INSTITUTIONAL EVOLUTION IN ECONOMIC INTEGRATION: A CONTRIBUTION TO COMPARATIVE INSTITUTIONAL ANALYSIS FOR INTERNATIONAL ECONOMIC ORGANIZATION

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1. INTRODUCTION

A growing number of regional economic integration arrangements ("RIAs") have attracted many researchers on international trade of various disciplines. Indeed, "[w]hen the WTO was established on 1 January 1995, most Members were parties to at least one regional agreement that had been notified to GATT."

Moreover, of all the agreements that GATT has been given notice of since 1948, thirty percent of them were signed between 1990-94 and fifty-five percent of those currently in force were signed between 1990-95. It is interesting to note that if we remove those agreements that: i) are still in force, ii) involve more than two parties (not bilateral), and iii) are presented as free trade areas or customs unions (not preferential trade arrangements ("PTA")), there

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2 Out of 109 agreements, including those notified under the 1979 Enabling Clause as well as GATT art. XXIV, 32 were signed between 1990-94. See WORLD TRADE ORG., REGIONALISM AND THE WORLD TRADING SYSTEM 77-89 app. tbl.1 (1995) [hereinafter WTO].

3 Out of 88 agreements, 48 were signed between 1990-95. See WTO Ann. Rep. 1996, supra note 1, at 40-42.
are only about ten remaining, half of which are in the Western Hemisphere. The purpose of this Article is to develop a framework to analyze the institutional design of international economic organizations ("IEOs"), especially RIAs and to apply this framework to analyze the impact of economic integration measures on their institutional development. This Article applies the theory of transaction costs to the analysis of IEOs. The initial questions posed under this theory were: 1) why do IEOs exist; 2) why has one super-IEO not emerged; and 3) why is the internal governance of an IEO the way it is. This theory answers that since the solution minimizing transaction costs is different between different IEOs, or within one IEO at different points in time depending on the surrounding environment, institutional arrangements may also be different. This Article will compare several different IEOs and will attempt to explain the unique features of each and the differences between them through this transaction cost theory. This Article will also demonstrate the application of this theory to predict the future institutional evolution of the Association of Southeast Asian Nations ("ASEAN"). Commentators pay less attention to the regional economic integration effort of ASEAN than the European Union ("EU") or the North American Free Trade Agreement ("NAFTA"), perhaps rightly so considering their respective achievements so far. This Article suggests, however, that if we look carefully at the recent development of ASEAN since the introduction of the ASEAN Free Trade Area ("AFTA"), we can find good reason to believe that this may lead to a more conspicuous example of RIAs. Section 2.1. of this Article briefly looks at the economic cooperation of ASEAN; the theory, framework, and methodology

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4 The remaining agreements are AFTA, the Andean Pact, CACM, CARICOM, CEFTA, EFTA, EU, MERCOSUR, and NAFTA. See WTO, supra note 2, at 26, 77-89 tbl.1 & app. tbl.1. Also remaining are the Arab Common Market and COMESA. See WTO Ann. Rep. 1996, supra note 1, at 40-41. These sources give no description of COMESA, but in some respects it seems something more than a PTA. See Richard Harmsen & Michael Leidy, Regional Trading Arrangements, in INTERNATIONAL TRADE POLICIES: THE URUGUAY ROUND AND BEYOND, VOLUME II 88, 108 app. 1 (1994).


6 See id. at 471-72.
that underlies the analysis of this paper is developed in Sections 2.2. and 2.3. Section 3 compares the institutional designs of several IEOs based on the theory and framework in the previous part in section two. In Section 4, following a brief comparison of the state of regional economic relations of several regions through statistical data, the findings of the preceding analysis are presented. Section 4.3. demonstrates how the preceding discussions can be applied to a prediction of the future institutional evolution of ASEAN. Section 5 concludes.

2. BASICS

2.1. ASEAN and AFTA: An Overview

ASEAN was established in 1967 with the ASEAN Declaration (or Bangkok Declaration) by the five original members: Indonesia, Malaysia, the Philippines, Singapore, and Thailand. Shortly thereafter, Brunei (1984), Vietnam (1995), Laos, and Myanmar (1997) joined.

The original purpose declared upon its establishment sets forth three broad groupings for ASEAN activities: political and security, economic, and functional. It states that its purpose is “to accelerate the economic growth, social progress and cultural development . . . to promote regional peace and stability . . . [and] to promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields.”

ASEAN’s first decade was devoted to political issues and made little progress in economic cooperation. ASEAN Preferential

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8 Association of Southeast Asian Nations Declaration, Aug. 8, 1967, 6 I.L.M. 1233 [hereinafter ASEAN Declaration].

Trading Arrangements ("PTAs") were introduced in 1977, yet they were too limited to have a significant impact on intra-regional trade.11

A significant step toward further economic integration was taken in 1992 at the Summit Meeting in Singapore by the signing of two principal economic agreements.12 One agreement is to "establish the ASEAN Free Trade Area using the Common Effective Preferential Tariff (CEPT) Scheme as the main mechanism within a time frame of 15 years beginning 1 January 1993 with the ultimate effective tariffs ranging from 0% to 5%." They later decided to "further accelerate the progress towards the actualisation of AFTA before the target date of Year 2003." The other agreement sets forth an extensive list of areas of cooperation, including industry, finance, agriculture, transportation, and research and development. Since 1995, a series of agreements establishing frameworks in respective sectors have been signed pertaining to services, intellectual property cooperation, investment, customs, and finance.

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11 See Stephenson, supra note 9, at 441.
12 These two agreements were the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA), Jan. 28, 1992, 31 I.L.M. 513 [hereinafter AFTA Agreement] and the Framework Agreement on Enhancing ASEAN Economic Cooperation, Jan. 28, 1992, 31 I.L.M. 506 [hereinafter Economic Cooperation Agreement].
15 See Economic Cooperation Agreement, supra note 12, arts. 2, 3.
2.2. A Theory of International Economic Integration: Transaction Cost

Before looking at actual examples of RIAs, I will first articulate a theory providing a framework to analyze these RIAs in the sections that follow.

2.2.1. The Basic Model

The theory of transaction costs was initially introduced by Ronald Coase to answer the following questions about the business firm: Why does it exist, and why is there not just one large firm? In applying this theory to analyze IEOs, international relations are analogized to a market where states interact to maximize their utility. The hypothesis here is that "states use and design international institutions to maximize the members’ net gains (NG) ... from engaging in intergovernmental transactions." Net gains (NG) equal total gains (TG) from engaging in intergovernmental transactions minus the sum of transaction losses (TL) from such transactions and transaction costs (TC) of international relations. Assuming that states enter the market in order to gain from transactions, there can be no transactions, cooperation, or integration without net gains from transactions defined as (NG = TG - (TL + TC) > 0). Each of these components will be described below.

2.2.2. Components

2.2.2.1. Transaction Gains

External effects caused by other states through, for example, regulation that fails to protect foreign interests, strict regulation that contains protectionist effects, or lax regulation that may be viewed as a subsidy, may cause other states to limit these activi-

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See Trachtman, supra note 5, at 471.
See id. at 498.
Id. at 473-74 (footnote omitted).
See id. at 474.
See id. at 489.
ties. These states begin inter-jurisdictional negotiations over which states may regulate such actions. There are two main ways to do this: bilateral persuasion and institutionalization.

2.2.2.2. Transaction Costs

Transaction costs are ultimately "the costs of running the economic system." They include costs of identifying appropriate counter-parties, negotiating with them, and writing and enforcing contracts. They include both costs in the market and within an institution, the latter of which includes the costs of reaching an agreement within an established institutional setting and the costs of modifying the institutional setting.

2.2.2.3. Transaction Losses

Transaction losses arise from restricting the ability of member states to regulate in favor of maximizing local preferences. They are analogous to production costs, and are sometimes perceived of as a threat to sovereignty.

2.2.3. Prediction on the Institutionalization of IEOs

In line with the theory set forth above, a discussion of the theoretical prediction on how institutionalization takes place follows.

As economic relations among participants of a transaction deepen and expand, the need for the transaction also increases. The examples given in the explanation of transaction gains demonstrate how transactions among closely interdependent economies would take place far more often than transactions among economies with few direct relations.

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26 See id. at 491.
27 See id.
29 See id. at 500.
30 See id. at 544.
31 See id. at 552.
32 Cf. Philip G. Cerny, Globalization and the Changing Logic of Collective Action, 49 INT'L ORG. 595, 597 (1995) ("[T]he more that the scale of goods and
However, as inter-governmental transactions increase, the existing institutional setting will become less efficient. This is due to the fact that such transactions would most likely include fields that generate more asset specificity as well as other issues for which complete contracting is impossible. Greater duration adds further difficulty in completing a contract.

The concepts of asset specificity and incomplete contracting require some explanation. "[A]ny transaction where one state advances consideration at a particular point in time, and must rely on one or more other states to carry out their end of the bargain at a later point in time or experience a significant loss in its expected value, is 'asset specific.'" For example, it is often difficult to re-establish a tariff once it is withdrawn, and harmonization of a regulation is even more difficult to reverse. Therefore, even if one state takes advantage of another and defects, the other state that already took the agreed upon measures (e.g., tariff reduction or harmonization) cannot reverse this course. And, "with higher magnitudes of asset specificity and greater uncertainty and complexity, there are greater incentives and possibilities for opportunism." Given the positive transaction costs, it is impossible to write explicit contracts that prevent opportunism. Thus, as coverage of a transaction expands and includes areas with assets produced, exchanged, and/or used in a particular economic sector or activity diverges from the structural scale of the national state..., then the more that the authority, legitimacy, policymaking capacity, and policy-implementing effectiveness... will be challenged...”).

From the standpoint of the history of international economic integration, it might be theorized that states will engage in integrative transactions in areas characterized by low asset specificity early. Once gains from trade in low asset specificity areas are exhausted..., there are greater incentives... for integration in higher asset specificity areas.

Trachtman, supra note 5, at 531.

