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Legal Aspects of the Institutionalization of APEC

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. Introduction

Following the trend of an increasing integration of the modern international society, variety of international institutions are emerging one after another. Asia-Pacific Economic Cooperation (APEC) is one of such institutions. There is no doubt, however, that APEC will in future be a very significant institution in world trade along with the European Union (EU), the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO) / the General Agreement on Tariffs and Trade (GATT). APEC, created in 1989, is still at an infant stage, and it may be considered somewhat premature at present to think of its organizational aspects. However, it is the belief of the author that the structure and function of any international organization should be understood as a continuing process of institutionalization, and that the process would reflect features of the international society on which an international organization is based. From such a perspective, APEC offers an extremely interesting model for international institution-building. It would, therefore, be worth while to study the organizational aspects of APEC as they stand now.

There have been two distinctive approaches proposed for the formation of APEC: one is the Western-style legalistic approach modeled after the EU and NAFTA, and the other the typically Asian, non-formal approach which has been taken in the case of the Association of the Southeast Asian Nations (ASEAN). While these two approaches are radically different, it is submitted that they are not mutually exclusive but rather mutually complementary, and that they can be effectively integrated in the evolution of APEC as an international organization¹.

¹ The concept of an international organization is very broad. Even if an examination is confined international *economic* organizations to which APEC belongs, various kinds of organizations can be included in that category. The broadest definition of an international economic organization would be “a corporate entity which is engaged in economic activities that are not limited in scope to the territory of one State only” (Angelo P. Sereni, “International Economic Institutions and the Municipal Law of States,” *Recueil des Cours*, 1959– , p.133), which can be classified into the following seven types: (1) a regional economic community such as the EU, which has the characteristics of both the operational inter-governmental organization and the integrated union of States; (2) an inter-governmental organization such as International Monetary Fund (IMF), International Bank for Reconstruction and Development (IBRD) and Asian

This paper attempts to analyze some legal aspects of institutionalization of APEC. Accordingly, we will first describe factual developments regarding the formation of APEC, with focus on its institutional aspects. Proposals for institution-building by the United State and other Western members are compared with those by ASEAN and other Asian countries. Then, two models of regional integration, the Western style approach taken by the EU and NAFTA on the one hand, and the Asian model based on ASEAN on the other, will be contrasted from the viewpoints of international institutionalization. We will further demonstrate how these radically different approaches may be integrated in the evolving process of APEC by looking into some institutional aspects such as the structure and function of the proposed organization and the legal basis.

Development Bank (ABD) whose membership is limited to States; (3) a new type of inter-governmental organizations in which not only States but also international organizations, and public and private corporations are admitted to participate in the operation as in the case of International Telecommunications Satellite Organization (INTERSAT); (4) an international authorities such as the Aéroport Bâle-Mulhouse, established by an inter-governmental agreement for the purpose of providing public services, which nonetheless, is “created in accordance with, and is chiefly governed by, the national law of a particular State” (Sereni, *Ibid.*, p.171); (5) an international company such as the Bank for International Settlements (BIS) and the Société Européenne pour le Finacement du Matériel (EUROFIMA); (6) an international agreement such as the GATT of 1947, which was in the premature stage of institution-building; (7) other international organizations such as an international cartel, an international joint venture and an international consortium, which are not based on inter-governmental agreements but on contracts made between private bodies, as well as the so-called transnational corporation could be included in this type. (Shinya Murase, “Kokusai Keizai Soshiki to Kokunai-ho (International Economic Organizations and National Laws)”, *Juristo (Jurist)*, no.628, 1977, pp.210-211).

In this paper, an “international organization” is used to mean a formal institution established by an inter-governmental agreement, and an “international institution” is used as a broader concept which includes all the above-mentioned entities.

. Institutional Evolution of APEC

1. The Process of Institutionalization

APEC was formed in 1989 in response to growing interdependence among Asia-Pacific economies. Although there were already several fora and institutions designed to promote economic cooperation in the region², APEC was the first such instrument that was organized on the inter-governmental level. At the beginning, APEC was regarded as a consultative forum to discuss the region's economic development on *ad hoc* basis, and accordingly, APEC was not even designed to hold ministerial meetings regularly.³ Within five years after its start, however, APEC made steady progress in institutional structure for its expanding activities. There is no doubt now that APEC is an extremely important institution for dialogue and policy-making for economic affairs in the Asia-Pacific region.

To describe the process of institutionalization of APEC, its first step was the adoption of the Seoul Declaration at the third APEC Ministerial Meeting in 1991.⁴ This 14-article instrument prescribed APEC's objectives, the scope of its activity, mode of operation and the

² It is several international non-governmental institutions to have lead economic cooperation in the region for the last quarter of this century. In 1960's, two institutions were inaugurated. One is the Pacific Trade and Development Conference (PAFTAD), in which professional economists discuss and comprehend economic problems relating to the region; and the other is the Pacific Basin Economic Council (PBEC) that provides a forum for exchanging information among business people from the region. The Pacific Economic Cooperation Conference (PECC), founded in 1980, also actively further regional collaboration with linking academics, private business, and governmental officials.

³ The region's ministers for trade and cooperation assembled in Canberra in 1989 mainly for discussing how to prevent block economies and warning to the European Union and NAFTA parties not to turn projectionist. Thus, they had no solid and concrete vision for how to build an Asian-Pacific organization (Yoichi Funabashi, *Asia Pacific Fusion: Japan's Role of APEC*, Washington D.C.: Institute for International Economics, 1995, p.7).

⁴ APEC started working actively up to around the Seoul Ministerial Meeting. Therefore, ministers recognized the need to strengthen APEC's role and agreed to consider the possibility of establishing a mechanism on a permanent basis to provide support and coordination for APEC activities at various levels, ways to finance APEC activities, and other organizational matters.

principles for participation in APEC.⁵ The next significant step in APEC's institutionalization was the measure taken at the fourth APEC ministerial meeting, held in Bangkok in 1992, which agreed to establish a permanent secretariat as an effective support mechanism and an APEC fund to finance the implementation of APEC activities.⁶ The Eminent Persons Group (EPG) was also established as a private advisory council to enunciate a vision for trade in the Asia-Pacific region to the year 2000.

