Cho/J. Kurtz*, Legalizing the ASEAN Way: Adapting and Reimagining the ASEAN Investment Regime, Am. J. Comp. L. 66 (2018), 236 et seq.: with a "healthy dose of humility".

[10] *R. A. Wessel*, Informal International Law-Making as a New Form of World Legislation?, International Organizations Law Review 8 (2011), 253 et seq..; *A. Berman/S. Duquet/J. Pauwelyn/R. A. Wessel/J. Wouters* (note 2); *J. Pauwelyn/R. A. Wessel/J. Wouters*, Informal International Law as Presumptive Law: Exploring New Modes of Law-Making, in: R. Liivoja/J. Petman (eds.), International Law-Making, Essays in Honour of Jan Klabbers, 2014, 74 et seq.

[11] *J. Pauwelyn/R. A. Wessel/J. Wouters* (note 6).

[12] *A. Berman/S. Duquet/J. Pauwelyn/R. A. Wessel/J. Wouters* (note 2), 3; *J. Pauwelyn* (note 6), 13 et seq. In addition, the existence of the accountability mechanism provided by courts or in the broader sense in terms of being process-oriented through transparency, decision-making rules and the participation of stakeholders also plays a role in the IN-LAW concept, which is neglected here due space constraints, see *E. Benvinisti*, Towards a Typology of Informal International Lawmaking: Mechanisms and Their Distinct Accountability Gaps, in: J. Pauwelyn/R. A. Wessel/J. Wouters (note 6), 308; *T. Corthaut/B. Demeyere/N. Hachez/J. Wouters*, Operationalizing the Accountability of Informal International Lawmaking, in: J. Pauwelyn/R. A. Wessel/J. Wouters (note 6), 313 et seq., in particular to "Accountability problems on IN-LAW mechanism in eight questions".

[13] See e.g. the ASEAN Trade in Goods Agreement, <https://asean.org>.

[14] *J. Pauwelyn/R. A. Wessel/J. Wouters* (note 10), 76.

which consensus, dialogue and co-operation in the multiple, and quite diverse, realms ASEAN covers can be built?

The structure of this article is as follows: In the following section, ASEAN will be situated in terms of its history, composition and principles regarding informality as one of its constitutive elements. Dialogue and consensus seeking in ASEAN can be recognised as a dominant feature which, in general, fits easily within IN-LAW. The AEC, as one of three pillars of ASEAN Community Vision 2025, allows insights into how a blueprint can be the basis for an integrational and transformative concept for Member States. Further, the core used for consensus must be dismantled to understand the underlying normative fundament of the layers of dialogue, consensus and informality. Then, in a further section, IN-LAW is applied to ASEAN in more detail. The essay ends with concluding remarks.

II. Fundaments of ASEAN

1. Historical View of ASEAN

A summary of ASEAN integration efforts via a timeline provides both contextualisation and the necessary background information.

In 2020, ASEAN looked back on the 53 years that had passed since its formation on 8.8.1967.[15] Initially, there were only five Member States, namely Indonesia, Malaysia, the Philippines, Singapore and Thailand, whose Foreign Ministers[16] agreed on just five articles in a political document, signed in the entrance hall of the Ministry of Foreign Affairs in Bangkok, Thailand as the so-called Bangkok Declaration of 8.8.1967.[17] Already reflecting the fundament of the ASEAN Way, it proclaimed that ASEAN represented

> "the collective will of the nations of Southeast Asia to bind themselves together in friendship and cooperation and, through joint efforts and sacrifices, secure

[15] To other regional organisations at that time bound to the Cold War era, such as MAPHILINDO, which is a combination of Malaysia, the Philippines, and Indonesia; Southeast Asia Treaty Organization (SEATO) and Association of South-East Asia (ASA). For ASA see *S. Cho/J. Kurtz* (note 9), 254 et seq.; and for SEATO see *J.-Y. Lee*, Contested American Hegemony and Regional Order in Postwar Asia: The Case of Southeast Asia Treaty Organization, International Relations of the Asia-Pacific 19 (2019), 237 et seq.

[16] ASEAN, History, The Founding of ASEAN, <http://asean.org>.

[17] The ASEAN Declaration (Bangkok Declaration) Bangkok, 8.8.1967, <https://asean.org>.

for their peoples and for posterity the blessings of peace, freedom and prosperity."[18]

The Association was first enlarged after Brunei was admitted on 7.1.1984 after attaining independence from the United Kingdom.[19] Cambodia – Lao People's Democratic Republic – Myanmar – Viet Nam, the so-called CLMV countries [20] then became Member States, starting with Vietnam on 28.7.1995 and Laos and Myanmar on 23.7.1997, while Cambodia joined on 30.4.1999.[21] Security concerns in the aftermath of the end of the Cold War, the closure of the United States (US) military bases in the Philippines and the outrage caused by the French nuclear experiments in the South Pacific led to the conclusion of the treaty establishing a nuclear-weapon-free zone in Southeast Asia, signed in Bangkok on 15.12.1995 by the ASEAN Member States.[22] One of the most significant developments has been the adoption of the ASEAN Charter, which was adopted on the occasion of the 40th Anniversary of ASEAN at the 13th ASEAN Summit on 20.11.2007.[23] The ASEAN Charter entered into force on 15.12.2008,[24] conferring upon ASEAN a legal personality[25] as an intergovernmental organisation and serving as a constitutional basis for ASEAN (Art. 3 ASEAN Charter).[26] The legal personality affects its capacity under international law to enter into relations with other organisations or States and also its competence to enter into different types of external agreements such as memoranda of under-

18 Fifth Bangkok Declaration; ASEAN, History (note 16).

19 *D. Seah*, I. The ASEAN Charter, ICLQ 58 (2009), 197 et seq., doi:10.1017/S0020589308000882, 197.

20 The common vision among the CLMV countries is to become a "sustainable upper middle-income economy by 2030" due to "The Eleventh Cambodia – Lao PDR – Myanmar – Viet Nam (CLMV) Economic Ministers' Meeting (EMM)", held on 5.9.2019, para. 4, adopted 5.9.2019.

21 Statement by the Secretary-General of ASEAN welcoming the Kingdom of Cambodia as the tenth Member State of ASEAN 30.4.1999, ASEAN Secretariat, <https://web.archive.org>; *M. Ajmani/P. K. Joshi/R. Vr/D. Roy,* Market Integration with ASEAN and Beyond: The Case of Myanmar. IFPRI Discussion Paper 1773, 29.11.2018. Available at SSRN: <https://ssrn.com/abstract=3324554>.

22 *M. Roscini*, Something Old, Something New: The 2006 Semipalatinsk Treaty on a Nuclear Weapon-Free Zone in Central Asia, Chinese Journal of International Law 7 (2008), 595, quote 5.

23 2007 Singapore Declaration on the ASEAN Charter, Adopted in Singapore on 20.11.2007, <https://cil.nus.edu.sg>.

24 Charter of the Association of Southeast Asian Nations, <https://asean.org>.

25 *C. Closa/L. Casini*, Comparative Regional Integration, 2016, 167, 169; ASEAN is a treaty-based IGO, but it also displays elements of transgovernmental and transnational networks.

26 *I. Deinla*, The Development of the Rule of Law in ASEAN: The State and Regional Integration, 2017, 1.

standing (often used), an agreement or a treaty.[27] It remains an essential purpose of ASEAN to preserve the ASEAN region as a nuclear-weapon-free zone and keep it free of all other weapons of mass destruction (Art. 1 sec. 3 ASEAN Charter), reflecting historical experiences and, at the same time, stressing self-determination and avoidance of external interference.[28]

2. Introduction to the Basics of ASEAN Law (Member States, TAC, ASEAN Charter and ASEAN 2025)

a) Member States

The 10 ASEAN Member States[29] are very different in terms of culture, religion, ethnic groups, languages, colonial history and their respective underlying national constitutional foundations as well as in their current states of development (e.g. Laos – Singapore).[30] This diversity corresponds to the range exhibited by the Member State's respective constitutions: Socialist constitutions characterise Vietnam and Laos, English parliamentary democracies influenced by "Westminster" characterise Malaysia and Singapore, while Brunei is governed by a Malay Muslim monarchy. The military sets the tone in Myanmar (Burma), a parliamentary democracy, while Indonesia and the Philippines have presidential systems in which the influence of religion is hard to overlook. In Thailand, on the other hand, there is a constitutional monarchy which, in practice, is associated with the changing intermezzi of the military. ASEAN was recognised as an experiment by its founding members in which Member States were to rely upon patient consensus-building to reach informal understandings or loose agreements.[31] Because of the remarkable complexity and diversity present within and among Member States, the ASEAN Charter requires that all ASEAN Member States respect the different cultures, languages and religions of the

[27] *D. Seah*, Problems Concerning the International Law-Making Practice of ASEAN: A Reply to Chen Zhida, Asian Journal of International Law 6 (2016), 273 et seq.

[28] Preamble, Art. 2 sec. lit e and f ASEAN Charter.

[29] According to Art. 4 of the ASEAN Charter, the Member States of ASEAN are Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Vietnam.

[30] *I. Venzke/L. Thio*, The Internal Effects of ASEAN External Relations, 2016, 7.

[31] *I. Deinla* (note 26), 7; *M. Ewing-Chow/L. Bernard*, The ASEAN Charter: the Legalization of ASEAN?, in: S. Cassese/B. Carotti/L. Casini/E. Cavalieri/E. MacDonald (eds.), Global Administrative Law: The Casebook, 3rd ed. 2012, 116.

people and, despite existing differences, should emphasise the common values of ASEAN in the spirit of unity.[32] The ASEAN motto "One Vision, One Identity, One Community"[33] reflects the broad diversity of the Member States, which are symbolised in the ASEAN flag as ten bundled rice panicles enclosed in a circle characterising the unity of ASEAN.[34] The creation of the ASEAN Charter in 2008 is seen as an essential step towards global constitutionalism, as it promotes legal norms,[35] although these norms are subject to constraints reflecting the different constitutions of the ASEAN Member States and their specific approaches to decision-making.[36] The overarching characteristic of the decision-making process is that it is based on consensus and the absence of organs with regulatory power.[37] This approach marks a significant difference in the legal architecture of the European Union (EU) and ASEAN.[38] Why is this so? It has to do with the wide diversity evinced by Member States, which will be explained directly.

ASEAN is recalling self-determination from dominant superpowers and seeks to enshrine its cultures, traditions and history as well as its cultural sensitivity and internal vulnerability using a model which cannot be compared directly with a Western model without reference to the local context.[39] These common values of ASEAN Member Stares have amalgamated into the ASEAN Way, which seeks to establish a framework of consensual and joint convictions via goals, blueprints and values to convince Member States to do the right thing from a subjective point of view rather than relying more on the normative force of legally binding rules.[40]

---

32 Art. 2 lit l ASEAN Charter.

33 Art. 36 ASEAN Charter.

34 Art. 37 and Annex 3 ASEAN Charter.

35 *D. Vanoverbeke*, Are We Talking the Same Language?, in: T. Suami/A. Peters/D. Vanoverbeke/M. Kumm (eds.), Global Constitutionalism from European and East Asian Perspectives, 2018, 221.