33 See id. at 526.
34 Id. at 522.
35 See id.
36 Id. at 524.
37 See id.
38 Id. at 524.
39 See id.
40 Throughout this Article, “coverage” refers to the fields that are included in inter-governmental transactions (e.g., goods, services, investment, intellectual property, and competition policy), but not to smaller sectors covered in individual fields (e.g., products covered under tariff reduction agreements).
higher asset specificity, uncertainty, and complication, transaction
costs will grow unless a more efficient institutional setting is cho-
sen.\textsuperscript{41} The solution is greater institutionalization.\textsuperscript{42}

However, there is a limit to institutionalization. Greater de-
grees of institutionalization lead to greater transaction losses. 
Transaction losses also depend on the size and nature of coverage 
and the member states. Expansion of coverage will cause transac-
tion losses in more fields, and expansion in the number of mem-
ber states will create transaction losses against more states. Even 
if an agreement includes new coverage, if the restrictions do not 
actually restrict the state's ability, (e.g., an agreement on tariff re-
duction on products that do not have a tariff) there are no unique 
transaction losses (except the ability to reverse zero tariff policy). 
The magnitude of transaction losses also depends on the percep-
tion of the member states about losing their own ability, as well 
as on their perception of other member states with whom they 
agree to give up such ability. These factors determine how seri-
ously the transaction losses are perceived as losses.

This prediction will be employed and tested below in the ex-
planation of the institutionalization of IEOs.

2.3. \textit{Analytical Framework and Methodology}

Another building block of this Article, together with the the-
ory of transaction costs, is the framework and methodology for 
empirical analysis. Transaction cost theory is operational, non-
tautological, and testable only when it is accompanied by a com-
parative method.\textsuperscript{43} Empirical analysis, as defined here, is intended 
to extend comparative methods to facilitate the simultaneous 
comparison of several IEOs within a certain general framework. 
This enables us to observe the broader picture as to how the insti-
tutional design of a particular IEO at a particular point in time 
looks in comparison to its past and to other IEOs. It also gives us 
the empirical tendency of institutional design,\textsuperscript{44} and is expected to

\textsuperscript{41} For additional explanation of the connection between incomplete con-
tracts and institutionalization, see infra section 2.3.1.
\textsuperscript{42} See Trachtman, supra note 5, at 524-25.
\textsuperscript{43} See id. at 502.
\textsuperscript{44} The idea of “empirical analysis” is borrowed from econometrics. Just as 
econometrics gives economic theory empirical content, the framework for em-
pirical analysis developed below is intended to give empirical content to the 
theory of transaction costs developed above. See generally DAMODAR N. 
GUJARATI, BASIC ECONOMETRICS 2 (3d ed. 1995).
give us some idea about the future institutional evolution of an IEO. This Section will elaborate on this general framework.

2.3.1. Basic Framework

The basic framework consists of two variables: dispute resolution mechanisms and decision-making, especially legislation. The salient characteristics of international law that govern intergovernmental transactions are an incomplete legislation (body of law) and incomplete dispute resolutions. As a result, "potential opportunism gives rise to transaction costs which forestall opportunistic action." Here there are two sources of problems, and therefore two possible solutions. To complete an otherwise incomplete contract, and thus reduce transaction costs, IEOs have two non-mutually exclusive options: institutionalization in legislation and institutionalization in dispute resolution. To the extent that this incompleteness is a problem that any IEO faces, this framework is generally applicable.

From a methodological standpoint, this general applicability is important because it means that the state of institutionalization of any given IEO can be analyzed in terms of these two variables. Accordingly, these IEOs can be plotted in a two-dimensional diagram that shows the relative state of institutionalization of different IEOs. Such a diagram will reveal a "degree of institutionalization," (i.e., how far an IEO has gone along the spectrum from spot market transactions to institutionalized transactions), and a "direction of institutionalization," (i.e., which type of institutionalization is more heavily employed in the IEO).

2.3.2. Measurement of Institutionalization

The central difficulty in applying this framework to a real world analysis comes from the difficulty in measurement. Measuring the amount of institutionalization that an IEO employs to maximize utility is not comparable to measuring how much capital and labor a firm employs to maximize its profits.

This Article utilizes the following method. I will specify several institutional features which are parameters for dispute resolution and legislation in order to describe the overall degree of institutionalization of an IEO. These chosen parameters will be

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45 See Trachtman, supra note 5, at 529.
46 Id. at 526.
purported to best highlight the differences among different IEOs, and represent balanced aspects of institutions. Then I will examine whether each institutional feature fits each IEO. The total number of parameters that fit an IEO will be defined as the index of degree of institutionalization of the IEO. The higher the index, the higher the degree of institutionalization.

2.3.3. Relations with Theory of Transaction Costs

The two-dimensional framework developed in this section can be used to test the validity of the transactional cost theory. With a given level of transaction gains, possible institutional designs lie along a spectrum of degree of institutionalization with respect to dispute resolution and legislation. Member states will maximize net gains by choosing the optimal institutional design subject to a trade-off between reduction of transaction costs by greater and an increase in transaction losses. If transaction costs theory is a valid hypothesis then the outcome shown in the two-dimensional framework must reflect the transaction cost economizing solution.

2.3.4. Behavioral Factors

The primary source of the institutional analysis in this Article are official documents that formally spell out the institutional design when possible. It may be questionable whether or not we should take behavioral factors into account. For example, in indexing each IEO according to the above method, what should be

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47 I owe the concept of this method to political economy literature. See, e.g., Alberto Alesina & Lawrence H. Summers, Central Bank Independence and Macroeconomic Performance: Some Comparative Evidence, 25 J. MONEY, CREDIT & BANKING 151, 151-62 (1993). For a more extensive comparison of laws using this index representation, see generally RAFAEL LA PORTA ET AL., LAW AND FINANCE (National Bureau of Econ. Research Working Paper No. 5661, 1996). As such, the idea of indexing a law for comparison is not entirely novel, but these are designed to show the correlation between legal variable and economic performance. Therefore, a model exhibiting the correlation between two legal variables seems new.

48 Assuming a U-shaped "transaction cost curve," just as a standard short-run production cost curve, under a fixed institutional design, as transactions among states increase, it will become increasingly costly to engage in further transactions beyond a certain point. Change in institutional design can make their transaction more efficient. This is analogous to the distinction between long-run and short-run costs of production. See, e.g., DAVID M. KREPS, A COURSE IN MICROECONOMIC THEORY 256-58 (1990).
done if a parameter analytically fits the IEO on paper, yet is not actually working that way? Should we count this parameter or not? Or, if a similar-looking institution actually works very differently, should we make some adjustment? For example, should we "discount" a credit from one that partially fits the parameter, and then add one credit to the other that fits perfectly? This Article takes the position that, in such a case, we should count the parameter regardless of the behavioral factor, and we should not consider any "discount." It is not that the behavior factor is unimportant; certainly, behaviors of the European Court of Justice ("ECJ") play a significant role in the "federal" legal order of the Community, even beyond what one expects from the constitutional provisions. In addition, behaviors of national courts helped the success of the judicial system of the EU. A similar-looking court in another IEO does not necessarily work in the same way as the ECJ. Arguably, institutional comparison is not complete unless behaviors are taken into account. After all, institutions work through behaviors.

However, it is still reasonable to exclude behavioral factors from our primary focus for the purpose of this Article. First, behaviors are generally hard to measure and relatively volatile. To avoid additional complication and maintain parsimoniousness of our measurement method of institutionalization, we should focus on more objective and stable parameters. Second, behavior is influenced by total institutional design. So when we are com-


50 See GEORGE A. BERMANN ET AL., EUROPEAN COMMUNITY LAW 204 (1993) ("[D]irect effect and supremacy ... are largely creations of the Court of Justice.").


52 This approach is employed in political economy literature on central banks for similar reasoning. See Vittorio Grilli et al., Political and Monetary Institutions and Public Financial Policies in the Industrial Countries, 13 ECON. POL'Y 342, 366-70 (1991).

53 For example, even if the appellate review systems of ASEAN and the WTO behave differently, the difference may be caused by varying forms of political intervention. It is no wonder ECJ's appellate court functions are very different from these two because the total institutional design is very different.
paring very different institutions, it is of no wonder that we observe different behaviors. Therefore, in order to devote this Article to institutional analysis, and to keep institutional design distinct from behavior, it is best to assume that differences in the workings of institutions in this context depend more heavily on institutional design than on behaviors.

3. INSTITUTIONAL COMPARISON

3.1. Dispute Resolution Mechanisms in Comparison

One of the major achievements of the Uruguay Round is the enhanced dispute resolution mechanism ("DRM"). Similarly, ASEAN has recently introduced its DRM. This section will compare the DRMs of the WTO, the EU, and NAFTA with that of ASEAN. Concerning NAFTA, the Chapter 19 procedure will be compared separately from the general provisions of Chapter 20 because it shows distinct features that merit a separate analysis. Also, I will examine the WTO, even though it is not a "regional" arrangement.

3.1.1. Parameters

Based on the considerations explained in the previous section, the parameters are as follows:

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It is more of a matter of institutional design than behavior. Comparing the workings of ASEAN and the EU is not like comparing the workings of the Warren Court and the Burger Court.


57 NAFTA's DRM is separated into five mechanisms. The main mechanism is provided in Chapter 20, which deals with all general disputes arising under NAFTA. Chapter 19 is the mechanism for review of antidumping and countervailing duty cases, and Chapter 11 deals with investment disputes. The two ancillary agreements, the North American Agreement on Labor Cooperation ("NAALC") and the North American Agreement on Environment Cooperation ("NAAEC"), have their own mechanisms. See Cherie O'Neal Taylor, Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?, 17 NW. J. INT'L L. & BUS. 850, 854 (1996/97).

58 See supra Section 2.3.
Basic structure: (a) is it a permanent court system or an ad hoc panel system; (b) is it composed of judges;

Procedure: (c) is consultation required before adjudication; (d) is appellate procedure available or not;

Effect: (e) does a panel decision automatically become the final ruling for dispute resolution or is intervention by the disputing parties possible; and (f) does the ruling have an automatic, binding effect or not?

Justification and analysis of each variable will be elaborated upon below.

3.1.2. Comparison

3.1.2.1. Court or Panel

The existence of a permanent court is more than symbolic. It reduces the chance of bargaining between the disputing parties over the composition of a panel member. This, in turn, increases the credibility of law and reduces the uncertainty and transaction costs.