Further progress was made at the Seattle Meeting in 1993, where the characteristics of APEC changed dramatically, and APEC came to take the direction which was to "move beyond the phase of institutionalizing APEC to making it operational"⁷. The key event was that the Informal Leaders Meeting was held for the first time. The Committee on Trade and Investment (CTI) was established as the first standing committee⁸, and the Pacific Business Forum (PBF), which is another advisory group to the leaders, was also established⁹.

Process of Institutionalization

- | | |
|------|---|
| 1989 | Inauguration of the APEC as an international forum, having Ministerial Meeting and Senior Officials' Meeting
Establishment of seven Working Groups |
| 90 | Regularizing the Ministerial Meeting |
| 91 | Adopting the Seoul Declaration
Establishment other three Working Groups |
| 92 | Establishment of the permanent secretariat and APEC fund |

⁵ See Chapter for further details.

⁶ Under the Bangkok Declaration on APEC Institutional Arrangements, the secretariat was established in Singapore in January 1993.

⁷ Hadi Soesastro, "The Institutional Framework for APEC: An ASEAN Perspective", in Chia Siow Yue, ed., *APEC: Challenges and Opportunities*, Singapore: Institute of Southeast Asian Studies, 1994, p.49.

⁸ APEC has other standing committees at present, namely, the Budget and Administrative Committee and the Economic Committee.

⁹ The members of EPG are such as professional economists and ex-bureaucrats. Those of PBF, on the other hand, are from business sector.

Establishment of the EPG

- 93 Promotion of the Committee on Trade and Investment from an informal group to a standing committee
Holding the Informal Economic Leaders' Meeting
- 94 Regularizing the Leaders' Meeting
Promotion of the Economic Committee from an ad hoc group to a standing committee

After the 1993 Seattle Meeting, the organizational structure of APEC has demonstrated rapid expansion and firm development.¹⁰ Not only the Ministerial Meetings but also Senior Officials' Meetings which meet more frequently, and the various Working Groups are now regular features of APEC. Furthermore, several additional ministerial meetings, such as finance ministers meetings and transport ministers meetings are held regularly. These developments are the reflection of the fact that the Asia-Pacific region has now recognized the need to work together in order to serve its common interests. It is expected that, in the rapid progress of APEC's over-all activities, its institutionalization will be further accelerated in coming years.

2. Different Attitudes toward Institutionalization

While the institutional structure of APEC has been substantially strengthened, the process of institutionalization has not been achieved smoothly. In fact, from the beginning, there has been essentially different views on the direction and methods for the growth of APEC. On the one hand, the "Western" country members, most notably the United States, strongly favored the EC type of regional economic organization which is composed of the organs with clearly defined mandates and whose operation is carried out through legally

¹⁰ David K. Linnan, "APEC Quo Vadis?", *American Journal of International Law*, vol.89, no.4, 1995, pp.826f.

binding instruments and decisions. The Asian countries, on the other hand, preferred the Asian approach, that is, spontaneous, conciliatory, informal, exhortatory, and consensus-oriented approach. Needless to say, the nature and function of an international institution depends on the intent of its participants. Thus, the views on institution-building on APEC reflect the expectations of its member economies.¹¹

(1) Western Countries' View on Institutionalization

The United States and other Western countries, in promoting institutionalization of APEC, consider APEC not only as a forum to discuss economic policies among its members, but also as an organization with specific goals of reducing barriers to trade in goods and services and promoting liberalization of investment. These countries believe that the evolution of APEC's institutional structures and procedures will have a significant influence on its effectiveness for reaching consensus and for implementing meaningful work programs. From such perspectives, reinforcement of organizational structure and binding agreements are regarded to be indispensable for member economies to commit themselves in their pledge for liberalization of trade and investment.¹²

(2) ASEAN's Position on Institutionalization

By contrast, ASEAN and several Asian governments have been reluctant to institutionalize APEC in a formal and legal fashion.¹³ They fear that Western partners might develop APEC to be an Western style organization in the region, which would be controlled

¹¹ A participant of APEC is generally identified as a "member economy". It is APEC's another unique aspect that this institution is composed not only of States but also of economic entities such as Taiwan and Hong Kong.

¹² Ms. Sandra Kristoff, the Ambassador of the United States for the APEC affairs, proposed that APEC should become a formal economic cooperation association or "a GATT for Asia-Pacific". And Mr. Fred Bergsten, the representative of the United States to the EPG and the chairman of it, stated that "leaders in Seattle desirably began the process of converting APEC from a purely consultative body into a substantive international institution" (Soesastro, op.cit., pp.46-49).

¹³ While Japan is also concerned with excessively rapid institutionalization of APEC, Malaysia, Indonesia and China take a firm stance against it.

by big powers, particularly the United States, and that the interests of the Asian countries might not be sufficiently safeguarded.¹⁴ The concern of the ASEAN countries is that rapid institutionalization would make APEC an inflexible organization and would accelerate excessive liberalization of trade and investment which might be imposed on them without due consideration of their special circumstances. For this reason, the ASEAN countries insist on informal arrangements rather than rigid institutionalization of APEC.¹⁵

ASEAN countries believe that reaching agreements by consensus is most important. APEC is an extremely diverse and heterogeneous group with its members extremely different from each other in their economic system, level of development, life-style of the population and

¹⁴ The Kuching Consensus declared in 1989 showed clearly such ASEAN's basic attitude for participating in the APEC process. It stated as follows:

- ASEAN's identity and cohesion should be preserved and its cooperative relations with its Dialogue Partners and with third countries should not be diluted in any enhanced APEC.
- An enhanced APEC should be based on the principles of equality, equity and mutual benefit, taking fully into account differences in stage of economic development and socio-political systems among countries in the region.
- APEC should not be directed towards the formation of an inward-looking economic or trading bloc but should strengthen the open, multilateral economic and trading systems in the world.
- APEC should provide a consultative forum on economic issues and should not lead to the adoption of mandatory directives for any participant to undertake or implement.
- APEC should be aimed at strengthening the individual and collective capacity of participants for economic analysis and at facilitating more effective, mutual consultations to enable participants to identify more clearly and to promote their common interests and to project more vigorously those interests in the larger multilateral forums.
- APEC should proceed gradually and pragmatically, especially in its institutionalization, without inhibiting further elaboration and future expansion.

