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Legalization of International Economic Relations:

Is Asia Unique?

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December 2017

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The concept of "legalization" developed by international relations theorists in the early 2000s seems to be very useful in analyzing the development of international laws. Legalization is a particular form of institutionalization characterized by three aspects: obligation, precision, and delegation. While earlier studies tend to simply argue that Asian institutions are less legalized than their Western counterparts, such a simplistic argument may need some revisions. Because there are already many bilateral and regional agreements in Asia that attempt to facilitate economic integration, it is very timely to re-examine the state of play of legalization of Asian economic relations. There is a possibility that Asian institutions are now legalized in terms of one or two aspects of legalization, but not all.

Keywords: Legalization, International economic law, ASEAN way, Asian regionalism, Free Trade Agreement (FTA), Dispute Settlement Mechanism (DSM)

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Introduction

It is not easy to conduct a theoretically informed comparative study of *de jure* economic integration, namely, economic integration in terms institutional development. Therefore, we tend to have a simplistic argument that economic relations in Europe are more institutionalized or legalized than those in Asia, which has adopted an "informal" approach, without further elaboration. As a result, Asian scholars and policy makers are often preoccupied to learn lessons from Europe and to contemplate what Asia should do to achieve a comparable level of institutionalization or legalization as Europe. Alternatively, Asian elites simply argue that Asia is very different from Europe and it should pursue its own way of regionalism without having careful reference to integration efforts in other regions. In essence, there is a lack of real comparative study of *de jure* economic integration across regions.

One of the reasons for the lack of serious attempt of comparative study is limited scholarly interactions between international economic lawyers and international relations experts (Burley 1993). International economic lawyers tend to focus on the interpretation of rules on a case by case basis, without too much generalization, such as the European or Asian way of setting international rules. International relations theorists, in contrast, are preoccupied in identifying the causes of institutionalization (conditions under which international relations are institutionalized), without paying large attention to differences in institutional design. In addition, area study experts (e.g., European studies experts in Asia) who are interested in comparative regionalism studies seem to keep some distance from disciplinary studies such as laws and international relations, which resulted in another knowledge gap, the one between area studies and disciplinary studies.

However, several important theoretical works that look into the legal aspects of institutions have been conducted by international relations theorists since 2000. One area of research that achieved remarkable theoretical development is the "legalization of institutions." While earlier studies do not clearly distinguish the difference between the two terms (institutionalization and legalization), and often use them interchangeably, Abbott et al. (2000) define legalization as a particular form of institutionalization characterized by three components: obligation, precision, and delegation. Political scientists are now studying specific questions regarding the legalization of institutions, such as the impact of flexible languages (Linos and Pegram 2016[1]) and the form of delegation of power (Duina 2016[2]).

This paper asks a very simple but important question: Is Asia unique in terms of the legalization of economic relations? I try to answer this question by reviewing the legalization of ASEAN trade liberalization. The paper mainly discusses the liberalization of goods trade and dispute settlement mechanisms, but it also touches upon services trade

[1] Linos and Pegram (2016) argue that flexible languages in treaties often have unexpected impacts on state behaviors. When an agreement specifies some tasks firmly and provisions on other expected tasks include flexible languages, governments may respond by strategically redirecting efforts toward firmly specified tasks.

[2] Duina (2016) argues that the delegation of power takes different form between FTAs among civil law countries and those among common-law countries. The former prefer a permanent court to solve disputes while the latter prefer an *ad hoc* dispute settlement mechanism.

liberalization in ASEAN[3]. While past influential studies argue that international relations in Asia are less legalized, implying that rules are imprecise and non-binding and Asian countries are reluctant to delegate power (Kahler 2000[4]), such an observation needs careful re-examination given the number of economic agreements signed in Asia since the early 2000. We should also not rule out the possibility that Asia has a distinct approach to legalization that is different from Europe or elsewhere. Moreover, it is important to ask which aspects of legalization (precision, binding-ness, or delegation) has been most developed in Asia because there is a possibility that Asian institutions are legalized in terms of one or two aspects of legalization, but not all.

