East Asian Regionalism from a Legal Perspective

Current features and a vision for the future

Edited by
Tamio Nakamura

Routledge Contemporary Asia Series

East Asian Regionalism from a Legal Perspective

Plenty has been written about the political and economical aspects of regionalism, but the legal perspective has been neglected. *East Asian Regionalism from a Legal Perspective* is unique in synthesizing legal, economic and political analyses.

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The third part of the book is truly unique in proposing an essential groundwork for the institutionalization of an East Asian Community. It conceives a draft East Asian Charter, an essential document that distils what East Asian nations have achieved, and also includes integral principles and fundamental rules for future cooperation among countries and peoples in the region.

This book will be of interest to graduates and academics interested in regionalism, international relations, international law and Asian studies.

Tamio Nakamura is professor of Law at the institute of Social Science at the University of Tokyo.

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Contents

Tables

Figures

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Preface

This book presents a legal vision of possible future East Asian regionalism, drawing major lessons from the experience of ASEAN, and European and Latin American regionalism. The discussion in Part I starts from the current economic features, the weakness and the potential of East Asian regionalism, taking both a perspective from within East Asia, and comparative perspectives from the Americas and Europe. In Part II, the focus shifts to the current scanty yet diverse legal responses to East Asian regionalism: ASEAN's gradual institutionalization; East Asian countries' bilateral free trade agreements concluded with ASEAN; and an argument for a more constructive role of law in East Asian regionalism. Finally, in Part III, the book proposes and explains a legal vision of East Asian regionalism. This is the book's most innovative part, and indeed constitutes the first academic attempt in East Asia to draft a legal document for a feasible East Asian Community.

The book originates from the CREP research project, on the comparative regionalism of Europe, the Americas and East Asia that I directed at the Institute of Social Science, the University of Tokyo, from 2005 to 2007. We held annual international conferences during this research period: firstly in 2005, to set common analytical frameworks for comparing regionalism in Europe, the Americas and East Asia; secondly in 2006, to carry out comparisons of regionalism; and finally in 2007, to propose a draft Charter of an East Asian Community, as our legal vision for future East Asian regionalism. The last symposium was held in Tokyo on 21 July 2007, where we discussed the original version of our draft Charter of the East Asian Community. The draft was revised in September 2007, in the light of both the critical suggestions and supportive opinions expressed at the symposium by international participants coming from Asia-Pacific and European countries.

I am particularly grateful to the contributors to this book, and the other conference participants who presented papers or acted as discussants. The latter include Professors Seung Wha Chang (Seoul National University, Korea), Stephen Day (Oita University, Japan), Gaspare Genna (University of Texas at El Paso, USA), Martin Holland (University of Canterbury, New Zealand), Xinxin Hu (Chinese Academy of Social Science, China), Jianren Lu (Chinese Academy of Social Science, China), Toshihiro Matsumura (University of Tokyo, Japan), Shigeru

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I hope this book will inspire not only further academic debate on East Asian regionalism, but also give an impetus to many East Asian policy-makers, political leaders and citizens in general, to develop better macro-regional relationships for peace and prosperity in East Asia.

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Introduction

Tamio Nakamura

The role of law and institutions in East Asian regionalism

The present book originates from a basic question: can law and institutions play any role at all in developing East Asian regionalism? If there is a role, what is it, and to what extent can it be involved? East Asia is taken to mean the ten ASEAN member countries, and China, Japan and Korea (the so-called ASEAN Plus Three), but may include some other neighbouring countries, depending on the issue.

The East Asian countries, in particular the ASEAN Plus Three, have officially shared a long-term target of creating a macro-regional community since 2005 (e.g. the 2005 Kuala Lumpur Declaration on the ASEAN Plus Three Summit, point 1). However, there has been a noticeable lack of discourse over the role of law and institutions in promoting regionalism in this macro-region.

In real politics, for example, few official efforts have been made to recognize law and institutions as essential foundations for East Asian regionalism. One exception is the adoption of the ASEAN Charter by the ASEAN countries in 2007. This Charter will give the legal foundation for ASEAN, if it is ratified by all the member states. However, the ASEAN Charter has not induced any further political debate for the purpose of institutionalizing wider regionalism in East Asia. In Northeastern Asia, China, Korea and Japan's political talks have been haphazard. The preparatory talks for a bilateral free trade agreement (FTA) between Korea and Japan have stalled, while China, Korea and Japan have independently pursued their own political and economic dialogues with ASEAN countries since the beginning of the 2000s. The lack of overall political consensus on the future course of cooperation among the governments in East Asia has resulted in a complicated web of FTAs, and multiplication of intergovernmental frameworks, such as the Asia-Pacific Economic Cooperation (APEC), and the ASEAN Regional Forum (ARF), the latter addressing general security concerns in the region.

