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Towards the Rational Choice Theory in The Asian Approach to International Law

M. Ajisatria Suleiman¹

The notion of "Asian approach to international law" refers to the international political relations of and among the Asian countries as well as the development of international law, and how the two dynamics interact between each others. A comprehensive analysis of the issues thus requires one single analytical tool that can encompass both issues at hand. Interestingly, at present research discussing the most appropriate methodology remains under-developed, as scholars mostly focus on particular case studies. The article offers the "rational choice theory" as the first stepping stone for further theoretical development and practical application. The rational choice theory, in essence an economic theory that deals with individual decision making, has been a valuable tools in assessing international relations from an institutionalism paradigm, and it has started to gain its importance in the field of economic analysis of international law. Therefore, I argue that the theory will provide an alternative insight of the "Asian approaches to international law" to the conventional theories of cultural differences (the west vs. the east) or political economy (developed countries vs. developing countries). I will first discuss the issues that conventional theories fail to address, and display how the rational choice theory can fill in the gap. For further practical implementation, I elaborate briefly several international law issues in the ASEAN context from the economics of rational choice perspective, namely on the principle of non-intervention and the institutionalization of human rights.

Keywords: *Asian approach, international law, rational choice theory, economic theory*

I. Introduction

Asian approaches to international law refer to the international political relations of and among the Asian countries as well as the development of international law, and how the two dynamics interact between them. Several scholars have pointed out the importance of the approaches as a new theoretical paradigm detached from value-driven international legal scholarship, and rather rest on the state's pursuit of interest, both individual and common interest.² This is the starting point to establish a compelling

¹ Faculty member, Faculty of Law at the University of Indonesia. This paper was presented in the Asian Society of International Law (AsianSIL) Young Scholars Workshop at the National University of Singapore, September 2010.

² Jean d'Aspremont, "International Law in Asia: The Limits to the Western Constitutionalist and Liberal Doctrines", *Asian Yearbook of International Law* 13 (2008), p. 89-111.

theoretical foundation, upon which the future of a rule-based international legal system in Asia is expected to emerge in the future. This article is based on the idea that developing a constructive framework for an interest-based approach to further be applied in a case-by-case basis is of the foremost important agenda of international law scholars. Further, given that the political nature among Asian countries and general international legal doctrine is at the center of the attention, a comprehensive analysis of the issues thus requires one single analytical tool that can encompass both issues at hand. That said, I argue that a sound theoretical foundation of the Asian approaches to international law need to take into cognizance the contribution that law and economics (L&E) movement has offered so far, along with its comparative approach.

L&E, to which rational choice theory is embedded,³ assumes that states are rational, self-interested, utility-maximizing, and able to identify and pursue their interests. States interests are a function of the preferences of states, which are assumed to be given, or exogenous, stable, and fixed.⁴ It generalizes states' behaviors, which is necessary when discussing international law as a general discipline, yet allows a room for differences to emphasize the distinct Asian features.

L&E has been the most influential and successful approach in legal science so far;⁵ and there is no reason not to embrace this methodology in enriching the foundation of Asian approach to international law. As a matter of fact, the emergence of the sub-discipline of comparative law and economics (CL&E) during the early days was noted due to its ability to overcome the cultural differences argument between the Asian and Western institutions. For example, at the domestic level, CL&E manages to explain why share-cropping contract is found to be more popular in Asian agricultural societies than the Western ones. While, many attribute this to the culture of Asian communalism as opposed to Western individualism, Cheung attributes this to the different agricultural risk faced between them.⁶ Another seminal article is with regard to the low number of litigation in the Japanese judicial system, which argument is often invoked is related to the country's weak judicial system and adherence to the authority that create

³ For basic understanding of the role of legal system in an economic system, see Richard Posner, *Economic Analysis of Law*, 7th ed, (Aspen: 2007), and Robert Cooter and Thomas Ulen, *Law and Economics*, 5th ed, (Addison Wesley, 2007).

⁴ Andrew T. Guzman, *How International Law Works*, (Oxford University Press: 2007).

⁵ According to Posner, law and economics is "perhaps the most important development in legal thought in the last quarter century" *supra* note 3.

⁶ Steven N. S. Cheung, "Transaction Costs, Risk Aversion, and the Choice of Contractual Arrangements", 12 *Journal of Law & Economics* 1 (1969).

a non-litigious culture. However, a rational choice analysis shows that the Japanese legal system, with its strict and high amount of regulations, enable potential litigants to more properly calculate the costs of going to court proceeding, and prefer settlement instead.⁷ I am of the view that leveling up this similar approach into the field of international law would provide the benefit that CLE has offered with respect to domestic institutions.

This article is intended to be an initial step towards a new paradigm in the Asian approaches to international law, and further agendas need to be commenced. As such, this article would focus on why a single unifying tool is important, and why the conventional approach is no longer relevant. It will also explore several preliminary issues in the context of Association of South East Asian Nations (ASEAN) from the rational choice paradigm.

II. The Conventional Wisdom and the Future of Single Unifying Methodology

This section deals with the traditional wisdoms often attributed to discussions concerning the peculiarity of laws and institutions in Asia, namely the cultural differences and competing power. I will further analyze and incorporate them into the rational choice framework.