¹⁵ Such ASEAN's position is shown as follows: The Malaysian Minister, Ms. Rafidah Aziz, clearly opposed the idea transforming APEC from a purely consultative body into a substantive international institution, as was advocated Mr. Bargsten (see *supra* note 12). She expressed her concern that "APEC is slowly turning out to be what it wasn't supposed to be, meaning that APEC was constituted as a loose consultative forum" (Soesastro, *op.cit.*, p.46). Further statement was that "Kuala Lumpur will oppose attempts to give APEC a formal structure because it will weaken ASEAN. The moment APEC is institutionalized, ASEAN will be submerged," (*Jakarta Post*, 18 January 1994). Indonesia did not support turning the APEC forum into a formal and structured organization and that President Soeharto was of the opinion that APEC should remain just a loose and informal forum because of disparities in the level of economic development among its

cultural heritage. It does not enjoy such homogeneity as the European Union. The diversity of member economies requires special consideration regarding the method of decision-making. The ASEAN countries stressed therefore that sufficient discussion should be guaranteed before reaching an agreement among all the members of APEC.

As it has been shown above, there have been two opposing attitudes on the institutionalization of APEC. The “Asian” approach is to reach an agreement on the basic principles first, and then let things evolve and grow gradually and perhaps, slowly in piling up precedents. In contrast, the “Western” approach is very legalistic and institutional in order to achieve the APEC goals effectively and speedily.¹⁶

In order to compare these two styles, this paper will next explain the cases of the European Union and NAFTA as examples of the Western style, and the case of ASEAN as representing Asian style.

members (Soesastro, op.cit., p.46).

¹⁶ Dr. Frederic Roessler, former Director of the GATT Legal Office, offered a interesting contrast between the “legalistic model” and “common law model”. While the former is based on the belief that only the codified norms, agreed and written rules can achieve predictability, the latter approach stresses the need for the spontaneous development of new norms through the accumulation of stable practices and guiding precedents (Frederic Roessler, “Law, *De Facto* Agreements and Declarations of Principles in International Economic Relations”, *German Yearbook of International Law*, vol.21, 1978, pp.27f). The “Western” style approach in the context of APEC may be close to the “legalist” model, and the Asian approach to the “common law” model.

. Regional Integration—Comparative Analysis

Having described some factual developments and proposals regarding the formation of APEC, we will now compare the two approaches taken in the on-going regional integration. Since the features of the Western model, demonstrated in the European Union and North American Free Trade Agreement (NAFTA), are already well-known, we will confine ourselves to making a few basic points regarding their structure and function. With regard to the Asian model represented by ASEAN, a more detailed analysis will be given.

1. European Union and NAFTA

The basic characteristics of the Western approach to economic integration are that the organizations are (1) treaty-based, (2) having organs with clearly defined mandates and legal personality, and (3) with their decision-making process quite formal, transparent and often judicial.

(1) EU

Adopting of the Treaty on European Union, well-known as the Treaty of Maastricht, in 1993, the name of integration arrangement in Europe was changed from European Community to European Union. The core organization of the EU, however, is still the European Community (EC), formerly called the European Economic Community (EEC), which was instituted by the Treaty of Rome of 1957 aiming at the establishment of a common market and an economic and monetary union as its central objectives (Article 2 of the Treaty of Maastricht). All items regarding operation of European Union such as functions, institutional organs and the decision-making process are precisely prescribed in its treaties for establishment. The Community enjoys legal personality and the most extensive legal capacity accorded to legal persons under the national laws of each member State (Article 210 and 211). It has power to conclude agreements which is binding on the institutions of the Community and on member States (Articles 228 and 238). It is regarded that the

Community also enjoys implied powers in external relations by virtue of its responsibilities under the treaties or derived policies.¹⁷

The institutions of the Community are a European Parliament, a Council, a Commission, a Court of Justice and a Court of Auditors (Article 4). The Community has legislative power such as making regulations, issuing directives and taking decisions (Article 189)¹⁸. The principal legislative instruments are regulations which are directly applicable and take effect as laws in the member States; directives, essentially model laws which require the member States to take legislative action to implement them; and decisions, which are binding on the addressees, but are not normally used as legislative instruments of general character.¹⁹ The supremacy of the Community over national law is presumed so that the Community law prevails in case of conflicts. The judgment of the Court of Justice, which is one of the constituent of the EU Law, require member States to take the necessary measures to comply with it (Article 171).

The member States intend to promote economic integration in the region by vesting the authority in the European Council, in other words, by transferring their sovereignty to the EU, namely, to the Council. As a result, the EU has power to conclude agreement, the EU law can be directly applied to the member States, and the Council can take the appropriate measures in the course of the operation of the common market (Article 235). The EU members deliberately chose such approach for establishing of common market effectively and efficiently that they form a firm framework of system first, and then act according to it.

(2) NAFTA

NAFTA is another Western model of economic integration. It aims to establish a free

¹⁷ See Case 22/70 AETR [1971] E.C.R. 263 and opinion 1/76, Laying-up Fund [1977] E.C.R. 741.

¹⁸ For the most part of legislative power has been exercised by the Council on a proposal from the Commission after consulting the Parliament. In the Treaty of Maastricht, the power of the Parliament to adopt of Community acts has been more expanded (Article 138b), (Teruo Kanemaru, *EU towa Nanika (What the EU is)*, Tokyo: Nihon Boeki Shinko-kai (JETRO), 1994, p.20).

¹⁹ Parry, Grant & Watts, *Encyclopaedic Dictionary of International Law*, s.v. "European Economic Community," Oseana, 1985, p.118.

trade area consistent with Article of GATT among the three countries, the United States, Canada and Mexico (all three are also members of APEC). Although NAFTA does not intend to establish an international organization like EU, it is nonetheless an inter-governmental and formal institution established under the definitive international agreement which stipulates for standards, procedures and schedules for establishing a free trade area in its two-thousand-page text.

