

“A MEGA JUMBO-JET”: Southeast Asia’s Experiments with Trade and Investment Liberalisation

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This paper is about trade design and legal doctrine. It describes the Association of Southeast Asian Nations (ASEAN) Free Trade Area, current efforts towards building an ASEAN Economic Community, and also ASEAN’s wider aspirations in seeking to build a “mega jumbo-jet” with ASEAN as the fuselage, East Asia as one wing and South Asia the other through a complex network of free trade agreements (FTAs). Our attention is drawn principally to the formation of regional trade agreements under which no MFN doctrine applies at all; thereby allowing further, smaller FTAs to be formed in the shadow of such regional agreements under Article XXIV of the GATT-WTO Agreement. More than that, the recent innovation of bilateral Tariff Reduction and/or Elimination Agreements under the Early Harvest Programme (EHP) not only creates an exception to MFN, it replaces the idea of having some multilateralised concessions as between all the members that make up ASEAN as a whole. In that sense, there is no “ASEAN-China deal” as such, at least not substantively, beyond a multilateral framework under which the real deals get done separately and bilaterally. ASEAN’s FTA policies are therefore used to illustrate, and to test, the claim today that the MFN doctrine has fallen into desuetude. For example, is this loosely assembled regional organisational approach the direction which future FTAs might take? How large a scope or area might such regional FTAs cover? Should this be considered undesirable somehow? How might we refashion trade law doctrine so as to promote the “multilateralisation” of FTA concessions instead – a function traditionally performed by the MFN doctrine?

1. Introduction

Nations enter into FTAs for a variety of reasons. There is still an absence of consensus as to whether FTA policies should be analysed primarily in economic or strategic terms. This is

especially so in relation to the choice of FTA partners. Is the choice of China as an FTA partner by ASEAN to be measured primarily in strategic terms, in trade terms or both?¹ Similar questions might be asked, for example, in relation to the United States-Singapore FTA (USSFTA). As Singapore's then trade minister put it in relation to the USSFTA "[a]part from the benefits of increased trade and investment...both sides wanted the agreement for strategic reasons...[i]t also signals the U.S.'s long-term commitment to Asia".²

But taking a legal and institutional perspective could also yield important insights. From an ASEAN perspective, one observer has recently highlighted the danger of China-India trade "bypassing" Southeast Asia, a danger which ASEAN's current process of "economic integration" can perhaps address by adding something which neither India nor China at present has – a reliable legal-institutional framework for China-India trade.³ Yet others have focused on the variety of dispute settlement procedures which a range of FTAs currently employ and the potential weaknesses of such diversity in terms of their efficacy.⁴ Elsewhere, multilateralists point out that smaller and poorer nations are at a disadvantage in bilateral negotiations instead, and that policy questions concerning the equitable distribution of global wealth can therefore only be addressed multilaterally, and not through a global proliferation of FTAs.⁵

Viewed from a legal and institutional perspective, do ASEAN's FTAs contribute – i.e. do they add positively - towards the "architecture" of trade and investment? Parts II and III of this paper describe the trade and investment policy-aims and behaviour of the countries of Southeast Asia, acting both individually and collectively. Part IV deals with the impact of these policies on the global trading system, particularly as they might affect multilateralised trade concessions through the Most Favoured Nation (MFN) device.⁶

2. ASEAN's Path to Southeast Asian Economic Integration

We consider the history of ASEAN economic integration in this part while turning in the next part (Part III) to ASEAN's FTA negotiations with trading partners outside ASEAN.

A. Background

ASEAN's history in this regard is largely that of the creation of the ASEAN Free Trade Area (AFTA) and beyond.⁷ Some have argued that the true impetus for AFTA arose out of the 1997 Asian financial crisis.⁸ Notable amongst the official statements of the period are the ASEAN Heads of Investment Agencies' 1998 "Statement on Bold Measures". However true this observation might be in identifying a further impetus for the strengthening of AFTA, the history of AFTA pre-dates the financial crisis. AFTA was initiated in 1992 at the Fourth ASEAN Summit held in Singapore.⁹ Looking back at the financial crisis with the benefit of hindsight, some observers have criticised AFTA for having been conceived during a period of hubris; a time when there was both much talk of "Asian Values" as well as a "precipitate" expansion of ASEAN membership.¹⁰ Others emphasize ASEAN's resolve during this period:¹¹

After all, ASEAN has announced an ambitious and far-reaching ASEAN Vision 2020 and, amidst the crisis, undertook to proceed with its implementation with the

Hanoi Plan of Action.

In any event, the Ha Noi Action Plan saw the use of the term “ASEAN Economic Integration”, based on an open regionalist model. The present Secretary-General of ASEAN, H.E. Mr Ong Keng Yong has also observed that:¹²

[C]ollectively we are a market of 520 million with a combined GDP of US\$580 billion and total two-way trade of US\$781 billion (in 2000). In other words, ASEAN is about half the size of China in population and GDP. But we are a bigger trader than China; China’s external trade in 2000 was only US\$474 billion. ASEAN is the fourth biggest trader in the world after the EU-15, the US and Japan ...[and]... all major economic powers in the world are our key cooperation partners.

We must not draw the wrong conclusions from this. Jusuf Wanandi, a veteran observer of ASEAN’s movements has cautioned recently that ASEAN cannot in and of itself become the driving force behind the East Asia Community-building process. This is since “[i]t will take some years before ASEAN has enough strength to face and balance the North East Asian economies, which constitute...80% of the region’s economy”.¹³

Wanandi’s point is well-taken but what is notable today is that the history of ASEAN free trade can no longer be viewed in isolation from ASEAN’s more comprehensive ambitions not only to accomplish some considerable degree of trade liberalization, but also to pursue economic integration (the AEC) and to become a security and socio-cultural community with the two pillars of having (also) an ASEAN Security Community (ASC), and an ASEAN Socio-Cultural Community (ASCC).¹⁴

Recall that ASEAN’s focus was not always on economic integration.¹⁵ What is said here needs also to be viewed against ASEAN’s larger geo-strategic, social, cultural and political backdrop – and which encompasses a vision of human security in Southeast Asia in the broadest, contemporary sense.¹⁶ ASEAN in the aftermath of the Cold War was something of a security organization in search of a new identity and a new mandate. In the immediate post-Cold War period, some commentators had forecast the coming collapse of ASEAN. For them, ASEAN was an organization in search of a mission with the abatement of the historic Cold War threat of Soviet incursion into Southeast Asia.¹⁷ ASEAN, they said, had cut its teeth battling the Vietnamese occupation of Cambodia, viewing this as the first realizable sign of the erstwhile USSR’s ambitions in Southeast Asia. The lessons of cooperation were security-based in nature, and such a loose and indeed notoriously sluggish organization would falter in the absence of a common external threat. A principal culprit many pointed out is the cumbersome process of decision-making in ASEAN; namely, the *musyawarah* practice of consensus decision-making. This “ASEAN way” of decision-making has been something of an object of derision, especially on the part of external observers and skeptics within ASEAN.¹⁸

Following the Asian financial crisis, some saw hope for a new role for ASEAN. This was viewed against the backdrop of the economic and human challenges faced by the region following the severe effect the crisis had had on the Southeast Asian economies. But the doomsayers lingered on. According to them, the crisis was not so much an impetus to push ASEAN ahead but was instead merely a symptom of the malaise of ASEAN’s domestic institutions, particularly the absence of sound regulatory institutions in Southeast Asia and the inherent instability of ASEAN economies.¹⁹ Corruption, the absence of transparency, nepotism

and the like – these are the Southeast Asian characteristics that, even today, come quickest to mind.

ASEAN is not yet over that period of negative press coverage and negative popular public perception. But perhaps there is room for cautious optimism. Today, we see an ASEAN which has never been more energetic in its efforts to steer Southeast Asia to a secure position in an increasingly challenging global landscape. ASEAN is becoming more than both a security and an economic organization. Even with the grave threat of Southeast Asian-borne terrorism and religious extremism, and the grave economic divide between ASEAN's richest and poorest nations, the perception within ASEAN is one of cautious hope and optimism. Weathering the financial crisis has added a dose of reality, the diversion of foreign direct investment has added a sense of cohesiveness if not urgency in maintaining ASEAN as an attractive recipient of foreign direct investment (FDI), and the multiplicity and complexity of threats, the need that in turn creates for transnational political and regulatory cooperation, as well as the need to act as a singular, preeminent advocate of the Southeast Asian economies should cause us to take Southeast Asia seriously.

B. From the 1992 Inception of AFTA to the 1998 Ha Noi Action Plan

AFTA was initiated in 1992 through the Framework Agreement on Enhancing ASEAN Economic Cooperation, and the Common Effective Preferential Tariff Scheme (CEPT).²⁰ According to the 1992 CEPT Agreement, the original six ASEAN member states agreed to the elimination of quantitative restrictions (QRs) and other non-tariff barriers (NTBs) as well as to reduce tariff rates on intra-ASEAN trade in goods which meet the 40% ASEAN content requirement. They committed to a tariff reduction to the 0–5% range within 15 years, beginning 1 January 1993. Currently, more than 99% of the items on the inclusion list for the original six members have been brought down to that range. As for the newer members (Cambodia, Laos, Myanmar and Viet Nam), 66% of the almost 80% of total products which have already been moved into their inclusion lists are already within the 0-5% range.²¹

AFTA had taken one year to negotiate before signature in 1992. It precedes both NAFTA and the WTO Agreements. From its inception to the Ha Noi Plan of Action, the targets originally set for the achievement of the 0-5% tariff target for products which meet the 40% ASEAN content requirement in the case of the original six members were shifted twice, from the original target date of 2008 (i.e. 15 years from the inception of AFTA) to 2003 in 1994,²² and again, from 2003 to 2002 in 1998.²³ According to the Ha Noi Action Plan, the current target dates for achieving the 0-5% range are 2006 for Viet Nam, 2008 for Laos and Myanmar and 2010 for Cambodia based on the “10 year” formula (i.e. 10 years from the date of their membership of ASEAN).²⁴

(i) The Ha Noi Action Plan

At Ha Noi in 1998, during the Sixth ASEAN Summit, the ASEAN Ministers pushed forward the target date for the “completion” of AFTA from 2003 to 2002.²⁵ According to that target, tariffs on goods should by then have been brought down to no more than 5%. According to the Preamble to Part II of the Ha Noi Action Plan, the aim of “economic integration” (dealt with in

Part II) would be to create:²⁶

...a stable, prosperous and highly competitive ASEAN Economic Region in which there is a free flow of goods, services and investments, a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities.