1. Cultural and Power Approach: The Rebirth of Asian (Pragmatic) Values?

The present discourse concerning the Asian culture that is distinct from that of other regions of the world remains a lively one, though its form and focus have evolved over time. One example, upon the signing of the ASEAN Charter, the Malaysian Foreign Minister called for the incorporation of 'ASEAN value system' in the human rights provisions in the ASEAN Charter so as to ensure that the Charter would not be 'a mere importation of the universal values of human rights'.⁸ This statement, which is political in nature, took the spectators of the regional integration back to the controversial concept of "Asian values" promoted in around 1990s notably by Lee Kuan Yew of Singapore and Mahathir Mohamad in Malaysia to defend the respective countries political ideological position against the supposedly 'Western values' of liberal democracy and free market as well

⁷ J. Mark Ramseyer and Minoru Nakazato, "The Rational Litigant: Settlement Amounts and Verdict Rates in Japan", 18 *Journal of Legal Studies* 263 (1989).

⁸ See *Malaysia Wants to Human Rights Provision in Charter to Incorporate Asean Values System*, http://www.malaysianbar.org.my/legal/general_news/malaysia_wants_human_rights_provision_in_charter_to_incorporate_asean_value_system.html (5 July 2010).

as institutional arrangements associated thereto.⁹

Most scholars nowadays agree that "Asia" is not a single entity which can be classified into one unitary class, and as such, there is no single Asian approach to international law.¹⁰ Confucianism, with which Asian values are often associated, does influence countries such as China, Taiwan, or Japan and characterizes the legal and political life on strong and stable leadership, preservation of consensus and social harmony over open confrontation, deep involvement of the state, and the improvement of social and economic well being over individual and political life, to name a few defining nature. However, Asian countries nowadays are far from moving towards these spirits. Liberal democracy spurs across India, Indonesia, and the Philippines, with their stories of success and failure. Further, the role of Islamic values in the region cannot also be set aside, not to mention differences in their school of thoughts that influence from Pakistan to Brunei to Malaysia to Indonesia. Simply put there are no values in play under the concept of Asian approach to international law, and as such, this cultural approach is no longer relevant to explain the developments in the current international political, economical, and legal environment.

Rather the obvious characteristic of international and strategic decisions made by the Asian countries in the international legal order would be pragmatism,¹¹ pursuant to which cultural and ideological considerations play the minimum role, and strong emphasis is given the state's pursuit of individual and common interest. Schieder argues for this pragmatic approach as follows: "[a] plea is made for a 'new' pragmatic international law, beyond universality and objectivity... from the perspective of pragmatism, law is not is as an objective, already given norm, but as a contingent act, of creative problem solving."¹² One way to describe this approach in the Asian context would be that of Mahbubani and Chesterman with the notion of pragmatic Asia in the context of global governance.¹³ Only with pragmatism an "open legal order" can prevail which states, or any other international law actors for that matter, can freely pursue the one's interests

⁹ Randall Peerenbom, *Asian Discourses of Rule of Law*, (Routledge Courzon, 2004).

¹⁰ Thio Li-Aun, "Formalism, Pragmatism, and Critical Theory: Reflections on Teaching and Constructing an International Law Curriculum in a New (Post-Colonial) Asia," *Singapore Journal of International and Comparative Law* 5 (2001), p. 327-354.

¹¹ Thio *supra* note 10.

¹² Siegfried Schieder, "Pragmatism as a Path towards a Discursive and Open Theory of International Law," *European Journal of International Law* 11 (2000) 663-609.

¹³ Kishore Mahbubani and Simon Chesterman, "Asia's Role in Global Governance: World Economic Forum Global Redesign Initiative – Singapore Hearing", NYU School of Law Public & Legal Theory Research Paper Series No. 10-09, 2009.

without bounded by a certain norm supposedly applied universally.

As such, Asian values do not exist, and perhaps have never existed in the first place. However, if there is one thing worth noting for in the Asian values debate, as far as the development of international law is concerned, that would be the deconstruction of the traditional European values in international law. D'Aspremont traces back the historical root of the European tradition in international law from the classical thoughts of Kant and Grotius to the modern liberal approach of Franck¹⁴ or Slaughter,¹⁵ all of which assumes certain sets of values that international law rests upon. The pretext that international law gains its authority and legitimacy upon common values shared globally is, as a matter of fact, what the proponents of Asian values have been fighting for.¹⁶ According to which there is a slippery slope risk associated with the value-based European/Western approach, namely the cultural imperialist agenda. The increase of relative power of Asian countries has been, and will further be, raising the region's voice in advocating this approach. D'Aspremont further advances the argument for interest-based approach in the Asian international legal scholarship by quoting some reputable Asian scholars including R. P. Anand,¹⁷ M. Sornarajah,¹⁸ O. Yasuaki,¹⁹ Li-Ann Thio,²⁰ and N. N. Singh.²¹ That said, the alternative understanding of the international legal order offered by the Asian scholarship is as follows:

"It has relied on the work of Asian scholars with a view of construing a legal order based on individual and common interests rather than values. It has showed that Asian scholars have been more amenable to the idea that international law-making, even in the field of human rights and the protection of the environment, is driven by interests."

¹⁴ Thomas M. Franck, *Fairness in International Law and Institutions*, (Oxford University Press: 1995) and Thomas M. Franck, *The Power of Legitimacy Among Nations*, (Oxford University Press, 1990).