36 *G. L. Jing Xi*, ASEAN and Janus-Faced Constitutionalism: The Indonesian Case, I.CON 17 (2019), 177 et seq. Analysing that the Indonesian president can constitutionally ignore the views of the Constitutional Court and the House of Representatives regarding energy policy and that Indonesia's energy policies ultimately converge with "soft" ASEAN norms and diverge from its own constitution, jurisprudence and legislation.

37 *D. Seah* (note 19), 197 et seq. (205).

38 *P. L. Hsieh/B. Mercurio*, ASEAN Law in the New Regional Economic Order: An Introductory Roadmap to the ASEAN Economic Community, in: P. L. Hsieh/B. Mercurio (eds.), ASEAN Law in the New Regional Economic Order: Global Trends and Shifting Paradigms, 2019, 10, available at SSRN: <https://ssrn.com/abstract=3230488>.

39 *J. He*, Normative Power in the EU and ASEAN: Why They Diverge, International Studies Review 18 (2016), 92 et seq.

40 ASEAN Integration Report 2019, Jakarta, October 2019, xii para. 33: "[ASEAN Member States] AMS need to translate regional commitments into national-level commitments, milestones, and targets that can be readily enforced, observed, and measured. This requires

b) The ASEAN Way and the Treaty of Amity and Co-Operation in Southeast Asia Indonesia

Against the backdrop of such disparities, narrowly defined legal rules appear to be of little help; hence, in practice and based on a diplomatic approach, the informal "ASEAN Way"[41] was found to open up sufficient space for informal but pragmatic solutions.[42] The term "ASEAN Way", describing an autochthonous habit of decision-making, as *Daniel Seah* has put it,[43] can be traced back at least to the 1970s, when it was used to describe the close relations between the leading politicians of some ASEAN states.[44] The "ASEAN Way" is based primarily on two pillars,[45] dialogue and consultation, which are bridged in searches for consensus.[46] There are advantages to a procedure that focuses on – although unmentioned – on trust. Formal decision-making procedures and majority voting, including possible judicial reviews, can be avoided via the consensus route taken by the Member States.[47] A consensus in a political debate reveals a harmonious, and, at the very least, an autonomous and self-determined, decision on the part of the acting parties. The fundament of this unique way of making decisions is reflected among other organisations, first in the Treaty of Amity and Cooperation in Southeast Asia Indonesia (TAC) and second in the ASEAN Char-

---

incorporating ASEAN's economic integration agenda into the realm of national policy making and implementation, such as in the formulation of national development plans and strategies"; *S. Cho/J. Kurtz* (note 9), 256. Quoting in this regard *Robert Scalpino*, who observes that "Asianization", which he defines as a "widening and deepening network of ties between and among Asian states of diverse political and cultural nature", remains unfinished.

41 For the background from IR, see *T. Kivimäki*, East Asian Relative Peace and the ASEAN Way, International Relations of the Asia-Pacific 11 (2011), 57 et seq.

42 *S. Cho/J. Kurtz* (note 9), 252: "In particular, one trait stands out that emphasizes informality, consultation, and consensus in collective decision making, often coined as the 'ASEAN Way'."

43 *D. Seah* (note 27), 266.

44 *R. Pfeifer*, Die ASEAN im Wandel. Auswirkungen nationalstaatlicher Transformation auf die Institutionen der ASEAN, 2011, 69, <https://d-nb.info>; *P. K. Heng*, The "ASEAN Way" and Regional Security Cooperation in the South China Sea, Robert Schuman Centre for Advanced Studies Research Paper No. 2014/121. Available at SSRN: <https://ssrn.com/abstract=2540049>.

45 For more differentiation see *P. Boyce*, The Machinery of Southeast Asian Regional Diplomacy, in: L. T. Soon (ed.), New Directions in the International Relations of Southeast Asia, 1973, 175, quoted in *S. Cho/J. Kurtz* (note 9), 233 et seq., doi:10.1093/ajcl/avy026, 252, quote 118.

46 *I. Venzke/L. Thio* (note 30), 9.

47 *S. Inama/E. W. Sim*, The Foundation of the ASEAN Community, 2015, 43.

ter. The six principles of the TAC,[48] which was adopted in 1976 and to which the US,[49] among others, in 2009, acceded on the basis of an opening protocol, are fundamental for dialogue, consultation and the search for consensus.[50] The underlying "ASEAN Way" can further be seen in the Declaration on the Conduct of Parties in the South China Sea between ASEAN and People's Republic of China, where the parties reaffirm "a peaceful, friendly and harmonious environment of the South China Sea", and the TAC is integrated as well to explore "ways for building trust and confidence".[51] According to Art. 2 TAC, the six principles underlining the "ASEAN Way",[52] of which a modernised version has been incorporated into the basic principles of co-operation according to Art. 2 of the ASEAN Charter, are:

a. Mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations;[53]

b. The right of any State to lead its national existence free from external influence, subversion or coercion;

c. Non-interference in the internal affairs of others;[54]

d. Settlement of differences or disputes by peaceful means;[55]

e. Renunciation of the threat or use of force;[56]

---

[48] Treaty of Amity and Cooperation in Southeast Asia Indonesia, 24.2.1976, (TAC) <http://asean.org>; *D. Seah*, The Treaty of Amity and Cooperation in Southeast Asia: The Issue of Non-Intervention and Its Accession by Australia and the USA, Chinese Journal of International Law 11 (2012), 785 et seq.

[49] *D. Seah* (note 48), 785 et seq.; *M. E. Manyin/M. J. Garcia/W. M. Morrison*, U.S. Accession to ASEAN's Treaty of Amity and Cooperation (TAC), Congressional Research Service, 5.9.2009, <https://web.archive.org>.

[50] In accordance with Art. 52 of the ASEAN Charter.

[51] Declaration on the Conduct of Parties in the South China Sea, 17.10.2012, <https://asean.org>; *S. Wu/H. Ren*, More Than a Declaration: A Commentary on the Background and the Significance of the Declaration on the Conduct of the Parties in the South China Sea, Chinese Journal of International Law 2 (2003), 311 et seq.; closes on p. 319 with the perspective that "from now on, ASEAN and China are joining hands together to establish common security and to gain common prosperity". See, also, the Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines, Chinese Journal of International Law 15 (2016), 906: "Fourth, the Philippines' unilateral initiation of arbitration violates the commitment made by China and ASEAN Member States, including the Philippines, in the 2002 Declaration on the Conduct of Parties in the South China Sea (DOC) to resolve the relevant disputes through negotiations by states directly concerned"; and *L. Boisson de Chazournes,* Introduction to Symposium on the South China Sea Arbitration, AJIL Unbound 110 (2016), 263 et seq.

[52] *S. Cho/J. Kurtz* (note 9), 252, quote 116: "The most conspicuous legal ground for the ASEAN Way may be found in the Treaty of Amity and Cooperation in Southeast Asia."

[53] See Art. 2 para. 2 lit. a ASEAN Charter.

[54] See Art. 2 para. 2 lit. e ASEAN Charter.

[55] See Art. 2 para. 2 lit. d ASEAN Charter.

f. Effective co-operation with each other.

ASEAN stresses that culturally, the ASEAN Way is a more effective method for resolving disputes in Southeast Asia and that by not forcing its members into legally binding standards, ASEAN has moved its members from animosity to the close, co-operative relationship that they enjoy today.[57] Up to now, the ASEAN Member States have not delegated any power or competences to a supranational entity for economic matters[58] because doing so could interfere with self-determination and autonomy.[59]

c) The Overall Framework: "ASEAN 2025: Forging Ahead Together"

On 31.12.2015, the Heads of State of ASEAN proclaimed the formal establishment of the ASEAN Community through Declaration,[60] which was prepared by the "Roadmap for an ASEAN Community: 2009-2015" endorsed by ASEAN Leaders at their 14th ASEAN Summit in Cha-am, Thailand from 2.2.-1.3.2009.[61] As a result, ASEAN's architecture evolved and was newly declared to be "ASEAN 2025: Forging Ahead Together", by the Leaders of ASEAN Member States at their 27th Summit in 2015.[62] This declaration comprises all the efforts of ASEAN to achieve a Community that is "politically cohesive, economically integrated, and socially responsible".[63] Therefore, the Heads of ASEAN Member States agreed that "ASEAN 2025: Forging Ahead Together" encompasses the following:

- the Kuala Lumpur Declaration on ASEAN 2025: Forging Ahead Together,
- the ASEAN Community Vision 2025 and the related
- ASEAN Political-Security Community (APSC) Blueprint 2025,
- the AEC Blueprint 2025 and the
- ASEAN Socio-Cultural Community (ASCC) Blueprint 2025.[64]

---

56 See Art. 2 para. 2 lit. c ASEAN Charter.

57 *D. Seah* (note 48), 785 et seq.; *M. Ewing-Chow/L. Bernard* (note 31), 116.

58 *S. Inama/E. W. Sim* (note 47), 197.

59 *C. Hung Lin*, ASEAN Charter: Deeper Regional Integration under International Law?, Chinese Journal of International Law 9 (2010), 832 et seq., sec. 27.

60 Kuala Lumpur Declaration on The Establishment of The ASEAN Community, in Kuala Lumpur, 22.11.2015, <https://www.asean.org>.

61 *Cha-am Hua Hin*, Declaration on the Roadmap for the ASEAN Community (2009-2015), 1.2.2009, <https://asean.org>.