(ii) The “Two-Track” Approach

(a) Goods: The ASEAN Integration System of Preferences

For the goods trade, the Ha Noi Action Plan covered trade liberalisation, customs harmonisation, standards and conformity assessment as well as other means of trade facilitation.²⁷ A two-track approach was adopted for trade liberalisation as between the older and newer ASEAN members. The aim was to:²⁸

- a. Maximise the number of tariff lines whose CEPT tariff rates shall be reduced to 0-5% by the year 2000 (2003 for Viet Nam and 2005 for Laos and Myanmar);
- b. Maximise the number of tariff lines whose CEPT tariff rates shall be reduced to 0% by the year 2003 (2006 for Viet Nam and 2008 for Laos and Myanmar); and
- c. Expand the coverage of the CEPT Inclusion List by shortening the Temporary Exclusion List, Sensitive List and General Exception List.

The two-track approach was adopted in order to bridge the development gap between the various ASEAN Members in accordance with the Initiative for ASEAN Integration, ASEAN Ministers also agreed in Ha Noi to implement the ASEAN Integration System of Preferences, involving the extension of tariff preferences to the newer members of ASEAN by older, established members.²⁹

(b) The Investment “Three-Prong” Strategy

To further the ASEAN Investment Area (AIA) through individual and collective action according to the agreed schedules and timetable,³⁰ a three-prong investment strategy was also adopted at Ha Noi comprising (1) cooperation and facilitation, (2) promotion and awareness, and the (3) AIA liberalisation programme itself. The central strategy, in paragraph 2.2.a of the Ha Noi Plan consisted of the abovementioned two-track approach. The two-track approach was taken both to coverage and time-lines so as to:³¹

Immediately extend national treatment and open up all industries for investments. However, for some exceptions, as specified in the Temporary Exclusion List and the Sensitive List, these will be progressively liberalised to all ASEAN investors by 2010 or earlier and to all investors by 2020 in accordance with the provisions of the Framework Agreement on AIA.

This is followed by a non-exhaustive, illustrative list of policy objectives to realize ASEAN’s three-prong investment strategy.³²

By and large the three-prong strategy seeks to further the regime created under the 1998 ASEAN Framework Agreement on Investment, the 1987 ASEAN Investment Treaty and its 1996 Protocol. Notable features of the 1998 Framework Agreement are the inclusion of pre-establishment rights for ASEAN investors,³³ exclusion of portfolio investments,³⁴ provision for Market Access in respect of all industries subject to exceptions,³⁵ National Treatment for ASEAN investors subject to a “Temporary Exclusion List” and a “Sensitive List”,³⁶ and MFN treatment subject to waiver.³⁷ The Framework Agreement envisages National Treatment for ASEAN investors by 2010 and for all other investors by 2020, subject to exceptions.

The earlier 1987 ASEAN Investment Treaty had provided for investment screening,³⁸ MFN but not National Treatment,³⁹ the standards of “full protection” and “fair and equitable treatment”,⁴⁰ what approximates the Hull standard of compensation,⁴¹ and compulsory investor-State arbitration.⁴²

(c) Services: Negotiation Coverage of All Services Sectors and Modes of Supply

As for services, a notable in-principle commitment in Ha Noi was to open up negotiations for all services sectors and all modes of services supply.⁴³ In addition, Part I of the Ha Noi Plan laid out a framework to strengthen ASEAN macroeconomic and financial cooperation.

C. The ASEAN “Bali” Concord II

This was followed up in 2003 by the Declaration of ASEAN Concord II of 7 October 2003 (Bali Concord II) comprising two general parts – a “Declaration” and “Framework”.

(i) An “Open” ASEAN Community

Paragraph 1 of the declaratory part of Bali Concord II (hereafter, “Bali II Declaration”) is a watershed in the evolution of ASEAN economic integration.⁴⁴ In declaring the establishment of the “ASEAN Community”,⁴⁵ paragraph I states that:⁴⁶

An ASEAN Community shall be established comprising three pillars, namely political and security cooperation, economic cooperation, and socio-cultural cooperation that are closely intertwined and mutually reinforcing for the purpose of ensuring durable peace, stability and shared prosperity in the region...

Paragraph 2 drives home the capaciousness of the ASEAN Community concept:⁴⁷

ASEAN shall continue its efforts to ensure closer and mutually beneficial integration among its member states and among their peoples, and to promote regional peace and stability, security, development and prosperity with a view to realizing an ASEAN Community that is open, dynamic and resilient...

The notion of an “open” ASEAN Community is particularly notable, and paragraph 7 elaborates

further, stating that:⁴⁸

ASEAN is committed to deepening and broadening its internal economic integration and linkages with the world economy to realize an ASEAN Economic Community through a bold, pragmatic and unified strategy...

Paragraph 9 – the “RTA paragraph” – reinforces an “open regionalist” ASEAN policy:⁴⁹

ASEAN shall build upon opportunities for mutually beneficial regional integration arising from its existing initiatives and those with partners, through enhanced trade and investment links as well as through IAI process and the RIA...

(ii) The “Framework”

The Bali II Declaration then goes on to state that the ASEAN members thereby “adopt” a “framework to achieve a dynamic, cohesive, resilient and integrated ASEAN Community” (hereafter, “Bali Framework”). Part “B” of this Bali Framework, entitled the “ASEAN Economic Community” (hereafter, “the Community”), states that:⁵⁰

The ASEAN Economic Community is the realisation of the end-goal of economic integration as outlined in the ASEAN Vision 2020, to create a stable, prosperous and highly competitive ASEAN economic region in which there is a free flow of goods, services, investment and a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities in year 2020.

The Community is premised upon a “convergence of interests”, while employing “clear timelines” to “deepen and broaden economic integration efforts”.⁵¹ So there are two dimensions. Put simply, the underlying vision here is that of a perceived mutual interest amongst the ASEAN nations to further economic integration in a disciplined manner.

Paragraph 3 adds that the Community itself “shall establish ASEAN as a single market and production base”.⁵² One commentator has observed that:⁵³

Apparently, a single market is more than a common market, but how much more is an interesting question. The Single European Act describes it as “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured”. Criticizing...this definition...[for being]...imprecise... [Lloyd]...defines a single market “as one in which the Law of One Price must hold in all goods, services and factor markets”, which means that “there should be a single price in the regionwide market for every tradable commodity and factor, expressing all prices in a common currency and adjusting for the real costs of moving goods or factors between locations”. In essence, a single market requires not only the elimination of border measures and full national treatment of beyond-the-border measures applying to imports, but also harmonization of rules and procedures across participating states.

Clearly, the economic divide between ASEAN’s older and newer members poses a problem in this regard and so paragraph 4 states that:

The ASEAN Economic Community shall ensure that deepening and broadening integration of ASEAN shall be accompanied by technical and development cooperation in order to address the development divide and accelerate the economic integration of Cambodia, Lao PDR, Myanmar and Viet Nam through IAI and RIA so that the benefits of ASEAN integration are shared and enable all ASEAN Member Countries to move forward in a unified manner.

In the eyes of ASEAN's Members, intra-ASEAN cooperation is key in this regard, and so paragraph 5 states in turn that:

The realization of a fully integrated economic community requires implementation of both liberalization and cooperation measures. There is a need to enhance cooperation and integration activities in other areas. These will involve, among others, human resources development and capacity building; recognition of educational qualifications; closer consultation on macroeconomic and financial policies; trade financing measures; enhanced infrastructure and communications connectivity; development of electronic transactions through e-ASEAN; integrating industries across the region to promote regional sourcing; and enhancing private sector involvement.

At the instigation of Thailand, Singapore and Malaysia, ASEAN's trade ministers, meeting in August 2006, are currently seeking to move the target date for achieving the AEC forward to 2015. This is expected to be confirmed during the ASEAN Summit at year-end in Cebu.⁵⁴

(iii) Other Pillars

Finally, there are the other two pillars mentioned earlier in addition to the ASEAN Economic Community (AEC) - the initiatives for an ASEAN Security Community (ASC) and the ASEAN Socio-Cultural Community (ASCC). These are dealt with in Parts "A" and "C" of the Bali Framework respectively.

D. Towards a Single Market and Production Base: An ASEAN Economic Community

Ha Noi was about completing the AFTA but with the Bali II Declaration and Framework, ASEAN's ambition is now clearly fixed on the creation of an ASEAN Community. According to Bela Balassa's oft-quoted "stages approach", there are several varieties of economic integration, evincing both differences of kind and degree, be it in the form of a:⁵⁵

...free-trade area, a customs union, a common market, an economic union...[or]... complete economic integration. In a free-trade area, tariffs (and quantitative restrictions) between the participating countries are abolished, but each country retains its own tariff against nonmembers. Establishing a custom union involves, besides the suppression of discrimination in the field of commodity movements within the union, the equalization of tariffs in trade with nonmember countries. A

higher form of economic integration is attained in a common market, where not only trade restrictions but also restrictions on factor movements are abolished. An economic union, as distinct from a common market, combines the suppression of restrictions on commodity and factor movements with some degree of harmonization of national economic policies, in order to remove discrimination that was due to disparities in these policies. Finally, total economic integration presupposes the unification of monetary, fiscal, social, and countercyclical policies and requires the setting-up of a supra-national authority whose decisions are binding for the member states.

So what is the ASEAN Economic Community? We should think things and not words, as Oliver Wendell Holmes once said, but one answer (albeit in “words” for ASEAN remains at that stage)⁵⁶ is that there should be a “single market” and a “single production base”, with “free movement of goods, services and capital”. As the then Prime Minister of Singapore put it, echoing paragraph 3 of the Bali II Framework (above):⁵⁷

[T]he need for ASEAN to press on with economic integration remains as urgent as ever, if not more so. We must push towards an ASEAN Economic Community: a single production base and a single market, with free movement of goods, services and capital. This is the only way to make sure we remain competitive in the face of growing regional and bilateral FTAs, post-Cancun.

In other words, what Balassa would probably call a “common market”, but not a customs union and certainly not anything like the European Union. According to Ambassador Pierre Gramegna, for example, speaking at the United Nations University in 1997:⁵⁸

...ASEAN is a pure intergovernmental organization where decisions are taken by the ASEAN foreign ministers on the basis of consensus or unanimity. The EU ...is more than an intergovernmental organization, which became clear when France practised the vacant chair policy in 1966. The Union has its own special legal status and extensive powers of its own. On the other hand the European Union is not a true federation to which national parliaments and governments are subordinate in important matters.

Speaking of the Council of Ministers, the Commission, the European Parliament and the European Court of Justice, he points out that nothing that is truly like these organs exist in ASEAN.

