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REASSESSING APEC'S ROLE AS A TRANS-REGIONAL ECONOMIC ARCHITECTURE: LEGAL AND POLICY DIMENSIONS

Pasha L. Hsieh^{*}

ABSTRACT

This article examines the two-decade evolution of the Asia-Pacific Economic Cooperation (APEC) and the future prospects for Asian regionalism. It argues that while APEC retains advantages over competing regional structures, it should undergo reforms to accelerate the Bogor Goals and ensure its complementarity with the World Trade Organization (WTO). The article first analyzes the impact of stake-holding countries' trade policies on APEC's structure and development. By assessing APEC's soft-law mechanism, it explores APEC's WTO-plus contributions that reinvigorated the International Technology Agreement negotiations and improved supply chain facilitation. APEC's goal of creating a Free Trade Area of the Asia-Pacific (FTAAP) can overcome structural limitations and serve as an effective 'Plan B' for the Doha Round impasse. Nonetheless, caution should be given to legal challenges to the pathways to an FTAAP such as the Trans-Pacific Partnership. Finally, the article calls for reforms that will enhance APEC's institution-building and monitoring system. Such reforms will strengthen APEC's role under the multilateral trading system and reenergize the public-private partnership for trans-Pacific integration.

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I. INTRODUCTION

Established in 1989, the Asia-Pacific Economic Cooperation (APEC) is the world's largest trans-regional economic architecture, consisting of 21 economies in the Pacific Rim.¹ APEC represents more than 44% of world trade and 53% of global gross domestic product (GDP).² Its growth amounts to 4.3%, which exceeded the world growth of 3.5% in 2012.³ Moreover, the APEC agenda enhances key stake-holding countries' trade priorities such as the USA's and Russia's re-engagement with Asia and China's open-door policy. Despite its economic significance, APEC is yet to be a free trade zone as defined by World Trade Organization (WTO) law.⁴ Lacking an establishment treaty that confers international legal personality, APEC has functioned as a *de facto* institution that promotes economic integration through the non-binding or soft-law approach.⁵

APEC reached its zenith when it created the Bogor Goals to accomplish 'free and open trade and investment in the Asia-Pacific' for developed and developing economies by 2010 and 2020, respectively (the 2010/2020 target).⁶ However, the institution suffered a severe credibility crisis due to its failure to achieve Early Voluntary Sectoral Liberalization (EVSL), compounded by its inability to assist member economies during the Asian financial crisis in the 1990s.⁷ Aspirations for APEC rapidly waned. Commentators criticized that institutional weaknesses had caused APEC's importance to

¹ APEC at a Glance (2012), at 2. For discussion on trans-regionalism, see Richard W. X. Hu, 'APEC and Future Asia-Pacific Regional Architecture', 31 *American Foreign Policy Interests* 12 (2009) 18.

² APEC at a Glance (2012), at 2.

³ APEC Economic Trends Analysis, 31 May 2012, at 1.

⁴ For the legal requirements of free trade agreements, see Article XXIV of the General Agreement on Tariffs and Trade (GATT), Article V of the General Agreement on Trade in Services (GATS), and the enabling clause.

⁵ Melissa Castan, 'APEC: International Institution? A Pacific Resolution', 15 *University of Tasmania Law Review* 52 (1996) 54–56; Paul Davidson, 'The Role of Soft Law in the Governance of International Economic Relations in Asia', 24 *Chinese (Taiwan) Yearbook of International Law and Affairs* 1 (2006) 15–16. See also Hadi Soesastro, 'APEC's Overall Goals and Objectives, Evolution, and Current Status', in Richard E. Feinberg (ed.), *APEC as an Institution: Multilateral Governance in the Asia-Pacific* (Singapore: Institute of Southeast Asia Studies, 2003) 29, 31–32 (describing APEC's *de facto* institutionalization and 'soft' negotiations).

⁶ 1994 Leaders' Declaration: Bogor Declaration – APEC Economic Leaders' Declaration of Common Resolve, 15 November 1994 [Bogor Declaration].

⁷ See Ipppei Yamazawa, 'APEC's Achievements and Tasks', in Riyana Miranti and Denis Hew (eds), *APEC in the 21st Century* (Singapore: Institute of Southeast Asia Studies, 2004) 1, 7–11 (discussing the Early Voluntary Sectoral Liberalization (EVSL) failure); Richard Weixing Hu, 'APEC: The Challenge of Remaining Relevant', Opinion, November 2008, <http://www.brookings.edu/research/opinions/2008/11/apec-hu> (visited 1 July 2012) ('The Asian financial crisis eventually derailed the [EVSL] process...').

dwindle and made it terminally irrelevant to regional economic integration.⁸ To some extent, this position shifted the focus of international economic law research from APEC to competing regional structures such as the Association of Southeast Asian Nations (ASEAN) and the ‘ASEAN plus N’ framework or the Group of 20 (G20).⁹ To fill a much needed gap in the legal literature, the article reassesses APEC’s evolution over the past two decades and analyzes APEC’s implications for fast-growing Asian regionalism and the multilateral trading system.

This article argues that despite the diverse trade interests among its 21 members, APEC’s soft-law approach has contributed to trans-Pacific economic governance and fortified the political foundation to tackle emerging fragmentation of Asian regionalism. It further contends that APEC’s structural reform is essential to ensure its complementarity with the WTO and realizing the Bogor Goals. Such reform requires APEC to constitute an active incubator for a Free Trade Area of the Asia-Pacific (FTAAP), which could be an effective ‘Plan B’ for the Doha Round impasse and thus retains APEC’s advantages over competing regional frameworks.¹⁰

Section II examines the impact of APEC’s key stake-holding countries on APEC’s evolution as a soft institution. The political compromise due to the East–West divide is reflected in APEC’s structure and development, as well as its influence on economic integration in the Pacific Rim. Section III explores APEC’s soft-law mechanism by identifying its WTO-plus achievements and institutional restrictions. APEC’s role in the realization of the Information Technology Agreement (ITA) and potential pathways to an FTAAP such as the US-backed Trans-Pacific Partnership (TPP) Agreement will be addressed. Section IV provides insight into APEC’s prospective actions to actively implement the Bogor Goals and a binding FTAAP and to buttress public–private partnership between governments and businesses. APEC’s reform entails enhancing the soft-law system and introducing hard-law elements into the decision-making process. To this end, the section discusses reform proposals for enacting the APEC Charter and strengthening the

⁸ For the ‘APEC adrift’ argument, refer to John Ravenhill, ‘APEC Adrift: Implications for Economic Regionalism in Asia and the Pacific’, 13(2) *The Pacific Review* 319 (2000) 321–27; Hu, above n 1, at 14–16.

⁹ Legal literature on APEC was mostly published in the 1990s. Examples include David K. Linnan, ‘APEC Quo Vadis’, 89 *American Journal of International Law* 824 (1995), Merit Janow, ‘Assessing APEC’s Role in Economic Integration in the Asia-Pacific Region’, 17 *Northwestern Journal of International Law & Business* 947 (1997), and Castan, above n 5.

¹⁰ See e.g. C. Fred Bergsten, ‘A Free Trade Area of the Asia-Pacific in the Wake of the Faltering Doha Round: Trade Policy Alternatives for APEC’, in Charles E. Morrison and Eduardo Pedrosa (eds) *An APEC Trade Agenda? The Political Economy of a Free Trade Area of the Asia-Pacific* (Singapore: Institute of Southeast Asia Studies, 2007) 15, 23 (arguing that a Free Trade Area of the Asia-Pacific (FTAAP) will ‘offer a fall-back “Plan B” if Doha were to fail’).

APEC Secretariat and the peer review process. Section V concludes by summarizing legal and policy recommendations for APEC governments and trade negotiators.

II. THE EVOLUTION OF APEC AS A SOFT INSTITUTION

Amid the negotiations deadlock in the Uruguay Round and the rapid development of the European Union (EU) and the North American Free Trade Agreement (NAFTA), ministers from Asia-Pacific governments convened in 1989 on Australian Prime Minister Bob Hawke's initiative.¹¹ APEC was envisioned as an Asia-Pacific version of the Organization for Economic Cooperation and Development (OECD), which promotes economic cooperation through dialogue and peer pressure.¹² However, the diverse economic scales of APEC's 21 members, as evidenced by GDP per capita of Australia being almost 40 times of that of Papua New Guinea, have posed hurdles to effective integration.¹³ The lack of leadership and the East–West divide have also made APEC shift the focus between trade liberalization and technical assistance. The political compromise resulted in APEC's adoption of the non-binding, consensus-based approach at its inception. Such a compromise reflects certain APEC members' reluctance to establish APEC as an international organization in a legal sense. In particular, developing country members have been concerned about the transformation of APEC into a West-dominated FTA, thus compelling them to commit to a degree of liberalization that will harm their vulnerable domestic industries. Without an establishment treaty that confers APEC legal personality, APEC can be best categorized as a soft institution.¹⁴

APEC, as an institution that represents its 21 members, has profoundly influenced FTAs in the Asia-Pacific region. Despite certain advantages, APEC's soft-law nature could not meet the challenges posed by economic downturn caused by the financial crisis and the proliferation of FTAs due to the Doha Round impasse. APEC members have therefore gradually agreed on the 'hardening' of the institution. These steps, albeit in an ideal direction, should be accelerated. Reform proposals in this article will propel APEC to be an overarching framework for trans-Pacific governance.

¹¹ Andrew Elek, 'Back to Canberra: Founding APEC', in *The Evolution of PECC: The First 25 Years* (Singapore: PECC International Secretariat, 2005) 66, 66–75.

¹² *Ibid* at 71; David MacDuff and Yuen Pau Woo, 'APEC as a Pacific OECD Revisited', in Richard E. Feinberg (ed.), *APEC as an Institution: Multilateral Governance in the Asia-Pacific* (Singapore: Institute of Southeast Asian Studies, 2003) 47, 47–48.

¹³ The gross domestic product (GDP) per capita of Australia and Papua New Guinea are USD 55,150 and USD 1,382.3 respectively. APEC Outcomes & Outlook 2011/2012 (2012), at 23.

¹⁴ Richard E. Feinberg, 'Introduction', in Richard E. Feinberg (ed.), *APEC as an Institution: Multilateral Governance in the Asia-Pacific* (Singapore: Institute of Southeast Asian Studies, 2003) xiii, xiv.

A. Stake-holding countries' positions on APEC

APEC has developed *de facto* norms and procedures on the basis of established two-decade practices. These soft rules, detailed in the next section, strengthen APEC's structure and development and enable APEC to function as if it were a full-fledged organization. Moreover, APEC's 'membership effect' has a profound impact on members' exports and imports.¹⁵ The non-binding integration between APEC members leads to a more than 67% share of intra-regional trade, which is even higher than legally binding trade blocks, including the EU, NAFTA, and ASEAN.¹⁶

APEC possesses unique features that make it economically and geopolitically significant. First, APEC provides a trans-regional dialogue platform for East and Southeast Asia, North and South America, and the Pacific. Bilateral talks, which take place during APEC summits, elevate APEC's pragmatic functionalism. Such talks have covered issues ranging from the North Atlantic Treaty Organization (NATO) bombing of the Chinese embassy in Yugoslavia to terrorist attacks.¹⁷ In other words, while APEC has been criticized for its talk-shop nature, its high-profile dialogue has strengthened APEC's relevance in global governance. Second, APEC's tasks include trade and non-traditional trade mandates. The former includes WTO-plus and behind-the-border topics, whereas the latter incorporates issues such as counter-terrorism and anti-corruption.¹⁸ Finally, APEC is not merely an inter-governmental structure. It provides private businesses a platform to voice their concerns through the APEC Business Advisory Council (ABAC), thus enhancing public-private partnership in economic integration.¹⁹ For these reasons, APEC's 21 members have viewed APEC as a critical forum that advances their trade and political priorities, particularly the free trade agreement (FTA) expansion. In particular, the USA, China, Russia, and ASEAN have played a significant role in shaping

¹⁵ Hyun-Hoon Lee and Jung Hur, *Trade Creation in the APEC Region: Measurement of the Magnitude of and Changes in Intra-regional Trade since APEC's Inception*, APEC Policy Support Unit (2009), at 30–31.

