THE PERSISTENCE OF NON-TARIFF MEASURES IN ASEAN: A QUESTION OF COMPLIANCE*

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ABSTRACT

While various treaties and agreements have substantially reduced tariff rates on most traded goods, international trade is still burdened by restrictive laws and regulations. As a result, policymakers have shifted their focus to non-tariff measures ("NTMs") which have the potential to adversely affect trade flows. One such example is the Association of Southeast Asian Nations' (ASEAN) efforts to harmonize and reduce non-tariff measures, as well as eliminate non-tariff barriers, all of which are embodied in both treaty and soft law commitments. Nevertheless, these measures have persisted, and even increased, in ASEAN during the past decades.

In analyzing the reasons for the persistence of NTMs in ASEAN, the logical starting point is an examination of the effectiveness of the foundational legal instruments. Does the ASEAN trade regime sufficiently incentivize compliance with the NTM-related commitments? This analysis is guided by the compliance theories under the law and economics discipline. It is suggested that the language of the existing legal instruments insufficiently motivates compliance by the participating States. The lack of effective enforcement and dispute settlement mechanisms, such as in the form of a supranational body, complicates this compliance problem. The region's failure to provide effective incentives for compliance may provide one explanation for the persistence of NTMs.

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I. INTRODUCTION

Over the course of recent decades, the commitments of the Association of Southeast Asian Nations (ASEAN) to eliminate non-tariff barriers ("NTBs") and increase the transparency of non-tariff measures ("NTMs") have been embodied in several instruments, ranging from non-binding declarations to binding treaties. However, the consensus is that the ASEAN's efforts in this regard are still unsuccessful and need to be bolstered. This implies that these legal instruments have failed to influence the behavior of the ASEAN's Member States.

In analyzing the reasons for the persistence of NTMs and NTBs in Southeast Asia, the logical starting point is the effectiveness of the foundational legal instruments. Do Member States have an interest in complying with their international commitments? Specifically, does the ASEAN trade regime sufficiently incentivize compliance with the NTM- and NTB-related commitments? These issues regarding compliance with, and the effectiveness of, ASEAN international law obligations are the main issues dealt with in this paper. This paper proposes one explanation for the persistence of NTMs and NTBs in Southeast Asia: that the ASEAN's legal instruments have failed to provide sufficient incentives for compliance.

This paper begins with an overview of the main compliance theories in international law and law and economics, with emphasis on the latter. This discussion is not meant to provide an exhaustive review of the literature, but merely to guide subsequent discussions. Part II describes the ASEAN trade regime and enforcement framework. Part III provides an analysis of this trade regime, guided by the law and economics theories on compliance.

II. THEORIES OF COMPLIANCE

The key idea underlying the concept of compliance is conformity of behavior with the requirements of legal and regulatory institutions.[1] Thus, compliance in international law refers to (i) the extent to which signatory States have changed their behavior in accordance with their procedural and substantive obligations under treaties, customary international law and soft

[1] Joan Donoghue et al., *Theme Plenary Session: Implementation, Compliance and Effectiveness*, 91 AM. SOC'Y INT. L. 50, 52 (1997).

law instruments,[2] and (ii) whether their actions are in line with the spirit of the agreement.[3]

Implementation and effectiveness are concepts related to compliance. Implementation refers to the actions undertaken by states to fulfill their international law obligations.[4] Implementing actions are needed where the status quo in the signatory states diverges from the norms, obligations and requirements under international agreements. Where the existing regimes already conform to these international obligations and requirements, the signatory state is already compliant. Effectiveness refers to whether the international agreement has achieved its stated objectives or addressed the problems it was intended to resolve or both.[5] An international regime may be deemed ineffective, despite high compliance rates by signatory States, where the stated goals and objectives remain unattained or where the problems remain unresolved. Nevertheless, widespread noncompliance may be a sign of an ineffective legal regime.[6]

While noncompliance is a sign of ineffectiveness, compliance behavior does not necessarily prove the power of international law to influence states. Regularity of behavior among States may occur for reasons unrelated to the obligatory power of international law. Where states share common interests, for example, cooperation can occur even in the absence of law.[7]

Table 1 presents a hypothetical one-shot game involving two States, *A* and *B*, who share common interests. These might be neighboring States sharing a common border. In this scenario, each state does its best if it respects the border. Perhaps neither state has sufficient military and economic resources to launch an effective attack on the other. It is also possible that the costs of any such expansion outweigh the benefits gained from the additional territory. If *A* attacks *B*, the former wastes too many resources. *B* suffers a

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[2] Such as memoranda of understanding, joint agreements, and declarations which are non-binding instruments which contain promises or expressions of intent about future State actions; *Id.* at 59.

[3] Donoghue, *supra* note 1, at 59.

[4] *Id.*

[5] *Id.*

[6] Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345, 346 (1998).

[7] *See, e.g.,* Andrew Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1843 (2002) [hereinafter "Guzman, *A Compliance-Based Theory*"]; JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW 27–28 (2005); ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 25–26 (2008) [hereinafter "GUZMAN, HOW INTERNATIONAL LAW WORKS"].

small loss because its territory will be diminished, but it will suffer greater loss if it attacks *A* as well. If both respect the border, the maximum joint payoff is achieved. The dominant strategy of each self-interested state is to respect the border, regardless of the action of the other state. This result would have occurred even in the absence of a treaty or binding legal norm.[8] In other words, the legal rule merely requires the states to do what they would have already done.

		State B	
		attack	respect
State A	attack	-10, -10	-5, 10
	respect	10, -5	15, 15

TABLE 1. Shared Interests

International law can exert more influence when States find themselves in either a coordination game or a prisoner's dilemma. In a pure coordination game, the states have an incentive to cooperate. However, cooperation depends on the successful coordination of actions between the states. As shown in *Table 2*, the highest payoffs are seen when the states coordinate their actions, with both converging on either *(X,X)* or *(Y,Y)*. The problem becomes one of determining the focal points to maximize the total payoffs.[9] One example is the use of harmonized rules and standards for the international carriage of persons and goods by air. A common set of rules and standards benefits states as this decreases the costs associated with air transport. Once a set of rules has been determined, no state has an incentive to deviate. Thus, international law matters as a way of identifying cooperative actions and establishing a focal point for coordination.[10]

		State B	
		action X	action Y
State A	action X	5,5	0,0
	action Y	0,0	5,5

TABLE 2. Pure Coordination Game

Cooperation is most difficult when the States find themselves in a prisoner's dilemma. *Table 3* presents a bilateral one-shot example of this game, where the States can maximize their joint payoffs through coordination. However, coordination is not assured as they can each gain at the other's

[8] GOLDSMITH & POSNER, *supra* note 7, at 28; Guzman, *A Compliance-Based Theory, supra* note 7, at 1842–43; GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 7, at 29.

[9] GOLDSMITH & POSNER, *supra* note 7, at 32–33; GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 7, at 26–27.

[10] GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 7, at 28.

expense through defection.[11] As each state's dominant strategy is defection, the predicted outcome is a failure of coordination.[12]

		State B	
		defect	cooperate
State A	defect	5,5	10,1
	cooperate	1,10	8,8

TABLE 3. Prisoner's Dilemma

This prediction, however, is too bleak and unrealistic. States do comply with their international law obligations, even in prisoner's dilemma situations.

A. International Law Theories of Compliance

International law's main compliance theories are the legitimacy model and the managerial model. These theories rest on the traditional positivist and rule-based views of laws, where the focus is on the differentiation of law from non-law instruments.[13]

Legitimacy theory rests on the essential assumption that compliance occurs when rules have "come into being in accordance with the right process."[14] Legitimacy is defined as "a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."[15] Provided certain legitimizing factors were present, rules are able to generate a strong compliance pull, while the absence of these factors leads to a weaker compliance pull.[16]

However, the assertion that legitimacy generates compliance fails to explain the importance of legitimacy and the reason behind the causal link

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[11] GOLDSMITH & POSNER, *supra* note 7, at 29–32; Guzman, *A Compliance-Based Theory*, *supra* note 7, at 1842; GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 7, at 29–32.