But this is not to say that ASEAN cannot have highly similar aspirations in some respects, indeed this is what prompts the comparison in the first place however inapposite it may be in some other fundamental ways. The argument has been made, for example, that ASEAN must strengthen its institutions, particularly (as we shall see below) in the context of its FTAs with major powers like China. As another observer has argued, ASEAN should rely on a rule-based and institution-oriented regime in these wider relations precisely because it may be dealing with a major power.⁵⁹ Moreover:⁶⁰

Institutional theory suggests that before the development of an institution, it is likely that all basic actors are rational and autonomous individuals interacting on the basis of rational choice. Governments are only acting in their self interest and thus will

look out for their own gains. If however, like the EU, strong institutions are developed, particularly institutions that act as a supranational “honest broker” and one that acts as a supranational “impartial arbitrator”, it is likely that would secure the interests of all members rather than favoring any particular member or a group of members.

While that may be to peer too far into the future, it at least identifies an important factor in moving the ASEAN project forward, and one which ASEAN leaders have a rational, self-interested reason to pursue.

3. Intimations of ASEAN's Wider Trade-Architectural Aspirations: The “MEGA JUMBO-JET” Metaphor

The discussion below considers ASEAN's drive to conclude FTAs with the three “ASEAN + 3” nations (China, Japan and Korea) as well as India. It will also consider FTAs and FTA negotiations between individual ASEAN nations and these countries as well as other countries in the wider Asian region and with countries outside the region. So far as ASEAN's FTA and FTA negotiations with China, Japan, Korea and India are concerned, we will discuss the aim purely of having a network of FTAs, at least at the initial stage, linking these partners with ASEAN as a whole purely on an “FTA model”.

We will therefore put aside a range of overlapping and competing visions - for example, the East Asian Summit (“EAS”),⁶¹ the deeper “East Asian Comprehensive Economic Partnership” proposal by Japan in 2006,⁶² a Free Trade Area of the Asia-Pacific which would avoid the “Asia-bloc” outcome of the previous two proposals, and to embed such forms of regionalism within a wide Asia-Pacific geographical area,⁶³ and finally, the Indian-proposal of having “Pan-Asia Free Trade Area”, possibly including Australia and New Zealand within it.⁶⁴ The reason we put these visions aside is hardly because of their lack of importance – indeed each has the potential to transform ASEAN's future, and to transform ASEAN's vision of the future. However, they have not advanced as far in actual practice as the network of FTAs which ASEAN has entered into or is in the process of active negotiation with China, Japan, Korea and India.

A. A “Mega Jumbo-Jet”

The drive towards the AEC is but a first step, the occasional cautionary official statement notwithstanding. ASEAN, it appears, aims to move in widening circles, encompassing a pan-Asian vision of the benefits of having an open, liberal Asian trading system and the following statement probably captures ASEAN's policy aspirations at the present time:⁶⁵

Strategically positioned between China and India is Southeast Asia. We are a significant market of half a billion people - equivalent to the whole of Europe... ASEAN is also jointly and individually negotiating Free Trade Agreements with China, India, Japan and Korea. So the economies of Asia are being integrated too. By 2025, it will be a different Asia, more integrated and less divided.

Singapore as a small, open trading nation has perhaps been a vocal advocate of ASEAN trade liberalization and of the region's economic integration. So it might be appropriate to start with a somewhat Singaporean visual mental imagery:⁶⁶

I like to think of new Asia as a mega jumbo jet that is being constructed. Northeast Asia, comprising China, Japan and Korea, forms one wing with a powerful engine. India, the second wing, will also have a powerful engine. The Southeast Asian countries form the fuselage. Even if we lack a powerful engine for growth among the 10 countries, we will be lifted by the two wings.

What does the mega-jumbo jet metaphor involve?

B. ASEAN's "Open Regionalism"

We have already mentioned ASEAN's "open regionalist" policy. Nothing prevents ASEAN members from extending the same preferences extended to ASEAN Members to non-Members as well. At least one study has shown, for example, that two-thirds of the goods coverage of the six original ASEAN members under the CEPT has also been liberalized multilaterally under the GATT following intra-ASEAN liberalization. This minimizes the risk therefore of trade diversion by substantially minimizing the difference between intra- and extra-ASEAN tariff rates.⁶⁷ One inference we might draw is that open regionalism has thereby allowed AFTA to serve as a kind of building block for global trade liberalization, and not as a stumbling block. This is supported indirectly by a study by the International Monetary Fund (IMF) finding no evidence of FTAs causing trade diversion in Asia. That study explains Asia, and especially ASEAN's, higher "openness" towards non-Members as having been due in part to two decades of unilateral concessions during the 1980s and 1990s.⁶⁸ We might also speculate further that there is no reason *at least in principle* that an East Asian Economic Community could not eventually result in wider liberalization outside of it under an open regionalist policy.⁶⁹

But this clearly is not a foregone conclusion, and the proposition itself needs to be assessed more carefully in light of what we do know. We know that ASEAN wants to build an economic community because it represents a market the size of Europe and so as to allow ASEAN to open up (not close) trade with China, and also with India and Japan. The ASEAN Economic Community or AEC is therefore meant to allow ASEAN members to negotiate liberalization more effectively, and to seek bigger and better cuts for the trade in ASEAN goods and in ASEAN services particularly in light of China's rise.

The eventual creation of a "single ASEAN economic space",⁷⁰ however it might be described according to Balassa's typology, does not preclude the fruits of liberalization being spread more broadly. We might quibble about whether the GATT-born method of trade negotiations through reciprocal concessions best serves the ideal of liberalization, or whether it is not only second-best.⁷¹ But whatever imponderables there are to this question, the test for the mega-jumbo jet lies, today at least, in the conceptual policy device of an open-regionalist policy. This is the common thread that should run through the ideas of the ASEAN Economic Community as well as ASEAN's vision for Asian trade liberalisation and perhaps even, one day, some manner of integration. What does ASEAN's open regionalism really mean?

C. ASEAN + 3 & India

(i) China and Japan

As early as the ASEAN Economic Ministers' (AEM) meeting in Chiangmai in October 2000, the ASEAN secretariat had proposed studying the possibility of economic integration amongst the ASEAN + 3 (Japan, China and Korea). Following the absence of a consensus amongst ASEAN members, however, the Chair proposed a study of the feasibility of FTAs amongst the ASEAN + 3 members. This was accepted at the AEM and the ASEAN secretariat then put the proposal during ASEAN's meeting with the Ministers of Japan, China and Korea in Chiangmai. In the following month, Chinese Premier Zhu Rongji proposed an ASEAN-China FTA joint study at the ASEAN-China Leaders' meeting in Singapore.

Subsequently, the AEM-MITI meeting in Ha Noi in September 2001 established an Expert Group (EG) to commence a Closer Partnership Agreement (CEP) with Japan. The EG met several times prior to the AEM-METI meeting in Bandar Seri Begawan in September 2002 at which the AEM and METI recommended the commencement of negotiations on a framework agreement. That recommendation was accepted during the ASEAN-Japan Leaders' meeting in Cambodia in November 2002. As Hatakeyama Noboru puts it:⁷²

[T]he stimulus caused by the Japan-Singapore Economic Partnership Agreement (JSEPA) [concluded in ...] towards FTAs in the Asian region has led to the reaction on the part of China, which has invited another action by Japan...[and Hegel would have called this]...a dialectical development.

At present, the ASEAN-China (/China-ASEAN) Framework Agreement is already in force and it is anticipated that the ASEAN-China FTA will have been concluded by 2010 with the ASEAN 6 (i.e. the original six Members of ASEAN), and by 2015 with all the ASEAN countries. On 1 July, 2005 the ASEAN-China Trade in Goods Agreement came into force,⁷³ overlapping with a separate track under the Early Harvest Programme for the liberalization of trade in goods which will be discussed further below. The Early Harvest Programme was implemented in January 2004.⁷⁴ The ASEAN-Japan negotiations were only launched in 2005 with a target date for an eventual ASEAN-Japan Closer Economic Partnership Agreement by 2012.⁷⁵

(ii) Korea

Korea, because of concerns with agriculture, has been slower than China and India in its response, but has now caught up. Noboru observed dryly in 2003 that:⁷⁶

[I]t was President Kim Dae-Jung who proposed establishing an East Asian Vision Group (EAVG) at the second ASEAN plus three Summit Meeting held in Hanoi in December 1998. The EAVG came up with a recommendation at the fifth ASEAN

plus three Summit Meeting...to establish an East Asia Free Trade Area (EFTA) that would mainly consist of the ASEAN plus three. So it is a bit ironic for Korea not to be ready for an FTA even if it is only between Korea and the ASEAN countries.

Indeed Korea had earlier, in 2002, concluded an FTA with Chile, but that is best seen as a cautious first-step. Following Korean President Kim's visit to Japan in 1998, there has since been some movement, at least at the level of officials, towards a Korea-Japan FTA.⁷⁷ Thus Korea should, in fairness, be judged according to its cautious stance overall.

In the case of the ASEAN-Korea FTA (AKFTA), the leaders at the ASEAN Economic Ministers+Republic of Korea (AEM-ROK) Summit in November 2004 have since:⁷⁸

...agreed that (i) negotiations for the AKFTA commence in 2005 and be concluded within 2 years, (ii) that ASEAN-6 and Korea eliminate tariffs for 80% of all products by 2009, as a key milestone in the realisation of the AKFTA.

An executive summary of the ASEAN-Korea Experts' Group (formed following the ASEAN-ROK Summit in Bali in 2003) report was used to guide the negotiations.⁷⁹ In December 2005, ASEAN leaders signed a Framework Agreement with Korea.⁸⁰

(iii) India

During the Cold War, ASEAN turned towards the importance of China, especially in the position China not India. In 1971, India had signed a Treaty of Friendship and Cooperation with the Soviet Union. For all ASEAN's talk of non-alignment, the coalescence of ASEAN through its opposition to the Soviet-sponsored Vietnamese invasion of Cambodia was the glue which held ASEAN as an organisation together. In this, ASEAN preoccupied itself with China from the Sino-Soviet conflict to the US-China rapprochement. Subsequently, US-China-USSR relations continued to be a major preoccupation throughout the 1970s, as was US-China-Japan relations in the 1980s. But today India is on the rise and ASEAN turned towards India.⁸¹

This reorientation includes ASEAN's current FTA negotiations with India, in addition to ASEAN's policy of concluding FTAs with its ASEAN + 3 partners, namely China, Japan and Korea. To this end, the Framework Agreement to Enhance ASEAN-India Trade and Economic Cooperation was signed on 8 October 2003, and the target date for an ASEAN-India FTA (AIFTA) with the ASEAN 6 is currently 2011. The target date for an Indian FTA with all the ASEAN Members is 2016.⁸²

(iv) The "Multi-Track" Approach

None of these efforts preclude a multi-track approach. What follows is a glimpse of the current state of FTA negotiations involving ASEAN nations pursuing a multi-track approach. While it may be hard to discern the exact trade policy (and strategic) thinking of individual nations, the attraction of a multi-track approach may be likened perhaps to having a gearbox and a gear-shift mechanism in pursuing a comprehensive trade policy. For example, if country A, acting

collectively with countries B and C is pursuing an FTA with country D and the negotiations stall, policy-makers in country A would have the fall-back option of pursuing a bilateral directly with country D itself. In the long run, this may be seen to promote and not impede the formation of wider agreements as a temporary, partial answer to the so-called “convoy problem” – i.e. that trade liberalization moves at the speed of the “slowest” trading nation.⁸³ A multi-track approach could allow for greater flexibility in achieving trade liberalisation.