¹⁶ See *ibid* at 28 ('We have strong evidence that APEC economies as a whole are enjoying a very high degree of *de facto* integration.'). The shares of intra-regional trade in APEC, the European Union (EU), the North American Free Trade Agreement (NAFTA), and the Association of Southeast Asian Nations (ASEAN) were respectively 67%, 65%, 41.1%, and 25% in 2007. Progressing towards the APEC Bogor Goals: Perspectives of the APEC Policy Support Unit (2010), at 15.

¹⁷ Terence Hunt, 'Clinton, Jiang Try to Forge U.S.-China Thaw at APEC Forum', *Amarillo Global News*, 11 September 1999, http://amarillo.com/stories/1999/09/11/usn_LA0677.001.shtml (visited 1 July 2012); Hanns W. Maull and Nuria Okfen, 'Comparing Regionalism: The Asia-Pacific Economic Cooperation (APEC) and the Asia-Europe Meeting (ASEM)', in Heiner Hanggi et al. (eds), *Interregionalism and International Relations* (London and New York: Routledge, 2006) 217, 225.

¹⁸ Topics of APEC, see <http://www.apec.org/> (visited 20 June 2012).

¹⁹ The APEC Business Advisory Council: Founding and Structure, <http://www.abaonline.org/v4/content.php?ContentID=2521> (visited 20 June 2012).

APEC's development. Their trade agendas have invariably influenced APEC's overall evolution.

1. *The USA*

The USA is the world's largest economy and the key driving force behind APEC's trade liberalization initiatives. President Bill Clinton initiated the prominent APEC summit, officially known as the leaders' meeting, which first took place in Blake Island near Seattle in 1993.²⁰ This summit was the birthplace of APEC's longstanding custom that all 21 leaders take a group photo wearing the traditional costume of the host country.²¹ More fundamentally, the US goal was to transform APEC into an 'Asia-Pacific Community' akin to NAFTA, thus compelling their European counterparts to make further concessions during Uruguay Round negotiations.²² The US position on the legalization of APEC nonetheless suffered fierce opposition from Asian counterparts, which preferred to keep APEC as a voluntary and informal institution.

Although Washington's enthusiasm for APEC rapidly waned following the EVSL failure in the late 1990s, APEC was soon revitalized as a vital US geo-strategic platform.²³ On the security front, President George W. Bush utilized the APEC summit to garner wider support for the fight against terrorism in response to the 11 September terrorist attacks. The 2001 Leaders' Declaration thus flagged the first introduction of counter-terrorism actions into trade-oriented APEC.²⁴ Subsequently, the US Congress also passed the *National Defense Authorization Act for Fiscal Year 2006* to urge

²⁰ White House Press Release – New Details: President Obama, First Lady to Travel to Hawai'i, Attend APEC, 8 November 2011, <http://fpc.state.gov/176824.htm> (visited 1 July 2012) ('In 1993, President Clinton invited fellow APEC Leaders to meet on Blake Island near Seattle, elevating APEC from ministerial to head-of-government level for the first time.').

²¹ Due to the financial crisis, the only exception to this photo custom was the 2011 APEC summit hosted by the United States. 'Obama Opts Out of APEC Tradition', *CBS News*, 14 November 2011, http://www.cbsnews.com/8301-250_162-57324228/obama-opts-out-of-apec-tradition/ (visited 1 July 2012).

²² Yong Deng, 'Headless Dragons: The Problem of Leadership in APEC', 22 *Fletcher Forum World Affairs* 65 (1998) 68; Sung-Hoon Park and Jeong Yoen Lee, 'APEC at Crossroads: Challenges and Opportunities', 33(2) *Asian Perspectives* 97 (2009) 108. As China opposed the use of the word 'Community' because it referred to 'organization', the compromise was to use the lower-case 'C' so that the word 'community' could be translated as 'family'. Martine de Koning, 'APEC: Seven Years of Progress in Trade Liberalisation in the Asia Pacific?', 25 *Australian Law Review* 258 (1997) 260–61; William Bodde Jr., *View From the 19th Floor: Reflections of the First APEC Executive Director* 38 (Singapore: Institute of Southeast Asian Studies, 1994).

²³ See also John Ravenhill, *APEC and the Construction of Pacific Rim Regionalism* 97 (New York: Cambridge University Press, 2001) (explaining that US enthusiasm for APEC decreased because the APEC Non-Binding Investment Principle revealed the limitation of APEC's 'lowest common denominator approach').

²⁴ Statement on Counter-Terrorism, 21 October 2011; see also 2001 Leaders' Declaration: Shanghai Declaration – Meeting New Challenges in the New Century ('We wish to send a clear and strong message on the collective resolve of the Asia-Pacific community to counter terrorism.').

the president to focus on APEC to ‘address the emergence of China’ and ‘revitalize United States engagement in East Asia’.²⁵ After coming into office in 2009, President Barack Obama has similarly emphasized APEC’s role in fortifying the US–ASEAN security alliance.²⁶ From the trade perspective, APEC is crucial to implement Obama’s policy to re-engage with Asia and enhance US leadership in Asian regionalism. The 2011 APEC meeting in Honolulu demonstrated US commitment to build a ‘seamless regional economy’.²⁷ Building on the existing FTAs with seven APEC members, the US trade priority is to finalize the TPP and to make it the most promising pathway to an APEC-wide FTAAP.²⁸

2. *China*

The People’s Republic of China has evolved as an emerging global power since its open-door policy that commenced in 1978. China’s accession to APEC in 1991 was a major milestone toward integrating into the global economic order.²⁹ Diplomatically, APEC membership enabled China to break the blockade following the 1989 Tiananmen Square incident. APEC high-level talks have also buttressed China’s stance on par with the USA and Russia. As ‘three Chinas’ (i.e. China, Hong Kong, and Taiwan) were simultaneously admitted into APEC, Beijing was gravely concerned about Taipei’s official status. Importantly, APEC members are officially called ‘member economies’ rather than states, and heads of states are addressed as ‘leaders’. This arrangement therefore allows ‘three Chinas’ to co-exist in APEC. According to the memoranda of understanding (MoUs) that Beijing and Taipei respectively signed with South Korea, which served as the APEC chair, Taiwan joined APEC as ‘Chinese Taipei’.³⁰ Contrary to

²⁵ For relevant provisions, see Michael F. Martin, *The 2009 Asia Pacific Economic Cooperation (APEC) Meetings and U.S. Trade Policy in Asia*, *CRS Report for Congress*, 4 February 2010, at 19. Other statutes that stress US participation in APEC include the Federal Agriculture Improvement and Reform Act of 1996 and the Intelligence Reform and Terrorism Prevention Act of 2004. *Ibid.* at 18.

²⁶ Pasha L. Hsieh, ‘The Roadmap for a Prospective US-ASEAN FTA: Legal and Geopolitical Considerations’, 46(2) *Journal of World Trade* 367 (2012) 371–73.

²⁷ *APEC Outcomes & Outlook 2011/2012* (2012), at 20.

²⁸ The United States’ concluded free trade agreements (FTA) with seven APEC members, including Australia, Canada, Chile, Korea, Mexico, Peru, and Singapore. *Free Trade Agreements*, <http://www.ustr.gov/trade-agreements/free-trade-agreements> (visited 2 July 2012).

²⁹ Park and Lee, above n 22, at 113.

³⁰ The text of 1991 memoranda of understanding is cited in Philip Y. M. Yang, *Taiwan’s Approaches to APEC: Economic Cooperation, Political Significance, and International Participation*, 14 November 1997, <http://club.ntu.edu.tw/~yang/apec-paper-2.htm> (visited 1 July 2012). The official title of Taiwan is the Republic of China (ROC). The ROC was founded in Mainland China in 1912 and its government, led by the Chinese Nationalist Party, fled to Taiwan in 1949.

China's contention, such MoUs are not official APEC documents and do not constitute a legally binding accession package.³¹ Nonetheless, the 'practices' and 'conditions' outlined in MoUs have hindered Taiwan's APEC participation.³² Taiwan's foreign ministers have been excluded from APEC meetings.³³ Although in practice APEC host countries do 'invite' the Taiwan president to attend the summit, the president has to send a representative on his behalf.³⁴ Presumably, also for political sensitivity, Taiwan has never hosted the APEC summit.

APEC complements China's economic reform and FTA efforts. China's APEC membership facilitates the government's attraction of foreign investment and businesses to collect information on export opportunities. APEC also served as an external catalyst for liberalization particularly prior to China's WTO accession in 2002. In terms of tariff reduction, China complied with the 'down payment' it committed to during the Osaka Leaders' Meeting by lowering its average tariff rate from 35.9% to 23%, covering more than 4900 items in 1996.³⁵ The 'domino effect' has propelled China to expedite its FTA progress.³⁶ Since the conclusion of the first FTAs with Hong Kong and Macau in 2003, China has completed nine full-fledged FTAs with 12 APEC members.³⁷ Significantly, APEC provides a unique

³¹ See Shih Hsiu-chuan and Chang Yun-ping, 'Seoul Urged to Honor APEC Agreement', *Taipei Times*, 15 October 2005, <http://www.taipetimes.com/News/front/archives/2005/10/15/2003275846> (visited 22 June 2012) ('The Presidential Office [of Taiwan] accused Beijing of distorting the spirit of [the 1991] MOU...').

³² Guidebook on APEC Procedures and Practices 20 (2007).

³³ Ibid. For example, Taiwan and Hong Kong were excluded from APEC discussions on terrorism because China viewed them as a 'non-sovereign economies'. Chien-peng Chung, 'Designing Asia-Pacific Economic Cooperation', in Lok Sang Ho and John Wong (eds), *APEC and the Rise of China* (Singapore: World Scientific, 2011) 15, 31.

³⁴ Guidebook on APEC Procedures and Practices 20 (2007); Shih Hsiu-chuan, 'US Ambassador Delivers APEC Invite to President', *Taipei Times*, 6 July 2011, <http://www.taipetimes.com/News/taiwan/archives/2011/07/06/2003507538> (visited 1 July 2012). For instance, Lien Chan, former vice president of the Republic of China (Taiwan), was appointed as the 'Leader's Representative' by President Ma Ying-jiou from 2008 to 2012.

³⁵ The Osaka Initial Actions, <http://www.mofa.go.jp/policy/economy/apec/1995/initial.html> (visited 28 June 2012) [The Osaka Initial Actions]; Daisuke Takoh, 'China's APEC Policy and the Accession to the WTO', IDE APEC Study Center Working Paper Series 96/97, No. 6 (1997), at 7. See also Vinod K. Aggarwal and Charles E. Morrison, 'APEC as an International Institution', in Ipeei Yamazawa (ed.), *Asia Pacific Economic Cooperation (APEC): Challenges and Tasks for the Twenty-first Century* (London and New York: Routledge, 2000) 298, 316 ('[T]he national bureaucracies often look to APEC and each other for reinforcement of a liberal economic policy line against domestic interests that do not share the liberalising ideology.').

³⁶ For China's FTA strategy, see Pasha L. Hsieh, The China-Taiwan ECFA, Geopolitical Dimensions and WTO Law, 13(1) *Journal of International Economic Law* 121 (2011) 131-33.

