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Beyond Market Access?
The Anatomy of ASEAN's Preferential Trade Agreements

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European University Institute
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Abstract

This study seeks to enhance the understanding of ASEAN's external preferential trade agreements (PTA) in context of the recent growth of economic regionalism in East Asia. First, the paper compares the content of ASEAN's five plurilateral PTAs with China, Korea, Japan, India, Australia, and New Zealand with the status quo of ASEAN's internal economic integration. In a second step, the paper compares ASEAN's plurilateral agreements and ASEAN's internal integration with the content of six bilateral PTAs that individual ASEAN member states have concluded with Japan. The empirical findings demonstrate that the ambition of ASEAN's five plurilateral agreements finds its upper limits in the substantive content of ASEAN's internal economic integration. Within these limits, the coverage and depth of commitments varies considerably in correlation with the intensity of trade between ASEAN and the respective external partner. Moreover, the comparison shows that bilateral PTAs between six individual ASEAN member states and Japan go significantly beyond the status quo of ASEAN's internal integration and exceed the coverage and depth of ASEAN's external plurilateral PTAs. The author contends that the coverage and depth of ASEAN member states' plurilateral PTAs is limited by the structural heterogeneity of the signatories and, as a result, a relatively high diversity of policy preferences. Bilateral PTAs between ASEAN member states and the same external partners result in deeper commitments than the plurilateral accords, because of both a higher common denominator among the parties to the agreements and the free-rider problem that persists in plurilateral negotiation settings. Moreover, it is argued that the coverage and depth of the agreements is a function of the intensity of trade among the parties: high trade intensity results in deeper and more comprehensive agreements that tackle 21st century trade issues, whereas low trade intensity results in shallow agreements that aim to reduce first-generation trade barriers. These hypotheses, which are fully verified by the empirical findings of this study, allow for important conclusions about the role of ASEAN member states - collectively and individually - in current and future economic integration initiatives such as ASEAN+6, the TPP, or EU – ASEAN PTA negotiations.

Keywords

ASEAN, Japan, East Asia, regional economic integration, preferential trade agreement, free trade agreement, economic partnership, plurilateral, bilateral, trade intensity, WTO

JEL Classification

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**BEYOND MARKET ACCESS?
THE ANATOMY OF ASEAN'S PREFERENTIAL TRADE AGREEMENTS**

*David Kleimann**

I. Introduction

The recent surge of preferential trade agreements (PTAs) is fast reshaping the architecture of the world trading system and the trading environment. As of end-2010, WTO members have notified 278 PTAs, around half of which have come into force during the last 15 years.¹ The nature and content of regional agreements is also evolving rapidly.² One important dimension of more recent PTAs is their increasingly comprehensive scope, which frequently includes treatment of border regulatory measures such as trade facilitation and standards, and complex behind-the-border regulatory issues, such as competition policy, investment policy, government procurement, and intellectual property. These policies are often not covered in the current WTO rulebook, nor are they on the table in the now dead-in-all-but-name Doha negotiations.³

Booming East Asia has been particularly active in negotiating intraregional and interregional trade and investment agreements during the past decade. With only three PTAs on record by the year 2000, 58 bilateral or plurilateral accords that involve at least one Asian nation as a signatory have entered into force since then.⁴

On the first sight, East Asian intraregional economic integration through PTAs appears to have created a considerable amount of chaos through the overlap of membership and substantive obligations of the agreements concerned - much rather than legal certainty and predictability for businesses.

* David Kleimann is a Researcher at the Law Department of the European University Institute in Florence and a graduate from the World Trade Institute in Berne. The author gratefully acknowledges helpful comments from Petros Mavroidis, Marise Cremona, and Joris Larik on an earlier draft. All remaining errors are the author's alone. The paper was prepared for the '**ASEAN Integration Through Law: The ASEAN Way in a Comparative Context**' project, which is one of the major research activities of the Centre for International Law (CIL) at the National University of Singapore (NUS). The ASEAN ITL research project examines the role of law and the rule of law in Asian legal integration. The project involves over 70 researchers from Asia and around the world. The outcomes of the project are expected to support the efforts of ASEAN member states to achieve the ASEAN Community. The Co-Directors of the project are Professor Joseph Weiler (NYU and NUS Law Schools) and Professor Michael Ewing-Chow (NUS Law School) with Executive Director Dr Tan Hsien-Li (Centre for International Law). The project directors kindly agreed to the publication of this paper in the EUI Law Department's Working Paper Series. A later version of the paper will form part of a forthcoming ASEAN ITL monograph, titled '**Collectively ASEAN: An Inventory and Typology of ASEAN External Agreements**', co-authored by Professor Marise Cremona, David Kleimann, Joris Larik, Rena Lee, and Professor Pascal Vennesson, and published by Cambridge University Press. Further information on the ASEAN ITL project is available at <http://cil.nus.edu.sg/research-projects/cil-research-projects/asean/>.

¹ WTO (2011): *The WTO and Preferential Trade Agreements – From Coexistence to Coherence*, World Trade Report 2011, Geneva. p.55

² For an overview of recent developments in economic regionalism, see: Chauffour, Jean-Pierre & Maur, Jean-Christophe (2010): *Beyond Market Access*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): 'Preferential Trade Agreement Policies for Development – A Handbook', World Bank, Washington D.C..

³ WTO (2011): *op. cit.* pp. 128-133

⁴ We narrowly define 'Asia' as the ten ASEAN member states plus China, India, Japan, and Korea.

At the centre of what has been labeled the East Asian ‘noodle bowl’, ASEAN internal economic integration has steadily progressed since the conclusion of the ASEAN FTA (AFTA) in 1992 and is now geared towards the achievement of the ASEAN Economic Community (AEC) by 2016.

The second layer of regional obligations was created by the conclusion of plurilateral PTAs between ASEAN member states and six of ASEAN’s dialogue partners, notably China (entry into force: 2005), Korea (2007), Japan (2008), India (2010), as well as Australia and New Zealand (2010). Due to their plurilateral character, these ASEAN+1 PTAs also bind ASEAN member states *inter se*.

Adding a third layer of regional integration, ASEAN’s six external PTA partners have concluded, or are in the process of negotiating, separate and parallel PTAs with up to seven individual ASEAN member states. Furthermore, these countries have - outside the realm of ASEAN member states’ involvement - concluded PTAs among each other – the latest incident of which is the announcement of trilateral negotiations between China, Korea, and Japan. At the same time, all of the actors mentioned above have been actively engaged in the negotiation of PTAs with other Asian and non-Asian economies.

What completes the initial confusion regarding the direction of East Asian economic integration is the recent initiation of ASEAN+6 PTA talks, i.e. negotiations that include all ASEAN member states and the six ASEAN+1 partners under one umbrella, as well as the ongoing negotiations of a transpacific partnership PTA (TPP), which involve four ASEAN member states (Brunei, Malaysia, Singapore, and Vietnam), the NAFTA signatories, Australia and New Zealand, as well as Peru, Chile and (likely to join soon) Japan.

This seemingly erratic negotiation behavior raises important questions with regard to the overall process of East Asian economic integration, which we limit, due to the scope of this paper, to an inquiry concerning the role of ASEAN member states in that process: how does ASEAN internal economic integration relate to the scope and depth of ASEAN+1 PTAs? For what reasons do ASEAN+1 external partners negotiate parallel and separate PTAs with individual ASEAN member states? Do these parallel agreements achieve broader and deeper commitments than ASEAN+1 PTAs, and if so, why? How do parallel agreements compare to the *status quo* of ASEAN internal economic integration? What do respective findings tell us about ASEAN and its member states as actors in the process of East Asian regional integration and what are the implications for their endeavour towards the conclusion of an ASEAN+6 PTA? Finally, how do ASEAN’s external liberalization and integration initiatives relate and compare to the potential outcome of TPP negotiations?

With a view to addressing these questions, this paper aims to locate ASEAN’s five plurilateral PTAs, which its member states have collectively concluded with external partners, within the broader cosmos of contemporary PTAs. In our analysis, we draw particular attention, first, to the broader question of whether ASEAN+1 accords match the recent global trend towards *more comprehensive* economic agreements, i.e. whether the agreements go beyond mere market access disciplines in terms of their issue area *coverage*, by including WTO-plus and WTO-extra disciplines on customs, standards, competition, investment, government procurement, intellectual property, labor mobility etc. This analysis is confined to two questions: on a horizontal level, we inquire whether specific policy areas are covered by the agreements by some kind of legal provision, or not. Respective findings, however, do not allow for any conclusions about the *legal quality* of these provisions, i.e. whether they are of substantive or procedural nature, and whether they are legally enforceable (hard and specific legal language, subject to dispute settlement procedures) or not. Subsequently, we determine the legal enforceability of the covered provisions: we distinguish between soft legal language, hard legal provisions that are exempted from a PTAs dispute settlement procedures, and hard law that is subject to dispute settlement. We shall extensively refer to the sources of this methodology and respective findings further below and in section V.

Secondly, we scrutinize the *intensity* and *depth* of the *de jure* integration provided by the agreements. In other words, to mention two extreme scenarios, we inquire whether, and to what extent, the

agreements codify hard and specific legal disciplines in the policy areas covered by the agreement, which require implementing measures on the national or regional level to comply with the accord, or whether and to what extent the parties instead opted for a more shallow approach by mandating future cooperation and negotiations among the parties on particular issues by means of cooperation clauses - so-called 'living agreement instruments'. We shall further refine the analytical concepts used in this analysis in section V.

Using the analytical concepts of legal coverage and depth of PTAs, third, we examine to what extent ASEAN's external PTAs mirror the *status quo* of ASEAN's internal economic integration and where, if at all, they go beyond the ASEAN *acquis*.

Fourth, we compare the legal coverage and depth of ASEAN's PTAs with six PTAs that individual ASEAN member states have concluded with Japan in parallel - notably Japan's agreement with Singapore (entry into force: 2002), Malaysia (2006), Thailand (2007), Indonesia (2008), the Philippines (2008), and Viet Nam (2009). Our expectation is that this comparison allows for conclusions as to why several external partners, which have recently concluded a PTA with ASEAN members collectively, are seeking to negotiate and conclude separate PTAs with individual ASEAN member states at the same time. The results of this investigation are also expected to contribute to an explanation as to why the European Union has recently decided to negotiate PTAs with individual ASEAN member states, instead of negotiating with ASEAN member states collectively.

By shedding light on these four dimensions of ASEAN+1 PTAs, we seek to enhance the understanding of the nature of these accords as a legal phenomenon of contemporary East Asian economic integration, and of ASEAN member states as actors in that very process. We do so against the background of an overview of ASEAN's *de jure* economic integration (section II) and a brief discussion of ASEAN+1 PTAs in context of the general growth of East Asian regionalism in the past decade (section III).

In section IV, we examine factors that potentially explain the substantive coverage and depth of ASEAN+1 PTA commitments, notably, among others, the 'heterogeneity' and 'proximity' of contracting parties as well as the intensity of trade between them. As a result of that discussion, we develop the hypothesis that ASEAN's PTAs with external partners likely do not exceed, both in terms coverage and depth, the *status quo* of ASEAN's intraregional *de jure* integration. Secondly, we argue that the coverage and depth of *de jure* integration through ASEAN's PTAs is contingent on the level of trade interdependence between ASEAN and its external partners. ASEAN's PTAs with low intensity trade partners are expected to be particularly shallow market access agreements. ASEAN's PTAs with high intensity trade partners, however, are likely to resemble the coverage and depth of the ASEAN *acquis*, and, in areas that are not covered by ASEAN internal *de jure* integration, establish a plurilateral cooperation and negotiation platform with a view to the development of legal disciplines in these areas in the future. Third, we contend that ASEAN+1 external partners are likely to negotiate separate agreements with advanced individual ASEAN member states with whom they have intensive trade relationships in order to overcome the 'lowest common denominator' and 'free-rider' problem of the ASEAN+1 plurilateral negotiation setting and to achieve more comprehensive and deeper legal treatment of 21st century trade issues. Therefore, these parallel and separate PTAs are likely to significantly go beyond the coverage and depth of ASEAN+1 PTAs.

We shall test these hypotheses in section V by examining both the coverage and depth of ASEAN+1 PTAs in comparison with the ASEAN *status quo* and in comparison with Japan's parallel PTAs with six individual ASEAN member states. For the analysis of the substantive coverage of PTAs, we use the methodology developed by Horn, Mavroidis, and Sapir (HMS).⁵ For the examination of the depth of PTA commitments in a number of select policy areas, we use the Asian Development Bank's

⁵ Horn, Hendrik & Mavroidis, Petros & Sapir, André (2009): *Beyond the WTO – An Anatomy of US and EU Preferential Trade Agreements*, BRUEGEL Blueprint 7, Brussels.

Regional Integration Center's Comparative FTA Toolkit.⁶ Finally, we discuss the policy implications of our findings and conclude the paper in section VI.

II. ASEAN Economic Integration through Law – A Point of Reference for ASEAN's Preferential Trade Agreements

In the following, we briefly take stock of ASEAN's main economic integration and cooperation efforts. We do so with the presumption that the extent of ASEAN's internal economic integration serves as an important benchmark for ASEAN member states' ability and willingness to take on commitments vis-à-vis external partners and vis-à-vis each other by means of concluding ASEAN+1 plurilateral agreements.

As a latecomer in regional economic integration, East and Southeast Asia, now finds itself at the centre of the current dynamic and fast paced process towards deeper regional and inter-regional economic integration around the globe. ASEAN established itself as a frontrunner in Asian trade liberalization by concluding East Asia's first PTA in 1992 – the ASEAN FTA (AFTA). AFTA, however, as a conventional market access agreement, only covered the reduction of tariffs on trade in goods, and originally only bound the six founding ASEAN members.⁷ The new ASEAN members Cambodia, Laos, Myanmar, and Viet Nam (CLMV) signed the agreement upon their accession to ASEAN and were subject to more generous transition periods than the original signatories. Tariff reductions were further consolidated by subsequently adopted protocols and the 2009 ASEAN Agreement on Trade and Goods (ATIGA), which we discuss further below.⁸

AFTA uses a negative list approach with an ambitious 0% target for all tariff lines. The Common Effective Preferential Tariff (CEPT) scheme allows countries to maintain a temporary exclusion list (TEL), sensitive list (SL), and general exclusion list (EL). Commodities are phased into the inclusion list (IL) gradually, with a longer transition period for CLMV. ASEAN-6 reached the 0–5 % average tariff target under AFTA in 2003, Viet Nam in 2006, Laos, Myanmar in 2008, and Cambodia in 2010.⁹ Overall, average tariff rate protection of the ASEAN-6 has reached a level of 1.5%, down from 12.8% in 1993. ASEAN-6 countries have now completely eliminated tariff protection on 99.11% of tariff lines.¹⁰ What remains for ASEAN-6 countries is the protection of highly sensitive sectors, such as food crops (rice, sugar), the steel industry, or, in some countries, the automotive sector.¹¹ As of today, 49.27% of CLMV's tariff lines are at a zero percent duty rate. These four countries are expected to complete the tariff elimination process by 2015, which is when, impressively, nearly 100% of all tariff protection in the entire ASEAN region will have been dismantled on a preferential basis.

It is noteworthy, in this context, that close to 90% of preferences under AFTA have progressively been multilateralized by ASEAN member states. In this way, ASEAN's plurilateral tariff liberalization program has significantly contributed to opening the region to global trade in a faster fashion than

⁶ The ADB's Regional Integration Centre's Comparative FTA Toolkit can be accessed at <http://aric.adb.org/comparisonftacontent.php>.

⁷ Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore, and Thailand.

⁸ For a detailed breakdown of the evolution of the AFTA's Common Effective Preferential Tariff (CEPT) see: <http://www.aseansec.org/19585.htm>

⁹ Zhang, Yunling & Shen, Minghui (2011): *The Status of East Asian Free Trade Agreements*, ADBI Working Paper Series, No.282, Asian Development Bank Institute, Tokyo. p11

¹⁰ Malaysia's Ministry of Trade and Industry Trade Portal, at: http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_8de83760-7f000010-72f772f7-f5047602

¹¹ Hill, Hal & Menon, Jayant (2010): *ASEAN Economic Integration – Features, Fulfillments, Failures, and the Future*, ADB Working Paper Series on Regional Economic Integration, No. 69, Asian Development Bank, Manila. p22

would have been achieved through GATT and WTO negotiations.¹² The multilateralization of AFTA tariff reductions also explains the fact that utilization rates of AFTA preferences have fallen dramatically over the years.

The remaining 10% of all tariff lines, which have not been multilateralized yet, however, provide plenty of policy space for the protection of sensitive sectors from competition from non-ASEAN economies and, at the same time, set incentives for non-ASEAN governments to negotiate preferential tariffs with ASEAN member states bilaterally or plurilaterally. ASEAN tariff data compiled by Mikic (2009), for instance, shows that not only ASEAN member states' bound MFN tariff rates but, more importantly, average weighed applied tariffs evidently discriminate against imports from the rest of the world. The author, moreover, reveals the significant number of applied tariff peaks that ASEAN member states apply to imports from non-ASEAN economies.¹³

The coverage of ASEAN's economic integration agreements further expanded in the coming years. Shortly after AFTA came into force, ASEAN member states concluded framework agreements on services liberalization (1995 ASEAN Framework Agreement on Trade in Services - AFAS), cooperation on intellectual property rights (1995 ASEAN Framework Agreement on Intellectual Property Cooperation, investment (1998 ASEAN Framework Agreement on the ASEAN Investment Area - AIA), and mutual recognition of conformity assessment (1998 ASEAN Framework Agreement on Mutual Recognition Arrangements).

As the term 'framework agreement' indicates, these accords, as a starting point, initially only established a platform for cooperation and general principles for the negotiation of further commitments and rules, to be agreed upon in the future. For instance, AFAS subsequently resulted in eight negotiation rounds in the region and respective eight 'packages' of commitments.¹⁴ Similarly, ASEAN has, under AFAS, concluded mutual recognition agreements (MRA) on engineering services (2005), nursing (2006), architectural services (2007), surveying qualifications (2007), and accountancy services (2008), as well as medical practitioners (2009), with an MRA on tourism services currently in the making.¹⁵ Furthermore, ASEAN members adopted first sectoral MRAs on conformity assessment for the goods sectors of electrical and electronic equipment (2002) and medicinal products (2009). ASEAN members have also made first experiences with the drafting of harmonized regulatory regimes in the sectors of cosmetics (2003) as well as electrical and electronic equipment (2005).

Furthermore, ASEAN members have concluded landmark agreements in the areas of customs reform (1997 ASEAN Agreement on Customs; 2005 ASEAN Agreement to Establish and Implement the ASEAN Single Window) and dispute settlement (2004 Protocol on Enhanced Dispute Settlement). 2004 also saw the conclusion of an agreement on the integration of priority sectors (2004 ASEAN Framework Agreement on the Integration of Priority Sectors). This agreement essentially bundles commitments governing various areas of trade policy (goods, services, customs, investment, standards, conformity assessment etc.) with a view to accelerating integration in specified sectors, such as agricultural products, fisheries, air travel, automotives, electronics, healthcare, textiles, and tourism.

In 2009, building on the 1998 AIA, member states signed the ASEAN Comprehensive Investment Agreement, which covers liberalization, protection, facilitation, and promotion of investment and pays tribute to the enormous importance of foreign direct investment (FDI) in the region.