62 Kuala Lumpur Declaration (note 60).

63 ASEAN 2025 at a Glance, para. 2, Statement from 24.11.2015: <https://asean.org>.

64 Kuala Lumpur Declaration (note 60); for the organisational aspects, in particular, see *I. Deinla* (note 26), 137 et seq.

d) ASEAN Economic Community as One Pillar of the ASEAN Community Vision 2025 – General Overview

Today ASEAN rests on three pillars, the APSC, the ASCC and a "market driven economy",[65] which, in 2015, found expression in the AEC.[66]

The AEC reflects ASEAN intent to create a single market which is stable, prosperous, highly competitive and economically integrated with effective facilitation of trade and investment,[67] in which there is a free flow of goods, services and investment (Art. 2 sec. 5 ASEAN Charter).[68] All of the three pillars have blueprints, i.e. visionary plans with specific goals and measures for the future to be achieved by 2025 under the ASEAN Community Vision 2025 (ASEAN Vision 2025).[69] The visionary character makes clear that the future outcome cannot be understood solely in terms of the objectives but should be viewed as an attractive strategic project strengthen the Member States to participate and to create an important economic "hub" in Asia.[70]

The move towards establishing an AEC was proposed in 2003 and formally inaugurated on 31.12.2015 with the expressed purpose of narrowing the economic gaps and accelerating the economic integration of the less-developed Member States (Cambodia, Lao People's Democratic Republic, Myanmar and Vietnam).[71] The first AEC Blueprint 2015 was adopted in 2007 and characterised the AEC as:

(i) a single market and production base,[72]
(ii) a highly competitive economic region,
(iii) a region of equitable economic development and
(iv) a region fully integrated into the global economy (ASEAN Secretariat, 2008).[73]

It identified the free flow of trade in services and skilled labour as two important targets.[74] As the end of AEC Blueprint 2015 approached,[75]

---

65 *J. Pelkmans*, The ASEAN Economic Community, A Conceptual Approach, 2016, 18 and 75. *S. Basu Das*, The ASEAN Economic Community and Beyond, 2016, 12.
66 For the bodies of the AEC, see ASEAN Charter, Annex I ASEAN Sectoral Ministries Bodies, II AEC No. 1-16.
67 *S. Cho/J. Kurtz* (note 9), 233 et seq.
68 A good overview in *P. L. Hsieh/B. Mercurio* (note 38).
69 *S. Inama/E. W. Sim* (note 47), 46.
70 *S. Basu Das* (note 65), 229 et seq.
71 *J. Pelkmans* (note 65), 101: "equitable development in the AEC".
72 *J. Pelkmans* (note 65), 97 et seq., 186 et seq.
73 ASEAN Secretariat, AEC Blueprint 2025, Jakarta, 1.
74 *J. Pelkmans* (note 65), 133 et seq.

ASEAN overhauled it in November 2015 to create AEC Blueprint 2025 to cover the next ten years. This blueprint consists of five interrelated characteristics, namely:

(i) A Highly Integrated and Cohesive Economy;
(ii) A Competitive, Innovative and Dynamic ASEAN;
(iii) Enhanced Connectivity and Sectoral Co-operation;
(iv) A Resilient, Inclusive, People-Oriented, and People-Centred ASEAN; and
(v) A Global ASEAN.[76]

At the same time, ASEAN set out to muster the political will to embrace ever-evolving digital technology as leverage to enhance trade and investments, provide an e-based business platform, promote good governance and facilitate the use of green technology.[77]

e) Global Megatrends and the AEC

Based on the AEC Blueprint 2025,[78] challenges for the AEC include global megatrends; the interconnectedness of goods, services and capital; facilitating the movement of skilled labour and business visitors; innovation; the digital economy; sustainable economic development and strengthening the private sector to increase "stakeholder engagement".[79] The megatrends include geo-economic and, to a certain extent geo-legal changes,[80] due to trade with China (e.g. the [one] Belt and [one] Road Initiative [BRI]),[81] in-

[75] *P. L. Hsieh/B. Mercurio* (note 38), 10 et seq.; *Y. Fukunaga*, Challenges of ASEAN MRAs on Professional Services, in: P. L. Hsieh/B. Mercurio (eds.), ASEAN Law … (note 38), 124.

[76] ASEAN Community Vision 2025, 1 para. 3.

[77] ASEAN 2025, 1 para. 6.

[78] ASEAN Secretariat, AEC Blueprint 2025, Jakarta, 2015.

[79] *S. Tay/J. P. Tijaja* (eds.), ASEAN Secretariat, Global Megatrends Implications for the ASEAN Economic Community, Jakarta, 2017, 7.

[80] *M. Jorgensen*, Equilibrium & Fragmentation in the International Rule of Law: The Rising Chinese Geolegal Order, KFG Working Paper Series 2018, No. 21, Berlin Potsdam Research Group "The International Rule of Law–Rise or Decline?", 22: "A geolegal order is constituted by more than simple legal power – in the sense of formal declaration and consent by states to a doctrine or constitutional order. Rather it encompasses a geographical domain in which one or more states articulate and make effective distinctive international legal rights and obligations, while excluding other alternatives, through a combination of legal, political and economic power." Available at SSRN: <https://ssrn.com/abstract=3283626>.

[81] *S. Tay/J. P. Tijaja* (note 79), 21; *K. Zeng*, The Political Economy of Chinese Outward Foreign Direct Investments in "One-Belt, One-Road (OBOR)" Countries, in: J. Chaisse (ed.), China's International Investment Strategy, 2019, 360 et seq.; *K. Zeng*, Conceptual Analysis of China's Belt and Road Initiative: A Road Towards a Regional Community of Com-

creasing competition as a result of globalisation and geopolitical changes,[82] as well as negotiations for the establishment of a Regional Comprehensive Economic Partnership[83] with all major partners in Asia (Japan, India, South Korea, Australia, New Zealand and China), for which negotiations began in 2011.[84] Under pressure from dwindling multilateralism, growing US protectionism and China's geo-legal economic expansion,[85] the RCEP was originally expected to be completed in 2018 and is now postponed until 2020,[86] creating presumably the largest free trade area in the world, with some 3.2 billion people and an extremely high share of world trade.[87]

f) SDGs Enshrined in the AEC

Another megatrend can be seen in the findings formulated in ASEAN Community Vision 2025, which states that implementation of the United Nations' Agenda 2030 for Sustainable Development and the SDGs[88] has begun in ASEAN and that the work continues.[89] As a member of the global

---

mon Destiny, Chinese Journal of International Law 15 (2016), 517 et seq.; *T. Yu*, China's "One Belt, One Road Initiative": What's in It for Law Firms and Lawyers?, The Chinese Journal of Comparative Law 5 (2017), 1 et seq.

82 *S. Tay/J. P. Tijaja* (note 79), 29.

83 AEC 2025, 3, 35. *H. Wang*, Building Toward the RCEP? Reflections on the ASEAN-China FTA, in: P. L. Hsieh/B. Mercurio (eds.), ASEAN Law … (note 38), 46, 53 et seq.; *H. Sun*, Statement of Public Interest Principles for Copyright Protection under the Regional Comprehensive Economic Partnership (RCEP), International Review of Intellectual Property and Competition Law (IIC) 48 (2017), 334; *S. Basu Das* (note 65), 139 et seq., 165 et seq., *D. A. Gantz*, The TPP and RCEP: Mega-Trade Agreements for the Pacific Rim, Ariz. J. Int'l & Comp. L. 33 (2016), Arizona Legal Studies Discussion Paper No. 15-36, available at SSRN: <https://ssrn.com/abstract=2703519>.

84 *D. Chakraborty/J. Chaisse/X. Qian*, Is It Finally Time for India's Free Trade Agreements? The ASEAN "Present" and the RCEP "Future", Asian Journal of International Law 9 (2019), 359 et seq.; ASEAN Secretariat, AEC Blueprint 2025, Jakarta, 2015, 35.

85 *M. Jorgensen* (note 80), 22.

86 ASEAN "Joint Leaders' Statement on the RCEP", November 2019, 1, <https://asean.org>, 4.11.2019, Bangkok, Thailand.

87 *W. Sinn*, RCEP on Track for Substantial Agreement by Year-End in Big Win for Free Trade, The Straits Times, 1.7.2018, <https://www.straitstimes.com>.

88 UNGA Res. of 25 September 2015, A/RES/70.

89 Declaration on ASEAN Post-2015 Environmental Sustainability and Climate Change Agenda, 21.11.2015, para. 2: "Continue our efforts to establish a balance among economic growth, social development and environmental sustainability as well as to strengthen ASEAN's commitments for the realization of the Post 2015 Development Agenda and the attainment of the Sustainable Development Goals (SDGs)"; <https://www.asean.org>; *P. L. Hsieh/B. Mercurio* (note 38), 12.

community, ASEAN has committed itself to the realisation of the SDGs,[90] that is, efforts are being made to improve living standards and implement these SDGs.[91] The EU and ASEAN, as well as ASEAN and China, are working on this implementation within ASEAN,[92] although the current rankings of the Member States indicate that they are currently not moving very successfully towards their goals. A report by the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) revealed that ASEAN and its Member States will probably not achieve any of the SDGs by the 2030 target date. It has been reported that the situation is deteriorating when it comes to providing clean water and sanitation (SDG 6), ensuring decent work and economic growth (SDG 8) and supporting sustainable consumption and production (SDG 12).[93]

III. Working Methods of ASEAN (Informality, Consensus, Trust)

The ASEAN working methods and the decision-making process of ASEAN, in principle, are based on consultation and consensus in all matters,[94] unless there are specific provisions in other legal matters.[95] Consensus seeking may be burdensome, time-consuming and difficult, but it guarantees the manifestation of self-determination and an autonomous decision-making process for every Member State. It also makes substantive outcomes less likely.

---

[90] ASEAN Secretariat, Annual Report 2017-2018, A Resilient and Innovative ASEAN Community, Jakarta 2018, 29.

[91] ASEAN Community Vision 2025, No. 6, 12.3, <http://www.asean.org>.

[92] *P. Reddy et al.* (UNDP, China, ASEAN), SDG Localization in ASEAN: Experiences in Shaping Policy and Implementation Pathways, 2019, 6 et seq.

[93] *J. Thomas*, ASEAN Not on Track for SDG Goals, The ASEAN Post, 29.5.2019: <https://theaseanpost.com>; *P. Reddy et al.* (note 92), 6 et seq.

[94] Art. 20 para. 1 ASEAN Charter.

[95] Art. 20 para. 3 ASEAN Charter; see *I. Venzke/L. Thio* (note 30), 16.

IV. The Concept of IN-LAW Applied to ASEAN

The concept of IN-LAW has been defined as

> "Cross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a forum other than a traditional international organization (*process informality*), and/or as between actors other than traditional diplomatic actors (such as regulators or agencies) (*actor informality*) and/or which does not result in a formal treaty or other traditional source of international law (*output informality*)".[96]

In light of the review of ASEAN as described above, the elements of IN-LAW are introduced and combined with the specific features of ASEAN. ASEAN, although perceived of as an actor taking the informal "ASEAN Way" and embarking recently on a more specific ASEAN rule-of-law way, has been analysed using the conceptual framework of IN-LAW – as far as it can be judged – only by *Deinla*.[97]

1. Process Informality

Process informality, as one criterion of IN-LAW, occurs in a loosely organised network or *fora* rather than in an international organisation. However, it does not exclude the existence of detailed procedural rules, permanent staff or physical headquarters.[98] Hence, the existence of an ASEAN Secretariat[99] does not exclude the finding of process informality.[100] What is instead excluded are formal negotiations between governmental representatives for the adoption of an instrument, such as a treaty or resolution,[101] as in the ASEAN Convention Against Trafficking in Persons, Especially

96 *J. Pauwelyn* (note 6), 22.

97 *I. Deinla* (note 26), see, in particular, the following chapters of her book: Conceiving the Rule of Law in ASEAN-Integration, 26 et seq.; ASEAN Community and Building the Law Regime in ASEAN, 126 et seq.; Soft Regulations and Informal Rule-Making in the ASEAN Economic Community, 161 et seq.

