Comparing Regional Integration Projects —Institutional arrangements for solving collective action problems in the EU and ASEAN—

Suguru HARADA

I. Introduction

The 27th Association of Southeast Asian Nations (ASEAN) Summit on 21st November 2015 in Kuala Lumpur declared the establishment of the ASEAN Community. Although the same word "Community" is titled, the ASEAN Community is much different from that of Europe, the European Community (EC), which is the predecessor to the European Union[1]. While European integration has been profoundly characterized by supranational institution[2], the ASEAN has not hitherto demonstrated supranational features in its history.

The aim of this article is, despite this characteristic difference between both regional integration projects, to compare them through the analysis of their institutional arrangements that mitigate or resolve problems caused by the collectivity of actors concerned. As both are based on a multilateral agreement to promote economic integration, problems stem from the necessity of coordinating participating-states' behaviors—collective action problems are one of unavoidable obstacles in the process of regional integration. Consequently, although probably taking different forms, institutional arrangements to solve collective action problems should be observed in the process of both projects.

From the perspective that regional integration needs to deal with collective action problems, this article analyzes the significance of institutions for the prospect of regional integration through a comparison of institutional arrangements undertaken in the EC and ASEAN Community, especially in the domain of economic integration.

For this purpose, the article consists of four sections. First, to provide a common framework of institutional analysis, the nature of collective action in the process of economic integration is clarified with a brief argument of common institutional features between the EC and ASEAN, namely the

[1] For the main period argued in this article is of the European Economic Community and the EC, the term EC is used to refer to the organization of the European integration project throughout this article. In some citations, the EC is mentioned to simply as "Community".

[2] To make clear distinction between a comprehensive institutionalized regime dedicated to regional integration and organizations established within the framework of regional integration project, the word 'organ' is used for describing such organizations. Accordingly, 'institutions' are to indicate a whole set of rules and procedures constructed for a regional integration project.

characteristics of incomplete contracts, which have heavily influenced the deployment of each integration process. Second, the emergence of judicial decision-making and its significance in the process of European integration is discussed. Although it was not intended, the function consequently fulfilled by the European Court of Justice (ECJ) contributes greatly to resolving collective action problems in the removal of non-tariff barriers (NTBs). However, this section also suggests that the effectiveness of judicial politics in promoting economic integration casts a shadow on the future of European integration. Third, the institutional framework demonstrated by the ASEAN Charter and its implications for the prospect of Southeast Asian economic integration is examined. While the characteristic approach of ASEAN, the so-called ASEAN way, has been crucial in maintaining the integration project in this region, this approach might not be effective in promoting economic integration. Nonetheless, the ASEAN way contains aspects favorable for the continuation of regional integration. The final section indicates the correlation, which turns out to be a key aspect of regional integration, between the effectiveness in the integration process and the costs imposed on member states. The article concludes with the prospects for future orientation in the two regional integration projects.

II. Theoretical Framework: Regional integration as collective action

In the founding agreements of both regional integration projects, the Treaty of Rome for Europe and the ASEAN Charter[3] for Southeast Asia, broad goals are enshrined without precision of means to achieve them. For example, as represented by the phrase 'ever closer union among the European peoples' in its preamble, the Treaty of Rome stated the economic development and the improvement of living standards as the goals of the EC in addition to the establishment of a common market. Regarding the ASEAN, the preamble of the Charter enumerated lasting peace, sustained economic growth, and social progress as common objectives of member states. While both have declared the commitment of member states within the framework of a collective entity to these broad goals, the means to achieve them are relatively ambiguous, if not absent, in these agreements. Thus, the founding agreements of both regional integration projects are marked as 'incomplete contracts'—while the general framework and members' political will to engage with the project are explicitly formalized, regulations, rules, and policies necessary to bring about regional integration are unspecified.

This incomplete contract offers several advantages to contracting parties. Given the uncertainty inherent in the future, the form of framework agreement can avoid arduous tasks of prescribing provisions even for unforeseeable contingencies. At the same time, bypassing these tasks considerably reduces transaction costs entailed by detailing all rules for contracting parties at the moment of concluding an agreement. The task of formulating rules later, in turn, provides the opportunity of renegotiating the contents of agreement (Cooley and Spruyt 2009: 5–6). In other words, incomplete contract facilitates concluding an accord among multiple actors by requiring collective commitment

[3] Hereafter, without a particular mention, 'Treaty' indicates the Treaty of Rome and 'Charter' is for the ASEAN Charter.

only to broad common goals and by providing the flexibility in determining precise obligations imposed on members.