¹⁵ Anne-Marie Slaughter, "A Liberal Theory of International Law", 94 *American Society of International Law Proceedings*, 240 (2000).

¹⁶ D'Aspremont *supra* note 2.

¹⁷ R. P. Anand, "Attitude of the Asian-African States Toward Certain Problems of International Law", 15 *International and Comparative Law Quarterly* 55 (1966).

¹⁸ M. Sornarajah, "Power and Justice in International Law", 1 *Singapore Journal of International Law* 28 (1997).

¹⁹ O. Yasuaki, "In quest of intercivilizational human rights: 'Universal' vs. 'Relative'", 1 *Asia-Pacific Journal on Human Rights and Law*, 53 (2000).

²⁰ Thio *supra* note 10.

²¹ N. N. Singh, "The Absence of A Sovereign Legislature and Its Consequences for International Law", 12 *Malaya Law Review* 277 (1970).

In short, the cultural approach of the Asian international legal scholarship has not been aimed at advertising new values to replace the traditional European-Western legal order of liberal tradition; rather it is a deconstruction of one and the formation of a new pragmatic approach. It is based upon this struggle to pursue one's interest, both for individual and common goal, that Asian legal scholarship has chosen to reform the power of the international legal scholarship, namely by invoking the fight in the name of "developing countries" against the traditional establishment of the "developed countries". There are many examples of how the Asians have offered new perspectives, from the post-colonialism territorial dispute to promotion of human right to solving environmental challenge to law of the sea. However, the same problem with that of the cultural approach arises, that the diverse Asia cannot all be placed in the "developing countries box"; and as a consequence, the developing countries' pursuit of interests might still be very well relevant in the formation of a new international legal order, but it cannot be exclusive for Asia. This dichotomy also signifies the failure to accommodate the changing economic power in Asia, notably in term of Growth Domestic Product (GDP) and economic power play. Japan is still one of the wealthiest countries in the world and Asia's biggest economy despite decades of crisis; the Asian four tigers (Singapore, South Korea, Hong Kong, and Taiwan) have long departed from the status of developing countries; China and India emerge to be the determining actors; and ASEAN countries consist of countries with different economic power and political institutions.

As for the former, there are various examples to show that Asian countries have established international alliance with countries from other regions to pursue their interests with regard to, among others, international trade and intellectual property rights, protection for foreign investors, law of the sea, and so forth. Failure to take into cognizance the role of non-Asian countries in international lawmaking this is of one Asian country's interest would not deliver fruitful impact. For example, analyzing India's legal position in the Agreement on Trade Related Aspects of Property Rights (TRIPs) negotiation without giving equal attention to that of Brazil does not provide full picture of the issue.

It is important to note that the starting point when discussing Asia's interests would be the region's voices on the international legal regime following the decolonialization era, and the legacy from which unclear boundaries are derived. It has started firstly on resolving territorial dis-

putes, perfectly summarized by Seokwoo that “[a]lmost all the countries in Asia are engaged in territorial and boundary disputes with neighbouring countries. Ironically, regional stability in Asia in the post-World War II era still heavily depends on the legacy of colonialism; that is, regional stability is partly dependent on the outcome of ongoing territorial disputes in which former colonising countries are a disputant.” Territorial disputes then lead to disputes over maritime boundary delimitation, which according to Miyoshi is a “reflection of territorial disputes, although the absence of territorial disputes does not necessarily mean that there can be no dispute over maritime boundary delimitation” and pave the way further for other legal innovation such as joint development in maritime area or the idea of ‘archipelagic state’ in the United Nations Convention on the Law of the Sea (UNCLOS).

Another peculiar feature of the voice from Asian legal scholarship is the effort to present a new idea for a just and equitable international economic order. In the field of international investment law, M. Sornarajah is known for clarifying the conflict between the developed countries and developing countries concerning the standard of protection of foreign investors, the conflict of which manifests in the tension in customary international law between the Hull rule of “prompt, adequate, and effective” and partial compensation, until finally settled in practice by the emergence of complex network of Bilateral Investment Treaties (BITs). Nevertheless the issue is again not exclusive to Asia, and recent developments show that it is of pivotal importance in the Latin America where many disputes arise under North American Free Trade Agreement (NAFTA) Chapter XI. The Doha Development Round of WTO negotiation also highlights Asia’s leading role in issues concerning compulsory license for essential medicines and protection of traditional knowledge, the issue of which two Asia’s strong economies, India and China, have different positions although carry out the same trademark of promoting developing countries’ interest. The major engagement of Brazil and many Africa countries pertaining to the issue provides another example of a network of states promoting the same interest to deconstruct the prevailing structure of international law.

I would like to wrap up the underlying conclusion that both cultural and political economy arguments do not hold up any longer in the present international landscape. Pursuit of interests becomes the salient feature of the new international law embodied in many forms from the “Asian values” to the division between the developed countries and developing

countries. As Asian values do not exist, the global political economic argument extends the voices of developing countries beyond Asia, insofar as common interests are shared.