98 *J. Pauwelyn* (note 6), 17 et seq.

99 ASEAN Secretariat/Basic Documents: According to the Basic mandate para. 1 the ASEAN Secretariat was established on 24.2.1976 by the Foreign Ministers of ASEAN. The Agreement on the Establishment of the ASEAN Secretariat stated that the basic mandate of the ASEAN Secretariat is "to provide for greater efficiency in the coordination of ASEAN organs and for more effective implementation of ASEAN projects and activities". <https://asean.org>.

100 *J. Pauwelyn* (note 6), 17 et seq.

101 *O. Herman/J. Wouters* (note 3), 5.

Women and Children or the ASEAN Agreement on Electronic Commerce[102] and many others which can be easily retrieved from the ASEAN List of Instruments,[103] particularly in the areas of trade and investment.[104] However, ASEAN as a legal person based on an international treaty is not equipped with any detailed procedural rules on decision-making, which creates some difficulties concerning regular international law-making practices within ASEAN.[105] Although the ASEAN Charter takes the viewpoint that ASEAN has embarked on leaving the ASEAN Way, it can be observed that an evolutionary modification and modern expression of the ASEAN Way is still in place instead of a rule-of-law oriented approach, which is, in particular, connected more closely to external relationships.[106]

2. Economic Co-Operation By Consensus and a Weak Framework of Law

ASEAN's system involving political restraint is seen as rule-based and not law-based.[107] ASEAN has, therefore, developed a widely informal and unique *mixtum compositum*, its own culturally and historically reflected expression of a most informal regime focused on co-operation and, to a lesser extent, formal legal regulations under the ASEAN Way.[108] A closer look reveals different legal tailoring between the intra-ASEAN collective (regional) rules and extra-ASEAN trade and investment treaties signed between individual ASEAN members and non-ASEAN countries.[109]

---

102 ASEAN Agreement on Electronic Commerce signed in Hanoi, Vietnam, 22.1.2019 but, as of 1.11.2019, still not in force.

103 <http://agreement.asean.org>.

104 See e.g. the agreements, protocols, declarations and other instruments related to the ASEAN Comprehensive Investment Agreement (ACIA), which are administered by the ASEAN Investment Area (AIA) Council. To ACIA see *J. Chaisse*, The ACIA: Much More Than a BIT of Protection for Foreign Investors, in ASEAN Law in the New Regional Order , in: P. L. Hsieh/B. Mercurio (eds.), ASEAN Law … (note 38), 232 et seq.; The AIA Council is the ministerial body under the ASEAN Economic Ministers responsible for overseeing the implementation of the ASEAN Comprehensive Investment Agreement (ACIA), ASEAN's main economic instrument for realising a free and open investment regime, for further information, see <https://asean.org>.

105 See, for this aspect, *D. Seah* (note 27), 265 et seq.

106 *I. Venzke/L. Thio* (note 30), 9, 11.

107 *I. Deinla* (note 26), 47.

108 *I. Deinla* (note 26), 199.

109 *S. Cho/J. Kurtz* (note 9), 234.

The overwhelming informality reflects the complementary approach and respect for independence, sovereignty, equality, territorial integrity, national identity and the principle of non-interference between all ASEAN Member States.[110] This informality also creates a vast space as well as the freedom to come to any possible outcome without restriction, excluding the underlying cultural and behavioural approach outlined in the ASEAN Charter. Thus, outcomes and future developments can be carefully directed and controlled by the Member States, while a fully equipped legal system remains unnecessary. This conception avoids, from the beginning, the creation of a supranational organisation similar to the EU.[111] Limited power is a result of the consensus and co-operation process rooted in the ASEAN Charter, even though the Heads of State or Government of the Member States constitute "the supreme policymaking body of ASEAN",[112] that is, the ASEAN Summit. This central organ has been given the power to address emergencies affecting ASEAN via appropriate actions.[113] It has the power to take decisions on key issues regarding the realisation of the objectives of ASEAN and all important matters of interest to Member States.[114] Constitutional controls, such as checks and balances, are lacking. Therefore, critics state that the constitutional character of ASEAN raises serious doubts as to whether ASEAN functions in the proper role of an international independent organisation[115] because it is unable to deal with serious questions creating severe tensions like a typical international organisation.[116] In this respect, it is unlikely that ASEAN will develop a will that stands out and differs from those of the Member States.[117] The ASEAN Summit is only called in as a decision-making body if a consensus cannot be reached[118] or there has been an unsuccessful settlement of a dispute.[119] In the absence of a consensus, this decision-making body is empowered to make simple or quali-

110 Art. 2 ASEAN Charter.

111 *J. He* (note 39), 92 et seq.; *W. Huck*, ASEAN and EU: Trust, Consultation and Consensus Instead of "Ever Closer Union" (28.8.2018). European Journal of Business Law/Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 21 (2018), 886 et seq., available at SSRN: <https://ssrn.com/abstract=3364223>.

112 Art. 7 No. 2 a ASEAN Charter.

113 Art. 7 No. 2 d ASEAN Charter.

114 Art. 7 No. 2 b ASEAN Charter.

115 *J. D. Bagulaya*, ASEAN as Wayang Kulit: A Critique of the Constitutional, Extra-Constitutional, and Practical Fetters of ASEAN, Asian Journal of International Law 9 (2019), 275, 279 et seq.

116 *J. D. Bagulaya* (note 115).

117 *I. Venzke/L. Thio* (note 30), 13.

118 Art. 20 para. 2 ASEAN Charter.

119 Art. 26 ASEAN Charter.

fied majority decisions,[120] provided that the trajectory seems to be practicable. Dialogue, consensus and consultation determine the formal framework of the political forum, the outcome and content of decision-making processes and the finding of solutions through dispute settlement. If there is no consensus, a different path must be sought and found through consultation, which may enable a consensus.

3. The Normative Fundament for Process Informality, Consultation and Consensus Seeking: Trust

The basis for informal and flexible co-operation and decision-making in ASEAN is trust. Trust as a fundamental provision enables and facilitates discussion, consultation (*musyawarah*) and consensus seeking (*mufakat*).[121] Finding consensus on political solutions requires trust as a basic human factor between the acting partners as enshrined in private, public and international law. Trust is a fundamental normative concept,[122] with a basis that can be found in almost all areas of law and which claims universal validity.[123] Private law contract theory recognises the approach in which trust plays an important role in the resolution of common interests, as in the conclusion of complex long-term negotiations to build large infrastructure projects such as airports, seaports, bridges or nuclear facilities. These contracts are described as "relational contracts", and one of their predominant characteristics is trust, a foundation upon which situational solutions rest.[124] The conditions of a contract describe an overview, that is, a basis upon which the behaviour of the participants is co-ordinated autonomously and situationally. Trust is, therefore, a key element in contract theory, which can lead to consensual behaviour and resilient results in "mega-projects". This concept of trust as a basic foundation can even be compared and transferred to interregional organisations, such as the EU and ASEAN, which can be seen as open and dynamic and (more or less) rule-of-law-based mega-projects in some respects. Building trust and confidence and maintaining both, based

120 *S. Inama/E. W. Sim* (note 47), 152.
121 *I. Deinla* (note 26), 2; *I. Venzke/L. Thio* (note 30), 9.
122 *B. Lomfeld*, Die Gründe des Vertrags, 2015, 125.
123 University of Cologne, <www.trans-lex.org> for proof of "bona fides", "Vertrauen".
124 *I. R. MacNeil*, Relational Contract Theory: Challenges and Queries, Nw. U. L. Rev. 94 (1999-2000), 877; *M. D. Diathessopoulos*, Relational Contract Theory and Management Contracts: A Paradigm for the Application of the Theory of the Norms (15.6.2010). Lancaster University Law School Research Papers. Available at SSRN: <https://ssrn.com/abstract=1625348>.

upon which fruitful dialogue, consultation and understanding are possible, was one of the main objectives in the creation of ASEAN. Confidence-building as well as trust and its maintenance have been recurrent themes throughout the history of ASEAN and remain fundamental principles in the political agenda of ASEAN to this day. Personal relationships, which are fundamental in Asia, create personal bonds (as in the Chinese *guanxi*) which are valued highly in practice and pave the way to mutual understanding and consensus.[125] When it comes to the integration of the diverse Member States through ASEAN, it must be noted that a legal integration into ASEAN, as it has evolved in the EU as an integral part of the supranational character of the EU, has been completely absent.[126] As can be observed widely, binding rules are lacking in ASEAN (despite external treaties and investment agreements). Although a more precise language and binding dispute mechanism is gaining ground in ASEAN economic integration, binding regulations remain absent in the ASEAN Political and Security and ASEAN Socio-Cultural communities.[127] The same remains true within the AEC, which provides only a framework for decisions taken by consensus.[128] *Inama* and *Sim* have analysed the AEC and related external agreements between ASEAN, ASEAN Member States and third states and state that no legal texts, tools or juridical framework have been furnished to a single entity within the AEC with the rights and powers to discharge the appropriate measures of a regulator.[129] An ASEAN Court of Justice with a far-reaching understanding of interpretation and an "*effet utile*" aimed at the practical effectiveness of Union law does not exist. ASEAN is an intergovernmental organisation lacking any supranational ambitions with respect to the sovereignty of its Member States. Within the Asian dispute settlement culture, which is characterised by *Confucian* elements, Member States must endeavour to resolve all disputes in a timely and peaceful manner through dialogue, consultation, and negotiation (Art. 22 para. 1 ASEAN Charter). In the absence of specific ASEAN dispute settlement instruments, disputes shall be resolved peacefully and under the TAC (Art. 24 para. 2 ASEAN Charter). In the event of any conflict between the rights and obligations under an earlier agreement and the ASEAN Charter, the more recent ASEAN Charter shall prevail, in accordance with the interpretation rule "*lex posterior derogat legi priori*", which is also found in international and

125 *I. Venzke/L. Thio* (note 30), 17.
126 *I. Deinla* (note 26), 43.
127 *I. Deinla* (note 26), 43.
128 *S. Inama/E. W. Sim* (note 47), 43.
129 *S. Inama/E. W. Sim* (note 47), 198.

European law.[130] This legal principle at least puts in place a weak glimpse of a normative hierarchy.

