# LEGAL IMPLICATIONS OF AN ASIA-PACIFIC ECONOMIC GROUPING

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## 1. INTRODUCTION

In recent years, several Asian leaders have advanced proposals for the formation of an Asia-Pacific economic grouping.[1] While the idea remains controversial, the development and apparent success of trading blocs in other regions, especially the European Union ("EU"), and the sense that the Uruguay Round of the General Agreement on Tariffs and Trade ("GATT") will not sufficiently ensure the viability of global free trade,[2] have forced many countries in the region to consider the formation of an Asian or Asia-Pacific trading bloc.[3] Interest in an Asia-Pacific regional trading bloc increased in 1994 after the creation of the North American

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[1] Jonathan Manthorpe, *Leaders Warm to Pacific Free Trade; Conference Seems Ready to Agree on a Massive Co-operation Zone*, THE GAZETTE (Montreal), Nov. 15, 1994, at A12. The terms "economic grouping" and "trading bloc" describe the general phenomenon of a group of nations coming together to form some type of cooperative arrangement related to trade.

[2] For a discussion of the successes and shortcomings of the Uruguay Round, see Al J. Daniel, Jr., *Agricultural Reform: The European Community, The Uruguay Round, and International Dispute Resolution*, 46 ARK. L. REV. 873, 885-917 (1994); Kenneth W. Abbott, *The Uruguay Round and Dispute Resolution: Building a Private-Interests System of Justice*, 1992 COLUM. BUS. L. REV. 111.

[3] The idea of an Asian trading bloc has been proposed consistently in recent years. *See S'pore Calls for Open Regionalism*, Xinhua News Agency, Mar. 9, 1995, *available in* LEXIS, News Library, Curnws File; Marsha Stopa, *Emerging Markets: Dangers, Opportunity*, CRAIN'S DETROIT BUSINESS, Mar. 3, 1995, at I-5; Kieran Cooke, *How Malaysia Discarded its Fear of China: A New Alliance is Emerging to Counter Western Influence*, FIN. TIMES, Feb. 10, 1995, at 4.

Free Trade Agreement ("NAFTA"), which many Asian leaders saw as the United States' response to the same factors.[4]

Commentators have focused their analysis on the economic and political consequences of a new Asia-Pacific grouping, largely ignoring the legal dimension of the inquiry.[5] This Article formulates a model that illustrates the extent to which a legal regime introduced on a regional basis differs qualitatively from a global regime. The Article then uses the model to evaluate whether the creation of a regional economic structure to govern trade between some or all of the Asia-Pacific nations would be advantageous.

Recent scholarship on the legal evolution of the European Union has identified the legal regime that governs trade and political relations among EU Member States as a new development in binding supranational law.[6] While analysts disagree as to whether the rules governing the behavior of the Member States and their citizens represent a new system of

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[4] The United States has paid keen attention to the possibility of an Asia-Pacific trade bloc. *See* Dave McIntyre, *Trade Victories Carry a Cost for U.S. Foreign Policy*, Deutsche Presse-Agentur, Feb. 27, 1995, *available in* LEXIS, News Library, Curnws File; *Remarks by President Clinton to the Canadian Parliament*, U.S. Newswire, Feb. 24, 1995, *available in* LEXIS, News Library, Curnws File.

[5] *See, e.g.*, Deborah A. Haas, Note, *Out of Others' Shadows: ASEAN Moves Toward Greater Regional Cooperation in the Face of the EC and NAFTA*, 9 AM. U.J. INT'L L. & POL'Y 809 (1994).

[6] *See* PAUL JOAN GEORGE KAPTEYN & PIETER VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES AFTER THE COMING INTO FORCE OF THE SINGLE EUROPEAN ACT 103 (Laurence W. Gormley ed., 2d ed. 1989); Alberta M. Sbragia, *Thinking About the European Future: The Uses of Comparison, in* EURO-POLITICS: INSTITUTIONS AND POLICYMAKING IN THE "NEW" EUROPEAN COMMUNITY 257 (Alberta M. Sbragia ed., 1992). Supranational law is law created by and is valid in a polity that includes more than one nation-state. *See* John W. Head, *Supranational Law: How the Move Toward Multilateral Solutions is Changing the Character of "International" Law*, 42 KAN. L. REV. 605, 622 (1994) (footnotes omitted). Such boundary-transcending legal systems include the basic system of international law as well as regional systems of international law. While regional legal systems emerge from conventional international law instruments, supranational law includes the interstitial law created by treaty institutions based on the applicable treaties; the European Union and the jurisprudence of the European Court of Justice represent the best examples of this phenomenon. *See* J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2426 (1991). Although in some sense all such law could also be considered international law, the term supranational refers to the distinction between the law directly constituted by treaty and the law endogenously developed by supranational institutions.

law or a strengthened version of traditional international law, there is general agreement that the legal constraints imposed on EU Member States are a significant break from the past state of international affairs.[7] Indeed, one commentator has hypothesized that the development of this legal system was driven by an internal institutional dynamic that pushed the bounds of the European Union beyond those attainable by treaty.[8]

The common legal heritage, political will, and traditional economic interdependence of the European nations have contributed to the successful development of a binding EU legal regime.[9] There are indications, however, that the institutional structure of the European Union also contributed to the expansion of its legal competence and enabled the European Union to impose a set of legally binding norms on its Member States.[10]

Outside of the European Union, the GATT is the principal legal framework governing global transnational trade.[11] Even prior to completion of the Uruguay Round, the GATT appeared to be an unsatisfactory vehicle for Asia-Pacific countries to achieve their goal of free trade.[12] In light of the political controversies that almost prevented the resolution of the Uruguay Round and now threaten to impede the progress of the post-Uruguay Round regime, the GATT seems even less likely to promote an effective free trade regime in the region.[13]

While proponents of an Asia-Pacific economic grouping

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[7] For a discussion of the binding nature of EU law, see *infra* Section 3.2.

[8] *See* Weiler, *supra* note 6, at 2449-50.

[9] *See* Peter Lange, *The Politics of the Social Dimension*, *in* EURO-POLITICS: INSTITUTIONS AND POLICYMAKING IN THE "NEW" EUROPEAN COMMUNITY 225 (Alberta M. Sbragia ed., 1992).

[10] David R. Cameron, *The 1992 Initiative: Causes and Consequences*, *in* EURO-POLITICS: INSTITUTIONS AND POLICYMAKING IN THE "NEW" EUROPEAN COMMUNITY 23 (Alberta M. Sbragia ed., 1992).

[11] *See* Daniel, *supra* note 2, at 885.

[12] *See* Frank B. Gibney, *Creating a Pacific Community: A Time to Bolster Economic Institutions*, FOREIGN AFF., Nov./Dec. 1993, at 20, 23.

[13] *See Uruguay Round Agreement is Reached*, 10 Int'l Trade Rep. (BNA) No. 49, at 2103 (Dec. 15, 1993) (describing the contentious nature of the Uruguay Round) [hereinafter *Uruguay Round Agreement*]; Gibney, *supra* note 12, at 23 (noting that "[l]ately, given GATT's problems, there has been more discussion of building Asia-Pacific economic institutions").

support the GATT system, even the GATT's strongest adherents recognize its institutional and structural weaknesses.[14] Much of the motivation for an Asia-Pacific economic grouping arises from the structural inadequacies in the GATT that result in a weak legal regime governing international trade.[15]

In considering whether to form a regional economic bloc, Asia-Pacific nations should consider the nature of the legal regime contemplated and whether it is plausible, politically desirable, and well suited for the types of trade-related problems the member countries hope to resolve. This Article analyzes the correlation between the structural regime chosen (e.g., customs union, looser free trade area, or an overarching global regime) and the legal and institutional developments that are likely to occur in the context of such a regime. This comparison will be used to evaluate the situation in the Asia-Pacific region and discern the extent to which the constituent nations are amenable to this type of structural development. This Article then identifies the aspects of the structural alternatives best suited to a regional economic grouping among Asia-Pacific nations. Finally, this Article assesses how the legal paradigm can be incorporated into the larger policy debate over an Asia-Pacific grouping.

Section Two presents the general scheme of the GATT and addresses the structural and political problems that have caused Asia-Pacific nations to question whether the GATT can satisfactorily resolve their international trade problems. Section Two also discusses the reforms and improvements adopted in the Uruguay Round of the GATT. Section Three addresses the European Union and identifies the aspects of its

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[14] *See* Gibney, *supra* note 12, at 23.

[15] *See* Seth Goldschlager & Dominique Jacomet, *Business: Be Wary of the New Group*, N.Y. TIMES, Jan. 29, 1995, § 3, at 9; Deborah Eby, *Rating GATT: Trade Pact's Breakthroughs and Barriers*, America's Network, Jan. 1, 1995, *available in* LEXIS, News Library, Curnws File. Uruguay Round reforms, most notably the World Trade Organization ("WTO") attempt to meet the current system's inadequacies. *Uruguay Round Agreement*, *supra* note 13, at 2103. The WTO will serve as the institutional mainstay of the GATT system, "pull[ing] together into a single institutional framework the GATT as it now exists, all arrangements concluded under GATT auspices[,] and all other bodies emanating from the Uruguay Round." *Id.* While the WTO will likely improve the operation of the current system, it is too early to assess its effectiveness.

structure and development that have enabled the European Union to become a more legalistic regime. Section Four analyzes the extent to which existing regional structures in the Asia-Pacific region have the potential to evolve into a regional trading bloc and develop binding supranational law. Section Four also includes an analysis of other potential groupings of Asian or Asia-Pacific states. Section Five explores those institutional characteristics cited in Section Two as having contributed to the successful development of the European Union that may be incorporated into an Asia-Pacific grouping. This analysis will include possible formulations of the legal/political bargain that participants might achieve. Finally, Section Six discusses how the addition of the legal dimension to the development of regional trading blocs changes the existing analysis and explores what it suggests for the future.

## 2. THE GATT

The nations of the Asia-Pacific region have collectively realized the necessity of maintaining global free trade to insure the continued prosperity of wealthier nations and opportunities for the growth of less developed nations in the region.[16] While these countries have declared their desire to expand the current GATT system, they also have realized that the GATT may not be the means of achieving this objective.[17] The increasing frustration of some EU and U.S. policymakers over their inability to eliminate trade barriers in Asia, and the growing feeling that GATT free trade is a one-way street, have led EU and U.S. policymakers to consider other mechanisms, most notably regional arrangements, as either additions to or substitutes for the GATT framework.[18] Further, the

[16] H.B. Junz & Clemens Boonekamp, *What is at Stake in the Uruguay Round*, FIN. & DEV., June 1991, at 10, 11.

[17] Peter Kenevan & Andrew Winden, *Flexible Free Trade: The ASEAN Free Trade Area*, 34 HARV. INT'L L.J. 224 (1993).

[18] *Good in Parts*, ECONOMIST, Jan. 9, 1993, at 60, 61. In 1992, sixteen regional trading arrangements were notified to the GATT (excluding NAFTA, which had not yet been ratified). *Id.* While many of these pacts were between formerly communist countries in Eastern Europe and the countries of Western Europe, some were from Asia and Latin America, reflecting the growing trend toward trade liberalization in developing countries. *Id.*

difficulty faced by the European Union and the United States in agreeing on the limited specific improvements presented in the Uruguay Round, as well as the amorphous nature of the WTO, has made Asia-Pacific leaders question the efficacy and value of the GATT system.[19]

The GATT system of international trade regulation has widened the scope of international free trade. While successive rounds have resulted in a considerable reduction in average tariff rates among the contracting parties, the GATT legal regime has not substantially lessened non-tariff barriers.[20] Average tariff rates have reached a point where further comprehensive reductions are unlikely to have a substantial effect on overall free trade, except in specific protected sectors.[21] In addition, many governments have found non-tariff barriers to be an effective method of protecting domestic industries without creating GATT compliance problems.[22] According to some commentators, GATT remedial measures, such as escape clause actions and anti-dumping sanctions, have mutated from their original purpose of ensuring a level playing field into devices for protecting domestic industries.[23] In light of these problems with the current international trading regime, the GATT has two systemic flaws. First, although interested officials, policymakers, and scholars have identified these problems, the GATT has not yet developed an institutional framework to address them on an international legal level.[24] Second, in the political realm, continuing discord between the United States and the European Union delayed progress in the Uruguay

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[19] *See* Gibney, *supra* note 12, at 23.

[20] Junz & Boonekamp, *supra* note 16, at 10-11. The Asian trading nations have had a mixed history with non-tariff barriers, although they have used them extensively to protect their infant industries and satisfy domestic sector demands for exclusive markets. The Asian nations have also been increasingly targeted by industrialized nations' non-tariff barriers, especially those of the European Union. *Id.* at 11.

[21] *Id.* at 13.

[22] *Id.*

[23] *See id.* at 13. Asian nations have been the most seriously affected by these devices; the United States, the European Union, Australia, and Canada have "initiated over 1,000 investigations, of which some 50 percent have led to action." *Id.*

[24] *Id.*

Round,[25] and will likely impede post-Uruguay Round reforms.[26] Many areas of contentious disagreement were not definitively resolved in the Uruguay Round, and thus remain the subject of conflict within new GATT structures like the WTO.[27]

### 2.1. *Institutional Weaknesses of the GATT*

Since the beginning of the GATT process, Contracting Parties have successively reduced their tariffs on manufactured products to the point where the average rates for the big three economic players (the United States, the European Union, and Japan) are approximately five percent.[28] Despite recent progress in reducing tariffs, many countries still find that their exporters are impeded by a myriad of non-tariff barriers.[29] The substantive provisions of the GATT aim to eliminate non-tariff barriers as well as reduce tariffs.[30]

Parties to the Tokyo Round of the GATT addressed non-tariff barriers, including subsidies, preference for domestic suppliers in government procurement, and anti-dumping actions.[31] Although the relevant provisions of the GATT are not as exhaustive as comparable provisions in the Treaty of Rome,[32] they are nonetheless extensive enough to eliminate certain non-tariff barriers if enforced.[33]

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[25] *Uruguay Round Agreement*, *supra* note 13, at 2103.