¹² *ibid.*: p7

¹³ Mikic, Mia (2009): *ASEAN and Trade Integration*, UN ESCAP Trade and Investment Division Staff Working Paper 1/09, Bangkok. pp13-14

¹⁴ ASEAN (2011): *ASEAN Integration in Trade in Services: Development, Challenges, and Way Forward*, ASEAN Secretariat Paper, presented at *ADB-PECC Conference on "Strategies to Enhance Competitiveness and Facilitate Regional Trade and Investment in Services"* Hong Kong, China, 1-3 June 2011. p7

¹⁵ *ibid.*: p9

Table 1: Milestones of ASEAN Economic Integration through Law

Date of Conclusion	Agreement
1992	ASEAN Free Trade Area (AFTA)
1995	ASEAN Framework Agreement on Trade in Services (AFAS) ASEAN Framework Agreement on Intellectual Property Cooperation
1997	ASEAN Agreement on Customs
1998	Framework Agreement on the ASEAN Investment Area (AIA) ASEAN Framework Agreement on Mutual Recognition Arrangements
2002	ASEAN Agreement on the Mutual Recognition of Conformity Assessment Procedures for Electrical and Electronic Equipment
2003	Agreement on the ASEAN Harmonized Cosmetic Regulatory Regime
2004	ASEAN Protocol on Enhanced Dispute Settlement ASEAN Framework Agreement on the Integration of Priority Sectors
2005	Agreement to Establish and Implement the ASEAN Single Window ASEAN Mutual Recognition Arrangement on Engineering Services Agreement on the ASEAN Harmonized Electrical and Electronic Equipment Regulatory Regime
2006	ASEAN Mutual Recognition Arrangement on Nursing Services
2007	ASEAN Mutual Recognition Arrangement on Architectural Services ASEAN Mutual Recognition Arrangement on Surveying Qualifications
2008	ASEAN Mutual Recognition Arrangement on Accountancy Services
2009	ASEAN Mutual Recognition Arrangement on Medical Practitioners ASEAN Sectoral Mutual Recognition Arrangement for Good Manufacturing Practice (GMP) Inspection of Manufacturers of Medicinal Products ASEAN Comprehensive Investment Agreement ASEAN Agreement on Trade in Goods (ATIGA)

Finally, at the 14th ASEAN Summit in early 2009, ASEAN leaders reconfirmed their commitment to “achieve free flow of goods in ASEAN as one of the principal means to establish a single market and production base for the deeper economic integration of the region towards the realisation of the AEC

by 2015” and signed the ASEAN Trade in Goods Agreement (ATIGA). The ATIGA consolidates all existing ASEAN economic integration initiatives related to trade in goods and legally integrates the agreements into one comprehensive framework. In addition to the chapter on tariff liberalization and rules of origin, ATIGA contains chapters on non-tariff measures, trade facilitation, customs, standards, technical regulations and conformity assessment procedures, as well as trade remedy measures.

The ATIGA includes a binding and specific obligation to progressively eliminate non-tariff barriers to intra-regional trade, to harmonize or ‘align’ standards across the region, and further develop harmonized regulatory regimes. Importantly, the agreement also establishes the institutional infrastructure and associated mandates necessary to achieve these objectives.

As such, since 1992, ASEAN has made, at least on paper, significant steps towards deeper regional economic integration beyond mere market access liberalization. The agreements listed above make for important milestones towards the achievement of the ASEAN Economic Community (AEC) by 2016.

However, ASEAN’s regional integration through legal agreements has important gaps in terms of policy area coverage and depth of commitments. First and foremost, ASEAN has never established a common external tariff and is unlikely to do so in the near future. Competition policy, moreover, is one of several prominent carve-outs in terms of behind-the-border policies. The ASEAN Economic Community Blueprint calls, in aspirational language for the enactment of competition laws in all ASEAN member states by 2015, which can be deemed, as a matter of appropriate sequencing, a prerequisite for cooperation on and integration of competition policies at the regional level. So far, however, only five member states have enacted competition laws - notably Indonesia, Singapore, Thailand, Vietnam, and Malaysia. Similarly, the development of regional rules and cooperation on government procurement has not taken place at all. Yet another area, in which regional integration through substantive legal disciplines has been largely absent is intellectual property rights, where member states have merely declared their intention to foster cooperation between national IPR offices and build institutional capacity.

III. ASEAN’s Preferential Trade Agreements in Context of East Asian Growth in Regionalism

Following the pioneering integration efforts by ASEAN, Asia (for our purposes narrowly defined as ASEAN member states plus China, India, Japan, and Korea) experienced a massive growth in negotiations and the conclusion of PTAs, which is unprecedented in the history of global regionalism. In the period of 2000 to November 2012, the number of PTAs that include at least one Asian economy as a signatory increased from only 3 to 58 agreements,¹⁶ with a plethora of PTAs either proposed or currently under negotiation.¹⁷

Additional to China (with 12 PTAs), India (13 PTAs), Japan (13 PTAs), and Korea (10 PTAs), ASEAN member states have played an important role in this process. ASEAN member states have concluded, respectively, 17 (Singapore), 12 (Thailand), 11 (Malaysia), 8 (Brunei Darussalam and Laos), 7 (Indonesia, the Philippines, and Viet Nam), and 6 (Cambodia and Myanmar) PTAs up until today.¹⁸ For each ASEAN member, these figures include AFTA/ATIGA and the 5 ASEAN+1 FTAs that ASEAN has concluded with external partners as a common negotiator. The numbers indicate that some ASEAN members have been highly active in pursuing their own economic integration objectives

¹⁶ This figure avoids double-counting the individual country FTAs that are listed further below.

¹⁷ Asian Development Bank: FTA database. Accessible at: <http://aric.adb.org/ftatrends.php>

¹⁸ *ibid.*

(such as Singapore, Thailand, and Malaysia), while others have entirely relied on ASEAN's capacity as a common negotiator (Cambodia and Myanmar). ASEAN+1 PTAs, i.e. PTAs that ASEAN member states have collectively negotiated as plurilateral agreements with non-ASEAN partner countries, have been concluded with the People's Republic of China (entry into force: January 2005), the Republic of Korea (June 2010), Japan (December 2008), India (January 2010), and a joint agreement with Australia and New Zealand (January 2010). All of these accords can be associated, in terms of timing of their negotiation and conclusion, with the latest global 'wave' of regionalism.¹⁹

With these agreements, ASEAN has, on the first sight, established itself as a hub for economic agreements within the Asia-Pacific region. However, the fact that ASEAN member states have concluded, and are in the process of negotiating, a larger number of PTAs with the very same external partners individually and in parallel points at a considerable limitation of the significance of ASEAN as an external negotiator. Japan has concluded PTAs with seven ASEAN members in parallel to its negotiations with ASEAN as a bloc, which came into force between 2002 and 2009. New Zealand concluded three PTAs with individual ASEAN members (Singapore, entry into force in 2001; Thailand, 2005; Malaysia, 2010). India (Singapore, 2001; Malaysia, 2011) and Australia (Singapore, 2003; Thailand, 2005) both concluded two individual accords with ASEAN countries, with Australia currently negotiating with Malaysia and Indonesia. Korea (2006) and China (2009) both sealed a deal with Singapore, whereas Korea is now in the process of negotiating PTAs with Vietnam and Indonesia.

The recently announced pause of EU-ASEAN PTA negotiations and the subsequent EU decision to negotiate PTAs with ASEAN member states individually further justifies skepticism with respect to ASEAN's potency as a collective PTA negotiator. We discuss the potential reasons for the conclusion of parallel agreements between individual ASEAN member states and ASEAN+1 partners in the following section. In a nutshell, we consider that those individual ASEAN member states that are more advanced in terms of economic and institutional development may feel comfortable with negotiating more comprehensive and deeper commitments with non-ASEAN partner countries, whereas others may lack the institutional and economic preparedness to conclude agreements that would commit them to complex and demanding behind-the-border reforms that have not yet been achieved domestically or regionally in the context of ASEAN economic integration. We test this hypothesis in section V by comparing the substantive coverage and depth of commitments of ASEAN+1 PTAs with a sample of six PTAs that individual ASEAN member states have concluded with Japan. In the now following section, we examine factors that may determine the coverage and depth of ASEAN+1 PTAs.

¹⁹ WTO (2011): op. cit. p53

IV. Factors explaining Substantive Coverage and Depth of *de jure* Economic Integration in ASEAN's PTAs

In this section, we examine several factors that may explain the substantive coverage and depth of *de jure* integration in ASEAN+1 agreements. We first discuss the concepts of 'heterogeneity' and 'proximity' of contracting parties as potential explanatory factors. Subsequently, we turn to an examination of the causal relationship between *de jure* and *de facto* economic integration in East Asia.

1. *Heterogeneity and Proximity*

Kelley (2010) argues, in regard of the process of East Asian economic integration, that the realm of commonly assumed obligations among multiple parties is determined by their heterogeneity in terms of policy preferences, which are, in turn, a function of variables such as regime type, commonly shared beliefs, and degree of economic development and capacity.²⁰ Hamanaka (2010) purports that, in a scenario of multiple highly heterogeneous potential parties to an agreement, negotiators face a trade-off between an inclusive membership approach, on the one hand, and more comprehensive and deeper commitments, on the other.²¹

In the scholarly literature on economic integration, Kelley's and Hamanaka's hypotheses, which advance 'heterogeneity' as a determinant of the scope and depth of common obligations, translates into the consideration of 'proximity' factors: notwithstanding the absolute potential benefits of *de jure* convergence and integration, policy-makers are likely to factor adjustment costs into their assessment of the necessary depth as well as geographic and material scope of convergence and integration. Adjustment costs tend to be low in cases of close 'proximity' between the partner countries in terms of factors such as geography, language, levels of development, legal systems, institutional compatibility, policy objectives, and regulatory preferences. Adjustment costs tend to be high for countries, on the other hand, where convergence would require the deviation from a national standard that optimally reflects domestic policy preferences and implementation capacities.²²

As a general observation, ASEAN member states are highly diverse in terms of economic and institutional development and capacity, economic structures and resource endowments, economic specialization, legal systems, regulatory quality, ease of doing business, demography, languages etc. In consideration of all of the before-mentioned variables, some authors conclude that ASEAN is likely the most diverse region in the world.²³ Grounded on the general observation of highly diverging socio-economic indicators, we find it safe to assume that ASEAN member states have highly diverging policy preferences and needs with regard to the breadth and depth of *de jure* economic integration - both intra-regionally and through plurilateral agreements with non-ASEAN countries. Furthermore, it is safe to assume that the evolving *status quo* of ASEAN *de jure* integration (the ASEAN *acquis*) mirrors the lowest common denominator, in terms of policy preferences, among a set of highly diverse ASEAN member states.

²⁰ Kelley, Judith (2010): *The Role of Membership Rules in Regional Organizations*, ADB Working Paper Series on Regional Economic Integration, No. 53, Asian Development Bank, Manila. pp5-8

²¹ Hamanaka, Shintaro (2010): *Institutional Parameters of a Region-Wide Economic Agreement in Asia: Examination of Trans-Pacific Partnership and ASEAN+X Free Trade Agreement Approaches*, ADB Working Paper Series on Regional Economic Integration, No. 67, Asian Development Bank, Manila. p10

²² Mattoo, Aaditya & Sauv , Pierre (2011): *The Preferential Liberalization of Services Trade*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): 'Preferential Trade Agreement Policies for Development – A Handbook', World Bank, Washington D.C. p240

²³ For a general presentation of the socioeconomic diversity of ASEAN member states, see: Hill, Hal & Menon, Jayant (2010): op. cit. p1, 9-13

For our purposes, the ASEAN *acquis* thereby becomes an important substantive benchmark for the assessment of ASEAN+1 PTAs. In accordance with the consideration of heterogeneity and proximity as factors determining substantive coverage and depth of integration, our working hypothesis is that ASEAN member states, collectively, do not commit to obligations in ASEAN+1 agreements that go beyond the ASEAN *acquis*. In other words, ASEAN+1 agreements are unlikely to provide for hard legal obligations and the creation of institutions in areas where common commitments, rules, and institutions have not yet been established intra-regionally or nationally in all ASEAN member states likewise. In policy areas where common commitments, rules, and institutions are absent, the agreements are likely to mandate, at most, future cooperation and/or negotiations among ASEAN member states and the third country party, and will avoid substantive and specific hard legal disciplines that go beyond the *status quo* of ASEAN *de jure* integration.

We, furthermore, follow Gilligan (2004) in the assumption that the trade-off between heterogeneity of parties to an agreement and substantive coverage and depth of commitments is diminished, where the technical modalities of the codification of obligations allow for a differentiation of commitments among the parties and thereby allow for the incorporation of diverging policy preferences.²⁴ Differentiated legal disciplines are easy to provide for by means of liberalization schedules for tariffs and services sectors. Country specific tariff reduction and liberalization schedules can allow for differentiated treatment of ASEAN members vis-à-vis the external partner and vis-à-vis each other. What remains, however, is the ‘free-rider’ problem: parties to an agreement that would generally be willing to make stronger commitments will be hesitant to do so if these concessions benefit parties that are not willing to match this commitment level in return. The free-rider problem, in a plurilateral setting, can only be solved through variable geometry rules, which ensure that bargains between high-commitment parties exclusively benefit this narrower set of countries, rather than the entire membership.

Differentiation of commitments, in any case, is less practical with regard to substantive rules that codify general disciplines on complex border and behind-the-border policies, such as customs administration, standard setting and conformity assessment, competition policy, intellectual property rights, and investment regimes. In these areas, where the agreements can only provide for disciplines that apply to all parties equally, we expect the lowest common denominator of policy preferences (as a function of ASEAN members’ degree of heterogeneity / proximity) to determine the coverage and the depth of the agreements.

In contrast, coverage and depth of PTAs, which advanced ASEAN member states negotiate individually with the very same developed non-ASEAN partners (Japan, Korea, Australia, and New Zealand) in parallel to ASEAN+1 agreements, are likely to exceed the coverage and depth of ASEAN+1 accords. Governments of the more advanced ASEAN members - such as Singapore, Brunei, Malaysia, and Thailand, and even Viet Nam, Indonesia, and the Philippines – may come to the conclusion that their domestic regulatory, institutional, and economic *status quo* allows them to individually commit to complex customs or behind-the-border-reforms and to advance their economic interest by establishing bilateral rules that tackle more complex trade and investment issues beyond traditional border barriers in a tailor-made fashion. Moreover, bilateral agreements with external partners can secure the exclusivity of concessions for the bargaining parties, hence increase the value of concessions for the benefiting party, and thereby lead to more valuable bargains and deeper commitments than in a plurilateral negotiation setting.

We therefore expect that the PTAs that the more advanced ASEAN member states individually negotiate with developed ASEAN+1 external partners display more comprehensiveness in terms of issue area coverage, more depth in terms of concessions and hard legal disciplines, and more

²⁴ Gilligan, Michael (2004): *Is There a Broader-Deeper Trade Off in International Multilateral Agreements?*, International Organization 58 (3) pp459-484

institutionalization than ASEAN+1 PTAs. Examples of such 'parallel' agreements are Japan's separate PTAs with the seven more advanced ASEAN member states, Korea's ongoing negotiations of individual agreements with Indonesia and Viet Nam in addition to the already sealed Korea-Singapore PTA, or Australia's negotiations with Indonesia and Malaysia on top of its existing agreements with Singapore and Thailand.

In the following subsection, we discuss the explanatory value of *de facto* economic interdependence between contracting parties for the depth and coverage of PTAs as means of *de jure* economic integration.

2. The Relationship between *de facto* and *de jure* Economic Integration

The conclusion of PTAs between two or more countries can be explained by means of two diverging rationales, which, in fact, place *de facto* and *de jure* economic integration at the opposite ends of their respective causality chains.

According to the first hypothesis, countries conclude PTAs in a context of low levels of trade interdependence with a view to unleashing the trade potential between their economies. This typically starts with the dismantling of traditional market access barriers – tariffs and import quotas.

The second and equally plausible hypothesis holds that high levels of trade interdependence render the conclusion of PTAs necessary as policy-makers seek to tackle increasingly complex (non-tariff) trade barriers, which only come to the forefront as a result of high levels of interdependence. In other words, *de jure* integration may be a consequence of either underdeveloped or advanced *de facto* economic integration.²⁵ Either cause, however, results in very different types of institutional design in terms of issue area coverage and depth, as we will discuss below.

The prevalent approach explaining the large amounts of PTAs that were concluded in East and Southeast Asia in the past 15 years and the mass of agreements that are currently under negotiation portrays this current wave of *de jure* regionalism as 'market-driven', i.e. as a consequence of high levels of existing trade interdependence within the region.

This narrative of market driven Asian *de jure* regionalism starts with the exorbitant growth in Japanese wages in the 1980s and 1990s, which resulted in the loss of Japan's comparative advantage in many manufacturing sectors. Looking for more cost-efficient locations for production, Japanese automobile and electric machinery producing multi-national companies (MNC) offshored labor intensive stages of manufacturing (including assembly) to nearby Asian economies, where they found abundance in low wage labor, while Japanese firms retained the production of high-technology parts and components in Japan.²⁶

What followed was a long period of market driven intra-regional trade and foreign direct investment in neighboring ASEAN economies and the Republic of Korea, which, through learning and innovation at the firm level, increasingly outward oriented national trade and development strategies that replaced prior import substitution policies, and enhanced investment in human capital and infrastructure, became more and more competitive in supplying MNCs or producing high-technology parts and components. Singapore, Korea, Hong Kong China, and Taiwan subsequently experienced rising labor costs themselves and offshored labor-intensive production to more cost efficient production locations within the ASEAN region.

²⁵ Hamanaka, Shintaro (2012): *Is Trade in Asia Really Integrating?*, ADB Working Paper Series on Regional Economic Integration, No. 91, Asian Development Bank, Manila. p13

²⁶ Kawai, Masahiro & Wignaraja, Ganeshan (2010): *Asian FTAs: Trends, Prospects, and Challenges*, ADB Economics Working Paper Series, No. 226, Asian Development Bank, Manila. p3

These developments were manifested in the establishment of sophisticated intraregional production sharing networks and intra-industry trade in parts and components, which created what is now called the 'Factory Asia'.²⁷ The growth and development of Asian regional production networks was further facilitated by falling transport costs as well as innovations in information technology.²⁸ China's increasing openness, moreover, added another 500 million low-wage and low-productivity workforce to the Factory Asia, which further eroded the comparative advantage of 'headquarter economies' in labor intensive production and made offshoring solutions even more efficient.²⁹

Nominal trade figures appear to mirror the establishment of ASEAN as an integrated production network. Between the establishment of ASEAN in 1967 and the entry into force of the AFTA in 1992 - a pure tariff reduction agreement - total merchandise trade among ASEAN's five original members expanded from US\$ 8.9 billion to US\$ 357 billion. In the same period, total exports of parts and components rose from 2% to 17%, whereas intraregional trade in parts and components increased from 2% to 18%.³⁰

Proponents of the 'market-driven' explanatory approach to *de jure* integration among ASEAN countries and the wider East Asian region argue that efficient and sustainable intraregional production sharing networks required low trade costs as well as predictable economic policies. One element of intraregional trade costs had been addressed through falling tariff barriers as the result of AFTA and multilateral tariff liberalization within the GATT framework. However, as the 2011 World Trade Report notes, differences in legal systems and economic institutions among countries in areas such as customs administration, product and services standards, intellectual property rights protection, investment protection, competition policy regimes, as well as access to dispute settlement mechanisms increased transaction costs and uncertainties for traders and investors. Hence, "to keep the momentum of production networks going, countries increasingly needed to turn their attention to policies beyond tariff reduction."³¹ Supporting empirical evidence of the effects of ASEAN's deep and comprehensive *de jure* integration is drawn from studies which suggest that ASEAN's ongoing efforts in the areas of customs reform and behind-the-border measures have resulted in a significant decrease of costs arising in the course of intra and interregional trade (stemming from non-discriminatory intra-ASEAN reforms in the latter case).³²

Many scholars, furthermore, generalize the 'market-driven' rationale for the entire East Asian region. Kawai and Wignaraja (2009), among others, consider "the spread of FTAs in East Asia" to be "first and foremost" the result of "deepening market driven economic integration through trade", which required "further liberalization of trade and FDI as well as harmonization of policies, rules, and standards governing trade and FDI."³³ In summary, the by far most prevalent explanatory approach presents ASEAN's and East Asia's history of regional economic integration as an example *par excellence* for market-driven 'deep and comprehensive' integration agreements among highly interdependent trading partners.

²⁷ Baldwin, Richard (2006): *Multilateralizing Regionalism: Spaghetti Bowls as Building Blocks on the Path to Global Free Trade*, World Economy 29(11). pp1451–518.