³⁷ For the information on China's FTA, see China's FTA Network, <http://fta.mofcom.gov.cn/topic/ensingapore.shtml> (visited 1 July 2012). Note that the China-ASEAN FTA covers 10 ASEAN states, including seven APEC members.

opportunity for China to expand ties with Latin America, thus cultivating FTAs with Chile and Peru. APEC also offers a forum for China–Taiwan dialogue at the working level despite long-lasting political disagreement. As an ‘interim agreement’, the landmark Cross-Straits Economic Cooperation Framework Agreement (ECFA) that China and Taiwan concluded in 2010 marked Beijing’s most recent FTA progress.³⁸ Post-ECFA developments may in turn change China’s recalcitrant position on Taiwan’s accession to FTAs, including an FTAAP. With respect to APEC’s overall mandates, China has preferred economic cooperation to economic integration.³⁹ This position reflects Chinese opposition to APEC’s evolution as a negotiation forum that yields binding commitments. Moreover, China has been cautious about the TPP due to the concern that APEC will become a US-dominated network, thus diminishing China’s regional interests.

3. *Russia*

The Russian Federation is expected to be a key driving force in elevating APEC’s relevance in the multilateral trading system. The year 2012 marked a milestone for Russia’s global economic power because it not only acceded to the WTO, but also served as the chair of the APEC meetings.⁴⁰ In the 1990s, Russia represented a mere 0.4% of Asia-Pacific exports and was hardly considered an intrinsic part of Asia from a trade perspective.⁴¹ Because of its insignificant trade connection with Asia, Moscow’s admission to APEC in 1997 was controversial and was criticized as ‘an act of international vandalism’.⁴² A political compromise was reached because Russia’s APEC membership would alleviate its tensions with Japan over the Kuril Islands dispute and with the USA over NATO’s eastward expansion, as well as help China strengthen its non-West alliance in APEC.⁴³ Except for

³⁸ A detailed analysis on the Cross-Straits Economic Cooperation Framework Agreement (ECFA), see Hsieh, above n 36, at 121–37.

³⁹ For example, *Chinese President Calls on APEC to Reform itself to Raise Efficiency of Co-op*, Xinhua, 15 November 2009, http://news.xinhuanet.com/english/2009-11/15/content_12460803.htm (visited 1 July 2012).

⁴⁰ *Russia to Become WTO’s 156th Member on Aug 22*, Reuters, 23 July 2012, <http://www.reuters.com/article/2012/07/23/us-russia-wto-idUSBRE86M0MY20120723> (visited 26 July 2012); For information on Russia and APEC, see <http://www.apec2012.ru/docs/about/apec2012.html> (visited 20 June 2012).

⁴¹ Artyom Lukin, ‘Russia and the Emerging Institutional Order in the Asia-Pacific’, in Vinod K. Aggarwal and Richard Feinberg (eds), *APEC Study Centers Consortium Conference 2011: Key Findings and Policy Recommendations: Green Growth, Trade Integration and Regulation Convergence* (APEC Study Centers Consortium, 2011) 101, 108.

⁴² Speech by The Hon. P J Keating to 1998 Pacific Rim Forum, 22 September 1998, APEC’s Six Leaders’ Summit Meeting: Implication for the Strategic Architecture of the Asian Hemisphere, Australian APEC Study Centre Issues Paper 14, <http://www.apec.org.au/docs/iss14.htm> (visited 1 July 2012).

⁴³ Ravenhill, above n 23, at 207.

terrorism issues, Russia's participation in APEC has been symbolic, and it has no clear stance on APEC's trade agenda.⁴⁴

The 2012 APEC priorities would fortify Russia's 'Strategy 2020' economic roadmap endorsed by President Vladimir Putin.⁴⁵ APEC's supply chain initiatives benefit capacity building in facilitating trans-Siberian trade networks and developing Russia's Far East region. The Kremlin budgeted USD 22 billion in constructing infrastructure in Vladivostok and its adjacent Russky Island, a major venue for APEC talks and the leaders' meeting.⁴⁶ Furthermore, APEC contributes to Russia's regional economic integration. Although Russia's current FTA partners are confined to members of the Commonwealth of Independent States, it has initiated FTA negotiations or feasibility studies with three APEC members, including New Zealand, Vietnam, and Singapore, since 2010. It is expected that APEC membership will reinforce Russia's policy of integration into Asian regionalism.⁴⁷

4. ASEAN

As a fast-growing trade bloc, the 10-state Association of Southeast Asian Nations has collectively influenced APEC's trade agendas significantly. For decades following its founding in 1967, ASEAN progressed marginally under its non-intervention principle.⁴⁸ Its slow economic integration did not begin until 1992, when member states decided to create the ASEAN Free Trade Area through the Common Effective Preferential Tariff (CEPT) scheme.⁴⁹ As APEC includes seven ASEAN states (Brunei, Indonesia, Malaysia, the Philippine, Singapore, Thailand, and Vietnam), it was perceived as both an opportunity for expanding ASEAN's eminence and a threat to ASEAN's integration.⁵⁰ In 1990, the Kuching Consensus stipulated ASEAN's principles for its participation in APEC, including preservation of ASEAN's 'identity and cohesion' and opposition to APEC's 'adoption of mandatory directives'.⁵¹ Consequently, similar to China's position, ASEAN states,

⁴⁴ See Kirill Muradov, 'Russia and APEC 2012: "Imaginary Engagement"', *Asia Pacific Bulletin*, No. 141, 6 December 2011, <http://www.eastwestcenter.org/sites/default/files/private/apb141.pdf> (visited 1 July 2012) ('The only forum with substantial Russian input... is the [APEC] Counter Terrorism Task Force...').

⁴⁵ For the 'Strategy 2020' plan, refer to the speech by Ambassador Leonid Moiseev's to the Pacific Economic Cooperation Council Conference, 26 April 2012: Nurturing Asia Pacific Growth in the Aftermath of the Fiscal Crisis in Europe: Paradigm Shift and Structural Change Needed, or the Russian Approach Perhaps?, at 3-5 (on file with the author).

⁴⁶ Muradov, above n 44.

⁴⁷ Lukin, above n 41, at 110. The WTO list of notified RTAs in force includes six Russia's FTAs. Russian Federation, <http://rtais.wto.org/UI/PublicSearchByMemberResult.aspx?MemberCode=643&lang=1&redirect=1> (visited 28 June 2012).

⁴⁸ ASEAN's founding document is the ASEAN Declaration (Bangkok Declaration), concluded on 8 August 1967.

⁴⁹ For reasons for the slow progress of ASEAN's initial economic integration, see Hsieh, above n 26, at 379.

⁵⁰ For detailed information, see Annex 1.

⁵¹ Kuching Consensus (1990), principles (a) and (d).

except for Singapore, have opposed APEC as a negotiation forum for a trade bloc and preferred that APEC focus on technical assistance instead of trade liberalization.

To strengthen its competitiveness compared to the development of NAFTA and the EU, ASEAN expedited its internal and external economic integration. In 2007, ASEAN leaders set 2015 as the deadline for forming the ASEAN Economic Community (AEC) and signed the Charter of the Association of Southeast Asian Nations (ASEAN Charter) to confer the bloc legal personality.⁵² Every pre-ASEAN Charter FTA was in fact a combination of 10 separate FTAs with each member state. ASEAN's newly gained legal personality allows the block to negotiate and sign external FTAs as a single entity.

ASEAN has exercised the policy of power balance, particularly given China's emerging economic dominance and the importance of the US security alliance in South China Sea disputes. Its economic relations reflect such a policy. ASEAN has concluded FTAs with India and four APEC members, including Japan, Korea, Australia, and New Zealand, thus making the bloc the center for Asia's hub-and-spoke architecture.⁵³ In ASEAN's view, the 'ASEAN plus N' framework, built on former Malaysian Minister Mahathir Mohamad's East Asia Economic Caucus (EAEC) proposal, was a preferred pathway to an FTAAP.⁵⁴ This framework has nonetheless limited progress. Four ASEAN states—Brunei, Malaysia, Singapore, and Vietnam—have joined TPP negotiations.⁵⁵ The TPP may pose renewed challenges to ASEAN cohesion. One concern is the TPP's contravention of the 'special and different treatment' mandate outlined in the 2011 ASEAN Framework for Regional Comprehensive Economic Partnership.⁵⁶

B. APEC's structure and development

APEC's key stake-holding countries such as the USA, China, Russia, and ASEAN countries have substantially influenced APEC's institutional building and operation. The East–West divide has limited APEC to the least-common-denominator approach to trade liberalization under soft-law

⁵² ASEAN Economic Community Scorecard (2010), at 3; Charter of Association of Southeast Asian Nations (2007) Article 3.

⁵³ The list of ASEAN FTAs, refer to AFTA and FTAs, <http://www.aseansec.org/4920.htm> (visited 20 June 2012).

⁵⁴ See Yong Deng, above n 22, 73 (1998) ('In July 1993, ASEAN foreign ministers formally endorsed the EAEC proposal, which would... exclude the non-ASEAN countries...').

⁵⁵ Members of the Trans-Pacific Partnership (TPP) Agreement, see The United States in the Trans-Pacific Partnership, <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/united-states-trans-pacific-partnership> (visited 1 July 2012).

⁵⁶ See ASEAN Framework for Regional Comprehensive Economic Partnership (2011) ('The agreement shall provide for special and differential treatment to ASEAN Member States, especially Cambodia, Lao PDR, Myanmar and Viet Nam.').

obligations. As a soft institution, APEC's declarations and decisions constitute political commitments rather than binding treaties. However, *de facto* rules established in the past two decades have dominated APEC's governance. APEC's structure includes policy and working levels.⁵⁷ At the apex of the policy level is the annual leaders' meeting, which issues declarations on APEC's commitments and agenda. Below the apex are foreign and trade ministers' meetings, as well as sectoral meetings that cover finance, transportation, and other APEC-related matters. These ministerial meetings and the ABAC, which consists of business leaders appointed by APEC governments, make recommendations to APEC leaders.⁵⁸ The senior officials' meeting (SOM), which convenes four times a year, oversees working-level committees and task groups that include government representatives.⁵⁹

Divergence of national interests led to APEC's three-stage development. In APEC's infancy, the ambitious 1994 Bogor Declaration that outlined the 2010/2020 target for regional liberalization ignited the high expectation of this new trans-regional framework. The Declaration underpinned the three-pillar foundation of APEC's work agenda, including trade and investment liberalization, business facilitation (collectively known as TILF), and economic and technical cooperation (ECOTECH).⁶⁰ To implement the Bogor Goals, the 1995 Osaka Action Agenda (OAA) prescribed the guiding principles that led to the modality of 'concerted unilateral liberalization' (CUL).⁶¹ Unlike WTO agreements, CUL relies on voluntarism, under which governments are allowed to liberalize economic sectors at a pace they choose. Based on CUL, the 1996 Manila Action Plan developed two mechanisms: the Individual Action Plan (IAP) and the Collective Action Plan (CAP).⁶² The IAP requires APEC members to periodically report on 15 policy areas that the OAA identified.⁶³ With collective purposes, the CAP provides participating countries with best practices and databases, hence benefiting capacity building.⁶⁴ Both mechanisms aim at enhancing transparency and strengthening peer pressure. The infancy stage reached its climax

⁵⁷ APEC Outcomes & Outlook 2011/2012 (2012), at 25.

⁵⁸ Martin, above n 25, at 10.

⁵⁹ The list of APEC working groups, see *ibid.*

⁶⁰ APEC at a Glance (2012), at 3 and 6.