V. Process Informality in the AEC 2025

1. Informal Process Mechanism

The major implementation method used for the AEC 2025 Blueprint is based on goals, measurements or indicators to identify compliance.[131] Legal instruments, such as treaties and Free Trade Agreements between ASEAN and ASEAN Member States or third parties such as RCEP, are not included in this informal process.[132] The AEC is the principal body in charge of the overall implementation of the strategic measures in the blueprint. Informality can be demonstrated in how the strategic measures of the AEC Blueprint 2025 are to be undertaken. The key pattern and concept is that the strategic measures are to be operationalised via key action lines pursued by relevant ASEAN sectoral bodies[133] through their corresponding work plans, which were formulated according to the AEC 2025 Consolidated Strategic Action Plan.[134] The Consolidated Strategic Action Plan thus seeks to complement the AEC 2025 Blueprint by serving as a single public reference document intended to inform stakeholders of the key action lines that will be implemented in pursuit of ASEAN economic integration from 2016 to 2025.[135] In this respect, the composition of specific Terms of Reference (TOR) will foster monitoring and implementation of the strategic measures.[136] The ASEAN Member States are additionally obliged to translate milestones and targets of the AEC Blueprint 2025 into national milestones and targets.[137]

---

130 *M. Nettesheim*, Normenhierarchie im EU-Recht, EuR 41 (2006), 738; *E. Vranes*, Lex Superior, Lex Specialis, Lex Posterior – Zur Rechtsnatur der "Konfliktlösungsregeln", ZaöRV 65 (2005), 391 et seq.

131 AEC Blueprint 2025, 36, paras. 81 et seq.

132 See the listing at ASEAN, Free Trade Agreements with Dialogue Partners <https://asean.org>; AEC Blueprint, 2025, 36, para. 81 ix.

133 The entire list of the ASEAN Sectoral Ministerial Body appears as Annex 1 to the ASEAN Charter. Annex 1 was updated on 13.2.2018 pursuant to Art. 10 (2) of the ASEAN Charter, <https://asean.org>.

134 ASEAN Economic Community 2025 Consolidated Strategic Action Plan, para. 3 FINAL, endorsed by the ASEAN Economic Ministers' (AEM) and AEC Council on 6.2.2017 and updated on 14.8.2018, <https://asean.org>.

135 ASEAN Economic Community 2025 Consolidated Strategic Action Plan, para. 4.

136 AEC Blueprint, para. 82 i.

137 AEC Blueprint, para. 82 v.

The process's informality can further be demonstrated via the monitoring processes. Monitoring means controlling targets, and the attempts to meet them, are at least measured. The ASEAN Secretariat, especially the ASEAN Integration Monitoring Directorate (AIMD) supported by ASEANstats,[138] conducts the monitoring through an enhanced monitoring framework[139] that is supported by the ASEAN Community Statistical System (ACSS). Therefore, ASEAN has introduced an AEC 2025 Monitoring and Evaluation (M&E) Framework to ensure the implementation of the AEC Blueprint 2025.[140] Within the AEC, outcomes are measured through Key Performance Indicators (KPIs) that must be in line with the strategic measures and goals of the blueprint. The KPIs are measurable quantitative and qualitative indicators[141] drawn from different sources.[142] Examples of KPIs include, among others, the ASEAN Trade in Goods Agreement utilisation rate,[143] preferential tariffs and the amount of intra-ASEAN trade.[144] Other monitoring instruments are the Impact Evaluation[145] and the Reporting and Reviewing mechanisms.[146] It is obvious that the framework itself and the divisions in goal setting and monitoring have been established informally for conducting a process without using legal instruments and a top-down executive power based on legal norms but with some room for accountability, participation and transparency.[147] ASEAN itself reiterates the need for

138 For the organization of ASEANstats, see <https://asean.org>.

139 AEC Blueprint, para. 82 vi; and the ASEANstats regime, especially *M. Koh*, Indicators in the ASEANstats Statistical Regime: A Case-Study on the Need for Accountability, Participation, and Transparency in International Governance by Indicators, Asian Journal of International Law 6 (2016), 162 et seq.

140 ASEAN, Towards ASEAN Economic Community 2025: Monitoring ASEAN Economic Integration, Jakarta, February 2007, 5.

141 *W. Huck*, Measuring Sustainable Development Goals (SDGs) with Indicators: Is Legitimacy Lacking? (31.1.2019), in: M. Iovane/F. Palombino/D. Amoroso/G. Zarra, The Protection of General Interests in Contemporary International Law: A Theoretical and Empirical Inquiry, forthcoming. Available at SSRN: <https://ssrn.com/abstract=3360935>, 8 et seq.; *M. Infantino*, Global Indicators, in: S. Cassese (ed.), Research Handbook on Global Administrative Law, 2017, 348 et seq.; *M. Siems/D. Nelken,* Global Social Indicators and the Concept of Legitimacy, International Journal of Law in Context 13 (2017), 436 et seq.; OECD, Handbook on Constructing Composite Indicators. Paris, 2013. Available at: <www.oecd.org>; *K. E. Davis/A. Fisher/B. Kingsbury/S. E. Merry*, Introduction: Global Governance by Indicators, in: K. E. Davis/A. Fisher/B. Kingsbury/S. E. Merry (eds.), Governance by Indicators. Global Power through Quantification and Rankings, 2012, 3 et seq.

142 ASEAN, Towards ASEAN Economic Community 2025 (note 140), 11.

143 ASEAN Trade in Goods Agreement, February 2009, entered into force on 17.5.2010 with a transition period of 180 days, see the text here: <http://www.asean.org>.

144 ASEAN, Towards ASEAN Economic Community 2025 (note 140), 11.

145 ASEAN, Towards ASEAN Economic Community 2025 (note 140), 12.

146 ASEAN, Towards ASEAN Economic Community 2025 (note 140), 14.

147 *M. Koh* (note 139), 179 et seq.

consensus and conflict solution in the AEC when it states that the AEC Blueprint 2025 will allow for both consensus and a flexible approach in the decision-making processes undertaken by economic bodies concerning certain sensitive aspects. When a consensus cannot be reached or when the need for an accelerated decision arises, ASEAN is entitled to apply Art. 21.2 of the ASEAN Charter.[148]

Note that, as an example, process informality is also present in the structure of the Intergovernmental Commission on Human Rights because an enforcement process is lacking and outcomes are based on informal processes.

2. Consensus on the Protection of Human Rights?

The economic relevance of human rights hardly needs to be mentioned separately. The principle of consensus as a basis for dealing with political issues naturally limits the resolution of controversial political issues.[149] What remains problematic is the solution to real conflicts that sometimes require a clear and unambiguous position. In this context, it cannot be overlooked that the institution responsible for human rights is poorly equipped and not required to make conflict-laden decisions in the first place.[150] According to Art. 14 of the ASEAN Charter, the ASEAN Intergovernmental Commission for Human Rights (AICHR)[151] is responsible for human rights. It is composed of members of the governments[152] but is not empowered to exercise any coercive force and merely performs consultative functions.[153] Its task is to promote and protect[154] human rights and fundamental

[148] ASEAN, Towards ASEAN Economic Community 2025 (note 140), 14; for the definition of the ASEAN Minus X Formula according to Article 21.2 of the ASEAN Charter, see e.g. ASEAN, Integration in Services, Jakarta, April 2007, 5: "Under this approach, two or more countries may proceed with an agreed services sector liberalisation without having to extend the concessions to non-participating countries."

[149] *B. Dewansyah/I. Handayani*, Reconciling Refugee Protection and Sovereignty in ASEAN Member States: Law and Policy Related to Refugees in Indonesia, Malaysia and Thailand (April 2018), The Central European Journal of International and Security Studies 12 (2018). Available at SSRN: <https://ssrn.com/abstract=3308116>.

[150] *C. M. Renshaw*, The ASEAN Human Rights Declaration 2012, HRLR 13 (2013), 557 et seq.; *J. L. Neo*, Realizing the Right to Freedom of Thought, Conscience and Religion: The Limited Normative Force of the ASEAN Human Rights Declaration, HRLR 17 (2017), 729 et seq.

[151] The ASEAN Intergovernmental Commission on Human Rights, Annual Report 2018, Adopted on 31.7.2018; <http://asean.org>.

[152] AICHR TOR 5.1, <http://asean.org>.

[153] AICHR TOR 3; *I. Venzke/L. Thio* (note 30), 15.

freedoms but not in a confrontational[155] way that could affect national sovereignty and other principles.[156] Instead, it is intended that regional co-operation should be used for these purposes.[157] The opportunities for political and legal solutions remain limited by consensus[158] based on Art. 20 of the ASEAN Charter.[159] Another example of process informality can be seen in the process of harmonisation used in the cosmetics industry, which is based upon the ASEAN Community Vision 2025.[160]

VI. Output Informality and Law-Making

First, output informality means that international co-operation does not lead to a formal treaty or any other traditional source of international law but rather to a guideline, standard, declaration or even more informal policy co-ordination or exchange.[161] This is exactly the case for the three AEC blueprints. However, it is important to add that ASEAN and its Member States have, at the same time, concluded Intra-ASEAN and Extra ASEAN trade and investment treaties investment while continuing to rely strongly on informal co-operation ot transform the strategy of AEC.[162]

1. Good Regulatory Practice

Output informality can be demonstrated paradoxically in the area of regulation. ASEAN has realised Good Regulatory Practice (GRP), and effective regulations are essential to support growth, investment, innovation, and the functioning of markets and society as a whole.[163] GRPs are internation-

154 AICHR TOR 1.1.
155 AIHCR TOR 2.4 ("constructive and non-confrontational approach").
156 AICHR TOR 2.
157 AICHR TOR 1.5.
158 AICHR TOR 6.1.
159 *K. Jayangakula,* History of the Human Rights Crisis in ASEAN: The Crisis of the Rights of Women and Children in ASEAN (31.10.2017). Available at SSRN: <https://ssrn.com/abstract=2977889>.
160 *I. Deinla* (note 26), 183.
161 *J. Pauwelyn* (note 6), 15.
162 *T. H. Yen*, Fragmented Approaches to Investor-State Dispute Settlement Mechanism and Norms for Investment and Commercial Disputes in ASEAN, in: P. L. Hsieh/B. Mercurio (eds.), ASEAN Law … (note 38), 254 et seq.
163 ASEAN Integration Report 2019 (note 40), 77, para. 193: "ASEAN Member States (AMS) will need to keep in mind both the ASEAN GRP Core Principles and the broader

ally recognised processes, systems, tools and methods for improving the quality of regulations. GRP uses public consultation and stakeholder engagement as well as impact analyses of government proposals before they are implemented to make sure they are fit for their stated purposes and will deliver what they are set out to achieve.[164] This modern approach has been embraced by ASEAN to the point that ASEAN emphasised GRP in the AEC Blueprint 2025, in particular in Element B7 "Effective, Efficient, Coherent and Responsive Regulations and Good Regulatory Practice" under the second characteristic of "A Competitive, Innovative and Dynamic ASEAN".[165] A similar outcome can be observed in the Core Principles of ASEAN.[166] The ASEAN GRP Core Principles are qualified as a practical, non-binding set of principles that serve as a guide to mainstream GRP into ASEAN work.[167] These Core Principles are declared explicitly and are generally non-binding, but they are meant to be implemented at least on a best-endeavour basis by each relevant AEC sectoral body or ASEAN Member State national regulatory system.[168] Further, as it is laid down in, principle No. 6 efficiency and effectiveness will be regularly reviewed with systematic monitoring of regulatory performance.[169]

economic integration agenda in considering new or reviewing existing national, regional, and sectoral regulations, measures, or initiatives."