²⁸ Baldwin, Richard (2010): *Economics*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): 'Preferential Trade Agreement Policies for Development – A Handbook', World Bank, Washington D.C. p85

²⁹ *ibid.*

³⁰ WTO (2011): *op. cit.* p147

³¹ *ibid.*: pp 147-48

³² See: Pomfret, Richard & Sourdin, Patricia (2009): *Have Asian trade agreements reduced trade costs?*, Journal of Asian Economics 20(3): 255-268. Pomfret, Richard & Sourdin, Patricia (2010): *Trade facilitation and the measurement of trade costs*, Journal of International Commerce, Economics and Policy 1(1) pp145-163.

³³ Kawai, Masahiro & Wignaraja, Ganeshan (2009): *The Asian "Noodle Bowl" – Is it serious for Business?* ADBI Working Paper Series, No. 136, Asian Development Bank Institute, Tokyo. p5

This finding is surprising to the extent that contemporary East Asian PTAs encompass very different combinations of signatories, with highly diverse economic and institutional capacities, economic structures, trading relationships among each other, regulatory preferences etc. In this context, one would expect, in fact, that the institutional design of contemporary East Asian PTAs varies depending on such structural factors. We will come back to this point further below.

Other factors that are commonly referred to in the above cited literature, with a view to explaining the sheer explosion of PTA numbers and negotiations in the region during the past 15 years - if, however, only subsidiary to the 'market-driven integration' rationale) - include the creation of a new sense of East Asian identity and collectivity following the 1997 Asian economic crisis; 'competitive' regional integration in response to deepening economic integration in North America (NAFTA) and Europe (EU Common Market); as well as, most recently, the breakdown of Doha Round world trade negotiations.

Ravenhill (2010) is among the few to contest the 'market-driven' rationale for East Asian regionalism in its entirety.³⁴ The main challenge that Ravenhill advances targets the very foundation of the 'market-driven' *de jure* integration narrative, notably the contention that high levels of trade interdependence have resulted in deep and comprehensive PTAs in the region.

To support his challenge, Ravenhill points at the allegedly negligible intraregional trade share increase in East Asia - narrowly defined as ASEAN member states plus China, Japan, and Korea - from 37.6% in 1995 to 38.3% in 2006. Secondly, he presents trade share data, which suggests that the share of China's exports to the region has declined sharply from 53% in 1996 to 36% in 2007.

Third, Ravenhill deems declining intraregional trade intensity³⁵ in the entire Asian region in the period from 1955 to 1995, at which point the index stabilizes, as hard evidence contradicting the prevalent narrative of increasing Asian trade interdependence.³⁶ Intraregional trade intensity is a measure that adjusts for the economic size bias of raw trade share data and is therefore a much more reliable indicator for trade interdependence.

What Ravenhill omits, however, is that ASEAN's intraregional trade intensity index has, between 1980 and 2009, always been far higher than in any other major trading region, such as the EU-15 or NAFTA. During the same period, ASEAN+3 (China, Japan, Korea) intraregional trade intensity consistently ranged in between of EU-15 and NAFTA.³⁷ Ravenhill also dispenses with a deeper analysis of the fluctuations of Asia's and ASEAN's intraregional trade intensity during the past thirty years and does not zoom in on the intensity of trade among individual trading partners (e.g. ASEAN-Japan, ASEAN-China, ASEAN-Korea etc.). He merely states that 'Asia's' intraregional trade intensity was higher in 1955 than in 1995 – an observation that is of little value for any argument.

Furthermore, the author purports - on the basis of the limited amounts of available empirical evidence³⁸ - that utilization rates of AFTA as well as of several ASEAN+1 PTA plurilateral agreements have been low, notably due to negligible preferential margins provided by these agreements. Ravenhill infers an indifference of businesses with regard to the allegedly negligible benefits of the agreements.³⁹ As already stated in section II of this paper, 90% of preferences under

³⁴ Ravenhill, John (2010): *The 'new East Asian regionalism': A political domino effect*, Review of International Political Economy, pp1-31

³⁵ The intraregional trade intensity index is the ratio of intra-regional trade share to the share of world trade with the region, calculated by using exports data. An index of more than one indicates that trade flow within the region is larger than expected given the importance of the region in world trade.

³⁶ Ravenhill (2010): op.cit. p5

³⁷ Hamanaka (2012): op. cit. p6

³⁸ ASEAN's customs authorities are notorious for publishing little data on preference utilization.

³⁹ Ravenhill (2010): op. cit. p22

AFTA have progressively been multilateralized by ASEAN member states over the years. In this way, ASEAN's plurilateral tariff liberalization program has significantly contributed to opening the region to global trade in a faster fashion than would have been achieved through GATT and WTO negotiations. The multilateralization of AFTA tariff reductions explains the fact that utilization rates of AFTA preferences have fallen dramatically over the years. In this context, however, the reported utilization of AFTA preferences for 30.9% (Thailand), 19.1% (Malaysia), and 14% (Philippines) of intraregional exports in 2005 indicate that businesses are in fact all but indifferent to the remaining 10% non-multilateralized AFTA preferences and the remaining difference to ASEAN countries' applied MFN tariff rates.

It is noteworthy in this context that it is common practice among trading nations around the globe to shelter sensitive sectors through tariff peaks, which are hidden behind a very narrow range of tariff lines. 10% of tariff lines, beyond doubt, can provide for very significant policy space for the protection of the most sensitive domestic industries from non-ASEAN exports. Some commentators indicate that ASEAN countries have indeed used this space to accommodate some of their most vested domestic sectoral interests.⁴⁰

Ravenhill's argument culminates in the allegation that the institutional design of PTAs in the region consistently omits the elements necessary to address 'deep integration' issues, such as rules on intellectual property rights, investment, competition policy, and government procurement, which is, in turn, presented as a logical consequence of shallow regional *de facto* economic integration.⁴¹ Ravenhill concludes that, in absence of business interests, geostrategic and diplomatic considerations of political elites were the driving forces behind the recent wave of PTA negotiations in East Asia, with China causing a 'political domino effect' in the region by proposing negotiations with ASEAN in 2001. Competing political interests as well as diverging visions of the region, rather than deepening trade integration, had encouraged other non-ASEAN countries to match China's initiative swiftly in order to prevent their exclusion from a new era of East Asian economic diplomacy.⁴² If we follow Ravenhill's logic, this political domino effect then resulted in the negotiation of about two dozens plurilateral and bilateral East Asian PTAs – on purely political grounds.

But regional negotiation activity was, according to Ravenhill's theory, not only *not* driven by business interests. He goes further by suggesting that – because "institutional design matters" – East Asian governments deliberately opted for shallow PTAs, with ASEAN+1 PTAs with China and India being the most notorious in terms of lack of WTO-plus and WTO-extra coverage as well as depth of commitments. Even ASEAN+1 accords with developed economies such as Korea and Japan had failed, despite their broader coverage, to create deep substantive commitments. We shall address this contention in section V below. At this point, it suffices to make two comments.

First, Ravenhill's PTA sample does not include any of the intraregional accords that ASEAN member states have concluded in parallel to ASEAN+1 agreements. In other words, his conclusions, which he applies to the entire region and all intraregional PTAs, are based on incomplete evidence.

Secondly, Ravenhill seems to employ a somewhat static concept of preferential trade agreements. This concept, which over-emphasizes the importance of hard legal disciplines, precludes the consideration of both the point of departure of bilateral or plurilateral commercial and diplomatic relations as well as the fact that PTAs frequently serve as cooperation and negotiation platforms, i.e. as a starting point for the sequential and gradual development of broader and deeper commitments in the future. Exemplary agreements of this kind are, for instance, EU Association Agreements with Mediterranean countries, which have significantly expanded and deepened over time to address evolving trade issues. Such

⁴⁰ Hill & Menon (2010): op. cit. p7

⁴¹ Ravenhill (2010): op. cit. p16

⁴² *ibid.* p23

arrangements, which can be characterized by a hard legal core surrounded by a larger realm of soft law in their early stages, are most plausible when the signatories include one or several developing countries, which would be overburdened with the implementation of a wide range of hard legal and specific substantive obligations that require complex border and behind the border reforms. What matters most for such agreements, initially, is the establishment of an effective bilateral or plurilateral institutional infrastructure and procedural rules, which can be employed for the design of joint action plans, capacity building programs and associated resource dedication, the prioritization of further rule development, and the informal settlement of disputes.⁴³

This type of PTA, to be sure, is not to be confused with agreements that are negotiated for a set of mature and advanced trading relationships between two or more developed trading partners with strong economic and institutional capacities. The latter type of commercial relationships indeed warrants the negotiation of comprehensive and deep hard legal commitments to address the more complex trade issues that mature trade relations bring to the fore.

Returning to Ravenhill's narrative of East Asian regionalism, governments allegedly sought to limit both positive and negative effects that these agreements could exert domestically by choosing a shallow design of ASEAN+1 PTAs, and thereby reduced the potential of domestic political consequences for the governing elite.⁴⁴ We submit, at this point, that, if policy makers were in fact serious about avoiding economic impact or relevance for businesses, they appear to have done a lousy job. Looking at the telling example of the two largest countries in the region, we observe that the implementation of the ASEAN-China PTA has resulted in widespread and vigorous opposition from the Indonesian private sector and complementary mass demonstrations across the country in 2009, which aimed at a renegotiation of the agreement or a delay of the phase-in of tariff reductions. At the same time, in light of the fact that the Indonesian economy as a whole was expected to benefit from the agreement in a significant manner, domestic trade observers and experts advocated for retaining the implementation schedule as it was negotiated. However, the domestic pressures applied by no less than 14 industrial sector representatives and the general public led to major quarrels at the highest domestic political level and forced the Indonesian government to demand a longer implementation period for the agreement at an intergovernmental summit in Yogyakarta, though without success.⁴⁵ In addition to this anecdotal, though insightful, evidence, several econometric studies have demonstrated the potential welfare benefits that ASEAN+1 PTAs can result in, as well as the economic costs that to those who are excluded from these agreements.⁴⁶

In summary, we have presented two sharply diverging explanatory approaches for the increase in negotiations and the conclusion of East Asian PTAs and their alleged institutional design. The first approach contends that high levels of *de facto* economic integration have rendered necessary and resulted in the negotiation and conclusion of multiple deep and comprehensive PTAs across the region, notwithstanding other subsidiary but nonetheless important factors. The second approach has launched a full-on attack on the prevalent 'market-driven' *de jure* integration narrative and, instead, explains contemporary Asian regionalism by reference to competing geopolitical and strategic

⁴³ For a discussion of the institutional design requirements for effective PTA implementation in developing countries, see: [forthcoming] Chauffour, Jean-Pierre & Kleimann, David (2013): *The Challenge of Implementing Preferential Trade Agreements in Developing Countries – Lessons for Rule Design*. World Bank, Washington D.C.

⁴⁴ *ibid.*: p24

⁴⁵ For a comprehensive presentation of this telling episode, see: Chandra, Alexander & Lontoh, Lucky (2011): *Indonesia – China Trade Relations: The deepening of economic integration amid uncertainty?* Trade Knowledge Network (TKN), International Institute for Sustainable Development (IISD). pp6-11

⁴⁶ See, for instance: Estrada, Gemma et. Al (2011): *ASEAN's Free Trade Agreements with the People's Republic of China, Japan, and the Republic of Korea: A Qualitative and Quantitative Analysis*, ADB Working Paper Series on Regional Economic Integration, No. 75, Asian Development Bank, Manila. p19

considerations of the governments involved, which resulted in narrow and shallow PTAs with little relevance for private sector actors. Both approaches display a high level of generalization, abstraction, as well as a strong reliance on one main source of causality, i.e. either market forces or geopolitical considerations of governing elites.

In our view, both approaches suffer, despite a core of plausible reasoning, from both a rather selective presentation of empirical evidence as well as a monolithic orientation towards the explanation of a highly complex and multi-faceted phenomenon - notably 'East Asian regionalism'. In context of a set of highly diverse nation states, in terms of their 'proximity' attributes as outlined above; distinct levels of economic interdependence between different pairs or groups of economies in the region; as well as countries' different positions on the geopolitical chessboard, we find it hardly convincing that only one factor can sufficiently explain a wide range of in fact very different institutional phenomena.⁴⁷

Instead, we advocate for both a more nuanced and holistic approach, which considers a variety of explanatory variables and looks at each and every trading relationship, *de jure* and *de facto*, individually, rather than seeking to explain 'East Asian regionalism' as a whole by reference to a single factor in a dogmatic fashion. It appears to be rather implausible that larger numbers of policy makers, representing highly diverse nation states and economies with highly diverse economic relationships among each other, advance decisions on negotiation proposals as well as negotiation positions on the design of a prospective agreement solely on the basis of one determining factor – which is, on top of all, assumed to be invariant across different social, economic, and political contexts.

To be sure, this is not to say that geopolitical considerations or market forces did not play a major role in the decision-making process of some governments to propose negotiations and negotiate specific PTA contents, just as much as it would be absurd to deny that East Asian regionalism has been partially inspired by North American and European economic integration, the experience of the 1997 Southeast Asian crisis, and the breakdown of Doha negotiations. Similarly, it appears unreasonable to assume that the degree of proximity or heterogeneity among different sets of countries lacks a bearing on the design of PTAs, which, in turn, were negotiated irrespective of countries' economic and institutional capacities.

What is striking, however, is the fact that proponents of either approach consistently overemphasize the explanatory value of their respective theory and the empirical evidence they present, which then allows them to explain all PTAs negotiated within the region across the board. This notion particularly applies to their reference of trade interdependence as an either critical or negligible variable. A more nuanced observation, as presented below, reveals that the degree of trade interdependence between various configurations of East Asian economies at various points in time, and the respective institutional design of PTAs associated with these country configurations, in fact differ considerably.

We now turn to an examination of trade interdependence between ASEAN and its member states, on the one hand, and its external PTA partners, on the other. Subsequently, in section V, we examine the institutional design of ASEAN+1 PTAs and then compare these agreements with six PTAs that ASEAN member states' have concluded with Japan individually in parallel. In our analysis, we are guided by the question, whether high levels of trade interdependence in fact result in deeper and broader PTAs, and vice versa.

⁴⁷ For a comprehensive discussion on the need to explain the conclusion and content of contemporary PTAs by means of a 'multi-motive' approach, see: [forthcoming] Messerlin, Patrick A. (2013): *The Domestic Political Economy of Preferential Trade Agreements*, in Kleimann, David (ed): 'Global Europe? Aspects of Contemporary EU Preferential Trade Agreements', EUI Working Paper, RSCAS 2013/[xx], Florence, Italy.

3. *The Intensity of ASEAN's Trade with ASEAN+1 Partners*

In the past 15 years, ASEAN's internal trade, compared to its trade with the rest of the world, has been considerably lower than the intraregional trade shares of NAFTA or the EU-15. This, however, is owed to the fact that ASEAN states are comparatively small trading nations.

ASEAN's intraregional trade shares increased from the 1980ies on (from 17% in 1986 to 24% in 2009), which is when Japanese multinational companies started to outsource labor intensive production stages to ASEAN member states and established production networks in the region. Trade share values of ASEAN + Japan, if defined as a region, followed the very same trend, with the only difference that ASEAN + Japan intraregional trade shares exceeded the value of ASEAN intraregional trade shares at all times by between one and seven percentage points, indicating the central Japanese position within the highly integrated production networks that developed in the region.⁴⁸

ASEAN's intraregional trade intensity⁴⁹, at values of between 5.0 and 3.0, has always exceeded respective values of NAFTA (between 1.9 and 2.7) and the EU-15 (between 1.2 and 1.8) during the same period. ASEAN's intensity scores, however, sharply declined at around 1985, from 5.0 to 3.0. The index only stabilized in 1995, which is when another upward trend commenced that left the region with a score of roughly 4.0 in 2008.⁵⁰

In context of decreasing trade intensity in ASEAN in the second half of the 1980ies, the conclusion of the 1992 tariff-only (i.e. 'shallow') AFTA is highly plausible, as tariff elimination is the first and easiest measure to be employed in order to stop a trend of declining intraregional trade, which was in fact successfully reverted by the year 1998. ASEAN's successive behind-the-border economic integration initiatives can be explained by both increasing trade interdependence and the emergence of more complex 'second generation' trade barriers as tariffs were being dismantled and production networks were established across the region.

Intraregional trade intensity of the region defined as ASEAN + China, however, has continuously declined over the past thirty years (from 3.1 in 1980 to 1.4 in 2009), starting at considerably lower values than ASEAN, but higher values than ASEAN + Japan. ASEAN + Japan intraregional trade intensity surpassed ASEAN + China scores in 1992 already. Decreasing trade interdependence between ASEAN and China can be explained by China's emergence as a global rather than a regional trader, whereas increasing trade interdependence between ASEAN and Japan (from 1.5 in 1986 to 2.4 in 2009) follows the production network rationale.⁵¹ Again, the attempt to revert the trend of decreasing regional trade interdependence can provide a convincing economic explanation for the conclusion of a 'shallow' ASEAN-China trade accord (entry into force in 2005) that focuses on the removal of traditional market access barriers rather than second generation trade barriers. If defined as a region, ASEAN + India intraregional intensity values are reported to reside at levels similar to those of ASEAN + China, with the only difference that a 'shallow' market access agreement between

⁴⁸ Hamanaka (2012): op. cit. pp6-7

⁴⁹ Our sources computed intraregional trade intensity as:

$$\frac{[X_{ii} / ((X_{iw} + X_{wi}) / 2)]}{[(X_{iw} + X_{wi}) / 2] / X_{ww}}$$

where X_{ii} is exports of region i to region i ; X_{iw} is exports of region i to the world, X_{wi} is exports of world to region i , and X_{ww} is total world exports. It determines whether trade within the region is greater or smaller than should be expected on the basis of the region's importance in world trade. An index of more than one indicates that the trade flow within the region is larger than expected given the importance of the region in world trade.

⁵⁰ Hamanaka (2012): op. cit. pp6-7

⁵¹ Hamanaka (2012): op. cit. pp6-7

ASEAN and India (as concluded in 2010) would aim at unleashing unearthed trade potentials rather than reverting a declining trend.⁵²

The case is very different for the trading relationship between ASEAN and Japan, which, if defined as a region, approximates (with a value of roughly 2.4 in 2009) the intraregional trade intensity values of NAFTA (2.7 in 2009), and exceeds the value of the EU-15 in the same year (roughly 1.8).⁵³ Generally, trade interdependence at this level provides for a convincing rationale for *de jure* integration that aims at disciplining more sophisticated border and behind-the-border measures, in order to decrease transaction costs along the regional supply chain network.

If we both broaden and refine our approach by looking at ‘trade intensity’⁵⁴ data (which is computed on the basis of a different formula than ‘intraregional trade intensity’) for all combinations of ASEAN+1 external partners with ASEAN as a whole and with individual ASEAN member states, we can observe several interesting patterns. Tables 2 to 7 below present respective trade intensity scores for the period between 1990 and 2008.

First, Japan consistently scores high trade intensity values with ASEAN in general, and for its trade relationships with the seven more advanced ASEAN member states in particular, with a slightly below-average score for its trade relationship with Singapore. Table 2 also displays very low scores for Japan’s relationship with the poorest countries in the region, notably Cambodia, Laos, Myanmar. Interestingly, Japan has negotiated and concluded parallel and separate PTAs with the seven ASEAN countries that it trades intensively with, all of which came into force between 2006 and 2009, with the exception of Japan’s FTA with Singapore (2002).

Cambodia, Laos, and Myanmar, generally, score very low on trade intensity with almost all non-ASEAN external partners. There are a few exceptions (notably China-Myanmar, India-Myanmar, China-Laos, and China-Cambodia), which can be explained by the strong reliance of these miniscule economies on trade with the geographically proximate economic giants, China and India. The tiny oil sultanate Brunei Darussalam scores extraordinarily high on trade intensity with Australia, Japan, Korea, and New Zealand, which are all among Brunei’s top six export destinations in 2010 and among the top ten of Brunei’s overall trade partners.