In academia, legal and institutional study of East Asian regionalism also remains scarce: most studies of East Asian regionalism have hitherto been made predominantly from economic and political perspectives (e.g. Lincoln 2004; Rozman 2004; Pempel 2005; Katzenstein 2005; Katzenstein and Shiraishi 2006; Fort and Webber 2006; Marsh 2006; Zha and Hu 2007). Even the few available studies from legal or institutional perspectives concentrate on ASEAN (Yamakage 1991, 1997;

Davidson 2002; Beeson 2002). Discussions of East Asian FTAs have rarely been connected to wider issues of the possible role of law and institutions in future East Asian regionalism. Perhaps the only exceptional academic contribution has been from Michio Morishima, a late Japanese professor of economics, who proposed the establishment of a Northeast Asian Economic Community (Morishima 2000). His idea was modelled on the law and institutions of the European Community (EC).

In contrast, law and institutions have played significant roles in European integration in the framework of the EC and the European Union (EU), from their inception. Phrases such as 'integration through law' (Cappelletti *et al.*1986) characterize a major feature of European integration. Not only are the frameworks of the EC/EU built on legally binding treaties, their institutions have also played significant roles in promoting economic and political integration in Europe since the 1950s. Thus, the European Commission, the Council of the EU and the European Parliament have worked together to adopt Union/Community policies, often in the form of legal instruments called regulations and directives; the Community's independent courts, including the European Court of Justice (ECJ), have developed a distinct body of case law, while the ECJ has collaborated with national courts of the Member States in interpreting and applying Union/Community law. ECJ case law has revealed several unwritten constitutional principles of the EC/EU. The autonomous development of such European law and institutional activities have constantly transformed the political, economic and social relations between the European states and peoples into more rule-based, peaceful, cooperative and stable relations (Weiler 1991; Maduro 1998). Correspondingly, the national laws of EU Member States have evolved to accept European constitutional principles, such as the supremacy and direct effect of Community law, in their national legal orders (Oppenheimer 1994, 2003; Albi 2005). The role of law and institutions is such that contemporary European integration studies, be they economics or political science, invariably include discussions on the role of European law and institutions (e.g. Pelkmans 2006; Wallace and Wallace 2005; Alter 2001).

Why is East Asian discourse in real politics and in academia, on the role of law and institutions in developing regionalism, so lacking? Some standard answers are as follows:

(a) In East Asia as a whole, 'regionalism' remains weak. 'Regionalism' is a deliberate *political* attempt to create a new unit of intergovernmental political relations in a certain macro-region. The common political will and consensus for this purpose have not yet matured between East Asian governments. What is mistaken for regionalism in East Asia is *de facto* economic 'regionalization', which requires no governmental political initiative. East Asian economic regionalization has mainly been achieved since the 1980s by private corporations, through developing their macro-regional production networks, according to their own business strategies. The weak state of regionalism in East Asia has resulted in various non-legally binding intergovernmental frameworks, whose effectiveness is based solely on political good will. As for legal academia, it has not reacted proactively: as long as a non-legal approach

is taken by governments, lawyers have no actual legal rules to interpret and apply; conversely, once legal agreements such as FTAs emerge, these will attract lawyers to examine their legal issues.

(b) Many East Asian countries are young nation-states and cherish the principles of state sovereignty and non-interference in the affairs of other states. Most of them regard the creation of macro-regional law and institutions as politically suspect, because they tend to associate such arrangements with the supra-national organization of the EC, and fear a consequent loss of national autonomy under such arrangements. East Asian states' concern for national sovereignty is evident from ASEAN's discourse and practices in the past and present (Severino 2006), and in the operation of APEC since the 1990s (Nakamura 2002).