[164] OECD, ASEAN-OECD GRP Network, <http://www.oecd.org>; ASEAN Integration Report 2019 (note 40), 75 para. 187 with Table 3.24. ASEAN GRP Core Principles.

[165] ASEAN GRP Core Principles, Final adopted by the AEM at the 50th AEM Meeting and endorsed by the AEC Council in November 2018, I. 1.

[166] The ASEAN GRP Core Principles were adopted at the 50th AEM Meeting on 29.8.2018 and subsequently endorsed by the AEC Council: <https://asean.org>.

[167] For challenges involved in the design of the regulatory framework for infrastructure, see *A. Estache/C. Crampes,* Regulatory Tradeoffs in Designing Concession Contracts for Infrastructure Networks (August 1997), World Bank Policy Research Working Paper No. 1854. Available at SSRN: <https://ssrn.com/abstract=604982>.

[168] ASEAN GRP Core Principles, ASEAN Good Regulatory Practice, II. 3.

[169] ASEAN GRP Core Principles, ASEAN Good Regulatory Practice, II. 6.

2. Informal Guidelines and Standards in Environmental and Economic Law

Standards are often used within the ASEAN Community to facilitate the economy, and those standards are put together in lists, which are then promulgated by the ASEAN Secretariat.[170]

An example of output informality being used in a guideline is the ASEAN Guidelines on Risk Assessment of Agriculture-Related Genetically Modified Organisms (GMOs).[171] These Guidelines are established to ensure an ASEAN framework for the assessment of risks associated with the transboundary movement of agriculture-related GMOs. These guidelines are explicitly deemed as not legally binding and not taking precedence over national legislation.[172] Issues such as compensation and liability, labelling, socio-economic and religious factors are excluded as well.[173]

Another standard which was recently discussed is the revised Standard Operating Procedure (SOP) for Monitoring, Assessment and Joint Emergency Response under the ASEAN Agreement on Transboundary Haze Pollution, in which the Alert Levels, Trigger Points and Actions on Fire Prevention and Suppression were incorporated.[174]

In the realm of the economy, the harmonisation of standards and conformance gain incremental importance.[175] ASEAN, through the ASEAN Consultative Committee on Standards and Quality (ACCSQ), has endeavoured to harmonise national standards with international standards and implement mutual recognition arrangements so that conformity in assessment can achieve its end goal of "One Standard, One Test, Accepted Everywhere". At this point, the ASEAN Member States have accomplished the

[170] ASEAN: List of ASEAN Standards approved/revised/withdrawn/confirmed/amended (17.10.2012), <https://asean.org>.

[171] According to the Preamble, the 21st Meeting of the ASEAN Ministers for Agriculture and Forestry held on 28.-29.10.1999 in Bandar Seri Begawan, Brunei Darussalam endorsed the ASEAN Guidelines on Risk Assessment of Agriculture-Related Genetically Modified Organisms; Source: <https://asean.org>.

[172] Preamble (i) of the ASEAN Guidelines on Risk Assessment of Agriculture-Related Genetically Modified Organisms.

[173] Preamble (iii) of the ASEAN Guidelines on Risk Assessment of Agriculture-Related Genetically Modified Organisms.

[174] Para. 6 of the Outcome of the Twenty-first Meeting of the Sub-Regional Ministerial Steering Committee on Transboundary Haze Pollution (21st MSC), which was held on 6.8.2019 in Brunei Darussalam; <https://asean.org>.

[175] For the ASEAN Standards and Conformance Strategic Plan 2016-2025, see ASEAN Standards and Conformance Strategic Plan moves forward from 13.10.2018, <https://asean.org>.

harmonisation of standards for 20 priority products and 81 standards for Safety and Electromagnetic Compatibility (EMC).[176]

The Standard for In-Company Trainers in ASEAN Countries was developed to serve as a regional benchmark to ensure that trainers have the necessary skills, knowledge and competences to conduct in-company training effectively. It was influenced by the German standard for in-company trainers (Ausbildereignungsverordnung [AEVO]).[177] Although the standard lacks any legally binding power, it has proved to be effective.

3. Declarations as Provisions of Output Informality

Output informality can be further demonstrated to a great extent in declarations, from which the following examples were chosen because their specific designs include original goals, objectives and target settings to be monitored:

- ASEAN Declaration on Strengthening Social Protection – Regional Framework and Action Plan to Implement the ASEAN Declaration on Strengthening Social Protection[178] Jakarta: ASEAN Secretariat, November 2018[179]
- Bangkok Declaration on Combating Marine Debris in the ASEAN Region[180]
- Vientiane Declaration on the Transition from Informal Employment to Formal Employment towards Decent Work Promotion in ASEAN[181]

---

176 ASEAN Standards and Conformance, ASEAN Cooperation on Standards and Conformance to Facilitate Trade in the Region, <https://asean.org>.

177 Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, "Standard for In-Company Trainers in ASEAN Countries" March 2019, 5, which was jointly developed by 60 experts from six ASEAN Member States with support from the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) and has subsequently been endorsed by ASEAN Senior Officials Meeting on Education (SOM-ED) and the ASEAN Senior Labour Officials Meeting's Working Group on Progressive Labour Practices to Enhance the Competitiveness of ASEAN (SLOM-WG).

178 ASEAN Declaration on Strengthening Social Protection – Regional Framework and Action Plan to Implement the ASEAN Declaration on Strengthening Social Protection Jakarta: ASEAN Secretariat, First published: February 2016, 1st Reprint: November 2018.

179 ASEAN Declaration on Strengthening Social Protection (note 178), 9 et seq.

180 Bangkok Declaration on Combating Marine Debris in ASEAN Region from 22.6.2019, <https://asean.org>.

181 Vientiane Declaration on Transition from Informal Employment to Formal Employment towards Decent Work Promotion in ASEAN Jakarta: ASEAN Secretariat, November 2018, <https://asean.org>.

- ASEAN Post-2015 Health Development Agenda (2016-2020)[182] Jakarta, ASEAN Secretariat, October 2018
- ASEAN-China Strategic Partnership Vision 2030[183]
- ASEAN Declaration on the Gender-Responsive Implementation of the ASEAN Community Vision 2025 and SDGs[184]
- Many other declarations can be identified easily based on the specific websites of each of the remaining communities (the AEC having been covered by this list).[185]

4. ASEAN, Agenda 2030 and the SDGs

The global commitment to the United Nations 2030 Agenda for Sustainable Development (Agenda 2030) and its SDGs[186] form an integral part of the EU's ongoing integration process as well as that of ASEAN.[187] As a result, an ASEAN-EU Dialogue on Sustainable Development was announced by the EU and ASEAN on 17.11.2017 and focuses on the question of how SDGs[188] can be implemented effectively.[189] Key issues are the promotion of

[182] ASEAN Post-2015 Health Development Agenda (2016-2020) Jakarta, ASEAN Secretariat, October 2018, <https://asean.org>.; see also *V. Te/R. Griffiths/K. Law/P. S Hill/P. L. Annear*, The Impact of ASEAN Economic Integration on Health Worker Mobility: A Scoping Review of the Literature, Health Policy and Planning 33 (2018), 957 et seq.

[183] ASEAN-China Strategic Partnership Vision 2030, 14 November 2018 in Singapore, <https://asean.org>.

[184] ASEAN Declaration on the Gender-Responsive Implementation of the ASEAN Community Vision 2025 and Sustainable Development Goals from 13 November 2017, <https://asean.org>.

[185] As an example under the AEC, see ASEAN Ministerial Meeting on Minerals (AMMin) and the ASEAN Minerals Cooperation Action Plan 2016-2025 (AMCAP-III), <https://asean.org>.

[186] UNGA Res. of 25 September 2015, A/RES/70.

[187] EU-ASEAN Blue Book 2018, 14, <https://eeas.europa.eu>; ASEAN-EUROPEAN UNION, Dialogue Relations, ASEAN Secretariat's Information Paper as of July 2018; <http://asean.org>; *M.-G. Manea*, The Institutional Dimensions of EU-ASEAN/ASEAN Plus Three Inter-regional Relations, in: T. Christiansen/E. Kirchner/P. Murray (eds.), The Palgrave Handbook of EU-Asia Relations, 2013, 313; *R. Wong*, Model Power or Reference Point? The EU and the ASEAN Charter, Cambridge Review of International Affairs 25 (2012), 669; Mission of the European Union to ASEAN, 40 Years of EU-ASEAN, Partnership & Prosperity, 2017, 2.

[188] *W. Huck/C. Kurkin*, The UN Sustainable Development Goals (SDGs) in the Transnational Multilevel System, ZaöRV 78 (2018), 375. Available at SSRN: <https://ssrn.com/abstract=3273899>.

[189] EU-ASEAN Blue Book 2019, 11-13 <https://eeas.europa.eu>; EU-ASEAN Blue Book 2018 (note 187), 14.

gender equality and, in particular, the empowerment of women and girls[190] as keys to change as well as the promotion of green growth[191] and recycling,[192] including environmentally[193] sustainable and climate-resilient cities,[194] sustainable consumption[195] and production,[196] and the fight against climate change.[197] These issues also include finding ways to involve the private sector, civil society and science effectively in promoting sustainable development.[198] The EU and ASEAN agreed that a strong commitment to community building, sustainable development and rule-based integration is the best way to offer their citizens security and prosperity. The ASEAN-EU Plan of Action, which does not create any legal obligations, [199] aims to promote sustainable development and solve environmental problems. The ASEAN-EU Dialogue on Sustainable Development serves as an additional platform from which to discuss and foster development and sustainability issues as well as a way to include Agenda 2030 and SDGs.[200]

The ASEAN Vision 2025 underlined that the Agenda 2030[201] and the enshrined SDGs[202] are complementary to ASEAN community-building efforts intended to uplift the standards of living of all people in the ASEAN