[12] GOLDSMITH & POSNER, *supra* note 7, at 30; Guzman, *A Compliance-Based Theory*, *supra* note 7, at 1842; GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 7, at 32.

[13] Kingsbury, *supra* note 6, at 348-349; GOLDSMITH & POSNER, *supra* note 7, at 15.

[14] Thomas Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 706 (1988).

[15] THOMAS FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24–25 (1990).

[16] THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 24 (1998).

between legitimacy and compliance. This shortcoming is the main weakness of the legitimacy theory.[17]

The managerial model is attributed to Chayes and Chayes.[18] Focusing mainly on treaties, they examined the mechanisms underlying the compliance of States. This model eschews the importance of sanctions and other coercive mechanisms, asserting instead that compliance can be achieved through "a cooperative, problem-solving approach."[19] This model assumes that States have a general propensity to comply with international law due to considerations of efficiency, interests and the force of norms. First, compliance minimizes transaction costs, as States no longer need to constantly perform cost and benefit analyses for every decision; thus, compliance leads to efficiency. Second, international agreements and treaties are consent-based, wherein States would not have agreed to if such instruments failed to serve their interests. Also, a general compliance norm generates a compliance pull which influences States to comply.[20] In other words, the existence of a treaty itself creates a normative obligation to comply. Given this general propensity to comply, compliance is the expected outcome of international legal regimes.

Considering that states have a general propensity to comply with their treaty obligations, deliberate violations are the exception and can be traced to certain factors. One such factor is the use of ambiguous and indeterminate treaty provisions, which "produce a zone of ambiguity within which it is difficult to say with precision what is permitted and what is forbidden."[21] Alternatively, breaches may be traced to the states' limited capacity to perform their undertaking and obligations due to the lack of scientific, technical, bureaucratic, and financial resources. States may also lack the capacity to perform when the treaty obligations aim to constrain the actions of individuals and private entities.[22] Lastly, breaches may be explained by the time lag which occurs before the social or economic changes required by treaty obligations can take effect.[23]

The managerial model is criticized for its limited applicability to treaties and international agreements which only address coordination

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[17] Guzman, *A Compliance-Based Theory*, *supra* note 7, at 1834–35.

[18] ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 2, 3–9 (1995).

[19] *Id.* at 3.

[20] *Id.* at 8–9.

[21] *Id.* at 10.

[22] *Id.* at 14.

[23] *Id.* at 15.

problems,[24] and its inability to explain the mechanisms and motivations underlying state compliance. Consent-based theories such as this merely assume that states comply with the law without explaining why mere consent would suffice to generate actual compliance. In reality, consent alone does not provide a strong enough incentive to comply, especially if compliance is costly or against the state's self-interest.[25] Also, the notion of a compliance norm is a mere assumption which fails to explain why a state would comply with burdensome obligations, particularly where international obligations conflict with national interests and objectives.[26]

B. Law and Economics Theories of Compliance

The compliance theories in law and economics scholarship use rational choice assumptions, particularly the existence of self-interested and rational states, in explaining how, when, and why States comply with international law. The main proponents are Goldsmith, Posner, and Guzman.

Goldsmith and Posner focus on states as unitary actors "acting rationally to maximize their interests, given their perception of the interests of other states and the distribution of state power."[27] Unlike the managerial model, they shun the assumption of state preference for compliance for two reasons. First, compliance will not occur at the expense of other state preferences, such as for security or economic goods. Second, assuming the existence of a preference for compliance fails to explain the mechanisms underlying actual compliance. Thus, this model rejects the view that states comply with the law for non-instrumental and normative reasons.[28]

They modeled international interactions as a two-stage game involving states.[29] During the first stage, states can allocate resources among themselves in accordance with a set of rules—for example, international law—which is consistent with their interests and capacities. The second stage arises because of a shock which threatens the stability of the first stage status quo. Due to transaction costs and imperfect information, states are incapable of efficiently adjusting the initial set of rules to accommodate this shock. The resulting patterns of behavior could fall under any, or a combination of four types:

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[24] Guzman, *A Compliance-Based Theory*, *supra* note 7, at 1832–33; GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 7, at 16.

[25] Guzman, *A Compliance-Based Theory*, *supra* note 7, at 1832.

[26] *Id.*

[27] GOLDSMITH & POSNER, *supra* note 7, at 3.

[28] *Id.* at 14–15.

[29] *Id.* at 10–11.

a. In *coincidence of interest*, the dominant strategy of each self-interested state is to act in accordance with the set of rules, regardless of the actions of the other States. In equilibrium, the States seemingly act in accordance with the rules, whereas in reality they are each acting independently in their own interests.[30]

b. In *coordination*, each state is indifferent to the different possible states of the world. The priority is to create a focal point on which the states can plan their actions, thus, avoiding conflict. In this case, states can achieve higher payoffs when they coordinate their actions, and no state has an incentive to defect from the agreed set of rules.[31]

c. The states may find themselves in a repeated prisoner's dilemma. While it may be in a state's interest to deviate from the initial set of rules, this action may set off retaliatory actions and other sanctions on the part of the other Parties, making all states worse off. Under *cooperation*, self-interested states refrain from seeking short-term benefits in order to preserve medium- and long-run benefits. The prisoner's dilemma may be overcome if: (i) the States are aware of what qualify as cooperative acts; (ii) they have sufficiently low discount rates; (iii) the game is repeated indefinitely; and, (iv) the short-run payoffs do not outweigh the long-run payoffs.[32]

d. If a state, or a coalition of like-minded states, is powerful enough to pursue its interests even at the expense of weaker states and in deviation of the set of rules, then a state of *coercion* exists. Weaker states are forced to sacrifice their interests at the behest of powerful states because the threat of costly punishment from the latter is credible. In equilibrium, the strong and weak states act rationally in accordance with their beliefs regarding the interests and relative power of the other states.[33]

According to Goldsmith and Posner, international law is "endogenous to state interests" as it "emerges from states' pursuit of self-

[30] *Id.* at 11–12, 27–28.
[31] *Id.* at 12, 32–35.
[32] *Id.* at 12, 29–32.
[33] *Id.* at 12, 28–29.

interested policies on the international stage."[34] Thus, law is the result of the rational pursuit of interests by states, constrained only by the interests and relative power of other states.

Elaborating on the above assertions, Goldsmith and Posner then discussed the mechanisms underlying compliance. The basic idea is that states enter treaties in order to reduce uncertainty, thus, encouraging cooperation or coordination.[35] In establishing treaty and soft law regimes, states agree on common terms, necessarily distinguishing acts of cooperation from defection. Even in a multilateral setting, states either comply or defect in pairs, with "each state in a pair complying with the common terms as long as the other state in the pair does."[36] This implies that any punishment for defection will come from the affected state alone. The corollary is that despite the multilateral nature of a regime, there will be heterogeneity in the behavior of states in line with their interests and relative power.[37] Compliance occurs when states "fear retaliation from the other state or some kind of reputational loss, or because they fear a failure of coordination."[38]

Meanwhile, Guzman presents a compliance theory which shows how international law can affect a state's behavior even in the absence of an effective enforcement system. This theory defines international law as those obligations that affect the incentives and behavior of states,[39] making it more likely that a state will act in a manner consistent with its obligations and promises.[40] International law, thus, encompasses non-binding soft law[41] instruments such as joint declarations and memoranda of understanding.[42]

Guzman assumes that states rationally pursue solely their own interests, without any innate preference for compliance and without regard for the legitimacy of laws.[43] This implies that cooperation is only likely if this is in the interest of the involved states. In situations where cooperation is easy

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[34] *Id.*

[35] *Id.* at 84–85.