⁵² *ibid.* p15

⁵³ *ibid.* p6-7

⁵⁴ The trade intensity index is calculated in a different manner than the intraregional trade intensity index, which we have used in our discussion above. Our sources computed the index as:

$$TII_{ij} = \frac{t_{ij} / T_{iw}}{t_{wj} / T_{ww}}$$

where t_{ij} is the dollar value of total trade of country/region i with country/region j , T_{iw} is the dollar value of the total trade of country/region i with the world, t_{wj} is the dollar value of world trade with country/region j , and T_{ww} is the dollar value of world trade. An index of more than one indicates that trade flow between countries/regions is larger than expected given their importance in world trade.

Table 2: Japan – ASEAN Trade Intensity

Indicator	Partner	1990	1992	1995	1998	2000	2003	2005	2008
Trade Intensity Index	Indonesia (2008)	5.24	4.21	3.77	3.30	3.63	3.11	3.08	3.16
Trade Intensity Index	Lao PDR	1.58	1.49	0.82	0.69	0.53	0.35	0.30	0.43
Trade Intensity Index	Cambodia	1.10	3.59	0.61	0.45	0.45	0.51	0.50	0.53
Trade Intensity Index	ASEAN (2008)	2.90	2.65	2.56	2.36	2.41	2.38	2.29	2.33
Trade Intensity Index	Brunei (2008)	4.43	4.20	3.41	4.33	5.03	5.67	5.95	7.32
Trade Intensity Index	Malaysia (2006)	2.42	2.45	2.21	2.04	2.12	1.94	1.82	2.02
Trade Intensity Index	Thailand (2007)	3.26	3.11	3.25	2.86	2.76	3.21	3.20	3.01
Trade Intensity Index	Viet Nam (2009)	4.04	2.79	2.15	2.40	2.45	2.26	2.26	2.54
Trade Intensity Index	Singapore (2002)	1.91	1.73	1.93	1.77	1.79	1.58	1.45	1.45
Trade Intensity Index	Myanmar	1.19	1.19	1.00	1.41	1.01	0.83	0.80	0.83
Trade Intensity Index	Philippines (2008)	2.69	2.81	2.83	2.84	2.81	2.99	2.76	2.61

Source: IMF Directions of Trade Statistics / ADB Regional Integration Centre

Note: Blue shades indicate the existing PTA with ASEAN; green shades indicate existing separate PTAs with individual ASEAN member states; red shades indicate ongoing PTA negotiations with an individual ASEAN member state; parenthesized dates indicate the year of the coming into force of the agreement.

Table 3: Australia – ASEAN Trade Intensity

Indicator	Partner	1990	1992	1995	1998	2000	2003	2005	2008
Trade Intensity Index	Indonesia	2.80	3.45	2.96	4.51	3.26	3.25	2.81	2.29
Trade Intensity Index	Lao PDR	0.48	3.51	1.97	0.22	0.42	0.66	1.32	0.31
Trade Intensity Index	Cambodia	0.96	0.63	0.77	0.34	0.21	0.27	0.54	0.34
Trade Intensity Index	ASEAN (2010)	2.05	2.30	1.89	2.15	2.25	2.30	2.59	2.76
Trade Intensity Index	Brunei Darussalam	0.98	1.56	1.01	0.70	3.48	6.61	7.02	6.91
Trade Intensity Index	Malaysia	1.81	1.69	1.58	1.86	1.88	1.89	2.21	2.39
Trade Intensity Index	Thailand (2005)	1.34	1.69	1.53	1.71	2.06	2.43	2.83	3.26
Trade Intensity Index	Viet Nam	0.98	2.96	2.10	3.25	5.42	3.92	4.40	3.70
Trade Intensity Index	Singapore (2003)	2.40	2.65	2.02	1.93	2.34	2.19	2.81	3.28
Trade Intensity Index	Myanmar	1.60	1.41	0.29	0.55	0.44	0.31	0.55	0.30
Trade Intensity Index	Philippines	1.71	1.70	1.66	1.26	1.20	1.15	0.97	1.07

Source: IMF Directions of Trade Statistics / ADB Regional Integration Centre

Note: Blue shades indicate the existing PTA with ASEAN; green shades indicate existing separate PTAs with individual ASEAN member states; red shades indicate ongoing PTA negotiations with an individual ASEAN member state; parenthesized dates indicate the year of the coming into force of the agreement.

Table 4: New Zealand – ASEAN Trade Intensity

Indicator	Partner	1990	1992	1995	1998	2000	2003	2005	2008
Trade Intensity Index	Indonesia	1.43	1.32	1.63	1.31	1.63	1.48	1.83	2.67
Trade Intensity Index	Lao PDR	0.09	0.00	0.13	0.01	0.90	0.18	0.06	0.09
Trade Intensity Index	Cambodia	1.05	0.16	0.27	0.13	0.20	0.07	0.11	0.17
Trade Intensity Index	ASEAN (2010)	1.15	1.26	1.08	1.26	1.26	1.40	1.61	2.34
Trade Intensity Index	Brunei Darussalam	0.06	0.38	0.71	0.35	0.14	8.29	4.41	12.91
Trade Intensity Index	Malaysia (2010)	1.52	1.59	1.21	1.57	1.49	1.47	1.55	2.64
Trade Intensity Index	Thailand (2005)	0.90	1.09	0.88	1.27	1.29	1.49	1.75	2.19
Trade Intensity Index	Viet Nam	0.10	N/A	1.11	1.67	1.65	1.29	1.16	1.14
Trade Intensity Index	Singapore (2001)	0.94	1.17	0.84	1.01	0.96	1.03	1.52	2.21
Trade Intensity Index	Myanmar	0.19	0.01	0.08	0.48	0.66	0.37	0.16	0.30
Trade Intensity Index	Philippines	1.53	1.60	1.31	1.18	1.08	1.63	1.67	2.18

Source: IMF Directions of Trade Statistics / ADB Regional Integration Centre

Note: Blue shades indicate the existing PTA with ASEAN; green shades indicate existing separate PTAs with individual ASEAN member states; red shades indicate ongoing PTA negotiations with an individual ASEAN member state; parenthesized dates indicate the year of the coming into force of the agreement.

Australia's story is one of a high and generally increasing trade intensity with ASEAN in general, from 1.89 in 1995 to 2.76 in 2008, which applies to six more advanced ASEAN members in particular. The Philippines are the exception, with a score far below the ASEAN average. By 2008, Australia had, in fact, a more intensive trade relationship with ASEAN member states than Japan.

Australia has already concluded parallel and separate PTAs with Singapore (2003), and Thailand (2005) and is currently negotiating with Malaysia (signed in 2012, but not yet ratified) and Indonesia. All of these trading partners score high on trade intensity with Australia. Trade intensity scores for both Singapore and Thailand have greatly increased – though from high levels and following an upward trend - since the entry into force of their accords with Australia.

New Zealand's profile very much resembles the one of Australia, whereas, for New Zealand, Viet Nam takes the place of the odd below-average-intensity trading partner instead of the Philippines in case of Australia. On average, New Zealand now trades as intensively with ASEAN members as Japan. It has concluded parallel and separate PTAs with Singapore (2001), Thailand (2005), and Malaysia (2010). All of these partners made for three of New Zealand's four most intensive trade relationships with ASEAN member states in 2008, whereas trade intensity with Singapore and Thailand has greatly increased since the coming into force of respective agreements.

Korea, in contrast, is an ambivalent case, with an average ASEAN intensity score of 1.79 in 2008. Korea has intensive trading relationships with some of the more advanced and/or larger ASEAN members (Brunei, Indonesia, Viet Nam, the Philippines, Singapore) and below average intensity levels with Malaysia and Thailand. Korea, in addition to its ASEAN+1 PTA, currently negotiates parallel and separate agreements with the two trading partners that it trades most intensively with, notably Indonesia and Vietnam, and has already concluded an accord with Singapore (2006).

Table 5: Korea – ASEAN Trade Intensity

Indicator	Partner	1990	1992	1995	1998	2000	2003	2005	2008
Trade Intensity Index	Indonesia	2.90	3.57	2.87	3.13	3.43	2.60	2.75	2.41
Trade Intensity Index	Lao PDR	N/A	N/A	N/A	0.25	0.20	0.31	0.36	1.02
Trade Intensity Index	Cambodia	N/A	N/A	N/A	1.39	1.10	0.90	0.82	0.95
Trade Intensity Index	ASEAN (2007)	1.71	2.07	1.67	1.98	1.86	1.76	1.67	1.79
Trade Intensity Index	Brunei Darussalam	3.23	3.16	2.70	4.20	3.85	3.59	4.29	4.97
Trade Intensity Index	Malaysia	1.87	1.73	1.29	1.94	1.62	1.51	1.44	1.43
Trade Intensity Index	Thailand	1.29	1.48	1.07	1.09	1.07	1.16	1.03	1.08
Trade Intensity Index	Viet Nam	N/A	3.72	3.68	3.57	2.75	2.79	2.33	2.65
Trade Intensity Index	Singapore (2006)	1.33	1.92	1.67	1.55	1.58	1.55	1.48	1.85
Trade Intensity Index	Myanmar	1.25	1.10	1.15	2.44	2.58	1.53	0.98	1.06
Trade Intensity Index	Philippines	1.63	1.75	1.65	2.62	2.14	2.10	1.84	2.06

Source: IMF Directions of Trade Statistics / ADB Regional Integration Centre

Note: Blue shades indicate the existing PTA with ASEAN; green shades indicate existing separate PTAs with individual ASEAN member states; red shades indicate ongoing PTA negotiations with an individual ASEAN member state; parenthesized dates indicate the year of the coming into force of the agreement.

Table 6: India – ASEAN Trade Intensity

Indicator	Partner	1990	1992	1995	1998	2000	2003	2005	2008
Trade Intensity Index	Indonesia	0.98	0.69	1.65	2.03	1.83	2.50	2.04	2.03
Trade Intensity Index	Lao PDR	0.36	0.02	0.06	0.15	0.73	0.09	0.25	0.15
Trade Intensity Index	Cambodia	2.23	0.57	2.65	0.47	0.36	0.44	0.29	0.30
Trade Intensity Index	ASEAN (2010)	1.36	1.34	1.18	1.44	1.24	1.56	1.46	1.61
Trade Intensity Index	Brunei Darussalam	0.01	0.03	0.14	0.11	0.08	0.09	0.40	1.97
Trade Intensity Index	Malaysia (2011)	1.86	1.70	1.09	1.86	1.35	1.42	1.10	1.71
Trade Intensity Index	Thailand	0.81	0.79	0.79	0.85	0.89	0.98	0.84	0.91
Trade Intensity Index	Viet Nam	4.22	2.20	1.10	0.93	1.08	1.07	1.01	1.03
Trade Intensity Index	Singapore (2005)	1.67	1.74	1.37	1.54	1.40	1.90	2.20	2.20
Trade Intensity Index	Myanmar	9.55	12.09	8.63	9.94	6.73	9.43	7.71	6.12
Trade Intensity Index	Philippines	0.18	0.59	0.44	0.39	0.37	0.57	0.53	0.45

Source: IMF Directions of Trade Statistics / ADB Regional Integration Centre

Note: Blue shades indicate the existing PTA with ASEAN; green shades indicate existing separate PTAs with individual ASEAN member states; red shades indicate ongoing PTA negotiations with an individual ASEAN member state; parenthesized dates indicate the year of the coming into force of the agreement.

China and India, finally, score the by far lowest average trade intensity values with ASEAN member states, 1.55 and 1.61 with ASEAN respectively in 2008, with some individual exceptions (China-Myanmar, China-Philippines, India-Indonesia, India-Brunei, India-Myanmar, India-Singapore). China's trade intensity with ASEAN stagnated during the last 20 years, while India's scores have slightly improved since 1995. China has concluded one separate and parallel PTA with Singapore. India has concluded two PTAs with above-average intensity partner countries (Singapore, 2005, and Malaysia, 2011) and currently negotiates one accord with a below-average intensity but large partner (Thailand).

Table 7: China – ASEAN Trade Intensity

Indicator	Partner	1990	1992	1995	1998	2000	2003	2005	2008
Trade Intensity Index	Indonesia	1.65	1.64	1.51	1.64	2.04	1.36	1.34	1.33
Trade Intensity Index	Lao PDR	6.00	4.02	2.10	0.95	1.17	1.84	1.13	1.35
Trade Intensity Index	Cambodia	1.95	0.67	1.14	2.46	1.76	1.15	1.18	1.18
Trade Intensity Index	ASEAN (2005)	1.49	1.11	1.15	1.33	1.35	1.56	1.57	1.55
Trade Intensity Index	Brunei Darussalam	0.18	0.15	0.22	0.07	0.40	1.02	0.51	0.20
Trade Intensity Index	Malaysia	1.21	0.84	0.75	1.00	1.09	1.64	1.60	1.64
Trade Intensity Index	Thailand	1.36	0.86	1.01	1.21	1.36	1.46	1.43	1.49
Trade Intensity Index	Viet Nam	0.06	1.29	2.38	2.00	2.37	1.84	1.78	1.77
Trade Intensity Index	Singapore (2009)	1.72	1.20	1.24	1.52	1.28	1.51	1.49	1.33
Trade Intensity Index	Myanmar	13.94	11.04	8.43	6.25	3.60	3.38	2.57	2.60
Trade Intensity Index	Philippines	0.76	0.60	0.97	1.01	0.91	1.76	2.25	2.44

Source: IMF Directions of Trade Statistics / ADB Regional Integration Centre

Note: Blue shades indicate the existing PTA with ASEAN; green shades indicate existing separate PTAs with individual ASEAN member states; red shades indicate ongoing PTA negotiations with an individual ASEAN member state; parenthesized dates indicate the year of the coming into force of the agreement.

4. *Preliminary Conclusions*

The political and economic factors that influence policy-makers' decisions to propose, negotiate, and conclude PTAs with regional partners are as numerous as the factors that determine the eventual coverage and depth of these agreements. In order to acquire a nuanced understanding of the legal content of ASEAN+1 accords, we ought to examine every respective trading relationship individually and then place them back into the context of the broader phenomenon of East Asian regionalism. As far as the scope of this paper allows us to do so, we have discussed the potential factors above and have come to the following preliminary conclusions.

The conclusion of AFTA in 1992, as one of the first PTAs in East Asia, has been partially driven by external factors such as economic integration initiatives in North America and the European Union, as well as the rise of China as a trade power and destination of large amounts of foreign direct investment (FDI). As such, AFTA can be understood as a 'competitive' response sparked by external global

developments. At the same time, AFTA provided for a targeted countermeasure to the sharp decline – starting in 1985 - of ASEAN's traditionally very high intraregional trade intensity – a trend that was only reverted by 1998.

By that time, the spread of Japan-centred production networks throughout the region, the associated inflow of FDI, the rising importance of services to support regional supply chains, and the search for ways and means to lower intraregional transaction costs with a view to increasing the efficiency of fragmentation trade led to several economic integration initiatives, which, during the following 15 years, resulted in legal accords on services, investment, standards, customs etc. ASEAN's commitment to regional economic integration was significantly boosted by the 1997/98 financial crisis, which underlined the need for enhanced regional cooperation and integration. The increasing breadth and depth of the ASEAN *acquis* correlates with increasing intraregional trade intensity.

Despite these achievements and its further ambitions for the establishment of the ASEAN Economic Community by 2016, ASEAN remains a loose confederation of extremely diverse nation states with very distinct economic and institutional capacities. ASEAN's few regional institutions remain weak and leave policy initiatives, governance, and policy implementation to the member states. Because of ASEAN's consensual *modus operandi*, the ASEAN *acquis* of today naturally only reflects the lowest common denominator of highly diverse policy preferences held by its heterogeneous members that move at the pace of the slowest.

ASEAN's heterogeneous membership and associated internal integration dynamics have important ramifications for the coverage and depth of plurilateral PTAs that ASEAN member states collectively conclude with external partners. Similar to ASEAN's internal integration process, it is the 'lowest common denominator', as a function of the preparedness of the least developed signatories of the agreements, which determines the scope and depth of joint commitments. ASEAN+1 PTAs will therefore, both in terms of coverage and depth, not include commonly assumed hard legal obligations applying to policy areas for which such rules do not exist at the regional level. In other words, ASEAN+1 PTAs likely mirror, at most, the ASEAN *acquis*. In policy areas where the differentiation of commitments is technically possible, i.e. for tariff reductions as well as services and investment liberalization, ASEAN member states' commitments are unlikely to exceed ASEAN internal commitments due to the free-rider problem that persists in a plurilateral negotiation setting.

Notwithstanding the fact that the upper limit of commitments in ASEAN+1 PTAs is set by the ASEAN *acquis*, we expect the level of commitments of ASEAN+1 PTAs to correlate with the intensity of ASEAN trade with the external partner. This implies that the accords with Japan, Australia and New Zealand, and even Korea would include the most comprehensive and deepest disciplines, whereas PTAs with China and India would only provide for shallow market access disciplines. Separate and parallel PTAs of individual ASEAN member states with external high-intensity trading partners, moreover, are expected to exceed the ASEAN internal *status quo* as the limiting 'lowest common denominator' and 'free-rider' factors are absent in the bilateral negotiation setting.

With these hypotheses in mind, we can construct the following narrative of ASEAN+1 regionalism.

China, in 2001, has taken the first initiative to negotiate a PTA with ASEAN members collectively, which was motivated, as argued by many, by China's strategic concerns over the exclusion from an economic and political integration process of a larger number of emerging powers in its immediate neighborhood as well as US and Japanese ambitions in the region.⁵⁵ From a trade perspective, the 2005 ASEAN-China PTA responded to a trend of declining intensity of intraregional ASEAN-China trade at already low levels. In context of low and declining trade intensity, a shallow PTA focused on traditional market access barrier removal provides for an effective immediate countermeasure.

⁵⁵ See, for instance: Gao, Henry (2011): *China's strategy for free trade agreements: political battle in the name of trade*, in: Buckley, Ross P. & Weixing Hu, Richard & Arner, Douglas W. (eds.): 'East Asian Economic Integration – Law, Trade, and Finance', Edward Elgar Publishing, Northampton, USA.

Notwithstanding the institutional capacity constraints that several smaller ASEAN members face in any case, China has traditionally avoided the negotiation of deep and comprehensive trade accords and, in line with this tradition, did not attempt to negotiate deeper and more comprehensive agreements with individual ASEAN members. Singapore remains the odd exception, as for all of ASEAN's external partners, which is owed to Singapore's bold strategy to pursue PTAs in the region and beyond since the late 1990ies. It is noteworthy, in this context, that trade agreements with Singapore come at very low cost for its negotiation partners, given the country's virtually complete openness to imports and its strategic position as a transit harbor in the region.

The conclusion of the ASEAN-China PTA set in train a 'competitive liberalization' process in the region, which involved all larger non-ASEAN economic powers. Japan in particular, in context of its anxiety over its geopolitical influence in Southeast Asia, was prompted to match the Chinese initiative. For that matter, Japan was forced to abandon its strategic orientation favoring trade liberalization through WTO-centred multilateral negotiations, albeit the growing recognition of the fact that the Doha Round was not going to deliver any outcomes in the foreseeable future and, if at all, not to the desired extent.⁵⁶ The mature and intensive nature of ASEAN-Japan trade relations, in contrast to the ASEAN-China configuration, demanded deep and comprehensive integration measures. The 2008 ASEAN-Japan accord therefore likely pushed the upper limits of, and somewhat resembles, the coverage and depth of the ASEAN *acquis*. Japan's parallel and separate PTAs with the more advanced ASEAN member states, six of which were concluded between 2006 and 2009, hence likely responded to the demand for broader coverage and deeper integration, which ASEAN member states, collectively, could not deliver.