(a) Bilaterals with the ASEAN + 3 Nations & India

Individual ASEAN countries have been pursuing FTAs with China, India, Japan and Korea. A classic example is Singapore which has concluded FTAs with all the above but for China in relation to which negotiations have only recently been resumed, following earlier controversy over a visit by (then) Deputy Prime Minister Lee Hsien Loong to Taipei. Malaysia and the Philippines both concluded FTAs with Japan in 2005 and 2006,⁸⁴ respectively while Thailand-Japan negotiations are still ongoing. Thailand had earlier concluded the China-Thailand Accelerated Tariff Elimination Agreement.

Such accelerated tariff agreements are the result of an amendment to the ASEAN-China Framework Agreement on Comprehensive Economic Cooperation (hereafter, “China-ASEAN Framework Agreement”). Under its Early Harvest Programme (EHP), tariff concessions by the parties are intended to have been immediately realised. However, controversy arose over the possibility of free-riding where country A’s concessions are immediately realized by all other Framework Agreement Members under the MFN clause without sufficient concessions in exchange. In a sense, this was a negotiating wrinkle since a pre-condition was the similar inclusion of the same products in the EHP schemes of MFN-treatment beneficiaries. However, the Philippines and China had failed to establish an EHP scheme, while others feared competition from efficient Thai farming. Malaysia broke away and proposed an innovative clause that would allow it to negotiate bilaterally with China in return for Chinese concessions under the EHP.⁸⁵ Thus, the tariff acceleration agreement was born.⁸⁶

(b) Other Sub-Regional & Cross-Sub-Regional FTA Negotiations Involving ASEAN Nations

Aside from these bilaterals, there are also other sub-regional and cross-sub-regional initiatives involving ASEAN nations such as Thailand with India, amongst others, in relation to the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Co-Operation (BIMSTEC) FTA. Myanmar too is a party to the BIMSTEC FTA, and which includes India. The other parties to the BIMSTEC FTA aside from Thailand, Myanmar and India are Bangladesh, Bhutan, Nepal and Sri Lanka thereby covering a swathe of nations bordering the Bay of Bengal. The scheduled date for BIMSTEC’s entry into force was July 2006.⁸⁷

Finally, Malaysia recently concluded its Agreement on the Early Harvest Programme (EHP) for the Malaysia-Pakistan FTA,⁸⁸ while Singapore-Pakistan negotiations are on-going.⁸⁹

(c) Bilaterals and Plurilaterals involving ASEAN Nations and Trading Partners outside Asia

And outside Asia altogether, Singapore has concluded its FTA with the United States as well as with the European Free Trade Area (EFTA), Jordan, Panama, Australia, New Zealand and with Chile in the context of the Trans-Pacific Strategic Economic Partnership (SEP) Agreement. And there are on-going negotiations with Bahrain, Canada, Egypt, Mexico, Pakistan, Peru, Sri Lanka, Kuwait, Qatar and the United Arab Emirates progressing at different speeds.⁹⁰

Likewise, Malaysia is currently negotiating with Australia, New Zealand and the United States.⁹¹ Thailand has concluded its FTA with Australia,⁹² while US-Thailand FTA negotiations are on-going.⁹³ The Philippines, in addition to its FTA with Japan is negotiating with the United States. Brunei as we have already seen is a party to the Trans-Pacific SEP (which includes, in addition to Singapore, both Chile and New Zealand).

(d) The Slip-Stream of the Jumbo-Jet

So if we hear talk of a mega-jumbo-jet being constructed today spanning the breadth of South-to-East Asia, with Southeast Asia in between, we also see individual Southeast Asian nations pursuing the slipstream of that jet, but going beyond South Asia and East Asia. What does all this mean for the architecture of international trade (and investment)?

4. ASEAN & Trade Law Doctrine

There are three features in the legal architecture of ASEAN's latest trade liberalization treaties which should be noticed.

First, as we have seen, ASEAN member nations have adopted a multi-track approach. Some ASEAN countries are negotiating FTAs or have entered into FTAs with countries which ASEAN as a whole is also negotiating or has entered into FTAs or Framework Agreements with. Individual ASEAN countries have also negotiated or entered into FTAs with countries outside the ASEAN sub-region (i.e. cross-sub-regional FTAs), or even outside Asia (i.e. cross-regional FTAs), or some combination of these. The absence of an MFN provision - whether we are talking about an MFN clause limited in scope only to more favourable treatment given to others outside the FTA, or one that is more expansive and includes more favourable treatment given to those within the FTA membership - does what GATT Article XXIV essentially does. It removes the discipline of MFN treatment and allows for preferential treatment of one sort or another instead.

Secondly, ASEAN has entered into FTAs with non-WTO Members - currently, Cambodia and Laos with the recent accession of Viet Nam into the WTO.⁹⁴ The question in such a case is whether WTO disciplines in relation to the formation of FTAs also apply to FTAs between WTO and non-WTO members.

Thirdly, an ASEAN-wide FTA may utilize a "framework approach" instead, or at least at the outset. Here, the substance of the deal may not involve any multilateralised concessions at all. This is what happened in the case of the China-ASEAN FTA where, under the Early Harvest Programme, separate tariff reduction or elimination deals are concluded bilaterally. We may

compare this sort of innovation in treaty-making with the case where there exist multilateralised concessions but no MFN requirement. In the latter case, so long as tariffs are kept within bound rates, better treatment given to, say, another non-FTA member under the first FTA through a further bilateral deal (i.e. a second FTA) will not require similarly favourable treatment being granted to members of the first FTA. Another example would be where an FTA member (where there are more than two) enters into a further deal with a second member without conferring similar benefits to a third FTA member – this is the case with China-ASEAN and with tariff acceleration under NAFTA. But neither of these cases is tantamount to a third, more extreme example which we will discuss below – namely, the case where there are no multilateralised concessions to start with, even if this might just be a half-way house on the way towards fully multilateralised concessions between all the FTA members.

We have already dealt with the features of a multi-track approach above. The discussion that follows deals with the second and third features identified above.

A. The “Non-WTO Member” Problem

(i) The “Textualist” View: “Any Other Country” in Article I & “As Between the Territories of Members” in Article XXIV:5

There are at least two approaches to whether an FTA concluded by a WTO Member with a non-WTO Member is permissible under Article XXIV of the GATT. According to the first, the GATT-WTO provides an answer somewhere in the text of the agreement, or in the proper interpretation of the text of the agreement - what I call here the “textualist” view.

According to this view, GATT Article I states that MFN treatment applies to treatment accorded by “any contracting party” to “any other country”. Thus, at first glance, the “any other country” formulation would not be limited only to WTO-GATT contracting parties. But this begs the question. What, exactly, is the relationship between Article XXIV of the GATT-WTO and Article I?

Putting aside the special procedure under Article XXIV:10, does anything in Article XXIV extend the exception from the MFN obligation in Article I to FTAs between WTO contracting parties and non-parties? If not, the special procedure would have to be relied upon to justify an FTA with a non-WTO member country which seeks exemption from the MFN obligation in Article I of the GATT-WTO.⁹⁵

So far as the proper interpretation of treaties goes, we might also turn to the practice of the GATT 1947 contracting parties. Such practice has been equivocal, both in terms of the individual instances in which the question arose, and over that extended period of time. The various incidents during which the question arose in the history of the GATT have been amply treated by Professor Won-Mog Choi in an unpublished manuscript.⁹⁶ The GATT Working Party review of the Latin-American Free Trade Area (LAFTA) in 1960 states that “[d]oubts were expressed...[as to conformity with paragraphs 5 to 9 of Article XXIV of GATT]...in view of the fact that some member States were not contracting parties to the General Agreement”.⁹⁷ How much doubt by how many members, and how many members would be required to establish

such doubt dispositively? Similarly, in reviewing the European Free Trade Area (EFTA) when it was first formed (i.e. the Stockholm Convention), “certain members of the Working Party...had, so far, the greatest difficulty” in accepting that anything but the special procedure under Article XXIV:10 could justify MFN-exemption in the case of an FTA with a non-contracting party.⁹⁸ Finally, in relation to the Working Party’s review of the UK-Ireland RTA, Ireland was encouraged to accede to the GATT.⁹⁹

In a recent article, Professor Choi concludes that the question is ultimately to be governed by the language of Article XXIV: 5.¹⁰⁰ Paragraph 5 states that an FTA shall not be prevented from coming into being “as between the territories of contracting parties”. But, as Choi points out,¹⁰¹ this was due to a deliberate amendment to earlier proposed language during the drafting of the ITO Charter. Originally, the language proposed in the ITO draft Charter of 1947 would have permitted an exception to the ITO Charter MFN obligation in the case of FTAs between ITO parties and non-parties.¹⁰² However, Article 44 of the ITO Charter in its final form confined this exception instead to the formation of customs unions or free-trade areas “as between the territories of Members” of the ITO.¹⁰³ In Choi’s view, the amendment to the originally proposed language was, in all probability, made in response to France’s request during the Havana Conference to form a customs union with Italy, which was not then a GATT Member.¹⁰⁴ Article 44 was adopted into the GATT by way of special protocol in June 1948,¹⁰⁵ becoming what is now Article XXIV:5 of the GATT-WTO. France agreed on condition that it would receive a waiver in respect of the Franco-Italy Customs Union.

Thus seen, GATT practice, indeed the intent of the Framers of Article XXIV:5 was, or so it may be argued, that FTAs between GATT/WTO Members and non-GATT/non-WTO Members should not enjoy the exception provided for under Article XXIV (i.e. Article XXIV:5 which says the formation of FTAs shall not be prevented) to the MFN obligation in GATT-WTO Article 1.