[26] Shada Islam, *Goodbye GATT: Asia Welcomes Creation of New World Trade Body*, FAR E. ECON. REV., Dec. 30, 1993, at 79, 80. The areas into which the GATT aims to expand its coverage include trade-related environmental issues, national domestic competition policies, and labor standards. *Id.* All of these policymaking areas traditionally have been domestic concerns and will probably be as difficult to resolve as the agricultural dispute that almost prevented a successful conclusion to the Uruguay Round. *See id.*

[27] *Id.*

[28] *See* Junz & Boonekamp, *supra* note 16, at 13.

[29] *Id.* at 13-14. The term "non-tariff barriers" encompasses everything from quotas to subtle differences in domestic product standards to economic policies that restrict market access to foreign products. *Id.*

[30] *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XI, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

[31] Junz & Boonekamp, *supra* note 16, at 10.

[32] Daniel, *supra* note 2, at 899.

[33] *See id.*

One institutional weakness of the GATT is that it contemplates interstate bargaining on a traditional international level as the primary means of dispute resolution.[34] Compliance with the GATT is seen more as the resolution of differences between disputing states than as the enforcement of legal rights.[35] The power dynamic in the resolution of GATT disputes thus replicates that which exists in the international political realm, where a nation's bargaining power is a product of its economic or political influence rather than the legal merits of its position.[36] In such a system, powerful nations often triumph regardless of the underlying legality of their position.[37] This political dimension of the bargaining context has prevented GATT's rules from evolving to the same extent as the rules of an entity like the European Union, in which institutional innovations have been endogenously driven by the actions of the European Court of Justice ("ECJ") and the Commission, entities within the European Union but outside of the normal interstate bargaining process.[38]

Another flaw in the GATT is the absence of an institutional identity. Under the GATT's dispute resolution system, the Contracting Parties appoint a panel of mediators from the affected countries to resolve a trade dispute.[39] The Contracting Parties adopt the panel's resolution by consensus,

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[34] David S. Huntington, *Settling Disputes Under the North American Free Trade Agreement*, 34 HARV. INT'L L.J. 407, 409-10 (1993). Only after bilateral consultation and negotiations fail are disputes referred to the Contracting Parties acting as a body. *Id.* If not resolved there, the dispute may be referred to a panel of independent experts. *Id.*

[35] OLIVIER LONG, LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM 75-76 (1985).

[36] Daniel, *supra* note 2, at 907.

[37] *Id.*

[38] *See id.* at 900-04 (describing the role of the ECJ in strengthening and regulating the European Union). The distinction between law and politics in any legal system is elusive and somewhat illusory. *See* LONG, *supra* note 35, at 81-83 (describing the way that political and trade/legal problems are resolved by the GATT dispute settlement procedure). This Article will show, however, that there is a clear distinction between the resolution of trade disputes through reference to and interpretation of substantive rules by a neutral arbitrator in the EU context, and the quintessentially political process that occurs between GATT disputants under the current panel system.

[39] Huntington, *supra* note 34, at 410.

which means that one member can veto its decision.[40] Even if a decision is adopted, the remedies a panel can effectively invoke are limited.[41] Thus, unlike the European Union, which has a permanent adjudicatory body (the ECJ), the GATT does not have a comparable uniform body before which its members can vindicate their rights and obligations in a legal environment.

A third institutional weakness of the GATT, related to its lack of a permanent adjudicative body, is its private nature.[42] A private institutional framework attempts to replicate the arrangements to which its parties would agree among themselves, and does not independently initiate or promote change.[43] In contrast, a public-oriented entity has a "communal vision" and mobilizes its institutional powers in order to achieve this vision.[44] The private interest characteristics of the GATT[45] prevent it from expanding free trade to the extent that public institutional structures like the European Union have been able to accomplish.[46]

In order to revitalize free trade, the world community must remedy the institutional weaknesses of the current GATT system or develop a new system that avoids these flaws. The WTO may prove to be an effective institution in overcoming some of these weaknesses.[47] Nevertheless, until the actual structure is implemented, it is difficult to assess the likelihood of the WTO's success. To the extent that its decisionmaking and other institutional structures labor under the same

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[40] *Id.* at 411.

[41] LONG, *supra* note 35, at 77 (noting that while retaliatory measures such as suspension of trade concessions are an option, the one time such sanctions were applied the affected country did not withdraw from GATT as was expected).

[42] *See* Kenneth W. Abbott, *GATT as a Public Institution: The Uruguay Round and Beyond*, 18 BROOK. J. INT'L L. 31, 36 (1992).

[43] *Id.* at 34.

[44] *Id.* at 35.

[45] *Id.* at 36-38 (noting six key ways in which GATT is based on a private model yet reaches toward some public goals).

[46] Daniel, *supra* note 2, at 900-07; Weiler, *supra* note 6, at 2478-82.

[47] *See* William D. Hunter, *WTO Dispute Settlement in Antidumping and Countervailing Duty Cases*, *in* THE COMMERCE DEPARTMENT SPEAKS ON INTERNATIONAL TRADE AND INVESTMENT 1994 (PLI Corp. & Practice Course Handbook Series No. 547, 1994) (outlining the proposed structure of dispute resolution under the WTO), *available in* Westlaw, JLR Database.

political constraints as the current structure,[48] it is likely that the WTO will face similar difficulties.

*2.2. Uruguay Round Reforms*

Some of the substantive and institutional weaknesses of the GATT were addressed in the Uruguay Round.[49] Agriculture was brought under the coverage of the GATT system in the Uruguay Round.[50] Under the new provisions, countries currently protecting their agricultural sectors through non-tariff barriers will convert the non-tariff barriers into tariffs affording the same degree of protection.[51] This process of "tariffication" will be followed by a progressive reduction in tariffs.[52] The countries also must reduce the level of export subsidies that they provide to farmers.[53]

The Uruguay Round agreement also extended GATT's coverage to include textiles, an industry previously governed by the protectionist Multi-Fiber Arrangement.[54] The Uruguay Round provides for a phase out of current trade restrictions on textiles over a ten-year period.[55] The new agreement also incorporates other new areas into the GATT structure, including foreign direct investment restrictions,[56] intellectual property protection issues,[57] and services.[58] Thus, in terms of substantive coverage, the Uruguay Round revitalized the GATT's potential as a catalyst for further liberalization of international trade.

The Uruguay Round also expanded the GATT's coverage of

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[48] *Id.*

[49] *See* Abbott, *supra* note 2, at 111.

[50] *Uruguay Round Agreement*, *supra* note 13, at 2103-04.

[51] *Id.* at 2104.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.* at 2105.

[57] *Id.* at 2105-06.

[58] *Id.* at 2105. The new General Agreement on Trade in Services now governs services supplied to one country by another, and extends the general GATT principles of most-favored-nation ("MFN") status, nondiscrimination, and transparency. *Id.*

non-tariff barriers.[59] The new agreement limits the use of safeguards as an instrument to protect domestic industries[60] by requiring additional procedural steps and limiting the extent and duration of safeguard quotas.[61] It also addresses voluntary export restraints, a tactic countries have used to avoid the existing requirements for safeguard actions.[62] The final agreement also tightens the requirements for a determination of dumping in an effort to limit abuse of the anti-dumping mechanism.[63]

As well as strengthening the substantive provisions of the GATT, participants in the Uruguay Round also attempted to improve the GATT's dispute resolution procedure.[64] The GATT General Council ("General Council")[65] was created as part of the new institutional structure of the WTO.[66] Under the new rules, the decision of a GATT panel automatically becomes binding unless all WTO members block its adoption.[67] This shift in the burden of ratification would increase the "legal" nature of the panels' decisions by making it more difficult for contracting parties to prevent panel decisions from becoming effective. The General Council will enjoy a stronger legal foundation than the existing structure

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[59] *Id.* at 2103-04.

[60] GATT, *supra* note 30, art. XIX.

[61] *Id.*

[62] *See id.*

[63] *Id.* at 2104-05; Islam, *supra* note 26, at 79. The new rules raise the burden of proof for demonstrating injury to domestic producers and require the termination of an anti-dumping investigation upon a determination that the dumping margin is *de minimis*. *Uruguay Round Agreement*, *supra* note 13, at 2104. In addition, the new rules introduce a "sunset" provision that requires the discontinuation of anti-dumping tariffs after five years unless there is a subsequent finding of dumping. Islam, *supra* note 26, at 79.

[64] Abbott, *supra* note 2, at 117.

[65] The General Council will run the WTO; it "will act as a dispute settlement body, and will establish subsidiary bodies dealing specifically with goods, services, and intellectual property." *Uruguay Round Agreement*, *supra* note 13, at 2103.

[66] *Id.* at 2103. The WTO encompasses the current GATT framework and all GATT-related trade arrangements (e.g., the Government Procurement Code and other Tokyo Round Codes and all the regimes created by the Uruguay Round). *Id.*

[67] *See* Hunter, *supra* note 47, at 2. Previously, if any member objected to the adoption of a panel report, the adoption would be blocked. *See supra* notes 37-38 and accompanying text.

and will also play a role in strengthening the GATT's dispute resolution procedures.[68]

Despite these advances in the quality of the dispute resolution process, there remain considerable limitations to its effectiveness. Contracting parties may be able to persuade the General Council to rescind an adverse finding. Further, the remedy for aggrieved parties remains limited. Thus, even after the Uruguay Round reforms, the GATT remains a predominantly private oriented institutional structure.

### *2.3. Political Weaknesses*

A dispute between the United States and the European Union during the Uruguay Round illustrates the problems inherent in the GATT's preference for a political approach. The dispute, centered around the comparatively minor area of agriculture, jeopardized the progress of the entire Uruguay Round.[69] Key countries seem to have weakened in their resolve to give priority to improving the GATT system.[70] In the year prior to the completion of the Uruguay Round, both the European Union and United States arguably shifted some of their attention towards regional developments in the European Union and North America, and gave less priority than before to resolving political gridlock in the GATT.[71] This phenomenon has indicated to Asian leaders that the GATT framework on which they were depending might not be an effective means for achieving their goals.[72] A last-minute settlement between the United States and the European Union did little to alleviate these doubts.[73]

In light of these political problems, Asian nations have

[68] *See* Hunter, *supra* note 47, at 2.

[69] *Negotiators Clear Path to GATT Pact by Sweeping Away Remaining Differences*, 10 Int'l Trade Rep. (BNA) No. 49, at 2106, 2106-07 (Dec. 15, 1993). Even with their compromise over agriculture, the European Union and the United States failed to reach agreement on a number of other issues including audiovisual rights, aircraft subsidies, financial services, and maritime services. *Id.* The European Union and the United States agreed to disregard these areas of disagreement in order to complete the Round. *Id.*

[70] *See supra* note 18 and accompanying text.

[71] *Id.*

[72] *See supra* notes 16-19 and accompanying text.

[73] *See Good in Parts*, *supra* note 18, at 61.

discussed creating an Asian regional economic bloc.[74] Due to the doubts of certain key countries in the region, advocates of such a grouping have limited the scope of their proposal.[75] Proponents of an Asian economic bloc argue that such a grouping might have a positive effect within the current political framework of the GATT as a force for revitalization of the GATT and the expansion of free trade.[76] While the development of an Asian economic bloc could benefit the current GATT political situation by creating a coalition of nations devoted to freer trade within the GATT, a core group of Asian or Asia-Pacific nations might also be able to cure some of the institutional weaknesses of the GATT system. Before proceeding with this inquiry, however, it is useful to consider the single supranational structure that has resolved many of the institutional weaknesses that characterize the GATT and built a more effective free trade regime: the European Union.

### 3. Development Of The European Union And The Growth Of Hard Trade Law

Like the GATT, the European Union made its principal goal the eradication of barriers to trade and the use of economic interdependence to ensure regional economic prosperity and political stability.[77] Unlike the GATT, the European Union has succeeded in eliminating almost all direct barriers to trade within its region, and has gone beyond its original economic sphere to become the forum for resolution of other trade-related transnational problems facing its Member States.[78]

While the scope of the European Union is more ambitious

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[74] Susumu Awanohara, *Loose-Knit Family*, FAR E. ECON. REV., Dec. 2, 1993, at 12.

[75] *Id.*

[76] This was the United States' strategy at the November 1993 APEC summit, discussed *infra* Section 4.1. The United States used the summit to rally support for a speedy and successful conclusion to the Uruguay Round, and to put pressure on the recalcitrant European Union. *See* Awanohara, *supra* note 74, at 13.

[77] Daniel, *supra* note 2, at 898-99.

[78] *Id.* at 899-904.

than that of the GATT,[79] certain of its systemic characteristics could be adaptable to either a GATT-type structure or a regional structure in Asia. For this reason, analysis of the legal/political development[80] of the European Union reveals means by which a transnational framework to govern trade can become more effective. If some aspects of this development are amenable to a smaller group of nations, then the success of the European Union as a legal framework might supply a further argument for Asia-Pacific nations to proceed towards a regional grouping.