190 SDG 5.1, 5a.
191 SDG 8.4.
192 SDG 12.3 and 12.4.
193 See *K. Kheng-Lian/N. A. Robinson/L. Lin-Heng*, ASEAN Environmental Legal Integration, Sustainable Goals?, 2016, 13.
194 SDG 11.3, 11.6, 11.b.
195 SDG 12a.
196 SDG 2.4, 8.4, 12.3.
197 SDG 13.
198 EU-ASEAN Blue Book 2018 (note 187), 14.
199 No. 6 (d) of ASEAN-EU Plan of Action, final, 6.8.2017.
200 No. 3.5. (a) ASEAN-EU Plan of Action, final, 6.8.2017.
201 UN A/RES/70/1, Resolution adopted by the General Assembly on 25.9.2015, Transforming Our World: The 2030 Agenda for Sustainable Development.
202 Selected literature dealing with SDGs: *E. Doussis*, Does International Environmental Law Matter in Sustainable Development?, Yb. Int'l Env. L. 28 (2017), 3 et seq.; *D. N. French/L. J. Kotzé* (note 1); *W. Huck/C. Kurkin* (note 188), 375; *M. Lim/N. Kanie/F. Biermann* (eds.), Governing through Goals: Sustainable Development Goals as Governance Innovation, Yb. Int'l Env. L. 27 (2016), 555 et seq.; *M. Kamau/P. Chasek/D. O'Connor* (eds.), Transforming Multilateral Diplomacy, The Inside Story of the SDGs, 2018; *M.-C. Cordonier Segger/C. G. Weeramantry* (eds.), Sustainable Development Principles in the Decisions of International Courts and Tribunals, 2017; *F. Dodds/D. Donoghue/J. L. Roesch*, Negotiating the Sustainable Development Goals: A Transformational Agenda for an Insecure World, 2017; *P. Durán y Lallaguna/C. M. Díaz Barrado/C. R. Fernández Liesa* (eds.), International Society and Sustainable Development Goals, 2016; *K. Kheng-Lian/N. A. Robinson/L. Lin-Heng* (note 193).

community.[203] ASEAN has committed itself to implementing two parallel but interrelated processes: the ASEAN Community Vision 2025 and Agenda 2030.[204] Only five priorities out of 17 goals and 169 sub-goals have been identified: poverty eradication, infrastructure and connectivity, sustainable management of natural resources, sustainable production and consumption, as well as resilience.[205] All of the mentioned processes and goals contained in ASEAN Community Vision 2025 are subject to accountability but organised based on reviews and global indicators[206] or business-related KPIs.[207]

5. International Law-Making

Another requirement of IN-LAW is that it must be "international", meaning that international co-operation "must include two or more actors in different countries".[208] It is easy to conclude that ASEAN meets this requirement in multiple ways both internally and externally through its ten Member States. However, IN-LAW requires law-making, which does not mean a strict separation of formal and informal law-making, but sometimes an interaction between both ways as well.[209] Within this context, law-making is defined as "norm-setting or public policy-making by public authorities".[210] Law is used in a broader sense and includes e.g. statements and guidelines. However, it is notable that these statements or guidelines must "have legal effects or fit in the context of a broader legal process".[211] All

[203] ASEAN Secretariat, ASEAN 2025: Forging Ahead Together Jakarta, November 2015, 13.

[204] UN Economic and Social Commission for Asia and the Pacific, Complementarities between the ASEAN Community Vision 2025 and the United Nations 2030 Agenda for Sustainable Development: A Framework for Action, 2017, 10.

[205] UN Economic and Social Commission for Asia and the Pacific (note 204), 11.

[206] *M. Infantino* (note 141), 348.; *M. Siems/D. Nelken* (note 141), 436 et seq.; *S. Cassese/L. Casini*, Taming Honey Birds? The Regulation of Global Indicators (24.1.2012). Available at SSRN: <https://ssrn.com/abstract=1991396>; *W. Huck* (note 141); *K. E. Davis/A. Fisher/B. Kingsbury/S. E. Merry* (note 141), 1 et seq.

[207] ASEAN Secretariat, ASEAN 2025: Forging Ahead Together Jakarta, (note 203), 55, 121, 122 (Key Performance Indicators); for KPIs, see, in particular, *D. A. Amariles*, Supping with the Devil? Indicators and the Rise of Managerial Rationality in Law, International Journal of Law in Context 13 (2017), 468.

[208] *J. Pauwelyn* (note 6), 21.

[209] *G. C Shaffer/M. A. Pollack*, The Interaction of Formal and Informal International Lawmaking, in: J. Pauwelyn/R. A. Wessel/J. Wouters (note 6), 242, 251, 254 et seq.

[210] *J. Pauwelyn* (note 6), 21.

[211] *J. Pauwelyn* (note 6), 21.

blueprints are designed to achieve a deeper integration, which could be led alternatively by a legal effort as it is within the EU, but here the effects of an integrational process consisting of wide range of policy targets are achieved with a specific form of governance which consists mainly of a consensual strategy. Based on this strategy, goals are set and the outcomes are to be measured by KPIs. From a practical point of view, the results reveal no great differences if goals caused an outcome or the outcome was a success as the result of following legal norms. Either way, the outcome is a deep and ongoing integration process. The specific challenges and outcomes of the integration process are documented in an edition of the ASEAN Economic Integration Brief (AEIB).[212] Further, in the Masterplan of Connectivity, the GRP singles out four stages of the regulatory process for improvement: consultation, design, implementation and review. Therefore, the provision of law-making is fulfilled.

VII. Actor Informality and Accountability

As mentioned previously, actor informality refers to international co-operation between actors other than traditional diplomatic actors, such as regulatory agencies, sectoral ministries, sub-federal entities or the judicial or legislative branch. In addition, private actors and international organisations may be actively involved in the law-making process.[213] The concept of IN-LAW excludes purely private co-operation without the involvement of public authorities, thus the law-making process remains state-based.[214] ASEAN has set out procedures and criteria for engagement with entities associated with it. These rules are categorised as guidelines by the Secretariat and Art. 16 of the ASEAN Charter, which states that "ASEAN may engage with entities which support the ASEAN Charter, in particular its purposes and principles".[215] ASEAN has listed 72 entities associated with it in Annex 2 of the ASEAN Charter.[216] Actor informality can also be identified in the Mas-

[212] ASEAN Economic Integration Brief, <https://asean.org>.

[213] *J. Pauwelyn* (note 6), 19.

[214] *O. Herman/J. Wouters* (note 3), 12.

[215] ASEAN Engagement with Entities, Jakarta, September 2016, Introduction of the Rules of Procedures and Criteria for Engagement for Entities Associated with ASEAN.

[216] ASEAN, Register of entities associated with ASEAN, as of 5 December 2018, there are five (5) categories which these entities fall under. The number of entities under each category is as follows: Parliamentarians and Judiciary: two (2) entities; Business Organisations: fifteen (15) entities; Think Tank and Academic Institutions: two (2) entities; Civil Society Organisations (CSOs): forty-four (44) entities; Other Stakeholders in ASEAN: nine (9) entities.

ter Plan on ASEAN Connectivity (MPAC) 2025. The ASEAN Secretariat is charged with providing regular (e.g. annual) updates to key business associations and other external stakeholders regarding the progress in implementing MPAC.[217] ASEAN highlights that

> "Partnership arrangements with the private sector, industry associations and the wider community at the regional and national levels will also be actively sought and fostered to ensure an inclusive and participatory approach to the integration process".[218]

Actor informality is visible in the energy field, where State agencies work jointly with private actors or associations on standards.[219] Energy is one of the keys to the realisation of the AEC.[220] The participation of the private sector and the involvement of the governments of the Member States are crucial from the ASEAN viewpoint in terms of realising the ASEAN Power Grid (APG).[221] All work related to the APG is subject to a monitoring process carried out jointly by ASEAN and the Regional Energy Policy and Planning Sub-sector Network (REPP-SSN).[222] Actor informality can further be identified in the Heads of ASEAN Power Utilities/Authorities (HAPUA), which is an electricity organisation in the Southeast Asia region.[223] HAPUA comprises council members from the private sector and country co-ordinators representing the states. Its objective is to promote co-operation among its members to strengthen regional energy security through interconnected development, enhancing private sector participation and encouraging standard setting and the standardisation of equipment.[224]

Accountability is closely connected with effectiveness and is essential to the IN-LAW framework, although no one-size-fits-all mechanism exists; therefore, it deals in a broader sense with responsiveness to people.[225] Accountability can be defined with the definition provided by *Mark Bovens* as a

---

217 ASEAN, Master Plan on ASEAN Connectivity 2025, Jakarta, 2016, 11.
218 ASEAN Economic Community: <https://asean.org>.
219 For the energy sector, see *G. L. Jing Xi* (note 36), 177 et seq.
220 ASEAN, Ministers on Energy Meeting (AMEM), <https://asean.org>.
221 Memorandum of Understanding on the ASEAN Power Grid, <https://asean.org>.
222 ASEAN Centre for Energy, ASEAN Plan of Action for Energy Cooperation (APAEC) 2016-2025, Phase I: 2016-2020, Indonesia 2015, 11 et seq.
223 Heads of ASEAN Power Utilities/Authorities (HAPUA), <http://hapua.org>.
224 Heads of ASEAN Power Utilities/Authorities (note 223).
225 *J. Pauwelyn* (note 6), 23; *J. Pauwelyn/R. A. Wessel/J. Wouters*, Informal International Lawmaking: An Assessment and Template to Keep It Both Effective and Accountable, in: J. Pauwelyn/R. A. Wessel/J. Wouters (note 6), 500, 536.

"relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences".[226]

The main issue related to accountability in terms of IN-LAW concerns how to prevent abuse.[227] Accountability can affect individual freedom, and its main features include participatory decision-making, transparency and a complaint mechanism at the international or domestic level.[228]

Applying accountability, it can be observed in general that ASEAN seems to be reluctant to integrate the main contents of accountability,[229] namely transparency, individual freedom and a complaint mechanism. A forum that opens up a discussion about responsibilities of powerful actors like enterprises and representatives of the Member State governments in ASEAN is widely lacking, although in some cases judicial bodies have been created on the national level[230] and recent attempts are to be observed.[231] But it is difficult to identify accountability as a leading principle nor individual freedom, transparency and a complaint mechanism in the realm of ASEAN, although differences between ASEAN member states must be recognised,[232] for instance, different views on the concept of rule of law[233] to which accountability is related.

---

226 *M. Bovens*, Analysing and Assessing Accountability: A Conceptual Framework, European Law Journal 2007, 447 et seq.

227 *J. Pauwelyn* (note 6), 22.

228 *J. Pauwelyn* (note 6), 22.

229 *I. Deinla* (note 26), 190: "Accountability mechanisms, currently lacking in the ASEAN processes […]"

230 Asian Forum for Human Rights and Development (FORUM-ASIA), Corporate Accountability in ASEAN: A Human Rights-Based Approach, 2013, Bangkok, 43, 87, 92.

231 See Forum-ASIA, Civil Society Groups Convey Concern About Human Rights to ASEAN Leaders, 2.11.2019: "Today, for the first time in five years [sic!], a formal inter-face meeting took place between ASEAN Foreign Ministers and representatives of ASEA civil society groups"; *J. Thomas*, Towards Public Transparency in ASEAN, The ASEAN Post 14.9.2019, <https://theaseanpost.com>: "According to a joint report […] published by the Asian Development Bank (ADB) and the Organisation for Economic Cooperation and Development (OECD), ASEAN governments are strengthening their governance structures and institutional capacity to deliver better services to their people in the pursuit of a citizen-centric approach."; see *A. Duxbury/H.-L. Tan*, Can ASEAN Take Human Rights Seriously?, 2019, 191, 208, 306.