However, the nature of pre-commitment to common goals and its subsequent need for *ex post* legislation engender other difficulties than consensus-making for an initial agreement. Pre-commitment and *ex post* legislation lead to the problem of how to ensure members' compliance with rules that are undefined at the time of negotiation. Put another way, how to avoid collective action problems becomes more urgent.

In economic integration, collective action problems are defined in terms of dilemmas of common interests that occur when "jointly accessible outcomes are preferable to those that are or might be reached independently". In this situation, to attain the optimal outcome for a *collective* entity, institutional arrangements are required to constrain members' actions based on *individual* interests, particularly such as defection, cheating, and free riding (Stein 1982: 304–316). Therefore, expected common profits from the liberalization of markets are maximized only when collective commitment to a joint decision is guaranteed. In this regard, ensuring pre-commitment to rules that would be specified in the future exacerbates the difficulty of institutional design for solving collective action problems. In short, institutional arrangements to overcome collective action problems are crucial for sustaining regional integration projects founded on incomplete contracts.

In conventional studies of regional integration, this institutional aspect was given an auxiliary status for the success of regional integration. As determinant factors, the scale of expected profits from integration and strong leadership with the capacity to settle with asymmetrical distribution of profits were indicated as the conditions for the success of regional integration (Mattli 1999: 41–43). It was argued that the absence of institutional arrangements for ensuring commitments such as enforcement or/and monitoring mechanism might be compensated with repeat-play, issue-linkage, and reputation. While the importance of expected profits from regional integration cannot be underestimated, the requirement of a paymaster state in member states is disputable.

In the ASEAN, although Indonesia is the largest country in the region, it has less economic capability than Singapore despite Singapore's small country-size. Other member states such as Thailand and Malaysia have relatively high economic capabilities in the region yet none of these four countries' economies are sufficient to independently support the whole process of regional integration. Consequently, "economic contributions from extra-regional countries have been substantial" to help less developed member states in the ASEAN. The region clearly lacks a state capable to act as a regional paymaster (Mattli 1999: 169–170; Yoshimatsu 2006: 131–136).

The EC also lacked such a hegemonic state in its initial period. Although West Germany grew to the degree that it could fulfill the role of regional paymaster in the later period, the balance in economic strength among founding states at the time of the Treaty of Rome was only moderately asymmetrical (Cooley and Spruyt 2009: 161–163). The continuation of regional integration in the initial period and, more importantly, the functions of European institutions cannot be fully explained simply by the political will of Germany.

By framing regional integration as a collective project, institutional arrangements increase the importance in the analysis of regional integration processes. When an institution is once in place, it

constitutes the contextual structure that shapes participating states' behaviors even after their initial interests in such institutions change. This 'stickiness' of institution is explained by the avoidance of costs for constant recalculation of sunk costs and potential benefits, the uncertainty inherent in the future including the permanence of national interests, and actors' adaptation to the existing institution that might shift the very criteria of national decision. "Institutional maintenance is not, then, a function of waiving of calculation; it becomes a factor in the decision calculus that keeps short-term calculations from becoming decisive" (Pierson 1996:144–148; Stein 1982: 316–324). Thus, instead of institutional arrangements as a weak condition to facilitate strategic interactions in the process of regional integration (Mattli 1999: 50–57), an institution might affect the very formation of national strategies. Accordingly, institutional analysis can shed light on other conditions for the survival, if not the success, of regional integration.

The following two sections are dedicated to analyzing the EC and the ASEAN Community respectively from the point of view of how to solve collective action problems by institutional arrangements with attention to the institutional effects in shaping member states' behaviors. As the institutionalization of European integration precedes the ASEAN and the ASEAN has clearly drawn lessons from the experience of Europe (Yamakage 2015: 1), the analysis starts from the case of the EC and proceeds to the ASEAN Community with a perspective deduced from the EC.