In analyzing this legal/political dynamic and its role in the evolution of EU law and institutions, the theory of Joseph Weiler is particularly helpful.[81] By showing the relationship between political developments during the history of the European Union and legal developments in the decisions of the ECJ, as well as the actions of the Member States in complying with such judgments, Weiler describes the evolution of the "hard law" of the European Union.[82] He argues that a large part of the development of hard law was driven by the interaction between the institutional and substantive characteristics of the European Union, rather than in the political context of interstate bargaining towards a legal dispute resolution process more akin to the character of domestic legal systems.[83]

### *3.1. The European Union as a Public Institution*

One prominent difference between the European Union and the GATT is the European Union's placement in the public/private dichotomy.[84] The European Union has evolved into a more public-oriented grouping with a "communal vision," and has adopted institutional mechanisms to further this vision.[85]

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[79] *Id.* at 899.

[80] The term legal/political conveys the sense in which politics is implicated, but the legal aspect of the dynamic is clearly as important. This conception of law "encompasses a discourse that is much wider than doctrine and norms." Weiler, *supra* note 6, at 2409.

[81] *Id.*

[82] *Id.* at 2410-53.

[83] *See id.* at 2409-10.

[84] For a discussion of the public/private dichotomy, see *supra* Section 2.1.

[85] Tycho H.E. Stahl, *Liberalizing International Trade in Services: The*

The European Union has independent institutions that often act on the basis of their evaluation of the European Union's interests rather than the interests of one Member State.[86]

The two most important EU institutions are the Commission and the Council of Ministers ("Council").[87] The Commission is the quasi-executive, quasi-legislative branch of the European Union.[88] Commission members are required to act in furtherance of the interests of the European Union as a whole.[89] The Commission enjoys the "right of initiative" in EU lawmaking,[90] plays a crucial role in influencing the majority voting of the Council,[91] and serves as the enforcer and administrator of EU law.[92]

The primary legislative body of the European Union is the Council.[93] While the membership and negotiating dynamic of the Council correspond to those of a multilateral treaty (i.e., the traditional interstate political bargaining process)[94] there are elements of a public-oriented structure in the content and process of the Council's decisionmaking. The scope of the Council's authority is limited by the Treaties that define the substantive law of the European Union, perhaps because Council members view the Community interest "through the spectacles of national interest."[95] Further, from a legal perspective, decisions of the Council are not international agreements but measures of Community law.[96]

The Commission serves as the enforcement arm of the European Union. It has the power to bring Member States that are not in compliance with the constitutive treaties or

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*Case for Sidestepping the GATT*, 19 YALE J. INT'L L. 405, 437 (1994) (footnotes omitted).

[86] *See id.*

[87] KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 6, at 103.

[88] For a description of the Commission's role, see *id.* at 125-130.

[89] *Id.* at 108-09.

[90] *Id.* at 126.

[91] *See id.*

[92] *Id.* at 125-130.

[93] *Id.* at 124-25.

[94] B. Guy Peters, *Bureaucratic Politics and the Institutions of the European Community*, *in* EURO-POLITICS: INSTITUTIONS AND POLICYMAKING IN THE "NEW" EUROPEAN COMMUNITY 75, 78 (Alberta M. Sbragia ed., 1992).

[95] KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 6, at 104.

[96] *See* Peters, *supra* note 94, at 100-03.

other provisions of substantive community law before the ECJ.[97] This differs from the GATT political paradigm in that the Commission may prosecute a Member State for noncompliance even when other Member States do not wish to act.[98] This power enables the Commission to enforce the European Union's laws by bringing a test case before the ECJ and then prevailing upon the Member States to abide by the Court's decision.[99] Thus, the nature and extent of the Commission's power ensure that the decisional law of the ECJ and its interstitial rulemaking are driven by a conception of the public and systemic needs of the European Union, rather than the parochial interests of EU Member States.

The public's conception of the European Union arguably has resulted in expansion of the ECJ's realm of influence. Weiler identifies the ECJ's adoption of the doctrine of implied powers as an advance that allowed the European Union to legislate in areas that were not originally part of its competence, when such an expanded scope was necessary to achieve a legitimate goal of the European Union.[100] This flexibility enabled the European Union to address areas of free trade that touch on the sovereignty of Member States, through harmonization of Member State laws and the development of EU-wide law in some areas.[101] While the ECJ justified the jurisdictional expansion on policy and pragmatic grounds,[102] the fact that the Commission served as an advocate in some

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[97] TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY art. 169 [hereinafter EEC TREATY]; Weiler, *supra* note 6, at 2419-20.

[98] *See* KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 6, at 273-74. Other Member States may be hesitant to take action because they are guilty of the same or another type of non-compliance, or they may not want to "rock the boat" over the issue. Of course, the Commission also has the discretion not to bring suit against a non-complying Member State if it feels that such an action would not be in the interest of the Community. *Id.*

[99] *See* Martin Shapiro, *The European Court of Justice*, *in* EURO-POLITICS: INSTITUTIONS AND POLICYMAKING IN THE "NEW" EUROPEAN COMMUNITY 123, 124-28. Member States usually accept determinations by the Court and hence honor their community obligations once an issue has been adjudicated. Weiler, *supra* note 6, at 2429. For a discussion of the Member States' reasons for compliance, see *infra* Section 3.2.

[100] Weiler, *supra* note 6, at 2416.

[101] *Id.* at 2416-17.

[102] *Id.* at 2416 (nothing that the ECJ sidestepped the presumptive rule in international law that treaties must be interpreted to minimize encroachment on state sovereignty).

instances should not be overlooked.[103] Further, the Commission's conception of the European Union also influenced the extent to which the ECJ was prepared to expand its legal reach.[104]

In summary, the institutional structure of the European Union strengthens its public-oriented nature. The European Union's mechanisms for developing and enforcing the communal interests of the Member States allowed the ECJ to expand the scope of EU substantive law.[105] The Commission was able to direct much of the development of the EU decisional law towards fulfilling EU interests[106] and ensuring that Member States comply with their legal obligations.[107] The institutional strength of the public-oriented bodies contributed to the growth of community ethos, which in turn made the ECJ more willing to increase the extent of the European Union's influence.[108]

### *3.2. Enforcement Powers of the European Union and the Hardening of Community Law*

The European Union's power to enforce its substantive law differentiates it from the GATT and explains the European Union's greater effectiveness in eliminating barriers to free trade. This dimension of the European Union's power allows the Commission to undertake its institutional role with confidence that the Member State involved in a dispute will comply with the ECJ's determination or even settle the dispute by agreeing to obey the relevant provision.[109] European Union Member States obey the rulings of the ECJ and treat their EU obligations as binding.[110]

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[103] *See* D. LASOK & J.W. BRIDGE, LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES 183-95 (4th ed. 1987).

[104] *See id.*

[105] *See* Weiler, *supra* note 6, at 2416.

[106] *See id.* at 2413-17.

[107] *See* KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 6, at 275-80.

[108] *See id.* at 310-49.

[109] *See id.* at 275-80. Before bringing a member state before the ECJ, the Commission must issue a reasoned opinion and give the member state an opportunity to evaluate its arguments and respond. EEC TREATY art. 169; KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 6, at 274-75.

[110] *See* KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 6, at 310-49.

Another aspect of the EU system that ensures nations' compliance with substantive legal provisions is the preliminary reference from a national court.[111] Under this procedure, a national court may, or in some instances must, refer to the ECJ any issues of EU law the interpretation of which are essential to the resolution of the dispute.[112] The preliminary reference procedure enables individuals to appeal to their national courts for the enforcement of their rights under EU law.[113] By vesting individuals with specific rights derived from the constitutive law of the European Union and supplying them with the means to enforce such rights, the European Union effectively makes every citizen a private attorney-general, thus greatly enlarging the scope of its enforcement power.[114] The Member State courts have by and large accepted this intervention into their sovereign functioning.[115] This means that in many cases it is the national courts that compel Member States to honor their EU obligations.[116]

The ECJ also has adopted legal doctrines that have increased acceptance of the EU legal system. The doctrine of direct effect has contributed to the success of the preliminary reference device by expanding the scope of EU-derived legal rights that individuals can vindicate in their national courts.[117] Under this doctrine, the Member States may no longer choose not to implement measures adopted by the European Union.[118] The doctrine of direct effect illustrates the difference between the character of EU law and typical

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[111] *See* EEC TREATY art. 177.

[112] *Id.*

[113] *See* Weiler, *supra* note 6, at 2413-15. This approach departs from the classical conception of international legal obligations as directed towards states. *Id.*

[114] *See id.* at 2414.

[115] *See id.* at 2426-27. Weiler suggests that the ability of the national judiciaries to develop the law which would bind them was a key factor in the member states' acquiescence to the intervention. *Id.*

[116] *Id.* at 2421.

[117] *Id.* at 2413. Direct effect is a rule of construction that provides that when an EU substantive legal provision (whether it be a treaty, a directive, or a regulation) is sufficiently "clear, precise and self-sufficient," it can be enforced by a national court even in the absence of national legislation transforming it into national law. *Id.*

[118] Shapiro, *supra* note 99, at 126.

international treaty law: under the latter legal rights and obligations apply only to states and not to individuals.[119]

Another way in which the ECJ has increased the scope of EU law beyond that of normal treaty-based international law is through the doctrine of supremacy.[120] This doctrine ensures that where there is a conflict between EU law and the law of a Member State, the EU measure will control.[121] Together with the doctrine of direct effect, the doctrine of supremacy ensures that EU law will take precedence over conflicting national laws.[122]

These doctrinal devices have strengthened EU law and the public character of the European Union. It is important to examine what motivated the various players to accept a system that encroached on traditional areas of state sovereignty. The explanation for this acquiescence includes both the legitimacy of the EU institutions driving the change and the political motivations of the participating governments.

### *3.3. Legitimacy of Institutions*

Member States' compliance with binding ECJ rulings has been crucial to the development of the EU legal system. While national courts became the ultimate enforcers of ECJ decisions pursuant to the Article 177 preliminary reference provision,[123] Member States have also complied with decisions of the ECJ that were independent of their domestic legal systems.[124] One reason for this compliance is the legitimacy of the ECJ as an institution.[125] The ECJ is

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[119] Weiler, *supra* note 6, at 2413.

[120] *Id.* at 2414-15. Although the EEC Treaty does not contain a supremacy clause, the doctrine of supremacy provides that any EU law takes precedence over the conflicting law of any Member State. *Id.*

[121] *Id.*

[122] *See id.* at 2415.

[123] *Id.* at 2425. For a discussion of the use of the Article 177 preliminary reference, see Shapiro, *supra* note 99, at 126-27.

[124] Weiler, *supra* note 6, at 2425.

[125] *Id.* Even though the constitutive treaties of the European Union provide for mandatory jurisdiction for certain actions involving the Commission's prosecution of a Member State for non-compliance with Community law, there is no ex ante reason to believe that the Member States will honor the determinations.

composed primarily of former judges from the Member States.[126] Often these judges are senior jurists from the highest courts in their respective countries.[127] As a result, both Member State courts that make Article 177 references and Member State governments have great respect for the determinations of the ECJ.[128] This is in marked contrast to the status of "binding" resolutions of GATT panels, which are regularly ignored.[129]

The second source of the ECJ's legitimacy is the grounding of its determinations in law. The ECJ adopted a teleological approach to interpreting the law, with the aim of developing a coherent legal framework to govern the emerging European Union.[130] The locus of the ECJ's legitimacy was in the view of law as a binding norm.[131] Thus, the fact that an authoritative and respected legal body generated judgments based on strict legal reasoning lent credibility to the ECJ's pursuit of a legitimate collective legal system.[132]

Finally, Weiler identifies the judicial empowerment provided by the Article 177 procedure as a crucial incentive that enabled judges in domestic legal systems to circumvent their judicial superiors or political counterparts by appealing points of European law to the ECJ.[133] As Member State courts accepted this new structure, they created a momentum that led other Member States to accept the new role of the ECJ.[134]

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[126] The ECJ's judges must be "persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office." EEC TREATY art. 168a. Although not required by EU law, it has become the practice to have one judge from each of the Member States. *See* KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 6, at 147.

[127] *See* Weiler, *supra* note 6, at 2425.

[128] *See id.*

[129] *See* Abbott, *supra* note 2, at 113-19.

[130] *See* Weiler, *supra* note 6, at 2416.

[131] *See* KAPTEYN & VERLOREN VAN THEMAAT, *supra* note 6, at 310-49.

[132] *See id.*

[133] *See* Weiler, *supra* note 6, at 2426. In states without judicial review, domestic courts found themselves for the first time able to refer issues to the ECJ, and then to use the ECJ's ruling to strike down national law. Even in states with limited judicial review, Article 177 permitted lower courts to strike down (through preliminary references to the ECJ) laws made by the political branches. *Id.*

[134] *See id.* at 2425.

It is difficult to separate these factors because each affected the others. It is thus more illuminating to consider them as a whole. While this constellation of factors accounts for many of the unique features of the EU legal order, the most important element is the link between these institutional and structural characteristics and the nature of the legal/political bargain struck by the Member States.