⁶¹ See Ipeei Yamazawa, *APEC: New Agenda in its Third Decade 56* (Singapore: Institute of Southeast Asian Studies, 2012) (stating that Japan 'invented the concept of "concerted unilateral liberalization" (CUL) within the Osaka Action Agenda, which disappointed many Americans...').

⁶² Martin, above n 25, at 11; Man-jung Mignonne Chan, 'APEC's Eye on the Prize: Participants, Modality, and Confidence-Building', in K. Kesavapany and Hank Lim (eds), *APEC at 20: Recall, Reflect, Remake* (Singapore: Institute of Southeast Asian Studies, 2009) 41, 45–46.

⁶³ APEC at a Glance (2012), at 7.

⁶⁴ For instance, the Group on Services developed the APEC Services Trade Access Requirement Database that is crucial to service providers' business expansion. It also held workshops that assisted small and medium-sized enterprises in the APEC region.

when the USA, Japan, and Canada garnered support from APEC members to push the ITA to be the WTO's first sectoral agreement in 1996.⁶⁵ Not surprisingly, the ITA success prompted APEC members to attempt more audacious trade liberalization.

APEC's second phase, the frustration period, was marked by the plummet to its nadir in 1997. Developed APEC countries initiated the Early Voluntary Sectoral Liberalization program that would lower tariffs and non-tariff barriers (NTB) for 15 sectors in 1996.⁶⁶ In these countries' view, EVSL could make APEC 'useful' by functioning as a catalyst to expedite trade liberalization. EVSL switched from the CUL approach to WTO-style negotiations, but failed within a year primarily owing to Japan's opposition supported by Asian countries.⁶⁷ Notably, EVSL's multi-sector coverage was more complex than the ITA and its inclusion of fisheries and forestry products propelled fierce opposition in Japan. Due to the Asian financial crisis, many countries that initially committed to EVSL became incapable of further liberalization. The EVSL failure made APEC suffer an unprecedented credibility crisis and shifted APEC's agenda from TILF to ECOTECH, which developing countries preferred.

APEC recovered from this prevailing pessimism in the third stage, which led APEC toward reform and regained momentum for regional economic integration. The 2001 Shanghai Accord adopted new measures to reinvigorate APEC's development. The pathfinder approach permits a group of '21 minus X' members to shepherd the implementation of initiatives moving toward the Bogor Goals.⁶⁸ This approach contributed to the world's first multilateral open skies agreement and promoted innovations such as the use of electronic certificates of origin (e-CO).⁶⁹ More remarkably, due to fast-growing Asian regionalism, APEC leaders announced in 2006 that it was 'timely for APEC to seriously consider' the ABAC's FTAAP proposal.⁷⁰ An FTAAP will not only be an attractive 'Plan B' for the Doha Round impasses, but also transform APEC to a binding architecture. The US decision to lead the TPP and refocus on APEC further brought APEC into prominence.

⁶⁵ Jiro Okamoto, 'The Development of EVSL Consultations and Setting the Research Questions', in Jiro Okamoto (ed.), *Trade Liberalization and APEC* (London and New York: Routledge, 2004) 33, 34–36.

⁶⁶ The list of designated sectors for early voluntary liberalization, see Ippei Yamazawa, 'APEC's Achievements and Tasks', in Riyana Miranti and Denis Hew (eds), *APEC in the 21st Century* (Singapore: Institute of Southeast Asian Studies, 2004) 1, 8.

⁶⁷ *Ibid* at 7–10.

⁶⁸ Appendix 1 – Shanghai Accord: APEC Economic Leaders' Declaration, 21 October 2001.

⁶⁹ Michael C. Mullen, 'Business Involvement in APEC', in Richard E. Feinberg (ed.), *APEC as an Institution: Multilateral Governance in the Asia-Pacific* (Singapore: Institute of Southeast Asian Studies, 2003) 199, 208; APEC Committee on Trade and Investment: Annual Report to Ministers 2011 (2011) [CTI Report 2011], at 33.

⁷⁰ 2006 Leaders' Declaration: Ha Noi Declaration – Towards a Dynamic Community for Sustainable Development and Prosperity, 19 November 2006 [2006 Leaders' Declaration].

III. AN EXAMINATION OF APEC'S INCREMENTAL ACHIEVEMENTS

APEC's development has ebbed and flowed because of an inevitable East–West compromise that keeps APEC a non-binding institution and imposes considerable obstacles to trade liberalization. As a result, criticism persists as to APEC's function as a 'talk shop' or 'a perfect excuse to chat'.⁷¹ APEC's soft-law approach is by no means perfect. Nonetheless, APEC's contributions that cover WTO-plus and 'Singapore issues' should not be ignored.⁷² It is these incremental achievements that have catalyzed Asia-Pacific economic integration amid the wide divergence of trade interests.

A. Ill-defined principles and the soft-law approach

APEC's evolution has suffered from the inception because of its ill-defined guiding principles. APEC's Bogor Declaration failed to define the objective of 'free and open trade and investment'.⁷³ The 2010/2020 target dates depend on an economy's classification as developed or developing, but each APEC member has the discretion to determine its classification. The subsequent Osaka Action Agenda, which intended to elaborate on the Bogor Goals, lacks neither action nor agenda. The principles outlined in the OAA contradict each other in practice.⁷⁴ The principle of flexibility can be interpreted as allowing APEC members to choose their own liberalization timeframes and exclude sensitive sectors from liberalization. Such a principle can hardly be reconciled with the principle of comprehensiveness that undertakes 'all impediments to' the Bogor Goals.⁷⁵ Furthermore, consensus never exists on the non-discrimination principle, commonly known as 'open regionalism'.⁷⁶ Controversies lie in the free-riding concern about whether liberalization should be granted to non-APEC countries such as

⁷¹ Monique Chu, 'Critics Pan APEC as Merely "A Perfect Excuse to Chat"', *Taipei Times*, 11 November 2000, <http://www.taipetimes.com/News/local/archives/2000/11/11/0000060755> (visited 1 July 2012). Former Australian Prime Minister Paul Keating considered APEC as 'a talk shop of debatable output'. Elizabeth Keenan, 'Talking Shop', *Time*, 31 August 2007, <http://www.time.com/time/magazine/article/0,9171,1657918,00.html> (visited 1 July 2012).

⁷² 'Singapore issues', which refer to working plans determined at the 1996 WTO Ministerial Conference in Singapore, include competition policy, and on transparency in government procurement and trade facilitation. Understanding the WTO: Cross-Cutting and New Issues: Investment, Competition, Procurement, Simpler Procedures, http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm (visited 20 June 2012).

⁷³ Bogor Declaration, above n 6.

⁷⁴ These principles 'are applied to the entire APEC liberalization and facilitation process'. APEC at a Glance (2012), at 7.

⁷⁵ *Ibid.*

⁷⁶ See Vinod K. Aggarwal and Elaine Kwei, 'Asia-Pacific Economic Cooperation (APEC): Transregionalism with a New Cause?', in Heiner Hanggi et al. (eds), *Interregionalism and International Relations* (London and New York: Routledge, 2006) 67, 73 (identifying four schools of open regionalism).

the EU on a conditional basis.⁷⁷ Even APEC's basic operation principle of consensus lacks agreement. While no member disputes that APEC consensus is distinguishable from WTO consensus, which results in a process of binding commitments, disagreement persists as to whether APEC consensus denotes unanimity.⁷⁸

Notwithstanding the absence of clear guidance due to the political reality, APEC has continued to progress as a trans-regional economic architecture. It was suggested that the soft-law approach functions more efficiently in international financial law than in trade law.⁷⁹ International conventions including the Basel Accords and institutions such as the Financial Stability Board and G20 underpin the foundation of the international financial framework.⁸⁰ The following reasons explain how APEC's soft-law mechanism enables APEC to provide comparable functions in the trade arena.

First, the nature of political commitments in APEC's declarations and decision, as well as the CUL process, minimizes 'sovereign costs'.⁸¹ The lack of the treaty-ratification process and potential trade retaliation due to a violation of the *pacta sunt servanda* rule have prompted APEC governments to commit beyond WTO requirements.⁸² Second, APEC's best practices and model measures reflect a common understanding of trade and investment approaches. By interpreting these soft rules as international standards, APEC governments have utilized them as 'voluntary' external pressure to resist domestic protectionism for structural reform. Third, the expectation that these soft rules may evolve to hard law further fortifies their legitimacy. In fact, the WTO's ratification of the ITA based on APEC's consensus and the use of APEC rules as benchmarks in TPP negotiations prove that soft law may constitute interim steps to create binding commitments.⁸³

⁷⁷ Ibid.

⁷⁸ Akiko Yanai, 'Characteristics of APEC Trade Liberalization: A Comparative Analysis with the WTO', in Jiro Okamoto (ed.), *Trade Liberalization and APEC* (London and New York: Routledge, 2004) 9, 22–24.

⁷⁹ Chris Brummer, 'Why Soft Law Dominates International Finance – and Not Trade', 13(3) *Journal of International Economic Law* 623, 623–24; Julien Chaisse, 'Sovereign Wealth Funds in the Making – Assessing the Economic Feasibility and Regulatory Strategies', 45(4) *Journal of World Trade* 837 (2011) 837–60. For discussion on APEC's soft-law approach, see also Davidson, above n 5, at 15–16; Sungjoon Cho, 'Rethinking APEC: A New Experiment for a Post-Modern Institutional Arrangement', in Mitsuo Matushita and Dukgeun Ahn (eds), *WTO and East Asia: New Perspective* (London: Cameron May, 2004) 381, 403–4.

⁸⁰ David Zaring, 'Finding Legal Principle in Global Financial Regulation' 52(3) *Virginia Journal of International Law* 683 (2012) 688–700; Chris Brummer, *Soft Law and the Global Financial System: Rule Making in the 21st Century* (New York: Cambridge University Press, 2012) 60–114.

⁸¹ The notion of 'sovereign costs', refer to Brummer, above n 79, at 631–32.

⁸² See Harmut Hillgenberg, 'A Fresh Look at Soft Law', 10(3) *European Journal of International Law* 500, 509 (stating that soft law is 'a self-contained regime' that 'exclude[s] the application of rules which follow *pacta sunt servanda*...').

⁸³ See Promoting Supply Chain Connectivity – Can APEC Deliver?, Address by Stephen Jacobi to Customs Brokers and Freight Forwarders Conference, 10 May 2012, <http://www.nzibf.co>.

Finally, the reporting requirement under APEC's IAP and its peer review process serve as soft enforcement through monitoring members' progress. The IAP process galvanizes reputational costs and reciprocity that incentivize compliance with APEC norms.⁸⁴ Such compliance in turn enhances members' credibility and yields visible results such as attracting foreign investment.

These soft-law factors ensure APEC's evolution and relevance. Empirical evidence in the past two decades similarly demonstrates APEC members' substantive progress, particularly in areas of business mobility, standards and conformance, and intellectual property rights.⁸⁵ Before discussing reform proposals that will fortify APEC's soft-law mechanism, it is essential to understand APEC's incremental achievements that have contributed to trans-Pacific regional integration.

1. Tariff reduction for information technology and environmental products

The APEC region witnessed a dramatic decline in the most-favored-nation (MFN) applied tariff from 16.9% in 1989 to 5.8% in 2010.⁸⁶ Arguably, tariff reduction cannot be attributed primarily to APEC because each economy may have cut tariffs in compliance with WTO or FTA requirements.⁸⁷ However, APEC members' 'down payments' to which they committed during the 1995 Osaka Leaders' Meeting evidenced APEC's contribution to tariff liberalization.⁸⁸ The IAP process that includes customs as a core element also enhances the effectiveness of tariff reduction.