[36] *Id.* at 87.

[37] *Id.* at 88.

[38] *Id.*

[39] Guzman, *A Compliance-Based Theory*, *supra* note 7, at 1878.

[40] *Id.* at 1882.

[41] "Soft law" refers to non-binding rules and instruments which "interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct." Andrew Guzman & Timothy Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS, 171, 174 (2010).

[42] Guzman, *A Compliance-Based Theory, supra* note 7, at 1879.

[43] GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 7, at 16–17.

to achieve,[44] international law requires nothing more than what states would have done even in the absence of law.[45] The more interesting cases are those where cooperation is difficult, such as prisoner's dilemma games, as these show that international law does affect state behavior.[46]

Even though the highest overall payoffs will be achieved through mutual cooperation, the expected equilibrium in one-shot prisoner's dilemma games is defection.[47] International law is one mechanism used to overcome this dilemma. Nevertheless, in one-shot games and without any effective enforcement system, doubts as to the effectiveness of international law regimes are not unwarranted. If the parties are incapable of imposing credible sanctions for defection, the payoff schemes—and the incentives to defect—are left unchanged. However, it is illusory to categorize inter-state relations as one-shot games. The repeated nature of state interactions enables the "Three Rs of Compliance"—reciprocity, reputation, and retaliation—to promote cooperation.[48]

Reputational sanctions[49] and reciprocal actions are not intended to penalize a defecting state. Rather, both are adjustments in the compliant states' beliefs and actions, respectively, because of the defection. Specifically, a reputation for compliance "consists of judgments about the state's past behavior and predictions made about future compliance based on that behavior."[50] Reciprocity is the "adjustment in a state's behavior motivated by a desire to maximize the state's payoffs in light of new circumstances or information."[51] Retaliation, on the other hand, refers to "actions that are costly to the retaliating state and intended to punish the violating party."[52]

According to Guzman, reputation—even in the absence of retaliation and reciprocity—can effectively induce compliance as it does not require compliant States to embark on costly actions.[53] Compliant states only need to assess potential or current partners' reputations, which act as proxies for their actual willingness to comply with legal obligations. Habitual compliance will

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[44] Such as games of common interest, pure coordination, and the battle of the sexes. *Id.* at 25–29.

[45] *Id.*

[46] *Id.* at 29–30.

[47] *Id.* at 30–31.

[48] *Id.* at 33–34.

[49] This refers to the costs suffered by a State's reputation in case of noncompliance. *Id.* at 33.

[50] GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 7, at 33.

[51] *Id.*

[52] *Id.* at 34.

[53] *Id.* at 39–40.

create a good reputation, which allows states to easily find partners, enter future agreements, and extract more generous concessions.[54] States are assumed to be interested in maintaining a good reputation only to the extent that this improves their payoffs.[55] When a party defects from an agreement, it is implied that its future gains do not eclipse short term gains. In the face of such an incentive to defect, having strong reputational sanctions that outweigh the payoffs from defection can effectively tilt the scales in favor of compliance. In addition, reputational sanctions can also affect the payoffs from future agreements. Their lessened credibility will make it difficult for defecting states to not only enter future agreements, but also to obtain generous concessions from future partners. Thus, if states sufficiently value long-term over short-term gains, compliance with international law is possible due to the value of reputation as collateral for both current and future agreements.[56]

Compliance is also a function of reciprocity. In a prisoner's dilemma, every party has incentive to defect in order to take advantage of possible short-term gains. However, this defection will spur reciprocal defections from the other parties, thus, undermining the future stability of the legal regime. If long-term payoffs outweigh the short-term gains, the mere threat of reciprocal defections may suffice to deter defections. Nevertheless, reciprocity may fail to deter defections if this threat is not credible or is inconsequential to the defecting state.[57] Reciprocity is also ineffective in multilateral settings, specifically where the legal regime aims to address issues involving collection action and public goods. For example, if a state breaches an environmental treaty, it is irrational for the other parties to engage in reciprocal defections as this would undermine the purpose of the treaty, and would be to the detriment of all. As a result, the threat of defections lacks credibility and the "incentive to comply is reduced"[58].

Retaliation plays a role where reputation and reciprocity may not suffice to generate compliance. Retaliatory actions, which are costly for the retaliating State, are only rational if they generate benefits for the retaliating State. One possible benefit is the creation of a credible reputation for punishing defectors whenever the rights and payoffs of the retaliating state are compromised. A State may also resort to retaliation to convince defectors to cease ongoing breaches through the imposition of costly sanctions, thereby

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[54] *Id.* at 35.
[55] *Id.*
[56] *Id.* at 40.
[57] *Id.* at 45.
[58] *Id.* at 65.

making breach costlier than future compliance.[59] As with reciprocity, retaliation is less effective in multilateral scenarios involving public goods due to the free-rider problem. In the event of breach, compliant states have an incentive to free ride on the retaliatory acts of others; thus, the resulting level of retaliation is sub-optimal. This collective action problem lessens the credibility of the threat of retaliation.[60]

Thus, Guzman posits that compliance is a function of reputation, reciprocity, and retaliation. By making instances of breach costlier, states are incentivized to comply. Clearly, international law regimes can affect state behavior.

II. THE ASEAN INTERNATIONAL TRADE REGIME

ASEAN was formed with the signing of the Bangkok Declaration in 1967. Ostensibly, the goal was to "accelerate economic growth, social progress and cultural development in the region."[61] However, during its early days, its primary focus was on political-security issues.[62] It was modeled after the European Free Trade Area's system of open regionalism with a decentralized institutional structure.[63] This structure allowed ASEAN to pursue its consensus-based approach and its policy of non-interference. Specifically, ASEAN has dealt with regional matters using the *ASEAN Way* of cooperation, using informal rules and consensual decision-making which respects the Member States' sovereignty.[64] Essentially, the *ASEAN Way* is a diplomatic process which used "informal discussions to later facilitate a consensus-based decision at official meetings. [...] Accordingly, ASEAN will

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[59] *Id.* at 46–47.

[60] *Id.* at 66–67.

[61] Association of Southeast Asian Nations (ASEAN) Declaration (The Bangkok Declaration), Aug. 8, 1967, *available at* https://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967/.

[62] *See, e.g.* Paul Bowles & Brian MacLean, *Understanding Trade Bloc Formation: The Case of the ASEAN Free Trade Area,* 3 REV. INT'L POL. ECON. 319, 321 (1996); Lay Hong Tan, *Will ASEAN Economic Integration Progress Beyond a Free Trade Area,* 53 INT'L COMP. L. Q. 935 (2004); Robert J.R. Elliott & Kengo Ikemoto, *AFTA and the Asian Crisis: Help or Hindrance to ASEAN Intra-Regional Trade?,* 18 ASIAN ECON. J. 1, 7 (2004); Anja Jetschke, *ASEAN, in* ROUTLEDGE HANDBOOK OF ASIAN REGIONALISM 327, 328 (Mark Beeson & Richard Stubbs eds., 2012).

[63] Jetschke, *supra* note 62, at 330.

[64] *Id.* at 329.

adopt only policies to which all member states agree, either because the policy itself has been modified, or member state positions have converged."[65]

Over the following decades, and in response to calls for a stronger and more effective institution, ASEAN endeavored to reorganize and establish a more centralized structure. This was most notable in the aftermath of the 1997 Asian financial crisis, which culminated in the enactment of the ASEAN Charter and the transformation of ASEAN into a rules-based entity with legal personality.[66] Economic regionalism likewise began to take center stage during the 1990s. Various economic shocks prompted the move towards closer economic integration, in particular, the establishment of the ASEAN Economic Community ("AEC").