### 3.4. *Legal/Political Paradigm*

#### 3.4.1. *The Foundational Period of the European Union*

Although the Treaty of Rome, the constitutive treaty of the European Union, provided for majority voting in the Council,[135] the idea of majority voting was not immediately accepted by the Member States; rather, a system of unanimous voting was adopted.[136] The decisive power of the Commission was assumed by intergovernmental bodies like the Committee of Permanent Representatives ("COREPER"), in which Member States bargained at a more traditional political level.[137] At the same time, the European Union was strengthening the reach of its laws through the doctrinal developments described previously.[138] Weiler posits a relation between the degree of participation that the Member States enjoyed in the EU lawmaking process as a result of the

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[135] *See* LASOK & BRIDGE, *supra* note 103, at 198-99. Majority voting does not mean that fifty percent of the member states can pass legislation, but rather that the votes of each Member State were weighted in such a way so as to allow several Member States to veto proposed measures.

The current system gives the large countries, Germany, Britain, France, and Italy, ten votes each. Spain has eight votes; Holland, Greece, Belgium, and Portugal have five; Denmark and Ireland have three; and Luxembourg has two. *The Maths of Post-Maastricht Europe*, ECONOMIST, Oct. 16, 1993, at 51. A measure requires 54 of the 76 total votes to pass. As a result of this system, all of the large states voting together cannot outvote the small states, and the small states need the support of at least three large states to obtain the qualified majority. *Id.* This system will hereinafter be referred to as majority voting.

[136] EEC TREATY art. 145.

[137] *See* Peters, *supra* note 94, at 80. COREPER is comprised of representatives of each of the Member States who handle the daily business of the Council. Weiler, *supra* note 6, at 2424 n.45.

[138] These developments include the doctrines of direct effect and supremacy. For a discussion of these doctrines, see *supra* notes 117-22 and accompanying text.

unanimity requirement and the Member States' willingness to acquiesce to the increasing reach of EU law.[139] On one level, the fact that each Member State could veto legislation ensured that no Member State would have to adopt an unpopular provision.[140] Thus the veto power made the prospect of binding supranational law less threatening.[141] More important in explaining why Member States accepted the increased power of EU law is the idea that not every expansion of the EU lawmaking power came at the expense of the Member States.[142] Rather, the enhancement of EU power led to a concomitant enhancement of the strength of the Member States.[143]

The legal/political bargain of the Member States had several elements. Each Member State recognized that its membership in the Community had more aggregate benefits than costs.[144] Further, apart from the general economic benefits obtained from membership in the Customs Union, each Member State saw the EU decisionmaking process, in which it enjoyed a veto, as a means for resolving the issues it faced as part of the European Union and as a nation.[145] This was especially true for the small countries, which gained bargaining leverage with the larger states as a result of their veto power.[146] The large states gained the ability to pursue their own interests more effectively by doing so on an EU-wide basis.[147] Thus, even in an era when the Member State governments distrusted supranationalism in theory,[148] legal and political conditions combined to provide Member States incentives for entering into a new system of binding international legal agreements.

Unique characteristics of the European Union also appealed to different segments of the Member States. Article

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[139] *See* Weiler, *supra* note 6, at 2426-27.

[140] *See id.* at 2429.

[141] *See id.*

[142] *Id.*

[143] *Id.*

[144] *See id.*

[145] *See id.*

[146] *Id.* at 2429 n.59.

[147] *See id.*

[148] *Id.* at 2428.

177 enabled the judiciaries of the members states to expand the scope of their power in cooperation with the ECJ.[149] More importantly, the system empowered the governments of the Member States by enabling them to legislate binding law while circumventing their domestic lawmaking procedures.[150] Thus, under the institutional structure of the European Union, the two branches of the Member States whose passivity, if not active support, was required to strengthen the EU legal regime had their powers enhanced in this process. The result was a legal/political equilibrium within which the basic structure of the European Union's lawmaking system developed.

### *3.4.2. Recent Developments*

Recent developments have called into question the stability of this legal/political construct. Many of the key doctrinal developments started when the European Union had only six members; when subsequent Member States joined, the decisional mechanisms were not altered to incorporate the additional members.[151] As the European Union expanded, the equilibrium produced by unanimous voting became more precarious.[152] In key areas of policy, the Council was unable to make decisions effectively; this "decisional malaise" culminated in a White Paper that criticized the paralysis of the European Union in moving toward harmonized regulations and a single market.[153] This resulted in the Single European Act ("SEA"), which reintroduced majority voting to the European Union and strengthened the Commission's position in relation to that of individual Member States.[154] This development represented a change in the legal/political bargain. A Member State no longer had the option of not complying with EU legislation that it did not support.[155]

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[149] *See supra* note 96 and accompanying text.

[150] *See* Weiler, *supra* note 6, at 2430.

[151] *See id.* at 2456.

[152] *See id.* (explaining that achievement of unanimity became more difficult as the number of Member States increased and cultural and political homogeneity decreased).

[153] *See id.* at 2456-57.

[154] *See id.* at 2458.

[155] *See supra* note 118 and accompanying text.

However, with the increase in the number of Member States, this modification was essential to ensure the efficacy of the EU decisionmaking power.[156]

Now that the terms of the original "bargain" have changed, it is unclear to what extent the equilibrium can be maintained.[157] One problem is the extent to which Maastricht and other planned treaty-based expansions of EU competence indicate that the European Union will become involved in more areas that affect the sovereignty of the Member States. An important economic goal of the Maastricht Treaty that has resulted in debate among the Member States is the introduction of a common currency into the European Union.[158] Under the Maastricht Treaty, the EU Member States were to move toward convergence of their main fiscal criteria in preparation for the formation of a European Central Bank and the adoption of an EU currency by 1997 or 1999.[159] On August 1, 1993, as a result of the collapse of the French franc, the European Union was forced to change the Exchange Rate Mechanism ("ERM"), the fixed band within which the EU currencies are supposed to fluctuate by 2.25%, to a much looser arrangement permitting variances of up to 15%.[160] This development shook confidence in the European Union's move toward a full monetary union and most likely ensured that the transformation would not occur on schedule.[161]

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[156] *See* Weiler, *supra* note 6, at 2456-57.

[157] *Id.* at 2465.

[158] *See Europe's Future: In Their Hands?*, ECONOMIST, Aug. 7, 1993, at 21 [hereinafter *In Their Hands?*].

[159] *See The Maths of Post-Maastricht Europe*, *supra* note 135, at 51 (describing the main criteria for monetary union as "low inflation, low budget deficits, a stable exchange rate and a public debt limited to 60% of a country's gross domestic product"); *see also In Their Hands?*, *supra* note 158, at 21-22 (providing that the target date for monetary union lies between December 31, 1996 and January 1, 1999).

[160] *In Their Hands?*, *supra* note 158, at 21. The pressure on the system came from Bundesbank's (the German Central Bank) refusal to reduce interest rates in the face of recessions in the other major EU countries. *Id.* Because of Germany's fiscal imbalances, the Bundesbank placed the fulfillment of its duty to combat inflation at home above the interests of the other Member States. *See id.* Under the Maastricht criteria, currencies of nations on the fast track to a common currency were to remain within narrow 2.25% bands for two years before the eventual achievement of the monetary union. *Id.*

[161] *Id.* at 21-22.

In the area of the free movement of goods it is likely that the equilibrium will hold. In newer areas such as the currency union, however, it appears that the strengthening of EU law that occurred during the majority voting period may not be sufficient to prevent the collapse of the equilibrium.[162] Weiler posits the question in terms of loyalty to EU institutions and whether Member States will be willing to enter into a binding supranational system of law in which they individually do not have a veto.[163] The ERM experience suggests that this loyalty has not developed sufficiently to allow unlimited expansion of EU competence. Despite these potential threats to the furthering of EU competence, however, EU trade law remains firm and continues to function well, especially in comparison to the GATT.

The potential addition of new members to the European Union could also disrupt the current voting equilibrium in the Council. Three states, Sweden, Austria, and Finland joined the European Union in 1995. With the addition of three new small nations the current balance between large and small states may be disrupted. In the sixteen-member community, any eight small countries could veto the proposals of the other countries.[164] Spain and Britain's resistance to the change in the number of blocking votes illustrates the difficulty of changing the existing equilibrium.[165] Further, the addition of new Member States required an increase the number of Commissioners.[166] If the European Union permits additional nations to become Member States it will have to modify its institutional arrangements to arrive at a workable political equilibrium.

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[162] *See id.* The controversy over the move towards a currency union demonstrates the potential for the European Union's collapse as it struggles with the major issues confronting it.

[163] *See* Weiler, *supra* note 6, at 2465. Under the system of qualified majority voting, relatively small groups of states in various alliances can still block Council legislation so that they are not completely succumbing to the will of the majority. *See The Maths of Post-Maastricht Europe, supra* note 135, at 51 (describing the effects of the qualified majority voting system).

[164] *The Maths of Post-Maastricht Europe, supra* note 135, at 51.

[165] *Still Stuck*, ECONOMIST, Mar. 19, 1994, at 64. Spain and Great Britain are resisting an increase in the number of votes required to block a proposal in the Council of Ministers from 23 to 27. *Id.*

[166] *See The Maths of Post-Maastricht Europe, supra* note 135, at 52.

There are two conceptual viewpoints from which the European Union might view its future development. The participants might envision themselves to be in the process of developing a federal state of Europe.[167] The emergence of a European suprastate would involve the replacement of Member State nationalism with a supra-European nationalism.[168] One problem with this approach is that by replacing the national identities with a European identity, the European Union will be restoring the national unit on a larger scale.[169] In terms of the world trading system, this type of development will likely to lead to additional protectionism and inward-looking growth. Although it is possible that the bargaining dynamic of the international trading community would be simplified by reducing the number of participants, this type of institutional matrix would prevent the achievement of a new legal construct that accomplishes regional objectives while enhancing global free trade.

Weiler advocates that the European Union develop towards a "community vision" of the European experience.[170] He defines this vision as "premised on limiting, or sharing, sovereignty in a select albeit growing number of fields, on recognizing, and even celebrating, the reality of *interdependence*, and on counterpoising to the exclusivist ethos of statal autonomy a notion of a *community* of states and peoples sharing values and aspirations."[171] This conception of the European Union does not contemplate the gradual disappearance of the Member States, but rather a new level of multinational interaction. The sense of European identity would not eclipse national identity, and thus would not imply an inward-looking or exclusive conception of the European Union. Under this model the European Union would not represent a threat to global free trade, but rather a step towards the goal of liberalization.

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[167] Weiler, *supra* note 6, at 2479.

[168] *Id.* at 2481.

[169] *Id.* at 2482.

[170] *Id.* at 2478-82.

[171] *Id.* at 2479 (emphasis in original).

### *3.5. Importance for Asian Nations*

The history of the evolution of the European Union suggests that the number of states involved in such regional groupings plays a role in the effectiveness of the legal/political bargain that can be achieved. It also suggests that merely copying, even in part, the institutional features and doctrinal devices that contributed to the European Union's success will be difficult in the context of the GATT. There is a strong argument that regional groupings with fewer member nations are more likely to develop an effective and binding legal structure. Participants in such a scheme can agree more easily upon a legal/political bargain and develop the institutions to produce a public-oriented, transnational legal structure. This type of development would contribute to further liberalization of the world trading system while allowing its participants to address trade problems more effectively on a supranational level. The EU experience illustrates that such a regional structure does not necessarily threaten participant states' sovereignty, and that national and supranational policymaking can coexist.[172] Thus, the possibility that the formation of a regional grouping in East Asia might enable nations in the region to achieve a legal/political bargain should be considered in evaluating the wisdom of such a course.

## 4. PARTICIPANTS IN AN ASIA-PACIFIC REGIONAL GROUPING

### *4.1. APEC*

An existing Asian grouping, the Asia-Pacific Economic Cooperation forum ("APEC"), often is cited as having the potential to develop into a trading bloc. This loose association initially included the six ASEAN[173] nations, Japan, South

[172] The division between the national and international policymaking spheres is reflected in the doctrine of subsidiarity, pursuant to which the European Union should leave to national policymakers those issues more amenable to national action. *See* Peters, *supra* note 94, at 110-11.

[173] The Association of South-East Asian Nations ("ASEAN") was originally created as a political grouping in August 1967. Kenevan & Winden, *supra* note 17, at 224 n.1. Recently, however, ASEAN leaders have taken steps towards economic integration. *See* Michael Vatikiotis, *Less*

Korea, Australia, New Zealand, the United States, and Canada.[174] Australian Prime Minister Bob Hawke originally proposed the creation of APEC in January 1989.[175] The first APEC meeting was held in Canberra, Australia in November 1989.[176] It was attended by the economic and foreign ministers of the participating nations.[177]

Participants in the forum initially conceived of APEC as an informal consultative grouping through which they could formulate and implement common goals.[178] At the Canberra meeting APEC participants agreed to cooperate in the Uruguay Round of the GATT, and to establish working groups to plan concerted action in a number of trade and development areas.[179] In early APEC meetings participants stressed the informal nature of the association and rejected the idea of APEC as a trading bloc.[180] All of the participating nations also agreed that the underlying principle of the new grouping would be to liberalize trade, and that APEC would be outward-looking in perspective.[181]

The first APEC meeting did not result in the creation of any institutional structure.[182] The ASEAN nations initially wanted to have the APEC structure develop out of the ASEAN Secretariat.[183] At that stage, however, the United States

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*Haste, Less Speed*, FAR E. ECON. REV., Jan. 7, 1993, at 61. For further discussion of the efforts of the ASEAN economic grouping, see *infra* Section 4.2.