The next section reviews the development of international relations theories on institutions and explains the studies on legalization of institutions in detail. Section 3 discusses ASEAN countries' attitudes toward precision and binding-ness in developing international rules or commitments. Section 4 discusses the third aspect of legalization, namely, the delegation of power. In addition to the arrangement of delegating power, it discusses the actual exercise of delegated power. The final section concludes and attempts to answer the question whether Asia is unique.

Review of Theories: From Regime to Legalized Institution

There was a rise of regionalism in the 1960s, which was triggered by the launch of the European Commission in 1957 (Mansfield and Milner 2003). Naturally, scholars started to analyze the interesting development of regionalism and some comparative analyses were conducted. The focus then was on the *organization*, which is an inter-state association with some physical body such as a permanent secretariat. In fact, Nye (1968) states that "regionalism in the descriptive sense is the formation of inter-state associations or groupings on the basis of regions and, in the doctrinal sense, the advocacy of such formations." Interestingly, one of the leading journals of international relations, *International Organization*, was launched in 1947.

International relations scholars started to think that the focus of analysis is too narrow if they stick to the concept of organizations. Krasner (1982) started to use the term "regime," which refers to a set of "implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations." The scope was widened, to capture various mechanisms that affect state behaviors, going beyond written rules and formal organizations. Moreover, an emphasis was placed on regimes, which are the accumulation or networks of various mechanisms, such as a security regime (Jervis 1982) and a human rights regime (Donnelly 1986). However, the concept of regime is so broad that it is often difficult to conduct an empirically sound analysis (Haggard and Simmons 1987).

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[3] Investment is another important area where international economic relations are legalized. However, we will not discuss investment in this paper because the legalization of investment relations deeply involves private entities, such as investor–state disputes, which makes the nature of delegation of power very different from the case of trade. For the legalization of international investment relations, see Salacuse (2007).

[4] Interestingly, Kahler argues that economic cooperation is one of areas that achieve a relatively high level of legalization, unlike security. Note, however, that many international economic lawyers are of the view that economic cooperation in Asia is poorly legalized the signing of FTAs. See Davidson (2000) and Ewing-Chow (2008).

After this, the literature developed in two ways. A first group of scholars conducted analyses on international norms. While norms are included in the concept of "regime" because they affect state behaviors, their treatment was marginal in empirical studies because a positive analysis of norms is difficult, i.e., norms are often unwritten. Finnemore and Toope, who belong to this group of scholars, heavily criticize legalization literature (see below) that intends to contribute to "positive" empirical studies, on the grounds that the concept of legalization is vast and summarizing it into a limited number of "variables" misses the point (Finnemore and Toope 2001).

What is interesting is that literature on regional institutions that emphasizes the role of norms has developed in the context of Asian regionalism. This is particularly evident in a study on the Association of Southeast Asian Nations (ASEAN), whose institutionalization started more than a half-century ago. For example, Acharya (1997) dubbed the institutionalization of cooperation in Southeast Asia as the "ASEAN way." It is very interesting to note that several key words to describe ASEAN way use somewhat contradictory terms. "Flexible consensus" means that decision making is based on consensus, which does not necessarily require the consent of all parties. Proponents of the ASEAN way distinguish consensus and unanimity. Consultations to reach flexible consensus are held at "informal official" meetings. Such a meeting is not an unofficial meeting. What is agreed as a result of such consultations becomes "non-binding commitment." Countries need to implement commitments, but non-fulfillment does not lead to punishment. Above all, the overarching attitude of ASEAN negotiations can be said to be "agree to disagree" (Puig and Tat 2015).

Other scholars return to the analysis of organizations. The paper by Abbott and Snidal (1998) that tackles the question "why states act through *formal* international organizations" (emphasis added) is one of illustrative examples. It is important to note that theorists start to make a conscious effort to develop concepts that are useful for empirical studies. So-called "rational" institutional design projects (Koremenos et al. 2001) have made a very important contribution in this regard. They argue that institutions have five key institutional features (membership rules, scope of issues covered, centralization of tasks, rules for controlling the institution, and flexibility of arrangements), from which angle sound empirical studies, including comparative studies, of international institutions can be conducted.

