

ASEAN'S LEGAL FRAMEWORK ON FINANCIAL INTEGRATION*

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ABSTRACT

Historic and global events affecting international finance would befall upon this Earth that require a rectification of their unsavory and unintended consequences. States may not have it in their economic and political structures to respond to them. This paper illustrates how groups or entities other than sovereign states are better fitted to approach problematic effects caused by these historic and global phenomena. International finance, with its son and sibling, follows the same trend. Its son consists “of the key international financial techniques of loans, bonds, equity and the diverse secondary products deriving from these core products.”¹ Its unintended sibling called the financial crisis has catastrophic consequences with contagious effects across sovereign states. With the fluid nature of cross-nation financial activities, non-state actors provide a pragmatic solution to the ever dynamic concerns to these financial crises. This paper discusses the nature of soft law and hard law in international law, international finance, and its context within the Association of South East Asian Nations (ASEAN), the context of the ASEAN Way in its peculiar approach to ASEAN’s regional financial integration, and the legal framework of such a multinational relationship.

* *Cite as* Hector Uy, *ASEAN’s Legal Framework on Financial Integration*, 89 PHIL. L.J. 231, (page cited) (2015).

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¹ Agasha Mugasha, *International Finance Law, Is the Law Really “International” and Is It “Law” Anyway?*, 26 BANKING & FIN. L. REV. 381 (2011).

I. INTRODUCTION TO SOFT LAW AND HARD LAW IN INTERNATIONAL FINANCE LAW

A. Definition of Hard Law and Soft Law

To understand better the nature of the legal framework of the ASEAN's Financial Integration, it would do well to define first the concept of "soft law" and "hard law" in international law. There is considerable disagreement in the existing literature on their definitions² but the usual definition is of a binary nature. Simply put, hard law is any agreement legally binding and enforceable upon participating states while soft law consists of law-like promises or statements that fall short of hard law.³ These definitions are more widely used but some scholars differ.⁴ Shaffer and Pollack discuss the various view points:

Positivist legal scholars tend to deny the very concept of "soft law," since law by definition, for them, is "binding." Rational institutionalist scholars respond that "the term 'binding agreement' [in international affairs] is a misleading hyperbole." They nonetheless find that the language of "binding commitments" matters because through it states signal the seriousness of their commitments, so noncompliance entails greater reputational costs. Constructivist scholars, in contrast, focus less on the binding nature of law at the enactment stage, and more on the effectiveness of law at the implementation stage, addressing the gap between the law-in-the-books and the law-in-action; they note how even domestic law varies in terms of its impact on behavior, so that binary distinctions between binding "hard law" and nonbinding "soft law" are illusory. Interestingly, international relations realists take a related view regarding the existence and impact of "hard law" in international affairs from a rationalist perspective. At the international level where centralized institutions are typically missing, most observers agree that "most international law is 'soft' in distinctive ways," especially as compared to most domestic law.⁵

All the same, many legal scholars indeed use a simple binary binding-nonbinding divide to distinguish hard from soft law.⁶ The legal framework of

² Gregory Shaffer & Mark Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706 (2011).

³ Andrew Guzman & Timothy Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 174 (2010).

⁴ *Id.*

⁵ Shaffer & Pollack, *supra* note 2, at 712-14.

⁶ *Id.* at 712.

the ASEAN Financial Integration seems to carry with it the nature of soft law—law not “hardened” into binding law but nevertheless observed and respected for communal benefit.

B. Soft Law in International Finance, ASEAN Decentralization, and the ASEAN Way

Peculiar to international finance among the kinds of species of economic globalization, are the phenomena of territoriality and regulatory export of rules of governance.⁷ The national law of dominant markets, supplemented by the customary practices of those countries' most influential financial actors, has historically supplied many of the rules in international finance.⁸ Perhaps it is because there is no one unified institution that has a final say on governance, like that of the World Trade Organization (WTO) in international trade. Perhaps it is because the nature of the flow of funds in international finance is that it is the perfect example of a market-dictated economy where the big firms that operate in the most efficient and economies-of-scale operations will dominate the markets. In either of these circumstances, soft law will always have a place to regulate the direction of fund flows where it could better interplay with a region's comparative advantage. More importantly, soft law could also have a role in establishing a legal framework that downplays fluctuations, market over-confidence, and systemic risks found as elements of international finance that are not found in other species of globalization. Such soft law agreements help secure the geographic and economic stability of ASEAN member-states.

Let us look at, for instance, the nature and effect of the dominant control of the United States (US) in the economic arena vis-à-vis the 2008 Global Financial Crisis (GFC). By virtue of its preeminence in global capital markets, the US as a global hegemon has long dictated the terms by which bankers, broker-dealers, and other financial intermediaries have moved wealth around the world.⁹ However, the 2008 GFC severely undermined the American claim to economic wisdom and political legitimacy.¹⁰ Investors and regulators around the world freely assigned ample blame to “American-style free-market capitalism and the idea of globalization.”¹¹ Countries that had

⁷ See generally CHRIS BRUMMER, *SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM* 22-59 (2011).

⁸ Jim Chen, Review, *Soft Law and the Global Financial System*, 25 EMORY INT'L L. REV. 1562 (2011). This book review condenses much of the salient points provided by BRUMMER, *supra*.

⁹ *Id.* at 1562-63.

¹⁰ *Id.*

¹¹ *Id.*

emulated the American approach to financial regulation by “open[ing] themselves to trade and foreign investment took an especially tough hit.”¹² Meanwhile, countries that were “less dependent on cross-border financial flows,” whether by design or by default, “weathered the storm.”¹³

The incorporation of global finance principles without deliberation by the local legislative authorities is the real source of democratic deficit of soft international law.¹⁴ International finance law thus operates under the same terms as soft law does, where incorporation without deliberation becomes the norm for the economically weakest players in global financial markets that are least likely to participate within the informal, decentralized regulatory framework for making international financial law.

Indeed, there are two sides to view the 2008 GFC. The first view is the economic view that understands that the more open the economy of a nation is to international trade and investments, the higher is its correlation to the detrimental impact of the GFC. The second view takes the international law perspective which suggests that hegemonic nations, whose rules dominate the financial regulation of international finance, lose their ascendancy in the rule-making hierarchy when they are the cause of a GFC. This phenomenon only serves as a disincentive for other nations to rely on the current global financial architectural structure. Truly, the issue of a democratic deficit may be more apparent than real. But after the 2008 GFC, this issue of a democratic deficit may just have transformed into one more real because the pinch of the GFC left a trail of clear damage upon many countries that are not active participants in the rule-making of international finance.

The problem of home-versus-host country supervision and oversight over multinational financial institution exemplifies this situation; but immediately, one should ask what possible solution lies to this problem.

Pan illustrates the problem:

“For instance, the Icelandic Financial Supervisory Authority (IFSA) had responsibility for supervising the consolidated operations of Icelandic banks and their branches in foreign countries. Regulators in host jurisdictions relied on the IFSA, as home country supervisor, to monitor the soundness of these banks. To the extent that those jurisdictions accepted consolidated home country supervision, financial institutions were able to expand aggressively

¹² Chen, *supra* note 8, at 1562-63.

¹³ *Id.*

¹⁴ *Id.*

and offer a range of services to clients outside of their home jurisdiction.

Since the recent financial crisis, certain host country supervisors have questioned the ability of home country supervisors to adequately supervise foreign branches and to protect the interests of foreign customers. (U.K. officials have expressed concern with the principle of home country supervision after the collapse of several Icelandic banks put billions of pounds of deposits made by U.K. residents at risk.) [...] On the other hand, “[I]f host country supervisors refuse to defer to the home country supervisor, cross-border financial institutions will find themselves subject to oversight by multiple supervisors [...] e.g. maintenance of adequate capital in local branches [...] Such an effect would make it difficult for financial institutions to conduct business across borders and stifle international financial markets, to ensure efficient capital allocation between branches.”¹⁵

He offers a solution where “the best way to avoid the problems associated with host country supervision is to ensure intensive cooperation among national supervisors. This degree of cooperation would require a greater commitment by national supervisors to work with their foreign counterparts that has been shown to date, and ultimately [...] commitment to supporting new and more powerful international administrative regimes.”¹⁶ He expands further that “[c]ross-border supervision and regulation consists of two tasks: harmonization and cooperation[.]”¹⁷ On the one hand, “[h]armonization refers to the task of narrowing differences between national regulatory regimes. Such acts include agreeing upon rules and establishing common standards. Harmonization, however, is a static process. Progress on harmonization takes place on a periodic basis through informal and formal agreements and works best when regulators are attempting to agree on an *ex ante* rule that must be implemented across jurisdictions.