The ASEAN nations are Singapore, Thailand, Malaysia, Indonesia, the Philippines, and Brunei. Kenevan & Winden, *supra* (citing SARWAR HOBOHM, ASEAN IN THE 1990S: GROWING TOGETHER 1 (1989)).

[174] Jacqueline Rees, *First Step Taken*, FAR E. ECON. REV., Nov. 16, 1989, at 10.

[175] *Id.*

[176] *Id.*

[177] The participating nations were Singapore, Thailand, Malaysia, Indonesia, the Philippines, Brunei, Japan, South Korea, Australia, New Zealand, the United States, and Canada. *See id.*

[178] *See* ANDREW ELEK, PACIFIC ECONOMIC CO-OPERATION: POLICY CHOICES FOR THE 1990S 11 (1993).

[179] Rees, *supra* note 174, at 10.

[180] *See* ANDREW ELEK, TRADE POLICY OPTIONS FOR THE ASIA-PACIFIC REGION IN THE 1990S: THE POTENTIAL OF OPEN REGIONALISM 1 (1992).

[181] *See id.*

[182] *See* Rees, *supra* note 174, at 10-11.

[183] *See id.*

and Japan advocated an informal consultative process rather than an established institutional framework.[184] APEC's participants decided that the consultative process for preparing future meetings would include the ASEAN Secretariat.[185]

APEC leaders' unwillingness to develop an institutional framework illustrates the key characteristics of the process at the time. First, the lack of any formal mechanism prevented the grouping from developing an institutional identity separate from those of the participating nations. Second, the reluctance of Japan and the United States to allow this new grouping to develop independent bodies demonstrated the countries' hesitation at creating a new grouping similar to the European Union. One interesting feature of the new APEC structure was its ties to the already-existing ASEAN institutional framework.[186] ASEAN as a grouping was assigned an important role in charting the future course of APEC's development.[187] In recognition of ASEAN's importance to APEC, the participants in the founding conference agreed that alternate meetings would be held in an ASEAN country.[188]

In 1990 the second APEC conference was held in Singapore.[189] At this meeting the scope of the grouping was further defined, and China, Taiwan, and Hong Kong, the three remaining economic powers of the region, were invited to participate in APEC.[190] After the addition of the three countries, APEC members accounted for more than half of the world's trade.[191] APEC also discussed regional trade liberalization and resolved that any such liberalization only

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[184] *Id.* at 11.

[185] *Id.*

[186] *Id.*

[187] *See id.*

[188] *Id.*

[189] *See APEC Meeting in Singapore Said to Establish Group as Major Forum for Region's Interests*, 7 Int'l Trade Rep. (BNA) No. 32, at 1245 (Aug. 8, 1990) [hereinafter *APEC Meeting in Singapore*].

[190] *See South Korea and China Reportedly Discussing Chinese Membership of APEC*, BBC Summary of World Broadcasts, Oct. 17, 1990, *available in* LEXIS, News Library, Arcnws File.

[191] *See* Robert Trautman, *Global Trade Reform Said Vital for Rich, Poor*, Reuter Library Report, Sep. 11, 1990, *available in* LEXIS, News Library, Arcnws File.

would be taken in conformity with GATT principles.[192]

Although APEC leaders decided that APEC would not become an economic trading bloc, summit participants specified that all regional trade liberalization would be in conformity with GATT.[193] APEC leaders' creation of a permanent secretariat in Singapore in 1992 indicates a willingness on the part of the participants to conceive of APEC as a more institutionally developed grouping with the potential for becoming a free trade area.[194]

One important goal of the APEC grouping was the successful completion of the Uruguay Round.[195] APEC achieved substantial progress in building a united front for GATT negotiations.[196] In the period prior to the final agreement on the Uruguay Round, various Member States as well as an APEC Eminent Persons' Group proposed that in the event of the failure of the Uruguay Round, APEC could act to restore GATT rules among its members.[197]

The November 1993 meeting of the APEC forum in Seattle engendered renewed interest in the organization. This summit was the first meeting at the level of heads of state.[198] In the period immediately preceding the Seattle summit, an APEC Eminent Persons' Group released a report calling for the establishment of a "community of free-trading nations as a goal for APEC."[199] The report stated that APEC's existence

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[192] *See APEC Meeting in Singapore*, *supra* note 189, at 1246.

[193] *See* ELEK, *supra* note 180, at 1.

[194] *APEC Ministerial Meeting Joint Statement*, 4 U.S. DEP'T ST. DISPATCH 828, 831 (Nov. 29, 1993).

[195] Awanohara, *supra* note 74, at 13.

[196] *See APEC Meeting in Singapore*, *supra* note 189, at 1245.

[197] *See* Susumu Awanohara & Nayan Chanda, *Uncommon Bonds*, FAR E. ECON. REV. Nov. 18, 1993, at 16, 17.

[198] Nigel Wilson, *Perspective on APEC's Future Course*, AUSTL. FIN. REV., Nov. 12, 1993, *available in* LEXIS, World Library, Allwld File. Malaysian Prime Minister Mahathir did not attend the summit, and both Taiwan and Hong Kong sent lower-level representatives to appease mainland China. *Fifth Annual APEC Forum Includes First Ever Regional Summit*, KOREA ECON. DAILY, Nov. 9, 1993, *available in* Westlaw, Koreaecon Database.

[199] *Narongchai Defends Call for APEC Free Trade*, BANGKOK POST, Nov. 12, 1993, *available in* LEXIS, World Library, Allwld File. In this article, the Thai member of the Eminent Persons' Group stressed that a "community of free-trading nations" would permit nonmembers agreeing to abide by the guidelines of the bloc to receive the same trading privileges, drawing a distinction between this kind of structure and a more inward-looking free

would be in danger unless it redefined its role.[200] This bold proposal proved controversial among a number of APEC's member nations, especially the ASEAN countries.[201]

At the Seattle meeting APEC leaders agreed on a Declaration of Trade and Investment Framework and action plan[202] and established a Committee on Trade and Investment to facilitate a more open environment for investment among the participating nations.[203] The leaders authorized the Eminent Persons' Group to continue its work on developing a larger vision for the future of APEC.[204] In addition to enhancing APEC's organizational status and aim at the Seattle meeting, APEC leaders invited Mexico and Papua New Guinea to join the alliance.[205] After the addition of Mexico, APEC encompasses all of the NAFTA countries. Chile joined APEC in 1994, bringing APEC's total membership to eighteen.[206]

APEC is currently the main focus for the regional

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trade area. *Id.*

[200] Pilita Clark, *Future of APEC at Risk, Say Experts*, THE AGE (Melbourne), Nov. 6, 1993, *available in* LEXIS, World Library, Allwld File. Among other proposals, the Group called for coordination of member states' monetary and macroeconomic policies. *Id.*

[201] *See Aimless in Seattle*, ECONOMIST, Nov. 13, 1993, at 35. Under the leadership of Prime Minister Mahathir who advocates a solely Asian grouping, Malaysia has led the opposition to an increased institutionalization of APEC. *See id.* Indonesia has also expressed reservations about enhancing the structure of APEC; its Foreign Minister, Ali Alatas stated that, "[W]e in ASEAN see [APEC] as a grouping which should not too quickly institutionalise." Eric Ellis & Peter Gill, *Change of Name Not on Seattle Agenda—The APEC Acronym*, AUSTL. FIN. REV., Nov. 4, 1993, *available in* LEXIS, World Library, Allwld File.

[202] *Asia-Pacific Economic Cooperation (APEC)*, 4 U.S. DEP'T ST. DISPATCH 835 (Nov. 29, 1993).

[203] *Declaration on an APEC Trade and Investment Framework*, 4 U.S. DEP'T ST. DISPATCH 832, 832-33 (Nov. 29, 1993); Awanohara & Chanda, *supra* note 197, at 16.

[204] *See APEC Ministerial Meeting Joint Statement*, *supra* note 194, at 828-29. APEC already has ten working groups that encompass various areas of trade and economic interests. *See Asia-Pacific Economic Cooperation (APEC)*, *supra* note 202, at 835-36. The working groups are Trade and Investment Data, Trade Promotion, Investment and Industrial Science and Technology, Human Resource Development, Energy Cooperation, Marine Resource Conservation, Telecommunications, Transportation, Tourism, and Fisheries. *Id.*

[205] Awanohara, *supra* note 74, at 13.

[206] *The Opening of Asia*, ECONOMIST, Nov. 12, 1994, at 23, 24.

integration policy of several of the most important nations in Asia. Its primary champion, Australia, has been active in trying to expand APEC's role because Australian leaders see APEC as a vehicle for participation in the economic prosperity of the Asia-Pacific region.[207] Some ASEAN nations have misgivings about expanding the scope of APEC due to a fear that the organization could become an instrument of U.S. foreign policy.[208] Malaysia, the country at the forefront of this criticism, advocates the formation of an exclusively Asian grouping.[209] Leaders of another ASEAN member, Thailand, have concerns that APEC is too small to be an overarching trading regime such as the GATT, and too large to form an economic bloc.[210] The United States has adopted a cautious attitude with regard to the future course of APEC in light of current ASEAN hesitation.[211]

Following the Seattle Summit, the Eminent Persons' Group was charged with developing a plan for implementing its recommendations.[212] In August 1994 the Eminent Persons' Group released a report advocating the development of free trade in the Asia-Pacific region as well as various other institutional developments to combat free trade problems.[213]

At the most recent meeting of the APEC leaders in Indonesia, following the recommendation of the Eminent Persons' Group, the APEC nations declared their intention to move

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[207] *See* Geoffrey Barker, *Asia-Pacific Is Future, Says PM*, THE AGE (Melbourne), Nov. 11, 1993, *available in* LEXIS, World Library, Allwld File. In fact, prior to the summit Australian Prime Minister Keating suggested that APEC change its name to the Asia Pacific Economic Community, signifying a deeper and more substantial grouping. *See* Ellis & Gill, *supra* note 201. Nevertheless, the name change never made the meeting's agenda. *Id.*

[208] Awanohara, *supra* note 74, at 12.

[209] *Aimless in Seattle*, *supra* note 201, at 35.

[210] *See id.*

[211] *See* Pilita Clark, *US Official Warns of APEC Tensions*, THE AGE (Melbourne), Nov. 10, 1993, *available in* LEXIS, World Library, Allwld File.

[212] Barry Wain, *APEC Still Struggling to Establish an Identity, Settles Down to Task of Further Opening Trade*, ASIAN WALL ST. J., Nov. 14, 1994, at A27.

[213] Dan Biers, *Analysts Downplay Need for Tariff-Cut Timetable*, ASIAN WALL ST. J., Nov. 14, 1994, at A1. For example, to reduce the use of anti-dumping actions as barriers to free trade the EPG advocated the creation of a task force to address the issue of anti-dumping as well as the development of a dispute mediation service. *Id.*

towards a free trade area by 2020.[214] This result from the latest summit demonstrated an advance in developing institutional goals for APEC. The long timetable for the achievement of free trade and indications that some of the summit's participants did not intend to be bound by this commitment suggests that APEC still has not determined that it will become the nucleus of an institutionally developed economic grouping in the near future.[215] Nevertheless, the summit and the free trade declaration are likely to solidify APEC's role as a potential economic grouping and provide momentum for further institutional development.

Despite recent advances, the APEC structure remains largely undeveloped. Because of the degree of consensus required for the adoption of measures that APEC shares with the GATT, many contentious issues remain unresolved.[216] The large number of APEC members, and the ethnic and geographical diversity among them, represent a distinct setting for a regional grouping than the European Union, or even the two regional groupings within APEC, NAFTA and the ASEAN Free Trade Area ("AFTA"). Despite these problems, the report and recommendations of the Eminent Persons' Group, as well as the declarations at the Indonesian summit, represent a far-reaching vision of an enhanced APEC emerging as a strong, cohesive regional grouping ensuring free trade and prosperity for its members. Thus, this organization, even at its current infant stage, presents a potential context within which the type of legal/political bargain described in Section Two could lead to the formation of a regional group to develop a new intermediate-level, hard international law.

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[214] *A Dream of Free Trade*, ECONOMIST, Nov. 19, 1994, at 35. APEC members created a bifurcated schedule for trade liberalization under which "developed" nations would agree to free trade by 2010 and "developing" nations by 2020. *Id.* At the conference itself, there was disagreement over which countries would be considered developed. The United States argued that by 2010, South Korea and possibly China would be developed, to which Malaysia responded that Asian developing countries would still be behind the United States in economic development at that time. *Id.*

[215] *See id.* Malaysian Prime Minister Mahathir stated that Malaysia would not consider itself obligated to completely liberalize trade if its economy has not developed sufficiently. *Id.*

[216] *See* Awanohara & Chanda, *supra* note 197, at 17.

### 4.2. ASEAN/AFTA

The smaller ASEAN regional bloc of Singapore, Thailand, Malaysia, Indonesia, the Philippines, and Brunei has already formed its own free trade area, the AFTA. Originally a political grouping, ASEAN inaugurated a regional trading bloc in 1992, due in part to fear that the development of regional trading blocs would leave the ASEAN nations behind.[217] While AFTA's goal of completion of a free trade area is impressive, the provisions of its plan are not very ambitious. The group aims to reduce tariffs to less than five percent in fifteen years, and subsequently to phase out non-tariff barriers.[218] Some AFTA members can delay their first tariff cuts while others must start reducing tariffs immediately.[219] This framework was necessary to ensure an agreement with binding restrictions on the actions of the Member States.[220] AFTA also permits two or more Member States to hasten the schedule of tariff reductions between them if they so desire.[221] Several AFTA nations have lowered tariffs at a more rapid rate than that demanded by the agreement.[222] AFTA has also introduced rules of origin for trade with members, requiring that at least forty percent of a product be made by ASEAN countries.[223] Despite the potential for a dramatic reduction in protectionism among AFTA members, the low level of intra-ASEAN trade suggests that the agreement will not have a significant effect in altering the existing trade patterns of the AFTA countries.[224]

The agreement itself does not detail how or which non-tariff barriers will be prohibited. Non-tariff barriers matter most to the participating nations.[225] The first year of

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[217] Gibney, *supra* note 12, at 22.