The most relevant indicator of the legalistic character of NAFTA is the mechanism for dispute settlement. Chapter twenty of the Agreement precisely provides for NAFTA's general dispute resolution procedures.²⁰ According to it, the disputing parties should primarily have recourse to good offices, conciliation, mediation or such other recommendatory dispute resolution procedure (Article 2007). If the matter has not been resolved under such procedure, any consulting party may request the establishment of an arbitral panel (Article 2008), and the final report of the panel has a compelling force to the disputing parties (Article 2018).

NAFTA contains institutional arrangement establishing the Free Trade Commission and the Secretariat (Article 2001 and 2002). The Free Trade Commission, comprising cabinet-level representatives, convenes at least once a year in regular sessions, supervises the implementation of the Agreement, and resolves dispute that may arise regarding its interpretation or application. And all decisions of the Commission shall be taken by consensus. The Secretariat is established under the Commission in order to provide assistance to the Commission and administrative assistance to arbitral panels. It is, however, only national secretariat located in each party and not an international secretariat. Because the number of members of NAFTA is few, it does not need strong organs like those found in the European Union.

²⁰ This procedures for dispute settlement is similar to those of the Canada-United States Free Trade Agreement (CUSFTA) to which NAFTA expansively succeeded.

2. ASEAN

ASEAN, as an inter-governmental institution established to promote regional cooperation²¹, offers a striking contrast to the above-mentioned Western institutions, EU and NAFTA. While ASEAN has been actively performing its role, it is sometimes regarded from the Western legal conception as an “immature” organization because of its informality and vagueness. It should, however, be noted that it is a different institution based on a different concept of institutionalization. The purpose of this chapter is to analyze legal features of ASEAN from institutional aspects.

(1) Legal Basis of the Association

ASEAN was formed in 1967 in accordance with the Bangkok Declaration signed by five members’ foreign ministers. ASEAN does not have a charter or a constitution, or any other legal instrument regarding the establishment, basic structure and function of the Association. The foundation of the ASEAN was “declared” by this brief Declaration which set out only the aims, the basic principles, and the minimum machinery. This is a remarkable feature of the ASEAN as an international institution. Although the Declaration is considered to be an instrument for establishment, it is not a treaty subject to ratification by each member State, and thus the ASEAN lacks a rigidly defined structure and function as an organizational establishment.

There was in fact a move toward adopting a formal charter of ASEAN at the time of drafting the Declaration²², and even after its adoption.²³ After careful deliberation and

²¹ The original member States were Indonesia, Malaysia, the Philippines, Singapore and Thailand. Brunei joined ASEAN in 1984 and Vietnam in 1995.

²² Purification V. Quisumbing, “An ASEAN Perspective on the Legal and Institutional Aspects of the Community: ‘Emerging Legal Framework of ASEAN’,” in Quisumbing and B. B. Domingo eds., *EEC and ASEAN: Two Community Experiences*, Quezon City: University of the Philippines Law Center, 1983, p.77.

²³ At the Ministerial Meeting in 1974, examination of a Charter for ASEAN was formally proposed by the Philippines (Paragraph 9 of the Joint communiqué), who advocated also to hold a leaders’ meeting aiming at upgrade ASEAN and to establish a secretariat of ASEAN for institutionalizing its function and structure (Susumu Yamakage, *ASEAN: Shimboru kara Shisutemu e (ASEAN: From the Symbol to the System)*, Tokyo: Tokyo Daigaku Syuppankai (University of Tokyo Press),

consultation, however, the Ministerial Meeting reaffirmed that the original Declaration and subsequent basic documents, especially the Declaration of ASEAN Concord of 1976, were adequate to constitute the foundation of the Association.²⁴ Evidently, member States of ASEAN preferred a flexible institution to a formal one.

(2) Legal Personality and Legal Capacity

ASEAN has hardly ever acted as an independent international entity on behalf of the ASEAN members as a whole. It is partly because ASEAN is not a firmly established international organization like the United Nations, EEC, and other international inter-governmental organizations, to which the “objective international personality” and accompanying legal capacity are recognized.²⁵ It is also because paying full respect for the sovereignty and independence of each member State is one of the fundamental principles of the Association. The ASEAN countries have concluded more than twenty agreements elaborated within the framework of ASEAN since its establishment. All of the agreements except one were signed by the foreign ministers of ASEAN member countries as individual representatives of their respective States.²⁶ The exception is the Agreement between the Government of Indonesia and ASEAN Relating to the Privileges and Immunities of the ASEAN in 1976. In this instance, the Secretary-General of the ASEAN Secretariat signed the agreement *for ASEAN*, which indeed implies that ASEAN is recognized as possessing the

1991, pp.241-244).

²⁴ Quisumbing, *op.cit.*, p.76. In the Joint communiqué of the tenth ASEAN Ministerial Meeting, it was pronounced that “[t]hese (means the Bangkok Declaration and the ASEAN Concord) historic documents would continue to provide the basis and operational framework for the further intensification of ASEAN cooperation and its expanding role in international relations” (Article 12).

²⁵ See International Court of Justice, Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949, pp.174f., and Frederic L. Kirgis Jr., *International Organizations in Their Legal Setting*, 2nd ed., St.Paul: West Publishing, 1993, pp.1-53.