Only the EU has established a judicial institution, the European Court of Justice, that has a capacity equal to political institutions, namely the Parliament, the Council, and the Commission. It consists of fifteen judges and the President of the Court assigns cases. Other RIAs have adopted a panel system, under which a panel will be established upon request by the disputing parties. Each Secretariat maintains a list of potential panelists, and panelists of a dispute will be nominated by the Secretariat in the cases of the WTO and ASEAN or by the disputing Parties

59 In selecting these parameters, I first set up a comprehensive list of elements that constitute a DSU, compared with other panel systems, and then added elements that constitute other panel systems which a DSU does not have. Then, I deleted features commonly shared by all the samples from this list, divided the remaining ones under the three headings above, and picked up the parameters so that they satisfy the conditions stated in Section 2.3., supra.

60 See Treaty Establishing the European Economic Community, Jan. 1, 1958, art. 4.1, 298 U.N.T.S. 11, 16 [hereinafter Treaty of Rome].


62 See Bermann et al., supra note 50, at 70.

63 See DSM, supra note 55, art. 5; DSU, supra note 54, para. 6; NAFTA, supra note 56, art. 2008, para. 1.
under NAFTA. In the course of the panelist selection, bargaining is still possible.

However, the appellate review system in the WTO is a departure from this standard panel system. Members of the Standing Appellate Body, which is no longer called a “panel,” are appointed by the Dispute Settlement Body (“DSB”), and three of the seven members serve on any one case in rotation. There is no provision similar to that of panelist selection. This is more comparable to a permanent court.

3.1.2.2. Qualification of Members

A judicial system that requires the members of a panel or a court have qualifications that are equal to that of domestic judges or lawyers, should be recognized as being oriented more towards jurisprudence than those that do not require such qualifications.

The judges of the ECJ have to possess the qualifications “required for the holding of the highest judicial office in their respective countries or who are jurists of a recognised [sic] competence.” However, others define the qualifications for panelists in much broader language, and do not limit it to legal experts. The only exception to this can be found in Chapter 19 of NAFTA, which expresses a clear preference for judges and lawyers. Furthermore, the Extraordinary Challenge Procedure, the

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64 See DSM, supra note 55, app. 2, para. 7; DSU, supra note 54, para. 8.6; NAFTA, supra note 56, art. 2011.
65 However, this opportunity for bargaining has been diminished. See DSM, supra note 55, app. 2; DSU, supra note 54, para. 8.7.
66 See DSU, supra note 54, para. 17.1.
68 Treaty of Rome, supra note 60, art. 167.
69 Panels shall be composed of well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of an MTO Member or of a contracting party to the GATT 1947 or as a representative to a council or committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.
70 See NAFTA, supra note 56, annex 1901.2, para. 1 (“The roster [of individuals to serve as panelists in dispute resolution under Chapter 19] shall in-
appellate body under Chapter 19, requires judge-equivalent persons to serve as panelists, even though they are still called "panelists," not "judges," in the provisions. However, it is worth noting here that they are expected to interpret domestic laws, as well as provisions of NAFTA, and the binational panel review replaces judicial review of such determinations of each party.

3.1.2.3. Consultation

Relative preference of adjudication over consultation shows greater limits on discretion of member states in dispute resolution. It is common for panel systems to require consultations among disputing parties before requesting the establishment of a panel. However, NAFTA's Chapter 19 is an exception once again. It does not provide a procedure for consultation for initial review. Rather, consultation before panel review is only required in a dispute to safeguard the Panel Review System that arises after the initial review has been completed (in this case reviewed by a special committee).

3.1.2.4. Appellate Review

An appellate review procedure enhances the credibility of the law and reduces uncertainty. It is available in many panel mechanisms, with the only exception being NAFTA's Chapter 20. Appellate review of ASEAN appears to be a little different because it is an inter-governmental body which has ASEAN Eco-
economic Ministers ("AEM"), who receive such an appeal, and no panel procedure is provided.\textsuperscript{77}

The ECJ has served as a federal court in relation to the other courts in the Community.\textsuperscript{78} It has become an appellate court at the Community level due to the establishment of the Court of First Instance in 1988 which was given "jurisdiction to hear and determine at first instance, subject to a right of appeal to the Court of Justice on points of law."\textsuperscript{79} Initially, the court was only given limited jurisdiction by Decision 88/591, O.J. (C 215) over staff and competition cases, in addition to coal and steel cases arising from the ECSC Treaty,\textsuperscript{80} but it "now has jurisdiction over all actions brought by 'non-privileged' parties—i.e. parties other than Member States or Community institutions."\textsuperscript{81}

3.1.2.5. Political Intervention

Under the panel system, a panel report is not considered the final ruling. It usually has to be approved by an intergovernmental body, which is by nature more political than judicial. Examples include the DSB in the WTO, and the Senior Economic Officials Meeting ("SEOM") in ASEAN. An exception to this practice is NAFTA's Chapter 19, which does not provide for any such involvement. Besides this formality, the procedures of the WTO, ASEAN, and NAFTA are tremendously different. Under WTO procedures, "the report shall be adopted at a DSB meeting unless . . . the DSB decides by consensus not to adopt the report."\textsuperscript{82} This is virtually the same as a panel report which is automatically binding, and thus, political intervention is significantly limited. In contrast, the procedure under NAFTA's Chapter 20 allows disputing parties, which cannot be institutions, to reach a final resolution based on the panel report. Consequently, it is not much different from a mere consultation system.\textsuperscript{83}

\textsuperscript{77} This may appear to be a little strange, but the GATT’s DRM used to be organized in this manner. See General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXIII, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 see also Taylor, supra note 57, at 872-73.

\textsuperscript{78} See Jacobs & Karst, supra note 49, at 192.

\textsuperscript{79} Treaty of Rome, supra note 60, art. 168a.

\textsuperscript{80} See BERMANN ET AL., supra note 50, at 73.

\textsuperscript{81} CRAIG & DE BURCA, supra note 61, at 75.

\textsuperscript{82} DSU, supra note 54, para. 16.4 (footnote omitted).

\textsuperscript{83} See NAFTA, supra note 56, art. 2018.
procedurally, ASEAN lies somewhere between NAFTA and the WTO. The SEOM is authorized to make a ruling based on a simple panel majority, at which the disputing parties "can be present during the process of deliberation but shall not participate in the ruling." 84 ASEAN differs from NAFTA because the panel report is not directly addressed by disputing parties themselves. ASEAN also differs from the WTO since it takes simple majority rule, which still allows disputing parties to gather support from other members. Thus, under the ASEAN dispute resolution procedures, political intervention is still possible.

3.1.2.6. Binding Effect

Once a final decision is issued, the next question is what is its legal effect. Many DRMs explicitly provide that a decision shall be automatically binding, 85 or, alternatively, that it must be accepted by the parties before any further measures may be taken. 86 The one exception is NAFTA's Chapter 20, which only requires that the parties "normally shall conform" 87 with the recommendations of the panel, and leaves the parties to agree upon a final resolution.

3.1.3. Summary

The preceding comparison is summarized in Table 1 which is contained in the Appendix to this Article. Asterisks show that each IEO fits the parameters above, and the total number for each IEO is shown in the column on the right. To clarify the meaning of each parameter, a "reverse parameter" is provided in each column below. This is simply the opposite to "parameter;" therefore, an asterisk is not shown when an IEO fits this "reverse parameter."

3.2. Legislation System in Comparison

The next set of issues deals with the institutional features of decision-making, most notably legislation. This section deals

84 DSM, supra note 55, art. 7.
85 See DSM, supra note 55, art. 8, para. 3; NAFTA, supra note 56, art. 1904, para. 9.
86 See DSU, supra note 54, para. 17.14; Treaty of Rome, supra note 60, art. 171.
87 NAFTA, supra note 56, art. 2018.
with the Organisation for Economic Development and Coopera-
tion ("OECD") and includes comparisons to the organizations
discussed in the previous section.

3.2.1. Parameters

The parameters addressed here are as follows:
- Inter-governmental organs: (a) whether an inter-
governmental body within an arrangement is subject to an inter-

-- internal constraint; (b) whether majority voting is available in their
decision-making;
- Secretariats: (c) whether the Secretariat is independent of its

-- member states; (d) whether they have the capacity to initiate deci-

-- sion-making in the institution;
- Parliaments: (e) whether they are composed of directly
elected representatives; and (f) whether directly elected representa-

-- tives are involved in decision-making.

Again, justifications for these parameters will be provided be-

-- low.

3.2.2. Comparison

3.2.2.1. Internal Constraints upon Inter-Governmental

-- Bodies

International organizations uniformly contain institutions
consisting of representatives from member states. Examples from
the organizations discussed above are: The Ministerial Confer-
ence, the General Council and other Councils of the WTO;90 the
Council of the EU;91 the Free Trade Commission of the
NAFTA;92 the ASEAN Heads of Government, the ASEAN Min-
isterial Meeting ("AMM"), the ASEAN Economic Ministers

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88 In choosing these parameters, I first established the three categories of
institutional features above and classified the features of each RIA into one of
the categories. Then I selected parameters so that they satisfy the conditions
stated in Section 2.3., supra.

89 "[T]he term 'inter-governmental' here denoting [sic] a relationship be-

-- tween states of the kind generally found under international law, with no fed-

-- eral or supranational element." Jacobs & Karst, supra note 49, at 184.

90 See Agreement Establishing the Multilateral Trade Organization, Dec.

-- 15, 1993, 33 I.L.M. 13, art. IV [hereinafter WTO].

91 See Treaty of Rome, supra note 60, art. 146.

92 See NAFTA, supra note 56, art. 2001.
and other series of ministerial meetings in ASEAN; and the Council in OECD. Contrary to what their names suggest, they belong to different species.

The term "internal constraint" means constraints placed upon the competence of an inter-governmental body by other institutions within an RIA, (i.e., institutional checks and balances). The word "internal" is chosen to contrast with "external" constraints, which constrain the competence of inter-governmental bodies through checks imposed by member states outside of an RIA. Recall that institutionalization is intended to complete an otherwise incomplete contract, thereby reducing the possibility of opportunism due to potential transactions outside of a given institutional arrangement. Therefore, internal constraints are an indicator of institutionalization, whereas external constraints are an indicator of under-institutionalization.