International bodies, such as the Basel Committee or the International Organization of Securities Commissions (IOSCO), that host meetings of national representatives play a crucial role in lowering the cost of regulatory coordination and harmonization.¹⁸ On the other hand, Pan describes the equally crucial task of cooperation to “refer[] to a more dynamic relationship between regulators. Cooperating regulators do not operate

¹⁵ Eric Pan, *Four Challenges to Financial Regulatory Reform*, 55 VILL. L. REV. 743, 767-768 (2010).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

independently of each other. Rather, they are co-dependent. They must share information in real-time and make decisions in consultation with one another. Cooperation describes a relationship that is better suited to the task of supervising financial institutions as opposed to making rules and agreeing upon supervisory standards.¹⁹

He thus states:

[T]he optimal conditions for cooperation between regulators occur when there is a pre-existing mutual understanding between regulators that comes about through familiarity with each other's regulatory frameworks, markets, and regulatory approaches. Thus, it is more likely for regulators to cooperate in an effective manner if they focus on developing bilateral, as opposed to multilateral, cooperative relationships. Cooperation will best take place if there is both harmonization of standards (i.e. coordination as a prerequisite of cooperation) and commonality of regulatory interests and philosophies[.]²⁰

The ASEAN seems to be in a special context in its own corner of the world. First, ASEAN's financial economy is open enough to be called a participant in the global finance economy. Yet, it is not too open enough because its financial transactions are closer to the real economy as pragmatists, and further away from the exotic financial economy. This mid-situation in the spectrum of open financial economy allows ASEAN the confidence not to strictly adhere to the pattern of regulations that the European Union (EU) or the US has in the global market. Second, ASEAN had long cultured the ASEAN Way as its most diplomatic default process of decision-making on many of its international issues because this is a practical approach tending to preserve the integrity of each nation's sovereignty in the ASEAN.²¹ Adopting international rules of financial regulation from outside of the region tends to

¹⁹ Pan, *supra* note 15, at 769.

²⁰ *Id.* at 770-71.

²¹ Article 2 of the Treaty of Amity and Cooperation in Southeast Asia provides that ASEAN members must abide by the following principles: Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations; The right of every State to lead its national existence free from external interference, subversion or coercion; Non-interference in the internal affairs of one another; Settlement of differences or disputes by peaceful means; Renunciation of the threat or use of force; and Effective cooperation among themselves. "These principles have led ASEAN to develop what has been known as 'the ASEAN Way' of cooperation and dispute resolution in which members do not interfere with the internal affairs of other members and decision-making (as well as dispute resolution) is done only by consensus." Michael Ewing-Chow & Tan Hsien-Li, *The Role of the Rule of Law in ASEAN Integration*, European University Institute Robert Schuman Centre for Advanced Studies Working Paper No. 16 (2013), at 13.

impinge on their sovereignties. On the other hand, adopting international rules of financial regulation allows all ASEAN member-states to claim that it is part of the international aspect of the movement of nations in the globalization of goods, services and financial products, which is a practical view that the ASEAN Way can comprehend, having arisen from diplomatic practical considerations itself.

Balancing the interests of preserving national sovereignty of ASEAN nations within the ASEAN bloc and complying with the international rules of financial regulation is the context in which the present achievements of the ASEAN financial integration shall be measured. As the ASEAN continues to work on the appropriate road to financial integration within its region according to its declared objectives and pillars of integration, the hegemons will always intuitively question its compliance with the hegemonic dominated rules of international finance. Once more, soft law could again have a role in establishing a legal framework that allows ASEAN to apply the ASEAN Way to achieve its declared objectives of regional financial integration that could be claimed as well-streamlined along the measured standards of global finance by major international agenda-makers. ASEAN's avowed financial objectives at financial integration can be carried within a legal framework of soft law that ASEAN and its member-nations could display to the hegemons as directed to control systemic risks of the regional economy, petering out price fluctuations, and averting over-confidence in the market that all cause prices of assets to bubble precipitating the advent of financial crises.

Chen summarizes Brummer further:

The global economy reflects the continuing decentralization of international financial law. The ongoing crisis of confidence in sovereign debt and the European banking industry exposes the European Union's vulnerability to the sort of economic miscalculations that humbled Lehman Brothers and the entire American financial sector in 2008. Meanwhile, the "BRIC" nations – Brazil, Russia, India, and China – continue their economic and political ascendancy. The emerging system of international financial law exhibits distinct multipolarity without inescapable polarization. Hegemons old and new, from the United States and the European Union to BRIC and lesser blocs, continue to control financial rules within their borders. Even more important, the highly decentralized, informal, and market-driven nature of international finance enables national regulators to export their rules and norms to receptive markets around the world. As a result, the makers of international financial law routinely share information, engage

counterparts, and exhibit a healthy inclination to forge policy through compromise rather than conflict.²²

The decentralization of rules of international finance from big-to-small nations seems to be the norm. The upward flow of decentralization of the rules, i.e. from small-to-big, is imaginable in the context of information sharing. Soft law can be utilized to achieve information sharing and monitoring by member-nations of the ASEAN to achieve the major goal of the ASEAN Financial Integration. The patterns existing in the EU or other parts of global finance structure on surveillance and monitoring may also be resorted to by the ASEAN. The ASEAN member-nations have tended to move away from “western” style of international financial integration and have opted to simply secure their place in the world within the ASEAN. The ASEAN has achieved the tasks of harmonization and cooperation as mentioned by Pan in order to protect its financial integrity as will be discussed later.

The ASEAN Way

Much has been said of the “ASEAN Way” of cooperation and dispute resolution in which members do not interfere with the internal affairs of other members and decision-making (as well as dispute resolution) is done only by consensus.²³

Ewing-Chow and Tan Hsien-Li described the ASEAN Way:

The practice of flexibility in ASEAN relations is well-ingrained from the time of ASEAN’s establishment. Beginning with the Bangkok Declaration in 1967, ASEAN leaders made the deliberate choice to steer clear of binding legal obligations to allow for more flexible engagement. The Bangkok Declaration itself is only a political statement (as opposed to a legal document) that required no ratification. The ASEAN founding fathers wanted it to be an organisation with minimal legal institutionalisation. This was because ASEAN was first and foremost a diplomatic instrument for confidence-building at a time when their common concern was the containment of communist China. This emphasis on flexibility continues to permeate how ASEAN Integration is to proceed.²⁴

²² Chen, *supra* note 8, at 1563.

²³ Ewing-Chow & Tan Hsien-Li, *supra* note 21, at 5.

²⁴ *Id.* at 11.

In conducting its political, economic and cultural relations, consensus-building characterizes the relations of ASEAN's member-states that preserves individual sovereignty, rather than decision-making by a superstructure organization that has a higher sovereign personality above its member-states. Too much Asian diversity to be subjected to a single regional sovereign is alleged to be a primary cause for this consensus-building manner of decision-making and cooperation. Propensity to preserve each member-state's sovereignty is also an attributed cause why ASEAN member-states resort to consensus and consultation instead of surrendering sovereign powers to a superstructure. This manner of cooperation and decision-making among ASEAN nations is now sought to be applied in the new effort at regional financial integration of ASEAN.

Two perspectives classify the legal aspects that attach to the ASEAN Way at regional financial integration.

First, from an international perspective, international laws circumscribe and limit the regional legal framework of ASEAN in its application. Because the operation of this legal framework arose in the interrelation among sovereignties that is also situated in the larger context of a global relations of nations, this legal framework of the ASEAN financial integration must likewise align itself with international obligations of all nations in international law.

Second, from a national perspective, national laws of member-states who are actors in the regional legal framework of ASEAN at financial integration also require ASEAN's regional legal framework to comply with national laws of the ASEAN member-states.

At cooperation mode, the ASEAN Way was not an obstacle to the creation of a safety net of nations against short-term liquidity problems to supplement their foreign reserves when the Chiang Mai Initiative was adopted among member nations in the ASEAN region and around it. It was a direct multilateral agreement that squarely involves cooperation in international finance now called the Chiang Mai Initiative Multilateralization (CMIM) whose members consist of the ASEAN nations plus China, Japan and Korea (ASEAN+3). On the decision-making mechanism of the CMIM, fundamental issues (i.e. review, readmission, membership, terms of lending) are decided through consensus of the members of ASEAN+3, while the lending issues (i.e. lending, renewal, default) are decided through majority. Finance ministers of ASEAN+3 also committed to establish by early 2011 the ASEAN+3 Macroeconomic Surveillance Office, an independent regional surveillance unit to support the successful implementation of the CMIM. The

establishment of the CMIM shows that a regional cooperation mechanism with a strengthened decision-making procedure and surveillance arrangement is emerging.²⁵

At harmonization mode, decentralization of international financial norms can be reversed from small-to-big hegemonic nations. ASEAN+3 Research Group identifies policy issues and support exchange of views among ASEAN+3 officials. The ASEAN Capital Market Forum (ACMF) precisely focuses its efforts on projects to harmonize standards in capital market regulation in ASEAN in the two areas of disclosure requirements for equity securities and the rules of distribution.²⁶ The old habits of the ASEAN Way had not been an obstacle to their creation. It is not expected to impede on the decentralization of ASEAN's financial norms towards other regions of the world.