(c) In any case, the difference in economic, social and political conditions between Europe and East Asia has frustrated attempts to devise any EC/EU type of macro-regional law and institutions in East Asia. Many students of East Asian regionalism have been attracted to the EC/EU as a successful model of institutionalized regionalism, only to find formidable differences in the implicit assumptions of that model. The EU enjoys, for example, relatively minor disparities in the population of member states, compared with East Asia: Germany: Malta = 170:1, whereas China: Brunei = 3480:1, or China: Laos = 217:1. It also benefits from much smaller diversity in its member states' political, constitutional and economic practices than an East Asian model could. East Asia includes mega-populous China with its unique blend of a state and market economy; the divided North and South Koreas with their different political and economic systems; Myanmar with its military government and under-developed economy; Thailand, economically successful, but with its constitutional democracy marred by political uncertainty and occasional *coups d'état*; and Japan, whose ambiguous pacifist constitution rubs against its Self Defence Force's expanding operations outside Japan. Furthermore, European states share basic legal values and principles such as liberty, democracy, and respect for human rights and the rule of law. These are generally guaranteed by European national constitutions, by the EU Treaty and by the Council of Europe's conventions, including the European Convention on Human Rights. Whether the same principles hold good for East Asian states is a moot point (Marsh 2006).

These standard explanations, however, are neither comprehensive nor conclusive: if it is neither possible nor desirable to directly transplant EU law and institutions to East Asia, some other forms of law and institutions that do respond to the needs of East Asia could be devised. Academic lawyers could be proactive and creative. If political will for regional cooperation remains weak, it could be promoted by presenting a specific institutional vision as a catalyst for further discussion.

Indeed, it is the argument of this book that law and institutions can play a significant role in conceiving and promoting East Asian regionalism even from its infancy; that the EC/EU is not the only model for institutionalizing regionalism, and that we can certainly devise a different but suitable institution for current and future East Asian regionalism; that we can also find a role for law congruent to the

practice of East Asian regionalism; that it is worthwhile to examine whether East Asian peoples and their governments can share certain political values and legal principles to which they will commit themselves; that it is important to discuss the role of law and institutions in regionalism in East Asia, because regionalism practices all over the world since the 1990s have influenced not just the effectiveness of existing global institutions such as the WTO and the UN, but also could have the potential to enhance the overall effectiveness of global governance by complementing it, if we can succeed in developing substantive law harmoniously at macro-regional and global levels.

Therefore, as the conclusion of our studies, this book presents the Draft Charter of the East Asian Community: a possible, and hopefully feasible and effective, legal and institutional vision of future East Asian regionalism. It tries to identify the legal principles that we have observed East Asian nations to have accumulated and shared so far, and tries to supplement these with what we believe are essential principles and fundamental rules, both for future cooperation among the countries and peoples in the region, and to contribute to global governance. This Draft Charter is an independent academic idea, and a prototype to test our case for the role of law and institutions in macro-regionalism in the real world.

Realities, challenges and possibilities

Parts I and II of the book discuss the current features, the challenges and the possibilities of East Asian regionalism from perspectives within East Asia, and from the Americas and Europe. It is essential to take a closer look at the realities of the situation in East Asia before identifying a suitable role for law or devising appropriate institutions responsive to the needs of East Asian regionalism at present and in the future (Part III).

The opening chapter by Kazushi Shimizu offers a historical overview of ASEAN regionalism. He points out that ASEAN's political project of regional economic integration has been challenged by many centrifugal economic and political forces, including ASEAN members' internal conflict of interests and their constant need for foreign direct investment. Shimizu indicates the political and economic difficulties of reconciling ASEAN's (predominantly economic) 'regionalism' with the global economic forces that have actually promoted ASEAN's economic 'regionalization'. This contradictory reality has produced ASEAN's (and perhaps also the East Asian) maxim of 'open' regionalism. Shimizu describes ASEAN's moves towards some institutionalization, including the establishment of ASEAN's dispute settlement mechanism and ASEAN's own Charter, as necessary measures to strengthen the credibility and effectiveness of their economic project: vital conditions to attract and keep foreign direct investment. However, Shimizu points out that ASEAN's pragmatic approach has produced some spill-over effects in East Asia: some ASEAN trading rules (e.g. the rule of origin of goods) have been transferred to trading rules with China through bilateral agreements on free trade in goods and services.

The current situation of Northeast Asia shows a stark contrast with ASEAN. No political project of regionalism between China, Korea and Japan has yet emerged,

although privately led economic regionalization has been expanding. In Chapter 2 Tomoo Marukawa describes, through his case study of the mobile phone industry, a specific problem which is growing under current circumstances: the fragmentation of product standards and technical regulations in national markets. He warns that *de facto* regionalization supported by trade and investment liberalization does not necessarily bring about regulatory harmonization in the region, since industrial standards, especially safety standards, reflect the value each nation places on product safety. Moreover, industrial standards are often used by East Asian governments as non-tariff barriers against foreign products and services. Marukawa, however, draws a positive lesson for East Asia from the contrasting experience of Europe, that regional harmonization of product standards does not necessarily create a bloc, and that it may stimulate intra-regional trade and even enhance the competitiveness of regional industries in the global market.