The Council of the EU is subject to significant internal constraints. As the Treaty of Rome indicates, it is only one of five institutions of the Community, listed second only to the European Parliament. The Council plays a key role in the adoption of the budget and legislation, yet it is the Commission, not the Council itself, that has exclusive authority to initiate legislation. The Parliament's involvement in the legislative process is growing increasingly important due to the introduction of "parliamentary cooperation procedures" and "parliamentary co-decision procedures;" the latter of which essentially gives Parliament a veto power.

Other organizations exhibit few internal constraints. The role of the Council in the OECD and of the Ministerial Conference in the WTO is defined simply as everything under the agreement.

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95 See supra Section 2.3.1.
96 See Treaty of Rome, supra note 60, art. 4.
97 See id. arts. 189a, 189b, 189c.
98 The European Council, the summit meeting of the Heads of Government, is also becoming institutionalized. See infra Section 4.3.
99 See WTO, supra note 90, art. IV, para. 1 ("The Ministerial Conference shall carry out the functions of the MTO, and take actions necessary to this effect."); OECD, supra note 94, art. 7 ("A Council . . . shall be the body from which all acts of the Organisation derive.").
ASEAN is similar to these two, although the function of its ministerial meetings is hardly documented. The Heads of Government remains undefined, even though it is described as "[t]he highest authority of ASEAN" empowered "to lay down directions and initiatives for ASEAN activities." The AMM, which is described as being "responsible for the formulation of policy guidelines and coordination of ASEAN activities," is the only intergovernmental body documented at its inception in the ASEAN Declaration; its specific function, however, is still undefined. The AEM is better defined than the others. But nothing suggests particular "internal constraints" like those in the EU. Finally, NAFTA presents a good example of external constraints. It narrowly limits the Commission's authority on matters not specifically listed in the provisions to "consider," but not to act upon. "This is an important limitation on the power of the Commission to self-expand its authority." In other words, the parties reserve their rights outside the framework of NAFTA.

100 See Declaration of Concord, supra note 93 ("Meeting of the Heads of Government of the member states as and when necessary."); cf. Jacques Pelkmans, Institutional Requirements of ASEAN with Special Reference to AFTA, in AFTA: THE WAY AHEAD, supra note 9, at 99, 103.


102 Id.

103 See ASEAN Declaration, supra note 8, at 1234-35 ("[T]o carry out these aims and purposes, the following machinery shall be established: (a) Annual Meeting of Foreign Ministers, which shall be by rotation and referred to as ASEAN Ministerial Meeting.").

104 See Economic Cooperation Agreement, supra note 12, art. 8 ("The ASEAN Economic Ministers’ Meeting and its subsidiary bodies shall review the progress of implementation and coordination of the elements contained in this Agreement."); Declaration of Concord, supra note 93 ("Ministerial meetings on economic matters shall be held regularly . . . to: i) formulate recommendations for the consideration of Governments of member states . . . ; ii) review the coordination and implementation of agreed ASEAN programmes . . . .").

105 See NAFTA, supra note 56, art. 2001 ("The Commission shall: . . . (e) consider any other matter that may affect the operation of this Agreement."); see also FREDERICK M. ABBOTT, LAW AND POLICY OF REGIONAL INTEGRATION 28 (1995).

106 ABBOT, supra note 105, at 28.
3.2.2.2. Majority Voting

Majority voting is another indicator of institutionalization in the decision-making process. Majority voting makes it easier to make decisions as an RIA and eliminates the veto power that is present under unanimous voting. The EU makes the most extensive use of majority voting. The Treaty of Rome states that "[e]xcept where otherwise provided for in this Treaty, the conclusions of the Council shall be reached by a majority vote of its members." Treaty of Rome, supra note 60, art. 148, para. 1. Majority voting is employed in many decisions regarding a wide range of areas where votes are weighted and a qualified majority consists of fifty-four out of seventy-six votes. See id. at 148, para. 2.

Some of these areas include agriculture, transportation, competition law, commercial policy, most measures in environmental and consumer protection, public health, and education. See BERMANN ET AL., supra note 50, at 52. This does not mean that unanimous voting has ceased to exist. The Luxembourg Compromise requires the Council to unanimously agree to an issue concerning the "very important interests" of a member state. Even after the Single European Act of 1987 and the Treaty on European Union of 1992, it may still survive. See JOHN H. JACKSON ET AL., INTERNATIONAL ECONOMIC RELATIONS 192 (1995).

The basic decision-making rule in the WTO is as follows: "The MTO shall continue the practice of decision-making by consensus followed under the GATT [of] 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting," and "each Member of the MTO shall have one vote." WTO, supra note 90, art. IX, para. 1 (footnote omitted). As to the legislative process, the WTO treaty provides that amendments generally "shall take effect for the Members that have accepted them upon acceptance by two-thirds of the Members," and that any amendments to certain important provisions "shall take effect only upon acceptance by all Members." WTO, supra note 90, art. X, para. 3. In either case, an amendment does not take effect in a Member State until that Member accepts it. An exception is an amendment to Annex 2 (DSU) and Annex 3 (TPRM), which can only be amended by the Ministerial Council; however, the former requires consensus. See id. art. X, para. 8.
This provision does not seem to differ from conventional treaty making. Therefore, even though majority voting is available in ordinary decision-making, it is not available with respect to legislation.

The OECD and NAFTA are basically designed to operate by consensus. ASEAN's decision-making rules also seem to be based on consensus, since much of ASEAN's major legislation (agreement, protocol or understanding) is promulgated through the traditional treaty making process where it is signed by the Heads of Government or related ministers. But other than the recently signed Ministerial Understanding on ASEAN Cooperation in Finance, this is not explicit in any official documents.

3.2.2.3. General Status of the Secretariat: Insulation from Member States

Many heads of Secretariats are appointed by an intergovernmental body and are given independent status. NAFTA, whose Secretariat is comprised of "National Sections"

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114 *Id*. art. III, para. 2.


116 The founding declaration of ASEAN proclaims that the Member States "are determined to ensure their stability and security from external interference in any form or manifestation in order to preserve their national identities in accordance with the ideals and aspirations of their peoples." ASEAN Declaration, *supra* note 8 (emphasis added).

117 See, e.g., DSM, *supra* note 55, app. 1 (listing the DSM's covered agreements). However, the DSM does not cover all legislation in ASEAN. Also note that declarations often play an important role. The most obvious example is the ASEAN Declaration, the very foundation of ASEAN.

118 *See* Finance Understanding, *supra* note 20, art. 5, para. 1.


120 *See* WTO, *supra* note 90, art. VI, para. 4; ASEAN Secretariat Agreement, *supra* note 119, art. 3, para. 1; OECD, *supra* note 94, art. 11; Treaty of Rome, *supra* note 60, art. 157, para. 2.
but has no Secretary-General, is an exception. Each party has the responsibility and discretion to establish and manage the office of its Section and to designate its Secretary. Only the address of the Section shall be provided to the Commission.\textsuperscript{121}

3.2.2.4. Capacity of Secretariat to Initiate

The most basic responsibility of Secretariats generally involves administrative work. The NAFTA Secretary has limited responsibility and specifically "provide[s] administrative assistance."\textsuperscript{122} The WTO Charter only addresses the budget planning responsibilities of the Secretary.

However, other RIA's go further. The Commission of the EU, which almost entirely monopolizes legislative initiatives, represents an extreme case of expanded responsibility.\textsuperscript{123} Although other Secretariats possess some initiative responsibility, their capacity to do so is more limited than that of the EU's Commission. The ASEAN's Secretary-General "initiate[s], advise[s], co-ordinate[s] and implement[s] ASEAN activities," "address[es] the ASEAN Ministerial Meeting on all aspects of regional co-operation and offer[s] assessments and recommendations on ASEAN's external relations," and "chair[s], on behalf of the Chairman of the ASEAN Ministerial Meeting, all Meetings of the Standing Committee except the first and last."\textsuperscript{124} The OECD Secretary-General "may submit proposals to the Council or to any other body of the Organisation" and "serve as Chairman of the Council meeting at sessions of Permanent Representatives."\textsuperscript{125}

3.2.2.5. Directly Elected Representatives

Directly electing representatives is a unique feature of the EU. The European Parliament "shall be composed of representatives of the peoples of the States united within the Community"\textsuperscript{126} elected "by direct universal suffrage in accordance with a uniform

\textsuperscript{121} See NAFTA, supra note 56, art. 2002, paras. 1, 2.
\textsuperscript{122} Id. art. 2002, para. 3.
\textsuperscript{123} See Jacobs & Karst, supra note 49, at 187 ("Generally' but not always, the Council can legislate only on the basis of a proposal from the Commission.").
\textsuperscript{124} ASEAN Secretariat Agreement, supra note 119, art. 3, para. 2(iv, xv, xvi).
\textsuperscript{125} OECD, supra note 94, art. 10, para. 2.
\textsuperscript{126} Treaty of Rome, supra note 60, art. 137.
procedure in all Member States." Although some of the heads of state who assemble for ministerial meetings are either elected directly or by parliament, each of these officials represents the executive branch.

3.2.2.6. Involvement in Decision-Making

Decision-making power of the European Parliament is still limited. As discussed above, the Commission proposes legislation, and the Council has the primary power in directing the legislative process. The allocation of power is the same with respect to the budgetary process. However, the 1992 Treaty on European Union, which deleted the description of the Parliament as an "advisory and supervisory" body in Article 137 of the Treaty of Rome, symbolized an increase in the Parliament's power. Moreover, the Parliament has been granted a veto power, in the form of a co-decision procedure, in certain areas.

3.2.3. Summary

The preceding comparison is summarized in Table 2 in the Appendix.

4. FINDINGS

4.1. Regional Economy in Comparison

Departing from institutions for a while, let us briefly look at the state of regional economic relations based on intra-regional and extra-regional trade as a share of total export and GNP of the region.