[218] *See* Vatikiotis, *supra* note 173, at 61.

[219] Malaysia and Singapore have already begun to reduce their tariffs; Indonesia, Brunei, and the Philippines will not start cutting certain tariffs until 1996 and Thailand will not begin reducing tariffs until 1999. Vatikiotis, *supra* note 173, at 61.

[220] *See* Kenevan & Winden, *supra* note 17, at 225.

[221] *Id.* at 227 (citation omitted).

[222] *Id.* at 232.

[223] *Id.* at 227 (footnote omitted).

[224] *See* Vatikiotis, *supra* note 173, at 61.

[225] Michael Vatikiotis, *AFTA, Mark II*, FAR E. ECON. REV., Oct. 21, 1993,

implementation of AFTA was disappointing because only Singapore and Malaysia made the required cuts in their tariff rates.[226] As a result of this limited success, the ASEAN leaders relaunched the project a year later, and reduced the time between the various countries' tariff cuts.[227] They also reduced the number of excluded items and added coverage for unprocessed farm goods.[228]

To enforce the terms of AFTA, ASEAN established a ministerial committee, the Council, to monitor the Member States' compliance with their obligations.[229] In addition, the heads of state of the ASEAN nations are required to meet every three years.[230] While AFTA has started to develop an institutional apparatus to administer its tariff reduction program and free trade program, and this body could serve as a nucleus for further institutional developments, the structures currently in place are inadequate to implement even limited AFTA objectives.

The AFTA agreement has many institutional features in common with the GATT and the European Union. Its safeguard clause is consistent with Article XIX of the GATT,[231] and its general exceptions for areas of special concern to the Member States are analogous to Article 36 of the Treaty of Rome.[232] These provisions could provide Member States a legal justification for evading their treaty

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at 74.

[226] *Id.*

[227] *Id.*

[228] *Id.*

[229] Kenevan & Winden, *supra* note 17, at 226. The Council, in which all member states have equal representation, cooperates with the assisting ASEAN Secretariat in monitoring compliance. *Id.* Unfortunately, the Council is a political body that is unlikely to exhibit institutional autonomy in monitoring the compliance of the member states. *See id.* at 238. Further, there is no specification of what role the Council should play and what procedures it should adopt. *Id.*

[230] *Id.* at 226.

[231] *See id.* at 230-31. Under the safeguard clause, a country can suspend its adherence to its obligations if imports of products similar or identical to one of its domestic industries threaten to cause "serious injury" to that industry. The general exceptions allow a government to restrict imports for reasons of "national security, or the protection of public morals, plant and animal life, and items of historical and archeological value." *Id.* at 231.

[232] *See* EEC TREATY art. 36.

obligations and introducing protectionist measures like quantitative restrictions. In the face of these broad provisions which are subject to differing interpretations, the mechanism for determining the contours of the features becomes extremely important. The dispute resolution procedures of AFTA are not adequate for this task. AFTA members are directed to resolve disputes amicably, and if that fails, to report the dispute to the Council.[233] There is no indication of how the Council is to arbitrate members' disputes.[234] This omission in the coverage of the agreement represents a significant deficiency which, if not corrected, may prevent AFTA from evolving into a more structured and developed legal grouping capable of eliminating regional barriers to free trade.

An examination of AFTA, the only existing Asian trade bloc, highlights the problems a larger Asian economic grouping would face. First, the varying levels of economic development among component members lead them to perceive their interests as divergent. This discrepancy of interests impedes agreement on the pace of the traditional course of trade liberalization, the reduction of tariffs, and the elimination of the most obvious quantitative restrictions.

A second problem with AFTA is that the relative unimportance of intergroup trade means that Member States do not receive significant economic benefits from their trade concessions. A primary concern of the ASEAN nations is the endangerment of their access to world markets, but the opening of their neighbors' economies has a limited scope for spurring their export trade. The lack of a major world economy in AFTA to serve as a large export market and source of investment, and to aid transfers also is likely to prevent AFTA from playing a significant role.

Finally, AFTA's institutional structure in its current form is not adequate to generate the endogenous institutional development necessary to eliminate tariff and non-tariff barriers and harmonize those substantive regulations of the Member States that impact trade.[235] Dependence on a political body (the Council) for enforcement and dispute resolu-

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[233] Kenevan & Winden, *supra* note 17, at 236-37.

[234] *Id.* at 237.

[235] *See id.* at 238.

tion will prevent the emergence of an autonomous body devoted to the interests of the AFTA community.[236] Thus AFTA has more of a private-oriented structure which aims to resolve issues as the parties would have originally wanted rather than a public-oriented characteristic like that of the European Union.

Despite these problems, AFTA represents a first step in the evolution of an Asian regional grouping. Whatever the weaknesses and inadequacies in the terms and institutional underpinnings of the agreement, AFTA serves as an institutional framework upon which others might build. By incorporating one or more of the larger Asia-Pacific economies, AFTA could achieve an economic viability that would allow it an important role in world trade. Further, AFTA is a manifestation of the desire to create Asian alternatives to the regional trading blocs which are developing around the world and a response to the threat of regionalism posed by the European Union and NAFTA. Section Five will further explore AFTA's potential for serving as a building block for a larger Asia-Pacific free trade grouping.

### *4.3. An Exclusively Asian Economic Grouping*

Another proposed grouping of nations that could evolve into a regional bloc is the East Asian Economic Grouping ("EAEG"). Prime Minister Mahathir of Malaysia is the foremost advocate of such a grouping, which would include the geographically and ethnically Asian members of APEC, but exclude the United States, Canada, and Australia.[237] Prime Minister Mahathir's desire to form the EAEG stems from his fear that the United States and Australia will use the APEC process to dominate the Asian trade agenda and advance their own interests, as well as a belief that the Asian members of APEC share circumstances and cultural traits which would make them more likely to find commonalities of interests.[238] The United States has "sought to block the creation of [EAEG] out

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[236] *See id.*

[237] *See* Philip Shenon, *The Pacific Summit; Boycott in Order, Malaysian Says*, N.Y. TIMES, Nov. 21, 1993, at A15 (explaining that Prime Minister Mahathir supports EAEG, a solely-Asian grouping); Clark, *supra* note 200 (describing the composition of the proposed trade group).

[238] *See* Manthorpe, *supra* note 1, at A12.

of fear that it could become a trade bloc that would shut out Western powers."[239]

Japan, Australia, and other members of APEC have taken very cautious positions on an exclusively Asian economic grouping.[240] In July 1993 at an ASEAN summit meeting, the major parties agreed that the EAEG could serve as a subgroup of APEC, although they did not specify how such an arrangement would be implemented or how broad or limited its authority would be.[241]

The idea of an exclusively Asian economic grouping also exists in the context of a possible yen bloc that could emerge in East Asia.[242] The Southeast-Asian and North-Asian nations that would comprise such a bloc would be linked by their trade with Japan, as well as their dependence on investment from Japan.[243]

A closer look at the economic fundamentals suggests that an exclusively Asian economic grouping might not be economically feasible if it led to the exclusion of the United States from the region's international trade. Even in Malaysia, the foremost proponent of the EAEG, U.S. investment surpasses that of Japan.[244] In addition, the United States is Malaysia's foremost export market.[245] Recognizing these economic realities, Malaysia's foreign minister has stated that Prime Minister's Mahathir's emphasis on ethnically Asian nations is the product of a past era.[246] Because of the importance of the United States to both the politics and economics of Asia, any grouping which excluded the United States would probably be doomed to failure.[247]

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[239] Shenon, *supra* note 237, at A15.

[240] *See Aimless in Seattle, supra* note 201, at 35.

[241] *See id.*

[242] *See* Gene Koretz, *Is the East Asian Trade Bloc Merely a Paper Tiger*, BUS. WK., Jan. 10, 1994, at 23. For purposes of this analysis, it would not be necessary for these countries to adopt the yen as their reserve currency; rather, it connotes the increasing economic integration of the North and Southeast Asian nations.

[243] *See id.*

[244] *See Aimless in Seattle, supra* note 201, at 35.

[245] *See id.*

[246] *See id.*

[247] *See* Emily Thornton, *Will Japan Rule a New Trade Bloc?*, FORTUNE, Oct. 5, 1992, at 131, 132. Singapore, Thailand, and the Philippines depend

### 5. LEGAL/POLITICAL DIMENSIONS OF AN ASIAN REGIONAL BLOC

This Section explores the general possibilities for the formation of an Asia-Pacific regional trading group. By way of methodological clarification, it does not attempt to fill a predictive role. Rather, the aim of this analysis is to explore some potential legal and structural characteristics of such a bloc to highlight ways in which some or all of the nations or groupings described in Section Four might be able to strike a legal/political bargain leading to the emergence of a new level of multinational legal interaction. The discussion of the proposed groupings will draw on the analysis of the strengths and weaknesses of the GATT-style and EU-style structures described in Sections Two and Three.

The development of a regional grouping capable of becoming a supranational structure analogous to the European Union ultimately would require something more than the gradual evolution of current institutions. Such a development would require a political leap of faith and vision that transcends the current understanding of the scope of national and international law and the national interests of the states involved. In the European context, the vision of Jean Monnet and the desire of the main combatants of the World War II to rebuild a peaceful Europe provided this crucial input.[248] It is unclear what stimulus could provide such an input in the Asian-Pacific context. This discussion suggests ways in which the legal and structural advantages of such a grouping might provide incentives for the members of the Asia-Pacific Community to take this important step. In addition, this analysis demonstrates that the current conditions of the Asia-Pacific trading community could make such a transformation desirable to the participants in the near future.

One justification for a trade regime based on APEC or another subset of the Asia-Pacific countries should be distinguished from this analysis. One argument in favor of

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on the United States as the primary market for their exports and the United States is the second largest export market for Malaysia. *U.S. Economic Relations With East Asia and the Pacific*, 4 U.S. DEP'T ST. DISPATCH 554 (Aug. 2, 1993).

[248] *See* John H. Barton, *Two Ideas of International Organization*, 82 MICH. L. REV. 1520, 1527 (1984) (footnotes omitted).

such a regional grouping is that even within an essentially GATT-like institutional structure, the smaller number of countries involved will make it easier for this subset of the GATT community to make the concessions necessary to go beyond Uruguay Round reforms and achieve a fairer and more economically efficient trade regime.[249] A similar theory is that the creation of essentially a "fast-track" GATT, centered in the most dynamic region of the world economy, would spur the rest of the international trading community to make comparable concessions.[250] These arguments for an Asia-Pacific grouping are not the subject of this analysis. At the other extreme, this analysis is not a proposal to create a federal state of the Asia-Pacific region, as such an idea is beyond the mainstream of current political possibilities.

The nature of the potential structures proposed here, and the reasons for moving towards such groupings, is that they represent a qualitatively different legal paradigm from that embodied in the GATT. The aim is to explore the possibility of creating a legal structure that goes beyond the GATT legal regime and addresses problems in the international trading system. The European Union is such a model because it has, in the eyes of many commentators, mutated into an advanced form of binding international law. This Article adopts Weiler's "community vision" of the European Union as the most helpful way of understanding the development of EU law and the interpretation of the EU experience most promising for transplant into an Asian-Pacific context.[251]

### *5.1. An Asian Grouping as a Public Institution*

One factor that distinguishes the EU system from that of the GATT is the European Union's public character.[252] The

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[249] *See Aimless in Seattle, supra* note 201, at 35 (noting that Thailand prefers a regional, more aggressive grouping).

[250] *See id.* (arguing that an Asia-Pacific grouping could "prod Europe into being more cooperative in the GATT round").

[251] For a discussion of Weiler's "community vision," see *supra* notes 170-71 and accompanying text.

[252] As described *infra* Section Two, the Uruguay Round contemplates the creation of a new institutional mechanism for the GATT system, the WTO. *See supra* note 15. It is not yet clear what the role of this institution will be, but it will likely assume a more public character. *Cf.* Islam, *supra* note 26, at 79 (noting that at least one commentator believes that the WTO will

most important characteristic of a public-oriented institution is the existence of an interest distinct from that of its individual members, and a structure to vindicate, to some extent, that distinct interest.[253] Public-oriented institutions are not unusual in international law regimes. The degree of power granted to such institutions representing the public interest, however, distinguishes the EU experience. Within the European Union, the Commission and the ECJ are the primary loci of this public orientation, although the European Parliament may evolve into an additional locus of EU institutional identity. In the Asia-Pacific context, a public orientation will be one of the important structural features of any grouping seeking to advance beyond the current, traditional international law model.