Particularly, APEC's sectoral tariff reductions for information technology (IT) and environmental goods are important case studies. As the WTO's first sectoral agreement, the 1996 Information Technology Agreement eliminated tariffs on six covered categories of IT products by 2010.⁸⁹ Different from

nz/index.asp?Pageid=2145896562 [Jacobi's speech] (visited 1 July 2012) ('TPP... provides a means to take the work from a voluntary, non-binding forum like APEC into a rules-bound framework of a free trade agreement.').

⁸⁴ For example, Hadi Soesastro, 'Revamping APEC's Concerted Unilateral Liberalization', in K. Kesavapany and Hank Lim (eds), *APEC at 20: Recall, Reflect, Remake* (Singapore: Institute of Southeast Asian Studies, 2009) 67, 72 (stating that an Indonesian official felt 'embarrassed' when he realized 'that Indonesia's offer was less progressive than' [other countries] and therefore 'thought that Indonesia should immediately revise its IAP').

⁸⁵ Yamazawa, above n 61, at 65.

⁸⁶ Keynote Speech by Amb. Muhamad Noor to the Pacific Economic Cooperation Council (PECC) Singapore Conference 2012, 27 April 2012, http://www.apec.org/Press/Speeches/2012/0427_PECC.aspx (visited 1 July 2012).

⁸⁷ C. Fred Bergsten, 'APEC in 1997: Prospects and Possible Strategies', in C. Fred Bergsten (ed.), *Whither APEC? The Progress to Date and Agenda for the Future* (Washington, DC: Peterson Institute for International Economics, 1997) 3, 10 ('There is no hard evidence to date that any APEC country has taken additional liberalization steps solely due to APEC.').

⁸⁸ The Osaka Initial Actions, above n 35.

⁸⁹ Catherine Mann and Xuepeng Liu, 'The Information Technology Agreement: Sui Generis or Model Stepping Stone?', in Richard Baldwin and Patrick Low (eds), *Multilateralizing Regionalism: Challenges for the Global Trading System* (Cambridge: Cambridge University Press, 2009) 182, 189.

other multilateral trade agreements negotiated under the auspices of the WTO, the ITA's key components—product coverage and formulas for reducing tariffs—were first agreed upon in the 1996 APEC ministerial meeting.⁹⁰ The 'APEC caucus' in the WTO then transformed the consensus to the actual binding ITA.⁹¹ Since 1996, global exports in IT products have grown 10% annually and amounted to more than USD 1.4 trillion.⁹² The number of WTO members that are parties to the ITA also increased from 28 to 74, representing more than 97% of global IT trade.⁹³ The ITA is crucial to APEC because nine of the world's top 10 IT product exporters are APEC members.⁹⁴ Moreover, as ITA commitments are on an MFN basis, APEC developing country members yet to accede to the ITA are entitled to duty-free treatment, thus enhancing their IT export industries.⁹⁵

APEC's relevance to the ITA did not diminish. With dramatic technological advances, the application of the ITA increases uncertainty. Numerous IT products have developed multiple functions that original ITA signatories could not envision. The 1996 Harmonized System (HS) tariff nomenclature, which provided the basis for the ITA coverage, also underwent three profound changes as of 2012.⁹⁶ To accommodate rapid IT changes, countries have argued for more consumer electronic products such as global positioning satellite (GPS) and MP3 players to be incorporated into the ITA.⁹⁷ The uncertainty involving the ITA culminated in *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products (EC – IT Products)*.⁹⁸ Three APEC members—the USA, Japan, and Taiwan—brought the WTO complaint against the EU on the ground that it imposed 6–14% tariffs on three types of multifunctional machines.⁹⁹ The complainants contended that the flat

⁹⁰ Ibid.

⁹¹ See also Joint Statement, The Nineteenth APEC Ministerial Meeting, 5–6 September 2007 (requiring 'Geneva WTO representatives to work through the APEC caucus to provide active support for' WTO negotiations).

⁹² Concept Paper for the Expansion of the ITA, Communication from Canada, Japan, Korea, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Singapore and the United States, G/IT/W/36, 2 May 2012 [Concept Paper for the Expansion of the ITA], at 1; 15 Years of the Information Technology Agreement: Trade, Innovation and Global Production Networks (2012) [15 Years of the ITA], at 3.

⁹³ 15 Years of the ITA, above n 92, at 3; Lamy Says ITA Success is Inspiration to Doha Negotiators, 28 March 2007, http://www.wto.org/english/news_e/sppl_e/sppl58_e.htm (visited 1 July 2012).

⁹⁴ 15 Years of the ITA, above n 92, at 54.

⁹⁵ Mann and Liu, above n 89, at 189.

⁹⁶ Concept Paper for the Expansion of the ITA, above n 92, at 1.

⁹⁷ Ken Monahan, 'Expanding the Information Technology Agreement: New Products, New Countries', *Bloomberg Gov't Briefing*, 10 August 2011, at 7.

⁹⁸ Panel Report, *European Communities and its Member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R, WT/DS376/R, WT/DS377/R, 16 August 2010 [EC – IT Products].

⁹⁹ EC – IT Products, paras 7.119, 7.766, and 7.1138.

panel displays, set-top boxes with communication functions, and multifunction digital machines were covered by the ITA, thus entitling duty-free treatment.¹⁰⁰

The WTO panel disagreed with the EU that these products' new functions justified reclassification.¹⁰¹ As these products fell within the EU concessions, the tariff imposition violated the ITA and Article II:1(a) and Article II:1(b) of the General Agreement on Tariffs and Trade (GATT).¹⁰² Significantly, the panel did not give a blank check to eliminate ITA uncertainty. It carefully cautioned that multifunctional machines should be determined 'on a case-by-case basis' and that they may become dutiable should their 'principal function' transform fundamentally.¹⁰³ To meet the need of IT product exporting countries, the ITA requires revamps. The negotiations for expanding the ITA coverage, also known as ITA II, stalled in 1998, but regained momentum in both APEC and the WTO.¹⁰⁴ After the 2011 APEC Leaders' Declaration called for APEC's 'leadership role in launching [ITA II] negotiations', four APEC members introduced a concept paper that galvanized informal WTO negotiations on the ITA.¹⁰⁵

The tariff-cutting for IT products similarly informed negotiations over environmental goods and services liberalization. APEC's EVSL program, which covered the environmental sector, failed in 1997.¹⁰⁶ The mandate of 'reduction or, as appropriate, elimination of tariff... to environmental goods' under Article 31.3 of the Doha Declaration suffered the same fate as the Doha Round.¹⁰⁷ Despite the slow negotiation process, APEC's environmental goods exports increased by 13.5% annually, amounting to more than USD 443.5 billion.¹⁰⁸ APEC reenergized the momentum to liberalize trade barriers to environmental goods. In 2011, APEC set 'green growth' as a priority and committed to slashing the applied tariff on environmental

¹⁰⁰ Paola Conconi and Robert Howse, 'Panel Report on EC-IT Products', 11(2) World Trade Review 223 (2012) 223–24.

¹⁰¹ Ibid.

¹⁰² For example, *EC – IT Products*, paras 8.3–8.11.

¹⁰³ For example, *EC – IT Products*, paras 7.734, 7.986, and 7.1501; paras 7.1308 and 7.1397; Tsai-Yu Lin, 'Systemic Reflection on the EC-IT Product Case: Establishing an "Understanding" on Maintaining the Product Coverage of the Current Information Technology Agreement in the Face of Technological Change', 45(2) Journal of World Trade 401 (2011) 417–19.

¹⁰⁴ Information Technology Agreement – Introduction, http://www.wto.org/english/tratop_e/inftec_e/itaintro_e.htm (visited 1 July 2012).

¹⁰⁵ 2011 Leaders' Declaration: The Honolulu Declaration – Toward a Seamless Regional Economy, 12–13 November 2011 [2011 Leaders' Declaration]; Concept Paper for the Expansion of the ITA, above n 92, at 1–2.

¹⁰⁶ See Yamazawa, above n 7, at 8 (stating that nominating economies include Canada, Japan, Taiwan, and the United States).

¹⁰⁷ Article 31.3, Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001.

¹⁰⁸ Carlos Kuriyama, 'A Snapshot of Current Trade Trends in Potential Environmental Goods and Services', *APEC Policy Support Unit Policy Brief*, No. 3, 30 April 2012, at 2.

goods to 5% or less by 2015.¹⁰⁹ In 2012, APEC members agreed on the list of 54 environmental goods for liberalization.¹¹⁰ This initiative may in turn prompt the APEC caucus to push for WTO action. The only visible opposition was China, which was initially hesitant to commit to the initiative.¹¹¹ Beijing stressed APEC's voluntary nature and argued that the 'common but differentiated responsibilities' principle should be applied to environmental goods liberalization.¹¹² A more profound reason was presumably China's caution over US 'protectionist' measures to increase antidumping and countervailing actions targeted at China-made solar panels and wind turbine towers.¹¹³ Even though there are differences among APEC members, tariff reductions for IT and environmental products demonstrated APEC's role in bringing forth critical masses for global trade liberalization.

2. Trade facilitation and supply chain connectivity

Equally important to tariff and NTB liberalization, trade facilitation has a considerable impact on supply chain connectivity and transaction cost. It is particularly important to small and medium enterprises (SMEs), which lack capacity to handle complex logistics. Trade facilitation was one of the 'Singapore issues' incorporated into the subsequent Doha Development Agenda work program, known as the 'July Package', but WTO members have not agreed on substantive matters other than negotiating modalities.¹¹⁴ In comparison with the WTO, APEC plays an exceptional role in trade facilitation on a multilateral basis. The soft-law approach is particularly remarkable in trade facilitation because unlike trade liberalization, trade facilitation commitments involve limited concessions that would incur domestic opposition. To respond to the 2001 APEC leaders' call to enhance trade facilitation, APEC developed two Trade Facilitation Action Plans (TFAPs), including TFAP I (2002–2006) and TFAP II (2007–2010).¹¹⁵ Through collective actions and pathfinder initiatives, each TFAP cut

¹⁰⁹ 2011 Leaders' Declaration, above n 105.

¹¹⁰ APEC List of Environmental Goods: Promoting Exports, Creating Jobs, and Advancing Green Growth and Sustainable Development, <http://www.ustr.gov/about-us/press-office/fact-sheets/2012/september/apec-environmental-goods> (visited 1 November 2012); Annex 2 – Indicative Timeline to Develop an APEC List of Environmental Goods, 2012/SOM1/020anx2, 18–19 February 2012, at 2–3.

¹¹¹ See 16(22) *Bridges Weekly Trade News Digest*, 6 June 2012, at 2 ('[In addition to the United States,] Thirteen other APEC economies have also submitted environmental goods lists of their own, though Chia has yet to do so...').

¹¹² *Ibid* at 1–2.

¹¹³ Steve Leone, 'DOC Imposes Tariffs on Chinese Wind Towers', *Renewable Energy World*, 31 May 2012, <http://www.renewableenergyworld.com/rea/news/article/2012/05/doc-imposes-tariffs-on-chinese-wind-towers> (visited 1 July 2012).

¹¹⁴ Annex D: Modalities for Negotiations on Trade Facilitation, Decision Adopted by the General Council, WT/L/579, 2 August 2004; Doha Development Agenda: Doha Work Programme, 1 August 2004, http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm (visited 1 July 2012).