2. Wanted: A Single Unifying Methodology

Previous sections came to the conclusion that Asian approaches to international law signify the pursuit of both individual and common interests. This promotes the use of formal and methodological fashion of channeling interests and preferences even further. At a more concrete level, a general framework is required to explain how international legal order can emerge among different interests, say, the competition between Asian values vs. non-Asian values, or developing countries vs. developed countries, and how to incorporate the dynamics in international politics in the international legal doctrine. L&E approach in international law is advocated specifically for this very reason, and it is why I argue that the approach can provide much benefit if applied in the context of interests-based Asia. Goldsmith and Posner argue that this approach can explain how international law works by integrating it with the realities of international politics while blaming for an improbable combination of idealism and doctrinalism with the aim of generating a 'comprehensive theory of international law.' That said, L&E offers a promising foundation, including a coherent set of common assumptions and various analytical tools on which to base positive theorizing regarding the creation and influence of international law in Asia. The main agenda of L&E in international law is to investigate how - and when- international law affects state behavior by examining individual state (rational) decisions and drawing inferences about whether those (rational) decisions are motivated by the relevant international rules.

L&E of international law is crafted following scholarly debate on creating convergence between international relations and international law. At the beginning, international political scientists have used rational choice analysis for around two decades to understand international institutions, notably with a special issue of *International Organization* in 1982, and the journal has since then become the incubator for the institutionalist approach in international relations. Others have also used similar methodological tools to assess international law, such as Keohane, Krasner, Lipson, Abbott and Snidal, and Morrow, among others. However, these authors did not specifically focus on international legal doctrine as a set of discipline, more interested in international cooperation in general, and as such did not

generate a comprehensive theory in international law. For example, the discussions mostly circulate around treaty making and enforcement without paying attention to the development of customary international law.

The connecting dot between the two fields is therefore institutionalism in international relations, with which the abovementioned scholars are associated, and in which standard economic tools of rational choice such as game theory are heavily employed. The tradition dates back to the work as far as Schelling, yet the underlying question remains the same: how states could cooperate in the absence of centralized lawmakers and enforcers. The central research question deals with "regime", defined as "sets of implicit or explicit principles, norms, rules, and decision making procedures around which actor's expectations converge in a given area of international relations."

International law scholars quickly understood that "international institutions" the institutionalist political scientists refer to indeed resemble "international law" as they have always comprehended. Slaughter characterized this institutionalism as "reinventing international law in rational-choice language" while Abbott paved international law scholars the first way for embracing political scientists' arguments about institutions into the legal vocabulary. Present research agendas have moved further not to discuss the intersection between the two fields any longer, rather how rational choice theory is applied to analyze concrete legal doctrines or legal principles. Notable scholars are Sykes on the safeguard provision in the WTO agreement, Guzman on the prevailing BITs over customary international concerning compensation for expropriation, Posner and Goldsmith on *pacta sunt servanda* and *opinio juris* in international lawmaking, Ginsburg and McAddams on the role of decisions of international tribunal, Van Aaken on the flexibility of commitments in international investment agreements, Parisi and Ghei on reciprocity constraint on the law of treaties, Dunoff and Trachtman on the function of global constitutionalism, and many others.

How do Asian approaches to international law can fit into this picture? The pragmatic Asia can provide more nuanced and stylized case studies to the general research themes. It is what is initially devoted to institutionalism perspective falls better into the American realism tradition agenda, the example of which namely the work of Goldsmith and Posner which proposes that states only seek for short-term benefits and relative gains. In the theoretical sphere, the Asian experiences can falsify the competing thought

in international legal scholarship surrounding the initial starting point of rational choice theory. In a more practical level, in a world of economic and cultural diversity of Asia, L&E can be beneficial to explain how certain legal order emerges in Asia which traditional theory fails to answer, as well as to provide better strategies and substantiates an argument should an Asian country intend to raise its voice to dispose a well-established legal doctrine by also taking into cognizance the joint benefits all countries can enjoy.

III. Rational Choice Theory in International Law

This section is devoted to scrutinizing key issues that have been heavily discussed pertaining to the economic analysis of and the application of the rational choice theory to international law.

1. Relevant Concepts

(a) State and State Preference

The behavior and preference of states toward international law are the basic ingredients in the rational choice theory. However, one obvious caveat is that the preferences of a state might not necessarily reflect the preferences of the citizens, in addition to the problem of aggregating the preferences of its citizens to the national level. A strict assumption is therefore required to simplify the analysis regarding a state's behavior or preference, that the state is a single entity with definite preferences. This will serve as the general foundation pursuant to which further theoretical development can advance and the assumption can be relaxed. For example, the liberal approach of the economics of international law recognizes the role of sub-state actors in the formation of international law. Public choice theory also offers the probability of domestic or international non-state actors to influence the preferences of states, including private interest groups/civil societies/lobbyists, and domestic judiciary.

Assuming that states are the only relevant actors in international law, they must be rational, namely self-interested, and able to identify and pursue their interests; which are assumed to be exogenous and fixed. States will only cooperate with other states and comply with international law when doing so increases their own payoffs. As such, states have no preferences to comply with international law. This view differs from other interests-based formulations. Chayes and Chayes, founder of the "managerial school" of international law, for instance, believe that states have "general

propensity to comply with international legal obligations” because states somehow find it very costly to violate international law simply because its status as law. Rather the source of non-compliance is ambiguity in agreements and limits on state capacity to comply. Another view, Franck asserts the states “obey powerless rules” because they are pulled toward compliance by considerations of legitimacy (or “right process”) and distributive justice. This clearly does not conform to the rational choice model and this very idea –of asserting value-based legitimacy- is what has been rejected by Asian scholars over time. Recent studies do formulate a behavioral model that shows psychological factors, notably emotions, in international environmental law cooperation, yet it may only be applicable partially. State preferences must be all-encompassing, not only limited to security, power, and wealth as what the realist tradition in international relations always proposes. The preferences can be either for short-term and long-term, depending on the available information. And most importantly, as opposed to the realist tradition, states prefer absolute benefit to relative benefit. For example, if the creation of a treaty can provide absolute benefit –namely the joint surplus will be maximized and every state will be better off- those that stand to benefit the least will perceive themselves as having lost relative to others. This party, according to the realists, will not comply with the treaty.