The ASEAN Way has capabilities towards co-existing with a more rules-based system. In the template of cooperation in the ASEAN involving dispute settlement mechanisms, Professor Paul Davidson observed that a new element in the Dispute Settlement Mechanism (DSM) in ASEAN is that rulings by the Senior Economic Official Meeting (SEOM), the body to rule on disputes, are by simple majority and not by consensus. As part of the move to an ASEAN Economic Community, the leaders of ASEAN declared that it shall strengthen “the ASEAN Dispute Settlement Mechanism to ensure expeditious and legally binding resolution of any economic dispute.”²⁷

Even the behavioral propensity among ASEAN states did not escape the scrutiny of experts. Professor Voeten studied the creation of regional judicial institutions in Asia and found that “Asian states are not unusually averse to refer inter-state disputes over trade, investment, and territory to global judicial institutions. Moreover, Asian states are not unique in their reluctance to resolve regional inter-state disputes through judicial means: Regional judicial institutions elsewhere have also rarely been used to resolve inter-state disputes. The most valuable lesson for Asia from experiences elsewhere is the role that regional courts can play in resolving disputes

²⁵ Zhang Zhiyong, *Economic Integration in East Asia: The Path of Law*, 4 PEKING U. J. LEGAL STUD. 262 (2013).

²⁶ See Ass'n of Southeast Asian Nations [ASEAN], *Overview, Regional Cooperation in Finance*, ASEAN WEBSITE, at www.asean.org/communities/asean-economic-community/category/overview-13 (last visited Apr. 12, 2015).

²⁷ Paul J. Davidson, *The Asean Way and the Role of Law in Asean Economic Cooperation*, 8 SINGAPORE YRBK INT'L L. 165, 173 (2008), citing Declaration of ASEAN Concord II (Bali Concord II), Bali, Indonesia (Oct. 7, 2003).

between administrative agencies and private parties about the implementation of international law.”²⁸

To remain in the global economy means to recognize the diversity of the world of nations that is even more diverse than Asia alone. The ASEAN Way of consensus-building in decision-making is a product of practical considerations that is capable of adapting to the spiraling ride of adjustments in the movement of global capital at regional financial integration. Building regional institutions for an orderly financial integration in ASEAN is not alien to its member-states even with the continuing practice called the ASEAN way.

In the act of the ASEAN member-states to liberalize its financial market and infrastructure towards regional integration, the ASEAN way of consensus-building is not prejudiced when sovereign authority is seemingly given up in favor of a regional economic or financial requirement to standardize rules. In a regional financial integration, these regional requirements are market dictated, which every nation of ASEAN will eventually accommodate in its national laws had there been no ASEAN bloc that is regionalized. This augurs only too well if each member-state of the ASEAN desires to keep up and stay with the globalized economy. In elevating the recognition by each nation that the requirements to liberalize financial markets is market-driven to the level of a regional bloc like the ASEAN, sovereign rights were merely collected and not lost in that integration. The sovereign adjustment that each nation makes to stay in the global economy in the exercise of its national power is the same adjustment it would make in the collection of nations within the regional bloc of ASEAN.

Indeed, the ASEAN Way may be an irregular premise to establish a framework at financial integration. But in the words of one expert: “Yet, to suggest that this is not regional integration of a sort is akin to suggesting that Impressionism is not art because it does not conform to the ideals of its early years.”²⁹

²⁸ Erik Voeten, *Regional Judicial Institutions and Economic Cooperation: Lessons for Asia?*, ADB Working Paper Series on Regional Economic Integration No. 65, at iv (Nov. 2010).

²⁹ Ewing-Chow & Tan Hsien-Li, *supra* note 21, at 35.

II. STRUCTURE OF INTERNATIONAL FINANCE

A. International Context

Interestingly, in stark contrast with institutions like the WTO, the International Monetary Fund (IMF), and the World Bank (WB), the agencies of international financial law “lack the attributes of formal international organizations – institutions created by formal, ratified treaties and validated by state membership, tangible manifestations of organizational bureaucracy, and an adequate legal pedigree.”³⁰ Such agencies are manifestations of soft law agreements. The principal creators of international financial law fall into four distinct categories: agenda-setters, sectoral standard-setters, specialists, and international monitors.³¹

Chen expounds upon these four categories by Brummer and provides examples of the organizations concerned:

The financial ministers and the central bankers of the Group of Twenty Finance Ministers and Central Bank Governors (G-20) work alongside the newer and more technocratic Financial Stability Board *in setting the agenda for global financial regulation*. The task of *setting international standards* for the regulation of the banking, securities, and insurance industries falls to the Basel Committee on Banking Supervision, the International Organization for Securities Commissions, and the International Association of Insurance Supervisors (IAIS). The Basel Committee, IOSCO, and IAIS in turn coordinate their efforts within the Joint Forum on Financial Conglomerates. A wide variety of *specialized standards* emerges from organizations such as the International Accounting Standards Board, the International Federation of Accountants, the Committee on Payment and Settlement Systems, the Financial Action Task Force, the International Association of Deposit Insurers, and the International Swaps and Derivatives Association.

Several “hard law” organizations advance these efforts in a *supporting or monitoring capacity*. The Organization for Economic Cooperation and Development has devised standards for corporate governance. The Bank for International Settlements not only supplies research support to international financial standard-setting organizations, but also participates as a private, for-profit provider

³⁰ Chen, *supra* note 8, at 1564, citing David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Organizations*, 33 TEX. INT'L L.J. 281, 305 (1998).

³¹ See generally BRUMMER, *supra* note 7, at 60-114.

of reserve management services to central banks and other monetary authorities. Finally, the IMF and the World Bank *monitor* other regulators' formal compliance with international financial law. Together, these heterogeneous entities *form a fragmented network of structurally independent actors with distinctive sources of authority and pathways for legal decision-making*.³²

Brummer explains the personalities that participate in international finance law. International financial law is characterized by a global division of regulatory labor, consisting of diverse regulatory actors participating in formulating rules both in cooperation and in competition among each other.³³ Box No. 1 contains Brummer's observations how global rules and standards evolve to create a legal infrastructure in international finance.

Box No. 1³⁴

Even more central to the international financial infrastructure are the international standard-setting bodies themselves – that is, the global institutions in which national authorities meet regularly to coordinate and articulate common policy approaches.

Conceptually, these bodies can be organized along the lines of what I will describe as “agenda” and “standard” setters, though the line between them is not always easy to demarcate in practice. By agenda setters, I mean those institutions that are geared towards large organizations with broad and diverse regulatory memberships that define broad strategic objectives for the international system. Two are especially central to international financial regulation: the G-20 and the newly constituted Financial Stability Board.

Recently designated the “premier” organization for international economic cooperation, the Group of Twenty Finance Ministers and Central Bank Governors (G-20) provides a forum for banking and finance ministers from the nineteen largest and fastest-developing economies to meet, at times along with heads of state from member countries, to discuss financial, economic, and monetary policy.

³² Chen, *supra* note 8, at 1563-65. (Emphasis supplied.)

³³ Chris Brummer, *How International Financial Law Works (And How It Doesn't)*, 99 GEO. L.J. 257 (2011).

³⁴ *Id.* at 275-81. (Citations omitted.)

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The legislative products of the G-20 include “communiqués” and “declarations,” usually published at the end of summits that inform the public about agreements reached by G-20 members. In these public declarations, the G-20 leaders as a group articulate shared viewpoints with regard to economic policies, causes, and solutions to microeconomic and macroeconomic challenges [...] Communiqués also inform the public about future initiatives and frequently task other international bodies to implement agreed-upon priorities [...] Working groups comprised of representatives from all of the G-20 countries have, especially in the wake of the crisis, been tasked to develop reports and recommendations to strengthen international standards in areas like accounting, disclosure, and prudential management[.]