III. Judicial Guarantor of Members' Commitments in the EC

In the post-war Europe, the pressing problem was economic recovery from the aftermath of WWII. The regional integration project focusing on the establishment of a common market was the response to this problem and the conclusion of the Treaty of Rome was the collective decision to take the path of economic integration for the restoration of the continent. In its initial design of institutions for European integration, contrary to the function fulfilled in the later period, the role assigned to the ECJ was not salient. The main task was the supervision over European organs' actions as it had been so in the framework of the European Coal and Steel Community. Although the ECJ was incorporated into the infringement procedure as a co-monitoring organ, it was the European Commission (Commission) to initiate the procedure and any binding effects were not granted to ECJ's decision (Alter 2001: 5–8). In fact, the initial design envisaged the Commission as the leading organ for the European integration process.

Although the Council of Ministers (Council) had the power of final decision-making in the EC legislation, some institutional designers had prescribed procedural conditions into the Treaty in favor of the Commission. They had granted to the Commission the competence of initiating legislation which enables the Commission to act as a 'conditional agenda-setter'. They allocated asymmetrical positions to the Council and Commission. While the Commission can formulate and amend proposals for EC legislation in any time point of procedure, the Council is required unanimity to amend Commission's proposals. Since the integration process had been planned to move gradually toward the decision-making by majority voting, the procedural asymmetry to amend proposals stipulated in Art.149 EEC would enable the Commission to influence eventual legislative outcomes by "allowing

the Commission to initiate legislation while requiring unanimity in the Council for any amendment of a Commission proposal and only a qualified majority to adopt the proposal" (Tsebelis and Kreppel 1998: 57–60). Thus, initial institutional arrangements in the European integration process were devoted to enhancing the capability of the Commission in *ex post* legislation backed up by the authority based on the consent among a majority of member states.

However, strong opposition from a member state soon reversed this initial intent. The antagonistic attitude of Charles de Gaulle, the president of France during the 1960s, toward the supranationality of the institution caused the Empty Chair Crisis in 1965. The consequent Luxembourg Compromise, which agreed to retrieve the integration process from the demise, allowed a *de facto* veto for all member states in any policy domain. By stating that the issue on the table is of 'very important interests', the decision-making in the Council required unanimity, hence all individual member states could block the political process of the Community (Vanke 2006: 157–159). It is noteworthy that what opened the door for de Gaulle to the partial repeal of a once established framework agreement was the opportunity in *ex post* legislation at which de Gaulle had initially claimed favorable conditions for France in drawing up the Common Agricultural Policy (CAP). Although the conflict around the CAP had brought about the Empty Chair Crisis, the compromise reached as the resolution for this crisis diminished the Commission's potential to conduct *ex post* legislative procedure.

As the initial institutional arrangement had failed in solving collective action problems, the following period was termed 'Eurosclerosis' within which the EC political process was captured in a 'joint-decision trap'. This is caused by the Prisoners' Dilemma in a situation where decision-making for collective profits requires unanimity. Although a political option is acknowledged among participants to be necessary for achieving common goals, individual losses expected from that option hamper member states from taking such decisions. Accordingly, collective action in this situation has a tenacious tendency to *status quo* (Scharpf 1988: 254–271). This stagnation brought by the institutional failure in solving collective action problems persisted until the first institutional revision by the Single European Act (SEA).

Despite the lustreless progress in the political process, the European integration project has not collapsed. Exactly in the same period, there was a transformation in the European institutions, which maintained, if not promoted, the integration process—the constitutionalization of EC law has been achieved by the ECJ. As mentioned above, the function initially assigned to the ECJ was limited. However, the competence of interpreting the Treaty, which had been coincidentally granted to the ECJ (Keohane *et al.* 2000: 483), served to extend judicial discretion to an extent that went beyond the intent of institutional designers. Art.177 EEC prescribed that national courts can or must refer preliminary rulings to the ECJ in the case that the interpretation of the Treaty is crucially important in the adjudication on litigation brought before them[4]. Through this procedure of preliminary ruling, the ECJ has asserted the doctrine of direct effect and of supremacy in the cases known as *Vand Gend en Loose* in 1962 and *Costa* in 1964 respectively.

[4] In the case of national highest courts, they must refer to the ECJ for interpretations of the Treaty and EC law while national lower courts can choose whether they make reference or not.