The theme of potential economic benefit derived from creating regional regulatory cooperation in the region is reiterated by Eiji Ogawa and Kentaro Kawasaki in Chapter 3, in their case for East Asian currency cooperation. East Asian states learned this lesson following the Asian Currency Crisis in 1997; they have started to intensify mutual monetary coordination. Ogawa and Kawasaki examine the further economic possibility of introducing regional currency cooperation, and propose a multi-step process to realize that cooperation, which they argue would eventually become a basis for introducing a common currency in East Asia.

Thus, in Chapters 2 and 3, one can find specific micro and macroeconomic examples of the potential benefits of intergovernmental regulatory cooperation. To make such cooperation credible and stable, governments need some formal agreements on the procedure for cooperation, and permanent institutions to carry out and supervise the cooperation, as is indicated by the history of ASEAN's institutional evolution.

To give East Asian regionalism a certain institutional structure however involves careful planning, to produce current and long-term benefits in a constant and stable manner, against a changeable political and economic background. In that respect, some useful lessons can be drawn from the experiences of the Americas and Europe, where various attempts at the institutionalization of regionalism have been made.

Barbara Stallings, in Chapter 4, investigates the situation of regionalism in Latin America, which is economically opposite to that in East Asia. She wonders why Latin America has a long history of promoting regionalism, but has been unsuccessful in realizing regionalization. She finds that the intra-regional trade of Latin America has been pro-cyclical, which means that regional partners do not help each other when their economies are in stagnation. This failure of regionalism in Latin America can be explained, according to Stallings, partly by the lack or the inadequate involvement of the private sector in governmental schemes, and partly by the lack of a political project that transcends Latin American countries.

Assuming that the East Asian economic structure would remain different from that of Latin America in the future, some suggestions from the Latin American experience can still be inferred, such as the importance of private entities' involvement in the institutional operation of regionalism. Perhaps more relevant and effective macro-regional policies are likely to be produced and implemented if

proper channels for various private 'voices' are guaranteed beside governmental voices in the operation of macro-regional institutions, especially as East Asian 'regionalization' has been one of the driving forces of its 'regionalism'.

In Chapter 5 Ken-ichi Ando deals with the economically more comparable situation in Europe. He discusses the effect of establishing the liberalized Single European Market on foreign direct investment (FDI), and the behaviour of multinational enterprises (MNEs). He reveals how, given that the EU has an asymmetrical structure with an integrated market and diversified production conditions, MNEs construct a dynamic network to exploit the advantages that the EU offers. Ando observes that FDI serves as an engine for 'unbalanced' growth in host countries, that the home economies of MNEs can obtain 'superior' investment income from FDI, and that FDI constitutes part of the process of building up a 'dynamic' network of production in the region.

The point Ando makes concerning the 'dynamism' brought by FDI and MNEs may be taken as a warning of negative consequences for employment in the event of the transfer of production location. This serves as a call for institutional planning and/or legal rules on labour standards that could address the social and economic problems that may follow MNEs' strategic changes in production in a liberalized macroeconomic market. Institutionally, the interests of workers may need representation as well as those of business.

Will the weak political interest in regionalism between China, Korea and Japan remain a major obstacle to East Asian regionalism? Kenji Hirashima, in Chapter 6, compares the current political situation in East Asia with that in Europe in the early 1950s, before the establishment of the EEC, because at that time no institutional formation was taken for granted in Europe either. He initially finds Moravcsik's (1998) analytical perspective of liberal intergovernmentalism useful in this comparison, which takes each national government as a primary actor in international relations, but also emphasizes the domestic politics that shape governmental positions in international relations. Applying this interpretive tool to contemporary East Asia, Hirashima observes that the current situation of East Asia resembles that of Europe in the 1950s, when competing proposals for regionalism were put forward by various countries in the region. East Asian countries have diverse national preferences which affect their international positions and feelings of enthusiasm towards East Asian regionalism. Hirashima, however, casts some doubts on Moravcsik's model. He points out that Moravcsik's argument focuses too much on commercial interests in domestic politics and neglects the geopolitical concerns of each country; and that the argument is biased towards major powers, overlooking the fact that smaller states, especially the Netherlands, in the context of Europe, played an active role in proposing an irrevocable customs union in the first place. Thus, Hirashima leaves some hope that geopolitical concerns and some countries' active roles in the region may become a catalyst to establish institutionalized East Asian regionalism.