The negotiation and conclusion of the ASEAN-Korea PTA (entry into force in 2007), followed, above all, the objectives of Korea's 2003 'FTA Roadmap', in which national leaders declared the intention to maintain and enhance Korea's competitiveness abroad by concluding 'high quality' deep and comprehensive PTAs with its major trading partners. Since then, Korea has pursued a highly proactive negotiation strategy, which was further encouraged by the snail-pace progress in multilateral trade negotiations. Between 2005 and 2010, Korea concluded PTAs with ASEAN, the EU, and the US, among others, and is now in the process of negotiating similar accords with China, Japan, India, Indonesia, Vietnam, and Malaysia.⁵⁷ At the regional level, competitive liberalization dynamics, in all likelihood, played a major role in terms of timing of negotiations and choice of partners, as for all countries in the region. However, Korea's trade intensity profile with ASEAN, as discussed above, is rather inconclusive. Korea does not display a strong regional bias towards trade with ASEAN member states across the board. However, Indonesia, Vietnam, and Malaysia make for important trading partners in the region, all of which are now negotiating separate and parallel agreements with Korea. ASEAN economies in aggregation, moreover, are now Korea's second largest trading partner in terms of absolute trade value.

ASEAN's joint agreement with Australia and New Zealand, which came into force in 2010, as well as respective parallel agreements, are an example *par excellence* for market-driven *de jure* integration. Both Australia and New Zealand have reached high intensity trade levels with ASEAN member states during the past decade (with the exceptions of Cambodia, Laos, and Myanmar), which indicate maturing and now more sophisticated trade relationships between the booming ASEAN markets and the developed economies in the Pacific region. Both New Zealand and Australia have concluded, or are in the process of negotiating, separate PTAs with high-intensity trading partners within the ASEAN group - a fact that hints at the desire for deeper and more comprehensive integration through

⁵⁶ See, for instance: Nakagawa, Junji (2011): *Japan's FTA (EPA) strategy in the light of competitive dynamics*, in: Buckley, Ross P. & Weixing Hu, Richard & Arner, Douglas W. (eds.): 'East Asian Economic Integration – Law, Trade, and Finance', Edward Elgar Publishing, Northampton, USA. pp86-87

⁵⁷ Junkyu, Lee (2012): *Korea's Trade Structure and its Policy Challenges*, in: 'The Future of Korean Trade Policy', Korea Economic Institute, Washington DC.

individual agreements that go beyond the lowest common denominator of ASEAN members. As noted above, the negotiation and conclusion of these accords took and takes place in a context of a political and economic chain reaction in the region, which further accelerated in light of the failure of WTO negotiations to come to any result whatsoever.

Finally, India put its foot into the door of the Southeast Asian growth markets in 2010 when its agreement with ASEAN came into force. As much as China, India pursues a very cautious trade policy strategy as regards the depth and coverage of its PTAs. In this context, a shallow ASEAN-India PTA would come at no surprise, which is even more so in light of the low trade intensity between the respective partners. ASEAN-India trade intensity data suggests that, as in the case of China, a PTA confined to market access, as a first step, would serve to boost merchandise trade until second-generation trade barriers are revealed behind falling tariff protection.

A final point, before we turn to the comparative examination of the content of ASEAN+1 PTAs: so far, we have only considered explanatory approaches for the legal content and depth of ASEAN PTAs. However, as briefly discussed above, the design of contemporary PTAs is often not confined to static legal obligations and commitments - whatever their legal strength may be - but frequently provides for future cooperation in policy areas, where all or some of the signatories to an agreement are often not prepared to take on hard legal obligations at that particular point in time. This may have various reasons, such as uncertainties associated with the economic or broader social impact of alternative policy options, or prevalent domestic institutional capacity constraints. Another reason for the proliferation of cooperation provisions in PTAs is the fact that some policy areas simply do not lend themselves to the *ex ante* prescription of detailed rules and provisions governing a particular policy area. For all of these reasons, PTAs frequently contain 'living agreement' instruments, i.e. a mandate for the establishment of bilateral or plurilateral institutional mechanisms, which serve as a negotiation and cooperation platform for the joint drafting of action plans, gradual rule development, the proposal of new policy initiatives, monitoring of implementation, etc.

As we have discussed at great length above, we do not expect ASEAN+1 PTAs to go beyond the lowest common denominator of ASEAN member states policy preferences, which is mirrored in the ASEAN *acquis*. Where ASEAN external partners, however, have a strong preference for a coverage and depth, that would exceed this *status quo*, we expect that this preference will materialize in the agreements through the codification of cooperation provisions that are linked to the establishment of strong institutional mechanisms, i.e. 'living agreement' instruments, that can allow for the development of economic integration disciplines in the future. Cooperation provisions, on the other hand, which lack this institutional backbone, can be considered as of little if any value. As such, the presence of cooperation provisions, combined with the institutional dimension of a PTA - in addition to the hard legal coverage and depth of commitments - is a third analytical category, which should feature in any assessment of preferential trade agreements.

V. The Substantive Coverage and Depth of ASEAN's PTAs

One important dimension of the analysis of preferential trade agreements, as a first step, is the horizontal screening of their substantive coverage, i.e. the analysis of the 'extensive' dimension of the agreements.

Horn, Mavroidis and Sapir (HMS) have developed the most refined methodology so far. In their recent study, HMS have mapped the sectoral coverage of 28 US and EU PTAs.⁵⁸ The authors identify 52 policy areas, which they then classify into two groups. The first category of policy areas, labeled WTO-plus (WTO+) provisions, fall under the current mandate of the WTO and are already subject to some form of commitment in WTO agreements. WTO+ provisions reconfirm existing commitments and may provide for additional obligations in areas such as non-agricultural market access, agricultural tariffs, customs, TBT and SPS measures, anti-dumping (AD) and countervailing (CVM) measures, safeguards, services, public procurement, TRIPs, or TRIMS. The second category of policy areas, which HMS denote as WTO-extra (WTO-X) provisions, refers to obligations that are outside the current mandate of the WTO but frequently covered by contemporary preferential trade agreements, such as competition policy, IPR, investment protection and liberalization, movement of capital, environmental laws, labor market regulation etc.

In a second step, HMS identify whether the covered provisions are 'legally enforceable' or not. In defining 'legal enforceability', HMS were guided by three main factors, notably, first, the codification of hard vs. soft legal language (e.g. the use of the term 'shall' instead of 'should'); secondly, the specificity and detail vs. the vagueness of substantive obligations; and, third, the question of whether obligations are subject to a dispute settlement mechanism established under the respective agreements, or not.

HMS' systematic mapping of US and EU agreements is an excellent starting point for the comparison of the plethora of PTAs that have recently been concluded. Most prominently, the WTO Secretariat has used the HMS methodology in the preparation of the 2011 World Trade Report. WTO researchers expanded HMS' analysis to a total of 96 PTAs. The sample includes all five ASEAN+1 agreements and six out of seven PTAs that Japan has concluded with more advanced ASEAN economies individually, which we, in the following, use as one benchmark for comparison.⁵⁹

To be sure, a horizontal analysis at this level cannot result in conclusions about the actual depth of legal integration that ASEAN+1 PTAs create through their disciplines in any policy area. For instance, in the field of WTO+ areas, covered provisions on TBT, SPS, or IPR may merely reaffirm the WTO disciplines that the partner countries are subject to in any case but can still attain the status of 'legally enforceable' in context of the criteria that HMS apply. Other agreements may contain hard legal substantive disciplines on harmonization of standards, mutual recognition of conformity assessment, or TRIPS+ rules. HMS's methodology, however, does not differentiate between the former and the latter.

It is necessary, for this reason, to conduct a comprehensive analysis of the 'intensive' dimension of ASEAN+1 PTA disciplines and to assess them in light of useful benchmarks. What we consider 'useful' is a comparison that can tell us where ASEAN+1 agreements create 'new' rules that go beyond the WTO legal *status quo* and the *status quo* of ASEAN internal integration. Moreover, we find a comparison valuable that allows us to understand the differences between the depth of ASEAN+1 *de jure* integration and the disciplines contained in individual ASEAN member states' PTAs with the very same external partners.

⁵⁸ Horn, Mavroidis, Sapir (2009): op. cit.

⁵⁹ WTO (2011): op. cit. pp 157-159

Nevertheless, the HMS mapping can provide for interesting insights as regards the general coverage of the agreements under review. We present respective data in the subsequent subsection. In addition to ASEAN+1 PTAs, we use six individual ASEAN member states' PTAs with Japan as a comparator group. This comparison can, for this limited sample and at this general level, either verify or falsify our hypothesis that external partners sought to negotiate separate PTAs with more advanced ASEAN economies when ASEAN's 'lowest common denominator' principle resulted in unsatisfactory coverage of ASEAN+1 PTAs.

1. The Substantive Coverage of ASEAN's PTAs

Table 8 gives a general overview of the coverage of ASEAN+1 PTAs; the six ASEAN member states' separate PTAs with Japan; as well as global averages drawn from the WTO Secretariat's database of 96 PTAs. Tables 9 and 10 provide for a breakdown of the coverage of ASEAN+1 PTAs and the six Japanese PTAs by policy area, whereas we only include policy areas that are legally enforceable (see explanatory note). In table 9, we include only those policy areas, which are covered in a legally enforceable manner by at least one of the PTAs under review and are not explicitly exempted from the PTAs dispute settlement mechanism at the same time (see explanatory note).

Globally, the number of WTO+ areas covered by PTAs in the period of 1958 to 1999 averaged at seven WTO+ areas per PTA. Six out of seven policy areas were found to be legally enforceable.⁶⁰ Between 2000 and 2010, the average number of WTO+ areas in the PTAs included in the WTO sample increased from seven to ten areas, which were almost always legally enforceable.

In the field of WTO-X provisions, the number of WTO-X areas covered by PTAs in the period of 1958 to 1999 averaged at six WTO-X areas covered, whereas three of these policy areas were found to be legally enforceable. From 2000 to 2010, the average number of WTO-X areas increased from seven to nearly ten policy areas, whereas only four of these areas found to be legally enforceable.

ASEAN+1 PTAs with developed economies - Korea, Japan, Australia and New Zealand - follow the recent trend towards an enhanced coverage of WTO+ and WTO-X disciplines. The same applies to all six PTAs that individual ASEAN members have concluded with Japan. Moreover, all of the before-mentioned PTAs either match or exceed the global average number of enforceable disciplines. At a very general level, this observation allows for the conclusion that ASEAN members and their partner countries use the respective PTAs to advance policy objectives beyond the WTO *status quo*.

ASEAN+1 PTAs with developing economies – China and India – give a very different impression. In terms of its substantive coverage, the ASEAN-China PTA is a particularly 'thin' agreement with only six WTO+ areas covered, of which four are enforceable. These are industrial and agricultural tariffs, AD and CVM measures, as well as services trade and provisions relating to the WTO TRIMS agreement. In the category of WTO-X areas, the agreement covers only investment. Similarly, the ASEAN-India PTA appears to be, on the first sight, a shallow market access agreement with an average coverage of WTO+ areas and zero coverage of WTO-X provisions. Both PTAs therefore remain far below the global average for WTO-X coverage in PTAs concluded among developing countries.

⁶⁰ *ibid.*: p131

Table 8: WTO-plus and WTO-extra Policy Area Coverage in ASEAN's PTAs

PTA	WTO-plus areas covered	WTO-plus areas legally enforceable	WTO-extra areas covered	WTO-extra areas legally enforceable
ASEAN - China	6	4	1	0
ASEAN - India	9	8	0	0
ASEAN - Korea	12	11	11	8
ASEAN - Australia/ New Zealand	11	11	8	5
ASEAN - Japan	9	9	10	10
Japan – Indonesia	9	9	8	4
Japan – Malaysia	10	10	6	5
Japan – Philippines	11	9	8	5
Japan – Singapore	12	12	9	4
Japan – Thailand	9	9	9	4
Japan – Vietnam	12	12	5	4
Global Average (2000-10)	10	10	10	4
Global Average: developing country PTAs (2000-10)	8	7	5	3
Global Average: developing-developed country PTAs (2000-10)	11	10	10	4

Source: WTO World Trade Report 2011

Table 9: WTO-plus Policy Area Coverage in ASEAN's PTAs

Agreement	FTA Industrial	FTA Agriculture	Customs	Export Taxes	SPS	TBT	STE	AD	CVM	State Aid	Public Procurement	TRIMs	GATS	TRIPs
ASEAN-India	2	2	2	2	2	2	0	0	0	0	0	2	2	0
ASEAN-Australia-New Zealand	2	2	2	2	2	2	0	2	2	0	0	2	2	2
ASEAN-Korea	2	2	0	0	2	2	2	2	2	2	0	2	2	2
ASEAN-China	2	2	0	0	0	0	0	2	2	0	0	0	0	0
ASEAN-Japan	2	2	2	0	2	2	0	2	2	0	0	2	2	0
Japan-Indonesia	2	2	2	0	0	0	0	2	2	0	2	2	2	2
Japan-Malaysia	2	2	2	0	2	2	0	2	2	0	0	2	2	2
Japan-Philippines	2	2	2	0	0	0	2	2	2	0	0	2	2	2
Japan-Singapore	2	2	2	2	0	2	2	2	2	0	0	2	2	2
Japan-Thailand	2	2	2	0	0	0	0	2	2	0	2	2	2	2
Japan-Viet Nam	2	2	2	0	1	1	2	2	2	2	1	0	2	2

Source: WTO World Trade Report 2011

Note: -2- denotes a policy area that is covered by an agreement, legally enforceable in terms of legal language employed and specificity of the provisions, and not explicitly exempted from the dispute settlement mechanism of the PTA. -1- denotes a policy area that is covered, legally enforceable, but exempted from the dispute settlement mechanism of the PTA. -0- denotes a policy area that is either not covered at all, or not in a legally enforceable manner.

The comparison of ASEAN's PTA with Japan with Japan's separate agreements with individual ASEAN member states allows for several interesting observations. In the WTO+ category, we find five policy areas in which the ASEAN-Japan PTA does not provide for any disciplines whatsoever, and where some or all of Japan's separate agreements with ASEAN member states include substantive and enforceable rules that are not expressly excluded from the agreement's dispute settlement provisions. These policy areas are export taxes (covered by the Japan-Singapore PTA), state trading enterprises (PTAs with Singapore, the Philippines, and Viet Nam), state aid (PTA with Viet Nam), public procurement (PTAs with Indonesia and Thailand), and provisions related to the WTO TRIPs agreement (PTAs with Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Viet Nam).

A similar observation can be made with respect to the category of WTO-X disciplines. In the field of competition policy, the ASEAN-Japan PTA does in fact contain some provisions, which are, however, expressly excluded from dispute settlement. The Japan-Indonesia PTA, in contrast, contains competition policy provisions that are not excluded from recourse to dispute settlement.

Moreover, the ASEAN-Japan agreement does include some kind of provisions on IPR that are, however, not subject to dispute settlement. In contrast, PTAs with Malaysia, the Philippines, Thailand, and Viet Nam contain IPR provisions that are not exempted from dispute settlement. Movement of capital is not covered in the ASEAN-Japan PTA at all, whereas all six separate PTAs under review cover fully enforceable rules.

Finally, the ASEAN-Japan PTA does not contain any rules on visa and asylum, whereas all separate PTAs with ASEAN member states (except the agreement with Singapore) do contain such disciplines, which are subject to the agreements' standard dispute settlement provisions.

Table 10: WTO-extra Policy Area Coverage in ASEAN's PTAs

Agreement	Competition Policy	IPR	Investment	Movement of Capital	Agriculture	Cultural Cooperation	Energy	Information Society	Mining	Regional Cooperation	Research and Technology	SME	Visa and Asylum
ASEAN-India	0	0	0	0	0	0	0	0	0	0	0	0	0
ASEAN-Australia-New Zealand	0	2	2	2	0	0	0	0	0	2	0	0	2
ASEAN-Korea	0	2	0	0	2	2	2	2	2	0	2	2	0
ASEAN-China	0	0	2	0	0	0	0	0	0	0	0	0	0
ASEAN-Japan	1	1	2	0	1	0	1	1	0	1	0	1	0
Japan-Indonesia	2	0	2	2	0	0	0	0	0	0	0	0	2
Japan-Malaysia	1	2	2	2	0	0	0	0	0	0	0	0	2
Japan-Philippines	1	2	2	2	0	0	0	0	0	0	0	0	2
Japan-Singapore	1	0	2	2	0	0	0	0	0	0	0	0	0
Japan-Thailand	0	2	2	2	0	0	0	0	0	0	0	0	2
Japan-Viet Nam	1	2	0	2	0	0	0	0	0	0	0	0	2

Source: WTO World Trade Report 2011, amended by the author

Note: -2- denotes a policy area that is covered by an agreement, legally enforceable in terms of legal language employed and specificity of the provisions, and not explicitly exempted from the dispute settlement mechanism of the PTA. -1- denotes a policy area that is covered, legally enforceable, but exempted from the dispute settlement mechanism of the PTA. -0- denotes a policy area that is either not covered at all, or not in a legally enforceable manner.

These observations, however, hardly allow for conclusions about as to whether ASEAN+1 agreements remain within the realm of the ASEAN *acquis* or whether these agreements exceed ASEAN's internal level of *de jure* integration. In fact, we do find that ASEAN agreements with a developed partner country cover a wide range of policy areas in both the categories of WTO+ and WTO-X disciplines. However, as we have discussed above, the coverage of a policy area does not indicate whether the agreement merely calls for future intergovernmental cooperation in the respective field – whatever the legal strength of the provision – or whether the provisions in fact demand implementation and enforcement action by signatories' governments at the domestic level. Likewise, the horizontal level of analysis cannot tell us whether PTA rules require the establishment of regional institutions and the drafting, adoption, implementation and enforcement of rules and regulations at the regional level.

For this reason, we analyze the 'depth of integration' of ASEAN+1 agreements in select policy areas in a comparative manner further below. Before we turn to this analysis, we briefly examine the proliferation of cooperation provisions in ASEAN+1 PTAs in the next sub-section.

2. *The Proliferation of Cooperation Provisions in ASEAN's PTAs*

Another general observation relates to the proliferation of economic cooperation provisions across ASEAN+1 PTAs. Almost all of the agreements employ a general cooperation clause, which lists areas of cooperation across the board. The ASEAN – Australia / New Zealand PTA, in contrast, mandates further cooperation in the specific chapters that deal with the respective issue area. These mandates are subject to the agreements' general chapter on economic cooperation, which lays down the details of the modalities of economic cooperation as well as respective institutional responsibilities.

The 2002 ASEAN-China Framework Agreement on Comprehensive Economic Cooperation (under the umbrella of which the 2005 ASEAN-China PTA was concluded) identifies various areas of economic cooperation, including standards and conformity assessment, customs cooperation, investment, agriculture, capacity building and others. Similarly, the 2008 ASEAN-Japan Comprehensive Economic Partnership Agreement provides for numerous areas of cooperation, including trade facilitation, conformity assessment, mutual recognition of standards, business environment enhancement, energy, information and communications technology, human resource development, tourism and hospitality, as well as transportation and logistics. The 2010 ASEAN-Korea Comprehensive Economic Cooperation Agreement goes even further by identifying no less than 19 cooperation areas, such as customs procedures, trade and investment promotion, standards and conformity assessment, as well as sanitary and phytosanitary measures. A similar horizontal cooperation clause is included in the ASEAN-India Framework Agreement on Comprehensive Economic Cooperation, under the umbrella of which ASEAN and India negotiated the 2010 ASEAN-India Trade in Goods Agreement. As mentioned above, the ASEAN-Australia/New Zealand PTA proceeds in a different manner, by exclusively specifying areas of cooperation in the various chapters of the agreement.

The strong emphasis on economic cooperation in the agreements with regard to several important areas of integration indicates that ASEAN+1 agreements, with respect to such policy areas, may only mark the first step in a process towards future convergence and may well only establish a negotiation and cooperation platform, rather than to create specific and hard legal disciplines immediately.

As we have discussed in the preliminary conclusions of section IV, the merits of these cooperation provisions are highly contingent upon the detail and strength of the respective mandates, i.e. their enforceability and the institutional dimension of the agreements, as the substantive objectives that are codified in 'living agreement' disciplines require an institutional platform and a strong political mandate in order to result in any tangible achievements in the future.