In the case *Vand Gend en Loose*, the ECJ stated that the Treaty is not merely setting mutual obligations between member states since the objective of the Treaty is to establish a common market, which affects the direct concern of parties in the EC. This objective, drawing on the preamble of the Treaty by indicating that peoples of member states are included into the 'parties', characterizes EC law as a new legal order in international law. The ECJ concluded that this new legal order not only imposes obligations on individuals but also confers rights upon them. At the same time, the ECJ asserted that as long as the provision in question defines 'clear and unconditional' obligation, it generates direct effect that does not need any legislative procedure to be passed at the national level. Consequently, the ECJ has declared on the basis of an extensive interpretation of the Treaty that EC law has direct effect and individuals can invoke provisions of the Treaty before national courts in order to protect their rights derived directly from the Treaty.

The doctrine of direct effect logically posed the subsequent question regarding the relationship between national law and EC law—when they are in conflict, which law has priority? Thus, this legal question necessitated the doctrine of supremacy according to the logic of law in order "to maximize the efficiency by which the Community performs the tasks entrusted to it by the Treaty" (Burley and Mattli 1993: 65–67; Weiler 1999: 19–25). In the case *Costa*, the ECJ employed the same reasoning with the case *Van Gend en Loose* in its reasoning, and asserted the supremacy of EC law over national law because the former derived from "the terms and the spirit of the Treaty". In both cases, ECJ's rulings were characterized with rather a teleological than strict textual approach (Craig and de Búrca 2008: 272–274, 344–346). Indeed, despite its fragile legal basis provided with by the Treaty, the ECJ has developed EC legal order along with the logic of law rather than political negotiations. The constitutionalization of EC law was ECJ's achievement and a fully unintended consequence for the founders of the European institutions.

Although unintended, the established EC legal order is an effective resolution for collective action problems. As direct effect enabled individuals to bring litigation before national courts against national government's breach of and non-compliance with EC law, individuals constitute a part of the legal monitoring system over national legislative actions. Furthermore, the preliminary procedure prescribed in Art.177 EEC confines the role of the ECJ to giving interpretations of EC law. This implies that a final adjudication on specific cases in the formal sense is pronounced by a judiciary of a member state, not by the ECJ, although the ECJ can influence final judgment to a high degree through delivering a quite narrow and situation-specific interpretation. In this situation, a member state's opposition against ECJ's interpretation inevitably takes the form of defiance against national judicial authority that would give rise to fundamental disturbance in national politics (Maduro 1998: 19; Weiler 1999: 26–29). As a result, the EC legal order supplemented with the corollary of national legal systems functions as an effective enforcement mechanism. As exactly stated by the ECJ itself in its ruling of *Costa*,

> "the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and *without the legal basis of the Community itself*

being called into question." (Emphasis added by the author)

Thus, the compliance with EC law has been identified with the commitment to the European integration project, and the monitoring network involving individuals oversees member states' compliance. In short, the EC legal system constructed by the ECJ embodies the institution ensuring the commitment of member states.

This institutional arrangement emerging from the integration process has served practically for promoting economic integration. Regarding the removal of NTBs, Art.30 EEC in the Treaty only vaguely defined NTBs as 'measures with equivalent effect' to quantitative restrictions on importation. To solve the difficulty stemming from this ambiguity, the Commission legislated Commission Directive 70/50/EEC in 1969 within which 'measures with equivalent effect' were more precisely defined. However, the definition was not sufficient as there were still margins for various interpretations.

Furthermore, more significantly, the Commission was not entitled to define the meaning of the Treaty (Stone Sweet 2004: 120–122). As this Directive is 'Commission' Directive, not 'Council' Directive, institutional constraint was crucial for the Directive to have legal effects. It is suggested that such legislation to define the range and type of national measures to be removed should be with the approval of the Council, which required unanimity at that time. Since the removal of NTBs means a loss for individual member states in each specific case, such legislative proposals could not be passed. In such situations that joint benefits from liberalization require individual loss, the joint-decision trap was the most likely outcome. While the removal of NTBs would considerably improve the efficacy of the common market by putting an end to potential protectionist measures, each member state has to confront its short-term costs such as resistance from vested interest groups. Thus, individual loss impedes joint political decision for collective profits.