(ii) Subsequent Practice under Article XXIV:10

However, as Choi admits, subsequent practice beginning in the 1960s in relation to Article XXIV:10 which allows for a two-thirds majority of Members to approve an FTA between a Member and a non-Member, contradicts this understanding. Following the establishment of EFTA and LAFTA, opposition had grown to Article XXIV:10 when FTAs with non-GATT Members became more common. Choi surmises that the States which found this new opposition were especially the “powerful States in Europe and North America” which “exercised their influence” so that the normal review procedure under Article XXIV:7 was applied instead of the special approval/exemption procedure under Article XXIV:10. Today, the issue seems to have gone away with a pragmatic stance having been adopted by GATT (/WTO) Members since. Choi cites the example of the Japanese delegation’s sentiments during the Committee on Regional Trade Agreements’ (CRTA’s) review of the Interim Agreements of the FTAs between the European Communities and Latvia, Lithuania and Estonia:¹⁰⁶

The representative of Japan said that, despite the fact that Latvia, Estonia, and Lithuania were not members of the WTO, his delegation expected them to respect the obligations of GATT Article XXIV and GATS Article V.

If we are allowed to speculate a little, it might be supposed that a systematic study of CRTA

practice in reviewing FTAs will reveal that the standard CRTA “no progress” report, as is to be found in today’s CRTA reviews of FTAs may be also in part a hangover of this historically-rooted pragmatism on the part of GATT/WTO Members. Nonetheless, ASEAN’s recent practice, with Laos and until only recently, Viet Nam remaining ASEAN non-WTO Members, highlights the continued resonance of this problem under the rules of the GATT-WTO. It is one trade regime-design issue which Southeast Asia’s FTA practice has thrown up for renewed consideration as we peer into the future(s) of global trade law and policy design.

Creating an MFN exception for WTO Members in their FTAs with non-Members who, by definition, are not obligated to multilateralise their concessions is *arguably* anathema to what the WTO stands for, as well as to the spirit of GATT Article XXIV which is to promote trade liberalization and not create further exceptions to it. But in a sense, as the recent example of Viet Nam shows, this problem disappears soon enough as non-WTO members eventually become WTO members.

B. “The China-ASEAN Tariff Acceleration Precedent”

This brings us to a more serious problem than the one discussed above. Recall that under the China-ASEAN Framework Agreement,¹⁰⁷ a tariff acceleration agreement allows a China-ASEAN Framework Member to avoid multilateralising its concessions under the Framework Agreement’s (i.e. the FTA’s) Early Harvest Programme. Putting aside the Enabling Clause or the Article XXIV:10 special procedure, this raises the question of whether the Framework Agreement’s design would ultimately be WTO-compatible under the usual GATT-WTO Article XXIV approval procedure (i.e. the “prompt notification” of the CRTA under Article XXIV:7).

Under the normal procedure, the Framework Agreement would have to fulfill the “substantially all trade” requirement for intra-FTA trade under GATT Article XXIV:8, even if it fulfills GATT Article XXIV:5’s requirement that “duties and other regulations of commerce” applying to the non-FTA members should be “not on the whole higher or more restrictive”.¹⁰⁸ Could it be argued instead that a tariff acceleration agreement should be considered separately, or even under the different (and more relaxed) disciplines imposed for an “interim agreement” within the meaning of GATT Article XXIV:5?

Interestingly, the “substantially all trade” requirement under Article XXIV:8 does not apply in the case of an “interim” agreement, and it applies only to a final, full-blown FTA. Instead, the principal discipline applying in respect of an interim agreement is a surveillance mechanism under Article XXIV:5(c) – whereby a “plan or schedule for the formation of...[the FTA]...within a reasonable period of time” should be given.¹⁰⁹ Nonetheless, if other WTO Members consider that an FTA that fulfills both the “substantially all trade” and “not higher or more restrictive” requirements would not result within such a reasonable period, they could make such recommendations as they see fit.¹¹⁰

Be that so, allowing for such tariff acceleration agreements restricts the fruits of tariff liberalization within a regional trade agreement. It reduces or eliminates altogether the MFN device’s scope for application under a geographically expansive trade liberalisation regime. One might say this is no different from resort to tariff acceleration elsewhere, such as under NAFTA’s Article 302. According to Article 302, for example, tariff acceleration may be trilateral

(i.e. between all three parties) or bilateral, in which case it would raise substantially similar questions.¹¹¹ The China-ASEAN tariff acceleration clause is therefore a mimic of NAFTA's Article 302 in this sense. But there is a conceptual and practical difference, and this is what makes the China-ASEAN tariff accelerator clause a precedent. In NAFTA, except for agriculture, there were substantive multilateralised concessions between all three NAFTA parties even if *subsequent* tariff acceleration might still take place bilaterally. In the case of China-ASEAN, however, the tariff acceleration idea goes towards the basic design of the FTA itself.¹¹² China found itself with 10 countries knocking separately on its door. As the tariff acceleration notion was conceived, there was to be little in terms of a "deal with ASEAN" as such – the "ASEAN" dimension being but an empty box to be filled later by separate, bilateral deals. These individual deals have little or no interconnection – namely, the grant of MFN status by ASEAN members to each other.

5. Conclusions

I have outlined an area for the creation of FTAs outside the scope of Article XXIV. Put simply, WTO regulation of FTAs only go so far, it seems unless we adopt the view that the WTO also regulates FTAs between WTO Members and non-Members.

It makes sense to think that the WTO not only might or does regulate such situations, but that it should. There is no evidence, or at least none yet, that ASEAN is less committed to the WTO than it was before. More trade liberalisation in Southeast Asia and in Asia generally would only fulfill the aims of the WTO, particularly as it is envisaged under Article XXIV:4 of the GATT-WTO, which states that: "The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements". That is the spirit of WTO permissiveness in relation to the formation of FTAs.

It is not unreasonable, or unexpected therefore that the WTO may have sound legal and policy reasons to regulate FTAs between its Members and others to ensure the achievement of the general aspiration of greater global trade liberalisation. Putting aside whether as a matter of legal doctrine Article XXIV:5 should therefore be read in the use of the words "between the territories of contracting parties" to preclude FTAs with non-Members (i.e. by applying the MFN obligation in Article I), it might be thought that it should be read in such a way as a matter of WTO policy.

However, our study of Southeast Asia's treaty behaviour raises another question. If WTO Members wish to enjoy the MFN-exemption under GATT Article XXIV in the case of FTAs with broad geographical coverage, can they also say that individual FTAs once constituted should become an MFN "no man's land" under the GATT-WTO? And indeed under the FTA too because the FTA contains no MFN obligation of any sort? Is this the darker side of "open regionalism"? The problem of trade diversion is clearly much more than a symptom of the spaghetti bowl effect of complex, multiple rules of origin (ROOs).¹¹³ It is also a legal design or architectural problem. That is why GATT Article XXIV imposes the disciplines it does on FTAs and customs unions – to ensure that, eventually at least, such FTAs lead to multilateralised or non-discriminatory concessions.¹¹⁴ So what does it mean, for example, for an indeterminate

number of countries being smaller than the number of WTO Members and the total number of trading nations to disapply the unconditional MFN doctrine altogether in their treaty design? Would our answer be determined at least in part by how large a number of nations that involves?¹¹⁵ What if it were the total number of WTO Members minus one? ASEAN's recent practice and broader aspirations especially in the precedent set by the China-ASEAN Framework Agreement, prompts us at least to ask these questions.

Much of course depends on whether we view a broad disapplication of the MFN doctrine, in Southeast Asia or elsewhere, be it in the guise of an interim agreement or something else altogether, to be anathema to trade liberalization as a matter of sound policy and principle.¹¹⁶ But some might consider the Earl of Grenville's advice to the British Minister in Washington in a dispatch of 12 February 1885 as good advice still more than a century later in respect of the future of global trade design as a whole:¹¹⁷

The value of the clause in its usual form consists precisely in its absolute character...most-favoured nation clauses would cease to have any utility if it were open to one of the contracting parties, by subsequently attaching conditions to the grant of particular favours to third parties, to refuse such favours to the other contracting party on the ground that the clause did not operate in cases where such conditions had been attached.

Viewed as such, ASEAN's policy of open regionalism, a policy which *could* counteract trade diversion, also creates a trade regime-design challenge. ASEAN today has a choice as to whether it will just seek out other "mutually beneficial regional agreements" with key trading partners, or whether it will eventually seek to multilateralise its FTA gains more broadly.¹¹⁸ For individual Southeast Asian nations, will they continue to seek out individual FTAs? This is the principal difference between Southeast Asia's trade regime design and, say, that of the European Union.¹¹⁹

Furthermore, Southeast Asia's experiment with China could establish a wider precedent. Even if it were seen, in all fairness, as only an interim measure which is itself intended to accelerate tariff reductions in the face of practical negotiating complexities, resort to the China-ASEAN tariff acceleration model does at least suggest that trade liberalization in Asia or indeed elsewhere could yet take place according this kind of "three-layered wedding cake" model. The WTO and its regime of multilateralised concessions are perched above, region-wide FTAs lie in the middle while bilateral FTAs form a further, bottom layer. In principle, there could be an infinite number of layers, but as with wedding cakes the bottom becomes the "largest" layer – i.e. there could be a shift towards more-and-more bilateral FTAs.¹²⁰ As for the "highest" layer – the WTO and multilateralised concessions – only that is real even as it comprises the smallest of the different layers. What then becomes the true value of the middle layer? In what way does it provide support for the top layer – i.e. in what way do region-wide FTAs further the objectives of the WTO, when compared to bilateral FTAs?¹²¹

From the WTO viewpoint at least it might be asked how all this, if it transpires more fully, should shape our future thinking on the disciplines which the WTO currently imposes on FTAs.¹²² One way of addressing the economic policy issue could be by way of specifying more closely what "open regionalism" should mean – i.e. a concept of open regionalism which is linked, be it directly or indirectly, to the eventual furtherance of multilateralised trade concessions.¹²³ Thinking through ASEAN's "non-WTO Member" and "tariff acceleration"

features has served to illustrate the legal-doctrinal and trade design dimensions to this issue.

¹ See the analysis of China's regional trade agreements policy in Jiangyu Wang, "China's Regional Trade Agreements: The Law, Geopolitics, and Impact on the Multilateral Trading System", (2004) 8 *Singapore Year Book of International Law* 119, generally. *Contra* Michael Ewing-Chow, "ASEAN-China FTA: Trade or Tribute?", (2006) 10 *Singapore Year Book of International Law* (forthcoming) (on file) (arguing that trade should not become historic overlordship, or "tribute" again). I am grateful to Professor Ewing-Chow for permission to use his unpublished research. All references to page numbers are to the manuscript only.

² George Yeo, "Foreword", in Tommy Koh & Chang Li Lin (eds.), *The United States-Singapore Free Trade Agreement: Highlights and Insights* (Singapore: IPS & World Scientific, 2004) at vii. See also Margaret Liang, "Singapore's Trade Policies: Priorities and Options", (2005) 22.1 *ASEAN Economic Bulletin* 49.