127 Id. art. 138, para. 3; cf. CRAIG & DE BURCA, supra note 61, at 58 (stating that "the uniform electoral procedure envisaged by the original Article 138(3) of the EC Treaty is still not in existence").
128 See Abbott, supra note 115, at 931.
129 See BERMANN ET AL., supra note 50, at 66.
130 See id. at 89-90.
131 The state of regional integration is often described with a share of intra-regional export in total export. See, e.g., Akrasanee & Stifel, supra note 9, at 32. However, "the share of intra-regional trade in total trade is not the most relevant measure of dependence on extra-regional trade. The importance of extra-regional trade is more usefully measured by the ratio of total extra-regional trade—exports plus imports—to GNP." Robert Z. Lawrence, Emerging Regional Arrangements: Building Blocks or Stumbling Blocks?, in INTERNATIONAL POLITICAL ECONOMY PERSPECTIVES ON GLOBAL POWER AND WEALTH 407,
4.1.1. *Intra-Regional Exports*\(^{132}\)

Figure 1 in the Appendix shows the state of trade relations within each regional economy. The EU and Asia Pacific Economic Cooperation (“APEC”) are much more dependent on the region than other RIAs in terms of trade volume. NAFTA and ASEAN are located in the middle, but a clear contrast is observed in that NAFTA depends on regional economy more than ASEAN as a share of total export, but the share of GNP shows the opposite.\(^{133}\)

4.1.2. *Extra-Regional Exports*\(^{134}\)

Figure 2 in the Appendix shows the importance of the external trade relations for each respective region. Unlike Figure 1, the EU and APEC show very similar figures, together with NAFTA, while only ASEAN is exceptionally dependent on outside of the region.\(^{135}\)

4.1.3. *Implication to Institutional Design*

Exact interpretation of the data deserves separate economic analysis with more extensive data, but for the purpose of this Ar-

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411 (Jeffry A. Frieden & David A. Lake eds., 3d ed. 1995). I only discuss exports because, for the purpose of inter-regional comparison, adding imports does not make a dramatic difference.

132 See generally UNITED NATIONS, HANDBOOK OF INTERNATIONAL TRADE AND DEVELOPMENT STATISTICS 1994 (1995) [hereinafter UN] (discussing the intra-trade of 1993); WORLD BANK, WORLD DEVELOPMENT REPORT 1995 (1995) [hereinafter WORLD BANK] (discussing the GNP per capita and population of 1993); OECD, DEVELOPMENT COOPERATION 1995 REPORT (1996) (discussing the GNP of Brunei and Taiwan of 1993). Note that the intra-trade data of ASEAN does not include data of the recent member states, i.e., Vietnam, Laos, and Myanmar, and that the APEC intra-trade data does not include Taiwan.

133 However, ASEAN’s export share of GNP can be a statistical exaggeration. See, e.g., Stephenson, supra note 9, at 441 (“Much of ASEAN’s intraregional trade can be explained by transshipments through Singapore . . . , rather than traded goods actually consumed within the ASEAN region.”); see also Akrasanee & Stifel, supra note 9, at 32. This shows that a more accurate analysis would require data on each member state.

134 See generally UN, supra note 132; WORLD BANK, supra note 132.

135 It seems surprising but it is not. (The share of total export per GNP) = (the share of intra-regional export per GNP) / (the share of intra-regional export per total export). Thus, less “intra-regional export per GNP” and more “intra-regional export per total export” in NAFTA than in ASEAN implies less “total export per GNP” in NAFTA.
ticle, the following two preliminary points may be made. First, it makes sense if a region is highly dependent on the regional economy and less dependent on the outside like the EU, and is highly institutionalized. Second, it is not surprising if regions with different patterns on the figures like NAFTA and ASEAN have different tendencies in institutionalization. The following sections will focus on comparison in institutional designs.

4.2. General Institutional Comparison

4.2.1. General Institutional Design: Empirical Data

Figure 3 in the Appendix is the overall summary of the preceding institutional comparison. The index of institutionalization on legislation is on the horizontal axis and the index of institutionalization on dispute resolution is on the vertical axis. Thus, the state of institutionalization for legislation and for dispute resolution is represented in the vector from the origin. As introduced in Section 2.3.2., this vector shows the empirical tendency in degree of institutionalization and direction of institutionalization. The “degree” is represented by the distance from the origin, and the “direction” is represented by the direction of the vector from the origin. In terms of “degree,” we have two outlines: the EU has the highest by far and NAFTA has the lowest rate among the samples. Others are located in the middle. In terms of “direction,” all the RIAs, the EU, ASEAN, and NAFTA are located on the same ray from the origin, but the OECD is in the opposite region to the WTO and NAFTA’s Chapter 19, separated by the ray. Because incomplete contracts invite opportunism, and “the prospect of ex post bargaining invites ex ante pre-positioning of an inefficient kind,” institutionalization in both legislation and dispute resolution is generally necessary to minimize transaction costs. This hypothesis fits particularly well with RIAs, to a lesser extent with the WTO, but not with the OECD and NAFTA’s Chapter 19 as seen in both cross-sectional (cross-jurisdictional) comparison in the diagram and the time-series

137 See infra Section 2.2.3.
comparison shown in the development path of some of the IEOs on the diagram.

4.2.2. Rationale for Institutional Design

The next task is to see if the transaction cost theory can explain the current state of institutional design of individual IEOs. This section will try to provide possible explanations based on the theory.

4.2.2.1. NAFTA: Integration Without Institutions; Adjudication Without Institutions

One of the characteristics of NAFTA is that it "does not require the states to take any steps towards positive integration, such as the adoption of harmonized legislation." Also, "[m]any of the free trade arrangement goals are actually met by border measures (the phasing out of tariffs) or the elimination of other non-tariff barriers to trade." From the standpoint of transaction costs, since harmonization involves a more compelling case of asset specificity than elimination of trade barriers, there is a

139 The institutional development of ASEAN will be described in the next section. For the WTO,

[p]erhaps the most significant achievement . . . is the result of the Uruguay Round concerning institutions. Not only has an impressive new set of dispute settlement procedures been put forward, but a new charter for an international organization—the World Trade Organization (WTO)—has been approved as a sort of 'capstone' for the many complicated provisions of the negotiation results.


140 This title is taken from Abbott, supra note 115.

141 Taylor, supra note 57, at 865; see also ROBERT Z. LAWRENCE, REGIONALISM, MULTILATERALISM, AND DEEPER INTEGRATION 70-72 (1996) ("NAFTA can thus be classified as a genuine GATT-plus agreement. However, in numerous areas it goes no further than GATT.").

142 Taylor, supra note 57, at 865.

143 See Trachtman, supra note 5, at 522.
lower need for institutionalization.\textsuperscript{145} Therefore, it is not surprising that NAFTA is less institutionalized than other RIAs.

In addition, the U.S., the major member state of NAFTA, has consistently resisted supra-national decision-making,\textsuperscript{146} and this sentiment against customs unions seems to also be shared by other members.\textsuperscript{147} The goal of NAFTA (transaction gains) and the negative perception of supra-nationalism (transaction losses) are the underlying rationale for NAFTA’s minimalist approach.

Why, then, is NAFTA equipped with such a special DRM as provided in Chapter 19? The legislative history of Chapter 19 shows that

the Canadian government had hoped to exempt Canadian goods from U.S. AD [antidumping] and CVD [countervailing duty] laws. . . . The U.S. refused to agree to such an exemption. In its place, Canada accepted the binational review procedure as a means of placing some limits on the use of these laws by U.S. authorities.\textsuperscript{148}

Therefore, this institutional arrangement between the U.S. and Canada resulted in raising transaction gains of Canada at the expense of transaction losses of the U.S., but to a much lesser extent than Canada had originally hoped. It should have been possible for the U.S. and Canada to create a legislative body that would deal with competition law as well as the DRM, but the result was to establish a special DRM instead, and the idea of regulating AD and CVD as a part of the bilateral agreement was abolished altogether. Thus, the standard of review of this special DRM is that of domestic law, and not the agreement.\textsuperscript{149}

This shows that the Chapter 19 arrangement has to be understood in a broader context in which both countries made a grand bargain to create the CUSFTA (Canada-United States Free Trade Agreement), which was made to equilibrate the net gains of the

\textsuperscript{145} See supra Section 2.2.; see also Taylor, supra note 57, at 866.
\textsuperscript{146} See Abbott, supra note 115, at 931.
\textsuperscript{147} See LAWRENCE, supra note 142, at 101 ("Had such a rule [that only customs unions should be permitted by the GATT] been in effect, NAFTA would never have been concluded, since it is hard to imagine any of the three countries being willing to give up their trade policy independence.").
\textsuperscript{148} JACKSON ET AL., supra note 109, at 691.
\textsuperscript{149} See NAFTA, supra note 56, art. 1904, para. 3; see also id. annex 1911.
U.S. and Canada in their bilateral trade. At the same time, this agreement has to be understood in a context specific to the CUSFTA (or NAFTA) because such agreements do not happen often. To the contrary, the WTO Antidumping Code utilizes a unique "standard of review" provision\footnote{See Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, annex 1A, 33 I.L.M. 1125.} that limits the authority of the dispute settlement panel in fact-finding and interpreting the Code. The U.S. tried to impose this standard of review on the panel because it viewed several GATT panel decisions as "too intrusive."\footnote{See, e.g., New Zealand—Imports of Electrical Transformers from Finland, July 18, 1985, GATT B.I.S.D., (32d Supp.) at 67 (1985) (Rejecting the argument that the panel cannot challenge or scrutinize the determination of material injury, the panel noted that this kind of argument "would lead to an unacceptable situation under the aspect of law and order in international trade relations as governed by the GATT."). For an outline of the origins of the American view, see Steven P. Croley & John H. Jackson, WTO Dispute Procedures, Standard of Review, and Deference to National Governments, 90 AM J. INT'L L. 193, 195-97 (1996).} This is an interesting example of a country adopting different net gain maximizing solutions to the same issue depending on the situation.\footnote{This is also an example of how transaction losses and perceptions about it play a role in institutional design. See supra Section 2.2.3.} Considering that the basic purpose of AD/CDV laws is to achieve a level playing field by offsetting different policies and practices, it is understandable that the U.S. could compromise with Canada over restrictions on AD/CVD, but not in the WTO, which includes a much more diverse group of countries.\footnote{See JACKSON ET AL., supra note 109, at 667-69.} In this regard, it would be interesting to see the future course of events with the enlargement of NAFTA.\footnote{The NAFTA debate provides a precedent. While the CUFSTA did not spark much debate in the U.S., NAFTA was much more politically charged. See LAWRENCE, supra note 142, at 72-73. Another commentator also notes the importance of perception in forming an RIA.} However, all these have limited implications to other RIAs.