A. ASEAN Trade-Related Instruments

ASEAN's efforts to liberalize trade and eliminate trade barriers date from as early as 1977, with the enactment of its first Preferential Trade Agreement. Unlike the region's tariff liberalization measures, there has been limited success in eliminating NTBs and harmonizing NTMs, primarily due to a lack of specific implementing plans.[67] As such, the region's current focus is on the elimination of border and behind-the-border protectionist practices other than tariffs that impede trade.[68] This is reflected in the AEC Blueprint, which contains the guiding principles and main commitments for the creation of the AEC.

Under the AEC Blueprint, the Member States are bound to, among other things:

a. Simplify, harmonize, and standardize trade and customs processes, procedures, and related information flows;[69]

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[65] Lee Leviter, *The ASEAN Charter: ASEAN Failure or Member Failure,* 43 N.Y.U. J. INT'L L. & POL. 159, 167 (2010).

[66] Charter of the Association of Southeast Asian Nations, art. 3, Nov. 20, 2007, *available at* https://asean.org/storage/images/archive/publications/ASEAN-Charter.pdf [hereinafter "ASEAN Charter"].

[67] Myrna Austria, *Non-Tariff Barriers: A Challenge to Achieving the ASEAN Economic Community, in* THE ASEAN ECONOMIC COMMUNITY: A WORK IN PROGRESS 31, 36 (Sanchita Basu Das, Jayant Menon, Rodolfo C. Severino & Omkar Lal Shrestha eds., 2013).

[68] The ASEAN Secretariat, *ASEAN Economic Community Blueprint 2025*, at 3 (2015), *available at* https://www.asean.org/storage/2016/03/AECBP_2025r_FINAL.pdf [hereinafter "AEC Blueprint 2025"].

[69] The ASEAN Secretariat, *ASEAN Economic Community Blueprint*, at 8 (2008), *available at* https://asean.org/wp-content/uploads/archive/5187-10.pdf, [hereinafter "AEC Blueprint"].

b. Establish the ASEAN Trade Facilitation Repository,[70] which shall contain trade-related and NTM-related information. This information will enable the identification and elimination of NTBs;

c. Harmonize standards, regulations, and conformity assessment procedures by aligning them with international practices, where applicable;[71]

d. Develop and implement mutual recognition agreements on conformity assessment for specific sectors;[72] and

e. Work towards the complete elimination of NTBs[73] through enhanced transparency, effective surveillance mechanisms, and the establishment of regional rules and regulations that are consistent with international best practices.[74]

The AEC Blueprint is supplemented by the ASEAN Trade in Goods Agreement ("ATIGA"). This treaty specifically addresses NTMs and aims for the removal of existing NTBs. First, it binds the Member States not to adopt or maintain any NTM on the intra-ASEAN trade of any good, except in accordance with either their WTO rights and obligations or with the provisions of ATIGA. Second, Member States have to ensure (i) the transparency of permitted NTMs, and (ii) that these NTMs do not create "unnecessary obstacles in trade among the Member States."[75]

Member States have further committed not to adopt or maintain any prohibition or quantitative restriction on the intra-ASEAN trade of any good.[76] They likewise reiterated their commitment to review NTMs in order to identify and eliminate NTBs,[77] following the schedule provided by the AEC Blueprint.[78] The list of NTBs for elimination shall be agreed upon by the

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[70] *Id.*

[71] *Id.* at 9.

[72] *Id.*

[73] By 2010 for Brunei Darussalam, Indonesia, Malaysia, Singapore, and Thailand; by 2012 for the Philippines; and by 2015, subject to a certain flexibility for Cambodia, Lao People's Democratic Republic, Myanmar, and Vietnam; *Id.* at 7.

[74] *Id.*

[75] ASEAN Trade in Goods Agreement, art. 40, ¶ 2, Feb. 26, 2009, *available at* http://finder.tariffcommission.gov.ph/index.php?page=atiga [hereinafter "ASEAN Trade in Goods Agreement"].

[76] ASEAN Trade in Goods Agreement, *supra* note 75, art. 4.

[77] ASEAN Trade in Goods Agreement, *supra* note 75, art. 42, ¶ 1.

[78] *See* AEC Blueprint, *supra* note 69.

ASEAN Free Trade Area ("AFTA") Council, based on the recommendations of a number of ASEAN bodies.[79] The Coordinating Committee for the Implementation of the ATIGA is also tasked with the review of NTM notifications by the Member States and reports from the private sector, in order to identify NTBs that should be eliminated.[80]

Furthermore, the ATIGA contains provisions which address standards, technical regulations, conformity assessment procedures, and sanitary and phytosanitary measures which aim to prevent, if not eliminate, unnecessary barriers to trade.[81] For example, Member States can opt to harmonize their standards and technical regulations with international standards and practices.[82] For standards, Member States can pursue alternative recourses such as the promotion of mutual recognition of conformity assessment results, the development and implementation of Sectoral Mutual Recognition Agreements and Harmonized Regulatory Regimes, or a combination of these actions.[83]

While the launch of the AEC was originally scheduled for 2020, it was brought forward to 2015. However, in November 2015, ASEAN recognized its failure to fulfill key obligations such as the elimination of NTBs. As a result, ASEAN adopted the AEC Blueprint 2025 as the successor instrument to the AEC Blueprint. This instrument aims to complete the unfinished actions under the previous Blueprint, such as the elimination of NTBs, the convergence of the Member States' trade facilitation regimes through the harmonization of standards and mutual recognition agreements, the improvement of conformity assessment procedures, and the enhancement of transparency and information flows between Member States.[84]

B. Dispute Settlement and Enforcement Mechanisms

Enforcement systems can serve an important role in incentivizing States to comply with their obligations. Enforcement in ASEAN comes in the

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[79] These include the Coordinating Committee for the Implementation of the ATIGA, the ASEAN Consultative Committee on Standards and Quality, the ASEAN Committee on Sanitary and Phytosanitary, the working bodies under ASEAN Directors-General of Customs, and other relevant ASEAN bodies. ASEAN Trade in Goods Agreement. ASEAN Trade in Goods Agreement, art. 42, ¶ 1.

[80] ASEAN Trade in Goods Agreement, *supra* note 75, art. 42, ¶ 1.

[81] *See* ASEAN Trade in Goods Agreement, *supra* note 75, arts. 73–76, 79, 81.

[82] *See* ASEAN Trade in Goods Agreement, *supra* note 75, arts. 73, 79.

[83] *See* ASEAN Trade in Goods Agreement, *supra* note 75, art. 73.

[84] AEC Blueprint 2025, *supra* note 68, at 3–6.

form of dispute settlement mechanisms which rely mainly on voluntary submissions by Member States.

The Treaty of Amity and Cooperation represents an early attempt by ASEAN to institute a dispute settlement procedure which is "rational, effective and sufficiently flexible."[85] Notably, it embodies the region's commitment to abide by the *ASEAN Way* by establishing the following as its guiding principles for intra-ASEAN relations:

a. Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;
b. The right of every State to lead its national existence free from external interference, subversion, or coercion;
c. Non-interference in the internal affairs of one another;
d. Settlement of differences or disputes by peaceful means;
e. Renunciation of the threat or use of force;
f. Effective cooperation among themselves.[86]

Under this treaty, a High Council[87] shall take cognizance of intra-regional disputes.[88] Member States are bound to settle differences amicably through friendly negotiations, without resorting to threats or use of force.[89] If negotiations between the parties fail, the High Council is empowered to recommend the use of appropriate settlement mechanisms[90] along with other appropriate and necessary measures.[91] However, this provision is subject to a consensus requirement, for instance, that all the disputants agree to the use of the recommended settlement mechanism.[92]

The Treaty of Amity and Cooperation, however, does not provide for monitoring and implementing measures, and sanctions in case of noncompliance with the results of the dispute settlement mechanisms.