Hirashima's observation appears particularly relevant in the light of ASEAN countries' claim to be 'the driving force' of East Asian regionalism, in the framework of the ASEAN Plus Three (2005 East Asian Summit Chairman's Statement, point 10).

It is arguable that turning the ASEAN Plus Three into a formal institution may be a promising means of strengthening political will for regionalism in East Asia in the near future.

Legal and institutional responses

Part II discusses the current scant, but nevertheless diverse, legal and institutional responses to nascent East Asian regionalism. Lawan Thanadsillapakul in Chapter 7 explains the institutionalization of ASEAN as corresponding to its members' economic need to keep their region open to the world economy ('open' regionalism). ASEAN's institutional response to the concern for sovereignty is expressed in a so-called ASEAN way of decision-making and flexible implementation: first reaching agreements by consensus based on formal and informal deliberations between governments; then adopting several legally binding and/or non-legally binding measures, but also allowing flexible implementation by each country, depending on their national economic circumstances. The recent ASEAN Charter formally confirms the decision-making and implementation procedure based on the current practice. Thanadsillapakul argues that ASEAN needs to advance to some degree of harmonization of members' regulatory rules, and needs to devise a stable dispute settlement mechanism for their legal measures. She thus calls for more institutionalization of ASEAN activities, although she does not call for the establishment of supranational institutions following the EU model, in the light of the strong nationalism of and the disparities in legal and cultural traditions among ASEAN countries.

Dukgeun Ahn in Chapter 8 examines a different legal response by Northeast Asian countries to current East Asian regionalization, and the consequent practical legal problems, namely the diversification of trading rules arising from the Northeast Asian countries' conclusion of various FTAs with Asia Pacific countries. Ahn focuses on the diversification of trade remedy rules contained in these FTAs. Trade remedy rules are the rules concerning anti-dumping and countervailing measures, as well as safeguard measures. According to Ahn, both Korea and Japan adopted anti-dumping and countervailing rules that conformed with the corresponding WTO rules in their first FTAs respectively with Chile and Singapore. However, later, Korea adopted stricter anti-dumping rules than those of the WTO in its FTA with Singapore. Japan introduced a substantially different set of safeguard rules from those of the WTO in its FTA with Singapore. As both Korea and Japan share an interest in modifying the relevant trade remedy rules of the WTO, Ahn argues that the proposed FTA between Korea and Japan – if its stalled negotiations are reopened – may provide for a new set of trade remedy rules that both countries will promote as model rules at the WTO, as well as for East Asia.

These two chapters in Part II suggest some unique concerns and problems in building an overall legal vision of East Asian regionalism:

(a) at least some procedures and new political institutions could and probably should be introduced to restrain the classic assertions of state sovereignty and non-interference in other states' affairs, with a view to fostering mutual trust

and constructive discussion as a community (the ASEAN Charter being a good precedent in this respect);

(b) it would be useful to devise some multi-speed measures and/or general framework measures that acknowledge the economic and social diversity of East Asian countries, but, at the same time, to maintain the effectiveness of such measures, some systematic monitoring of their national implementation should be introduced (the recent institutionalization of ASEAN activities have shown this to be necessary);

(c) East Asia needs harmonization of conflicting regional trade rules: if the region is ever to maintain 'regionalism' it requires a more harmonious and systematic approach to formulating substantive macro-regional rules (of trade in goods and services, etc.);

(d) at the same time, East Asia's 'open' regionalism needs regional rule-making to be more compatible with global rule-making.

Takao Suami in Chapter 9 emphasizes the positive change in East Asian governments' awareness of law and institutions. He notices the growing confidence among the governments in the use of law in constructing international relations. He concludes that the legal institutionalization of East Asian regionalism stands a better chance now than previously. He observes that the change has been gradual but qualitatively decisive since the start of the 2000s, because governments in the region have gained confidence in using the highly judicialized dispute settlement mechanism of the WTO, and they have also gained confidence in concluding various FTAs, not just with each other but with the United States and other major countries in the world. The ASEAN countries, moreover, have adopted their own Charter to strengthen the legal foundation of ASEAN. As to a possible dispute settlement mechanism in East Asia, Suami argues, however, that it would be premature to establish an EC-type Community court to solve macro-regional legal issues comprehensively throughout the region, and that it would be more propitious to introduce a case-specific dispute settlement mechanism modelled after the one in the WTO.