Finally, international law affects behavior in the way that it changes the costs and benefits that a state must calculate prior to an action. Without the existence of compensation rule, expropriating a foreign investor’s asset will be costless; without legal protection of maritime border, there is no benefit of investing in territorial sea; and so on. The rules are therefore exogenous (external) and do not change the preference of states endogenously (internally). Constructivists have always proposed that international rules can change states’ internal preferences and beliefs, and recent behavioral economics approaches have been applied to prove the notion. For example, states comply with the International Court of Justice (ICJ) because the ruling serves as a focal point and signal that can update the states’ belief and resolve ambiguity in preferences. As these developments are indeed fruitful, the standard rational choice remains applicable in many instances.

(b) Common Interest and Collective Action Problem

Solving the collective action problem and achieving common interests in the absence of supranational body are the main questions of the institu-

tionalists; and the most often employed tool of rational choice to address the issues is game theory. When an (Asian) country aims at aspiring one's interest in the international lawmaking, one must concern not only with its own interests, but the interests and counter-reactions of other parties. The dynamics between interests under international law are best defined as strategic behavior, of which game theory can provide sound explanation. Keohane characterizes strategic behavior to have implications that, among others, the agent makes choices in anticipation of the likely choices and reactions of others; that she is concerned about the consequences of her actions; and that she selects means that she believes will achieve better rather than worse anticipated consequences in terms of her own ordered preferences.

The general world of game theory is one where a player can control only their own strategies, but not the final outcome. They have been many game theoretical modeling developed by scholars to explain how laws, rules, and norms operate within the society. Specifically in the field of international law, some methods being employed are pure common interests game (to explain the emergence of customary international law regarding Continental Shelf following Truman Proclamation of 1945), or coordination games (Stag-Hunt Game, Hawk/Dove or Chicken Game, and Battle of Sexes) that have been applied in international relations and institutions since Schelling introduced the focal point theory in international relations. The most popular game theory in international law, or any field of social science for that matter, however, is the Prisoner's Dilemma (PD). The problem of cooperation exemplified by PD is the most dominant paradigm of recent theoretical work in economics, politics, and law. As Axelrod puts it, "the two-person iterated Prisoner's Dilemma is the E. coli of the social sciences." The approach successfully describes the signing of treaty, emergence of CIL, and the spread of certain rules, and so forth. Below is the standard matrix of PD:

Prisoner 1	Prisoner 2	
	Cooperate	Defect
Cooperate	-2, -2	-8, 0
Defect	0, -8	-5, -5

Figure 1: The Classic Prisoners' Dilemma

With these payoffs, if Prisoner 2 cooperates, Player 1 is better off defecting (receiving a payoff of 0) than cooperating (-2). If Player 2 defects, Player 1 is better off defecting (-5) than cooperating (-8). Therefore, Player

1 has a "dominant" strategy of defecting; it is her best move regardless of what Player 2 does. Because the payoffs shown are symmetric, Player 2 has the same dominant strategy. Thus, the only equilibrium is Defect/Defect, described in the underlined payoffs. The game is termed a "dilemma" because this theoretically inevitable outcome is worse for each prisoner than the best available outcome, Cooperate/Cooperate.

(c) Market Inefficiency: Transaction Cost and Information Problem

The basic tenet in L&E, included in which is international law, is that voluntary exchange and transaction enhance efficiency. However, there are distortions in the market which prevent the efficient outcome to prevail, which distortions cannot be solved by supranational intervention due to its absence. The distortions come mainly from transaction costs and information asymmetry.

Transaction cost, in its simplest definition, is the cost for using the market. Coase was the first to challenge the efficiency of market transaction by highlighting the existence of transaction of cost. These include search cost, negotiation cost, contract formulation cost, and monitoring/enforcement cost. Williamson further refines the study by incorporating not only the ex-ante identified costs, but the ex-post ones, which include the maladaptation cost incurred when the transaction drifts out of alignment, the haggling cost incurred if bilateral efforts are made to correct misalignment, the setup and running costs of governance to which disputes are referred, and the bonding cost of effective secure commitment.

The classic Coasian solution to transaction costs is to make a rational choice between using the market and forming a firm (or institution in general). To date, this theory has been applied extensively to study the dynamics of international institutions. Keohane proposes that the origins, functions, and durability of international regimes are best understood by conceiving of them as "information-providing and transaction cost-reducing entities," arguing that states establish regimes to help them realize Pareto-improving bargains that would otherwise fail due to information asymmetries and transaction costs. Regimes provide information through standard-setting and monitoring. And they reduce the transaction costs of cooperation by legitimizing compliance and delegitimizing violations, by facilitating negotiation, and by linking different issues and associated regimes. Once established, regimes are durable because the transaction costs of negotiating replacements are high: "international regimes are easier to maintain than

to construct.” On the contrary, other view that of Moravcsik argues that in the realm of international relations, the transaction costs are low and institutions are readily disbanded and replaced when circumstances change. Higher costs come mostly from domestic pressures of interest group.