It was in this context that the concept of legalization of institutions was developed by Abbott et al. (2000). Legalization is a particular set of characteristics that institutions may possess, i.e., obligations, precision, and delegation. Obligation means that states or other actors are legally bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international laws. Precision means that rules unambiguously define the conduct they require, authorize, or proscribe. Delegation means that third parties have been granted the authority to implement, interpret, and apply the rules and to resolve disputes. While there has been a criticism that legalization is only one aspect of institutionalization, ignoring other important institutional features (Finnemore and Toope 2001), there seems to be a wide consensus that the concept is useful for empirical studies (Goldstein et al. 2001).

Whether rules or commitments are hard or soft has been one of the principal concerns among scholars studying international relations. When rule and commitments satisfy the three conditions of legalization (obligation, precision, and delegation), they can be regarded as hard law or highly legalized institutions. When one or more aspects of legalization are insubstantial, such can be called as soft law. There would be an extreme argument by neo-realists that even precise and binding rules do have little impact on states' behavior. However, for many, when obligations are binding and precise, they are likely to have a large influence on states' behavior. In other words, there is an assumption that "the harder, the better" regarding international rules. Many arguments that support the value of soft law actually take it for granted that hard law is the very best solution and that soft law is the second best. Because agreeing upon hard legalization is difficult due to sovereignty cost, states compromise and accept soft legalization, with some actors holding an expectation that institutions would be more legalized in future. Probably, the only factor that would make soft legalizations superior to hard ones is "uncertainty" (Abbott et al. 2000, 441)[5]. Because what will happen in future is uncertain, a soft approach that has ambiguous and broad scope is better at governing state behaviors. Institutions or rules that are too hard tend to be broken down or outdated easily when something unexpected occurs.

Likewise, delegation of power is to make international rules hard. As one can imagine, international relations tend to focus on "which country has more power."[6] The legalization literature made very important contributions in this regard, because it shows the possibility wherein power is delegated to a third party, not to other states. With the concept of delegation of power, we can go beyond questioning which country has more power. Borrowing ideas from game theory, institutionalists (neo-liberal institutionalists) argue that institutions that prevent the prisoners' dilemma situation are beneficial to all members. Institutionalists emphasize the importance of the mechanism that guarantees cooperation, such as monitoring, side payment and punishment (in the case of incompliance), whereas the legalization literature makes it very clear that power delegated to such a mechanism that guarantees cooperation is the key to understanding the nature of institutions.

Kahler (2000) examines Asian institutions such as ASEAN and Asia–Pacific Economic Cooperation (APEC), using the concept of legalization developed by Abbott et al. (2000). He convincingly concludes that Asian institutions are less legalized from the angle of all three aspects and asks why such is the case. He carefully examines two possibilities: the legal culture in Asia and authoritarian domestic regimes. He argues that Asia's uniform rejection of legalization should have been persistent if legal culture or domestic regime is the reason. In reality, however, he finds that Asia's attitude toward legalization is mixed, which implies that those constant factors do not explain why Asia often, but not always, prefers low level of legalization. In addition, regarding legal culture, he rejects such a possibility on the grounds that Asian states adopt the legalization approach in developing *domestic* legal institutions. Then, he argues that legalized institutions are a means to other

[5] Some international economic lawyers are critical of soft laws as the proliferation of soft laws might destabilize the international system (Weil 1983).

[6] Power can be military power and essentially based on material capability. However, according to Nye (1991), there is soft power as well. Nonetheless, the question of soft power is which country has larger influence, which is essentially on the same paradigm as hard power.

ends and Asian countries adopt legalization only when that serves their goal, though an important question regarding the way in which Asia accepts legalization remains unanswered.

The following sections discuss whether there is an Asian way of legalization of international economic relations and whether Asia has a distinctive approach to the legalization of institutions. First, we will analyze precision and binding-ness of rules together, because there may be a trade-off between the two aspects of legalization. Then, we will analyze the delegation of power. We will also discuss the exercise of delegated power, which is different from the delegation of power *per se*.