232 *D. Cohen/K. Tan/A. Nababan/F. S. D. R. Kong* (eds.), Human Rights Resource Centre et al., Update on the Rule of Law for Human Rights in ASEAN, June 2016, printed in Indonesia, see to the different meaning of rule of law in the ASEAN Member States, 8 et seq.

233 *D. Cohen/K. Tan/A. Nababan/F. S. D. R. Kong* (note 232), 43: "It is not possible to neatly encapsulate the status of the rule of law for human rights in the ASEAN region."

Communities and Civil Society Organisations (CSOs) contributed during the ASEAN Civil Society Conference/ASEAN Peoples' Forum (ACSC/APF) 2019 and asked ASEAN Governments to

> "resolve immediately […] the many conflicts and issues brought by mining and extractive companies in various ASEAN countries. The resistance of local communities reflects the destruction and negative impacts of these extractive projects, and ASEAN governments must listen and act to these peoples struggles."[234]

However, recent attempts should be acknowledged as steps towards a responsible relationship in the sense discussed by *Mark Bovens*.[235] Those steps can be seen in the ASEAN Regional Consultation on the SDGs, Access to Justice and Legal Aid, which was organised to discuss strategies for achieving equal access to justice for all[236] and resulted in the adoption of the Jakarta Recommendations in ASEAN.[237] The ASEAN Civil Society Conference/ASEAN Peoples' Forum should be mentioned as well, which is an annual forum of civil society organisations from ASEAN Member States held in parallel with the ASEAN Summit.[238]

These rare efforts within ASEAN[239] contrast to the more general finding that access to legal remedies is often denied due to lack of formal mechanisms that employees and affected communities can use to file complaints, seek dispute resolution or call for independent investigations.[240] Transparency enshrined as a major aspect within accountability becomes often blurred by bribes and corruption in ASEAN, as is reported by United Na-

---

234 Forum-ASIA, Statement of the Asia-Pacific Gathering on Human Rights and Extractives During the ASEAN Civil Society Conference/ASEAN Peoples' Forum (ACSC/APF) 2019, 16.9.2019, No. 4 of the messages to the ASEAN governments, <https://www.forum-asia.org>.

235 See note 226.

236 OECD, Governance as an SDG Accelerator: Country Experiences and Tools, Paris, 2019, 80, Box 6.2: doi.org/10.1787/0666b085-en.

237 ASEAN, Regional Consultation on Sustainable Development Goals, Access to Justice and Legal Aid, 2016: <https://namati.org>; see in particular to SDGs in ASEAN and accountability, *J. C. Teehankee*, Accountability Challenges to SDGs in Southeast Asia, in: R. Holzacker/D. Agussalim (eds.), Sustainable Development Goals in Southeast Asia and ASEAN: National and Regional Approaches, 2019 , 79 et seq.

238 See Forum-ASIA, ASEAN Civil Society Conference/ASEAN Peoples' Forum (ACSC/APF) 2019, 6.9.2019, <https://www.forum-asia.org>.

239 ASEAN, ASEAN Human Rights Body Holds Forum on Access to Justice, 18.12.2018, <https://asean.org>; ASEAN, AICHR Looks at Legal Aid to Promote Access to Justice for All, 23.10.2017, <https://asean.org>.

240 Asian Forum for Human Rights and Development (FORUM-ASIA) (note 230), 42.

tions Office on Drugs and Crime (UNODC).[241] It sounds like a commonplace but citizens and investors would profit from access to transparency and accountability regarding conflicting interests.[242] As to the alleged corruption, the ASEAN Responsible Business Forum, was a kind of a response that has been organised (so far) one time, seeks to provide a forum for key stakeholders, governments, ASEAN bodies, the private sector and civil society to engage in practical discussions about the future of businesses and their role in fighting corruption.[243] The wording indicates clearly that it was not a forum in the sense that the actors have an obligation to explain and to justify his or her conduct, and the actor may face consequences. Although the term of forum is used, the task is distant from the participatory approach of the definition of a forum by *Mark Bovens*.[244]

The involvement of civil society in officially organised activities in ASEAN seems to be a rare occurrence. Two public hearings in Jakarta in May 2011 and Bali in November 2011 have led to a report revealing legal and institutional deficits that fail to protect and promote Human Rights.[245] Accelerated investment in the absence of good governance in ASEAN – including transparency, accountability, and rule of law and access to justice – is observed as an "ill-regulated expansion of business practices".[246] Beneath a demand for clear standards to protect human rights against business, impact assessment of the blueprints,[247] the (sometimes too) close relationship between state and business in many instances has been viewed upon as the basis for an unaccountable decision-making on controversial projects lacking transparency, accountability, and community, civil society and public participation.[248] Therefore, there is a demand for a strong, transparent, accountable and adequately resourced regional platform for all actors to promote corporate accountability and complaint and redress mechanisms.[249]
The following features are listed to highlight the current situation and the vestigial efforts of ASEAN to establish an *ex post* accountability, one that should reveal an *ex ante* responsiveness towards stakeholders, including a willingness to take their views into account and to reconcile conflicting in-

241 UNDOC, ASEAN Jurisdictions Must Hold Businesses Accountable for Corruption Offences, 28.8.2018, <https://www.unodc.org>.
242 Transparency International, ASEAN Integrity Community, 2015, 9.
243 Forum-ASIA, <https://www.aseanrbf.org>.
244 See note 226.
245 FORUM-ASIA (note 230), 6.
246 FORUM-ASIA (note 230), 80.
247 FORUM-ASIA (note 230), 80.
248 FORUM-ASIA (note 230), 89.
249 FORUM-ASIA (note 230), 87.

terests, both in terms of substance and procedure, and questions of ongoing control.[250] Those features remain isolated in the vast range of different kinds of expressions within ASEAN. A coherent approach or an outcome demonstrating convergence of accountability cannot be identified. To underline this, the first (!) seminar promoting accountability and transparency in ASEAN was held in 2019.[251]

In addition, the ASEAN Enabling Masterplan 2025 seeks to complement the ASEAN Community Vision 2025 in terms of mainstreaming the rights of persons with disabilities across all three ASEAN Communities.[252] An overall (human) rights-based approach is indeed missing in the Masterplan. It is only stated that the participation of civil society organisations, in particular organisations for persons with disabilities, is crucial for ensuring its effective implementation.[253] Further, it is pointed out that regular policy dialogue events will be held to ensure integration of the three ASEAN Community pillars into cross-cutting issues concerning persons with disabilities, with participation expected from all relevant stakeholders, including government officials, organisations for persons with disabilities and Civil Society Organisations.[254]

Another feature combining to some extent the public and ASEAN is the Consolidated Strategic Action Plan (CSAP), which seeks to complement the AEC Blueprint 2025 by serving as a single public reference document intended to inform stakeholders of the key action lines that will be implemented in pursuit of ASEAN economic integration from 2016 to 2025. The CSAP facilitates stakeholder feedback to ASEAN economic integration priorities in succeeding years.[255] Also, the ASEAN Economic Integration Brief (AEIB) provides information to the public about the progress of ASEAN economic integration as well as regional and global economic developments relevant to ASEAN.[256] The ASEAN Community Progress Monitoring System (ACPMS) delivers reports[257] providing statistics on in-

250 *O. Herman/J. Wouters* (note 3), 22.

251 ASEAN Secretariat – ASEANSAI-AIPA joint seminar promotes accountability and transparency in ASEAN, Jakarta, 29.2.2019.

252 ASEAN Secretariat News: ASEAN Enabling Masterplan 2025: Mainstreaming the Rights of Persons with Disabilities, 15.11.2018.

253 ASEAN Enabling Masterplan 2025 (note 252), 7 para. 5.3.

254 ASEAN Enabling Masterplan 2025 (note 252), 7 para. 5.3.

255 ASEAN Economic Community 2025 Consolidated Strategic Action Plan, updated on 14.8.2018, <https://asean.org>.

256 ASEAN Economic Integration Brief (note 212).

257 This Report is the end result of a project titled "Establishing the Mechanism to Enhance National Data Collection, Compilation and Dissemination for the ASEAN Communi-

tegration outcomes for the AEC and ASCC, including indicators on global development aspirations. Those efforts can be judged as distant to the aim of accountability in the sense of IN-LAW and compared with the definition given by *Mark Bovens*.[258] Therefore accountability as an element of IN-LAW is to be judged as weak in ASEAN.

VIII. Concluding Remarks

ASEAN was founded in 1967 and has since developed into an intergovernmental organisation with a legal personality. Because of the diversity of the ASEAN Member States, it uses the triad of trust, consultation and consensus to solve internal and external challenges. Sovereignty and non-interference are regarded as major principles; hence, strong, independent institutions are lacking, as are independent legal sources and competences *vis-à-vis* the Member States. Decisions are taken based on consensus-oriented processes. Many of these processes within ASEAN are not based on legal provisions and formalised procedures but rather on informal understandings. A weak enforcement regime remains a crucial factor within ASEAN, and no ASEAN body is tasked with enforcement, including the ASEAN Secretary, who has competence for monitoring but not for enforcement.[259] Informal processes can be detected in great variety on nearly every political level, but there are exceptions in the form of binding treaties on trade such as the forthcoming RCEP or ATIGA. Therefore, ASEAN has been analysed via IN-LAW. The AEC, as one of three pillars of the ASEAN Community Vision 2025, allows insights into how a blueprint can be the basis for an integrational and transformative concept.[260] The rule of law is lacking throughout the AEC Blueprint 2025, meaning that soft regulations,[261] targets and goals drive economic integration. The outcome matters regardless of whether a goal or a binding rule is followed. In a practical sense, consensus allows – without control of ways and provisions – multiple ways to reach agreed-upon targets. Therefore, a harmonious standard setting in various fields with the participation of private entities and associations seems to be the appropriate choice for ASEAN integration. The com-

ty Progress Monitoring System" and was supported under the ASEAN–Australia Development Cooperation Program Phase II.

258 See note 226.

259 *I. Deinla* (note 26), 160.

260 *I. Deinla* (note 26), 163.

261 *I. Deinla* (note 26), 170.

plete absence of a regional judicial mechanism, where issues are to be solved within Member States' judicial systems, and the internal administrative procedures[262] reflect weak accountability in ASEAN. Accountability in the common sense[263] calls for the modern approach of *ex ante* participation on the part of affected groups and individuals and furnishing them with access to transparent stakeholder processes, in particular when they are directly affected, regardless of whether *de facto* or *de jure*. Further, individuals and groups should be provided with direct access to an independently staffed judicial system relying on equity and fairness on a national level and an international ASEAN level as well. These amendments forming an accountability perspective will pave the way for extending and strengthening the fundamental concept of trust as a prerequisite for consensus and informal law-making in ASEAN to the people.

262 *I. Deinla* (note 26), 176.
263 *J. Pauwelyn* (note 6), 25.