Closely related to the problem of transaction costs is that of information asymmetry. A state’s rational choice can only lead up to efficient solution if its beliefs are reasonable in view of available information and that it has searched for information that is relevant to the attainment of its objectives. It has been well-established in economics that information entails distortion for a rational economic actor to select the efficient decision in a market transaction, and consequently one will operate also based on one’s belief. Even if the information is available in the market, the cost of obtaining such might be so high that it does not justify the benefit it can acquire. Accordingly, economic actor’s rationality will be limited, the concept of which known as bounded rationality, and one needs to constantly update its belief.

(d) Compliance in International Law: Reputation, Reciprocity, and Retaliation

Why do states comply with international law? The rational choice theory proposes that states do so because it aligns with one’s interests. The interests at hand, however, are not merely limited to short-term goals, but cover also the long-term relations among states and possible future exchanges. Reputation works in a very simple way: if a state breaches its international legal obligation, its future commitment to compliance with international will lack credibility. Should one ignore the importance of reputation in international sphere, the analysis will fail to comprehend many international legal phenomena.

Reciprocity comes next after reputation. Reciprocity becomes irrelevant without taking into account reputation because one’s action may not be credible enough for the other party to reciprocate. The concept is simply “doing what others do to you.” It is deemed to be the most successful strategy to prevent Defect/Defect Nash Equilibrium in a PD world. A political scientist, Robert Axelrod once invited game theorists to submit the various strategies to be competed against each other in a PD game. It is then concluded that the reciprocity strategy of “tit-for-tat” became the winner of the game. Pivotal in the idea of reciprocity is reciprocity constraint, meaning that the choice of strategy is determined mutually by the parties.

It can explain how a certain condition can naturally, without any legal intervention, lead to mutual cooperation of states. International agreement can also serve as reciprocity constraint, if mutually agreed *ex ante*, to limit a state's choice in response to other state's action. International agreement then limits the opportunistic behavior of a state to prevent Defect/Defect Nash Equilibrium.

The final instrument in international law is retaliation. In contrast to reciprocity, retaliation entails real and explicit cost, in addition to opportunity cost that a state bears when refusing to reciprocate with an international law violator. In Guzman's view, "a retaliating state is communicating to the violating state, and potentially to other states, that it will react when its legal rights are compromised." Retaliation can be in the form of, among others, economic sanction, treaty termination, or even military force, all of which come with very high cost for the retaliating state. Putting reputation, again, into this perspective, this explains why a rational state, after having suffered losses from the other state's violation, can still decide to disburse further cost when the benefit is not apparent. Such state wants to hold up its reputation as the one that punishes any state that violates any commitment they have entered into, and cannot be violated against.

IV. Rational ASEAN: Some Possible Agendas for Further Research

This section aims at providing frameworks for further application of the rational choice theory in international law, specifically in the sphere of ASEAN. This narrows down the subject being discussed from "Asia" above to ASEAN herein. The unique nature and existence of ASEAN provides a good early understanding as to the "Asian" approach of international law. It does not attempt to build a solid law-and-economics model, and instead focus on early exploration of issues from which a complete research and modeling can be derived. The attractiveness of the rational choice theory is its suitability to unconventional subjects in economics. As such, the most debated issues in ASEAN upon the entrance into effect of the ASEAN Charter, namely the future of "ASEAN Way" and human rights institutionalization, will be briefly explored.

1. ASEAN and the Principle of Non-Intervention

Critics of ASEAN mostly undermine the capability of the regional body to cope with various violent conflicts and humanitarian crisis that

occurred in the region. The classic defense against these is the principle of non-interference and respect for sovereignty often associated with the "ASEAN way" although its legal basis goes back to the principle of sovereignty protected by the UN Charter. To name a few, failure to effectively deal with the situations in East Timor (now Timor Leste) in the events leading up to its independence from Indonesia in 1999 and the body's ambivalence towards Myanmar upon the country's domestic political situations. ASEAN arguably showed its incompetence when they failed to prevent military mobilization following the dispute between Thailand and Cambodia concerning the territory surrounding Preah Vihear Temple.

So to speak, the moral argument, being the protection of universal values of humanity, must be detached should the rational choice analysis is to be applied. Instead, the basic premise for state intervention against another state's sovereignty is merely about the protection of own interests. Slaughter sums up this argument as follows:

"The growing willingness of states to intervene in the domestic affairs of other states frequently has a far more self-interested basis. Governments increasingly understand that they often cannot afford to look the other way; that fundamental threats to their own security, whether from refugees, terrorists, the potential destabilization of an entire region, or a miasma of disease and crime, may well have their origins in conditions once thought to be within a state's exclusive domestic jurisdiction."