¹¹⁵ APEC's Second Trade Facilitation Action Plan (2007), at 3–4.

transaction costs by 5% in the region.¹¹⁶ APEC's Supply Chain Connectivity Initiative, launched in 2009, set an APEC-wide goal of reducing an additional 10% in costs by 2015.¹¹⁷

Three areas of APEC trade facilitation efforts can illustrate their innovative and WTO-plus feature. First, in terms of business mobility, APEC created the three-year valid APEC Business Travel Card (ABTC) scheme that permits pre-cleared business travelers short-term entry to 18 participating economies.¹¹⁸ Under this scheme, the USA, Russia and Canada are transitional members.¹¹⁹ The 2011 *APEC Business Travel Card Act*, which allows the issuance of the ABTC to qualified US nationals, paved the way for the USA to be a full member.¹²⁰ The ABTC scheme has contributed to the savings of USD 3.7 million and enables more than 88,400 ABTC holders to cut time spent at immigration checkpoints by 52.4% through a specially designated APEC line.¹²¹ Hence, it significantly facilitates temporary movement of natural persons under Mode 4 of the General Agreement on Trade in Services (GATS). Second, APEC's standards and conformance initiatives benefit regulatory coherence by aligning domestic technical regulations with international standards. For example, electrical and electronic equipment exports total more than USD 1 trillion in the APEC region.¹²² Compliance costs are reduced because 16 APEC members conform to the International Electrotechnical Commission (IEC) standards, and 18 participate in mutual recognition arrangements of conformity assessment.¹²³ These APEC initiatives complement the Agreement on Technical Barriers to Trade (TBT Agreement), particularly given the increasing number of TBT disputes in the WTO.¹²⁴

¹¹⁶ Ibid.

¹¹⁷ Jacobi's speech, above n 83.

¹¹⁸ APEC Business Travel Card, <http://www.apec.org/About-Us/About-APEC/Business-Resources/APEC-Business-Travel-Card.aspx> (visited 2 June 2012) [APEC Business Travel Card]. The APEC Business Mobility Group is considering extending the validity of the APEC Business Travel Card (ABTC) from three to five years. CTI Report 2011, above n 69, at 12.

¹¹⁹ APEC Business Travel Card, above n 118.

¹²⁰ Fact Sheet: APEC on Travel Facilitation, 12 November 2011, <http://www.whitehouse.gov/the-press-office/2011/11/12/fact-sheet-apec-travel-facilitation> (visited 1 July 2012); see also Murray Hiebert, 'Why U.S. Approval of the APEC Business Travel Card Matters', Center for Strategic & Int'l Studies, 14 December 2011, <http://csis.org/publication/why-us-approval-apec-business-travel-card-matters> (visited 1 July 2012) ('The ABTC program will not change procedures for foreigners entering the United States. U.S. immigration law does not recognize the ABTC as an entry visa...').

¹²¹ APEC's Achievements in Trade Facilitation in 2007-2010: Final Assessment of the Second Trade Facilitation Action (TFAP II) (2012) [APEC Trade Facilitation], at 1.

¹²² Ibid at 10.

¹²³ Ibid.; CTI Report 2011, above n 69, at 33.

¹²⁴ For example, Panel Report, *United States – Measure Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, 2 September 2011; Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, 15 September 2011; Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/AB/R, 29 June 2012.

Finally, fragmented customs procedures can frustrate ‘even the most efficient supply chain’.¹²⁵ Under the APEC working group’s auspices, 13 APEC members adopted single window systems to harmonize customs procedures and reduce duplicate paperwork required by multiple agencies.¹²⁶ An experiment-based paperless e-CO system also showed a potential decrease of 6.8% in transaction costs should it be adopted APEC-wide.¹²⁷ Furthermore, 10 APEC members initiated a pathfinder initiative that committed to exempting shipments from customs duties if they are under the *de minimis* value of USD 100.¹²⁸ These innovative measures fortified APEC’s role in facilitating multi-modal transport in the global supply chain.

3. *Best practices and model measures on trade and investment*

APEC’s best practices and model measures on trade and investment areas have buttressed APEC’s soft-law mechanism in the past two decades. These instruments, which cover investment, competition, government procurement, rules of origin (ROOs) and FTAs, complement the WTO by tackling ‘Singapore issues’ and other behind-the-border matters.¹²⁹ They not only reflect generally accepted regulatory practices, but also serve as guidance for creating hard-law in the WTO and FTAs. APEC’s non-binding rules were therefore carefully drafted as if they were binding. A highly relevant example is the *Best Practices for RTAs/FTAs in APEC*, which was circulated to the WTO for reference.¹³⁰ The best practices, which call for ‘avoiding duplication with the WTO dispute settlement mechanism’, address the overlapping jurisdiction issue in *Mexico – Tax Measures on Soft Drinks and Other Beverages (Mexico – Soft Drinks)*.¹³¹ In this case, the Appellate Body decided that the WTO cannot

¹²⁵ APEC’s Second Trade Facilitation Action Plan, 2007/MRT/004, 6 July 2007, at 19.

¹²⁶ Single Window Report – Working toward the Implementation of SW in the APEC Economies and International Interoperability, 2010/SOM3/SCCP/002, 15–17 September 2007, at 1.

¹²⁷ APEC Trade Facilitation, above n 121, at 16–17.

¹²⁸ See Raising the *de minimis* Threshold to Enhance Supply-chain Connectivity, 3 January 2012, http://www.apec.org/Press/Features/2012/0103_deminimis.aspx (visited 1 July 2012) (‘Setting a *de minimis* threshold of US\$100 could amount to cost savings of US\$19.8 billion per year . . .’).

¹²⁹ For example, APEC Non-Binding Investment Principles (1994), APEC Principles to Enhance Competition and Regulatory Reform (1999), APEC Non-Binding Principles on Government Procurement (1999), APEC Transparency Standards on Government Procurement (2004), Best Practices for FTAs/FTAs in APEC (2004), APEC Model Measures for Trade Facilitation in RTAs/FTAs (2005), and APEC Model Measures for RTAs/FTAs (2007), APEC Model Measures on ‘Rules of Origin and Origin Procedures’ Chapter (2007).

¹³⁰ Best Practices for FTAs/FTAs in APEC (2004); Communication from Chile and the Republic of Korea, Best Practices for FTAs/FTAs in APEC, TN/RL/W/187, 12 September 2005.

¹³¹ *Ibid*; Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, 24 March 2006 [*Mexico – Soft Drinks*].

decline its jurisdiction due to NAFTA's exclusion clause.¹³² It nonetheless indicated that a 'legal impediment' may exclude WTO jurisdiction in other cases.¹³³ As WTO jurisdiction at best provides limited guidance on the definition of 'legal impediment', APEC's soft-law best practices fill the gap to prevent complications arising from overlapping jurisdiction.

The legitimacy of APEC's consensus-based best practices and model measures incentivize compliance. Investigation into 28 FTAs and bilateral investment treaties (BITs) in the APEC region show a high degree of conformity with the *Non-Binding Investment Principles* and other investment instruments.¹³⁴ The only notable gaps between the Principles and these FTAs and BITs exist in prior authorization requirements and national treatment at the pre-establishment stage.¹³⁵ Also, evidence showed that APEC members have applied the voluntary *Transparency Standards on Government Procurement*.¹³⁶ Indonesia, Vietnam, Peru, and Mexico incorporated such transparency standards into domestic law as anti-corruption reforms.¹³⁷ Domestic opposition to the adoption of the standards largely decreased because they reflect internationally accepted benchmarks. These standards are crucial to APEC as a whole because only seven APEC members signed the Agreement on Government Procurement (GPA) and are therefore obliged to comply with the Article XVII transparency requirement under the GPA.¹³⁸ Another example of compliance is the *Model Measures on Rules of Origin*, which contributes to ROO harmonization.¹³⁹ Pursuant to these measures, ASEAN's CEPT changed from applying only the 40% regional value content rule to also allowing the tariff-heading change rule.¹⁴⁰ The comparison in the ROO requirement of the ASEAN–China FTA and the ASEAN–Japan Comprehensive Economic Partnership, which concluded

¹³² *Mexico – Soft Drinks*, paras 42–53.

¹³³ *Ibid.*, para 54.

¹³⁴ APEC Non-Binding Investment Principles (1994); Identifying Core Elements in Investment Agreements in the APEC Region, APEC Committee on Trade and Investment: APEC Investment Experts' Group, prepared by United Nations Conference for Trade and Development, December 2007 [Investment Agreements in the APEC Region], at 3.

¹³⁵ Investment Agreements in the APEC Region, above n 134, at 36–41.

¹³⁶ APEC Transparency Standards on Government Procurement (2004).

¹³⁷ APEC Procurement Transparency Standards in Indonesia: A Work in Progress 22–26 (2011); APEC Procurement Transparency Standards in Vietnam: The Need to Move from Law to Practice 20–24 (2011); APEC Procurement Transparency Standards in Peru: Strengthening the Culture of Integrity 24–28 (2011); APEC Procurement Transparency Standards in Mexico: Time to Engage the Private Sector 17–23 (2011).

¹³⁸ These APEC members include Canada, Hong Kong, China, Japan, Korea, Singapore, Taiwan, and the United States. Parties and Observers to the GPA, http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm (visited 20 July 2012).

¹³⁹ APEC Model Measures on 'Rules of Origin and Origin Procedures' Chapter (2007).

¹⁴⁰ Yamazawa, above n 61, at 76; Effective from 1 August 2008, all ASEAN member states have agreed to implement the new Rules of Origin (ROO) for Common Effective Preferential Treatment (CEPT), http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.article.Article_91bc0171-c0a81573-21d621d6-95e3178e (visited 20 July 2012).

after the model measures, also reflects the same change to allow further flexibility.¹⁴¹

B. Pathways to a free trade area of the Asia-Pacific

As demonstrated above, the significance of APEC's role as a trans-regional economic architecture could refute the conventional 'talk-shop' criticism. However, it cannot be denied that APEC's soft-law mechanism is circumscribed. In terms of tariff reduction, APEC's approach is limited to the sectoral approach, which focused on 'easy' sectors at the core of almost all APEC members' export interests. The liberalization of sensitive sectors that led to the previous EVSL failure remains a challenge. Although most APEC members' MFN applied rate is below 10%, dairy products exported to the USA and beverages and tobacco exported to Vietnam and Malaysia are subject to tariff rates of 20.3%, 43.6%, and 120.9% respectively.¹⁴² To persuade APEC economies to provide concessions on these sectors on a multilateral basis requires a binding FTA's give-and-take approach.

Most of APEC's trade facilitation initiatives are implemented through the pathfinder '21 minus X' approach. In fact, fewer than 12 APEC members take part in six out of 12 pathfinder initiatives.¹⁴³ The e-CO project, albeit innovative, has only three participating economies.¹⁴⁴ The participation in trade facilitation initiatives largely depends on national reform agendas. The fact that only a few initiatives are conducted 'on the basis of reciprocity' further decreases the incentive to participate.¹⁴⁵ Moreover, APEC's best practices and model measures serve as guidance for members. The problem nonetheless lies in compliance, which substantially varies across issue areas. For instance, while ROO harmonization may be encouraged by the *Model Measures on Rules of Origin*, it is inconceivable to rely on such measures to solve the 'spaghetti bowl' problem.¹⁴⁶ This issue has particularly escalated to a far-reaching challenge as a result of divergent ROOs in 21 APEC members' 128 FTAs including 49 intra-APEC FTAs.¹⁴⁷

¹⁴¹ ASEAN FTA Agreements, <http://www.aseansec.org/Fact%20Sheet/AEC/AEC-12.pdf> (visited 22 July 2012).

¹⁴² Key Indicators Database, StatsAPEC, http://statistics.apec.org/index.php/key_indicator/kid_result/4 (visited July 20, 2012); Brock Williams, 'Trans-Pacific Partnership (TPP) Countries: Comparative Trade and Economic Analysis', *CRS Report for Congress*, 30 May 2012, at 27–28.