As for disputes involving ASEAN economic agreements, the Member States can resort to the provisions of the Protocol of Enhanced Dispute

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[85] Treaty of Amity and Cooperation in Southeast Asia, pmbl., Feb. 24, 1976, 27 I.L.M. 610 [hereinafter "Treaty of Amity and Cooperation in Southeast Asia"].

[86] Treaty of Amity and Cooperation in Southeast Asia, *supra* note 85, art. 2.

[87] This High Council shall be composed of ministerial representatives from the Member States. Treaty of Amity and Cooperation in Southeast Asia, *supra* note 85, art. 14.

[88] Treaty of Amity and Cooperation in Southeast Asia, *supra* note 85, art. 14.

[89] Treaty of Amity and Cooperation in Southeast Asia, *supra* note 85, art. 14.

[90] Such as good offices, mediation, inquiry, or conciliation. Treaty of Amity and Cooperation in Southeast Asia, *supra* note 85, art. 15.

[91] Treaty of Amity and Cooperation in Southeast Asia, *supra* note 85, art. 15.

[92] Treaty of Amity and Cooperation in Southeast Asia, *supra* note 85, art. 16.

Settlement Mechanism.[93] Member States may initiate consultations regarding any disputed economic agreement.[94] In case of unsuccessful consultations, the complainant may raise the matter up to the Senior Economic Officials Meeting and request that a panel be set up. The Senior Economic Officials Meeting is, however, free to decide by consensus not to constitute a panel.[95] Panel reports may be appealed by Member States; otherwise, the Senior Economic Officials Meeting shall adopt the report.[96] The disputing parties may also request for good offices, conciliation, or mediation procedures.[97] Thus, this Protocol is non-obligatory, with Member States retaining the right of recourse to diplomatic channels.

Disputants must comply within sixty days of the adoption by the Senior Economic Officials Meeting of either the panel or Appellate Body report, unless the parties agree to a lengthier deadline.[98] In case of noncompliance, the other parties may initiate negotiations for compensation. However, the payment of compensation is purely voluntary. If the parties fail to agree on compensation, any party may request for authorization to suspend the concessions or other obligations under the economic agreement.[99] However, these remedies are temporary measures which shall last only until the disputed measure has been removed, the report's recommendations have been adopted, or when a mutually satisfactory solution has been reached.[100]

For more general disputes, the ASEAN Charter established an encompassing dispute mechanism for the region. It bound the Member States to abide by the principle[101] of adherence to multilateral trade rules and rules-based regimes in ensuring the implementation of economic commitments.[102] It likewise reaffirmed the primacy of the *ASEAN Way* through the adoption of the following principles: respect for the independence, sovereignty,

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[93] Protocol on Enhanced Dispute Settlement Mechanism, Nov. 29, 2004, *available at* https://asean.org/?static_post=asean-protocol-on-enhanced-dispute-settlement-mechanism, [hereinafter "Protocol on Enhanced Dispute Settlement Mechanism].

[94] Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 93, art. 3.

[95] Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 93, art. 5, ¶ 1.

[96] Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 93, art. 9.

[97] Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 93, art. 4.

[98] Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 93, art. 15, ¶ 1.

[99] Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 93, art. 16, ¶ 2.

[100] Protocol on Enhanced Dispute Settlement Mechanism, *supra* note 93, art. 16, ¶ 9.

[101] Member States are also bound to abide by the following principles: the renunciation of aggression; the peaceful settlement of disputes; and enhanced consultation on intra-regional matters. ASEAN Charter, *supra* note 66, art. 2, ¶ 2(c)–(d), (g).

[102] ASEAN Charter, *supra* note 66, art. 2, ¶ 2(n).

equality, territorial integrity and national identity of all Member States;[103] non-interference in the internal affairs of Member States;[104] respect for the right of every Member State to lead its national existence free from external interference, subversion, and coercion;[105] and, abstention from participation in any policy or activity which threatens the sovereignty, territorial integrity, or political and economic stability of Member States.[106]

In the event of any disputes, Member States must resolve them peacefully through dialogue, consultation, and negotiation.[107] They may resort to good offices, conciliation, or mediation which shall be conducted by either the ASEAN Chairman or its Secretary-General.[108] Compliance by Member States with the results of any dispute settlement mechanism shall be monitored by the Secretary-General.[109] Any non-compliance may be referred by affected Member States to the ASEAN Summit[110] for a decision.[111] However, the Charter does not provide for sanctions in case of noncompliance with, or breach of, the dispute settlement findings and other ASEAN instruments. The Charter also retains the *ASEAN Way* of decision-making through consultation and consensus,[112] although the ASEAN Summit may opt for a different decision-rule on a case-by-case basis where no consensus can be reached.[113]

As for the implementation of the AEC-related commitments, the AEC Blueprint provides for strategic schedules and target implementation dates.[114] In order to monitor the region's progress, the AEC Blueprint recommends the development and maintenance of statistical indicators and AEC scorecards.[115] But while the monitoring process was intended to be

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[103] ASEAN Charter, *supra* note 66, art. 2, ¶ 2(a).
[104] ASEAN Charter, *supra* note 66, art. 2, ¶ 2(e).
[105] ASEAN Charter, *supra* note 66, art. 2 ¶ 2(f).
[106] ASEAN Charter, *supra* note 66, art. 2 ¶ 2(k).
[107] ASEAN Charter, *supra* note 66, art. 22, ¶ 1.
[108] ASEAN Charter, *supra* note 66, art. 23, ¶ 2.
[109] ASEAN Charter, *supra* note 66, art. 27, ¶ 1.
[110] This is the supreme policy-making body of ASEAN and is composed of the Heads of State or Government of the Member States. ASEAN Charter, *supra* note 66, art. 7, ¶ 1, 2(a).
[111] ASEAN Charter, *supra* note 66, art. 27, ¶ 2.
[112] ASEAN Charter, *supra* note 66, art. 20, ¶ 1.
[113] ASEAN Charter, *supra* note 66, art. 20, ¶ 2.
[114] AEC Blueprint, *supra* note 69, at 26.
[115] *Id.* at 27.

conducted in phases,[116] only one AEC Scorecard Report[117] was published in 2012.[118] Instead of providing detailed accounts of the implementation process, the Scorecard adopted a yes-or-no checklist format. This checklist tracked whether the measures aiming to achieve an overall target had been fully implemented. Since it merely provided an overview, the Scorecard failed to identify which measures the Member States have failed to enact.

As with other ASEAN instruments, neither the AEC Blueprint nor the AEC Blueprint 2025 provided sanctions and penalties in case of noncompliance with, and breach of, its key commitments and provisions.

III. ASEAN COMPLIANCE WITH NTB- AND NTM-RELATED COMMITMENTS

Given the state of the law in Southeast Asia, it would be logical to expect a reduction in NTMs in the region. However, this expectation is belied by actual data.

Figure 1[119] illustrates the trends in the mean values of the region's frequency ratios from 2000 to 2015. The frequency ratio[120] shows the percentage of imported products that are regulated by at least one NTM. This is an inventory measure which shows the incidence of NTMs. In the case of ASEAN, the region's frequency ratios have been steadily rising up from 0.51 in 2000 to 0.87 in 2015. On average, a little over half of the region's imports were affected by NTMs in 2000. By 2015, almost 90% of the region's imports were regulated by at least 1 NTM. While NTMs are not necessarily

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[116] The intent was to monitor the progress in 4 phases: 2008–2009, 2010–2011, 2012–2013, and 2014–2015. The ASEAN Secretariat, *A Blueprint for Growth ASEAN Economic Community 2015: Progress and Key Achievements,* at 7–8 (2015), *available at* https://www.asean.org/storage/images/2015/November/aec-page/AEC-2015-Progress-and-Key-Achievements.pdf.