However, misuse of 'human rights control' property (or human rights abuse) generates negative externalities. When a state enforces its rights, some of the impacts are not borne by itself and rather externalized to other states. For example, the treatment of religious extremism in Malaysia, Thailand, and the Philippines heavily impact the increase of terrorist groups in Indonesia, and vice versa. For further analysis, first one can derive an analogy of a state possessing sovereignty rights to a person holding property rights; pursuant to which states can trade their sovereignty for other benefits. This is to suggest that international political market is like economic markets formed by interactions among states. A state has autonomy to determine its domestic (human rights) policy, and such a power can be treated as that state's sovereignty assets. Under a Coasian market solution, a state affected by human rights abuses in another state can negotiate with the violating state to decrease the level of abuse. The affected state can com-

pensate the state by offering, for instance, economic concessions, foreign aid and development assistances, extradition treaties, and so forth. Further, the offered compensation does not necessarily have to be in the form of tangible benefit, but can be of intangible ones. For instance, when Indonesia consented to the presence of United Nations peacekeeping force in East Timor (now Timor Leste), it did so not only under the consideration of any monetary benefit (several countries including the Netherlands, Denmark, and Canada), but also as a response of growing international pressure that affected its reputation. In such as, the price that Indonesia attached to reputation has lower discount value on future cooperation benefit.

It does not however mean that bargaining and exchange in the political market will always work. I present three arguments, which the latter can be an economic justification for intervention.

Firstly, the simplest argument is that humanitarian problems in one country do not generate high enough externalities for an action to be taken. This can be results of segregation of territories and cultures among states and minimize the effect of regional instability. This also prevents mobilization or migration of resources that affect the region in its entirety. The Thailand-Cambodia conflict can severely impact the Indochina region with influx of refugees, but might not concern Indonesia or Brunei that would only suffer negligible impact. As for the case of anti-terrorism measures, Malaysia or Thailand domestic policy on religious extremism might not affect Singapore although they are close neighbors. On the contrary, the situation in Timor Leste affected Australia more than those in the ASEAN region, so the country had more incentive to intervene.

Secondly, the classic obstacles to market solution are the presence of transaction costs, namely *ex ante* search costs, negotiation costs, formulation costs, and monitoring costs, in addition to the problem of information asymmetry. At present, the impact of transaction costs and information is not properly measured, and thus can be both enhancing and hampering the most efficient outcome to prevail. When Indonesia's proposal to be a mediator in the Thailand-Cambodia conflict was rejected, this could be a signal of negotiation failure. However, the strong networks among government officials and good diplomacy skills have prevented many disputes to arise at the first place, given many political and territorial disputes among the ASEAN member states. Arguably (and speculatively) the "ASEAN way" works simply because the member states manage to solve all disputes efficiently through market mechanism.

Thirdly, in practice, one must distinguish the differences between legal sovereignty and optimal sovereignty (or behavioral sovereignty). While legal sovereignty is the authority bestowed by international law, optimal sovereignty is the economically efficient level a state can exercise its sovereignty over its territory. In the neoclassical term, the efficient level will then be defined as one when the Marginal Benefit (MB) of exercising sovereignty is equal to the Marginal Cost (MC) of such exercise. Assume there are two states, A and B, and the abuse in the state A generates negative externalities to state B. Under standard market assumption, B will buy off A's interests so A has the incentive to respect human rights. Suppose the given legal sovereignty of A is noted as X and the optimal sovereignty is Y; when a state is weak (politically and economically), its optimal sovereignty will be lower than X ($Y < X$). Suppose also that the failure of a state to prevent humanitarian crisis is due to its inability to exercise the authority to cope with the relevant circumstances, (it occurs in the area between X and Y). In such case, trading legal sovereignty rights may not be an efficient solution because, even if A changes its policy pursuant to B's request, A has no power to enforce such a policy anyway. In other words, A is conveying zero value sovereignty rights in exchange for money paid by B. Thus, B has no reason to negotiate with A. Rather, it would be more efficient for B to intervene in A's uncontrolled jurisdiction if B can more cheaply control such an area.

This is to show that military intervention, and even war, can be efficient to restore negative externalities a country generates from its domestic policy. Suppose there are intensive terrorist training activities in a remote region of Indonesia, and this endangers the region's national security. If Indonesia does not have the capacity to cope with the problem, it is efficient for a concerned party to intervene Indonesia, if the cost of intervention is lower than providing assistance to the country to handle the problem. However, the above economic justification for intervention must also take into account the intervening party's "opportunistic behavior". It occurs when the incentive structures are different between ex-ante and ex-post conditions, namely "a common concern is that military intervention might become a pretext for military adventures in pursuit of ulterior motives." The state that engages in military action is not only enforcing its right, but also judging what the damage was and what the proper remedy is. If the attacking state has the option to impose punishment that makes itself better off at the expense of the attacked state, it becomes less clear whether the

attacking state is violating international law or simply trying to alleviate the damages.

From this approach, there are two possibilities of why intervention level is minimal among ASEAN member states. Firstly, the cost of providing assistance is very low so that a country would rather assist a country's capacity building on defense and security. Or secondly, lack of trust among ASEAN member states, due to history of conflict or any other reason, makes the potential opportunistic behavior very high. In this case, the country from where negative externalities are originated will invest heavily on diplomatic and political exchange, and even buy-off the affected country to not intervene the originating country. However, if this concern is shared among the region, it is cheaper to contribute to a strong regional body upholding non-intervention principle because the cost will be distributed among member states than buying-off each of the potentially affected country. This leads eventually to a strong body of ASEAN that focuses on cooperation and non-intervention. The answer to this problem requires further research. However, whatever the reason might be, the role of an independent party to legalize, permit, and conduct intervention is therefore of the essence, which role is assumed through the monopoly of the United Nations (UN). Creating another institution imposes high sunk costs for establishment and effective enforcement or otherwise the institution will not be credible enough. As such, ASEAN's role can be directed at aggregating regional pressure and allowing for the international political market, while the UN can focus on intervention, if necessary.