¹⁴³ CTI Report 2011, above n 69, at 33.

¹⁴⁴ *Ibid.*

¹⁴⁵ APEC Pathfinder Initiative for Self-certification of Origin, http://www.apec.org/Home/Groups/Committee-on-Trade-and-Investment/~/_media/47422D81998D46DFBFE79D5A3D8DB56A.ashx (visited 20 July 2012).

¹⁴⁶ The 'spaghetti bowl' problem, which refers to the complication that arises from the application of rules of origins in multiple FTAs, is also known as the 'noodle bowl' problem in the context of Asian regionalism.

¹⁴⁷ Amb. Muhamad Noor, *Regional Economic Integration: The Role of APEC*, Power Point Slides (2012), at 4 (on file with the author); see also APEC and Progress toward Bogor

To solve fragmentation of FTAs and APEC's soft-law restriction, it is vital for APEC to undertake a more active role in cultivating an APEC-wide FTAAP. Built on existing achievements supported by political consensus, APEC's position as an overarching architecture should complement regional trading blocs by harmonizing their differences. Therefore, APEC governments are reminded that the proliferation of FTAs without an enhancement of APEC's role would counteract economic integration. An FTAAP was first proposed by the ABAC in 2004.¹⁴⁸ An FTAAP is deemed a promising 'Plan B' for the Doha Round impasse and a stimulus for the Bogor Goals. It is expected to revitalize trade liberalization by transforming APEC into a binding trade bloc. After APEC decided to 'seriously consider' the ABAC proposal in 2006, the 2010 Leaders' Declaration identified potential pathways to an FTAAP, including 'ASEAN+3, ASEAN+6, and the Trans-Pacific Partnership'.¹⁴⁹ ASEAN+3 encompasses ASEAN's 10 countries and China, Japan and Korea, and ASEAN+6 covers these members, as well as Australia, India and New Zealand.¹⁵⁰ The TPP is an expansion of the Trans-Pacific Strategic Economic Partnership Agreement (the P4 Agreement), which was concluded between Singapore, New Zealand, Chile and Brunei and became effective in 2006.¹⁵¹ The USA joined the TPP in 2009 and aimed at building the TPP as the 'high-standards, 21st-century agreement' that will fortify the US policy to re-engage with Asia.¹⁵² As of November 2012, the TPP has undergone 14 rounds of negotiations and expanded to 11 APEC economies.¹⁵³

Of the three pathways to an FTAAP, the TPP has progressed most substantially. The TPP has encountered fewer political hurdles than its

Goals, Inter-American Development Bank (2010), at 1 ('Nearly two-thirds of APEC members' total trade is with other APEC economies. 42 percent of the intra-APEC trade, in turn, is between parties to an FTA...').

¹⁴⁸ Mary Swire et al., *APEC Business Leaders Push Asia-Pac FTA*, Tax-News, 29 February 2012, http://www.tax-news.com/news/APEC_Business_Leaders_Push_AsiaPac_FTA—54212.html.

¹⁴⁹ 2006 Leaders' Declaration, above n 70; 2010 Leaders' Declaration: Yokohama Declaration – The Yokohama Vision – Bogor and Beyond, 13–14 November 2010 [2010 Leaders' Declaration].

¹⁵⁰ Ian F. Fergusson and Bruce Vaughn, 'The Trans-Pacific Partnership Agreement', *CRS Report for Congress*, 10 January 2011, at 7.

¹⁵¹ *Ibid.* at 1.

¹⁵² *Ibid.*; USTR Statement Regarding the Trans-Pacific Partnership Negotiations, <http://www.ustr.gov/about-us/press-office/press-releases/2011/september/ustr-statement-regarding-trans-pacific-partnersh> (visited 20 July 2012).

¹⁵³ Trans-Pacific Partnership (TPP): 15th Round of TPP Negotiations Set for Auckland, New Zealand - 3–12 December 2012, <http://www.ustr.gov/tpp> (visited 26 November 2012); News: TPP Stakeholder Meeting, Australian Government: Department of Foreign Affairs and Trade [News: TPP Stakeholder Meeting], <http://www.dfat.gov.au/fta/tpp/> (visited 20 July 2012); Matt Spetalnick et al., 'Thailand Says to Join Trans-Pacific Partnership Trade Talks', *Reuters*, 18 November 2012, <http://www.reuters.com/article/2012/11/18/us-asia-obama-trade-idUSBRE8AH06R20121118> (visited 19 November 2012).

competitors because ‘in theory’, all APEC members are able to join. While Washington has opposed the ‘ASEAN plus N’ framework to transform an intra-Asia FTA that excludes the USA, Japan and ASEAN are also concerned about this framework becoming Sino-centric.¹⁵⁴ In comparison, the TPP has included more APEC members. Economic models also demonstrate that the TPP can create a more positive impact on the 21 members’ GDP and welfare than ASEAN+3 and ASEAN+6.¹⁵⁵

Notwithstanding the TPP’s rapid development, its substantive influence on APEC is rarely systemically examined. I offer the following observations. First, the pre-condition of whether the TPP can be a constructive building block for an APEC-wide FTAAP lies in the TPP’s membership and associated trade effect. In reality, the TPP’s expansion hinges on its significance to US trade because Washington is the TPP’s major driving force. APEC as a whole encompasses 62% of US merchandise trade, and the current 11 TPP members cover only 28% of such trade.¹⁵⁶ For the USA, the economic significance of including Canada and Mexico, the latest TPP members, is limited because NAFTA covers most of their trade.¹⁵⁷ Although China is the world’s second largest economy, its TPP membership can be a complicated issue because of the US Congress’ critical stance on Beijing’s unfair trade practices.¹⁵⁸ Tokyo expressed interest in joining the TPP in 2011.¹⁵⁹ While Japan would substantially increase the TPP’s economic scale, its accession hinges on whether its government can overcome the agriculture sector’s opposition amid a fragile post-quake recovery.

Importantly, the ongoing trilateral China–Japan–Korea (CJK) FTA negotiations could challenge the TPP’s expansion, as the three countries may view it as an interim substitute for the TPP. The CJK FTA launched negotiations in 2012, following the conclusion of the CJK investment agreement.¹⁶⁰ The CJK FTA not only covers trilateral trade valued at

¹⁵⁴ See e.g. Yamazawa, above n 61, at 114 (discussing US opposition to Malaysia’s East Asian Economic Caucus proposal).

¹⁵⁵ Sangkyom Kim, Pathways to Asia-Pacific Economic Community: ASEAN +3, +6 or TPP? Power Point Slides (2011), at 21–25 (on file with the author).

¹⁵⁶ Williams, above n 142, at 8.

¹⁵⁷ Ibid.

¹⁵⁸ See also Tingsong Jiang and Warwick J. McKibbin, ‘What Does a Free Trade Area of the Asia-Pacific Mean to China’, *Brookings Global Economy & Development Working Paper*, 23 August 2008, at 19 (‘China would turn to a loser of US\$4billion...if without joining the FTAAP...’).

¹⁵⁹ TPP Leaders Announce Broad Outline of Agreement; Japan, Canada and Mexico Express Interest, 15 November 2011, <http://www.barnesrichardson.com/?t=40&an=10194&format=xm1&p=3731> (visited 1 July 2012).

¹⁶⁰ ‘China Plans Talks with Japan, Korea on Free Trade Area’, *Bloomberg News*, 14 May 2012, <http://www.bloomberg.com/news/2012-05-12/china-japan-korea-to-start-free-trade-talks-this-year.html> (visited 1 July 2012).

USD 690 billion, but also influences the countries' stance on the TPP.¹⁶¹ In China's view, the CJK FTA may counterbalance the US-dominated TPP, which makes it difficult for China to join due to the demanding accession terms set by Washington.¹⁶² Both Japan and Korea are uneasy with the TPP's impact on heavy farm subsidies and may expect to concede much less in agriculture under the CJK FTA. Korea particularly holds the wait-and-see view on the TPP because the Korea-US FTA has already substantially liberalized barriers to the US market.¹⁶³

Second, the TPP membership is associated with its accession process. Although Article 20 of the P4 Agreement allows 'any APEC Economy' to enter the agreement, this 'open accession clause' is more complex in operation.¹⁶⁴ Candidate countries are expected to negotiate with each TPP member on a bilateral basis before an informal 'invitation' is extended based on the consensus of the existing members. The new members' accession is also subject to congressional approval. In the US case, such approval requires 90 days.¹⁶⁵ What APEC economies should note is that the TPP's 'highly secretive law making process', which academics and the US Congress have criticized, has undermined the fairness of the accession procedure.¹⁶⁶ The TPP's lack of transparency renders countries that subsequently acceded second-tier members.¹⁶⁷ Even though the negotiating countries were not informed of textual details, they are unable to veto negotiated provisions upon accession.¹⁶⁸ This process poses daunting obstacles for APEC

¹⁶¹ 'China, Japan, South Korea Agree to Start Free-Trade Negotiations', *Macau Daily*, 24 July 2012, <http://devmdt.macaudailytimes.com.mo/index.php/asia-pacific/35790-china-japan-south-korea-agree-to-start-free-trade-negotiations.html> (visited 26 July 2012).

¹⁶² See Shiro Armstrong, 'China's Participation in the Trans-Pacific Partnership', *East Asia Forum*, 11 December 2011, <http://www.eastasiaforum.org/2011/12/11/china-participation-in-the-trans-pacific-partnership/> (visited 26 July 2012) (examining the impact of China's accession to the TPP).

¹⁶³ Robert Scollay, 'Evolution of the Asia-Pacific Trade Architecture: Stocktake and Future Outlook', in Vinod K. Aggarwal and Richard Feinberg (eds), *APEC Study Centers Consortium Conference 2011: Key Findings and Policy Recommendations: Green Growth, Trade Integration and Regulation Convergence* (APEC Study Centers Consortium, 2011) 145, 154.

¹⁶⁴ Trans-Pacific Strategic Economic Partnership Agreement, Article 20.6.1.

¹⁶⁵ Trans-Pacific Partnership, <http://www.canadians.org/trade/issues/TPP/index.html> (visited 23 July 2012).

¹⁶⁶ David S. Levine et al., Letter to Amb. Ron Kirk, 9 May 2012, <http://bloglawblog.com/blog/> (visited July 22, 2012); Rosa L. DeLauro et al., Letter to The Honorable Ambassador Ron Kirk, 27 June 2012, <http://www.publicknowledge.org/files/TPP%20Letter%20FINAL.pdf> (visited July 22, 2012).

¹⁶⁷ See Michael Geist, 'What's behind Canada's Entry to the Trans-Pacific Partnership Talks', 28 June 2012, <http://www.michaelgeist.ca/content/view/6566/159/> (visited 26 July 2012) ('The price of admission was very steep - Canada appears to have agreed to conditions that grant it second-tier status...').

¹⁶⁸ *Ibid.*

members to assess their capability to join the TPP. For example, it is still unclear to what extent the TPP membership will affect Canada's dairy products, which are highly protected under a 315% tariff.¹⁶⁹

Third, with respect to the TPP's substance, intellectual property rights (IPR) protection is a key issue. Developed countries, led by the USA, have pursued the imposition of requirements beyond the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The Anti-Counterfeiting Trade Agreement (ACTA), which included seven APEC-member signatories, was the major initiative to cultivate TRIPS-plus standards on a multilateral basis.¹⁷⁰ After the European Parliament voted down the ACTA due to human rights and freedom of expression concerns in 2012, the TPP became the most feasible venue for TRIPS-plus standards.¹⁷¹ Nonetheless, TRIPS-plus obligations can be difficult for APEC's developing countries to accept. An example is Thailand's reluctance to US demands of including TRIPS-plus pharmaceutical patent protection due to the Thai health sector's opposition.¹⁷² Chile, an original TPP member, even threatened to withdraw from TPP talks because of unreasonable IPR standards.¹⁷³ Not to mention that the TPP standards go beyond ACTA requirements. While both treaties mandate criminal penalties for willful copyright infringements on a 'commercial scale', the TPP proposal allows even 'acts that result in no direct or financial gain' to be punished.¹⁷⁴ Seeking convergence of these IPR issues will continue to be a challenge for TPP negotiations.