[117] Which covered only the first two (2) phases. *Id.*

[118] *Id.*

[119] Based on the author's calculations using data from the Trade Analysis Information System ("TRAINS") Global Database on NTMs. United Nations Conference for Trade and Development (UNCTAD), *Trade Analysis Information System Global Database on Non-Tariff Measures* (2016), *available at* https://trains.unctad.org/Default.aspx.

[120] The frequency ratio (F_j) is obtained, thus:

$$F_j = \left[\frac{\sum D_i M_i}{\sum M_i}\right] \times 100$$

where D and M are dummy variables indicating the presence of NTMs and imports, respectively, regarding goods i in country j. D and M are coded 1 if there are NTMs or imports, respectively, and 0 otherwise.

protectionist or discriminatory, it is notable that 69 cases involving NTMs have been raised before the Coordinating Committee for the Implementation of the ATIGA and the ASEAN Consultative Committee on Standards and Quality from 2012 to 2014.[121] These trends suggest that the Member States have failed to comply with their international law obligations to eliminate NTBs and harmonize NTMs.

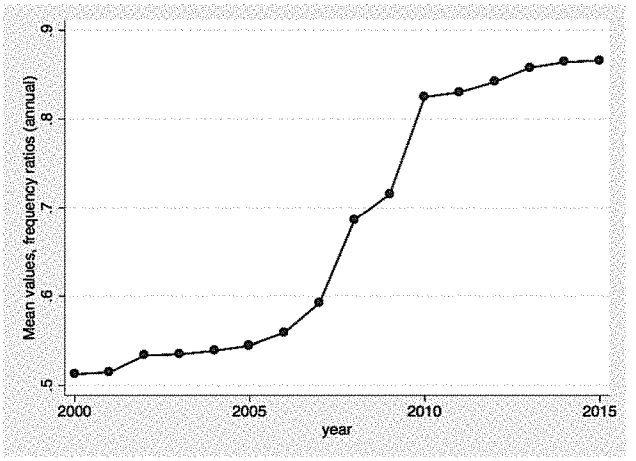

FIGURE. 1*:* Mean Frequency Ratios

The law and economics compliance literature suggests that international law can help tilt the scales in favor of compliance by altering the incentives of States. Law can create focal points for cooperation and make long-term benefits more valuable than short-term gains. International law regimes can also make a reputation for compliance a valuable form of collateral for inter-state dealings, providing an additional incentive for compliance. As will be seen in the following discussion, these insights can also shed light on ASEAN noncompliance. Due to the general and vague language of ASEAN legal instruments, not only have they failed to create focal points for coordination, but they have also undermined the effectiveness of reputation, reciprocity, and retaliation as incentives for compliance.

Let us assume that states are rational actors who, in their dealings with each other, primarily pursue their own interests and preferences. This implies that the Member States, in vowing to ensure the free flow of goods within the

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[121] ASEAN, *Matrix of Actual Cases on NTMs/Trade Barriers*, *available at* https://www.asean.org/wp-content/uploads/images/2015/July/Matrix_of_Actual_Cases/Matrix%20of%20Actual%20Cases%20on%20NTMs_Resolved%20Cases%20as%20of%2018th%20CCA.PDF (last visited Dec. 1, 2016).

region, believe that free trade is in their individual and common interest. This begs the question: why have the Member States failed to comply with their obligations to harmonize NTMs and eliminate NTBs?

To address this question, a closer look at the nature of trade is necessary. International trade has been characterized as a repeated multilateral prisoner's dilemma.[122] The highest payoffs can only be achieved when all states act to ensure the free flow of goods, for instance, by removing unnecessary trade barriers and harmonizing permitted NTMs. In this case, however, each Member State can gain at the expense of others by retaining protectionist trade barriers. This way, import-competing producers retain a domestic advantage while exporting producers gain access to foreign markets. Consequently, every state has an incentive to defect.

This multilateral prisoner's dilemma is further complicated by the nature of NTMs and NTBs. NTMs encompass a wide variety of measures and regulations, other than tariffs, that can affect the price or quantity of traded goods, whether the underlying intent is protectionist or not.[123] NTMs become NTBs when they are applied in a discriminatory manner against foreign firms, when they are imposed with a protectionist intent, or when they are unjustified or improperly applied.[124] This wide range of NTMs means that it is difficult to classify and monitor them.[125] For example, states may classify NTMs not as trade measures per se, but as health and safety regulations. Alternatively, states may be unaware that a certain measure, which has legitimate purposes, operates as a trade barrier. This uncertainty makes the breach, be it willful or inadvertent, more likely as the identification process of NTMs and NTBs is unduly burdensome and complicated.

That the Member States are in a multilateral prisoner's dilemma does not mean that international law no longer matters. It is important to note that the Member States do share an interest in ensuring the free flow of goods in the region. This can be seen in the region's successful tariff liberalization efforts.[126] For ASEAN, international law can be used to address the uncertainty and informational issues plaguing NTMs and NTBs.

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[122] *See* Guzman, *A Compliance-Based Theory, supra* note 7, at 1837.

[123] United Nations Conference on Trade and Development (UNCTAD), *Non-Tariff Measures to Trade: Economic and Policy Issues for Developing Countries*, UNITED NATIONS PUBLICATION, at 2 (2013), *available at* https://unctad.org/en/PublicationsLibrary/ditctab20121_en.pdf [hereinafter "Non-Tariff Measures to Trade"].

[124] *Id.*

[125] *See* GOLDSMITH & POSNER, *supra* note 7, at 148.

[126] AEC Blueprint, *supra* note 69, at 7.

In prisoner's dilemmas, the prerequisite for compliance is the parties' ability to distinguish acts of cooperation from acts of defection.[127] Ideally, the international law instruments clarify any ambiguities by identifying the focal points for state behavior. However, ASEAN treaties and soft law instruments have consistently used general and vague language in describing commitments, thus, leaving room for doubt as to the exact obligations of the Member States.

For example, on the obligation to ensure the transparency of permissible NTMs, the ATIGA requires Member States to ensure that NTMs are "not prepared, adopted or applied with the view to, or with the effect of, creating unnecessary obstacles in trade among the Member States."[128] Member States are likewise bound to ensure that standards, technical regulations, and conformity assessment procedures "do not create unnecessary obstacles to trade."[129]

However, what constitutes an unnecessary obstacle to trade is left undefined. Apart from reaffirming the Member States' rights and obligations under the Agreement on Technical Barriers to Trade (hereinafter "TBT Agreement"),[130] the specific goals and actions needed to identify and address unnecessary standards are not detailed. Indeed, ATIGA merely echoed the general provisions of the TBT Agreement without addressing how these will be implemented in the diverse political, economic, and cultural contexts of the Member States. The result is that the ATIGA has failed to establish effective focal points which Member States may align their legal regimes and practices to.

Another example involves the obligation of Member States to review the NTMs reported by the other Member States in the ASEAN Trade Repository Database[131] in order to identify and eliminate NTBs. Member States are further obliged to maintain the transparency of NTMs.[132] In view of this, the database should ideally shed light on both the rationale and mode of enforcement of NTMs.

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[127] *See* GOLDSMITH & POSNER, *supra* note 7, at 31.

[128] ASEAN Trade in Goods Agreement, *supra* note 75, art. 40, ¶ 2.

[129] ASEAN Trade in Goods Agreement, *supra* note 75, art. 71.

[130] ASEAN Trade in Goods Agreement, *supra* note 75, art. 73, ¶ 1.

[131] The ASEAN Secretariat, *ASEAN Trade Repository*, *available at* http://atr.asean.org. This database was established pursuant to Art. 13 of the ASEAN Trade in Goods Agreement.