²⁶ For example, Cooperation Agreement between the Member Countries of ASEAN and the European Economic Community was concluded in 1980 not behalf of ASEAN but behalf of each member State. On the other hand, the President in office of the European Council and the Vice-President of the European Commission signed the Agreement as the representative of the European Community.

legal personality under international law and as being able to conclude a treaty with other international entities.²⁷

(3) Institutional Structure

The structure of ASEAN has evolved progressively and therefore rather slowly. For the first ten years, ASEAN had been nothing more than a regularized conference of foreign ministers along with a minimum basic machinery incorporated in the framework.²⁸ With increased diversification and development of its activities, especially in the field of regional economic cooperation, the participants of ASEAN recognized the need of improving its machinery. The first ASEAN Summit in 1976 declared the establishment of the centralized ASEAN Secretariat, and the Ministerial Meeting on economic matters. The ASEAN Secretariat, however, has limited authority and rather weak function because the National Secretariat has been retained. While the National Secretariat carries out supervisory function in close connection with Ministerial Meeting and the Standing Committees, the ASEAN Secretariat acts merely as a liaison and a coordinator among various organs of the ASEAN.²⁹

The considerable restructuring was achieved in 1976 leading ASEAN to be closer to a normal international organization. Nonetheless, ASEAN has maintained its basic character as a “loosely connected association”.

(4) Decision-Making Process

The rules and procedures of decision-making in the ASEAN, which has not been

²⁷ Shinya Murase, “ASEAN to Kokusaiho Ikinai Kyoryoku Taisei no Ho-Keitai (ASEAN and International Law Legal System of Cooperation in the Region)”, in N. Yasuda, ed., *ASEAN-Ho Sono Shoso to Tenbo (The ASEAN Law Its Present Situation Considering in Various Aspects and the Prospects)*, Tokyo: Ajia Keizai Kenkyujo (Institute of Developing Economies), 1987, p.26.

²⁸ The original structure, as outlined in the Bangkok Declaration, has the Annual Meeting of Foreign Ministers, a Standing Committee, ad-hoc and permanent committees, and a National Secretariat in each member country.

²⁹ Wah Chin Kin, “The Constellation of ASEAN Institutions,” in Institute of Southeast Asian Studies ed., *ASEAN: A Bibliography*, Singapore: Institute of

explicitly stipulated in any of the relevant instruments, also distinctly show its unique character as an above-mentioned “loosely connected association”. The first feature is that the system of authority is decentralized and not well-defined. The Annual Meeting of Foreign Ministers has indeed retained its status as the highest policy-making body of ASEAN from the beginning.³⁰ However, other ministerial meetings, which have been officially set up to discuss and approve ASEAN programs in their respective fields, have become very important as well. Among them, Economic Ministers Meeting is especially influential, and it often challenges the Foreign Ministers Meeting for overall authority of ASEAN economic programs.³¹

The second feature concerning decision-making is that most of decisions in the ASEAN have been made by consensus through the “consultation based on the ASEAN’s tradition”, which means to negotiate and consult thoroughly till achieving an agreement without any objection. To the contrary of this consensus-building, nowadays the method so-called “6 minus X” is often used as a mode of decision-making in the ASEAN especially in the specific field of economic cooperation.³² Even if an agreement can not be reached due to the objection of a particular member, ASEAN would make a decision *as a whole* without counting the objecting member. In other words, the majority members capable of implementing the decision will go ahead while other minority members which are not prepared to implement it immediately can join in the decision at some later point.

(5) Mechanism for Dispute Settlement

The Treaty of Amity and Cooperation in Southeast Asia concluded in 1976 is the only instrument which specifies a legal framework for dispute settlement in the region. It provides in Chapter for the formal mechanism of dispute settlement “through the regional

Southeast Asian Studies, 1984, p. .

³⁰ The Joint Communiqué of the Ninth ASEAN Ministerial Meeting adopted in 1976 stipulated that “the Annual Ministerial Meeting remains the principal organ responsible for overall policy direction of ASEAN and coordination of all activities.”

³¹ Thomas W. Allen, *The ASEAN Report*, Volume , Hong Kong: Dow Johns (Asia), 1979, p.23.

³² Yamakage, op.cit., pp.277-279. As the latest instance, ASEAN Free Trade Area would be formed with this “6 minus X” method.

processes”, that is meant to be non-binding means, such as good offices, mediation, inquiry, and conciliation. ASEAN members are expected to make their best efforts to settle disputes through negotiation and consultation. This mechanism for dispute settlement reflects ASEAN’s preference for an informal and amicable approach. This is a striking contrast with the Western approach to dispute settlement in which preference is clearly on the side of judicial settlement based on clear rules and binding decisions.³³

Thus, ASEAN offers a unique model for a regional institution-building. This is called a “club of principles” which enumerates in an exhortatory manner broad standards of behavior to be observed among the States of the region, along with relatively weak system for monitoring and enforcement.³⁴ Accumulation of agreements and activities over time have reinforced the framework set up by the Bangkok Declaration, and have led the Association to a matured institution. Members of ASEAN have developed it to be an effective organization through repeated informal consultations, and they have succeeded in building up a sophisticated system of international cooperation through consensus based on mutual respect.

³³ The contrast in styles is revealed by a comparison between the mechanism for dispute settlement prepared by NAFTA and the ASEAN Free Trade Area (AFTA), which can be seen as a NAFTA among ASEAN countries. The former provides extremely precise mechanism for dispute settlement as above-mentioned, the latter, on the other hand, has no provision for that. Incidentally, the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA), which is the basic instrument for establishment of AFTA concluded in 1992, contains a grand total of eight pages.

³⁴ Miles Kahler, “Institution-Building in the Pacific” in Andrew Mack & John Ravenhill eds., *Pacific cooperation*, Boulder: Westview, 1995, p.34.

. Institutional Aspects of APEC

As has been described in the preceding chapters, the different approaches to international institution-building reflect different political processes, stages of economic development and cultural backgrounds in the respective regions. These two approaches have met at APEC and have severely opposed each other at first, and now try to unite gradually and to create a new model of regional-institution-building. This grand experiment has just started like as a newly-married couple. Thus, APEC, while it possesses already some institutional characteristics, is still referred to basically as a consultative forum or as an entity in the early stage of institution-building. It is mainly because APEC has not completed substantive agreements like those of EU and NAFTA.³⁵ However, the APEC organization is gradually evolving in a unique manner called “APEC process”, which means the step-by-step procedure for building consensus among all participants.³⁶ This chapter will focus on such institutional aspects of APEC.