³ See Michael Ewing-Chow, "The Asian Economic Community: ASEAN - A Building or a Stumbling Block for China and India Economic Cooperation", paper delivered at the Symposium on China, India and the International Economic Order, National University of Singapore, 23-24 June 2006 at 30 (on file with author). Again, I am grateful for access to unpublished research. All references to page numbers are to the manuscript only.

⁴ See C.L. Lim, "Free Trade Agreements in Asia: Some Common Legal Problems" in Yasuhei Taniguchi, Alan Yanovich and Jan Bohanes (eds.), *The WTO in the Twenty-First Century: Dispute Settlement, Negotiations and Regionalism in Asia* (Cambridge University Press, 2007), 434-456.

⁵ See Michael Ewing-Chow, "Southeast Asia and Free Trade Agreements: WTO Plus or Bust?", (2004) 8 *Singapore Yearbook of International Law* 193, at 193-198.

⁶ Of course, viewing the spread of liberalization through multilateralised concessions as an overriding aim involves a distinct set of assumptions. For a seminal treatment of the MFN clause from the perspective of public choice theory, in particular the problem of protecting concessions made against future erosion *versus* the free-rider problem, see Warren F. Schwartz & Alan O. Sykes, "The Economics of the Most Favored Nation Clause", in Jagdeep S. Bhandari & Alan O. Sykes (eds.), *Economic Dimensions in International Law* (Cambridge: Cambridge University Press, 1997) 43 at 43-53, 58-65.

⁷ ASEAN's earlier forms of economic cooperation consisted of (1) preferential trading arrangements which unlike today's FTAs employ a negotiated positive list of goods as opposed to a negative list subject to exclusions gradually to be phased out, and a discount on MFN tariffs, as opposed to a reduction and gradual elimination of tariffs, and (2) drawing a link between production and market through industrial allocation schemes (namely, the ASEAN Industrial Products or "AIP" Scheme formalized in 1980, the ASEAN Industrial Complementation Scheme or "AICS" Scheme formalized in 1981, and the ASEAN Industrial Joint-Venture Scheme or "AIJV" Scheme formalized in 1983) which were characterised by exclusive production rights and a discount on existing MFN tariffs (e.g. 50% in the case of the AIJV Scheme); see Rodolfo C. Severino, *Southeast Asia in Search of an ASEAN Community* (Singapore: Institute of Southeast Asian Studies, 2006) at 213-222.

⁸ Lawan Thanadsillapakul, "ASEAN Regionalisation", paper presented at the WTO at 10 Conference, United Nations University, Tokyo, 25-27 October 2005 at 1. I am grateful to Professor Lawan Thanadsillapakul for access to her unpublished research. All references to page numbers are to the manuscript only. See further Denis Hew, "Introduction: Roadmap to an ASEAN Economic Community" in Denis Hew (ed.), *Roadmap to an ASEAN Economic Community* (Singapore: ISEAS Publications, 2005) at 4.

⁹ For a discussion of earlier attempts by ASEAN to engage in economic cooperation in the form of ASEAN's early preferential trading agreements, see (e.g.) Jayant Menon, *Building Blocks or Stumbling Blocks: Regional Cooperation Arrangements in Southeast Asia*, ADB Institute Discussion Paper No. 41 at 6. The problems with these early PTAs, according to Menon, was that unlike the CEPT in 1992, they were item-by-item, reflected insufficient tariff cuts in relation to too narrow a coverage of commodities, and that they also suffered from half-hearted implementation while neglecting to deal with non-tariff barriers (NTBs). Menon concludes that they were a failure.

¹⁰ See Jesus Estanislao, "Southeast Asia: Development, Finance and Trade", in Simon S.C. Tay, Jesus Estanislao & Hadi Soesastro (eds.), *A New ASEAN in a New Millenium* (Jakarta: Centre for Strategic & International Studies/Singapore Institute of International Affairs: 2000) at 66, 67-68.

¹¹ See Simon S.C. Tay, "Institutions and Processes: Dilemmas and Possibilities", in Tay, Estanislao & Soesastro (eds.), *A New ASEAN in a New Millenium*, *op. cit.* at 155, 156.

¹² Speech by H.E. Ong Keng Yong, ASEAN Secretary-General, 22 March 2003, Ballroom of the Regent Hotel, Singapore (on file).

¹³ Jusuf Wanandi, "Strategic Developments in East Asia and the Role of the East Asian Community", (2006) 8.1 *Panorama: Insights into Southeast Asian & European Affairs* 51 at 58.

¹⁴ See the discussion of the "Bali Declaration", below.

¹⁵ Nor does it mean that economic and security considerations are easily separated, see Acharya's analysis of the economic dimensions of the security equation in ASEAN-China relations; Amitav Acharya, *Seeking Security in the Dragon's Shadow: China and Southeast Asia in the Emerging Asian Order*, Working Paper, Institute of Defence and Strategic Studies, March 2003.

¹⁶ For a succinct treatment of ASEAN's "holistic" approach (and ASEAN's need for such a broad approach), see Estanislao, "Southeast Asia: Development, Finance and Trade", *op. cit.* generally.

¹⁷ See Simon S.C. Tay, "Institutions and Processes: Dilemmas and Possibilities", *op. cit.* at 155-157.

¹⁸ But this is perhaps limited to activist viewpoints, stressing the lack of movement towards the institutionalisation of human rights in ASEAN or more robust environmental governance, for example, as a result of such a cumbersome decision-making structure. For an overview, see (e.g.) Paul J. Davidson, "The ASEAN Way and the Role of Law in ASEAN Economic Cooperation", (2004) 8 *Singapore Year Book of International Law* 165.

¹⁹ For a critique, see (e.g.) Ross P. Buckley & Sarala M. Fitzgerald, "An Assessment of Malaysia's Response to the IMF during the Asian Economic Crisis" [2004] *Singapore Journal of Legal Studies* 96.

²⁰ Framework Agreement on Enhancing ASEAN Economic Cooperation, Singapore, 28 January 1992; Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, 28 January 1992.

²¹ See the website of the ASEAN secretariat at: <www.aseansec.org>.

²² *Agenda for Greater Economic Integration*, Fifth ASEAN Summit, Bangkok, December 1994.

²³ See Mohamed Ariff, "Trade, Investment and Interdependence", in Tay, Estanislao & Soesastro (eds.), *A New ASEAN in a New Millenium*, *op. cit.* at 45, 47, but for a more detailed guide to the time-lines, see Lawan, "ASEAN Regionalisation", *op. cit.* at 3-4.

²⁴ See Severino, *op. cit.* at 226 for the negotiating history and the national policy reasons of these newer members. See also the website of the US-ASEAN Business Council at: <www.us-asean.org>.

²⁵ See the *Statement on Bold Measures*, 6th ASEAN Summit, 16 December 1998, Ha Noi, Viet Nam.

²⁶ *Ha Noi Plan of Action*, 6th ASEAN Summit, 15-16 December 1998, Ha Noi, Viet Nam.

²⁷ *Id.*, para. 2.1.

²⁸ *Id.* para. 2.1.1.

²⁹ See "ASEAN Moves Ahead", *op. cit.*

³⁰ See further the Framework Agreement on the ASEAN Investment Area, Brunei Darussalam, 7 October 1998 (hereafter, "ASEAN Framework Agreement on Investment"), and the Agreement Among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments ("ASEAN Investment Treaty"), Manila, 15 December, 1987, and the Protocol to Amend the Agreement Among the Government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, 12 September 1996 ("1996 Protocol").

³¹ Ha Noi Plan of Action, para. 2.2.a. For a discussion and critique of the Temporary Exclusion List and the Sensitive List devices, see Ewing-Chow, "The Asian Economic Community", *op. cit.* at 7: "While flexibility is required...as a result of these loopholes, there are effectively no real rules or obligations which ASEAN [M]embers are bound to in relation to ASEAN's internal tariff reduction. Indeed, the very genesis of the CEPT Protocol [establishing the Temporary Exclusion List scheme] was as a retrospective legitimization of Malaysia's withdrawal in 2002 of automobiles and completely knocked down automobile kits from the AFTA reductions it had previously agreed upon". Both devices allow for what Ewing-Chow has tersely dubbed "backtracking" on the part of ASEAN Members.

³² *Id.*, para. 2.2.

³³ ASEAN Framework Agreement on Investment, *op. cit.*, Art. 7(1)(b).

³⁴ *Id.*, Art. 2(a).

³⁵ *Id.*, Art. 4(c)

³⁶ *Id.*, Art. 7.

³⁷ *Id.*, Arts. 8 & 9.

³⁸ ASEAN Investment Treaty, *op. cit.*, Art. 2(1).

³⁹ *Id.*, compare Arts. 4(2) & 4(4).

⁴⁰ *Id.*, Arts. 4(1) & 4(2).

⁴¹ *Id.*, Art. 6(1).

⁴² *Id.*, Art. 10(2). See further M. Sornarajah, "Protection of Foreign Investment in the Asia-Pacific Economic Co-Operation Region", (1995) 29 *Journal of World Trade* 105 at 122-3.

⁴³ Ha Noi Plan of Action, *op. cit.*, para. 2.3.1.b.

⁴⁴ Declaration of ASEAN Concord II (Bali Concord II), 7 October 2002 (hereafter, "Bali Concord II Declaration").

⁴⁵ References to an ASEAN Economic Community had also been made slightly earlier, thus at the Thirty-Sixth

ASEAN (Foreign) Ministers' meeting in Phnom Penh, the Ministers issued a joint communiqué "reaffirmed the need to move deeper economic integration toward an ASEAN economic community"; Joint Communiqué of the Thirty-Sixth ASEAN Ministerial Meeting, Phnom Penh, 16-17 June 2003 at para. 8.

⁴⁶ Bali Concord II Declaration, para. 1.

⁴⁷ *Id.*, para. 2.

⁴⁸ *Id.*, para. 7.

⁴⁹ Bali Concord II Declaration, para. 9.

⁵⁰ "Bali Framework" of the Declaration of ASEAN Concord II, para. 1, Part B.

⁵¹ *Id.*, para. 2.

⁵² *Id.*, para. 3.

⁵³ Jianguy Wang, "China, India and Regional Economic Integration in Asia: The Policy and Legal Dimensions", paper delivered at the Symposium on China, India and the International Economic Order, National University of Singapore, 23-24 June 2006 (on file with author, forthcoming in the *Singapore Year Book of International Law*); quoting from Peter J. Lloyd, "What is a Single Market? An Application to the Case of ASEAN", (2005) 22:3 *ASEAN Economic Bulletin* 251, at 252-254. I am grateful to Professor Wang for permission to use his unpublished research. All references to page numbers are to the manuscript only.

⁵⁴ En-Lai Yeoh, "Southeast Asia Speeds Single Market Plan", Associated Press, 22 August 2006 (on file).