* * *

Alongside the G-20 is the Financial Stability Board. [I]n the wake of the 2008 crisis its mandate has grown substantially[.] Its responsibilities now include assessing weaknesses in the global financial system and advising regulators as to the implications of such weaknesses for regulatory policy. It is tasked with establishing a supervisory college to monitor large international financial service firms. In part through this role, and its general economic monitoring obligations, the Financial Stability Board has become an increasingly important player in establishing broad policy principles and objectives. Specifically, the organization has issued a series of broad recommendations and principles to strengthen the global financial system, including the Report on Enhancing Market and Institutional Resilience, aimed at improving banking capital adequacy requirements, accounting standards, and margin requirements for certain trading activities.

* * *

These bodies generally implement their broad regulatory agendas through more granular standard setting national regulators and the so-called standard-setting organizations. The best known and oldest of the international standard-setters is the Basel Committee, a group composed solely of the central bank governors and national bank regulators of the G-20 countries. The Basel Committee seeks to improve the quality of banking worldwide “by adopting international standards of prudential supervision covering such issues as capital adequacy and consolidated supervision of a bank’s cross-border operations.”

* * *

Among the Basel Committee's legislative products is the Core Principles for Effective Banking Supervision, which spells out best practices for banking regulators, and the concordat on cross-border banking supervision, which provides broad principles "for co-operation between national authorities in the supervision of banks' foreign establishments." It is also widely acclaimed for its 1988 accord on capital adequacy (or Basel I), which requires banks of member countries to hold a certain amount of capital on their books for investment activities. Under the agreement, ultimately adopted by each member and nearly 100 nonmembers, different kinds of financial activities were assigned different risks: the riskier the activities, the more capital banks were required to hold. These rules were revised in a new round of negotiations in 2004 (Basel II), which gave the world's largest banks substantial discretion in the methodologies used to generate their own internal risk ratings, and again in 2010 (under a presumptive Basel III).

The key standard setter for securities regulation is the International Organization of Securities Commissions (IOSCO). [...] Due in part to its status as a consensus-based organization, IOSCO has historically passed relatively little organization-wide legislation. [M]ost policy [of the IOSCO] is coordinated through the organization's Technical Committee, a group of now eighteen countries representing leading developed jurisdictions stemming from 279 countries with large domestic markets. Its main legislative achievements include Objectives and Principles of Securities Organization – a set of thirty principles outlining the organization's view of what comprises high-quality securities regulation – and the International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers. The Organization also boasts a multilateral agreement among regulators securing enforcement cooperation where witnesses or the proceeds of fraud are located in one other's jurisdiction.

The International Association of Insurance Supervisors (IAS) acts as the primary coordinator for national regulators of insurance companies and sets minimum standards of supervisory practice for the industry. Initially established in 1994, it soon evolved into a key international standard-setting body and boasts a membership covering more than 160 jurisdictions [...] The IAIS has developed, much like international securities regulation, a model bilateral agreement on the exchange of information and implementation. It has also developed international best practices, memorialized in its Insurance Core Principles and Methodology, which provides guidance for jurisdictions wishing to strengthen

their supervisory regimes, and has increasingly focused on matters of systemic risk management by insurance companies.

* * *

Institutions that engage in surveillance and monitoring make up the last important group of global regulatory actors. Although discrete monitoring activities are at times carried out by the other organizations, two institutions have been of traditional importance: the IMF and the World Bank. Although not generally tasked with devising sector-specific standards for finance per se, their missions have evolved over the years to primarily include the monitoring of financial codes and standards. They are also, notably, the only international institutions in the international financial architecture whose founding documents – their respective articles of agreement – are formally recognized hard law.

Surveillance has at least traditionally been executed through World Bank and IMF surveillance programs, including semi-regular (usually annual or biannual) consultations the IMF undertakes with each of its members as called for under Article IV of IMF's Articles of Agreement. Increasingly, however, the institutions rely on other vehicles for surveillance. The most important is the Financial Sector Assessment Program, an initiative administered jointly by the IMF and World Bank. This program is more rigorous than traditional IMF consultations, and undertakes examinations (financial sector assessments) to identify developmental and technical assistance needs of the jurisdiction in question, determine the risks its practices pose to the international system, and help prioritize policy development and coordination efforts with the local regulator.

Included in financial sector assessments -- where, again, experts from international standard-setting bodies, national supervisory agencies, and central bank authorities examine a country's market stability – are World Bank and IMF Reports on Observance of standards and Codes (“observance reports” or more officially, ROSCs), reports that focus on countries' adherence to targeted international codes and principles. The key standards address issues as diverse as accounting, auditing, anti-money laundering, countering the financing of terrorism, banking supervision, corporate governance, data dissemination, fiscal transparency, insolvency and creditor rights, insurance supervision, monetary and financial policy transparency, payments systems, and securities regulation. In preparing the ROSCs, experts from the World Bank and IMF not only familiarize themselves with the relevant country's laws and regulations, but also participate in

several on-site inspections and interview stakeholders such as law firms, government officials, and financial institutions.”

B. The ASEAN Context and its Approach to Integration

The international organizations mentioned as well as their functions have parallels within the ASEAN. At this juncture, a brief history of the development of the ASEAN, focusing on its economic and financial integration, is warranted.

1. *The ASEAN Timeline*

The ASEAN was established under the Bangkok Declaration signed in Bangkok, Thailand.³⁵ Currently, the member nations of the ASEAN are Singapore, Malaysia, Indonesia, Thailand, Philippines, Brunei Darussalam, Cambodia, Lao People's Democratic Republic (PDR), Myanmar, and Vietnam, subdivided into two groups: the ASEAN5 and the BCLMV. The ASEAN5, the original founders of the ASEAN, is composed of Singapore, Malaysia, Indonesia, Thailand, and the Philippines. BCLMV, on the other hand, is composed of Brunei Darussalam, Vietnam, Myanmar, Lao PDR, and Cambodia, which joined in 1984, 1995, 1997, 1997, and 1999, respectively.³⁶ The ASEAN was established to foster cooperation in the economic, social, cultural, technical, educational and other fields, and in the promotion of regional peace and stability through abiding respect for justice and the rule of law and adherence to the principles of the United Nations Charter to promote regional amity and cooperation among the member nations.³⁷

i. Establishment

The ASEAN was established on August 8, 1967 at the height of the Vietnam War. At this time, Indonesia was recently at war with Malaysia over colonies. Malaysia had just recently defeated a communist insurgency while Indonesia had just overcome army coups. The founding nations realized that the moment for regional cooperation had come or the future of the region

³⁵ ASEAN, *History*, ASEAN WEBSITE, at <http://www.asean.org/asean/about-asean/history> (last visited Apr. 12, 2015). See also Thanat Khoman, *ASEAN Conception and Evolution*, in THE ASEAN READER (1992).

³⁶ ASIAN DEVELOPMENT BANK, THE ROAD TO ASEAN FINANCIAL INTEGRATION: A COMBINED STUDY ON ASSESSING THE FINANCIAL LANDSCAPE AND FORMULATING MILESTONE FOR MONETARY AND FINANCIAL INTEGRATION IN ASEAN 1 (2013), available at <http://www.bnm.gov.my/index.php?rp=road-to-asean-financial-integrat> (last visited Apr. 12, 2015).

³⁷ ASEAN, *supra* note 35.

would remain uncertain.³⁸ Given these circumstances, it may be inferred that ASEAN was initially established for political and security purposes.

The founding nations, though varying in government systems and in culture, were motivated by their desire for economic dynamism, sustained prosperity, inclusive growth and integrated development of the region. In line with the above-mentioned objectives, several meetings and summits were held among the member nations to forge trade agreements and transactions among them.³⁹

Since then, and for more than three decades since its inception, ASEAN has served as a platform on which agreements among member nations are proposed and policies are thoroughly studied for the betterment of the economic condition of each member state and the whole region in general. More than that, the ASEAN functioned as a bloc for Southeast Asian nations to muster collective strength in dealing with the international community and to weather financial catastrophes.

ii. Trade in South East Asia

Most ASEAN states, with the exception of oil-rich Brunei, were focused on building export-oriented manufacturing sectors that relied on low wages, Japanese capital, and open Western markets.⁴⁰ This is mainly the result of the 1985 Plaza Accord and the relocation of the car manufacturing industry to East Asia because of the region's cheap cost of labor.⁴¹

A number of bilateral and multilateral agreements were also entered into by ASEAN. This is a result of external economic factors, such as the need to meet market demands and to compete against strong market forces (e.g. China, which pressured ASEAN to restructure trade). In an attempt to strengthen ASEAN's trade advantage, the Common Effective Preferential Tariff (CEPT) proposal was signed as a schedule for phasing tariffs and as a goal to increase the region's competitive advantage as a production base geared for the world market.⁴²

³⁸ ASEAN, *supra* note 35.