2. Human Rights Institutionalization in ASEAN

Other related problem in this context is the institutionalization of human rights in ASEAN, which proponents have been highly disappointed with the suggested toothless role of ASEAN Intergovernmental Commission on Human Rights. Many believe that the proper role of ASEAN is not to establish another commission, but to establish a regional adjudication body. The harder the enforcement, the stronger countries' adherence to human rights.

Before making assessments of this proposal, one must bear in mind that the major role of an external institution, be it inter-governmental commission or regional adjudication, is to promote the flow of information. In the international sphere, international tribunals do not have enforcement power and coercive authority resemble that of the domestic institutions.

For example, if a state refuses to comply with an international tribunal that awards a decision against the state's interest, there is no authority to coerce the state or render sanction such as seizures or arrests. At the end, the effectiveness of an international tribunal will depend on the response of the party and the counterparty of the dispute at hand. As such, how international tribunal works is similar to how other international law instruments work as well, which means their success depends on whether the interests of states are served including monetary payoffs and reputational benefits. Guzman came to the conclusion that international tribunals serve merely as information providers, not as enforcers of international law. In his own words,

"Reduced to its simplest components, a tribunal hears evidence and arguments from the parties and issues a ruling regarding the relevant facts and law. At that point its job is done; it generally does not supervise or enforce compliance with its decisions. In other words, the tribunal simply announces the relevant legal rules and, in the context of those rules, its interpretation of events. Its sole contribution to the dispute is information concerning what happened, what law governs, and how the law applies to the facts."

International adjudication plays an important role to disclose information. Further, analyzing how international tribunals operate must also take into account other means of providing information in the international community, including diplomatic exchanges, the establishment of a fact-finding commission, and political communications. The final objective is for states to obtain as much information as possible to settle their disputes. The effectiveness of a tribunal should be measured by the information it renders that enhances the adherence of the underlying international legal obligation.

As far as the ASEAN context is concerned, the main question is what is the best way to promote diffusion and disclosure of information among ASEAN member states? Is inter-governmental body sufficient? Does ASEAN need a regional adjudication body? Or else, they all do not matter because there is still lack of shared values among ASEAN member states about what is "human rights", or what are ASEAN values in human rights, if any. Any evaluation of the body must assess whether the proposed mechanism can generate information, and whether the response to such information triggers the same perception among the member states as to the

reputation of the human rights infringing states.

How ASEAN countries share the same perception on human rights will determine the future of human rights protection and promotion in ASEAN. Without this shared perception and common framework to assess certain events related to human rights, the establishment of human rights enforcement mechanism would only create political tension among the ASEAN member states. When information is assessed differently, its dissemination would then be counterproductive. That being said, instead of pursuing more effort on building strong human rights institution in the region, ASEAN might also explore the creation of a regional human rights treaty, regardless the form of enforcement. The treaty might not be equipped with strong enforcement mechanism, but it can facilitate negotiation as well as develop common perceptions and preferences on certain situations which can be considered as infringing (or not) human rights principles.

The creation of a human right treaty is not a new concept in international law. Many regions have created their own treaties from general regional treaties to those governing specific rights. Starting with the creation of the European Convention on Human Rights in 1950, the trend to elaborate regional standards continued with the adoption of the American Convention on Human Rights in 1967 and the African Charter on Human and Peoples' Rights, adopted in 1981. Various other regional treaties have been elaborated in an effort to render the protection not only of civil and political rights, but also of economic, social and cultural rights, more efficient. Regional treaty does not mean that the universality of human rights principles is diluted. One region may not always adopt one general human rights treaty, and instead can focus on more specific ones addressing one issue, for instance on the right of child or protection of minorities. This will demonstrate the importance of that specific human rights issue among the ASEAN member states, and express the commitment to the member states as well as other countries on that specific issue which will be the attention of the region.

The lack of enforcement can be justified if the regional treaty is designated to stimulate the regional political market by "making human rights control a tradable property" that relies on market negotiation without the need to build a supranational agency. Transaction costs in the market can be reduced by: (1) clarifying the definition of the violation and the scope of human rights; (2) reveal state's preferences in the negotiation, as states that fail to sign a treaty are automatically sorted out, in addition to the response

of the regular report issued by the commission.

V. Concluding Remarks

The paper aims at exposing the growing interests in the "Asian approaches to international law" to a sub-discipline of international law that can expectedly make sense out of the foreign policy dynamics in Asia and the classical doctrines in international law in one single methodology. It mainly rests on states' self interests, although the interests of which must not be restricted solely to security, power, and wealth as the realists propose. The pursuits of interests have been long embedded to the Asian international law scholarship. The next logical academic step is then to utilize various instruments in the rational choice theory, including game theory, transaction costs analysis, contract economics, economics of information, and many more to explain, predict, and tailor the Asian states' interests.

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