We find that ASEAN's PTAs with Australia and New Zealand, Japan, and Korea codify the modalities of economic cooperation in significant detail and hard legal language, make provisions for the allocation of necessary resources, the establishment of joint committees, and the identification of focal points within the administrative structure of each party, which are, in turn, mandated to draft economic cooperation work programs, monitor the implementation thereof, and report on implementation progress. ASEAN's PTAs with China and India, in contrast, omit respective provisions altogether, which is why respective mandates for economic cooperation remain unenforceable and are not included in Tables 9 and 10.

The proliferation of cooperation provisions in ASEAN+1 PTAs provides for indicative evidence of the importance of the 'lowest common denominator' principle for the depth of ASEAN+1 agreements. We may find in the following subsections that the agreements are characterized by a hard legal core of specific and enforceable obligations in key policy areas, which is surrounded by a realm of living agreement instruments in areas where some or all of the signatories were not (yet) prepared to make binding substantive commitments.

This dual approach of providing for hard and specific legal disciplines in key policy areas, on the one hand, and economic cooperation towards further convergence in the future, on the other, would be particularly plausible in the ASEAN context, where highly diverse institutional and private sector capacities to implement, administer, enforce, and comply with complex new regulatory and border regimes persist.⁶¹

⁶¹ For a general overview of implementation challenges in developing countries, see: (forthcoming) Chauffour, Jean-Pierre & Kleimann, David (2013): *op. cit.*

3. *The Depth of WTO-plus Commitments in ASEAN's PTAs*

In this subsection, we broadly analyze the depth of commitments and the institutional dimensions of ASEAN+1 PTAs in the category of WTO-plus policy areas. In doing so, we compare the depth of these accords with the WTO *status quo*, the ASEAN *acquis*, and six of seven PTAs that individual ASEAN member states have concluded with Japan in parallel to the ASEAN-Japan PTA. These are Japan's agreements with Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Viet Nam. In this analysis, we focus on a number of WTO-plus policy areas, notably market access issues (tariff reductions for industrial and agricultural goods, customs, SPS and TBT measures, countervailing and anti-dumping measures, bilateral and global safeguards, and export taxes) as well as services, government procurement, and intellectual property rights. For this comparison, we have used the Comparative FTA Toolkit of the Asian Development Bank's Regional Integration Centre.⁶²

A meaningful review of the rules of origin of the agreements under scrutiny would exceed the scope of this paper. A comprehensive analysis and assessment of AFTA/ATIGA and ASEAN+1 PTAs' rules of origin has, however, been conducted by Medalla (2010).⁶³

Unsurprisingly, all five ASEAN+1 PTAs cover WTO+ liberalization in the areas of **non-agricultural and agricultural market access** and establish free trade areas in goods trade under Article XXIV of the GATT. ASEAN member states' market access commitments in the area of merchandise trade stand in context of the liberalization that they have conducted under AFTA/ATIGA, within the WTO framework (including the plurilateral Information Technology Agreement - ITA), or by means of unilateral tariff reductions.

ASEAN member states have not created a customs union, which is why they can and do retain individual tariff reduction schedules in all five ASEAN+1 PTAs. These schedules create the substance of their market access obligations. Disciplining tariffs through individual schedules allows for the differentiation of commitments among the signatories of the plurilateral PTAs. All ASEAN+1 agreements, for instance, accord for special and differential treatment of the new ASEAN members, which takes the shape of longer transition periods for the implementation of tariff commitments vis-à-vis the external partner and vis-à-vis the other ASEAN members.

As an illustration, the ASEAN-Korea PTA follows a two-track liberalization schedule, which differentiates between ASEAN-6 countries CLMV. Under the normal track, tariffs must be eliminated by 2010 for ASEAN-6 and Korea. The four newly acceded ASEAN members have eight more years to follow a similar tariff reduction scheme (whereas Viet Nam is given 6 more years). Under the sensitive track, tariff reduction starts in 2012, to reach 0–5% tariff levels by 2016 for ASEAN-6 and the Republic of Korea, by 2021 for Viet Nam, and by 2024 for the remaining ASEAN-3.⁶⁴

The plurilateral character of ASEAN+1 PTAs implies that ASEAN member states' liberalization commitments do not only benefit the external partner but apply to all signatories *inter se*. This fact has no consequences for ASEAN-6 members commitments vis-à-vis other ASEAN members, as they have already achieved tariff elimination on more than 99% of tariff lines. Tariff concessions made by CLMV in context of ASEAN+1 PTAs, however, could, in theory, effectively change the *status quo* of AFTA/ATIGA, if such concessions exceeded their liberalization achievement under AFTA/ATIGA on the date of the entry into force of the respective external accord. We can, however, rule this theoretical option out, given the fact that CLMV are obliged to achieve full liberalization under AFTA/ATIGA by

⁶² The ADB's Regional Integration Centre's Comparative FTA Toolkit can be accessed at <http://aric.adb.org/comparisonftacontent.php>.

⁶³ Medalla, Erlinda M. (2010): *Taking Stock of the ROOs in the ASEAN+1 FTAs: Toward Deepening East Asian Integration*, Jae Lee, Chang & Okabe, Misa (eds.): 'Comprehensive Mapping of FTAs in ASEAN and East Asia', ERIA Research Project Report No. 26

⁶⁴ Zhang & Shen (2011): op. cit. p11

2015, which is much earlier than the end of CLMV's transition periods under ASEAN+1 PTAs. As such, in the area of tariff commitments, ASEAN member states remain highly consolidated among themselves vis-à-vis the external partner.

We have noted above that ASEAN member states have so far not multilateralized AFTA/ATIGA preferences on about 10% of tariff lines yet. This amount of tariff lines allows for plenty of policy space to shield sensitive sectors by means of tariff peaks. The remaining effective preferences set strong incentives for ASEAN+1 partner countries to attain tariff preferences through PTAs that resemble ASEAN internal preferences granted under AFTA / ATIGA, i.e. a full tariff elimination for almost 100% of tariff lines, which is the current *status quo* for the ASEAN-6 and will be achieved by CLMV by 2015.

Table 11 presents the tariff elimination coverage under all ASEAN+1 PTAs by country at the end of the respective implementation period as specified by each agreement. Overall, we can observe that none of the five PTAs, on average, comes close to meeting the AFTA/ATIGA benchmark of tariff elimination on more than 99% of tariff lines. In some instance, however, ASEAN member states match (or almost match) their AFTA/ATIGA reduction commitments.

Table 11: Tariff Elimination Coverage under ASEAN's PTAs

	ASEAN- Korea	ASEAN- China	ASEAN- AUS-NZ	ASEAN- India	ASEAN- Japan	Average
Singapore	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
Brunei	97.8%	97.9%	98.5%	82.6%	96.4%	94.6%
Malaysia	93.5%	93.7%	95.5%	79.6%	92.1%	90.9%
Thailand	93.7%	88.3%	98.8%	74.3%	96.9%	90.4%
Indonesia	90.3%	89.0%	93.4%	50.4%	88.7%	82.3%
Philippines	97.9%	86.5%	94.8%	75.8%	96.0%	90.2%
Vietnam	84.3%	n/a	90.9%	69.7%	84.7%	82.4%
Cambodia	85.5%	86.7%	86.2%	84.1%	76.0%	83.7%
Laos	85.4%	96.4%	90.7%	77.5%	84.2%	86.8%
Myanmar	87.5%	86.9%	86.1%	73.6%	79.4%	82.7%
ASEAN Ø	91.6%	91.7%	93.5%	76.7%	89.4%	88.4%
Korea	92.2%					
China		94.6%				
Australia			100.0%			
N. Zealand			100.0%			
India				74.3%		
Japan					86.3%	
Average	91.6%	92.0%	94.6%	76.5%	89.2%	

Source: Kuno, Arata (2010): Constructing the Tariff Dataset for the ERIA FTA Database, in: Jae Lee, Chang & Okabe, Misa (eds.): 'Comprehensive Mapping of FTAs in ASEAN and East Asia', ERIA Research Project Report No. 26

ASEAN PTAs with Australia / New Zealand, China, and Korea are ambitious, with average elimination commitments on well above 90% of tariff lines. The ASEAN-Japan PTA comes close but just fails to meet the 90% benchmark. The tariff commitments under the ASEAN-India PTA, in contrast, with an average of below 80% of tariff lines liberalized, lack any commercial value whatsoever and are clearly not consistent with the ‘substantially all trade’ requirement of GATT Article XXIV.

It is beyond doubt that four out of five ASEAN+1 PTAs (with the exception of the ASEAN-India PTA) significantly bite into the remaining effective AFTA/ATIGA preferences, i.e. those AFTA/ATIGA tariff preferences that have not been multilateralized yet. This is particularly so with regard to the commitments made by ASEAN-6 countries. ASEAN-6 tariff concessions are particularly ambitious in case of the ASEAN-Australia / New Zealand PTA and the ASEAN-Korea PTA. In case of the ASEAN-China PTA, we observe that Thailand, Indonesia, and the Philippines have taken a considerably more cautious approach to opening their markets to import competition from their neighboring economic giant. Among the ASEAN-6 countries, Indonesia – as one of the poorer ASEAN-6 members - is the most cautious in terms of market opening to ASEAN+1 external partners. CLVM’s tariff commitments, moreover, remain significantly below ASEAN-6 commitments. To provide a comparator, CLMV commitments, on average, still exceed the 80% liberalization requirement imposed by the EU on its African, Caribbean, and Pacific (ACP) partner countries in context of Economic Partnership Agreement (EPA) negotiations.

What is surprising, initially, is Japan’s relatively low liberalization commitment under its PTA with ASEAN. One way of explaining the relatively low tariff line coverage is to assume that Japan deliberately held back additional concessions vis-à-vis all ASEAN member states in order to retain bargaining chips for the negotiation of separate and parallel PTAs with seven more advanced ASEAN member states. Another reading of Japan’s limited tariff commitment vis-à-vis ASEAN member states emphasizes Japan’s notorious protection of large parts of its agricultural sector. While comprehensive PTA tariff coverage data is not readily available with regard to Japan, indicative evidence suggests that Japan’s commitment level in the ASEAN-Japan PTA can be explained by a combination of both of the rationales that we have outlined above. The Japan-Malaysia PTA, for instance, liberalizes 88.7% of Japanese tariff lines.⁶⁵ The Japan-Philippines PTA eliminates duties on 89.64% of tariff lines by the end of its implementation period.⁶⁶ In other words, Japan has made concessions in its bilateral PTAs with Malaysia and the Philippines that exceed those that Japan extended in context of the plurilateral PTA with ASEAN members collectively, but still retains a considerable sectoral carve-out to provide for the protection of Japan’s agribusinesses. Similarly, Japan’s counterparts in these two agreements are reported to have made tariff concessions that exceed those extended in context of the ASEAN-Japan PTA.

Despite the solid market access commitments in four out of five ASEAN+1 PTAs, the figures presented in Table 11 indicate that there remains, compared to ASEAN’s internal preferences, a significant potential for future liberalization vis-à-vis the external partners, which may take place in either a bilateral or plurilateral setting.

In fact, tariff lines that have not been subject to reduction commitments yet – which is where the bulk of protection is usually hidden - likely set incentives for Korea’s ongoing PTA negotiations with Indonesia and Viet Nam and Australia’s talks with Indonesia and Malaysia.

⁶⁵ Hirastuka, Daisuke & Sato, Hitoshi & Isono, Ikumo (2009): *Impacts of Free Trade Agreements on Business Activity in Asia: The Case of Japan*, ADBI Working Paper Series, No. 143, Asian Development Bank Institute, Tokyo. p4

⁶⁶ Balboa, Jenny D. (2008): *Negotiated Trade Liberalization in East Asia: Examining Japan’s Economic Partnership Agreements (EPA)*, Japan Center for Economic Research (JCER), Tokyo. p32

Table 12 underlines this point by presenting the share of tariff lines, which have not been committed to elimination under at least one of the five ASEAN+1 PTAs yet. The ASEAN average share of 25.8% of tariff lines that have not been liberalized under at least one PTA indicates that ASEAN member states carefully select the products that they do not wish to expose to competition, depending on the external partner - even if this figure is inflated by ASEAN member states' low commitment levels in the ASEAN-India PTA. All countries, except Brunei and Singapore, moreover, shield their most sensitive sectors under all five ASEAN+1 PTAs behind tariff peaks on a very narrow range of tariff lines.

Table 12: Distribution of Tariff Lines by Liberalization Status

	% of 'eliminated to all' products	% of 'depends on FTA' products	% of 'protected to all' products
Brunei	84.1	15.9	0.0
Cambodia	64.3	35.3	0.4
Indonesia	46.0	52.8	1.2
Laos	68.0	31.6	0.4
Malaysia	76.0	22.9	1.1
Myanmar	66.6	31.8	1.6
Philippines	74.6	24.4	1.0
Singapore	100.0	0.0	0.0
Thailand	75.6	24.3	0.1
Vietnam	78.1	19.1	2.8
Average	73.3	25.8	0.9

Source: Kuno, Arata (2010): Constructing the Tariff Dataset for the ERIA FTA Database, in: Jae Lee, Chang & Okabe, Misa (eds.): 'Comprehensive Mapping of FTAs in ASEAN and East Asia', ERIA Research Project Report No. 26

Three out of the five ASEAN+1 PTAs provide for binding provisions on **customs**.⁶⁷ ASEAN's PTAs with China and Korea only broadly include customs as a field of economic cooperation. The ASEAN-India PTA reaffirms the WTO and ASEAN *status quo* - notably the applicability of the WTO Customs Valuation Agreement. The ASEAN-India PTA further refers to the desirability of harmonizing customs procedures with international standards where possible, and the simplification of customs procedures.

The ASEAN-Australia/New Zealand, in contrast, breaks new ground in terms of ASEAN member states' external commitments in this area in that it provides for an elaborate chapter applying to customs procedures and facilitation; customs cooperation; the use of automated systems; the reaffirmation of the WTO Agreement on Customs Valuation; advance rulings; the prioritization of low-risk goods; the establishment of enquiry points; as well as importers' rights to review and appeal. The disciplines present a combination of hard and soft law, whereas the more general provisions display hard, and the more specific rules soft legal language. While these disciplines do go beyond the provisions of the 1997 ASEAN Agreement on Customs (especially in the areas of advance rulings, risk management, and use of automated systems), they are on par with ATIGA's chapters on trade

⁶⁷ For an overview of common trade facilitation and customs disciplines in PTAs, see: Maur, Jean-Christophe (2011): *Trade Facilitation*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): 'Preferential Trade Agreement Policies for Development – A Handbook', World Bank, Washington D.C.

facilitation and customs, which upgraded and modernized ASEAN's internal integration commitments in this area in 2010.

The ASEAN-Japan PTA merely reaffirms the provisions of the WTO Customs Valuation Agreement and includes some aspirational and vague language applying to the simplification and harmonization of procedures as well as transparency. Each and every separate PTA under review, which Japan has concluded with individual ASEAN member states, goes beyond the provisions of the ASEAN-Japan PTA in terms of scope, level of detail, and enforceability of the legal language employed. For instance, all agreements contain hard legal provisions on transparency and the harmonization and simplification of procedures, while some agreements codify hard legal disciplines on goods in transit, exchange of information, cooperation between customs authorities, the use of information technology, and refer to the applicability of international conventions, but do not, however, go beyond the ASEAN *status quo* as consolidated by ATIGA. The Japan-Malaysia PTA, which contains the most extensive rules on customs matters, additionally mandates capacity building measures and establishes a bilateral sub-committee on customs procedures.

Four out of five of the agreements contain binding provisions on **SPS and TBT measures**.⁶⁸ China remains the exception and merely denotes SPS and TBT as areas of cooperation in the 2002 ASEAN-China Framework Agreement. A result of ASEAN-China cooperation, the parties, in 2009, agreed on a Memorandum of Understanding (MoU) on strengthening cooperation in the field of standards, technical regulations, and conformity assessment. The agreements with India and Korea only reaffirm the rights and obligations provided for in the WTO SPS and TBT agreements and, in case of the ASEAN-Korea PTA, establish a sub-committee for further cooperation.

The ASEAN-Australia / New Zealand PTA, in contrast, contains elaborate chapters on SPS and TBT issues, which go far beyond WTO obligations. Generally speaking, the covered disciplines govern conformity assessment procedures; standards; technical regulations; the application of SPS measures; transparency; the establishment of contact points and joint committees and their respective mandate; areas of further cooperation; exchange of information; consultations; as well as modalities for the negotiation of mutual recognition and equivalence agreements and arrangements. The agreement thereby strongly formalizes cooperation on SPS and TBT issues and makes for a solid starting point for actual regulatory convergence. In the process of implementing the respective provisions, ASEAN members and their institutions are likely to be able to draw from the experience of internal cooperation and integration initiatives in the past decade. This process has been legally advanced and disciplined by several ASEAN agreements on conformity assessment, harmonized regulatory regimes, and the integration of priority sectors, which have been integrated in ATIGA's state-of-the-art chapters on standards, technical regulations, conformity assessment procedures, and sanitary and phytosanitary measures. Nevertheless, the intensity of cooperation that is required to achieve compliance and the stated policy objectives in the ASEAN-Australia / New Zealand PTA will likely present the institutions of the lesser-developed ASEAN members with highly demanding tasks, as MRAs with developed economies tend to require a significant upgrade of the quality control infrastructure in lesser developed countries.

The ASEAN-Japan PTA chapters on TBT and SPS resemble the ASEAN-Australia / New Zealand PTA in their scope but – importantly - lack the stated ambition of negotiating MRAs or equivalence agreements in both areas. Japan's parallel PTAs with individual ASEAN members only contain additional SPS provisions in two cases (Malaysia and Viet Nam), whereas these disciplines are identical to the rules contained in the ASEAN-Japan agreement.

⁶⁸ For an overview of common TBT and SPS disciplines in PTAs, see: Stoler, Andrew L. (2011): *TBT and SPS Measures, in Practice*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): 'Preferential Trade Agreement Policies for Development – A Handbook', World Bank, Washington D.C.

On TBT issues, however, several of the individual accords make big leaps forward on the path towards regulatory convergence and go far beyond the WTO and ASEAN *status quo* as well as the ASEAN-Japan PTA. The Japan-Malaysia PTA, for instance, calls for the harmonization of technical regulations; positive consideration to the equivalence of technical regulations of the other party; official justification in case of denial; positive consideration towards the acceptance of conformity assessment procedures of the other party; and lays down detailed modalities for the negotiation of MRAs on conformity assessment. Japan's PTAs with the Philippines, Singapore, and Thailand, however, have already arrived at a much more advanced stage in the convergence process. All three agreements establish highly specific and detailed substantive disciplines, which oblige the parties to recognize the certificates of conformity assessment of the respective other party. The Japan-Indonesia PTA (no rules on TBT at all) and the Japan-Viet Nam PTA (identical to the TBT chapter in the ASEAN-Japan PTA) remain notable exceptions.

All agreements under review reaffirm the right of the signatories to impose **AD, CVM, and global safeguard measures** that are consistent with the respective WTO agreements.⁶⁹ Moreover, all of ASEAN's external PTAs contain highly detailed provisions on the imposition of **bilateral safeguard measures** in the event of serious injury, or threat thereof, to the domestic industry, caused by increased quantities of imports of a good that is subject to preferential tariff treatment. None of the ASEAN+1 agreements include any provisions on **export taxes**. Only Japan's separate agreements with the Philippines and Singapore provide for such disciplines, which are aspirational in case of the former and legally binding (i.e. prohibitive) in case of the latter PTA. Overall, the trade defence instruments codified in our PTA sample do not exceed the scope or level of sophistication of the ATIGA treatment of such instruments. Export taxes remain the exception, as this measure is not provided for under the ATIGA provisions. Finally, a feature of great significance of the ASEAN-China PTA is the granting of market economy status by ASEAN members to China, which has important implications for the calculation of AD margins and marks an important concession on behalf of ASEAN member states.