³⁹ Ewing-Chow & Tan Hsien-Li, *supra* note 21, at 4-5.

⁴⁰ JOSHUA KURLANTZICK, ASEAN'S FUTURE AND ASIAN INTEGRATION 2 (2012).

⁴¹ Kornkarun Cheewatrakoolpong, Chayodom Sabhasri & Nath Bunditwattanawong, *Impact of the ASEAN Economic Community on ASEAN Production Networks*, ADB Institute Working Paper No. 409, at 4 (Feb. 2013).

⁴² Lay Hong Tan, *Will ASEAN Economic Integration Progress Beyond a Free Trade Area*, 53 INT'L COMP. L. Q. 935, 939 (2004).

The CEPT later on evolved as the legal framework for the ASEAN Free Trade Area (AFTA). The AFTA became effective in the year 1993, with the end goal of facilitating international trade within the region. Primarily, its motive is to intensify cooperation among the members of ASEAN to increase their international competitiveness and integration with the world. Secondly, it aims to stimulate the intra-ASEAN trade.⁴³ Trade liberalization ensued pursued closely by a phenomenon of financial liberalization. As a growth area, trade became more open and free.

In the year 1994, ASEAN established the ASEAN Regional Forum (ARF) to foster constructive dialogue and consultation on political and security issues of common interest and concern; and to make significant contributions to efforts towards confidence-building and preventive diplomacy in the Asia-Pacific region.⁴⁴

iii. The Asian Financial Crisis

Over the years, the interconnection of economies and the move towards globalization have necessitated the financial integration in South East Asia. Fund flows across ASEAN nations became fluid, including all the volatility inherent in it. Just like the EU, the ASEAN believes that the financial integration of ASEAN member states would strengthen its bargaining power and would increase its ability to withstand financial crises in the near future. This apparent need for integration became more evident after the year 1997 when the region experienced a major economic downturn on account of the Asian Financial Crisis (AFC).

Weakening confidence in Southeast Asia was first seen from mid-1996 in capital flight, including steep reduction in lending by Japanese and European banks.⁴⁵ Lenders that had willingly funded local banks and other borrowers began to scale back their commitments and refused the renewal of short-term credit lines.⁴⁶ The roots of the crisis were at the micro level in high corporate leverage, weak commercial profitability, and inadequate financial sector supervision.⁴⁷

⁴³ Tan, *supra* note 42, at 939.

⁴⁴ *Id.* at 965.

⁴⁵ QIAO LIU, PAUL LEJOT & DOUGLAS W. ARNER, FINANCE IN ASIA INSTITUTIONS, REGULATION AND POLICY 65 (2013).

⁴⁶ *Id.*

⁴⁷ *Id.*

Asia's regional crisis began with shocks in Thailand through deflation of an asset price bubble and the abrupt floating of an overvalued currency.⁴⁸ Several of the Thai domestic banks had adopted international targets for capital adequacy, but their accounting practices and procedures for reporting and provisioning for delinquent and defaulted loans (non-performing loans) were often substandard.⁴⁹ Thai authorities sought to defend the baht's peg to the US dollar, which until 1997 had been politically favored.⁵⁰ Forward sales of foreign currency were used to conceal the loss in reserves and were both technically illegal and speculative, in that the Bank of Thailand knowingly maintained a fixed exchange rate having exhausted resources for later delivery.⁵¹ The scale of intervention was kept secret but became subject to mounting rumors in May and June (1997).⁵² The Bank of Thailand finally revealed in early July the virtual exhaustion of its currency reserves and allowed the baht to float and find its own value in the foreign exchange markets.⁵³ It immediately lost over half its value against the US dollar and continued to fall in the following months.⁵⁴ Thailand was not unusual—similar growth in leverage was evident in Indonesia, South Korea, and Malaysia.⁵⁵ The result might have been confined to one economy, but linkages within the modern financial system can allow shocks to be transmitted rapidly between national markets, so that losses in confidence or unexpected changes in asset prices may reverberate in other markets.⁵⁶ This is the basis of the contagion that swept from Thailand throughout Asia, South Korea, Hong Kong and Taiwan.⁵⁷ Policymakers identified capital mobility as a condition that contributed to the financial crisis and the contagion that made its effects so severe.⁵⁸ The Asian financial crisis not only revealed weaknesses in national financial systems, but also an imperfect regional economic and financial linkages that made every domestic economy vulnerable to contagion from systemic shocks.⁵⁹

⁴⁸ LIU ET AL., *supra* note 45.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 67.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 69.

⁵⁶ *Id.* at 64-65.

⁵⁷ *Id.* at 65.

⁵⁸ *Id.* at 74-75.

⁵⁹ *Id.* at 75.

iv. The Asian Financial Crisis Aftermath

To recuperate from the losses brought about by the 1997 AFC, the ASEAN Heads of States, in addition to the measures observed in their locality, were left with no choice but to contemplate on a more systematic and organized regional financial and monetary cooperation. As a short-range reaction to the financial crisis, the Chang Mai Initiative (CMI) was created among the ASEAN member states with China, Japan and South Korea to manage regional short-term liquidity problems.⁶⁰ The CMI created a reserves pool to mitigate members' vulnerability to international capital inflow, speculation, and contagion if any one member's currency collapsed.⁶¹ This is in recognition of the fact that the volatility accompanying financial crises is associated with growing economies; growth areas are potential venues of financial crisis because of the large amounts of money flowing in their markets.

As a more concrete response to market factors and the 1997 AFC, the ASEAN Leaders, at their Summit in Kuala Lumpur in December 1997, decided to transform ASEAN into a stable, prosperous, and highly competitive region with equitable economic development, and reduced poverty and economic disparities, otherwise known as the ASEAN Vision 2020.⁶²

In 1998, the ASEAN finance ministers further agreed on the ASEAN Surveillance Process (ASP) on recent economic developments and policy issues in ASEAN. According to the ASEAN 2013, it will serve "as a mechanism for peer review and exchange of views among the senior officials (central bank and finance) and Finance Ministers on recent economic developments and policy issues in ASEAN."⁶³

The ASEAN declared the creation of the ASEAN Economic Community (AEC) by the year 2015. The AEC aimed "to transform ASEAN

⁶⁰ Joshua Kurlantzick, *ASEAN's Future and Asian Integration*, Council on Foreign Relations International Institutions and Global Governance Program Working Paper (Nov. 2012), at 5.

⁶¹ *Id.*

⁶² ASEAN, ASEAN ECONOMIC COMMUNITY BLUEPRINT 5 (2008), available at <http://www.asean.org/archive/5187-10.pdf>.

⁶³ Ulrich Volz, *ASEAN Financial Integration in the Light of Recent European Experience*, Paper presented at the ASEC-DIE-CoC Workshop "Financial and Macroeconomic Cooperation and Integration in ASEAN against the Background of the European Crisis," Jakarta, Indonesia (Mar. 19, 2013), at 8, available at <http://eprints.soas.ac.uk/16679/1/ASEAN%20Financial%20Integration%20in%20the%20Light%20of%20Recent%20European%20Experiences%2012May2013.pdf>.

into a region with free movement of goods, services, investment, and skilled labor, and freer flow of capital.”⁶⁴

v. The ASEAN Economic Community

Pursuant to the ASEAN Vision 2020, at the Bali Summit in October 2003, the ASEAN Leaders declared that the AEC should be the goal of regional economic integration (Bali Concord II) by the year 2020.⁶⁵

Subsequently, the ASEAN Economic Ministers Meeting (AEM) held in August 2006 in Kuala Lumpur, Malaysia, agreed to develop “a single and coherent blueprint for advancing the AEC by identifying the characteristics and elements of the AEC by 2015 consistent with the Bali Concord II with clear targets and timelines for implementation of various measures as well as pre-agreed flexibilities to accommodate the interests of all ASEAN Member Countries.”⁶⁶

In creating the AEC, ASEAN will observe “the principles of an open, outward-looking, inclusive, and market-driven economy consistent with multilateral rules as well as adherence to rules-based systems for effective compliance and implementation of economic commitments.”⁶⁷ The formation of such a community will benefit from the successful liberalization of the capital account and the domestic financial market in individual countries, and from the ASEAN-wide integration of financial markets and institutions supported by regulatory harmonization and the strengthening of policy coordination among the member states.⁶⁸ Interestingly, this may also be the first time that the usually consensus-based method of diplomacy that characterizes ASEAN’s decision-making approaches will mention and recognize adherence to rules-based systems for effective compliance of commitments. Adherence to a rules-based system of compliance results to submission by ASEAN’s sovereign member of aspects of their sovereignties, which had been evaded with the creation of the ASEAN Way. But the same ASEAN Blueprint also adopted the “ASEAN Minus X” schemes to effect the goals of ASEAN integration, showing flexible remnants of the ASEAN Way when it accorded pre-agreed flexibility to all ASEAN member countries.⁶⁹

⁶⁴ Volz, *supra* note 63, at 8.