1. Legal Basis of the Institution

(1) Constitutional Documents

Despite the increasing expansion of APEC activities, APEC does not have a “charter” that can be regarded as its constitutional document. Its fundamental document is the brief Seoul Declaration adopted at the third Ministerial Meeting in 1991. This Declaration is sometimes called the “APEC charter”, because it sets out the objectives, the scope of activity, mode of operation of APEC.³⁷ Paragraph 4 and 5 of the Seoul Declaration read as follows:

³⁵ Funabashi, *op.cit.*, p.9.

³⁶ The expression of “APEC process” is used to point out the APEC’s feature not only in decision-making, but also in operating the institution.

³⁷ The Seoul Declaration was based on and defined Chairman’s Summary Statement at the first Ministerial Meeting in 1989. This statement seemed to be prepared for adopting at the meeting as a basic document of APEC. However, it was announced as Chairman’s Summary Statement which was not attached so much importance, because the agreement to adopt the statement as a formal instrument

Mode of Operation

4. Cooperation will be based on:
 - (a) the principle of mutual benefit, taking into account the differences in the stages of economic development and in the socio-political systems, and giving due consideration to the needs of developing economies; and
 - (b) a commitment to open dialogue and consensus-building, with equal respect for the views of all participants.
5. APEC will operate through a process of consultation and exchange of views among high-level representatives of APEC economies, drawing upon research, analysis and policy ideas contributed by participating economies and other relevant organizations including the ASEAN and the South Pacific Forum (SPF) Secretariats and the PECC.

The Joint Statement issued on that occasion clarified that the Seoul Declaration endows APEC with clear international personality and a firm foundation of future APEC activities (Paragraph 7 and 8). It can be surmised from these paragraphs that members perceive APEC simply as a international entity, not merely as an arrangement for regular conferences. However, the process reaching the agreement of the Seoul Declaration implied another intention of member economies that APEC had not yet attain to a formal international organization.³⁸ As a result, the Seoul Declaration, considered to be the most important constitutional document of APEC, was adopted in a non-treaty form, same as the Bangkok Declaration.

had not been reached among members.

³⁸ As the first comprehensive articulation of APEC's mission, the Seoul Declaration was to have been adopted as the APEC Charter, but ASEAN resisted, objecting to paragraphs about establishing a secretariat and budget that were eventually omitted from the final text (Funabashi, op.cit., pp.76-77). Subsequent to adoption of the Seoul Declaration, there has not been a move to establish a formal charter for APEC.

(2) Binding Force of Agreements

APEC has released many declarations and joint statements by ministers and leaders as of today. However, none of them has binding force in international law such as a treaty or an agreement, and most of them are mere recommendations or policy-statements which indicate the directions that APEC activities should take. Therefore, no question would arise from the viewpoint of international law at present whether agreements formed in APEC had binding-force or not.³⁹ There is, however, an argument with regard to this question. Since the substance of the argument and the process reaching compromise would reveal the “APEC process”, consideration of this question seems to be meaningful.

There is a sharp division between the period prior to the 1993 Seattle Meeting and the post-Seattle period with regard to the question of binding force. Up until the Seattle Meeting,

³⁹ The active arguments on the sources of international law, more specifically, the arguments on the concept of “soft law”, have continued since the latter half of the 1970s. The idea of the “soft law” is to give some legally binding force to resolutions and codes of conduct formulated and accepted by international and regional organizations. Customary international law and treaties are traditionally regarded as the fundamental sources of international law. The changing international circumstances, however, had necessitated the need to review, reconsider, or reformulate the traditional views. Especially, the adoption of three instruments, namely the Declaration on the Establishment of a New International Economic Order (United Nations General Assembly —UNGA— Resolution, no.3201) in 1974, the Charter of Economic Rights and Duties of States (UNGA Res., no.3281) in 1974, and the Helsinki Final Act in 1975, brought out the concept of “soft law” (Shinya Murase, “Gendai Kokusaiho ni okeru Hogenron no Doyo (The Changing Views on the Sources of International Law), *Rikkyo Hogaku (Rikkyo Review of Law and Politics)*, vol.26, no.10, 1985, pp.97-98). While all of these instruments did not have the same legally binding force as treaties, it was advocated that they should not be regarded as an instrument having some legally binding force rather than a mere recommendation. (See e.g., Ignaz Zeidl-Hohenveldern, “International Economic ‘Soft Law’”, *Recueil des Cours*, 1979– ; G. J. H. van Hoof, *Rethinking the Sources of International Law*, Deventer: Kluwer, 1983).

The definition of “soft law” has not fixed yet, and the arguments concerning definition and effectiveness of “soft law” would continue. However, it should be considered that there is sufficient reason to propound a new source of international law, and “the use of soft law instruments has presented a challenge to the normative structure, the traditional sources, the subjects and subject matter of international law” (C. M. Chinkin, “The Challenge of Soft Law: Development and Change in International Law”, *International and Comparative Law Quarterly*, vol.38, part 4, 1989, p.866). Under this concept of “soft law”, some instruments

main activities of APEC had been confined to exchanging information and to consulting on general policies, and therefore, the agreements reached did not require member economies to carry out any legal obligations as such. Even if there were some provisions requiring members to take specific actions, the content of these actions was directed toward cooperation and coordination in specific economic areas, which no member economies would oppose.

In the Seattle Meeting, however, the central objectives of APEC came to be recognized as achieving concrete goals such as reducing barriers to trade in goods and services in a manner consistent with GATT principles, and improving the investment rules and procedures.⁴⁰ Since then, the member economies began paying attention to the question of binding-force.

In general, all instruments adopted in APEC are regarded as non-binding and exhortatory. However, conflict of views regarding the binding-force of APEC's instruments has become acute as this institution increasingly addresses concrete issues. While the United States tries hard to make these agreements binding, Asian members remain insisting on non-binding forms. The difference of these two attitude was particularly manifested through the process forming the Non-Binding Investment Principles⁴¹ which was declared at the Jakarta Ministerial Meeting in 1994. After heated arguments, members finally reached a compromise and adopted the Principles in the non-binding form. However, in elaborating the documents, member economies discussed its wording item by item as if they had been drafting a treaty, and from the discussion held in the course of elaboration, it was strongly suggested

formed in APEC could be regarded as legally binding.