All five ASEAN+1 PTAs contain provisions on **services liberalization**.⁷⁰ However, only the joint agreement with Australia and New Zealand establishes a GATS Article V free services trade area. ASEAN's PTAs with China, Japan, Korea, and India only mandate negotiations towards this end. ASEAN and China have so far concluded two commitment packages (in 2007 and 2011) on services liberalization under the 2002 Framework Agreement. ASEAN and Korea, in 2007, concluded the Agreement on Trade in Services under the respective ASEAN-Korea Framework Agreement. ASEAN currently negotiates services agreements with both India and Japan, which are reported to near finalization in early 2013.⁷¹

Compared with the GATS *status quo*, none of the agreements provide for major rule innovations with regard to trade in services. To the contrary, all of the agreements draw extensively from GATS legal language. In addition, the ASEAN-Korea accord contains an annex on financial services. The ASEAN – Australia / New Zealand PTA, furthermore, includes an additional chapter on the movement of natural persons and annexes on financial services and telecommunications.

⁶⁹ For an overview of common trade remedy provisions in PTAs, see: Prusa, Thomas J. (2011): *Trade Remedy Provisions*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): 'Preferential Trade Agreement Policies for Development – A Handbook', World Bank, Washington D.C.

⁷⁰ For an overview of common services trade and investment disciplines in PTAs, see: Mattoo, Aaditya & Sauvé, Pierre (2011): *The Preferential Liberalization of Services Trade*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): 'Preferential Trade Agreement Policies for Development – A Handbook', World Bank, Washington D.C. or WTO (2011): op. cit. pp133-37

⁷¹ See http://www.fta.gov.sg/fta_ongoingneg_asean_india.asp?hl=12 and http://www.fta.gov.sg/fta_ongoingneg_asean_japan.asp?hl=13

The liberalization schedules of these three agreements contain individual country specific commitments, which differ heavily across countries. This implies that negotiations remain based on the request-offer approach among individual countries, similar to WTO services negotiations. Given the plurilateral character of the ASEAN+1 agreements, commitments codified in signatories' schedules benefit all signatories. As such, any commitment that is made by an ASEAN member state not only benefits the external party but applies to ASEAN member states *inter se*.

The ASEAN Secretariat notes that the AFAS commitment packages have set an important benchmark for ASEAN's external negotiation partners as the latter seek to level the playing field by means of obtaining AFAS-like concessions for their services providers. On the other hand, the Secretariat observes that particular sector specific commitments made by certain ASEAN member states vis-à-vis external partners, which go beyond the AFAS *status quo*, create ASEAN-internal pressures to make concessions in these very sectors in future negotiation rounds under AFAS.⁷²

The Secretariat's argument is only valid for the separate and parallel PTAs that individual ASEAN member states negotiate with external partners, but not for ASEAN+1 agreements, because the latter already extend all commitments contained in individual schedules to all signatories, whereas the former (in absence of MFN clauses in AFAS and all of the ASEAN+1 services PTAs) grant exclusive commitments to the two partner countries. Therefore, any concession made by an ASEAN member state under an ASEAN+1 services agreement that is more liberal than the AFAS *status quo* would *de facto* alter the AFAS *status quo*, i.e. ASEAN member states' services commitments vis-à-vis each other, to a more liberal standard.

However, from a negotiator's point of view, the plurilateral setting in fact discourages ASEAN member states from making commitments that they have so far not extended to other ASEAN members under AFAS. Plurilateral agreements allow for 'free-riding' of those parties that do not partake in, or contribute to a specific bargain and exchange of concessions among a narrower set of negotiating parties. Separate PTAs between one ASEAN member and the external partner, on the other hand, foreclose the option of free-riding, increase the value of concessions through exclusivity, and would thus result in deeper and broader commitments than ASEAN+1 PTAs.

It is interesting, in this context, that Japan has opted for the conclusion of services agreements as part of every single one of its seven separate PTAs with individual ASEAN members, rather than choosing the ASEAN+1 approach first. Our contention is that Japan and its ASEAN partners chose this option because separate services agreements allow for exclusivity of concessions, hence a greater value of concessions at the negotiation table, and result in deeper and broader commitments. The inclusion of MFN clauses in several of Japan's separate accords with individual member states does indicate that the parties to these agreements are aiming for a more comprehensive approach to services liberalization, even if ASEAN members attach broad exemptions to their MFN obligations vis-à-vis Japan (for instance by excluding MFN applicability to AFAS concessions *per se* or by making broad sectoral exemptions).

Table 13 presents the 'Hoekman Index'⁷³ scores, i.e. average services commitment level data, of six ASEAN member states under AFAS, under ASEAN's PTAs with Australia and New Zealand, China, and Korea, as well as under their individual PTAs with Japan.⁷⁴

⁷² ASEAN (2011): *op.cit.* pp12-13

⁷³ The 'Hoekman Index' is an indexation method for measuring GATS-style commitment levels in service sectors. This method assigns values to each of 8 cells (4 modes of services supply and 2 aspects of liberalization - market access (MA) and National Treatment (NT)-), as follows: N=1, L=0.5, U=0; then calculates the average value by services sector and by country. Ishido (2010) has calculated the "Hoekman Index" for each of 55 sub-sectors for four ASEAN PTAs and six PTAs that Japan has concluded with individual ASEAN member states. The author then calculated the simple average at the level of the 55 sub-sectors. The results are presented in Table 11.

⁷⁴ Ishido, Hikari (2010): *Liberalization of Trade in Services under ASEAN+n and Bilaterals: A Mapping*

Table 13: 'Hoekman Index': Services Commitment Levels in ASEAN's PTAs

	AFAS	ASEAN-AUS / NZ	ASEAN- China	ASEAN- Korea	Six Individual ASEAN MS-Japan
Indonesia	0.35	0.16	0.04	0.18	0.14
Malaysia	0.31	0.16	0.06	0.19	0.12
Philippines	0.29	0.11	0.04	0.16	0.27
Singapore	0.36	0.32	0.23	0.31	0.44
Thailand	0.46	0.22	0.06	n/a	0.15
Vietnam	0.33	0.32	0.03	0.31	0.33
ASEAN	0.33	0.20	0.12	0.19	0.24
NZ		0.39			
AUS		0.38			
China			0.13		
Korea				0.28	
Japan					0.50

Source: Ishido, Hikari (2010): Liberalization of Trade in Services under ASEAN+n and Bilaterals: A Mapping Exercise, in: Jae Lee, Chang & Okabe, Misa (eds.): 'Comprehensive Mapping of FTAs in ASEAN and East Asia', ERIA Research Project Report No. 26

Note: The Hoekman Index score for Japan's commitment level under its six separate PTAs with individual ASEAN member states is calculated as the simple average of Japan's commitments for each of the six PTAs.

The results demonstrate that none of the ASEAN+1 plurilateral PTAs exceeds, on average, the AFAS *status quo* of services trade and investment liberalization. Ishido (2010) also finds that ASEAN member states have not only made their strongest average services trade commitments under AFAS, but that ASEAN member states' commitments under ASEAN+1 PTAs in individual sub-sectors do not exceed the AFAS benchmark in a single instance. In other words, ASEAN+1 PTAs do not change the AFAS *status quo*. In contrast, ASEAN member states appear to be highly consolidated among themselves. In fact, Ishido (2010) finds significant sector specific similarities (i.e. high correlations) among ASEAN member states' commitments made in context of the three ASEAN+1 plurilateral agreements on services trade.

Among the ASEAN+1 plurilateral agreements, the ASEAN-Australia / New Zealand PTA ranks first in terms of the average strength of ASEAN member states' commitments; ASEAN-Korea ranks second, and ASEAN-China, with a significantly lower average commitment level of ASEAN members, ranks fourth – mirroring the ranking order of trade intensity scores of ASEAN as a whole with its external partners (see section IV).

The aggregate average commitment level of six ASEAN member states under their separate PTAs with Japan is higher than under any ASEAN+1 agreement, but lower than under AFAS. For some individual ASEAN member states, however, the individual average commitment level under the PTAs with Japan approximates (Vietnam, Philippines) or exceeds (Singapore) their average commitment

(Contd.) —————

Exercise, in: Jae Lee, Chang & Okabe, Misa (eds.): 'Comprehensive Mapping of FTAs in ASEAN and East Asia', ERIA Research Project Report No. 26.

level under AFAS. Moreover, Ishido (2010) found that all of these six ASEAN member states extended, in their separate PTAs with Japan, commitments that exceed their AFAS obligations in some individual sub-sectors, which confirms the hypotheses that we have developed above.

None of the ASEAN+1 accords include any substantive rules or cooperation clauses applying to **government procurement**.⁷⁵ This complete lack of legal treatment mirrors the ASEAN *status quo* in this area. Public procurement remains entirely outside of the scope of ASEAN cooperation and legal integration efforts and is not even mentioned in the 2007 ASEAN Economic Community Blueprint.⁷⁶ Singapore, up until today, remains the only ASEAN signatory to the WTO's Government Procurement Agreement (GPA).

In contrast, all but one (Japan-Malaysia PTA) of Japan's PTAs with individual ASEAN members include government procurement provisions, which mostly manifest, however, the ambition of the parties to exchange information on government procurement rules and regulations, to enhance the transparency of their respective systems, and to cooperate on related issues in the future. For these purposes, Japan's PTAs with Indonesia, the Philippines, and Thailand establish sub-committees. Japan's PTA with the Philippines, remarkably, includes a legally binding and mandate for time-bound future negotiations on government procurement market access liberalization. Japan's PTA with Singapore, finally, refers to the GPA, to which both countries are parties.

In the area of **intellectual property rights**,⁷⁷ only ASEAN's PTAs with Korea as well as Australia and New Zealand contain binding provisions, while the PTAs with China and India, unsurprisingly, make no reference to intellectual property whatsoever. The ASEAN-Japan agreement includes IPR in its horizontal cooperation clause, but does not provide for any substantive disciplines.

The ASEAN – Korea PTA merely reaffirms the parties' obligations under the WTO TRIPs agreement. The ASEAN – Australia / New Zealand PTA devotes far more attention to this policy area by including a separate chapter on intellectual property rights. Its disciplines on copyrights, trademarks, and geographical indications as well as transparency contain, in terms of coverage, a few TRIPs-plus provisions, which, however, are predominantly framed in aspirational legal language, e.g. regarding the accession to TRIPs-plus IPR treaties or the effective legal protection against circumvention of technological measures used by copyright owners. An exception here is the hard legal TRIPs-plus obligation to maintain a trademark classification system consistent with the Nice Agreement. What is striking is the omission of any disciplines on procedural or administrative matters as well as enforcement in terms of border measures. The most important feature of the chapter, rather, is its highly detailed cooperation clause and the creation of a joint committee on IP issues. Once again, ASEAN's external commitments in this area broadly reflects the ASEAN internal *status quo*, which comprises of an agreement on intellectual property cooperation, the ASEAN 2004-2010 IPR Action Plan, the Work Plan for ASEAN Cooperation on Copyrights, and, most importantly, each ASEAN member's obligations under the WTO TRIPs agreement.

Japan's separate PTAs with ASEAN member states go beyond every ASEAN+1 agreement and, in some instances, contain binding TRIPs-plus provisions. The respective chapters provide for substantive and hard legal disciplines on patents, trademarks, industrial design, copyrights, protection of new plant varieties, geographical indications, enforcement in terms of border measures as well as

⁷⁵ For an overview of common government procurement disciplines in PTAs, see: Dawar, Kamala & Evenett, Simon (2011): *Government Procurement*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): 'Preferential Trade Agreement Policies for Development – A Handbook', World Bank, Washington D.C.

⁷⁶ ASEAN Secretariat (2007): *ASEAN Economic Community Blueprint*, Jakarta. Available at: <http://www.aseansec.org/5187-10.pdf>

⁷⁷ Fink, Carsten (2011): *Intellectual Property Rights*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): 'Preferential Trade Agreement Policies for Development – A Handbook', World Bank, Washington D.C.

civil and criminal remedies, transparency, and detailed rules on procedural matters. TRIPs-plus provisions can be found in the areas of procedural simplification (e.g. the obligation to apply an international classification system on patents as well as provisions relating to the publication of patents), the protection of trademarks, and enforcement (e.g. the prohibition to re-export goods infringing trademarks or copyrights). Moreover, the agreements establish sub-committees, which receive a detailed mandate to monitor, review, discuss, and cooperate on issues relating to the implementation of the chapters. The accords thereby create a solid TRIPs-plus legal framework and attach a bilateral cooperation mechanism between one of the main producers of intellectual property in the world and a set of developing countries with varying but generally low levels of IPR enforcement and enforcement capacity. As such, the level of ambition that is codified in most of Japan's bilateral agreements does in fact go beyond ASEAN's internal efforts, which merely focus on institutional capacity building and cooperation in this field.

4. The Depth of WTO-extra Commitments in ASEAN's PTAs

In this subsection, we analyze the depth and institutional dimension of ASEAN+1 PTA commitments in select policy areas of the WTO-extra category. In doing so, we compare these commitments with the ASEAN *acquis* and the depth of commitments in six out of seven PTAs that individual ASEAN member states have concluded with Japan in parallel to the ASEAN-Japan PTA. We have selected those policy areas for examination where our sample of overall eleven PTAs provides for a sizeable number of enforceable commitments and therefore make a comparison useful. The areas under examination are competition policy, investment, as well as movement of natural persons (i.e. labor mobility). For this comparison, we have used the Comparative FTA Toolkit of the Asian Development Bank's Regional Integration Center.⁷⁸

In the area of **competition policy**, the agreements under review do not provide for any major achievements.⁷⁹ The PTAs with Australia / New Zealand and Japan are the only ASEAN+1 agreements that in fact include any reference to competition policy at all. The PTA with Japan mentions competition policy as one among many areas of economic cooperation. Similarly, the competition chapter in the ASEAN-Australia / New Zealand PTA, in its four respective articles, does not contain any specific or legally binding obligations but, to the contrary, recognizes the diverse capacities of the parties to implement, maintain, as well as enforce competition laws and, on this basis, calls for a variety of cooperation and technical assistance activities. In this context, it should be remembered that, so far, only five ASEAN member states have enacted some kind of competition law - notably Indonesia, Singapore, Thailand, Vietnam, and Malaysia. The ASEAN Economic Community Blueprint calls, in aspirational language, for the enactment of competition laws in all ASEAN member states by 2015, which can be seen, as a matter of appropriate sequencing, as a prerequisite for cooperation on and integration of competition policies at the regional level.

For a better comparison of ASEAN+1 agreements with regard to competition policy provisions, we observe, for instance, that the inter-regional EU-Cariforum EPA provides for legally binding and time-bound disciplines, which require the establishment of competition authorities and the enactment of competition laws in all Caricom member states, as well as the formulation of regional competition regulations, which are to be enforced by the already existing regional Cariforum competition authority. Through these provisions, the EPA reinforces the obligations that are already provided for in

⁷⁸ The ADB's Regional Integration Centre's Comparative FTA Toolkit can be accessed at <http://aric.adb.org/comparisonftacontent.php>.

⁷⁹ For an overview of common competition policy disciplines in PTAs, see: Dawar, Kamala & Holmes, Peter (2011): *Competition Policy*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): 'Preferential Trade Agreement Policies for Development – A Handbook', World Bank, Washington D.C. or WTO (2011): op. cit., pp142-145

the Revised Treaty of Chaguaramas, whereas the EPA adds political clout and positive incentives - notably capacity building and technical assistance guarantees - to the intraregional treaty.

Japan's separate PTAs with individual ASEAN members, which all contain a miniscule competition chapter, go a little further than the ASEAN-Australia / New Zealand PTA by calling upon the signatories - in hard but the broadest possible legal language - to address 'anti-competitive activities' through the adoption of 'appropriate' laws and regulations. Similarly vague provisions are devoted to the principle of non-discrimination, procedural fairness, promotion of competition, cooperation, and technical assistance.

Remarkable achievements, however, can be reported in the area of **investment protection and liberalization**, which can be seen as a key ingredient to a policy framework that provides for the legal security and expansion of regional production networks.⁸⁰ Investment, it should be recalled, is one of the four 'Singapore Issues', which were dropped from the WTO Doha Round negotiation agenda at the 2003 Cancun Ministerial due to heavy opposition from developing countries.

In early 2009, ASEAN consolidated and significantly expanded previous intra-regional investment accords by concluding the ASEAN Comprehensive Investment Agreement, which, as a modern state-of-the-art investment treaty, covers investment protection, liberalization, facilitation, promotion, and transparency of investment rules and regulations. The conclusion of investment accords under the respective framework agreements with China and Korea followed promptly in the same year. Moreover, ASEAN, Australia, and New Zealand included a comprehensive investment chapter in their 2010 PTA. India and Japan, on the other hand, are still negotiating investment agreements with ASEAN, whereas Japan has either already included investment liberalization, protection, and promotion chapters in its separate PTAs with seven individual ASEAN member states, or, in case of Cambodia, Laos, and Viet Nam, concluded separate investment liberalization and protection agreements.

While a comprehensive and detailed comparison of investment rules and coverage under existent ASEAN+1 PTAs, the separate PTAs with Japan, as well as their reservations, would exceed the scope of this paper, we summarize a number of common features and differences below.

As a matter of simplicity, we start with the most important difference that distinguishes the ASEAN-China investment agreement from all other accords, notably the fact that it does not extend its national treatment provision to 'establishment' and therefore only governs investment protection, but not pre-establishment liberalization, which reportedly resulted from the reluctance of the Chinese government.⁸¹ Furthermore, the ASEAN-China agreement includes a provision, which exempts all 'existing or new non-conforming measures' from the scope of national treatment and MFN and thereby entirely erodes those two disciplines.

All of the agreements take a broad asset-based approach to the definition of investment, which is generally inclusive. Secondly, all agreements - except the Japan-Thailand PTA - use a negative list approach, which implies that the substantive disciplines of the agreements apply to any sector or sub-sector that is not expressly exempted, or included in a list of reservations annexed to the accord or the respective PTA chapter.

Generally speaking, the investment chapters and investment agreements in our sample commonly encompass all features of modern NAFTA-style investment accords, including provisions on the

⁸⁰ For an overview of common investment disciplines in PTAs, see: Miroudot, Sebastien (2011): *Investment*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): 'Preferential Trade Agreement Policies for Development - A Handbook', World Bank, Washington D.C. or WTO (2011): op. cit., pp 137-40

⁸¹ Xiao, Jun (2010): *The ASEAN-China Investment Agreement: A Regionalization of Chinese New BITs*, Society of International Economic Law (SIEL), Second Biennial Global Conference, University of Barcelona, July 8-10, 2010.

prohibition of performance requirements; fair and equitable treatment; compensation in case of strife; transfers; expropriation and compensation; subrogation; general and security exceptions; reservations; modification of commitments; denial of benefits; transparency; state-to-state disputes; investor-state disputes; and institutional arrangements establishing a committee that deals with issues arising under these provisions.

As noted above, all but the ASEAN-China investment agreement allow, in principle, for the application of national treatment provisions to pre-establishment, subject to sectoral and sub-sectoral reservation lists. More variety, however, can be found in regard of most-favored nation clauses. Among the plurilateral accords in our sample, only the ASEAN Comprehensive Investment Agreement itself confers an unconditional MFN status to the signatories, notwithstanding the lists of sectoral and sub-sectoral reservations. As mentioned above, the ASEAN-China agreement includes an MFN provision that is essentially hollow. The MFN clause in the ASEAN-Korea investment agreement, moreover, is highly conditional. It excludes from its scope all preferential treatment granted under any already existing PTA or regional agreement, as well as any preferential treatment granted under existing or future agreements between and among ASEAN member states. The ASEAN-Australia / New Zealand investment chapter does not grant MFN treatment in a binding manner at all. In contrast, we do find unconditional MFN clauses in four separate PTAs that Japan has negotiated with individual ASEAN member states. The agreements with Singapore and Thailand do not contain such clauses.

On this basis, we conclude that, following the coming into force of the ASEAN Comprehensive Investment Agreement, ASEAN's investment agreement / chapter with Korea as well as Australia and New Zealand have broken new ground by establishing deep and comprehensive investment protection and liberalization disciplines, whereas the ASEAN-China investment agreement is limited to investment protection. Japan has, prior to the ASEAN-internal investment agreement, secured separate comprehensive protection and liberalization chapters and agreements with nine out of ten individual ASEAN member states. Through the, in principle, unconditional granting of MFN status, most of these agreements and investment chapters appear, on their surface, to provide for more beneficial treatment than the ASEAN+1 accords, notwithstanding respective reservation lists.