Priority on Precision over Binding-ness: "Asian" Rules?

Asian countries, including ASEAN Members, prefer adopting declarations or political statements. By looking at the website of ASEAN, one can find that it is full of declarations and political statements. Declarations and political statements are usually non-binding and imprecise—they are hardly hard law. Another interesting phenomenon is that ASEAN likes to sign framework agreements that may or may not be followed by the signing of detailed agreements. ASEAN's project on trade liberalization starts with the signing of the Framework Agreement for Enhancing ASEAN economic Cooperation signed on January 28, 1992. Service liberalization projects are also conducted under the ASEAN Framework Agreement on Services (AFAS), signed in 1995. The Framework Agreement can be said to be a first step toward the legalization of international relations, because the signing of framework agreements is a manifestation of Members' interests in developing legalized institutions.

When economic liberalization commitments are legalized, ideally, rules or commitments should be both precise and binding. However, when precise *and* binding rules are too much, one of them should be prioritized. What is the case of ASEAN? It seems that ASEAN prioritizes precise commitment over binding commitment. In other words, ASEAN Members' commitments tend to be precise but non-binding.

There is no doubt that Asia and ASEAN start to have very precise rules with regard to economic liberalization commitments. Trade liberalization of ASEAN Free Trade Area (AFTA) is precise enough: it is very clear that by when and which tariff line should reduce the tariff level to which level. ASEAN's liberalization of services trade is also precise enough. The schedules of service liberalization commitments show the minimum level of liberalization that a Member shall maintain in the future. It is clear which sector and which mode of service supply are subject to which regulations.

The "Temporary Exclusion List" used in the AFTA Common Effective Preferential Tariff (CEPT) Scheme is an illustrative example of ASEAN's preference on precision over binding-ness. Article 1 of Protocol Regarding the Implementation of the CEPT Scheme Temporary Exclusion List signed in 2000 states:

> Article 1 Objective and Scope
> The objective of this Protocol is to allow a Member State to temporarily delay the transfer of a product from its [Temporary Exclusion List] TEL into the Inclusion List (hereinafter referred to as 'IL'), or to temporarily suspend its concession on a

> product already transferred into the IL, if such a transfer or concession would cause or have caused real problems, by reasons which are not covered by Article 6 (Emergency Measures) of the Agreement.

Haggard (2011) notes that the High Level Task Force on ASEAN Economic Integration argued for flexibility in meeting commitments, but at the same time proposed that commitments be more precise and transparent. In his observation, all commitments undertook by ASEAN Members are precise, but there is differentiation in terms of the timing of implementation across countries, including a possibility of a temporary opt-out. There is even a possibility of a perpetual opt-out based on "ASEAN minus X" formula. This is in line with ASEAN's original idea of a Temporary Exclusion List introduced in CEPT scheme. The idea is to make the commitments non-binding for a temporary period and not to make them imprecise.

The negotiation position of ASEAN at the multilateral services trade negotiations also suggests ASEAN's preference to precision over binding-ness. At the World Trade organization (WTO) Doha round services trade negotiations, ASEAN Members insisted upon the creation of new rules on Emergency Safeguard Measures (ESM) so that they can submit ambitious services liberalization commitments, which are precise in nature. This is because, with the system of ESM, WTO Members can be exempted from the liberalization commitments when something unexpected happens. ASEAN countries that had experienced the Asian financial crisis in 1997/8 are strong proponents of EMS because, for example, ASEAN's commitment of financial services liberalization can be suspended if another financial crisis hits the region and EMS is in place. It should be noted that WTO services trade liberalization follows the so-called "positive list" approach, wherein liberalization is required only in the sectors that each Member agrees to liberalize. While ASEAN Members have an option to take advantage of this rule by offering poor-quality commitments rather than requesting the ESM, they decided to insist upon the new rules on EMS, which enables them to submit ambitious offers. In short, ASEAN wants to relax the binding-ness of WTO services trade liberalization commitments while keeping them precise.