⁴⁰ The adoption of the Declaration of an Asia-Pacific Economic Cooperation Trade and Investment Framework in the Seattle Meeting led to the change of characteristic of instruments from recommendation to those requiring members to take actions. Under this Declaration, the Committee of Trade and Investment was established in order to "pursue opportunities to liberalize and expand trade, facilitate a more open environment for investment and develop initiatives to improve the flow of goods, services, capital and technology within the region" (Paragraph Two). Furthermore, ten work programs regarding trade and investment were settled.

⁴¹ It states twelve principles such as national treatment and minimizing the use of performance requirements for the improvement and further liberalization of member economies' investment regimes.

that a binding code of conduct might be formulated in future on the basis of the Principles.⁴²

This question arose again in the course of consultation of the Action Agenda in 1995. The Action Agenda prescribed guidelines and a framework which allowed APEC members to reach their target through a unique mechanism—called “concerted unilateral approach (cua)”⁴³—which is very different from the tough bargaining usually seen at the WTO/GATT and NAFTA. Several members opposed the idea of “cua” because liberalization in this approach would not be fully realized. However, it was finally chosen as the key means for implementing the Action Agenda after due consultation. Members will reach the long-term goal by the “peer pressure” without resorting to strictly legalistic and detailed trade agreements. This is a new approach reducing barriers to trade and investment.

The Osaka Meeting represented APEC’s another step on a new phase of action for its vision and goals.⁴⁴ It is expected that instruments requiring member economies to implement some specific measures will increase. Under such circumstances, implementing the contents of documents is much more significant than merely forming legal documents. Therefore, APEC should take the approach based on actual needs or actual situations in order to effectively implement its activities.⁴⁵ If agreements are achieved in such a way under the current APEC system, stronger or more formal organizations might not be required.⁴⁶

⁴² Tsutomu Kikuchi, *APEC : Ajia Taiheiyou Shinchitsujo no Mosaku (APEC: Groping for New Order in the Asia-Pacific Region)*, Tokyo: Nihon Kokusai Mondai Kenkyuujō (the Japan Institute of International Affairs), 1995, p.251.

⁴³ This unique approach is comprise actions by individual member economies called “concerted unilateral action” and actions by APEC fora called “collective action”. The “concerted unilateral action”, proposed by Asian countries, means that members would implement liberalization and facilitation on their own initiative with the speed they can do it. On the contrary, “collective action” asserted by the United States, is that all of members would make efforts to achieve the common goal under the common schedule.

⁴⁴ Leaders declared that “we have entered the action phase in translating this vision and these goals into reality,” and they “adopt the Osaka Action Agenda to carry through [their] commitment at Bogor”. Also declared was that “will implement the Action Agenda with unwavering resolve” (APEC Economic Leaders’ Declaration for Action in 1995, Osaka, Paragraph 2).

⁴⁵ The Eminent Persons Group suggested this pragmatism principle in the report titled “Achieving the APEC Vision” in 1994.

⁴⁶ Kahler, *op.cit.*, p.35.

2. Structure and Function of the Institution

(1) APEC Organs

As it is mentioned in Chapter , institutionalization of APEC is steadily proceeding. Especially after 1993, the APEC organization has rapidly grown without a long-term plan for institution-building. The decision-making powers are not centralized, which is another remarkable feature of APEC machinery. Although the Ministerial Meeting is formally the highest decision-making body, the Informal Economic Leaders' Meetings, despite its informality, is the ultimate authority to decide on a direction of APEC in recent years.⁴⁷

Other Ministerial Meetings, such as Finance Ministers Meeting and Small and Medium Sized Enterprise Ministerial Meeting, also make authorities of Ministerial Meeting weakened. These additional meetings are based on the proposals by the leaders of the members. Therefore, the relations or priorities between the declarations of Ministerial Meeting and those of additional Meetings are not clear. The statements made at these additional Ministerial Meetings have significant influence on the decisions of the Ministerial Meetings.

Another institutional feature of APEC is the absence of a centralized administrative body though APEC has a secretariat which could develop APEC to a formal organization in international law. However, it has been emphasized that "the APEC Secretariat should be small in size, simple in structure, and flexible enough to meet APEC's needs."⁴⁸ It is not intended to be an administrative body like many other secretariats of international organizations. The APEC Secretariat's function is generally to coordinate APEC activities and facilitate communications among its members. It has an only limited functions with the small budget and a few staff members.⁴⁹

⁴⁷ For instance, the Joint Statement of seventh Ministerial Meeting in 1995 stated "Ministers agreed to propose the *draft* Action Agenda to the Economic Leaders for their consideration and adoption" (Article 15). This manifests the Leaders Meeting has a higher position than the Ministerial Meeting.

⁴⁸ "Further Steps of APEC, Report on the APEC Senior Officials to the Fourth Ministerial Meeting," Bangkok, September 1992.

⁴⁹ The budget to be derived from member contributions was set at only US\$2 millions per year and the numbers of staff members is less than thirty persons which is expected to double in a few years.

The Bangkok Declaration on APEC Institutional Arrangements in 1992, which set out establishment of the Secretariat, specified that the Secretariat would “be empowered to act on behalf of APEC Members” (Article A-1-b) and would “be constituted as a legal entity enjoying such legal capacity as is necessary for the exercise of its functions” (Article A-4). As the activities of APEC expand, the operations of the Secretariat will increase. At the Osaka Meeting in 1995, Ministers recognized the need to strengthen the Secretariat especially in connection with the implementation of the Action Agenda. However, APEC member economies intend that the Secretariat would continue to be a “lean and mean”, and thus, the reinforcement of the Secretariat means strengthening its operational and supplementary function rather than accelerating institutionalization of APEC and aggrandizing its role in APEC’s decision-making process.