[132] ASEAN Trade in Goods Agreement, *supra* note 75, art. 40, ¶ 2.

Nevertheless, the binding nature of these commitments are weakened by the ATIGA itself. It establishes that the NTM database is to be based on the submissions and notifications of the Member States.[133] While the ATIGA specifies the information needed for the disclosure of proposed measures, it remains silent on the required information for those NTMs that are already in force. In effect, the ATIGA grants the Member States ample discretion regarding the manner of their compliance.

In fact, as of April 2018, the ASEAN Trade Repository Database is merely linked to the individual National Trade Repositories of the Member States. As each repository is maintained by its respective Member State, the information is not presented in a uniform and consistent manner. Specifically, there is incomplete information on the manner of enforcement, scope, and rationale of the NTMs, all of which are necessary information for the identification of NTBs. By not disclosing complete information, Member States hinder their compliance with their obligations vis-à-vis the elimination of NTBs and the enhanced transparency of NTMs.

The ATIGA also allows Member States can choose from different measures, or a combination thereof, "to mitigate, if not totally eliminate, unnecessary technical barriers to trade,"[134] such as the harmonization of standards and the mutual recognition of conformity assessment results. However, the general language of the provision provides broad discretionary power given to the Member States under this provision, along with the absence of any specific timeframes or schedules for compliance, easily enables them to counter any accusations of noncompliance or breach of their obligations.

The ATIGA may have adapted the NTB elimination schedules under the AEC Blueprint and used obligatory language in describing the commitment to eliminate NTBs, for instance, "shall eliminate [.]"[135] Nevertheless, the list of NTBs for elimination is subject to the agreement of the AFTA Council.[136] It should be pointed out that this body is composed of ministerial-level nominees and the ASEAN Secretary General.[137] Bearing in mind the *ASEAN Way* of diplomacy, it is doubtful whether such a Council will really be able to enforce the elimination of NTBs. That the elimination of

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[133] ASEAN Trade in Goods Agreement, *supra* note 75, art. 40, ¶ 4.
[134] ASEAN Trade in Goods Agreement, *supra* note 75, art. 73, ¶ 2.
[135] ASEAN Trade in Goods Agreement, *supra* note 75, art. 42, ¶ 2(a)–(c).
[136] ASEAN Trade in Goods Agreement, *supra* note 75, art. 42, ¶ 3.
[137] ASEAN Trade in Goods Agreement, *supra* note 75, art. 90, ¶ 1.

identified NTBs is still subject to the discretion of bureaucrats negates the obligatory character of the ATIGA provision.

Similarly, under both the AEC Blueprint and the AEC Blueprint 2025, Member States are obligated to eliminate NTBs and enhance the transparency of NTMs.[138] However, the implementing details are not specifically defined or explained. There is a dearth of guidance on which measures can be considered as NTBs, which standards shall be used as the benchmark in harmonization efforts, and which measures shall be adopted to enhance the transparency of NTMs. Additionally, there are no definite deadlines or timeframes in the AEC Blueprint 2025 for the implementation and completion of strategic measures. This level of generality in the definition of strategic measures makes it difficult to identify cases of noncompliance, breach of or incomplete compliance with their commitments by the Member States.

Ostensibly, the ATIGA, AEC Blueprint, and AEC Blueprint 2025, promote the free flow of goods and the creation of a single market and production based in the region. That the NTB- and NTM-related obligations are contained in both treaty and soft law instruments seem to imply that the Member States are serious about their commitments. Nevertheless, this is belied by the general and vague language used in these instruments, which creates uncertainty as to the precise obligations of the Member States. No instrument appears to delineate which acts are to be considered cooperative and which are to be deemed acts of defection, making it more difficult for the Member States to overcome this prisoner's dilemma. The seemingly obligatory and unequivocal nature of the commitments is also negated by the ample discretion exercised by the Member States,[139] which effectively allows them to evade their obligations.

Thus, the ASEAN instruments have essentially established weak substantive[140] terms and provisions. In theory, states enter into agreements which maximize their individual and joint payoffs subject to the costs and burdens that each state commits to bear. Stronger substantive provisions imply that states would need to bear more burdensome obligations in order to achieve the goals of the agreement; for example, a commitment to eliminate all NTBs by a definite deadline in order to promote trade. With strong

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[138] AEC Blueprint, *supra* note 69, at 7; AEC Blueprint 2025, *supra* note 68, at 4.

[139] For example, the creation of trade repositories vis-à-vis the elimination of NTBs.

[140] For Guzman (2008), the "*substance*" of an agreement denotes the obligations, commitments or promises made by States. GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 7, at 131.

substantive provisions, violations are clearly defined and costly as they can trigger the legal regime's enforcement provisions. Weaker substantive provisions, however, involve less onerous obligations which may ultimately undermine the benefits and goals of the agreement.[141] In this case, the weak substantive provisions of the ATIGA, AEC Blueprint, and AEC Blueprint 2025, make it hard to classify instances of either action or inaction as violations of the agreements. As the substantive provisions of the ASEAN instruments themselves reduce the likelihood of determination of instances of breach, they fail to provide effective incentives for compliance.

The effect of weak substantive provisions are usually countered by stricter formal provisions.[142] For example, agreements embodied in treaties indicate the signatory states' stronger commitment to be bound, as it delineates the obligations of the parties. Breaches thereof would uncontestably trigger the application of the Vienna Convention on the Law of Treaties.[143] Stringent monitoring and enforcement provisions likewise enhance transparency and information flows. As instances of breach are more likely to be detected and punished, states have an incentive to comply.[144]

While the region's use of both treaty and soft law instruments hints at a strong and serious commitment, this is offset by the instruments' lenient monitoring and enforcement provisions. Both the AEC Blueprint and AEC Blueprint 2025 merely provide for the general monitoring of the implementation of the commitments. Neither provides for sanctions or penalties in case of non-compliance. Considering the complexity and opaque nature of NTMs and NTBs, more detailed and fine-tuned monitoring mechanisms are necessary in order to obtain the necessary information to detect possible instances of violation. As for the obligation to eliminate NTBs, ATIGA allows exceptions thereto for several reasons including the protection of public morals and the protection of human, plant, and animal life or health.[145] This broad exception allows the Member States to avoid the performance of their obligation vis-à-vis NTBs without repercussions. ATIGA further provides that, in case of disputes, the Protocol on Enhanced Dispute Settlement Mechanism shall apply.[146] However, under this Protocol

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[141] *See* GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 7, at 155–156.

[142] "Formal" provisions are those "that determine the degree to which states have pledged to comply with the obligation, that determine when obligations can be avoided, and that provide for enforcement." GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 7, at 131.

[143] *Id.* at 134.

[144] *See* GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 7, at 130–161.

[145] ASEAN Trade in Goods Agreement, *supra* note 75, art. 42, ¶ 6.

[146] ASEAN Trade in Goods Agreement, *supra* note 75, art. 89.

the payment of compensation, in case of noncompliance with the decision, is purely voluntary. Additionally, only Member States can invoke the provisions of this Protocol. Private persons or entities, who will have more knowledge about the imposition by Member States of NTMs and NTBs, cannot initiate its proceedings.[147] Thus, by failing to make instances of breach sufficiently transparent and costly, the formal provisions likewise fail to incentivize compliance.

These weaknesses of these ASEAN instruments have repercussions on the effectiveness of reputation as a compliance incentive.[148] This is a serious weakness given that neither reciprocity nor retaliation can effectively encourage compliance within the region.

The threat of reciprocal defections by compliant Member States is not credible for several reasons. *Firstly*, this threat is not fully effective in the context of multilateral prisoner's dilemmas.[149] The endeavor to establish the AEC is precisely to pursue cooperative action in the face of said multilateral prisoner's dilemma and attain the highest possible payoffs. Thus, reciprocal defections lack credibility in this case as these would undermine the creation of the AEC.