Then, the question is why precision is prioritized over binding-ness. There are two possible explanations. First, because methodology of the commitment is globally standardized, Asia should follow it. Asian countries do not have room to make imprecise commitments because of globally harmonized way of liberalization. This is especially true for Asian countries' commitment under WTO, but this is also true for commitments under Asian FTAs that often follow globally standardized format. The second possibility is that the level of binding-ness can be adjusted relatively easily, even after the enforcement of rules. In contrast, reducing the precision of text involves additional negotiations to agree upon new set of ambiguous languages and commitments, which is time consuming.

Delegation of Power and the Exercise of Delegated Power

The first protocol on the Dispute Settlement Mechanism (DSM) of ASEAN was signed in 1996 (1996 Protocol); however, this was never invoked due to its excessively bureaucratic nature (Puig and Tat 2015, 282). Based on Abbott et al. (2001), Davidson (2004) reviews the legalization of economic cooperation among ASEAN achieved by the

early 2000s. While he acknowledges the growing momentum of delegation of power, he concludes that delegation is the most difficult aspect of legalization in ASEAN economic relations because of the norm of the "ASEAN way."

The institutional design of ASEAN services trade liberalizations also implies that delegation is the lowest priority in ASEAN. As discussed, at the WTO services trade negotiations, ASEAN Members are the proponents of EMS, which reduces the binding-ness of commitments. However, ASEAN's regional services trade liberalization called AFAS does not have EMS. This is perhaps partly because ASEAN Members are unlikely to exercise delegated power even if power is delegated (for further discussion on the exercise of delegated power, see the next section). As long as the initiation of a dispute settlement mechanism is unlikely, ASEAN Members accept not only precise, but also binding commitments. Because this assumption does not hold for the case of WTO services trade liberalization (once power is delegated, Westerns countries are likely to exercise it) , ASEAN needs to insist upon the EMS. Hence, we can say that the delegation of power is the lowest priority of legalization in ASEAN services trade liberalization.

However, there seems to be a growing consensus that the dispute settlement mechanism in ASEAN or ASEAN Free Trade Agreement (AFTA) is comparable with other FTAs. In 2004, ASEAN adopted the Protocol on Enhanced Dispute Settlement Mechanism (2004 Protocol), which establishes a near rule-based Dispute Settlement Mechanism for AFTA (Puig and Tat 2015). Does this mean that ASEAN's economic relations are fully legalized in terms of all of three aspects, namely, precision, binding-ness and the delegation of power? To tackle this question, it seems helpful to distinguish the two questions below:

(i) whether states delegate power to dispute settlement mechanisms and
(ii) whether power delegated to dispute settlement mechanisms are actually exercised.

Voeten (2010) argues that in general, countries are not keen to use a dispute settlement mechanism and attempt to solve problems diplomatically through consultation and consensus. Such an attitude is not unique in Asia and many non-Asian countries also solve problems without using a dispute settlement mechanism. However, it should be noted that what he finds was that there is no evidence that Asian countries are less likely than other states to refer trade, investment, or territorial disputes to a dispute settlement mechanism at the *global* level, such as the WTO Dispute Settlement Mechanism (emphasis added).

Then, the real question is why ASEAN countries refrain from using the ASEAN Dispute Settlement Mechanism against fellow ASEAN states, despite the fact that they initiate the WTO dispute settlement proceedings as frequently as other states. Articles 26 and 27 of the ASEAN Charter, which came into force on December 15, 2008, give us some idea on this problem:

> Article 26 Unresolved Disputes
> When a dispute remains unresolved, after the application of the preceding provisions of this Chapter, this dispute shall be referred to the ASEAN Summit, for its decision.
>
> Article 27 Compliance
> 2. Any Member State affected by non-compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, may refer the matter to the ASEAN Summit for a decision.