This political impasse has been broken by ECJ rulings. The cases *Dassonville* and subsequent *Cassis de Dijon* allowed ECJ's interventions into the definition problem of NTB. Firstly, in *Dassonville*, the ECJ has defined 'measures with equivalent effects' as "[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions." Thus, whereas the political processes in the EC had not found the way to resolve the definition problem of NTBs, the ECJ through the form of judicial decision-making gave a rough outline of NTBs' definition.

Secondly, the ECJ's ruling of *Cassis de Dijon* has advocated the principle of mutual recognition that goods lawfully produced and marketed in one of the member states should be basically admitted free circulation in other member states. Although not fully transposed into the EC policy, this ruling certainly triggered political debate and consequently affected the EC approach to harmonization incorporated into the SEA (Alter and Meunier-Aitsahalia 1994: 549–555).

Accordingly, the nature of the ECJ's activity as legal experts enabled the ECJ to bypass burdensome political process because of its legal logic ostensibly different from political one. Instead of calculations of benefits and costs, which prevail in the political process, what the ECJ does is

"continually to justify its decisions in light of the common interests of the member states as enshrined in both specific and general objectives of the original Rome treaty" (Burley and Mattli 1993: 68–73). By doing so, judicial decisions have created positive feedback for the promotion of economic integration—the more the ECJ actually removes trade barriers, the more litigation against national measures will be brought before national courts. Consequently, economic integration advances (Stone Sweet 2004: 129–133).

Thus, although it was unintended, EC legal order, which emerged from a small function assigned to the ECJ, has succeeded in affecting the course of European integration. Strategic interactions among the member states, which are considered as the determinant factor of regional integration process, are replaced with the legal reasoning on the ground of the logic of law in the EC integration process.

This replacement is, however, not without costs. As recent ECJ's rulings in cases such as *Viking* and *Laval* have clearly revealed, the logic of law forces heavy costs of adjustment for national structures, which could be mitigated in the political process through making concessions. In both cases, the main issue was the conflict between economic freedoms and social rights, more precisely, the right of industrial action.

Although the ECJ has neither denied social rights nor set them inferior to economic freedoms in an explicit form, its rulings suggest a restrictive approach to social-rights application in the case of conflicts between economic freedoms and social rights. In *Viking*, the ECJ ruled that industrial action should be the 'last resort'. This criterion poses a practical problem for trade unions about how to know whether other means at their disposal are exhausted or not. This uncertainty about the legality of industrial actions would render trade unions hesitant to exercise the right to strike (Barnard 2008: 489). In *Laval*, the ECJ's interpretation of Directive 96/71/EC has restricted the applicability of national social protection for posted workers. The reason for this ruling might be to keep faith with the freedom of providing services that has been enshrined into the Treaty as a fundamental element (Barnard 2008: 478–479). A possible consequence of this interpretation is, however, a downward regulatory competition among member states through transactions in the common market, although the Directive was considered to be headed toward upgrading social protection until *Laval* ruling (Deakin 2008: 587–593).

This issue of balancing economic freedoms with social rights at the European level still remains to be solved, but it certainly implies that the progress of economic integration facilitated by a legal institution imposes extra costs on member states. Consequently, an effective enforcement mechanism ensures joint benefits as well as certain unavoidable individual costs for member states.

IV. Flexible *ex post* legislation in the ASEAN way

Although the existence of the ASEAN goes back to 1967, its legal foundation—the ASEAN Charter in 2008—is a relatively recent achievement. In contrast to the EC, the foundation of the ASEAN was from rather political than economic interests. In the ASEAN, the shared objectives among the founding member states were the deterrence of regional conflicts (Shimizu 1998: 23–26). Economic cooperation was subsequently incorporated into the activity of the ASEAN from 1976.

However, while cooperation in the political sense achieved certain successes such as the Treaty of Amity and Cooperation in Southeast Asia, the economic cooperation devoted to the import-substitution at the regional level resulted in poor performance mainly because of the conflict of national economic interests among the member states (Shimizu 1998: 51–66). Accordingly, the institutional characteristic of the ASEAN, which developed during this initial period, reflected the approach taken in the coordination of national security concerns—the decision-making substantially based on the consensus among the member states through periodical meetings of national representatives (Suzuki 2014: 27–36). Although it was through a weakly institutionalized process, a significant feature that has deeply marked the process of regional integration in the ASEAN was gradually constructed—so-called 'ASEAN way'.