⁵⁵ Bela Balassa, *The Theory of Economic Integration*. (Homewood, Illinois: Richard D. Irwin, 1961) at 1-2, quoted in Wang, "China, India and Regional Economic Integration", *op. cit.* at 2.

⁵⁶ Former ASEAN Secretary-General Rodolfo Severino put it this way: "AFTA has seen little actual use by traders. The other foundations for regional integration have not been built upon. Regional economic integration seems stuck in framework agreements, work programs and master plans"; Rodolfo C. Severino, "The Future of ASEAN Economic Integration", Address at the Joint Conference of INSEAD & the Asia-Europe Foundation, Singapore, 7 July 2003 at 3 (on file).

⁵⁷ This was what Singapore's then Prime Minister said, citing the concerns of business leaders that lowering tariffs was not enough, and that manufacturing operations should be "linked seamlessly throughout the region" thereby allowing MNCs to "leverage on the diverse cost structure and comparative advantage across ASEAN"; Keynote Address by Prime Minister Goh Chok Tong at the ASEAN Business and Investment Summit, 6 October 2003, Bali, Indonesia, available at the ASEAN Secretariat website: <www.aseansec.org>. This is therefore linked to the view that ASEAN should be made attractive to foreign direct investment.

⁵⁸ H.E. Mr. Pierre Gramagna, "EU and ASEAN Integration Processes: Similar Models?", U.N.U. Public Forum, 8 May 1997, Tokyo, Japan (on file).

⁵⁹ *Cf.* Ewing-Chow, "Trade or Tribute", *op. cit.* at 21.

⁶⁰ *Id.* at 20.

⁶¹ Comprising ASEAN, China, Japan, Korea, India, Australia and New Zealand with the Russian Federation currently having observer status during the first summit in Kuala Lumpur in 2005. The decision to hold the First Summit in Kuala Lumpur was made during the 2004 ASEAN + 3 Summit. The current ASEAN Secretary-General, H.E. Mr. Ong Keng Yong has thus far described the EAS as a "forum for dialogue on broad strategic, political and economic issues"; H.E. Ong Keng Yong, "Leadership and Strategic Visions for the Development of East Asia", Second Asian Economic Forum, University of Cambodia, Phnom Penh, 25 April 2006.

⁶² Also known as the "CEPEA" (or "Comprehensive Economic Partnership for East Asia"), the "Nikai Initiative" or the "East Asian OECD", this proposal was formally announced in April 2006 by the Japanese trade minister, Toshio Nikai. This proposal would include an East Asian Free Trade Agreement between the current members of the East Asian Summit (ASEAN, China, Japan, Korea, India, Australia and New Zealand). See (e.g.) "Japanese Government to Propose Big Asian Free Trade Zone" (AFX News), available on the Forbes website at <www.forbes.com>.

⁶³ Fred Bergsten, "Plan B for World Trade: Go Regional", *Financial Times* [U.K.], 16 August 2006; *contra* Sungjoon Cho, "'Plan B' is Always Inferior to 'Plan A'", *Financial Times* [U.K.], 22 August 2006.

⁶⁴ C. Chitti Pantulu, "Manmohan Singh Sells his Vision of a Pan-Asian FTA", available on the Daily News & Analysis (Mumbai) website at <www.dnaindia.com>.

⁶⁵ "Global City of Opportunity", Keynote Address by Senior Minister Goh Chok Tong of the Republic of Singapore at the Singapore Conference, 15 March 2005 At 0930, Ballroom, the Millenium Mayfair, London, Singapore Government Press Release, 15 March 2005.

⁶⁶ *Id.*

⁶⁷ Menon, *Building Blocks*, *op. cit.* at 8. According to Jacob Viner, trade diversion is shown by a shift in production from a lower-cost producer outside the FTA to a higher-cost producer within and an FTA is efficiency and welfare reducing if it results in more trade diversion than trade creation; Nigel Grimwade, *International Trade Policy* (London: Routledge, 1996) at 237-238. Viner in his *Customs Union Issue* (Washington D.C.: Carnegie Endowment for International Peace, 1950) is therefore credited with having exploded the myth that preferential trade agreements are therefore necessarily efficiency and welfare improving. See further Carnegie Endowment Study Group on International Trade, *Reflections on Regionalism* (Washington D.C.: Carnegie Endowment for International Peace, 1997) at 11-18.

⁶⁸ International Monetary Fund, *Asia and Pacific Regional Economic Outlook* (Washington D.C.: International Monetary Fund, Inc., 2006), available on the Fund's website at <www.imf.org>. See also Wang, "China, India and

Regional Economic Integration in Asia”, *op. cit.* at 7.

⁶⁹ There is a whole host of imponderables to this question. For example, whether and how such a grouping would, or could integrate with South Asia to form a wider grouping and how both this and a wider grouping would behave – would a fortress mentality result? See (*e.g.*) Carnegie Endowment Study Group on International Trade, *Reflections on Regionalism*, *op. cit.* at 11-18; *cf.* the “policy recommendations” in Wang, “China, India and Regional Economic Integration in Asia”, *op. cit.* at 34-37.

⁷⁰ For the metaphor, see Association of Southeast Asian Nations, *Towards a Single Economic Space*, Public Information Series (Jakarta: ASEAN Secretariat, 2003).

⁷¹ See (*e.g.*) Andreas F. Lowenfeld, *International Economic Law* (Oxford: Oxford University Press, 2002) at 45-67.

⁷² Hatakeyama Noboru, “A Short History of Japan’s Movement to FTAs (Part 3)”, *22 Journal of Japanese Trade & Industry*, March/April 2003 at 42.

⁷³ *Agreement on Trade in Goods (TIG) of the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and China*, 29 November 2004, available at the ASEAN Secretariat website: <www.asean.org>.

⁷⁴ See the Singapore Government FTA website: <www.app.fta.gov.sg>. See further, Raul L. Cordenillo, “The Economic Benefits to ASEAN of the ASEAN-China Free Trade Area (ACFTA)”, Studies Unit, Bureau for Economic Integration, ASEAN Secretariat, 18 January 2005, available on the ASEAN Secretariat website at: <www.aseansec.org>.

⁷⁵ See the Singapore Government FTA website: <www.app.fta.gov.sg>.

⁷⁶ *Id.* at 43.

⁷⁷ See Won-Mog Choi, “Regional Economic Integration in East Asia: Prospect and Jurisprudence”, (2003) 6 *Journal of International Economic Law* 49 at 53-54 (also stressing the agriculture issue for Korea).

⁷⁸ See the ASEAN-Korea FTA (AKFTA) section on the Singapore Government FTA website: <www.app.fta.gov.sg>.

⁷⁹ *Id.*

⁸⁰ Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea, Kuala Lumpur, 13 December 2005, website of the ASEAN Secretariat at: <www.aseansec.org>.

⁸¹ See (*e.g.*) “Speech by Mr. Goh Chok Tong, Senior Minister at the Official Launch of the Institute of South Asian Studies, ISAS, 27 January 2005”, Orchard Hotel, Singapore, *Singapore Government Press Release*, 27 January 2005.

⁸² See the Singapore Government FTA website: <www.app.fta.gov.sg>. The ASEAN-India negotiations has of late been plagued by delays, see (*e.g.*) Ravi Velloor, “ASEAN-India FTA Faces Another Delay”, *Straits Times* [Singapore], 8 November 2006.

⁸³ See Ewing-Chow, “Southeast Asia and Free Trade Agreements”, *op. cit.* at 200.

⁸⁴ See the Japan Ministry of the Economy, Trade and Industry website: <www.meti.go.jp>.

⁸⁵ See (*e.g.*) Jiangyu Wang, “China’s Regional Trade Agreements: The Law, Geopolitics, and Impact on the Multilateral Trading System”, (2004) 8 *Singapore Year Book of International Law* 119 at 126.

⁸⁶ *The Protocol to Amend the Framework Agreement on Comprehensive Economic Co-operation Between the Association of South East Asian Nations and the People’s Republic of China*, 6 October 2003, available at the ASEAN Secretariat website: <www.asean.org>, Article 2(i)(2), and Article 2 generally. Note that Article 2(i)(1) also provides for unilateral concessions; see *id.* Even more curious is Article 4. See *Protocol to Amend the Framework Agreement on Comprehensive Economic Co-operation Between the Association of South East Asian Nations and the People’s Republic of China*, 6 October 2003, available at the ASEAN Secretariat website: <www.asean.org>, Article 4 which reads:

“The Framework Agreement shall be amended by inserting a new Article 12A immediately after the existing Article 12 of the Framework Agreement as follows:

ARTICLE 12A: Agreements Outside this Agreement

Nothing in this Agreement shall prevent or prohibit any individual ASEAN Member State from entering into any bilateral or plurilateral agreement with China and/or the rest of the ASEAN Member States relating to trade in goods, trade in services, investment, and/or other areas of economic co-operation outside the ambit of this Agreement. The provisions of this Agreement shall not apply to any such bilateral or plurilateral agreement.”

What does “outside of the ambit of this Agreement” mean?

⁸⁷ See “BIMSTEC FTA to Come into Effect from July, 2006”, available at the website of the Ceylon Chamber of Commerce: <www.chamber.lk>.

⁸⁸ See “Signing of Agreement on the Early Harvest Programme for the Free Trade Area between Malaysia and Pakistan”, Malaysian Government Press Release, available at the Malaysian Ministry of Trade and Industry website: <www.miti.gov.my>.

⁸⁹ See the Singapore Government FTA website: <www.app.fta.gov.sg>.

⁹⁰ *Id.*

⁹¹ See “Mahathir Fears Planned FTA with US Could Have “Adverse” Consequences”, *The Star* [Malaysia], 22 March, 2005, also available at the bilaterals.org website: <www.bilaterals.org> .

⁹² See the website of the Australian Department of Foreign Affairs and Trade: <www.dfat.gov.au>. See also Nataya Seetubtim, ‘Thailand FTAs’, June 2004, website of the ASEAN Secretariat at: <www.aseansec.org>.

⁹³ See the US-ASEAN Business Council website: <www.us-asean.org>. See also the announcement in 2003 of the

launch of US-Thailand negotiations, “Fact Sheet on Free Trade and Thailand”, White House Press Release, 20 October, 2003, available at the White House website: <www.whitehouse.gov>.

⁹⁴ See (e.g.) “Vietnam Gets WTO Entry”, *Straits Times* [Singapore], 8 November 2006.