While ASEAN trade dispute settlement mechanism developed to a certain degree, ASEAN is essentially an institution that solves problems through consultation and consensus. The ASEAN Charter anticipates that if disputes remain unresolved, then the dispute shall be referred to the ASEAN Summit, which is very likely to follow consultation and consensus rather than majority voting (Ewing-Chow 2008, 230).

In this regard, the difference between Asian countries and others is not negligible. As Kahler (2000) argues, non-Asian countries also solve problems outside legalized institutions. Nevertheless, the difference between the two should be emphasized. Asian countries are more explicit in accepting the fact that legal solutions have limitations and it is diplomatic efforts that ultimately solve legal problems. In contrast, Westerners focus on tightening the loopholes of legalized institutions to make them as "perfect" as possible. While Asians *formally* accept *informal* ways of solving problems, it seems that Westerners only *informally* accept the fact that an *informal* way is necessary to solve disputes.

Why, then, do Asians formally accept the informal way? In answering this question, we should remember that ASEAN started as an institution that mainly focuses on security issues. Even after ASEAN developed new rules and procedures to handle new issues such as trade and environment, the underlying norms developed during early era, such as non-interference and consultation and consensus are still present. Because the enforcement of new specific rules is constrained by the meta-regime that is based on old norms and values, they do not function as expected (Aggarwal and Chow 2016). The ASEAN way is effective in solving security problems or effective in putting sensitive security problems in the shelf. One could argue that security and trade issues are totally different in terms of dispute settlement because the latter deals with more time-sensitive problems that have huge commercial implications and the ASEAN way is not effective in solving those immediate disputes at hand (Puig and Tat 2015[7]). At the same time, one could also argue that everything is related to security and this is especially true for ASEAN, where the concept of "non-traditional" security issues is widely accepted (Tan and Boutin 2001).

Conclusion

Legalization is a particular form of institutionalization characterized by three aspects: obligation, precision, and delegation. During the last two decades, international economic relations among ASEAN Members have experienced the substantial process of legalization. While earlier studies tend to conclude that the legalization of economic liberalization in ASEAN was insubstantial in terms of all of the three aspects of legalizations, it is timely to re-examine this due to the progress of *de jure* economic integration in ASEAN and Asia.

It seems that the liberalization commitments of ASEAN trade liberalization are as precise as liberalization elsewhere. Because the "template" of liberalization has been globally standardized, ASEAN needs to follow it. The binding-ness of rules is also acceptable to

[7] Due to the fact that ASEAN Dispute Settlement has never been used to solve a trade dispute demonstrates the clear limitations of the ASEAN way. Puig and Tat (2015, 298) suggest the arbitration model for trade dispute settlement in ASEAN.

ASEAN. Only when the exercise of delegated power is likely does ASEAN try to keep rules non-binding. EMS under the WTO services trade negotiation is one illustrative example of this. Other than this scenario, ASEAN usually accepts precise and binding rules. The most difficult part of legalization in ASEAN is the delegation of power. Even if ASEAN Members agree to delegate power, there is an implicit understanding that trade disputes should be ultimately solved diplomatically outside the legalized system. In fact, ASEAN dispute settlement mechanism has never been used, despite the fact that ASEAN's use of the WTO dispute settlement mechanism is as frequent as other states. Thus, the situation is ironical: only when ASEAN Members agree not to use legal mechanism can they agree upon the establishment of such a legal mechanism. This does not, of course, mean that legalization in ASEAN is of no value. As long as disputes are not too critical to national interests, they are likely to be solved legally.

The difference between Asia, or ASEAN, and the Western world in terms of legalization is substantial. While Asians formally accept informal way of solving problems, it seems Westerners only informally accept the fact that the informal way is necessary to solve problems. One plausible explanation why ASEAN make it explicit that non-legal method should be always on the table is that ASEAN is essentially a security institution that tries to solve problems in amicable way and the implication of trade dispute to security is not negligible. ASEAN does not deny the value of legalization, but explicitly keeping the option of non-legal solution is the prerequisite to legalization. In order not to over-write the solution suggested by legalized institutions by last-minute diplomatic negotiations, legal and diplomatic methods are always hand-in-hand in ASEAN economic cooperation.

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