The ASEAN way is understood as "[t]he principle of non-interference in the internal affairs of member countries and the search for accommodation and consensus". According to this informal principle, while the member states' commitment to regional cooperation was repeatedly confirmed through institutionalized periodical meetings, collective actions in the economic field were carefully avoided because of the significance of economic growth for national government's political legitimacy and, therefore, the domestic regime security in the member states (Khong and Nesadurai 2007: 33–41).

Compared with the legal monitoring and enforcement system in the EC, which guarantees the commitment of the member states, the institutions based on the ASEAN way are clearly weaker as demonstrated in the case of its initial economic cooperation project. ASEAN's initial institutional design, which provided a facilitation mechanism of conflicting national interests only through consultations, has proved to be insufficient in organizing collective action in the field of economic policy (Yamakage 2015: 3).

Yet, the priority put on the preservation of the ASEAN way has subtly changed with the shift of regional economic policy from the import-substitution at the regional level toward a Collective Foreign Direct Investment-dependent and Export-oriented economic model (CFEI model). Not for individual state, but for the ASEAN as a whole, this model intended to attract foreign investments by which industrialization at the regional level would be achieved. This policy orientation was firstly declared in the Third ASEAN Heads of Government Meeting in 1987, and was followed by the initiation of the ASEAN Free Trade Area (AFTA) in 1992 (Shimizu 2009: 4–6). Thus, ASEAN's collective action was re-launched but was more open to outside economies than before and ASEAN's collectivity was emphasized in relation to the rest of the world.

In this new framework, a gradual institutionalization has taken place, which includes scheduling the tariff liberalization process, setting a dispute settlement mechanism, and the rules for derogation from the obligation of liberalization, by binding protocols that required domestic ratification. On the one hand, the adoption of new rules was motivated by the shared perception that the initial design of AFTA had several institutional shortcomings such as no guidelines on exemption from liberalization, the absence of a dispute resolution mechanism, and a plan of tariff reduction. On the other hand, these new rules themselves did not contain binding effects over member states' actions.

Indeed, although certainly enhanced, the institutions of AFTA were fundamentally voluntary-based.

Its survival depended on individual member states' calculation of short-term domestic gains and costs of defection. For instance, the Philippines in 2002 opted, instead of following the liberalization plan, for the delay in liberalizing petrochemical industry that could undermine the commitment of the Philippines to the AFTA, in order to avoid its assumed domestic loss from liberalization. Thus, in the institutional framework of the AFTA, member states could behave more freely than those with the EC's legal enforcement mechanism.

Nevertheless, the reason of institutional survival in the ASEAN case is explained also by the absence of an effective enforcement mechanism. Renegotiations through periodical meetings enabled the member states to revise the original plan downward in terms of promoting economic integration. Although the alteration of the original scheme was not "an ideal arrangement for all parties, it was the best available option that allowed the ASEAN governments to maintain what was for them a valuable project of economic cooperation" (Khong and Nesadurai 2007: 52–55). In other words, institutional flexibility available in *ex post* legislation has eased the pressure supposedly stemming from strict commitment requirements. Compared with the EC, the process of economic integration in the ASEAN is characterized rather with lessening centrifugal incentives among the member states than with increasing collective benefits from a centripetal binding mechanism.

The current project of the ASEAN Economic Community (AEC) is along the lines of these characteristics of the AFTA. The project was initiated in 1997, and as stated at the beginning of this article, the establishment of the AEC was officially announced at the end of 2015. In comparison with the long years of the European economic integration history, it might be too early to argue its institutional outcomes in an assertive manner yet weak institutional arrangements in parts of enforcement mechanism can be observed as a legacy of the ASEAN way.

The dispute resolution mechanism is enhanced by a protocol that has been in force since 2004. This Enhanced Dispute Settlement Mechanism (EDSM) is, however, still strongly characterized by the ASEAN Way. It offers panel proceedings and non-adjudicatory mechanisms, but the initial and final phases of panel proceedings—mandatory consultation and referral to the ASEAN Summit respectively—are political in nature, not legal. For economic disputes to be settled effectively, a political approach would be impractical (Puig and Tat 2015: 293–296).