Neither of the two existing groupings, APEC or AFTA, has developed a public orientation or institutional structures that could gradually assert such an orientation. In AFTA the absence is especially striking.[254] Nevertheless, AFTA's lack of an independent structural apparatus is consistent with its limited goals, and the fact that its members conceived the AFTA bloc as merely a local extension and deepening of the traditional GATT-style regulation of international trade.[255] Further, the limited size of the grouping and correspondingly low benefit level provide Member States little economic incentive to move beyond the traditional interstate bargaining paradigm.[256]

The APEC nations' reluctance to the development of a more public-oriented institution is not likely to disappear in the foreseeable future.[257] Nevertheless, the importance and size of inter-APEC trade could provide sufficient benefits to the participating nations to agree to the creation of a public-

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be "on par with the [International Monetary Fund] and the World Bank").

[253] For a discussion of the distinction between public- and private-oriented institutions, see *supra* notes 42-46 and accompanying text.

[254] The AFTA Council is apparently modeled after the EU Council. Although there is an AFTA Secretariat, its function seems somewhat limited. *See* Haas, *supra* note 5, at 838-39.

[255] *Id.*

[256] *See* Vatikiotis, *supra* note 173, at 61 (nothing that intra-ASEAN trade in 1991 was only 19% of ASEAN's total trade).

[257] *See* Joseph L. Brand, *The New World Order of Regional Trading Blocs*, 8 AM. U.J. INT'L L. & POL'Y 163, 171 (1992).

oriented institutional structure.[258]

Initially it is unclear what grouping of nations would be most amenable to the development of a legal regime at least partially outside of the political control of the Member States. At first glance, a smaller grouping like AFTA might appear more willing to cede some of its power over trade to an institution outside of the traditional interstate bargaining process. AFTA has not yet reached this point. Likewise, the doubts of some of APEC's members may prevent the emergence of a locus of APEC interests to emerge. Even the more ambitious members of APEC may be concerned about ceding power to place the APEC agenda in the hands of an autonomous body. Nevertheless, at some point, APEC Member States' perceptions of the benefits to be gained by creating a strong publicly-oriented institutional structure may convince them of the desirability of such a course.

As discussed in Sections Two and Three, one variable that determines the character of an international legal regime is the number of participants. It was easier for the European Union to create public-oriented institutions when it had only six members with shared legal and other traditions than it is for larger groupings.[259] The increase in the number of EU Member States has influenced its evolution, and has led to various institutional reforms to accommodate these changes.[260] Future increases in the size of the European Union may threaten aspects of its public-oriented institutional structure.[261] The large number of APEC participants indicates that APEC might be approaching the outer limit of the number of members for which a strong public-oriented structure is practical. If APEC desires to develop in such a way it would be well served by suspending the incorporation of new members until it has developed a sufficiently strong structural base.[262]

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[258] The proportion of such inter-APEC trade was 65% in 1992. Awanohara & Chanda, *supra* note 197, at 17.

[259] *See* Weiler, *supra* note 6, at 2405.

[260] *Id.*

[261] *Id.*

[262] At the November Summit, APEC decided that after the entrance of Chile there would be a three-year moratorium on new members. Awanohara, *supra* note 74, at 13.

One implication of the numbers problem is that a subset of APEC including more than just the AFTA Member States might reach agreement on a public-oriented institutional structure that would elude APEC as a whole. Prime Minister Mahathir's EAEG represents such a natural alternate grouping. Because of the smaller number of participants involved, cultural similarities, and the geographical closeness of these nations, acceptable public-oriented structures might develop more easily.

The development of a public-oriented structure is necessary to allow an East Asian grouping to evolve beyond the existing GATT-style paradigm of international law. While none of the current or possible groupings have started to develop public-oriented structures, either APEC or the proposed EAEG might move towards such an institutional structure in conjunction with transition to a free trade area among their Member States. It may be easier for EAEG than for APEC to create this structure because of its smaller number of Member States and cultural links. Nonetheless, if the legal/political bargain struck by the participating nations is attractive, either of the two groupings could develop an effective locus of public-oriented power to drive the evolution of a regional trade bloc.

### *5.2. Enforcement of Supranational Norms*

The second major characteristic of EU-type groupings is the character of their legal constraints. One of the most striking features of EU law is that nations take their EU obligations seriously and treat EU law the same way as national law.[263] Two types of developments enabled the European Union to accomplish this improvement: (1) procedural devices through which community institutions can intervene in the domestic context, and (2) doctrinal developments that serve to justify and legitimize such interventions. The potential applicability of these institutional mechanisms in the Asia-Pacific context is one possible inquiry. A related question is whether the nations involved might develop alternative mechanisms to accomplish similar functions.

One of the most important procedural devices adopted by the EU legal system is the preliminary reference, a device

[263] *See* Peters, *supra* note 94, at 100-03.

through which Member State courts can or must request legal opinions from the ECJ.[264] This device is potentially very intrusive into the domestic sovereignty of the states involved because national courts must enforce decisions of a foreign court. One reason for the acquiescence of the EU Member States' domestic judicial systems to such an intrusion was the prestige of members of the ECJ and respect for its legal reasoning.[265] A comparable basis of legitimacy would be necessary to introduce this type of mechanism into an Asia-Pacific context.

The AFTA institutional structure does not include any comparable devices in its program.[266] Its founders seem to have conceived of the group as a GATT-type arrangement, not a qualitatively different legal regime.[267] At first glance it also appears unlikely that the APEC nations would ever collectively agree to include a device involving such pronounced intrusions into their domestic judicial sovereignty.[268] Although the EU Member States are hardly uniform in terms of their legal systems, the degree of diversity of the legal systems of APEC is considerably greater.[269] In addition, the diversity of political structures and sources of legal/political legitimacy in the group would greatly increase the difficulty of creating a community legal structure with enough legitimacy to be accepted by the Member State judiciaries.

A related problem for the countries of the Asia-Pacific region is the weakness of the national courts in their respective domestic contexts.[270] The reason for the effectiveness of the preliminary reference device in the European Union was the traditional deference shown by the

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[264] For a discussion of the preliminary reference, see *supra* notes 111-16 and accompanying text.

[265] *See supra* notes 123-28 and accompanying text.

[266] *See* Haas, *supra* note 5, at 838.

[267] *Id.* at 840-41.

[268] *Id.* at 839.

[269] *See* Kunda Dixit, *Australia: Asia Embrace Worries Media Watchdogs*, Inter Press Service, May 6, 1994, *available in* LEXIS, News Library, Curnws File.

[270] *See id.* (contrasting Australia's "independent courts, constitutional stability and ... free media" with those features of other nations in the Asia-Pacific region).

national governments to their national courts.[271] While the democratic governments of the EU Member States had an established tradition of obeying their courts, many Asian nations have no comparable tradition. Thus, this particular mechanism of judicial review is not likely to translate well into an Asia-Pacific context. The weaknesses of the domestic legal systems vis-a-vis their political masters reduce the likelihood that the judiciary-empowering effect of this kind of mechanism could contribute to the Member States' acceptance of the multinational norms.

The second type of mechanism, the development of the doctrines of direct effect and supremacy, will be less effective in the absence of a means by which a multinational court can intervene directly in the deliberations of domestic courts.[272] The principal advantage of the preliminary reference device is that it equips private citizens to serve as private attorneys general, enforcing the norms of the community law against their respective governments in their national courts.[273]

It is possible that the doctrines of direct effect and supremacy could enter the judicial systems of the Asia-Pacific nations indirectly through a form of juristic osmosis. Alternatively, the treaty constituting the trade bloc could incorporate these doctrines textually. The principal disadvantage of these approaches is that the various domestic legal systems would interpret rulings differently, thus reducing consistency and leading to differential enforcement among participating nations.

Even if alternate channels of diffusion could serve as surrogate means for realizing doctrinal advances, it is unlikely that they would have the same impact in the Asia-Pacific context that they had in the European Union. The use of law to extend the strength and scope of community norms would have less of a legitimating effect on members of either APEC or EAEG because the groupings lack strong legal traditions and their constituent members' governments are not accustomed to abdicating their lawmaking responsibility. Even in the APEC countries with autonomous judiciaries and

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[271] *See* Weiler, *supra* note 6, at 2420-21.

[272] *See supra* notes 117-22 and accompanying text.

[273] *See supra* notes 113-16 and accompanying text.

some tradition of judicial law-making the doctrinal advances would not be met with immediate acceptance. In these countries, questions of democratic legitimacy and governmental accountability would impede acceptance of the removal of key policy decisions from the domestic democratic processes.[274] Thus, the intensive use of the domestic legal systems of the Member States of an Asia-Pacific community is not the most promising mechanism for increasing the "hardness" of multinational community norms.

It is also possible that community norms might gain a quality of hardness through other mechanisms. One other means of development and enforcement of multinational trade law is through the operation of public-oriented institutions that assume the prosecutorial functions of private attorneys general. In addition to the public prosecutor institution, a grouping must have an adjudicatory body with enough credibility to ensure that Member States fulfill their obligations as determined by that adjudicatory body. Such a mechanism exists in the European Union—the Commission can bring Member States that violate EU norms before the ECJ.[275] In one sense the creation of strong community institutions might be attractive to Asian members of a trade grouping because many Asian economies are currently controlled and directed by autonomous bureaucratic elites.[276] Community institutions would resemble a replication of that system on a multinational level. Conversely, the domestic bureaucratic elites most likely would fight to defend their

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[274] Concern over the potential enforceability of WTO determinations in the United States was one of the major obstacles to the U.S. Congress' ratification of the Uruguay Round. *See Dancing Round GATT*, ECONOMIST, Nov. 26, 1994, at 25. On one hand, this resistance to accepting determinations of a more binding international legal regime is disheartening. On the other hand, the compromise struck by the Congress in creating a new institutional structure consisting of a panel of federal judges to review WTO panel findings and evaluate whether rulings exceed the WTO's authority represents an accommodation of the domestic legal system with a binding international regime--an indication of a capacity for institutional adjustment. If the panel finds that such rulings exceed WTO authority three times in five years, the United States will withdraw. *Id.* While this remedy is draconian, the experience of the European Union suggests that shifting such evaluations from a political to a judicial body is a promising step.

[275] *See* Weiler, *supra* note 6, at 2419.

[276] *See* Jonathan Braude, *Leading Asian Slams Autocracy*, SO. CHINA MORNING POST, Dec. 3, 1994, at 5.

privileged positions.

The interaction of the Member States in a more legalistic context also could lead to greater compliance with community law. This would require a more objective and effective form of dispute resolution between the Member States than the means used under GATT.[277] In the European Union, the ECJ performs the function of the arbiter of interstate conflicts over EU norms, ensuring that the resolution of such disputes is based on legal principles and not political leverage.[278] An effective adjudicatory body is probably the best institutional means for accomplishing this goal, assuming that it has credibility or enforcement power sufficient to ensure Member State compliance with community-related obligations.

Other dispute resolution procedures also could be implemented. Some commentators have described NAFTA dispute resolution procedure as an advance in multinational dispute resolution.[279] In the NAFTA system parties to the treaty are entitled to a panel hearing that is a more binding version of the GATT panel procedure.[280] However, each state that is party to the dispute must choose panelists from a different country.[281] This requirement helps ensure the neutrality of the panelists and increases their credibility as neutral adjudicators.[282] NAFTA also provides for a different form of dispute resolution for anti-dumping and countervailing duty cases.[283] For these disputes the domestic law of the complaining party is the governing law, but binational panels replace the domestic courts for judicial review purposes.[284]

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[277] For a discussion of legal enforcement under GATT, see Richard H. Steinberg, *Antidotes to Regionalism: Responses to Trade Diversion Effects of the North American Free Trade Agreement*, 29 STAN. J. INT'L L. 315, 338-46 (1993).

[278] *See* Shapiro, *supra* note 99, at 125.

[279] *See, e.g.*, Huntington, *supra* note 34, at 407.

[280] *Id.* at 419.

[281] *Id.* at 421.

[282] *See id.*

[283] *See id.* at 430.

[284] *Id.* at 430. One interesting result of the current system utilizing international bodies but domestic laws is that the panels utilize a different standard of review depending on the originating nation. *Id.* at 434. Eventually, NAFTA is supposed to develop its own norms to govern these types of proceedings. *Id.* at 430.

It is noteworthy that individuals in the NAFTA system can gain access to review by these panels in cases in which they had recourse to judicial review under domestic law.[285] The combination of binding elements of the GATT multilateral dispute resolution system and a more intrusive international review of domestic determinations represents a hybrid system which should contribute to a greater degree of legality in decisionmaking.[286] This hybrid system presents a possibility for the future and lessons that may be valuable for the Asia-Pacific experience.

The potential Asia-Pacific groupings are more likely to prefer a form of interstate dispute resolution as the primary forum for both norm creation and enforcement. Such a structure would permit the governments of the participating countries to have more control over the process of "hardening" their regional multinational trade law.[287] In addition, with the large number and diversity of the nations in either APEC or the EAEG, keeping the process of legal development at the level of the Member States will not necessitate as great an intrusion of foreign international norms on the domestic legal systems of the Member States. The number of states in any potential grouping will have less relevance to the successful operation of the development of a public-oriented institution or an effective dispute resolution procedure. The NAFTA system of separating different types of actions into different procedures also might make sense in an Asia-Pacific context.[288] The Asian members are likely to be concerned about anti-dumping and countervailing duty litigation, and hence accept a more intrusive bloc role in their resolution. In addition, the fact that the three NAFTA members are part of APEC[289] may contribute to the acceptance of NAFTA-type specialized interstate dispute resolutions.

The limitation of legal development to an interstate context has disadvantages in comparison to the more direct

[285] *Id.* at 431.