Proposal of a Draft Charter: a test case

In the light of the preceding discussions, in Chapter 14 the book presents as its conclusion a possible legal vision of future East Asian regionalism: a Draft Charter of an East Asian Community. This independent academic proposal is drafted jointly by three academic lawyers and a political scientist, each of who explains the Draft Charter from their individual perspectives in Part III.

The contributions of Tamio Nakamura (Chapter 10), Takao Suami (Chapter 11), Yoichiro Usui (Chapter 12) and Yoshiaki Sato (Chapter 13) show the drafters' shared understanding of current East Asian circumstances. These include the diversity of political, economic and social conditions in East Asia; the continuing concern by most East Asian governments for maintaining national sovereignty and effective autonomy; the substantial American involvement in security and economic issues in this region; the 'open' nature of East Asian economies, which

are regionally interdependent and at the same time reliant on the world market; the emerging social and/or economic cooperation in the region by non-central government entities, including local authorities and non-governmental organizations; the small but steady accumulation of legal practices by East Asian governments in the sphere of their international economic relations (in the form of FTAs or in the framework of the WTO); and, in the case of ASEAN, members' recent attempt at institutionalizing their long-standing political practice of regular consultation and decision-making by consensus.

The Draft Charter (Chapter 14) reflects the drafters' concepts of the role of law and the means of institutionalization appropriate to East Asia at present and in the future.

Firstly, proposing an international treaty called a 'Charter', even at this nascent stage of East Asian regionalism, reflects the drafters' expectation that law and institutions can play a constructive role in creating and enhancing future social and political order. To elaborate on this role: law that embodies basic social values and ideals can inspire people to develop better relations; and law can organize macro-regional political discussions according to steadfast principles, especially when the political discourse is institutionalized in such a way that the participants in the discourse are made responsible for what they declare and what they agree on. The drafters infer these general points from the record of European integration and ASEAN integration. Thus the Draft Charter, mainly incorporating the achievements of ASEAN and recent East Asian FTAs, articulates long-term aims and social ideals common to the peoples of East Asia, including permanent peace, reconciliation and prosperity among the peoples of this region. The Draft Charter also recognizes the basic norms that should be shared in this region, including the rule of law and respect for human rights, and the Draft Charter establishes essential Community institutions where governments are to take decisions by consensus, and are made responsible for what they agree on. The Charter details how their national implementation of decisions will be monitored by non-governmental stakeholders as well as by the governments themselves, and how the monitor reports will be delivered to the Community secretariat.

Secondly, the Draft Charter aims to streamline and regularize the current diverse and haphazard political processes scattered among various regional frameworks. If one categorizes law in two groups, one relating to 'manner and form' (procedural/institutional law) and the other relating to 'substance' (substantive law), one could argue that the law relating to 'manner and form' can play a significant role in streamlining the current unsystematic East Asian frameworks. The Draft Charter achieves this by two steps: firstly by giving the current ASEAN Ten plus Three a legal Community status, and secondly by requiring the thirteen countries of the Community to discuss any East Asian regional matter before any other international frameworks in the region do so. If these countries could take a common position on a specific subject as a Community, they would effectively gain a new political power, that of setting agenda for the other intergovernmental frameworks in the region. This is because the thirteen countries already have the advantage of being the only common members of almost all those frameworks. The agenda-setting

power, if used strategically, would effectively give the East Asian Community a pivotal role through which currently uncoordinated frameworks of the region would be organized to form a systematic constellation of cooperation in this region.

Law of 'manner and form' can also prompt intergovernmental meetings to regularize their manner of discussion, decision-making and implementation of their decisions. By subjecting current haphazard political discourse to a clearly set procedure, one hopes the macro-regional intergovernmental discourse would become more organized, more transparent and answerable to national parliaments and peoples in the region. The Draft Charter makes the necessary provisions for these purposes. Law of 'manner and form' can even ensure better and wider involvement of non-governmental stakeholders in the macro-regional process of decision-making and/or policy implementation and monitoring. Such wider involvement is essential in the East Asian Community, especially when it is conceived as a non-EC type of Community, whose policies are expressed in the form of voluntary national action plans (rather than in the form of laws), and implemented nationally according to each government's choice of forms and methods (rather than monitored and uniformly enforced by Community and national judicial processes). In order to secure better implementation of voluntary action plans, it is essential to attain wider agreement on those plans before their implementation: better information sharing and wider prior agreement by relevant parties would secure a generally higher degree of voluntary cooperation afterwards. It is essential to devise the procedures and institutional settings that will guarantee wider consultation with the stakeholders in the preparatory stage of the plans. The Draft Charter takes an indirect approach in this respect: it allows non-governmental stakeholders to officially participate in the implementing and monitoring stages rather than in the formal preparatory stage of the policy cycle. However, it is assumed that in a continuously operating policy cycle, monitoring implementation and preparing a new policy cycle would effectively become part of this continuous process, and distinction between participants would become academic.