4.2.2.2. The OECD: Institutions Without Adjudication Powers

The OECD provides a counter-example to NAFTA's Chapter 19. The broad scope of its agenda is supported by the Secretariat with twenty directorates, but the OECD does not have a DRM.\textsuperscript{155} It is "a forum in which governments can compare their experiences, discuss the problems they share and seek solutions which can then be applied within their own national contexts [and] the practice of self-assessment being the most original characteristic of the OECD."\textsuperscript{156} There are some unique characteristics of the OECD that can account for this institutional feature from the standpoint of the transaction cost theory. First, since member states of the OECD are important to each other both politically, as well as economically, opportunistic behavior by a state would not be beneficial to that state in the long-run.\textsuperscript{157} It would find that it would be in its national interest to maintain its reputation as a reliable partner by observing the OECD rules, even in the absence of a DRM.\textsuperscript{158} Second, and related, if the rules are self-enforcing to all members, there is no need for a DRM. Relative homogeneity of members\textsuperscript{159} may help this to work. Since the OECD operates without a DRM, it is likely that the OECD will take up only those issues that are sufficiently self-enforcing or those in which reputation effects sufficiently hinder member

\textsuperscript{155} For example, the Arrangement on Guidelines for Officially Supported Export Credits defines aid projects that deserve tied aid assistance, but it is still "a gentlemen's agreement with no formal dispute settlement," and compliance is based on a procedural arrangement that facilitates mutual monitoring. OECD Countries Agree on New Export Credit Guidelines for Tied Aid, Dec. 5, 1996 (visited Jan. 16, 1998) <http://www.oecd.org/news_and_events/release/nw96110a.htm>. For the consultation procedure in the previous version of this arrangement (at the time of this writing, the redrafted version is not yet available on the web), see Arrangement on Guidelines for Officially Supported Export Credits, Apr. 1992, para. 14 (visited Mar. 8, 1998) <http://www.oecd.org/ech/pub/arang-e.pdf>.


\textsuperscript{157} "[T]he peer pressure system encourages countries to be transparent, to provide explanations and justifications, and to be self-critical where necessary."\textsuperscript{Id}

\textsuperscript{158} This is known as the effects of reputation. See OLIVER HART, FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE 66-68 (1995) (explaining the effects of reputation); see also Trachtman, supra note 5, at 528-29 (indicating that reputation can be used to enforce international agreements).

\textsuperscript{159} See What is the OECD, supra note 156.
states from deviating. Third, OECD does not exist as an island; given that most of the members of the OECD are members of the WTO and many are members of the EU, the issues that are not deemed to be appropriate to deal with in the OECD can be treated in the WTO or the EU. Finally, it may be the case that there are too many members in the OECD for it to become rigidly institutionalized because such rigidity involves too significant transaction losses.  

4.2.2.3. The EU: Integration Through Law and Institution

Contrary to NAFTA's Chapter 19 and the OECD, the EU exhibits a balanced and exceptionally high degree of institutionalization. The EU's state of economic interdependence is higher than that of the organizations discussed in the previous sections. Its share of intra-EU exports out of the total exports has been steadily rising. The coverage of the treaty creating the EU is defined and construed broadly such that "virtually any measure likely to advance the common market, promote the convergence of Member State economic policies or simply enhance economic performance within the Community would respond to a legitimate Community purpose." Therefore, it is reasonably predictable that such an RIA needs a high degree of institutionalization in both its decision-making (ex ante) as well as its DRMs (ex post) for the minimization of transaction costs to be achieved.

The EU contrasts with the NAFTA in this regard, but it also differs from the European Free Trade Association ("EFTA"). Unlike the EU, the EFTA apparently did not generate much asset

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160 These characteristics of the OECD are largely unique to "intermediate" IEOs that are larger than regional but smaller than global organizations. Thus, the OECD may be compared to APEC and the Free Trade Agreement of the Americas ("FTAA"). The OECD may be a good reference in analyzing those organizations, but that is beyond the scope of this Article.

161 In 1970, the percentage was 53.2% and in 1993, it was 61.2%. See UN, supra note 132.

162 See Treaty of Rome, supra note 60, arts. 2, 3.

163 "[T]he Court of Justice has long authorized expansive interpretations of Community competence on an 'implied power' theory without use of Article 235." BERMAN ET AL., supra note 50, at 31.

164 Id. at 30.

specificity among member states. In addition, the EFTA’s intra-regional economic interdependence, which was initially minimal, declined even further as time passed. By now, an agreement to establish an European Economic Area (“EEA”) has extended an extensive body of Community law to EFTA countries.

4.3. Future Institutional Evolution of ASEAN

Previous Sections have described that each RIA has its own unique institutional design based on its unique development, and showed that it is possible to explain from the standpoint of transaction cost theory. As shown in Figure 3 in the appendix, ASEAN sits in the middle of the ray of RIAs that connects the EU and NAFTA. This final section will try to apply the theory and framework developed in this Article to an analysis of the institutional evolution of ASEAN and explores whether general empirical results and individual experiences of predecessors have any implication for the future institutional evolution of ASEAN.

4.3.1. Background

4.3.1.1. Objectives of ASEAN

Several ASEAN objectives impact its future institutional development. First, unlike other RIAs, the primary objective of ASEAN covers not only economics but also politics and security. The latter two concerns have always been more important than economic issues. Second, AFTA is only a part of the economic integration measures of ASEAN. Third, one of the most compelling motivations for the formation of the FTA was to attract

166 “Like the U.S. and Canada, the EFTA countries have provided for and accomplished an intra-FTA elimination of tariff barriers and quantitative restrictions on trade in goods. This goal has been accomplished without a policy of legal harmonization and with a minimum of friction between the EFTA countries.” Abbott, supra note 115, at 940.

167 In 1970, the intra-regional interdependence was 18.1%; it fell to 11.4% in 1993. See U.N., supra note 132.

168 See Abbott, supra note 115, at 941.

169 Symbolically, the Economic Cooperation Agreement was signed by the Heads of Government, while the AFTA Agreement was signed by ministers. See Economic Cooperation Agreement, supra note 12; AFTA Agreement, supra note 12.
foreign direct investment rather than to facilitate intra-ASEAN trade.\textsuperscript{170} This together with a move towards harmonization,\textsuperscript{171} supports the co of "open regionalism,"\textsuperscript{172} a term that is often emphasized, but has never been defined.

\textbf{4.3.1.2. The Scope of Economic Integration}

The framework for economic integration of ASEAN is set forth in the Economic Cooperation Agreement of 1992 and has been expanded by subsequent agreements and declarations. In addition to the establishment of AFTA,\textsuperscript{173} other economic integration measures, beyond tariff elimination, have been announced, and include the following:

- the elimination of non-tariff barriers\textsuperscript{174} through "the harmonisation of standards, reciprocal recognition of tests and certification of products, removal of barriers to foreign investments, macroeconomic consultations, rules for fair competition, promotion for venture capital;"\textsuperscript{175}
- the liberalization of trade in services\textsuperscript{176} and cooperation in the intellectual property arena that ultimately explores setting up of an ASEAN patent and trademark system and an ASEAN Patent Office;\textsuperscript{177} and
- the harmonisation of tariff nomenclature, customs valuations, and other customs procedures.\textsuperscript{178}

Considering the fact that all of these measures were announced or amended between 1996 and 1997, recent developments are remarkable. This also means, however, that economic


\textsuperscript{171} "If regional arrangements go beyond border barriers and reflect agreements on domestic practices that reinforce market forces, they will make entry for outsiders easier and create rather than divert external trade." LAWRENCE, supra note 142, at 92.

\textsuperscript{172} See Stephenson, supra note 9, at 447; see also Joint Press Statement, supra note 170, para. 27.

\textsuperscript{173} See Economic Cooperation Agreement, supra note 12, art. 2, para. A1.

\textsuperscript{174} See AFTA Agreement, supra note 12, art. 5, para. A2.

\textsuperscript{175} Id. art. 5, para. C.

\textsuperscript{176} See Services Agreement, supra note 16, art. 1.

\textsuperscript{177} See IPR Agreement, supra note 17, art. 1.

\textsuperscript{178} See Customs Agreement, supra note 19, art. 1.
integration within ASEAN has only just begun. None of the provisions of these agreements, except those on tariff reduction, have imposed specific legal obligations on member states, which are still working on the recently set agenda.\(^\text{179}\) It should also be noted that the broad ASEAN goal has been officially called economic cooperation,\(^\text{180}\) not the establishment of a customs union nor a common market.\(^\text{181}\)

Still, the fact that this list includes much more than border measures is important. If the positive integration measures listed above begin to be fully implemented, it will involve greater magnitude of asset specificity. The theoretical prediction, based on transaction cost analysis (involving asset specificity and the possibility for opportunism) and supported by empirical evidence comparing the EU and NAFTA, suggests that greater institutionalization, both in legislation and DRM, will become necessary.\(^\text{182}\)

4.3.1.3. ASEAN Institutional Development in the 1990s

ASEAN institutions, especially the Secretariat and the DRM, have already showed significant developments in the 1990s. It was the greater emphasis on economic cooperation in the 1980s


\(^{180}\) See, e.g., Economic Cooperation Agreement, supra note 12, art. 1.