Secondly, the lack of widespread compliance among the Member States weakens the credibility of reciprocity. ASEAN itself has recognized that significant work still needs to be done to fulfill its NTB- and NTM-related commitments.[150] Threats of reciprocal defections lose credibility where the other parties themselves are in breach of, or have failed to sufficiently meet, their obligations.

Thirdly, the *ASEAN Way* weakens the effectiveness of reciprocity as a compliance mechanism. Given the importance of flexibility, consultation, and consensus in the region, ASEAN effectively only endorses policies which "satisfy the 'lowest common denominator.'"[151] Policies, commitments, and even opinions which do not meet the approval of all Member States are seemingly disregarded. Thus, the dissent of a single Member State would suffice to block implementation of measures and policies, and even the release

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[147] *See* Locknie Hsu, *The ASEAN Dispute Settlement System*, *in* THE ASEAN ECONOMIC COMMUNITY: A WORK IN PROGRESS 382, 390 (Sanchita Basu Das, Jayant Menon, Rodolfo Severino & Omkar Lal Shrestha eds., 2013).

[148] GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 7, at 93–96.

[149] *Id.* at 65.

[150] The ASEAN Secretariat, *ASEAN Integration Report 2015*, at 15–17 (2015), *available at* https://asean.org/storage/2015/12/ASEAN-Integration-Report-2015.pdf.

[151] Leviter, *supra* note 70, at 161.

of statements critical of other Member States. This flexibility undermines the obligatory pull of ASEAN commitments. If commitments are no longer obligatory, then there is less scope for reciprocal defections.

The *ASEAN Way*'s emphasis on sovereignty, and the resulting primacy of non-interference, further impairs the compliance pull of reciprocity. In particular, the ASEAN Charter binds the Member States not to interfere in other Member States' domestic affairs, be they economic or political. Threats of reciprocal actions may be construed as interfering with the other Member State's exercise of its sovereign powers. This is particularly likely in the context of NTM-related commitments. Member States need only to claim that the measures or policies in question are in pursuit of legitimate national interests. That being so, the default ASEAN response is, and has always been, a non-response. For example, neither ASEAN nor any of its Member States criticized Indonesia when forest fires that had been deliberately started resulted in a region-wide environmental hazard, or when Indonesian-backed militias launched attacks in East Timor.[152] The 2017 ASEAN Summit similarly failed to address the Rohingya crisis in Myanmar.[153] Against this backdrop, it is unlikely that breaches of NTM-related commitments would elicit reciprocal actions from the Member States.

As with reciprocity, retaliation is also an ineffective mechanism for compliance. Firstly, the ASEAN enforcement and settlement systems do not even provide for any penalties or sanctions in the event of breach of obligations. The ASEAN Secretariat is not even authorized to punish violations of AEC-related obligations.[154] While compensation in cases of breach is available under the Protocol on Enhanced Dispute Settlement, actual payment is purely voluntary. Thus, ASEAN enforcement systems lack any coercive power and ultimately fail to alter the payoff schemes of the Member States.

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[152] Shaun Narine, *Asia, ASEAN and the Question of Sovereignty: The Persistence of Non-Intervention in the Asia-Pacific*, *in* ROUTLEDGE HANDBOOK OF ASIAN REGIONALISM 155, 159 (Mark Beeson & Richard Stubbs eds., 2012).

[153] *Southeast Asia summit draft statement skips over Rohingya crisis*, REUTERS, Nov. 13, 2017, *available at* https://www.reuters.com/article/us-asean-summit-myanmar/southeast-asia-summit-draft-statement-skips-over-rohingya-crisis-idUSKBN1DD0CP; JC Gotinga, *ASEAN summit silence on Rohingya 'an absolute travesty'*, AL JAZEERA, Nov. 15, 2017, *available at* http://www.aljazeera.com/news/2017/11/asean-summit-silence-rohingya-absolute-travesty-171114211156144.html.

[154] Helen E.S. Nesadurai, *Enhancing the Institutional Framework for AEC Implementation: Designing Institutions that are Effective and Politically Feasible*, *in* THE ASEAN ECONOMIC COMMUNITY: A WORK IN PROGRESS 411, 418 (Sanchita Basu Das, Jayant Menon, Rodolfo Severino & Omkar Lal Shrestha eds., 2013).

The weaknesses in the region's enforcement institutions can also be traced back to the *ASEAN Way*. The preference for diplomatic processes[155] has resulted in the creation of institutions that are incapable of disciplining the Member States.[156] For example, the Senior Economic Officials Meeting is not even obliged to constitute panels when a Member State initiates proceedings under the Protocol on Enhanced Dispute Settlement. In a way, this ineffective enforcement system complements the policy of non-interference and respect for national sovereignty. Furthermore, the *ASEAN Way* discourages the resort to retaliatory actions against policies and decisions enacted pursuant to a Member State's exercise of sovereignty. In fact, no Member State has invoked the provisions of the Protocol on Enhanced Dispute Settlement.[157] Instead, the weak and ineffective enforcement systems encourage Member States to settle their differences through diplomatic inter-governmental channels.

In cases where retaliation and reciprocity are ineffective, reputation may serve to tilt the scales in favor of compliance.[158] However, the influence of reputation is lessened by legal uncertainty. When the legal instruments are vague, ambiguous or incomplete regarding the nature and content of the obligations, the reputational costs are lessened.[159] As a wide variety of measures can qualify as NTMs, Member States can plausibly claim that they have inadvertently failed to comply with their obligations. For this same reason, it is difficult to assert that another Member State has failed to address problematic NTMs. Instances such as these are not equivalent to intentional and clear-cut violations of international law, resulting in considerable reputational costs. This weakness illustrates the importance of the ASEAN Trade Repository, as this would provide greater transparency. Greater transparency promotes compliance as it is "less likely that a violation will be perceived as compliant or that compliant behavior will be perceived as a violation."[160]

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[155] Specifically, for "non-intrusive, intergovernmental mechanisms for decision-making, enforcement and adjudication." *Id.* at 413.

[156] *Id.* at 412.

[157] Letter from ASEAN Public Information, to author (Aug. 29, 2016) (on file with author).

[158] *See* GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 7.

[159] *Id.* at 93.

[160] *Id.* at 96.

IV. CONCLUSION

The compliance decisions of rational and self-interested states with their international law obligations is a multifaceted variable. In the setting of trade policy, it is in the interests of States to pursue cooperative action in order to ensure the attainment of the highest possible payoffs. In the ASEAN, this cooperative endeavor is embodied in both treaty and soft law instruments, suggesting that the Member States are serious about their goal of creating the AEC. However, an examination of the language used in these instruments suggests that the mere enactment of such legal instruments may not suffice to guarantee the Member States' compliance. In failing to establish the focal points for coordination, these instruments have failed to promote cooperation and compliance.

The rational choice compliance theories suggest that other mechanisms, namely reputation, reciprocity and retaliation, determine the compliance decisions of states. An examination of the enforcement and dispute settlement mechanisms in ASEAN, however, suggests that these "Three Rs of Compliance" may not suffice to effectively incentivize compliance by the Member States. This paper, thus, offers one possible explanation for the persistence of NTMs and NTBs in Southeast Asia.

Nevertheless, trade policy is not solely dependent on international law obligations. The question of why the ASEAN Member States persist in their use of NTMs and NTBs cannot be convincingly answered by merely looking at the compliance issue. For example, the political economy literature suggests that rent-seeking and lobbying activities also play an important role in the setting of trade policy. Thus, an analysis of other factors, such as the Member States' intra-state interactions and other institutional characteristics, is needed in order to identify the factors underlying and motivating the use of NTMs and NTBs in Southeast Asia.

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