Similar to the areas of tariff reduction commitments as well as services trade liberalization, we find it highly likely that the exclusivity of concessions provided by Japan's bilateral agreements would result in deeper commitments than the plurilateral agreements, which cannot foreclose the option of free-riding on specific bargains among a smaller number of negotiating parties and the resulting concessions. Due to the limited scope of this paper, however, we cannot conduct a comprehensive comparison of the respective reservation lists to verify this hypothesis.

The ASEAN+1 PTA with Australia and New Zealand is the only one of the five plurilateral agreements that provides for disciplines on the liberalization of the **movement of natural persons**, i.e. **mode 4 services liberalization**.⁸² The inclusion of such disciplines can be interpreted as an important concession on behalf of Australia and New Zealand, which has likely been traded against ASEAN concessions in other areas of the agreement. The respective chapter covers provisions applying to the transparency of regulations and administration and applies to the temporary entry of business visitors, investors, intracorporate transferees, contractual services suppliers, and spouses, which are, apart from the last one, the standard categories of temporary entry liberalization in PTAs. The country-specific commitments and attached conditions with regard to these worker categories (such as limitations on the length of stay or educational requirements) are codified in an annex to the agreement. The commitments made by Australia and New Zealand are much more liberal than those of ASEAN

⁸² For an overview of common labor mobility commitments in PTAs, see: Stephenson, Sherry & Hufbauer, Gary (2011): *Labor Mobility*, in: Chauffour, Jean-Pierre & Maur, Jean-Christophe (eds.): 'Preferential Trade Agreement Policies for Development – A Handbook', World Bank, Washington D.C.

member states, both in terms of the number of professional categories that are covered and the length of stay that is permitted.⁸³

Japan has opted, once more, for the inclusion of respective disciplines in context of its PTAs with individual ASEAN member states rather than the ASEAN-Japan PTA. Japan's agreements with Indonesia, the Philippines, Thailand, Singapore, and Viet Nam contain distinct chapters on the movement of natural persons, which, in their structure, resemble the ASEAN-Australia / New Zealand PTA. Japan's PTAs, in addition, establish sub-committees that are mandated to deal with the implementation of the chapters and the negotiation of further commitments in the future. Moreover, the provisions of Japan's PTAs deviate from the ASEAN-Australia / New Zealand PTA in terms of scope (covered worker categories), specific commitments (liberalized categories of professionals), and conditions (length of stay; educational requirements) that are attached to scheduled commitments. As in the ASEAN-Australia / New Zealand PTA, commitments are much more comprehensive on the side of the developed country party. In the PTAs with Indonesia and the Philippines, for instance, Japan's commitments with regard to length of stay and coverage of professional categories are considerably more liberal than the commitments of the respective other party. In essence, the mode 4 concessions made by Japan apply to the temporary entry of nurses and care-workers from abroad.⁸⁴

VI. Summary, Conclusions, and Policy Implications

Our findings, presented in the previous section, fully verify the hypotheses that we have developed in section IV, and which we have summarized in subsection 4 of section IV.

The lowest common denominator of ASEAN member states' highly heterogeneous policy preferences, which has shaped the depth and pace of ASEAN internal economic integration in the past two decades, is mirrored in the coverage and depth of PTA commitments that ASEAN member states have collectively negotiated and concluded with six external dialogue partners – notably China, Korea, Japan, India, as well as Australia and New Zealand. In other words, the lack of institutional and economic capacity of the least developed ASEAN member states to commit to certain market access or regulatory reforms is not only reflected in the ASEAN *acquis*, but similarly limits the coverage and depth of ASEAN+1 PTAs. Thus, not a single one of ASEAN+1 PTAs provides for greater coverage and depth of substantive and binding disciplines than the legal documents that establish the *acquis* of ASEAN internal *de jure* economic integration.

This finding does not only hold true for policy areas where common PTA rules apply to all signatories equally, but similarly for those commitments, which can technically be differentiated among the signatories by means of country specific tariff reduction and services trade liberalization schedules.

ASEAN member states have concluded ASEAN+1 PTAs in what can be called the 'default mode': it is not ASEAN as a legal entity but its individual member states, which are parties to ASEAN+1 PTAs. It is thus the member states, which are the individual subjects of the rights and obligations that the agreements extend. Hence, the fact that ASEAN+1 PTAs are plurilateral agreements in their legal nature implies that they create rights and obligations among all parties *inter se*. In theory, therefore, liberalization and integration disciplines in ASEAN+1 PTAs that are deeper and more comprehensive than ASEAN internal economic liberalization and integration disciplines could *de facto* alter ASEAN's internal *acquis* to a more liberal standard.

⁸³ For a summary of scope and coverage of the ASEAN-Australia / New Zealand PTA chapter and commitments on movement of natural persons, see: Stephenson & Hufbauer (2011): op. cit. pp297-99

⁸⁴ For a summary of the exact scope and coverage of the Japan-Philippines PTA chapter and commitments and the Japan-Indonesia PTA chapter and commitments on the movement of natural persons, see: Stephenson & Hufbauer (2011): op. cit. pp296-97

At the same time, the plurilateral legal character of ASEAN+1 PTAs not only requires the negotiation of a lowest common denominator for PTA rules that apply to all eleven (or twelve) parties equally, but also forecloses the option of an exclusive exchange of (tariff, services, or investment) concessions between an ASEAN member state and the external partner in areas where differentiated commitments are possible. The plurilateral setting therefore discourages ASEAN member states commitments that are deeper than the ASEAN internal *status quo* because other ASEAN member states would free-ride on a specific bilateral exchange of concessions with the external partner.

Our findings confirm this hypothesis: the plurilateral negotiation setting has prevented ASEAN member states from making concessions that go beyond the ASEAN internal *status quo* of integration and liberalization. This is not only the case with regard to common rules that apply among all parties *inter se*, but also in areas where ASEAN+1 PTAs provide for country specific commitments, i.e. in the areas of tariff reductions and services trade liberalization. We cannot, unfortunately, verify the validity of our hypothesis for the depth of ASEAN member states' individual liberalization commitments in the area of investment, as a comprehensive analysis of respective National Treatment and MFN reservation lists of the agreements would exceed the scope of this paper.

The important conclusion that we can draw from this finding is that ASEAN+1 PTAs do not have the legal effect of altering the depth of ASEAN's internal *de jure* integration, which thus merely remains a theoretical legal possibility. To the contrary, the comparison of the depth of disciplines and commitments found in ASEAN+1 PTAs with those of the ASEAN *acquis* results in the conclusion that ASEAN member states remain highly consolidated among themselves vis-à-vis the external partners. As a result, we find that, despite the fact that ASEAN member states are, *de jure*, the individual subjects of rights and obligations under external PTAs, they act, *de facto*, collectively to the extent that their external commitments do not transcend the internal *status quo*.

On a horizontal level, however, ASEAN's PTAs with Australia and New Zealand, Japan, and Korea appear to be more comprehensive than the ASEAN *acquis*. This finding stems from the fact that these agreements comprise a variety of hard legal disciplines, which mandate economic cooperation activities in a wide range of policy areas. The provision for such 'living agreement' instruments, however, does not affect the current depth of *de jure* economic integration among the signatories, but rather serve the purpose of enhancing institutional and private sector capacity with a view to strengthening domestic institutional, regulatory, and economic structures in preparation for future legal integration initiatives.

The merits of such economic cooperation provisions are highly contingent upon the strength of the respective mandates - i.e. their legal enforceability -, the institutional dimension attached to them, as well as upon provisions that govern the allocation of necessary resources. In other words, the substantive objectives that are codified in such disciplines require a solid institutional platform and a strong and detailed mandate in order to result in any tangible achievements in the future.

In this regard, we find that ASEAN's PTAs with Australia and New Zealand, Japan, and Korea satisfy the above-mentioned requirements, and therefore have a robust potential to render respective living agreement instruments fully operational and effective. Economic cooperation clauses in ASEAN's PTAs with China and India, in contrast, fail this basic test in all respects.

The proliferation of economic cooperation provisions in ASEAN+1 PTAs provides for additional evidence of the impact of the lowest common denominator negotiation principle that has shaped the depth of ASEAN+1 PTAs. Overall, we find that the agreements are characterized by a hard legal core of specific and enforceable substantive obligations in key policy areas, which is surrounded by a realm of living agreement instruments and/or soft law in areas where some of the signatories were not prepared to make additional substantive commitments, while other parties demanded a minimum standard of legal treatment and/or cooperation towards enhanced convergence in the future.

This dual approach of providing for, first, hard and specific legal disciplines in key policy areas and, second, economic cooperation and/or soft law aiming at further convergence in the future, is particularly plausible in the ASEAN context, where highly diverse institutional and private sector capacities to implement, administer, enforce, and comply with complex new regulatory and border regimes persist. In this way, ASEAN PTAs with external partners, and particularly with the developed economies among them, can contribute to and accelerate the process of ASEAN internal *de jure* and institutional integration, which, subsequently, can be extended to ASEAN's external relationships.

Overall, we find that the depth and coverage of ASEAN+1 PTAs corresponds to the level of trade intensity between ASEAN member states and external partners. Comparing the core of binding substantive disciplines and commitments of the five agreements, we find that ASEAN's PTA with Australia and New Zealand is by far the most ambitious. The accord achieves the strongest mutual commitments in virtually all areas - and particularly so in the areas of tariff reductions, customs reform, TBT and SPS measures (mandating negotiations on conformity assessment MRAs), intellectual property rights, investment protection and liberalization, and the movement of natural persons. The depth and coverage of the agreement - notwithstanding the general limitations that we have discussed above - thereby gives justice to the intensity of existing trade between the two regions, which is the highest among ASEAN's trade relationships with all external ASEAN+1 partners. Moreover, the ambition reflected by the agreement also gives an indication of Down Under's geopolitical commitment to ASEAN member states as a collective, which is underlined by the fact that Australia and New Zealand make by far the strongest commitments among the signatories in terms of tariff and services trade liberalization as well as technical assistance and capacity building commitments. The fact that both Australia and New Zealand have recently concluded, or are in the process of negotiating, various separate PTAs with individual 'high intensity' trade partners among ASEAN member states, points at the fact, however, that the parties to these parallel agreements are not willing to settle for the lowest common denominator among ASEAN members, both in terms of market access liberalization and behind-the-border disciplines.

The ASEAN-Korea PTA codifies commitments, which approximate the ambition of the ASEAN-Australia / New Zealand agreement in terms of tariff reductions, services liberalization, and the legal standard that it establishes for the protection and liberalization of investments. Mutual concessions are, however, more balanced than in the prior case. Moreover, the ASEAN-Korea accord dispenses with any binding and substantive WTO-plus legal treatment in other than the before-mentioned areas and is therefore more confined to the liberalization of merchandise and services trade as well as investments than the ASEAN-Australia / New Zealand PTA. Similar to Australia and New Zealand, Korea now negotiates parallel PTAs with the two ASEAN member states that it trades most intensively with in order to achieve 'ASEAN-plus' legal treatment in areas that matter most for businesses.

The policy priorities mirrored in the ASEAN-China PTA reflect the low intensity of trade between China and ASEAN members: the agreement provides for robust merchandise trade liberalization - which can serve to revert a trend of decreasing trade intensity - but falls way short of matching the commitment levels of the previous two agreements in terms of services liberalization. Moreover, the ASEAN-China investment agreement does not include liberalization measures at all.

The ASEAN-India PTA does not appear to create any additional commercial opportunities whatsoever. In fact, the accord stands in contradiction with GATT Article XXIV, which requires regional trade agreement to achieve a liberalization of 'substantially all trade' for it to be consistent with WTO legal disciplines. Moreover, the PTA does not contain any legal disciplines that exceed the current WTO *status quo*. We can only speculate over the motivations of this essentially hollow agreement. One way of explaining the extremely low tariff commitment levels are strong similarities of production structures, therefore a lack of complementarity of the respective economies, and, to the contrary, the existence of a competitive relationship between ASEAN and India in international merchandise trade. The case may be different in the area of services trade and investment, the

liberalization of which is currently under negotiation in the ASEAN-India context, and the outcome of which we cannot prejudge.

Japan, finally, in apparent awareness of the limitations of the potency of the 'ASEAN collective' in trade and investment negotiations, has pursued a dual market access liberalization and economic integration strategy with ASEAN member states from the very beginning. On the one hand, Japan has concluded a PTA with ASEAN member states collectively, which is confined to robust merchandise trade liberalization and strong economic cooperation provisions. The seven parallel agreements, which Japan has concluded with individual 'high-intensity' trade partners among ASEAN member states resulted in what Australia, New Zealand, Korea, and now the European Union are likely attempting to achieve in their own negotiations with individual ASEAN member states – notably preferential trade agreements that contain elements of deep and comprehensive economic integration.

The six separate Japanese accords that we have examined in this paper do not only exceed the depth and coverage of all five ASEAN+1 PTAs. They also extract commitments from the respective ASEAN partner country, which transcend the ASEAN internal *status quo* to a remarkable extent. The agreements thereby give further evidence to the impact of the lowest common denominator paradigm and the free-rider problem, which prevail in the ASEAN+1 plurilateral negotiation setting.

The two of Japan's seven separate and individual ASEAN member state PTAs for which we have found tariff coverage data exceed the average tariff commitments of all ASEAN+1 PTAs, including the ASEAN-Japan PTA. In the area of technical barriers to trade, Japan's agreements with the Philippines, Singapore, and Thailand require the mutual recognition of conformity assessments conducted or certified by the competent authorities of either party as of the date of entry into force. The other three Japanese agreements under review mandate negotiations towards this end. As the only agreement in our sample of overall eleven PTAs, the Japan-Singapore also outlaws the employment of export taxes.

Moreover, the average services commitments of ASEAN member states under six out of seven of the parallel agreements with Japan exceed the average commitment levels of all ASEAN+1 PTAs and either remain below, match, or exceed the ASEAN internal average commitment level under AFAS. In certain individual services sub-sectors, all of the six ASEAN member states have made commitments that go beyond their AFAS concessions.

Additionally, Japan's parallel agreements provide for 'ASEAN-plus' legal treatment in the areas of government procurement, IPR (TRIPs-plus), and competition policy. The disciplines contained in Japan's investment liberalization and protection chapters are, furthermore, more encompassing than those codified under ASEAN's Comprehensive Investment Agreement and in ASEAN+1 PTAs as they include generally unconditional MFN clauses. Finally, most of the agreements provide for chapters on the liberalization of the movement of natural persons (mode-4 services supply), under which Japan makes particularly strong commitments with regard to the temporary entry and stay of nurses and care-workers in Japan.

Our findings have several implications for ongoing and prospective negotiations of trade and investment agreements that involve ASEAN member states.

First, ASEAN's trade and investment partners should be well aware of the limits that the *status quo* of *de jure* ASEAN economic integration and the omnipresent free-rider problem impose upon ASEAN's external liberalization and integration efforts - should these partners aim for the negotiation of deep and comprehensive PTAs with ASEAN member states collectively. This inclusive approach can certainly result, as is compellingly demonstrated by the ASEAN-Australia / New Zealand PTA, in commercially meaningful merchandise trade, services, and investment liberalization, and yield benefits for ASEAN's regional integration process through economic cooperation, which will likely be extended to external partners in the long run.

Compared to the plurilateral ASEAN+1 setting, however, any bilateral agreement between a developed non-ASEAN economy, on the one hand, and an individual ASEAN member state, on the other, is likely to generate stronger commitments in these areas. The bilateral approach, moreover, allows for more comprehensive and rigorous legal treatment of other border and behind-the-border issues with a view to the elimination of second-generation trade and investment barriers. The bilateral approach, therefore, owns a much stronger potential to decrease the costs of 21st century trade among the partners and to render production networks more efficient and legally secure in the short run. Nevertheless, external partners that pursue a bilateral negotiation strategy with ASEAN member states individually should be under no illusion with regard to the significant differences that persist between the institutional and economic capacities of their ASEAN target partners. As such, PTA negotiations with, first, Brunei and Singapore; secondly, Malaysia and Thailand; and, third, Indonesia, the Philippines, and Viet Nam, will likely result in very different agreements in terms of their depth and comprehensiveness, given the distinct institutional and economic preparedness of these countries to sign up to bilateral commitments that require burdensome as well as costly (including politically) domestic reforms.

The ‘dual approach’ taken by Japan, Australia, New Zealand, and Korea, i.e. the negotiation of both a comprehensive but relatively shallow PTA with ASEAN member states, collectively, and bilateral PTAs with individual ‘high intensity’ ASEAN trade partners, separately, can maximize the aggregate benefits that these agreements can achieve in the short and in the long run. Given the European Union’s commitment to the negotiation of deep and comprehensive PTAs under its ‘Global Europe’ strategy, as well as its commitment to regional integration and economic development of ASEAN, European leaders will have eventually no choice but to follow a similar path.

Secondly, the creation of ASEAN-minus commitments in ASEAN+1 PTAs, on the one hand, and ASEAN-plus commitments in individual ASEAN member states’ PTAs with external partners, on the other, will likely result in competitive tensions among the ASEAN membership, which are geared towards the extension of ASEAN-plus concessions to the other ASEAN members. This competitive liberalization dynamic can result in the acceleration of ASEAN internal liberalization and integration efforts. At this stage, this is most apparent in the area of services trade liberalization, which is where ASEAN member states have the largest upward potential.

Our study provides, third, for strong indications of what can be expected from the recently announced ASEAN+6 PTA talks, if these negotiations do not allow for variable geometry to tackle what we have described as the lowest common denominator issue among a set of highly heterogeneous actors, as well as the free-rider problem that persists in plurilateral negotiation settings. In other words, if multi-speed liberalization and integration is not allowed for under the negotiation’s *modus operandi*, the ASEAN+6 PTA are unlikely to result in anything more than market access liberalization, which will be less ambitious than any parallel bilateral agreement, and therefore generate few if any additional commercial opportunities. The added value of such an accord, however, could lie in the harmonization of the rules of origin that apply to a substantial share of already liberalized tariff lines and thereby reduce transaction costs for businesses by disentangling parts of the Asian ‘noodle bowl’.

These considerations lead us to a final point, which concerns what has recently been discussed as a potential rivalry between ASEAN+n economic integration initiatives and the ongoing negotiations that are leading up to a Transpacific Economic Partnership Agreement (TPP). In our view, this ‘rivalry’ is an illusory scenario. Both initiatives, as a function of their distinct membership composition, will result in very different substantive depth and coverage of commitments. The membership of the TPP comprises a set of eleven advanced emerging and developed economies, which all benefit from relatively robust economic and institutional structures and can build on a rich experience of trade reform and negotiations. These *common* characteristics have the potential to enable TPP negotiating parties, even in the given plurilateral setting, to achieve deep disciplines that tackle second-generation trade barriers across the region in a comprehensive manner. As we have demonstrated, ASEAN member states *collectively* lack such enabling characteristics at this point in time. As a result,

ASEAN+n and the TPP provide benefits in very different areas, with an emphasis on market access liberalization for goods, services, and investment in case of the former and disciplines on complex border and behind-the-border regimes in case of the latter.

The overlapping membership of the two initiatives may lead to a spill-over of deep integration disciplines from the TPP to ASEAN+n at a later point in time, rather than two regimes that compete for application and effectiveness in the same policy areas. Australia, Brunei, Japan, Malaysia, New Zealand, Singapore, and Viet Nam are parties to both negotiation initiatives and may, following the development of deep-integration provisions under the umbrella of the TPP, carry such disciplines - through economic cooperation and further negotiations of intra-ASEAN and ASEAN+n legal agreements - into areas of prospective ASEAN and ASEAN+n economic integration. It is worth noting, in this context, that this scenario would leave the European Union with little, if any, influence with regard to the directions of East Asian and Asia-Pacific economic integration in the future.

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