Thirdly, the Draft Charter reflects the drafters' belief that the East Asian countries can also share some 'substantive' legal rules and principles. It also indicates their belief that most of these shareable rules and principles are also universally shareable at a global level. The drafters take pains to incorporate the standard legal terminology of international law, including human rights, and that of the international trade rules contained in WTO agreements, as well as the legal achievements of ASEAN and the various East Asian FTAs.

It is hoped that our legal vision will invite more debate on the useful role of law and institutions in developing regionalism, which would in turn also contribute to strengthening overall global governance. Let our case be heard; let our ideas be tested in the actualities of East Asia and the world.

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Part I

The current features of East Asian regionalism from a comparative perspective

1 East Asian regional economic cooperation and FTA

Deepening of intra-ASEAN economic cooperation and expansion throughout East Asia

Kazushi Shimizu

Introduction

Regional economic cooperation and integration have progressed rapidly throughout the modern world economy, as evidenced by the success of the European Union (EU). These types of economic cooperation and integration have promoted trade and factor movements (capital movement and labour movement) beyond national boundaries.

In East Asia, the Association of Southeast Asian Nations (ASEAN) has been the sole source of regional cooperation. Founded in 1967, ASEAN has implemented intra-regional economic cooperation since 1976. It has promoted deepening and widening of regional cooperation since its founding, deepening its political and economic cooperation and fostering other types of cooperation. The five original members of 1967 – Indonesia, Malaysia, the Philippines, Singapore and Thailand – welcomed Brunei in 1984, Vietnam in 1995, Myanmar and Laos in 1997, and Cambodia in 1999. Consequently, ASEAN presently extends throughout Southeast Asia.

As part of the structural changes affecting the world economy, ASEAN has further promoted intra-regional economic cooperation. The ASEAN Free Trade Area (AFTA), which was approved at the 5th ASEAN Summit in 1992, was established by the six original member countries in 2003. Today, ASEAN's new goal is establishment of the ASEAN Economic Community (AEC).

As an important axis of regional economic cooperation and free trade agreements (FTA) in East Asia, ASEAN has continued to expand. With the Asian economic crisis as a turning point, East Asian regional economic cooperation has increased steadily, coming as it has to include ASEAN Plus Three (APT: ASEAN Plus Japan, China and Korea). The East Asian Summit (EAS) has been held annually since 2005. At the same time, FTAs including the ASEAN–China Free Trade Agreement (ACFTA) and ASEAN–Japan Comprehensive Economic Partnership (AJCEP) have also been established. The advancement of East Asian regional economic cooperation and FTA will impart major influences on the overall East Asian economy as well as the world economy.

This paper presents an examination of the achievements and prospects of the East Asian regional economic cooperation and FTAs. The topic will be examined

mainly in terms of ASEAN. The author has analyzed intra-ASEAN economic cooperation on specific and long-term bases (Shimizu 1998a, 1998b, 1999, 2002a, 2004, 2005 and 2006a). This chapter addresses the characteristics and the deepening of current intra-ASEAN economic cooperation, and its major impacts on East Asian Economic Cooperation.

Section 2 discusses the process of intra-ASEAN economic cooperation during 1976–2003. Section 3 specifically describes developments in intra-ASEAN economic cooperation at the beginning of the 'ASEAN Concord II' in 2003. Section 4 examines East Asian regional economic cooperation and FTAs. The concluding section reviews these analyses and suggests some important future issues relating to East Asian regional cooperation and FTAs.

Intra-ASEAN economic cooperation during 1976–2003

Founded in 1967, ASEAN began intra-ASEAN economic cooperation at the 1st ASEAN Summit in 1976. This economic cooperation, based upon a report formulated by a United Nations Team ('Economic Cooperation among Member Countries of the Association of Southeast Asian Nations'), was carried out according to 'ASEAN's Strategy for Collective Import Substituting Industrialization for Heavy and Chemical Industries (ASEAN's strategy for CISI)'. (Shimizu 1998a: Chapter 1, 1998b). This strategy was designed under restricted foreign direct investment (FDI) and was conducted through collective self-reliance policies. However, the strategy suffered a setback from failures, resulting from conflicts of economic interests among the ASEAN countries (Shimizu 1998a: Chapters 2–3, 1998b), in the implementation of three policies: ASEAN Industrial Projects (AIP), ASEAN Industrial Complementation (AIC) and the Preferential Trading Arrangement (PTA) (along with the ASEAN Industrial Joint Venture, AIJV, also started in 1983). Failures in the creation of an interdependent market within ASEAN were a further cause of early setbacks.