\(^{182}\) In analyzing economic integration, a distinction between negative integration and positive integration is sometimes used. See, e.g., Taylor, supra note 57, at 865. These terms are defined as follows: “negative integration denotes the removal of discrimination in national economic rules and policies under joint and authoritative surveillance; positive integration refers to the transfer of public market-rule-making and policy-making powers from the participating polities to the union-level.” Jacques Pelkmans, The Institutional Economics of European Integration, in INTEGRATION THROUGH LAW: EUROPE AND THE AMERICAN FEDERAL EXPERIENCE, supra note 49, at 318, 321. There is a similar distinction between deeper integration and shallow integration. Deeper integration refers to “integration that moves beyond the removal of border barriers” and shallow integration is “trade liberalization.” LAWRENCE, supra note 142, at 8. The exact relationship between the two distinctions is not clear; the distinctions are not based on asset specificity or the possibility for opportunism. In this Article, the concepts of positive integration and deeper integration correspond to integration measures with larger magnitudes of asset specificity and larger possibilities for opportunism.
that made it necessary to restructure the organization of ASEAN. First, the Secretariat was significantly strengthened in 1992, the year that the AFTA Agreement and the Economic Cooperation Agreement were signed. Since the ASEAN Secretariat first came into existence in 1976, the staff members had been nominated by a Contracting Party. Now, there is open recruitment, and the number of professional staff members has been increased. The title of Secretary-General of the ASEAN Secretariat was changed to Secretary-General of ASEAN. The authority of this position has been expanded by explicitly granting it an enlarged mandate to "initiate, advise, co-ordinate and implement ASEAN activities." Second, in late 1996, a new dispute resolution mechanism was established, marking a clear departure from an OECD type of cooperative forum without adjudication. In 1997, the additional post of Deputy Secretary-General was created, and the sole responsibility of one of the two Deputy Secretary-Generals is AFTA and economic cooperation.

This development is visually pictured in Figure 3 in the Appendix. When ASEAN was established in 1967, its location on Figure 3 was exactly the same as NAFTA's. The ASEAN Declaration provided for only National Secretariats. The creation of the ASEAN Secretariat in 1976, represented a step along the horizontal axis toward the OECD. In 1992, there was further movement in this direction, and moved vertically to the present position in 1996 when the DRM was introduced.

183 See Pelkmans, supra note 100, at 100.
186 See Secretariat Agreement, supra note 184, art. 4.
187 The staff has been increased from 14 to 35. See ASEAN Secretariat, supra note 101.
188 See Secretariat Agreement, supra note 184, art. 2.
189 Id. art. 3, para. 2(iv).
This chronology fits the transac tion cost theory. Until the mid-1970s, the activities of ASEAN did not involve issues with high magnitudes of asset specificity. Introduction of the PTA in 1977, following two major agreements that clarified ASEAN's fundamental purpose, coincides with the creation of the ASEAN Secretariat. However, it was not until the 1990s, when comprehensive economic cooperation measures were announced, that ASEAN institutions were expected to play an important role in decision-making as well as in dispute resolution. This process illustrates the development of a more efficient institutional design to better accommodate the expansion of transactions and transaction costs.

4.3.2. Institutional Evolution for Further Economic Integration Within ASEAN

Based on such recent development and previous prediction, this section will speculate on the future institutional evolution by looking at individual institutions of ASEAN.

4.3.2.1. The Role of the Secretariat

If the announced integration measures take off, the role of the Secretariat will become more important. The Secretariat's greater involvement in the areas of research, analysis, policy recommendation, and the coordination of harmonization measures can significantly reduce transaction costs, and accelerate the creation of a more complete body of law that prevents opportunism. It will then push the integration forward. Moreover, it is important to monitor the implementation and opportunistic behavior of member states, and to help solve problems when questions arise.

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192 Information provided by the Secretariat can be very important in encouraging transactions that are necessary for an efficient outcome. Asymmetry of information among member states, may lead one member state to take advantage of the ignorance of others, resulting in inefficiency. Moreover, asymmetry of information may hinder transactions simply because the member states disagree about the value of that transaction. For examples about the role of information between two firms, see HART, supra note 158, at 82, 87-88.

193 See Abbott, supra note 115, at 944.

194 See Trachtman, supra note 5, at 45.
Recent agreements seem to share the same spirit in that they have established the role of the Secretariat in monitoring the implementation and the progress of those agreements. In addition, the Secretariat, whose obligations are defined as "Functions and Powers" of the Secretary-General, must "initiate, advise, coordinate and implement ASEAN activities" as well as perform other obligations. However, if the Secretariat undertakes such responsibilities in full, it will be a massive project. A staff of thirty-five professionals in the ASEAN Secretariat allocated to four bureaus does not seem overwhelming, in comparison to a staff of 500 in the WTO Secretariat and 18,000 in the EU Commission! The next problem is how to design the Secretariat so that it fulfills these responsibilities. To develop some image, an immediate reference would be the Secretariat of the OECD, which "acts" as a catalyst, given its capacity for intellectual persuasion.

Furthermore, if we look at the EU, "[b]eyond its function as an enforcement agency... the Commission participates in a variety of ways in the Community law-making process:" "The 'right of initiative,' "[a]mendment of the Commission's proposal," "[o]riginal legislative power," "[d]elegated legislation," and "[e]xecutive powers." This far-reaching list is striking, but many of the items are associated with the legislative authority of the Council, the intergovernmental body of the EU.

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195 See AFTA Agreement, supra note 12, art. 7, para. 3; Economic Cooperation Agreement, supra note 12, art. 7.
196 Secretariat Agreement, supra note 184, art. 3, para. 2(iv).
197 See ASEAN Secretariat, supra note 101.
199 See CRAIG & DE BÜRCA, supra note 61, at 43.
200 Pelkmans, supra note 100, at 101. However, he continues: "insofar as ASEAN continues to focus on projects of development and/or economic or other co-operation, the OECD example is of marginal relevance only, simply because it does very little in this domain." Id. Nevertheless, the OECD seems an eminent example for the purpose of economic integration. Left unanswered is the question of how to design and relate these two different fields.
201 Jacobs & Karst, supra note 49, at 187.
202 Id. at 187-91 (listing the characteristics of the Commission).
4.3.2.2. Defining and Refining Inter-governmental Bodies

A more fundamental problem lies at the decision-making level. ASEAN has no detailed “constitutional” document comparable to the Treaty of Rome. The ASEAN Declaration of 1967 is just a brief document and provides very little with respect to institutional arrangement. Even with respect to the major inter-governmental bodies at the ministerial level, the Heads of Government, the AMM, and the AEM, their exact functions and their relations are hardly documented. Apparently, though, the legislative process is still based on the traditional treaty making process. All the major agreements of the kind are negotiated by the head of each government or its related ministers and do not take the form of institutional legislation by ASEAN itself.\(^{203}\)

Such a procedure can delay the process of economic integration for the following reasons. First, the approval process of treaties by the legislative body at a domestic level, depending on the constitutional structure of each member state, may delay the process.\(^{204}\) Second, we can assume that further economic integration will increase the intergovernmental transaction to write more contracts that entail more asset specificity, uncertainty, and complexity. Such ministerial-level institutions will end up having to function like a working-level body, like the Commission and the Council in the EU combined. This is certainly not efficient. After all, “[n]o regional group without the type of centralized decision-making structure of the EC has yet been successful in fully integrating separate sovereign state economic systems.”\(^{205}\) Having this general issue in mind, the individual issues will now be examined.

4.3.2.2.1. The Heads of Government

The Declaration of Concord of 1976 stated that “[m]eeting[s] of the Heads of Government of the member states [will take place] as and when necessary.”\(^{206}\) Some reforms took place in

\(^{203}\) Recent amendments to the Investment Agreement are interesting. The official title of the initial agreement contained all of the member states, however, the individual state names were replaced by “ASEAN.” It shows a development toward legislation as ASEAN, rather than collective action of individual member states.

\(^{204}\) See Abbott, supra note 115, at 944.

\(^{205}\) Id. at 945.

\(^{206}\) Declaration of Concord, supra note 93.
1992 by a declaration that provided that "ASEAN Heads of Government shall meet formally every three years with informal meetings in between,"\textsuperscript{207} even though the ASEAN Heads of Government's specific role and constitutional constraint were not defined.

This reform is certainly one form of institutionalization of the Heads of Government.\textsuperscript{208} From a legal standpoint, whether it is stable or not is another matter. If such a high authority as the Heads of Government is fully institutionalized under the framework and constraint of the RIA, just as the people's right of amendment of a constitution is institutionalized under the framework and constraint of a constitution, it is likely to achieve a stable state. Furthermore, if such an authority stays completely outside of the RIA, it would also produce a stable state because it could not do anything within the framework of the RIA. In contrast, when the Heads of Government is integrated into the RIA without any internal constraint, which means it can do anything within the framework of ASEAN, there is nothing that assumes stability.

The development of the European Council sets a good precedent to deal with the Heads of Government. The European Council has held its meeting regularly since 1974 and has "resolved difficult political issues that the Council of Ministers could not settle."\textsuperscript{209} There was no treaty reference until 1987, when the Single European Act came into being. The Treaty on European Union in 1992 "would mark an important step in the European Council's integration into Community affairs."\textsuperscript{210} It provided that "[t]he European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof."\textsuperscript{211} It also provided that "the Council, meeting in the composition of Heads of State or of Government, shall, acting by a qualified majority, ... decide whether it is appropriate for the Community to enter the third stage [of Monetary Union]."\textsuperscript{212}

\textsuperscript{207} Singapore Declaration, supra note 13, para. 8.
\textsuperscript{208} See Pelkmans, supra note 100, at 105.
\textsuperscript{209} BERMAN ET AL., supra note 50, at 55.
\textsuperscript{210} Id. at 56.
\textsuperscript{212} Id. art. 109j.3.
We should notice the following points in this institutional development. First, the ordinary legislative power has always been retained within the framework of the Community, not the European Council. Second, as a consequence, the authority of the European Council has been limited to set guidelines or to deal with issues that cannot be resolved within the framework of the Community. Third, integration of the European Council into the Community facilitates "further transfer of sovereignty to the Community. It therefore advances rather than slows the integration progress."\(^\text{213}\) As a future issue for ASEAN, certain institutional constraints on the Heads of Government, and clear and efficient allocation of legislative authority may be considered.

4.3.2.2.2. Relationship Between the AMM and the AEM

The relationship between the AMM and the AEM is also not very clear.\(^\text{214}\) For the purpose of improving ASEAN-level general policy coordination, one obvious option is to integrate them under one institutional umbrella.\(^\text{215}\) However, whether it is necessarily desirable to do so is not so obvious.

It may rather delay the institutionalization of decision-making for economic integration because political issues by their nature exhibit very different transaction losses than economic issues. Another potential issue lies in the fact that this option is to incorporate an economic issue into an inherently political regional arrangement. It is the same type of challenge that the EU now faces from the opposite side, which is trying to incorporate a political issue into an inherently economic arrangement. Where economic issues are already dealt with in a forum of foreign ministers (the Council), incorporation of political issues does not seem peculiar. Where political issues are dealt with in a forum of foreign ministers (AMM), there is likely to be additional difficulty to incorporate economic matters, which have already been dealt with by the economic ministers (AEM). Thus, while setting a clear division of labor to avoid confusion in decision-making is essential, a hierarchical structure involving these two bodies would be the future

\(^{213}\) BERMANN ET AL., supra note 50, at 57.