Similarly, the Charter provides with the means of dispute settlement mainly through 'good offices, conciliation and mediation' by which parties concerned with a dispute are recommended to seek a solution based on agreement (Arts.22–26 the Charter). What makes the AEC distinctive from the ASEAN institution until the establishment of the Charter is the enhancement of the role played by the Secretary-General. The Charter assigns both the monitoring over the compliance of the member states with ASEAN agreements and possible involvement in the dispute settlement procedure to the Secretary-General (Arts.11 and 23 the Charter).

However, despite certain institutional progress, the lack of an enforcement mechanism unavoidably casts a shadow on the future of the AEC in terms of economic efficiency achievable through liberalization.

The significance engendered by the absence of effective enforcement mechanism can be discerned in policy implementation. As it mainly relies on the voluntary compliance of the member states, the

effectiveness of economic integration process cannot be confidently measured. The achievement of ASEAN obligation is measured by 'scorecards' that reflect only member states' self-assessment rather than impartial evaluation by a third-party.

The defect of this approach is salient especially in the removal of NTBs. In this approach, "the identification of such barriers is left to governments rather than heard from the actual traders". Consequently, the progress of effective liberalization is much more dependent on the political will of the member states (Severino 2011: 30–31). As there is no sanctioning system against member states' non-compliance in the ASEAN Community, only peer-pressure is available to ensure credible commitment (Yamakage 2011: 82–85). Since the promotion of economic integration in the ASEAN is possible only by the political process, costs-benefits calculation would dominate its course of economic integration. From the experience of the EC, it can be supposed that the AEC is more susceptible to the joint-decision trap, that is to say, stagnation by non-decision-making.

Regarding the policy-making process, however, the AEC circumvents an exhausting step of consensus-making by introducing flexible frameworks. The ASEAN Community takes the approach of periodical plan and the opt-out method—so-called 'ASEAN minus X'. These processes surely enable the member states to participate in AEC projects flexibly as much as possible and mitigate the risk of the joint-decision trap by bypassing the necessity of policy-implementation by all member states together. Consequently, while certain member states cannot overcome insufficient capabilities and domestic political resistance to implement collective agreements (Ishikawa *et al*. 2009: 24–25), broad options available in *ex post* legislation lighten the burden that would be in place if the AEC takes an all-inclusive approach for the member states, and that would generate strong pressure on member states for compliance.

Indeed, as indicated above in the case of the AFTA, institutional arrangements found in the AEC are dedicated to reducing the costs imposed on individual member states at the expense of effective liberalization. In other words, Southeast Asian regional integration does not intend to solve collective action problems as it did in Europe, but carefully envisages them not to be apparent and severe. The heritage of the ASEAN way, the respect of full national sovereignty, emerges in institutional arrangements as moderate requirement of light commitment for member states while it keeps away the burden of deep commitment in order to sustain the process of regional integration.

While this political approach is crucial for the survival of the regional integration project in Southeast Asia, the deepening of economic integration would unavoidably spillover into the legal domain—the more economic transactions the integration process stimulates, the more serious *de facto* barriers composed of disparities among national practices, regulations, and product standards arise. Furthermore, the flexibility of *ex post* legislation is not unlimited "because regulatory differences might ultimately decrease the potential benefits of free trade and investment, and might create conflict among contracting parties." Consequently, a certain degree of harmonization is required for the sustainability of economic integration project (Thanadsillapakul 2009: 130–134). In other words, the flexibility in *ex post* legislation cannot be exploited to the degree that fundamental economic incentives to participating in a regional integration process would be attenuated. From this perspective of balancing between collective economic profits and burdens of compliance with collective

agreements, the balance would become crucial also in the AEC like the EC as the preservation of the ASEAN way in economic integration has been at the expense of economic gains, which could be maximized by full-fledged 'integration'.

So far, we have analyzed the process of both regional integration projects—the EU and ASEAN. By focusing on the role of institutions in solving collective action problems, we find that the both confront the need of institutional reform. On the one hand, the EC should resolve the problem caused by the intrusive nature of ECJ rulings. The ASEAN, on the other hand, might need to enhance its interventional instruments. In both institutions, a reconsideration of their respective arrangements for collective action problems might be necessary but possible responses seem to go toward opposite directions.