[286] *See id.*

[287] *See* Weiler, *supra* note 6, at 2426 (describing "hard lawmaking").

[288] *See* Huntington, *supra* note 34, at 407 (providing an overview of the three principal dispute resolution chapters).

[289] *See* Gibney, *supra* note 12, at 21-22. Canada and the United States are original members; Mexico was admitted in 1993. *Id.*

mechanisms utilized in the European Union. Because states always have their own political agendas they are unlikely to fulfill their prosecutorial function as effectively as private citizens or public-oriented institutions. The emergence of an institutional mechanism would partially alleviate this problem, but the experience of the European Union suggests that there are limits to what even a powerful institution can accomplish.[290] The EU Commission is too understaffed to undertake any but the most high-profile prosecutions of Member States violating community norms,[291] and if it had been the sole source of EU enforcement, the legal evolution described in Section Three would have been considerably slower. Nevertheless, this tradeoff of speed and effectiveness might be necessary to make a hard multinational legal regime palatable to the various participants in an Asia-Pacific grouping.

Despite the greater number and diversity of potential members of an Asian-Pacific bloc, potential legal mechanisms exist to facilitate the development of "hard" law. Direct translation of many of the institutional features of the European Union into the context of an Asian structure will not always be possible or desirable. Nevertheless, by creating a public-oriented institutional structure and inaugurating an effective system of dispute resolution the participating nations would be able to gradually "harden" the norms of their grouping and create an intermediate level of binding international law. The possibility of such institutional development would permit Asia-Pacific nations to develop the legal framework if they could strike an advantageous legal/political bargain.

### *5.3. Legal/Political Bargain*

#### *5.3.1. Initial Impetus*

The preceding Section provided an overview of the institutional mechanisms which based on the experience of the GATT and the European Union appear necessary to develop a

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[290] *See* Weiler, *supra* note 6, at 2405-08.

[291] *See id.* at 2419-20 (discussing deficiencies in the Commission's enforcement).

binding international legal regime. The most important question still remains unresolved: might a community of interest develop sufficiently to allow some or all of the members of the Asia-Pacific community to agree to such a regime or an institutional structure that could evolve into such a regime. Various arrangements might be feasible, however all such bargains involve a basic tradeoff: in return for guaranteed access to a free trading regime within the group with the progressive reduction of tariff and non-tariff barriers, participating nations must agree to limit their discretion to implement domestic policy measures that impede free trade between the member nations.[292]

The first question nations must answer is whether the economic benefits the participants expect to accrue to them will justify a cession of sovereignty. Asian nations depend heavily on access to world markets for their current export-led growth.[293] Until now they have relied on the GATT system to guarantee them that access.[294] As discussed in Section Two, however, the limited success of the Uruguay Round and the inability of the existing world trade framework to remove obstacles to free trade have shaken Asia-Pacific nations' confidence in the ability of the GATT to fulfill this function.[295] As a result, the Asia-Pacific trading nations have a greater incentive to enter into an arrangement that will ensure their access to necessary export markets.

The nature of the Asia-Pacific nations' dependence on markets[296] will influence the composition of a regional grouping. Only if the grouping succeeds in improving access to critical markets will the participating nations gain sufficient benefits to justify a commensurate surrender of their sovereignty. Nations joining a new trade grouping will have to ensure that their accession does not compromise their access to the markets that are most important to their economies.

The increasing importance of intra-Asian trade suggests

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[292] *See* Vatikiotis, *supra* note 225, at 74.

[293] *See* Andrew Sentance, *Asian Waves Turning the Tide in the Their Favour*, EVENING STANDARD, Jan. 17, 1995, at 35.

[294] *See* Richard J. Barnet & John Cavanagh, *Creating a Level Playing Field*, 97 TECH. REV. 46, 47 (1994).

[295] *See supra* note 13 and accompanying text.

[296] *See* Islam, *supra* note 26, at 79-80.

that the need to ensure access to Asian markets might provide a sufficient impetus for the emergence of an Asian trading bloc.[297] The Japanese market has the size and wealth to induce the nations of East and Southeast Asia to agree to bind themselves in a supranational legal framework with a membership based on the EAEG.[298] Further, Japan has become the principal source of multinational investment capital in Asia.[299] Despite these market factors that suggest the feasibility of an Asian group, there are problems with an excessively Japan-centered group. Japan's markets have traditionally been closed to non-commodity imports from Southeast Asia and Japan runs large trade surpluses with all the nations in a prospective Asian group.[300] In addition, Japan might not have sufficient incentive to enter into such a grouping because it does not face excessive barriers in doing business within Asia.[301] Further, Asian political sensibilities might recoil at a grouping that was too Japan-oriented for historical reasons. The percentage of inter-APEC trade in 1992 was 65%, a greater proportion than inter-EU trade.[302] This suggests the large economic benefits that an APEC-based trading bloc could offer.

The trade patterns of the Asian countries favor the inclusion of as many nations as feasible given the political dynamics of the grouping. In the choice between the EAEG and APEC as a nucleus of a new grouping, the maximization of the benefits of ensuring access to these markets indicates the need for the inclusion of North America and Australia in the new grouping because the Southeast Asian nations depend heavily on access to these markets.[303] In addition, the main benefit that Japan could gain from its participation in such a

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[297] The share of East Asia's trade within the region increased from thirty-three to thirty-seven percent in the 1980's. Koretz, *supra* note 242, at 23.

[298] *See* P. James Schumacher, Jr., *Legal Disincentives to Japanese Direct Investment in the United States*, 4 IND. INT'L & COMP. L. REV. 441 (1994), *available in* Westlaw, JLR Database.

[299] *See id.*

[300] *See* Peter J. Katzenstein, *A World of Regions: America, Europe, and East Asia*, 1 IND. J. GLOBAL LEGAL STUD. 65, 73 (1993).

[301] *See* Schumacher, *supra* note 298.

[302] Awanohara & Chanda, *supra* note 197, at 17.

[303] *See* Koretz, *supra* note 242, at 23.

grouping would be ensured access to the U.S. market. Japan also would benefit from the regularization, and to the extent feasible the legalization, of its contentious trade relations with the United States. The United States also might see its membership in such a grouping as a means for resolving current trade problems through ensuring its unrestricted access to Japan and other Asia-Pacific markets.[304]

*5.3.2. Political Dynamic*

Once a core group of nations agrees upon the potential benefits attainable via membership in a regional trade grouping, the group must create an initial legislative-type institutional framework. Such a norm-formation capacity would be necessary to allow the new Asia-Pacific community to expand the coverage of its trade related law to encompass new areas. This institutional structure might also play a role in the application of group norms to specific situations in a dispute resolution or a public prosecutorial context. Because of the limitations of its prosecutorial and juridical institutions, an Asia-Pacific grouping would be more likely to expand the coverage of its trade law through the legislative side of its political structure.

As part of its institutional development process the Asia-Pacific group will need a political structure that provides the participating nations with enough input into the creation or interpretation of binding supranational norms to justify their compliance with such norms.[305] Typically multinational organizations have achieved this level of participation by granting Member States veto power over measures with which they do not agree.[306] As described in Section Three, the European Union originally filled this need by requiring

[304] *See Remarks by President Clinton to the Canadian Parliament, supra* note 4 ("the dynamic economies in the Asia Pacific area . . . are growing very fast, and we [do] not want this world to break up into geographical trading blocks"); *see also* Martin Rudner, *Institutional Approaches to Regional Trade and Cooperation in the Asia-Pacific Area*, 4 TRANSNAT'L L. & CONTEMP. PROBS. 159, 179 (1994) (explaining U.S. opposition to a solely-Asian "exclusionary trading bloc").

[305] *See* Weiler, *supra* note 6, at 2426-27.

[306] *See supra* notes 140-41 and accompanying text.

unanimity in all Council decisions.[307] Such a voting rule may be necessary to give the members of an Asia-Pacific group sufficient input into the norm formulation process to enable them to accept the substantive provisions that eventually emerge. Unfortunately a rule of unanimous voting replicates the traditional international law, treaty-based paradigm that requires the consent of all parties to be bound. The large number of states likely to be involved in either an EAEG-or an APEC-based grouping would make a system of decision by consensus as unworkable in the promulgation of compulsory norms as it is in the current GATT system.[308] Thus, to the extent a unanimous voting system is necessary to assure the participating nations' eventual compliance with supranational norms the number of participants in an Asia-Pacific grouping should be kept as low as possible to avoid decisional stalemate.

As the number of EU Member States increased, successive treaty revisions changed the system of unanimous voting that produced the decisional gridlock.[309] The European Union struck a compromise between the need for validating input into key decisions and the need for efficient procedures of norm formulation by introducing a system of qualified majority voting.[310] Under this system either a coalition of small countries or several of the large countries can veto EU legislation.[311] The EU system allows groups of countries with common interests acting in concert to veto legislation.[312]

A similar balance might be struck in an Asia-Pacific grouping by providing that one or two of the larger, industrialized members or a combination of smaller or less developed members could veto legislative provisions of the grouping. The hope would be that this kind of structural veto would convince the Member States that their interests had been included in the decisionmaking process and prevent them from evading the binding obligations established by the group. Over time, the operation of the group's institutions would also create a sense of loyalty that would reinforce the binding

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[307] *See supra* note 136 and accompanying text.

[308] *See supra* note 19 and accompanying text.

[309] *See supra* note 154 and accompanying text.

[310] *See id.*

[311] *See id.*

[312] *See id.*

nature of the group's legal norms.

A qualified majority voting system would offer participating nations important benefits in ensuring them greater control over decisions made by the group. Smaller countries acting in concert could prevent the grouping from taking actions adverse to their interests. The larger countries also would be able to veto (either individually or in collaboration) measures that were not in their interests.

One final feature of a binding supranational legal framework is the effect such a system might have on the domestic power of national governments. In his description of the European Union, Weiler explains how the strengthening of EU law allowed the governments of the Member States to introduce binding norms into their domestic legal systems without gaining the approval of their domestic legislative branches.[313] In this way the executive branches of the Member States gained the de facto power to promulgate international trade measures without going through their domestic systems. This creation of a new level of "hard" international law might appeal to the more authoritarian-type governments in Asia who would like such a device to enshrine their ability to bypass other domestic political institutions in legislating in the economic sphere.[314] Of course, as a trade-off, these governments would have to agree to abide by supranational norms and decisions with which they might disagree. This aspect of the system might also raise constitutional concerns in countries like the United States, in which the respective competencies and functions of the legislative and executive branches are clearly delineated.

## 6. CONCLUSION

This Article has presented a theory about the qualitative nature of a supranational legal regime that can emerge from a regional trading area with appropriate institutional mechanisms. The model of development for this new type of supranational law is based upon the institutional development

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[313] *See* Weiler, *supra* note 6, at 2413.

[314] *See* Braude, *supra* note 276, at 5 (Malaysian Deputy Prime Minister Anwar Ibrahim, referring to the "authoritarian posture of his own and other [Asian] governments").

experience of the GATT and the European Union. In contrast to the classic international law structure of the GATT, the law of the European Union has assumed a character more akin to that of domestic law. Both the institutional bodies created by the original treaties as well as the nature of the structural equilibrium established by the combination of the institutional bodies, voting rules, and interests of the Member States present potential models for the creation of a regional trading area in the Asia-Pacific region. Based upon the historical development of the European Union and the current configuration of regional groupings in the Asia-Pacific region, Section Five presented examples of the types of legal/political deals which might provide states in the region the incentive to create regional trading blocs and the institutional forms such groupings might assume.

This Article has implications in the debate over the desirability of the move toward regional trading blocs. It presents an alternative mode of developing transnational legal regimes. Through the combination of certain institutional structures and the legal/political deals they embody, the move towards a regional trade bloc can introduce a new quality of legal constraint to the actions of states in the areas of international trade. This new "hard" international trade-related law promises to be more effective in removing barriers to free trade. As this new legal structure expands to encompass more areas, it could also evolve into an effective forum for dealing with other international policy concerns including environmental protection and strategic stability.[315]

The possibility of developing this new level of legal interaction among Asia-Pacific nations serves as a compelling rationale for the move towards a regional legal structure to govern intraregional trade. In addition, the desire to gain this legal benefit from the new structure could present an independent criterion for carefully choosing the participants in any such grouping to maximize the possibilities of generating this new quality of supranational law and maintaining its integrity. Many of the key distinctions between the EU trading regime and the GATT framework appear to stem from

[315] Since many of these difficult issues have a trade-related component, it is likely that the regional legal structure will have to address them in a trade context.

the number of members and their mode of legal/political interaction. These lessons can also assist proponents of a regional trade grouping in creating a workable plan to gain the benefits promised by the new form of international legal constraints, whether by limiting participation or by forming an initial group that could expand once the institutional structure developed.

Ultimately the move towards a qualitatively different type of legal trading regime remains a political decision. Any shift toward a model of legal interaction that could alter the current understanding of the respective positions of national and international legal structures could occur inadvertently once the institutional structure has been put in place or as part of a dramatic and conscious political leap of faith. The European Union's historical experience exhibits both of these characteristics, an initial leap of faith to the idea of a European Union and a period of autonomous development out of the eyes of the political leadership of the Member States. At some point in the future, the political circumstances in the Asia-Pacific region could lead to a comparable need for changes in the structure of the norms governing international trade, the experience and institutional development of the GATT, the European Union, and the analysis of the legal/political arrangements possible among the nations of the Asia-Pacific region present a partial guide for the realization of these political goals through legal and institutional structures.