⁶⁵ ASEAN, *supra* note 62, at 5.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ ASIAN DEVELOPMENT BANK, *supra* note 36, at 1.

⁶⁹ ASEAN, *supra* note 62, at 10.

At the 12th ASEAN Summit in January 2007, the Leaders affirmed their strong commitment to accelerate the establishment of an ASEAN Community by 2015 as envisioned in the ASEAN Vision 2020 and the ASEAN Concord II, and signed the Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015.⁷⁰ In December of 2008, an unprecedented act took place where ASEAN signed a charter giving its ten member states a legal identity, a first step towards its aim of a free trade by 2015.⁷¹

In November 2007, the ASEAN heads of state adopted the AEC Blueprint. It aims to transform ASEAN into a single market and production base, a highly competitive economic region, a region of equitable economic development, and a region fully integrated into the global economy.⁷² ASEAN leaders also approved the Initiative for ASEAN Integration Strategic Framework and Work Plan (2009 – 2015), which is meant to bridge the perceived “development divide” between the older and economically more advanced members.⁷³

The AEC will establish ASEAN as a single market and production base making ASEAN more dynamic and competitive with new mechanisms and measures to strengthen the implementation of its existing economic initiatives; accelerating regional integration in the priority sectors; facilitating movement of business persons, skilled labor and talents; and strengthening the institutional mechanisms of ASEAN.⁷⁴ As a first step towards realizing the ASEAN Economic Community, ASEAN has been implementing the recommendations of the High Level Task Force (HLTF) on ASEAN Economic Integration contained in the Bali Concord II.⁷⁵

At the same time, the AEC will address the development divide and accelerate integration of Cambodia, Lao PDR, Myanmar and Vietnam (CLMV) through the Initiative for ASEAN Integration and other regional initiatives. Other areas of cooperation are also to be incorporated, such as human resources development and capacity building; recognition of professional qualifications; closer consultation on macroeconomic and

⁷⁰ Cebu Declaration on the Blueprint of the ASEAN Charter (Jan. 13, 2007), ASEAN WEBSITE, available at <http://www.asean.org/news/item/cebu-declaration-on-the-blueprint-of-the-asean-char-ter-cebu-philippines-13-january-2007>.

⁷¹ CHARTER OF THE ASS'N OF SOUTHEAST ASIAN NATIONS (2007), available at <http://www.asean.org/asean/asean-charter/asean-charter>.

⁷² ASEAN, *supra* note 62, at 6.

⁷³ *Id.* at 5.

⁷⁴ *Id.*

⁷⁵ *Id.*

financial policies; trade financing measures; enhanced infrastructure and communications connectivity; development of electronic transactions through e-ASEAN; integrating industries across the region to promote regional sourcing; and enhancing private sector involvement for the building of the AEC.⁷⁶

In December 2008, the ASEAN charter entered into force. It was made a legal entity which will create the single free trade area. The ASEAN Charter serves as a firm foundation in achieving the ASEAN Community by providing legal status and institutional framework for ASEAN. It also codifies ASEAN norms, rules, and values; sets clear targets for ASEAN; and presents accountability and compliance.⁷⁷

vi. ASEAN agreements that support Financial Integration

In an IMF Working Paper focusing on the recent initiatives made by the ASEAN in support of financial integration entitled “*ASEAN Financial Integration*,” Almekinders, Fukuda, Mourmouras, and Zhou observe that:

Several initiatives have been taken to enhance cross-border collaboration among the various capital markets in ASEAN, including building capacity and infrastructure: The Working Committee on Capital Account Liberalization monitors the implementation of priority actions to achieve freer flow of capital in the region as per the AEC Blueprint; the ASEAN Capital Markets Forum (ACMF) focuses on the harmonization of domestic laws and regulations and the development of market infrastructure with a view to integrate the region’s equities markets; in April 2010, ASEAN Central Bank Governors endorsed the creation of the Working Committee on Payment and Settlement Systems (WC-PSS), which focuses on policy, legal frameworks, instruments, institutions, and market infrastructure; in April 2011, ASEAN Central Bank Governors endorsed the creation of the Task Force on the ASEAN Banking Integration Framework (ABIF), which aims to achieve ASEAN-wide banking sector liberalization by 2020. The Working Committee on Financial Service Liberalization focuses on further liberalization of the banking and insurance sectors; and the ASEAN Capital Markets Infrastructure (ACMI) Blueprint was developed in 2013. Accordingly, the Working Committee on Capital Market Development aims to enable ASEAN issuers and investors to access cross-border ASEAN

⁷⁶ ASEAN, *supra* note 62, at 5-6.

⁷⁷ *Id.*

equity and bond markets through integrated access, clearing, custody, and settlement systems and arrangements.⁷⁸

Furthermore, as regards financial monitoring and crisis management and in addition to the CMIM, “[t]he ASEAN Integration Monitoring Office (AIMO) was established in 2010 to enhance the ASEAN Secretariat’s monitoring capacity in tracking progress of regional economic integration,” and, “[a]n independent regional macroeconomic surveillance unit—the ASEAN+3 Macroeconomic Research Office (AMRO)—has been operating in Singapore since 2011.”⁷⁹

vii. Recent Developments

In 2010, an agreement to develop a scorecard to measure the extent by which capital markets among ASEAN member-states comply with ASEAN standards and a common framework in facilitating cross-border offerings and investment was agreed upon. The Fifth Package of Financial Services Negotiations was also concluded. Economic growth reached 7.6% in the same year. In addition, the Finance Ministers pledged to intensify their efforts to build stronger integrated financial markets which will be mutually beneficial under the ASEAN Economic Community (AEC) by 2015.⁸⁰

In 2011, the ASEAN Central Bank Governors adopted the ASEAN Financial Integration Framework (AFIF) to provide a general approach to the liberalization and integration initiatives.⁸¹

In 2012, ASEAN placed in operation the USD 485.2 million ASEAN Infrastructure Fund (AIF), as well as the launching of initial projects for the Credit Guarantee and Investment Facility (CGIF).⁸² In the same year, the

⁷⁸ Geert Almekinders, Satoshi Fukuda, Alex Mourmouras & Jianping Zhou, *ASEAN Financial Integration*, International Monetary Fund Working Paper No. 34, at 7. (Feb. 2015).

⁷⁹ *Id.* at 8.

⁸⁰ Joint Media Statement of the 15th ASEAN Finance Ministers’ Meeting (AFMM) Bali, Indonesia (Apr. 8, 2011), ASEAN WEBSITE, available at <http://www.asean.org/communities/asean-economic-community/item/joint-media-statement-of-the-15th-asean-finance-ministers-meeting-afmm-bali-indonesia-8-april-2011-2/>.

⁸¹ Bangko Sentral ng Pilipinas, *ASEAN Economic Community (AEC) 2015: Financial Integration in ASEAN*, at 1, BANGKO SENTRAL NG PILIPINAS WEBSITE, available at <http://www.bsp.gov.ph/downloads/Publications/FAQs/ASEAN.pdf> (last visited Apr. 12, 2015).

⁸² See Joint Media Statement of the 16th ASEAN Finance Ministers’ Meeting (AFMM), at <http://ptv.ph/13-asean-corner/92-joint-media-statement-of-the-16th-asean-finance-ministers-meeting-afmm> (last visited Apr. 12, 2015).

ASEAN economies grew by 5.6% despite the global uncertainties. This was underpinned by strong macroeconomic fundamentals, robust domestic demand, and sound balance sheets of banks and the corporate sector.⁸³

In 2013, the ASEAN economies grew by 5.1%, with exports recovering during the second half of the year. Economic outlook remained robust, anchored by rising domestic demand stemming from private consumption and infrastructure investment. ASEAN remained vigilant in managing the downside risks, including capital outflows, volatile currency movements, emerging inflationary pressures, and tightening financial conditions, which could dampen economic growth.⁸⁴

As of October 2013, 279 measures (79.7%) of the ASEAN Economic Community Blueprint have been implemented.⁸⁵

By comparison, Box No. 2 reflects ASEAN's major progress at financial integration and reflects a parity of substantive approach to the international financial structure discussed in Box No. 1.