(2) Decision-Making Process

APEC has been taking a consensus-procedure as its decision-making process from the beginning.⁵⁰ This consensus-technique is aimed at the continuation of negotiations until an agreement has been reached. In many of the ordinary international organizations, which have procedural provisions in its constitutional documents, participants make decisions mainly by formal voting arrangements such as majority-vote and unanimous voting. Recently, however, there seems to be a trend towards an increased use of consensus as a mode of decision-making in international practice. This is caused by the changes in the international society which has grown more diverse as well as more interdependent, and as a result, the rule of unanimity and the majority-rule have become less suitable as modes of decision-making in present international relations.⁵¹ APEC, of which a most notable characteristic is its diversity, is much more apt to choose consensus-procedure for decision-making process.

⁵⁰ The Chairman’s Summary Statement issued at the first Ministerial Meeting in 1989 stated that “cooperation should involve a commitment to open dialogue and consensus, with equal respect for the views of all participants; cooperation should be based on non-formal consultative exchanges of views among Asia Pacific economies” (Paragraph 16).

⁵¹ G. J. H. Van Hoof, *Rethinking the Sources of International Law*, Deventer: Kluwer,

However, the consensus-procedure as the APEC decision-making process differs from that one used within the framework of ordinary international organizations such as the United Nations. The latter is formal procedure for making legally binding decisions along with majority-vote and unanimity-vote.⁵² The former, on the other hand, means the step by step process to achieve agreement rather than voting system. This APEC's process is very similar to the consensus-procedure taken in ASEAN.

3. Dispute Settlement

APEC has not been equipped with any dispute settlement mechanism. Both advisory board to the Leaders, the EPG and the PBF, have pointed out the need for any new APEC dispute settlement mechanism. The EPG urged again and again to create a voluntary Dispute Mediation Service (DMS) in its reports. The PBF has also recommended the establishment of an agreed panel of third party for dispute settlement. As a result of these suggestions, the Bogor Declaration mentioned the need of such mechanism for the first time in official documents of governmental level, furthermore, it was declared again in the Osaka Leaders' Meeting. In the light of these declarations, it is seemed that member economies would conceive "a voluntary consultative dispute mediation service" is desirable as a dispute settlement mechanism in APEC.⁵³

The institutional features of an organization would largely depend on what kind of mechanism it has for settling disputes. There is a view that it is advantageous for a competent organization to have stronger and more substantial power controlling participants in order to resolve various problems effectively.⁵⁴ However, the mechanism of dispute settlement of APEC is expected

1983, pp.225-226.

⁵² It is sure to exist several decisions by consensus not having legally binding force such as various resolution of the United Nations General Assembly. Yet, a binding instrument can be adopted by consensus in international organizations.

⁵³ In the Bogor Declaration, leaders agreed "to examine the possibility of a voluntary consultative dispute mediation service to assist in resolving such dispute among APEC economies and in avoiding its recurrence" (Paragraph 9). And in the Osaka Declaration, they "agree on the desirability of an APEC dispute mediation service" (Paragraph 4).

⁵⁴ Shigemi Watanabe, *Kokusaikiko no Kino to Soshiki* (The Function and Structure

to be of advisory nature which is similar to that of ASEAN, and not the type of detailed procedures embodied in the NAFTA.

. Concluding Remarks

As has been analyzed above, the “APEC process” characterizes the development of APEC. Although the “APEC process” is comprised of two different approaches for institution-building, it is more influenced by the Asian style rather than the Western style. This is not only because ASEAN has assumed significant roles in APEC from the beginning⁵⁵, but also because the Asia-Pacific region has its own distinctive features, that is, its socio-political diversity, its different levels of economic development, and its market-driven economic integration process. Therefore, it has been difficult for APEC to take a legalistic and institutional approach of integration like the EU and NAFTA. However, these two approaches, despite their remarkable differences, have started to fuse together since the Seattle Meeting in 1993, into an entirely new approach for institution-building. From this perspective, APEC would institutionalize in a peculiar manner which is different from both the Asian style and the Western style.

APEC has not only two different approaches of institution-building as has noted above, but also has two different aspects of its activities. The scope of APEC activities has rapidly expanded, and now it deals with various subjects ranging from economic cooperation to liberalization and facilitation of trade and investment. In the field of economic cooperation, APEC should continue functional institutionalization, in order to promote its various work programs effectively and efficiently. Also, each member economy is now required to implement the Action Agenda for achieving the APEC’s long-term goal of free and open trade and investment. Here, APEC should remain as a consultative forum adjusting each member’s economic policy.

There is no doubt that APEC is the international institution to promote most actively economic cooperation in pursuance of liberalization and facilitation of trade and investment in the Asia-Pacific region. However, APEC’s informality of legal foundation makes it difficult

⁵⁵ Because ASEAN countries had been reluctant to participate in APEC at first, it was necessary to regard ASEAN very highly in the formation of APEC. The other reason is that ASEAN has already had the rich experience to contribute to a regional institution-building which has come to be respected by non-Asia countries

to regard the Association as an “international organization” in the traditional sense of international law, which would certainly classify APEC as one of “other institutions”⁵⁶ than ordinary international inter-governmental organizations.⁵⁷ The modern international law has its historical root in the inter-state law among the Christian nations in Europe, and accordingly, most of non-Western countries, such as ASEAN countries, have hardly had the chance in forming the existing rules of international law. In the process of institutionalization of APEC, however, Western members and Asian members have been required to work together to establish new rules and new procedures. Thus, the existence of APEC as an international institution strongly suggests an alternative model of institution-building against the background of traditional international law, as same as the concept of “soft law” would challenge against the traditional sources of international law.⁵⁸

It should be noted that the structure and function of a given institution as well as the scope of its power and decision-making procedure depend on the international society, regional and otherwise, on which this institution is based. Therefore, it should be admitted that different societies will lead to different styles of institution-building and that an international institution should be understood in response to the changing needs and interests of its members. In this sense, APEC offers an extremely important and challenging case for the study of law of international organizations at this period of momentous change in Asia and in the world.

(Funabashi, op.cit., pp.52-53).

⁵⁶ See *supra* note 1.

⁵⁷ In general, it is required, to be recognized as an international organization, that it has a treaty for establishment, an independent decision-making organ from its member States, and clear rules for its activities.

⁵⁸ See *supra* note 39.

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