At the 3rd ASEAN Summit in 1987, that strategy ('ASEAN's strategy for CISI') was switched to a new strategy 'ASEAN's strategy for Collective FDI-dependent and Export-oriented Industrialization (ASEAN's strategy for CFEI)'. This was a new model strategy for intra-economic cooperation or economic integration among developing countries, which was the strategy to support ASEAN countries' FDI-dependent and Export-oriented Industrialization collectively. Specifically, 'ASEAN's strategy for CFEI' was intended to accomplish the following:

1) invite foreign capital (especially FDI) to the region, not on an individual national basis;
2) promote economic activities supported by foreign capital;
3) form an integrated intra-regional market;
4) create exportable industries within the region (Shimizu 1998a: Chapter 4, 1998b).

The former strategy had failed and some changes had occurred in economic conditions both inside and outside the ASEAN region. At the heart of this new strategy was the Brand-to-Brand Complementation (BBC) Scheme.[1]

In 1991, ASEAN's strategy for CFEI reached a significant turning point and a new phase, along with historical structural changes surrounding ASEAN, resulting from changes in the cold war framework and the rapid economic growth in East Asia. These changes promoted the deepening and widening of intra-ASEAN cooperation. In other words, AFTA, ASEAN Industrial Cooperation (AICO) and the ASEAN Investment Area (AIA) were promoted as extensions of ASEAN's strategy for CFEI, and the widening of ASEAN to include the countries of Indochina (Shimizu 1998a: Final Chapter).

With the 1997 Asian economic crisis as a turning point, intra-ASEAN economic cooperation entered a new phase because the structures of the world economy and the East Asian economy surrounding ASEAN had changed to a great extent. The first change was China's rapid growth and its expanding influence. China maintained its rapid growth of over 7 per cent during and after the Asian economic crisis, which contrasted starkly with conditions in ASEAN countries. Trade and investment, which led to this rapid Chinese growth, grew rapidly. China came to attract FDI and consequently put great pressure on ASEAN countries. The second change was the stagnation of worldwide trade liberalization by the WTO and the evolution of FTAs. The third change was the increased interdependency throughout East Asia including China, and the development of the foundation for economic cooperation throughout East Asia (Shimizu 2004, 2005).

Some examples of intra-ASEAN economic cooperation after the Asian economic crisis are illustrative. In fact, AFTA was almost established by the six ASEAN original member countries on 1 January 2003. The tariffs on 99.55 per cent (44,160 tariff lines out of a total 44,361 tariff lines) of products in the 2003 Inclusion List (IL) of the six ASEAN original member countries were reduced to the 0–5 per cent tariff range by the common effective preferential tariff (CEPT) scheme. The average tariff for the six ASEAN original member countries under the CEPT Scheme had been reduced to 2.39 per cent from 12.76 per cent when the tariff-cutting exercise started in 1993 (ASEAN Annual Report 2002–3: 19).[2] The elimination of import duties will be completed by 2010 among the original six member countries and by 2015 (2018 for some sensitive items) in the remaining four countries.

In addition, AICO[3] was agreed upon at the informal ASEAN Economic Ministers Meeting in April 1996 and came into effect in November 1996. No case was approved for more than one year. However, in 1998, some cases such as that of Sanden Corp, an auto-parts producer, were approved in the background of the Asian economic crisis. As of February 2003, 101 cases had been approved. Of these, 90 are auto-related cases including 27 by Toyota Motor Corp. (Toyota), 26 by Honda Motor Co., Ltd. (Honda), 7 by Denso Corp. (Denso), 5 by Nissan Motor Co. Ltd. (Nissan) and 2 by Mitsubishi Motors Corp. (MMC).[4] Actually, AICO was centred on the complementation of auto parts for Japanese automobile makers. For example, Toyota produced main auto parts such as steering gears in Malaysia, transmissions in the Philippines, diesel engines in Thailand and gasoline engines in Indonesia. It had been complementing these parts since 1990 under BBC and AICO. The main auto parts of Toyota in ASEAN were complemented at a tariff of 0–5 per cent (Shimizu 1998a: Chapter 5, 2004).