Box No. 2⁸⁶

ASEAN Surveillance Process (ASP)

The ASP started in 1999 as a mechanism for peer review and exchange of views among the senior officials (central bank and finance) and Finance Ministers on recent economic developments and policy issues in ASEAN. Since then, it has evolved into an important mechanism in ASEAN on regional economic monitoring and surveillance.

Key achievements to date include: establishment of a dedicated unit at the ASEAN Secretariat (ASEC) to conduct regional surveillance

⁸³ Joint Ministerial Statement of the 17th ASEAN Finance Ministers' Meeting (AFMM) Bandar Seri Begawan (Apr. 2013), ASEAN WEBSITE, available at <http://www.asean.org/news/asean-statement-communicues/item/joint-ministerial-statement-of-the-17thasean-finance-ministers-meeting-afmm-bandar-seri-begawan>.

⁸⁴ Joint Ministerial Statement of the 18th ASEAN Finance Ministers' Meeting (AFMM) Nay Pyi Taw, Myanmar (Apr. 5 2014), ASEAN WEBSITE, available at <http://www.asean.org/news/asean-statement-communicues/item/jointministerialstatement-of-the-18thasean-finance-ministers-meeting-afmm-nay-pyi-taw-myanmar-5-april-2014/>.

⁸⁵ Chairman's Statement of the 23rd ASEAN Summit (Oct. 9, 2013), ASEAN WEBSITE, available at <http://www.asean.org/images/archive/23rdASEANSummit/chairmans%20statement%20-%2023rd%20asean%20summit%20-%20text%20-%20final.pdf>.

⁸⁶ ASEAN, *supra* note 26.

and facilitate regional cooperation activities in finance; establishment of national surveillance units in selected countries (Indonesia, Cambodia, Lao PDR, Philippines, Thailand and Viet Nam) to assist in building capabilities in surveillance related work; capacity building training programmes for ASEAN finance and central bank officials on regional economic monitoring and surveillance, conducted by the Asian Development Bank (ADB); conduct of technical studies and policy papers on finance and economic issues (e.g., fiscal sustainability, banking and corporate restructuring, and monitoring of capital flows).

* * *

Roadmap for Monetary and Financial Integration of ASEAN (RIA-Fin)

Endorsed by the AFMM in Manila in 2003, RIA-Fin consists of steps, timelines and indicators of activities in four areas: (a) Capital Market Development, (b) Liberalisation of Financial Services, (c) Capital Account Liberalisation and (d) ASEAN Currency Cooperation, with the ultimate goal of greater economic integration in ASEAN by 2015.

Capital Market Development: [...] Key achievements [include] the adoption of a proposed “Medium-Term Strategic Framework (MTSF)” to guide the work of the Working Committee on Capital Market Development and to align capital market development to the ASEAN Economic Community (AEC) Blueprint; enhancing market access, linkages and liquidity through such proposed initiatives as ASEAN Exchanges linkages, Bond Markets linkages; and promoting credit ratings comparability between domestic and international credit rating agencies[.]

Financial Services Liberalisation: [...] Liberalisation is carried out based on a positive list approach modality, where Member States will prepare an indicative list of financial services sub-sectors and modes for liberalisation. Negotiations are undertaken based on the combined unilateral and/or request/offer mechanisms[.] In April 2010, a new modality for financial services liberalisation which is based on pre-agreed flexibilities was endorsed by the Finance Ministers [...] The Working Committee is also involved in negotiations of financial services with several ASEAN Dialogue Partners.

Capital Account Liberalisation: [...] Member States agreed to take stock of current status of, and prepare, and implement national work programmes for capital account liberalisation, including

capacity building. The progress of implementation of national work programmes will be monitored annually. To date, Member States have finalised their self-assessment and identification of rules appropriate for liberalisation of regulations related to foreign direct investment (FDI). The results of that assessment indicate that most Member States have been open in their FDI regimes[.]

ASEAN Currency Cooperation: Intended to explore ways that could further facilitate intra-regional trade and investment and economic integration, including through some forms of currency arrangements. As preconditions for closer currency cooperation, efforts would be made toward maintaining appropriate macroeconomic policies and foster greater macroeconomic convergence.

ASEAN Plus Three (ASEAN+3) Finance Cooperation

Chiang Mai Initiative Multilateralisation (CMIM)

The Chiang Mai Initiative (CMI) was established by the ASEAN Plus Three Finance Ministers Meeting (AFMM+3) in 2000 as a network of bilateral currency swap arrangements to: (a) address short-term liquidity difficulties in the region and (b) supplement the existing international financial arrangements. The CMI has two phases. In 2004, the AFMM+3 agreed to have a more advanced framework for liquidity support that focuses on the multilateralisation of CMI (CMIM).

An enlarged US\$120 billion swap arrangement under the CMIM took effect in March 2010. The CMIM signifies the most significant collective response of ASEAN, China, Japan and the Republic of Korea to the global financial crisis[.]

Asian Bond Markets Initiative (ABMI)

ABMI was launched in 2003 with two objectives: to (a) develop local-currency denominated bond markets, and (b) develop more accessible and well-functioning regional bond markets both for issuers and investors. Following the new ABMI Roadmap endorsed by the 11th ASEAN+3 Finance Ministers Meeting (AFMM+3) in Madrid in May 2008, the four ABMI Working Groups have evolved into Task Forces addressing the four key areas namely: i) promoting key issuance of local currency-denominated bonds; ii) facilitating the demand of local currency-denominated bonds; iii) improving regulatory framework and iv) improving related infrastructure for the bond markets. The Technical Assistance Coordination Team (TACT) has continued to provide technical

assistance in bond markets to interested members. One of the key initiatives under the ABMI framework is the establishment of the Credit Guarantee and Investment Facility (CGIF) aimed at supporting the issuance of local currency-denominated bonds in the region[.]

Under the new Roadmap, Task Forces have been streamlined to develop work programmes and focus on key priorities under each area. ASEC has been assisting the ABMI as administrator of technical assistance programmes being implemented by the Japanese Ministry of Finance under the Japan Technical Assistance Fund (JAFTA). The technical assistance focus on building capacities of ASEAN countries in various aspects of bond market development (e.g., infrastructure support).

ASEAN+3 Research Group

To identify policy issues and support exchange of views among ASEAN+3 finance officials, the ASEAN+3 Research Group has been undertaking policy-oriented studies since 2003. [I]n 2009/2010, the Research group has concluded research on two topics namely: i) Ways to Promote Foreign Trade Settlements Denominated in Local Currencies in East Asia and ii) Regulation and Supervision for Sound Liquidity Risk Management for Banks.

* * *

To promote financial stability in ASEAN+3 countries, the Ministry of Finance of Japan has been providing Technical and Research Assistance support (under the purview of ASEAN+3 Research Group) as well as capacity building programme for ASEAN Member States through the Japan – ASEAN Financial Technical Assistance (JAFTA) Fund. To date, JAF TA has provided technical assistance in Managing Capital Flows, Capacity Building for Macroeconomic Statistics and Developing Bond Markets (Phase I – IV) as well as Promotion of Medium Term Note Programme[.]

C. Parallels in the ASEAN Region

Thus, many of the ASEAN initiatives and agreements espouse the nature of the four types of creators of international finance law. To recall, internationally and in the West, we have agenda-setters such as G-20 and the EU. Sectoral standard-setters include the Basel Committee, IOSCO, and IAIS. Specialized institutions include the International Accounting Standards Board, the International Federation of Accountants, the Committee on

Payment and Settlement Systems, the Financial Action Task Force, the International Association of Deposit Insurers, and the International Swaps and Derivatives Association while monitoring organizations include the IMF and WB.

In the setting of the ASEAN financial integration as illustrated above, the ASEAN organization is itself an agenda-setter, just like the G-20 consists of nations. The AEC and ACMI Blueprints set out the policy intended to be achieved by the ASEAN. The ASEAN Central Bank Governors and Finance Ministers provide guidance and direction in the implementation of the work programs of the different working committees/task forces on financial integration.⁸⁷ Entities like the Working Committee on Capital Market Development ensure better cross-border integration of bond and equity markets. The Senior Level Committee (SLC) on ASEAN Financial Integration is composed of Central Bank Deputies and Chairs/Co-Chairs of the different working committees ensures the implementation of key milestones and timelines of financial integration in the region.⁸⁸ The Working Committee on Capital Account Liberalization CMIM, AIMO, and AMRO operate as monitoring institutions. The ASEAN Capital Markets Forum and the Working Committee on Payment and Settlement System are sectoral standard-setters while institutions such as the Task Force on ABIF and the Working Committee on Financial Service Liberalization specialize in the fields of banking and insurance.