\(^{214}\) "The AEM and AMM report jointly to the ASEAN Heads of Government during an ASEAN Summit." ASEAN Secretariat, supra note 101.

\(^{215}\) See Pelkmans, supra note 100, at 111.
Until then, the best analogy would be the United Nations, whose Security Council on one hand and whose Economic and Social Council on the other, each operate under different rules and procedures.

4.3.2.2.3. AEM and Its Legislative Role

Placing all aspects of economic cooperation under AEM supervision, and dissolving the five ASEAN Economic Committees in order to have SEOM handle the various aspects of economic cooperation, was a significant improvement for economic integration. It is an improvement in preventing the long conceived institutional problem of "excessive decentralization of [the] decision making process" concerning economic cooperation. Such a problem could make it difficult for ASEAN to have clear, long-run guidelines.

AFTA itself is overseen by the AFTA Council established by the AEM. However, for our purpose we can focus on the AEM rather than the AFTA Council, since "it will function under the AEM in case of conflict," and the AEM oversees economic cooperation as a whole.

The next step for the AEM would be to assume institutionalized legislation authority with division of labor with the Secretariat, similar to the Council in the EU, and to introduce a majority voting system. The former boils down to the issue of domestic allocation of power over ASEAN affairs, because such an institutionalized legislative body composed of each member state may no longer be able to be involved in legislation at the AEM. The latter will generate the problem of transaction losses by losing veto power under a consensus system. The due consequence of a majority voting system is a democracy deficit, so the next challenge would be ASEAN Parliament. Recall that all of these measures are designed to reduce transaction costs. The extent to which ASEAN will foster institutionalization depends on the calculation of transaction gains, which is a function of economic ties.

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216 See Economic Cooperation Agreement, supra note 12, at 508.
217 See Pelkmans, supra note 100, at 101.
218 See AFTA Agreement, supra note 12, art. 7, para. 1.
219 Pelkmans, supra note 100, at 125.
220 This is the original idea of institutionalization as discussed above. See Abbott, supra note 115, at 944.
within ASEAN, and conceived transaction losses, which are a function of political will and mutual trust.

To predict how far this cooperation will go, a comparison with the EU is useful. Compared with the EU, economic integration as seen by the amount of intra-regional trade is less in ASEAN than in the EU.\textsuperscript{221} Political will and mutual trust are probably less strong in ASEAN than in the EU. This comparative analysis leads us to a prediction that ASEAN will not go as rapidly or as far as the EU in economic cooperation in the immediate future. Therefore, we do not yet have to worry about the future problems that will arise when the "President of ASEAN" will state at his inauguration, "We are all Republicans; we are all Federalists."\textsuperscript{222} Such issues will include a democracy deficit, similar to the one the EU is currently facing, and the creation of institutional checks and balances, just like the Framers of the U.S. Constitution did in order to limit the power of a majority.\textsuperscript{223} The transaction cost economizing point must be far below it but probably more than the status quo. Immediate steps that can be taken would be to consider an institutionalized legislation process even without majority voting, just like that of the Council of the OECD.

4.3.2.3. \textit{Dispute Resolution}

Evaluation of the ASEAN DSM cannot preclude the difficulty that comes from the fact that it apparently has never been used. However, a comparison with other dispute resolution mechanisms reveals the following potential issues in its move toward a deeper economic integration.

At a glance, the ASEAN DSM is a short and simplified version of the WTO DSU; the wording and the structure are almost identical. However, there are two important differences. First, SEOM makes rulings based on a simple majority without the participation of the disputing parties,\textsuperscript{224} not negative consensus, where a panel report shall be adopted unless there is a consensus not to adopt the report.\textsuperscript{225} Second, the AEM conducts appellate

\begin{itemize}
\item \textsuperscript{221} See supra Section 4.1.
\item \textsuperscript{222} THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 3 (1897).
\item \textsuperscript{223} See Jacobs & Karst, supra note 49, at 175-76.
\item \textsuperscript{224} See DSM, supra note 55, art. 7.
\item \textsuperscript{225} See DSU, supra note 54, para. 16.
\end{itemize}
review and makes decisions on the same basis as SEOM. These leave more room for bargaining among member states, and therefore, will increase uncertainty in the reliability of agreements.

Another category of problems is the covered agreements of the DSM. First, legislation that provides substantive rules on which member states make claims against other member states have yet to be developed. In this sense, the mere existence of the DSM is nothing more than a paper tiger. Second, the DSM does not apply generally within the framework of ASEAN, but rather is accompanied by a long appendix that lists covered agreements. In this respect, the DSM follows the form of the WTO and not NAFTA’s Chapter 20. It will entail transaction costs to decide whether an agreement should be covered while drafting an agreement, but at the same time, it may encourage legislation by allowing flexibility whether it is covered by the DRM.

It would be possible for ASEAN to adopt a panel system similar to the one in NAFTA’s Chapter 19. The first thing to point out is that NAFTA’s Chapter 19 is a very special case, which is introduced based on a subtle bargain over transaction losses and transaction gains of the parties. Chapter 19 is also peculiar in that the panel is expected to apply domestic laws, and not an international agreement. However, the legal status of a ruling under Chapter 19, by which panel reports replace domestic judicial reviews, is an interesting phenomenon. Given the nature of harmonization that relies on domestic institutions for implementation of a common legislation, the DRM has an important role of setting up a uniform guideline for domestic courts. This is where supremacy comes in. As a practical matter, however, supremacy may become an issue only after such common legislation has been sufficiently developed.

226 "[T]he dispute settlement provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement . . . ." NAFTA, supra note 56, art. 2004.

227 As far as the AD/CVD issue is concerned, it would be a simpler solution to ban the application of AD laws among the parties, just as the EU and the Australia-New Zealand pact have done. See Jackson et al., supra note 109, at 681.

228 See Taylor, supra note 57, at 896-97.
5. CONCLUSION

5.1. Strengths and Weaknesses of the Methodology

If there is any unique contribution from this Article, it comes from combining theoretical prediction with the use of a newly established framework of empirical analysis. It has the following advantages: First, empirical analysis facilitated testing of theoretical hypothesis and enabled us to make a theoretical prediction. Second, the two-dimensional analysis enabled us to observe an empirical correlation of two variables. It is a departure from conventional typology of RIA in that it focuses specifically on institutionalization, and also in that it employed a two-dimensional framework, in contrast to one-dimensional, to improve the quality of the analysis.

However, there are important weaknesses as well. First, there was a salient difficulty in indexing degrees of institutionalization. If the wrong parameters are picked to analyze these RIAs, the diagram may lead us to the wrong analysis. Second, even if one chose appropriate parameters, they are often continuous variables, rather than discrete "yes or no" variables. In order to keep "yes or no" policy for simplicity, precise definition of parameters is vital. Third, there are only a small number of sample cases, which is not enough to derive a general conclusion based on empirical evidence. Fourth, analysis in this Article almost entirely focused on the calculation of an RIA as a whole, and not calculations of the individual member states (except the bargain over Chapter 19 between the U.S. and Canada) or individual sectors. To make it more realistic, a model may be built incorporating the differences in transaction economizing calculations of each state and each sector.

229 See, e.g., Pelkmans, supra note 182, at 332.
230 We can increase the data set by employing time series data, as I partially did with ASEAN, however, the sample size is still small. See supra Section 4.3.1.3. Generally speaking, this method entails a selection problem. If the institutional design at the time that we select as our sample is just a temporary one or in the course of transformation, it becomes inappropriate to derive general empirical trends from those samples. This is analogous to the advantage and difficulty in dealing with pooled data. See generally ROBERT S. PINDYCK & DANIEL L. RUDINFELD, ECONOMETRIC MODELS AND ECONOMIC FORECASTS 250-51 (4th ed. 1998).
5.2. **Findings and Their Limits**

5.2.1. **Relations Between Institutionalization in the DRM and Legislation**

In Section 4.2., this Article presented a theoretical prediction\(^{231}\) and supporting empirical evidence that institutionalization in the DRM and legislation tend to develop together. On the other hand, this conclusion indicates that there are some cases that deviate from this prediction under certain conditions. This gives us an opportunity for analysis and prediction as to the institutional design of other regional economic arrangements that are currently being formed. But a small sample size is, as always, a problem.

5.2.2. **Prediction on ASEAN**

The finding in this Article supported the prediction for further institutionalization of ASEAN. Generally, ASEAN tends to be viewed with either strong optimism or strong skepticism. This may be natural because it is only a few years ago that ASEAN formally began to move toward economic "integration," not just "cooperation." Thus, it is still hard to predict what will happen to ASEAN. This Article is intended to show a possibility of a more analytical approach by integrating theory, empirical analysis, and economic data. The major limits are, however, that the analysis of this Article is primarily based on official documents without evaluating their credibility. Therefore, the predictive power of this analysis depends on the extent to which the announced future direction is actually realized.

5.2.3. **How Should We Let the World Trading System Back In?**

Beyond comparison of existing RIAs, we can think of various RIAs with various institutional features by simply pointing to the place on the diagram presented in Figure 3 in the Appendix. We can analyze how plausible it is based on the theory and method that this Article has developed, but we cannot analyze whether they are good or not for the world trading system. In terms of evaluating welfare effects and efficiency, "much depends on the

\(^{231}\) See Williamson, *supra* note 138, at 279.
policies adopted,"\textsuperscript{232} and such an analysis is more for economists than institutional analysts. As a legal matter, however, the analysis of this Article does show that GATT's Article XXIV is not a complete guideline because tariffs constitute only a small portion of the various features of RIAs. RIAs that aim at deeper integration beyond tariff reduction leave much to be done from the side of a world trading system.

\textsuperscript{232} LAWRENCE, supra note 142, at 33.
APPENDIX

Table 1

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Table 2

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Figure 1

Share of Intra-Export by Region

Per Total Export

Per GNP
Figure 2

Share of Extra-Trade by Region

Figure 3