In the case of the ASEAN, the institutional arrangements have been strongly influenced by the ASEAN way. It might be unreasonable to expect the dilution of this character in the Southeast Asian integration process. The principle of non-interference in the ASEAN way is, however, seemingly changing since the ASEAN Charter has incorporated the principles on good governance, democracy, and human rights into Community's purposes. These newly incorporated principles suggest that "new boundaries for what states can do in the name of their national sovereignty" are emerging (Tay 2008: 167–169). Furthermore, as the response toward the 1997 Financial Crisis was the reinforcement of integration by the Chiang Mai Initiative, economic threats have stimulated institutional adaptations rather than abandoning the whole institutions (Cockerham 2010: 184; Khong and Nesadurai 2007: 55–58). It implies a tendency that the member states seek to form a response in the framework of the existing institutions. Although it is not so remarkable as the logic of law has prevailed in the process of European integration, the established institutional framework has also affected the ASEAN member states' behaviors. Accordingly, the persistent preservation of national sovereignty that was inherent in Southeast Asia may not be immutable. While the initial preference of member states could deeply characterize the institution with full respect to national sovereignty, the availability of collective actions provided by the institutions could also have effects on member states' preferences.

Regarding the requirement of certain legal harmonization for effective economic integration, there is also a sign of change. The Protocol to the ASEAN Charter on Dispute Settlement Mechanism was adopted in 2010, and has entered into force from 2017. As this Protocol includes an arbitration procedure, it would lead to establish the rule of law in the ASEAN (Naldi 2014: 129–137, but Gerard 2018), which is also advocated as Community's purpose in the Charter. Certainly, it is going too far to expect that the ASEAN would have a legal system equivalent with that of the EC, but the search for equilibrium between the flexibility for national sovereignty and the centrality of collective profits is an indispensable element in a regional integration process. The increase of collective profits from economic integration is possible only at the expense of preserved national sovereignty, according to the experiences in Europe.

V. Conclusion

In the framework of incomplete contracts, institutional solutions for collective action problems can be categorized into two types: one is focused on the enforcement of pre-commitment, and another is devoted to utilizing the advantages of *ex post* legislation. The EC saliently represents the former type. Although the role played by the Commission and the introduction of majority voting have certainly contributed to effective legislation, the process of European integration has been remarkable for its enforcement and monitoring mechanism sustained by the ECJ. EC's effective monitoring system involving individuals and the legal order guaranteed by the ECJ prevent member states from exploiting collective projects while the increase of collective profits from economic integration is ensured.

In contrast to the EC, the process of ASEAN is characterized by a respect of the flexibility of *ex post* legislation. Without enhancing a binding mechanism over member states' actions, its institutional design shows "a balancing act between mutually beneficial cooperation and a high regard for state sovereignty" (Cockerham 2010: 166). In this regard, *ex post* legislation—flexible as much as possible—has contributed to the survival of the regional integration as it considerably moderates the costs of adjustment for individual member states which might propel them to defection from the economic integration.

In sum, while both regional integration projects are commonly founded on an incomplete contract, institutional approaches to solving collective action problems differ. On the one hand, European integration brings institutional arrangements to bear on member states to keep their pre-commitments at the loss of certain national sovereignty; the ASEAN takes advantage of the flexibility in *ex post* legislation in order to minimize the friction against member states' own interests at the expense of economic efficiency in economic integration.

From this comparative institutional analysis, a circular relationship in regional integration is inferred. On the one hand, binding institutional arrangements would increase collective benefits from a regional integration process but these arrangements also impose higher costs of adjustments on individual member states. Therefore, the choice of withdrawal might be more attractive for individual member state if institutional binding effects are unacceptable. On the other hand, flexible regulations mitigate the burden of coordination at the national level with regional institutions while this flexibility would promise lower joint gains from integration. Accordingly, it brings less risk of dissolution caused by the costs of integration but weak profitability renders regional integration less attractive.

In both models, the balance between the profits from economic integration and the costs of adjustment is significant for the sustainability of regional integration. It is suggested that the regional integration could survive as long as this balance is maintained. From this perspective, while excessive enforcement could be a problem in the European integration process, the integration process in Southeast Asia would demand the consolidation of more effective enforcing instruments.

Acknowledgement

This study was supported by JSPS KAKENHI (Grant Number JP 20K22073).

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