ASEAN's program at regional financial integration begins to harmonize with existing standards in international finance laws when ASEAN adopts the standards that are already well entrenched in the architecture of international finance regulations, but in the ASEAN Way.

For example, the ASEAN and Plus Standards Scheme (hereinafter, "Scheme") was developed by the ASEAN Capital Market Forum (ACMF) to facilitate cross-border offerings of securities within the ASEAN region. The Scheme brings ease and cost savings to issuers who make offerings of securities across borders within ASEAN. The Scheme therefore enhances the attractiveness of ASEAN as a combined capital market for fund-raising, as well as underlines the combined ASEAN securities as an attractive asset class

⁸⁷ Bangko Sentral ng Pilipinas, *supra* note 81.

⁸⁸ *Id.*

by raising the disclosure standards among ASEAN members to international level.⁸⁹

The Scheme introduces two levels of standards, comprising a set of common ASEAN Standards, and a set of limited additional standards known as the Plus Standards.⁹⁰

The “ASEAN Standards” are based on the standards on cross-border offerings set by the International Organization of Securities Commissions (IOSCO). However, the ASEAN Standards do exceed some of the dated IOSCO standards where appropriate. They also fully adopt the accounting and auditing standards of the International Financial Reporting Standards (IFRS) and International Standards on Auditing (ISA).⁹¹ The “Plus Standards” contain additional standards that are required by some ASEAN jurisdictions due to their individual market practices, laws or regulations.⁹²

The adoption of the IOSCO standards on cross-border offerings on stock shares or equity brings to fore the harmonization of the ASEAN financial integration with the international finance structure. To this extent and on the matter of international cross-border offering on equity, ASEAN becomes a regional agenda-setter while recognizing the IOSCO as a standard-setter. Similarly, the adoption by member-states of ASEAN of anti-money laundering laws reflects ASEAN's cooperation with standards of international finance law on the subject of laundering money and cleansing the international finance legal structure of dirty money. ASEAN's effort at joining the international community's campaign against money laundering shows both the cooperation and the parallelism that it has with other global or regional efforts at financial integration.

The development and the achievements of the ASEAN as discussed also illustrates that ASEAN is in the path towards greater harmonization and cooperation of its rules and standards at financial integration with the region as well as with the global community through adoption or acquiescence to soft law that are enacted by the non-traditional and non-state actors. The adoption of the “plus-standards scheme” recognizes the economic development divide among ASEAN's member-nations. Since there is a sequencing requirement to be accomplished to minimize the development

⁸⁹ ASEAN, *The ASEAN and Plus Standards Scheme*, ASEAN WEBSITE, available at <http://www.asean.org/news/item/the-asean-and-plus-standards-scheme> (last visited Apr. 12, 2015).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

gaps between and among its members as it cooperates and harmonizes its rules and standards with the global community, the “plus-standards scheme” adapts well with the ASEAN Way of consensus building at financial integration.

History shows that major steps that led to regionalism were usually taken as a reaction to shocks—while the Second World War prompted the creation of the European Coal and Steel Community in 1951, the ASEAN+3 Finance Ministers Meeting was established in response to the crisis of 1997 – 1998.⁹³ The 2008 – 2009 GFC underscored the potential pitfalls of unfettered deregulation and premature opening of financial markets in emerging economies.⁹⁴ It led to many proposals on a wide range of reforms in financial markets, institutions, and regulatory systems, both regional and global like the Basel III Accord.⁹⁵ ASEAN’s history of its road to regional financial integration has a parallel to that of the other regions of the world. ASEAN’s present path in terms of legal framework shows a similar directional path of cooperation and harmonization with the standards of international finance rules.

III. CONCLUSION

The ASEAN Way spawned from practical considerations. In an effort to deviate from impinging on jurisdictional sovereignties of its member-nations, the ASEAN Way of consensus-building was born; it has embedded practical ways of solving interregional issues already preferred by its member-nations for decades. Having spawned from practical considerations, this ASEAN Way is capable of understanding the requirements of harmonization and cooperation in cross-border supervision and regulation of international finance regulations. Already, the ASEAN Way assists the member-states to understand that if this financial integration is not performed in a manner that the global finance community cannot assimilate, the “reputational costs” far outweigh against the benefits of self-dealing. The ASEAN Way carries a sound practical base when it interacts with soft law. The practical premise of the ASEAN Way is consistent with the path of harmonization and cooperation at cross-border supervision and regulation of the flow of global capital in international finance. Harmonization of rules by regulatory agencies

⁹³ Geneshan Wignaraja & Jenny Balboa, *ASEAN shouldn't get hung up on the AEC Deadline*, EAST ASIA FORUM, Dec. 25, 2014, at <http://www.eastasiaforum.org/2014/12/25/asean-cant-get-hung-up-on-the-aec-deadline/>.

⁹⁴ ASIAN DEVELOPMENT BANK, *supra* note 36.

⁹⁵ *Id.*

of ASEAN member nations falls short of traditional hard law. Cooperation between these regulatory agencies in sharing information and surveillance fits the ASEAN Way of consensus building in decision-making. The ASEAN Way is a perfect fit to how soft law works in the regulation of cross-border capital.

ASEAN countries, damaged by the ramifications of past GFCs, have decentralized from international entities of western nature to safeguard themselves better. In the process, the ASEAN has set up its own entities and frameworks, which cater better to their unique needs on account of its uniquely different place in the world with its own culture, politics, and socioeconomic needs. The development and the achievements of the ASEAN approach to financial integration consist of soft law agreements and not hard ones, the latter consisting more of binding treaties and domestic law. The desire of ASEAN member-states to maintain sovereignty and not fall prey to globally hegemonic practices is balanced with the desire of achieving multinational financial relations, albeit, in its smaller corner of the globe.

The ASEAN's establishment consisting of the member-states' respective Finance Ministers and Central Bank Governors and its creation of working groups composed of the Deputies Governor to create and implement ASEAN's actions at regional financial integration is a recognition of acting not in the traditional state-action ways that is known in traditional international law. ASEAN's creation of entities, committees and task forces that adopts standards by non-state actors like IOSCO, the Basel Agreements, the World Bank or the IMF, among others, highlights that non-state actors are preferred to immediately address the constantly changing concerns of international finance. Soft law agreements are most apt since enacting laws and passing treaties would perhaps prove to be too slow to address the dynamic nature of movements in global capital. This is rightfully so since with the interconnectedness of the economies of nations, a collapse in the economy of one state tends to topple the house of cards even before hard law can establish itself. Furthermore, the entities created by the ASEAN consisting of Central Bank Governors and their deputies to address its own financial integration mirror that of other international entities that have not attained any traditional state personality, punctuating further the intuitive resort to a soft law framework in regulating global capital.

The correctness of ASEAN's path of actions shall be determined by its studies and statistics that will be utilized to understand the region's economic peculiarities. The depth of its actions shall be determined over time. But this path of actions and depth of its financial integration can only become irreversible and true to the ASEAN vision if it were contained in a legal

framework with an implicit structure of practical disincentives not to prefer domestic laws *per se* in its battle against systemic risks that is embedded in international finance. Literature in economics abound with thoughts that too much public debt vis-à-vis gross domestic production is a cause for GFC, like the AFC of 1997, or that too much private debt vis-à-vis gross domestic production is the rightful cause of such GFC, like the 2008 Financial Crisis arising from the sub-prime mortgage-debts in the U.S. Whether it is public or private debt that is the cause of the GFC, both are debts in nature and the current global capital is just so awash with debt capital and its consequential risks. Debts create risks in the system of global finance. Variances in their global regulation by nations add to the systemic risks. This explains why systemic risk management is the decade-old focus in the management of GFCs by state and non-state actors alike. Financial integration in ASEAN not only provides the foundation for regional economic growth but also allows the spread of systemic risk among member-states to manageable limits. Decisions as to whether member nations of the ASEAN should utilize for development only such capital as is closest to the real economy, and less of debt capital, are issues for economists. Structuring a legal framework where soft law and the ASEAN Way intuitively create a legal framework that offers a state disincentive to prefer domestic laws over compliance to an integrated global financial rules and regulation in the ASEAN is an issue for the rule of law.

The formulation of disincentives to prefer domestic laws by ASEAN's member-states in their cooperation and harmonization with international finance is proposed to be the subject of a future study in the continuing formation of the ASEAN legal framework on financial integration.