⁹⁵ Or if applicable, the so-called “Enabling Clause”. But it appears that the Enabling Clause too would not permit an exception to the MFN obligation in the case of an FTA between a WTO Member and a non-Member. Paragraph 2(c) of the Enabling Clause permits “differential and more favourable treatment” in the case of “regional or global arrangements entered into amongst less-developed contracting parties”, and thus contemplates only FTAs between GATT Members; “Decision on Differential and More Favorable Treatment and Reciprocity and Fuller Participation of Developing Countries” (GATT Contracting Parties Decision of 28 November 1979, L/4903), paragraph 2(c). In support of this reading, see also Won-Mog Choi, “Integrating Trade in Goods and Services with ASEAN including Non-WTO Members, and WTO Jurisprudence”, paper delivered at the National Taiwan University, 8-9 July, 2005 (on file with author) at 18.

⁹⁶ Choi, “Integrating Trade in Goods and Services”, *ibid.* I am grateful to Professor Won-Mog Choi for permission to draw on his unpublished research in the account given below (correspondence, 18 August 2005). All references to page numbers are to the manuscript only.

⁹⁷ Customs Unions and Free-Trade Areas: Latin American Free Trade Area, Report adopted by the GATT Contracting Parties, BISD Supp. 9 at para. 31.

⁹⁸ Customs Unions and Free Trade Areas: European Free Trade Association, Report adopted by GATT Contracting Parties (1960) BISD Supp. 9 at para. 58.

⁹⁹ United Kingdom/Ireland Free-Trade Area Agreement, Conclusions adopted on 5 April 1966, BISD 14S/23.

¹⁰⁰ Choi, “Regional Economic Integration”, *op. cit.* at 74.

¹⁰¹ Choi, “Integrating Trade in Goods and Services”, *op. cit.* at 8.

¹⁰² Article XXI of Draft GATT & Article 38 of Draft Charter of ITO, Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, 20 January to 25 February 1947, New York at 78.

¹⁰³ Paragraph 2 of Article 44 of the Charter for an International Trade Organization (“Havana Charter”), *Report of Committees and Principle Sub-Committees of the United Nations Conference on Trade and Employment* (“Havana Report”), U.N. Doc. ICITO 1/8 (1948); *United Nations Conference on Trade and Employment, Final Act and Related Documents*, U.N. Doc. E/Conf.2/78 (1948).

¹⁰⁴ Choi, “Integrating Trade in Goods and Services”, *op. cit.* at 9.

¹⁰⁵ Special Protocol relating to Article XXIV of the General Agreement on Tariffs and Trade, 24 March 1948, 62 UNTS 56.

¹⁰⁶ Examination of the Interim Agreements between the European Communities and the Czech Republic, Slovak Republic, Hungary, Poland, Bulgaria and Romania and the Free Trade Agreements between the European Communities and Estonia, Latvia and Lithuania, Note on the Meeting of 19 June 1997, WT/REG1/M/2; WT/REG2/M/2; WT/REG7/M/2; WT/REG8/M/2; WT/REG9/M/2; WT/REG18/M/2 (3 October 1997), para. 33.

¹⁰⁷ See section III.C(iv)(a), earlier above.

¹⁰⁸ As is well-known, neither “substantially all the trade” nor “other regulations of commerce” have been well-defined under the GATT. For example, it has been argued that rules of origin comprise “other regulations of commerce” and their complication (a feature of the “spaghetti bowl effect”) would make them “more restrictive” for non-FTA members; see (e.g.) Mitsuo Matsushita, Thomas J. Schoenbaum & Petros C. Mavroidis, *The World Trade Organisation – Law, Practice & Policy* (Oxford: Oxford University Press, 2003) at 351-2. As for “substantially all trade”, one principal difficulty has to do with whether it represents a qualitative or quantitative measure, or indeed both; see further *id.* at 359-360. However, the Appellate Body has considered in the *Turkey-Textiles Case* that “it is clear that ‘substantially all the trade’ is not the same as *all* the trade, and also...is something considerably more than merely *some* of the trade”; *Turkey - Textiles* (1999), WTO Doc. WT/DS34/AB/R at para. 48. That still leaves open the question of, for example, whether a quantitative approach (“putting a number to the concept”) would suffice, and the problem of having to deal with such cases case-by-case, see Sungjoon Cho, “Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism”, (2001) 42 *Harvard International Law Journal* 419 at 443. Again, the Appellate Body in *Turkey-Textiles* has suggested that both qualitative and quantitative aspects are suggested by the ordinary meaning of the terms - see *Turkey-Textiles*, *op. cit.* at para. 49 – but that does not clear up the issue entirely. For “putting a number to the concept”, see Australia’s proposal in WTO, Committee on Regional Trade Agreements, Communication from Australia, WT/REG/W/22/Add. 1, 24 April 1998.

¹⁰⁹ This raises not only the problem of what a “reasonable period of time” is under this clause, but also the problem in practice that timely, prior notification (albeit mainly under Article XXIV:7) has been a discipline which the Members have not in practice observed.

¹¹⁰ Wang agrees with Jackson that this would require that the other Members agree on the set of recommendations to be made, and that this requirement therefore operates as a presumption in favour of the validity of notified agreements; “China’s Regional Trade Agreements”, *op. cit.* at 137; citing John H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* (Cambridge: Cambridge University Press, 2000) at 104.

¹¹¹ North-American Free Trade Agreement, 17 December 1992, Article 302. Article 302 is essentially a “successor” clause to the (bilateral) tariff reduction accelerator clause in Article 401.5 of the Canada-United States Free Trade

Agreement, 2 January 1988.

¹¹² In the case of NAFTA, this design feature may be seen most clearly instead in agriculture. Negotiations on Canada's refusal to proceed with comprehensive liberalization and the elimination of agricultural marketing boards continued into May 1992. But from Montreal onwards the ministers had decided on two separate bilateral agreements on agriculture and from Montreal onwards, the negotiations proceeded on three separate bilateral fronts – between Mexico and Canada, Canada and the United States, and the Mexico and the United States; Maxwell A. Cameron & Brian W. Tomlin, *The Making of NAFTA: How the Deal was Done* (Ithaca: Cornell University Press, 2000) at 147. See further Hermann von Bertrab, *Negotiating NAFTA: A Mexican Envoy's Account* (Westport: Praeger & the Centre for Strategic & International Studies, 1997) at 53.

¹¹³ See Jagdish Bhagwati & Arvind Panagariya, "Bilateral Trade Treaties are a Sham?", *Financial Times* [U.K.], 14 July 2003; Jagdish Bhagwati, "Preferential Trade Agreements: The Wrong Road", (1996) *27 Law & Policy in International Business* 865 at 867. Or what Asian Development Bank Vice-President, Liqun Jin has dubbed the potential "Asian noodle bowl effect"; see "Issues and Challenges in Designing Free Trade Agreements in Asia – Welcome Remarks by Liqun Jin", 20 March 2006, available at the Bank's website: <www.adb.org>.

¹¹⁴ See (e.g.) Frederick M. Abbott, "GATT and the European Community: A Formula for Peaceful Coexistence", (1990) *12 Michigan Journal of International Law* 1 at 3; John McMillan, "Does Regional Integration Foster Open Trade? Economic Theory and GATT's Article XXIV" in Kym Anderson & Richard Blackhurst (eds.), *Regional Integration and the Global Trading System* (NY: St. Martin's Press, 1993) at 292.

¹¹⁵ The GATT Framers never truly expected preferential trading arrangements to be as widespread or popular as they have become, see Patrick F.J. Macrory, Arthur E. Appleton & Michael G. Plummer (eds.), *The World Trade Organization: Legal, Economic & Political Analysis* (NY: Springer, 2005), Vol. II, at 222.

¹¹⁶ See (e.g.) Peter Sutherland, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (Geneva: WTO, 2004) at para. 60.

¹¹⁷ *British and Foreign State Papers*, Vol. 77 at 325.

¹¹⁸ Although in all fairness, would this not just depend on whether ASEAN's aspirations will receive the verdict on the European Community? Namely, that: "In the event, the creation of the European Common Market in 1958 changed, but did not weaken the international law of international trade as embodied in the GATT. On the one hand, the Treaty of Rome...conformed to the requirements for customs unions prescribed in the GATT. On the other hand, the European Community came to the fore within the GATT, negotiating and acting as a unit and on substantially equal terms with the United States"; see Lowenfeld, *International Economic Law, op. cit.*, at 47. And does this not itself involve an overstatement of the historical record? In a sense, it was disagreement over the compatibility of the European Economic Community with GATT Article XXIV which has caused the CRTA's FTA compliance surveillance task to have come to a virtual standstill; see Wang, "China's Regional Trade Agreements", *op. cit.* at 136. For the economic and political theory on whether FTA formations will lead to a fortress mentality and thereby become more resistant to trade liberalization over time instead, see Carnegie Endowment Study Group on International Trade, *Reflections on Regionalism, op. cit.* at 11-18.

¹¹⁹ Even ASEAN countries have at times failed to note the difference. Malaysia, for example, reacted strongly to Singapore's FTA programme at the beginning, alleging that Singapore's FTAs would be a Trojan Horse into ASEAN for other non-ASEAN nations. The allegation could only have involved a misunderstanding about what open regionalism entails in legal and policy terms; see "A Vital Role for Singapore in ASEAN Trade Relations", *the New Straits Times* [of Malaysia], 1 May 2003. On the "bandwagon effect" in ASEAN following the Singapore FTAs, see Ewing-Chow, "Southeast Asia and Free Trade Agreements", *op. cit.* at 200. For the exclusive competence of the Community, at least in relation to the trade in goods, see the ruling of the European Court of Justice in Opinion 1/94, *Agreement Establishing the World Trade Organisation* [1994] E.C.R. I-5267.

¹²⁰ For an analysis of some of the causes, see Margaret Liang, "The Realpolitik of Multilateral Trade Negotiations from Uruguay to the Doha Round", (2004) *8 Singapore Year Book of International Law* 149, generally.

¹²¹ For the suggestion as to how a Free Trade Area for the Asia-Pacific could save the WTO multilateral process, see Fred Bergsten, "Plan B for World Trade: Go Regional", *op. cit.*; *contra* Sungjoon Cho, "'Plan B' is Always Inferior to 'Plan A'", *op. cit.* This paper has argued for a nascent "obligation to multilateralise".

¹²² To the extent that FTAs are meant to be building blocks, should it cause a rethinking of the "desirability" of FTAs, particularly as to what is desired, and what is undesirable? Article XXIV:4 of the GATT-WTO states that: "The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements".

¹²³ See (e.g.) Fred C. Bergsten, *Open Regionalism*, Working Paper 97-3 (Washington D.C.: Institute for International Economics, 1997), available online at the Institute's website: <www.iie.com>. Bergsten's recommendations were directed at the Asia-Pacific Economic Cooperation (APEC) forum, but he argues that they should also apply to other FTAs; *id.* His recommendations draw on the work of the APEC Eminent Persons' Group (EPG) from 1993-1995; see *id.*