Fourth, compared to APEC's soft-law approach, the TPP will provide a more effective mechanism for ROO harmonization that will prevent the 'spaghetti bowl' syndrome. The TPP's controversial ROO issue is the potential adoption of the 'yarn-forward' rules, which were included in the NAFTA and following US FTAs. Under such rules, textile and apparel products can

¹⁶⁹ 'Pacific Free Traders Eye Canada's Dairy, Poultry Markets', *The Globe and Mail*, 21 June 2012, <http://m.theglobeandmail.com/news/politics/pacific-free-traders-eye-canadas-dairy-poultry-markets/article4358953/?service=mobile> (visited 1 July 2012).

¹⁷⁰ See Anti-Counterfeiting Trade Agreement (ACTA), <http://www.ustr.gov/acta/> (visited 22 July 2012) (stating that signatories include '[t]he United States, Australia, Canada, Korea, Japan, New Zealand, Morocco, and Singapore').

¹⁷¹ 'ACTA: Controversial Anti-Piracy Agreement Rejected by EU', *BBC News*, 4 July 2012, <http://www.bbc.co.uk/news/technology-18704192> (visited 6 July 2012).

¹⁷² See generally Duangrat Laohapakakul, *United States – Thailand Free Trade Agreement Negotiations: Potential Effects on Pharmaceutical Patent Protection in Thailand*, April 2006, LL.M. Paper, Harvard Law School, available at <http://leda.law.harvard.edu/leda/data/774/Laohapakakul06.pdf> (visited 6 July 2012).

¹⁷³ Sean Flynn, 'Chile Threatens to Pull out of TPP Because of US IP Demands', 10 May 2012, <http://infojustice.org/archives/21414> (visited 6 July 2012).

¹⁷⁴ Glyn Moody, 'Some Countries Want to Fix TPP...By Making it More Like ACTA', 22 May 2012, <http://www.techdirt.com/articles/20120515/06141218921/some-countries-want-to-fix-tpm-making-it-more-like-acta.shtml> (visited 6 July 2012).

only be accorded preferential treatment if they originate from FTA countries and their cutting and assembling also occur in the region.¹⁷⁵ Preferred by the US textile industry, the yarn-forward rules nonetheless contravene export interests of Vietnam and Malaysia, both of which substantially use Chinese fabrics.¹⁷⁶ Finally, the TPP's WTO-plus labor rights and environmental standards increase accession regulatory costs. Brunei, Mexico and Vietnam will be required to revamp their labor regulations, as their labor unions are primarily government or company-controlled and lack independent legal status.¹⁷⁷ These WTO-plus requirements will impose significant obstacles should China and Russia intend to join the TPP.

The TPP serves as a critical avenue to achieve APEC's Bogor Goals and an FTAAP and therefore profoundly impacts the APEC agenda. In 2010, APEC leaders instructed APEC to be the 'incubator' to offer 'leadership and intellectual input into' potential development of the TPP, as well as ASEAN+3 and ASEAN+6.¹⁷⁸ However, APEC has thus far failed to enforce this mandate. APEC's position as a non-negotiating forum makes it a passive incubator. It has provided neither leadership nor intellectual input or even logistic support for ongoing TPP talks. The only 'mechanism' that APEC performed is to offer convenient forums for TPP negotiations on the sidelines of APEC meetings. The APEC report on the TPP merely explains how the TPP and APEC are mutually beneficial and how APEC's existing soft-law rules can be useful.¹⁷⁹ In other words, APEC's position in reality is 'what we have done is enough'. APEC should assess the impact of various regional undertakings on APEC members. Providing an in-depth legal and economic analysis of TPP proposals will help non-TPP members assess potential accession. Such an analysis will contribute to the TPP's much-needed transparency and facilitate the convergence of APEC members' trade interests in negotiations.

IV. REFORM PROPOSALS

As APEC is marching toward its third decade, it becomes necessary for the soft-institution to undergo reforms to respond to 'next-generation trade and investment issues'.¹⁸⁰ Although academics and APEC members have proposed reform initiatives through the APEC International Assessment Network and

¹⁷⁵ Leonie Barrie, 'Why US Textile Groups Fear Vietnam in TPP Pact', 2 June 2011, http://www.just-style.com/analysis/why-us-textile-groups-fear-vietnam-in-tpp-pact_id111261.aspx (visited 1 July 2012).

¹⁷⁶ Greg Rushford, 'Obama's Double Standard on TPP', *The Wall Street J.*, 7 May 2012, <http://online.wsj.com/article/SB10001424052702304363104577389601932234844.html> (visited 1 July 2012).

¹⁷⁷ The Trans-Pacific Partnership (TPP), Citizens Trade Campaign, <http://www.citizenstrade.org/ctc/wp-content/uploads/2012/03/TransPacificFactsheet.pdf> (visited 22 July 2012).

¹⁷⁸ 2010 Leaders' Declaration, above n 149.

¹⁷⁹ The Mutual Usefulness between APEC and TPP, APEC Policy Support Unit, October 2011.

¹⁸⁰ 2011 Leaders' Declaration, above n 105.

the Reform Friends of the Chair since 2000, progress has been sluggish.¹⁸¹ APEC governments should focus APEC reform on transforming its role to an active incubator for the Bogor Goals that may lead to an FTAAP.

A cost-benefit analysis would support the proposals below as a feasible reform roadmap. On one hand, the potential costs are limited because the advantages of APEC's soft-law approach will be maintained in sensitive areas. The introduction of hard-law elements poses surmountable challenges to developing country members, particularly when compared with the competing FTA initiatives in which they already take part. Additional expenses that may occur for structural reform will constitute only a fraction of the budgets for APEC's annual meetings. On the other hand, reforming the decision-making mechanisms by allowing for legally binding agreements will pave the way for a binding FTAAP, which will reduce business and government costs because of the fragmentation of regional FTAs. The proposals that strengthen APEC's 'think tank' and peer review functions, modeled on the OECD and the WTO, will further energize APEC's role as an indispensable trans-regional economic framework.

A. The APEC Charter

I propose the ratification of the APEC Charter, which will confer legal personality on the institution and transform APEC's *sui generis* status under international law.¹⁸² Most multilateral organizations are accorded legal status under their establishment treaties such as the Marrakesh Agreement Establishing the WTO.¹⁸³ In *Reparation for Injuries Suffered in the Service of the United Nations*, the International Court of Justice (ICJ) dealt with a preliminary question as to legal personality of the United Nations (UN).¹⁸⁴ Although the Charter of the United Nations does not mention legal personality, the ICJ found that based on the Charter's 'purposes and principles' and the UN's 'practice', the UN possesses 'indispensable' personality on the international plane separate from member states.¹⁸⁵ Unlike these cases, APEC's legal personality can be neither conferred nor inferred. The 1992 Bangkok Declaration that stipulated APEC's intuitional arrangements was simply a declaration of intent, and members have consistently emphasized the non-binding nature of APEC's instruments and operation.

¹⁸¹ John McKay et al., 'Preface', in Richard E. Feinberg (ed.), *APEC as an Institution: Multilateral Governance in the Asia-Pacific* (Singapore: Institute of Southeast Asian Studies, 2003) 7, 7; APEC Reform 2006 Deliverables, Ministry of Foreign Affairs of Japan, November 2006, <http://www.mofa.go.jp/policy/economy/apec/2006/reform.html> (visited 1 July 2012).

¹⁸² Ravenhill, above n 23, at 4 (discussing APEC's *sui generis* status).

¹⁸³ Marrakesh Agreement Establishing the World Trade Organization, Article VIII.1.

¹⁸⁴ Advisory Opinion, *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports (1949), at 118–79.

¹⁸⁵ *Ibid.*

APEC should take a meaningful step to elevate its legal status. A common interest of 21 members, the APEC Charter will buttress APEC's commitments to economic integration. ASEAN may serve as a model. Like the Bogor Declaration, the loose ASEAN Declaration that established ASEAN mandates no legal obligations.¹⁸⁶ It took ASEAN almost 10 years to pass the first formal accord, the Treaty of Amity and Cooperation in Southeast Asia.¹⁸⁷ While maintaining the consensus-based principle, ASEAN's institutionalization culminated in the ASEAN Charter in 2007. As the evolution demonstrates, the drive for integration can overcome the Westphalian non-intervention concept. Similarly, the APEC Charter will be a pivotal impetus for accelerating APEC's implementation of the Bogor Goals. As APEC members have agreed upon a legally binding FTAAP as APEC's target, the APEC Charter will provide an incremental contribution to the process.

Under the APEC Charter, flexible consensus should be introduced into the decision-making process so that trade liberalization and facilitation initiatives can progress significantly. While recognizing that certain binding resolutions will expedite the process, 'special and differential treatment' should be granted to less developed countries. Based on the ITA and EVSL experiences, APEC should prioritize liberalizing less sensitive trade areas. Such liberalization can nonetheless be conducted on a multi-sectoral basis. Commitments to the pathfinder approach should not be accorded to non-participating countries, thus avoiding the free-rider problem and incentivizing additional members to participate. In addition, the APEC Charter should include the accession procedure for institutional growth. The 1997 APEC guidelines stipulate criteria for new members such as geographic location and 'substantial and broad-based economic linkages with existing APEC members'.¹⁸⁸ Yet, due to the moratoriums that extended to 2010, candidate countries including India, Panama and Myanmar were rejected from APEC membership.¹⁸⁹ More transparent accession procedures under the APEC Charter should allow for lifting the current *de facto* membership moratorium. Granting membership to Pacific Rim economies that commit to APEC's liberalization agenda will further energize regional integration.

¹⁸⁶ ASEAN Declaration (Bangkok Declaration) (1967).

¹⁸⁷ Treaty of Amity and Cooperation in Southeast Asia (1976).

¹⁸⁸ APEC Ministerial Statement on Membership (1997).

¹⁸⁹ In 2007, the original 10-year moratorium was further extended to 2010. Eric M. Pedersen, 'What Future Course of Action Should it Pursue?', 16 *Currents: International Trade Law Journal* 31 (2008) 34; see also Won-Ho Kim, 'The Next APEC Membership from Latin America: A Contextual Approach', *KIEP APEC Study Series 08-03* (2008), at 14 ('The failed applicants from 1997 and 2007 – India, Colombia, Ecuador, Macao, Mongolia, Pakistan, Panama, Sri Lanka, Cambodia, Laos, and Myanmar – possible will be the next candidates for new membership.').

B. Governance of the APEC Secretariat

The 1992 Bangkok Declaration provided the basis for the APEC Secretariat to be established in Singapore.¹⁹⁰ Unlike APEC's *sui generis* status, the APEC Secretariat was granted 'the legal capacities of a body corporate' under Singapore law in 1993.¹⁹¹ As the Bangkok Declaration was not a legally binding treaty, privileges and immunities of the APEC Secretariat and its staff are confined to Singapore only.¹⁹² The APEC Secretariat is unable to issue travel documents akin to UN laissez-passers to staff members.¹⁹³ In fact, APEC officials have to use their own national passports subject to the 21 members' visa requirements.¹⁹⁴ This travel barrier hinders their work efficiency and renders their status inferior to business professionals who are ABTC holders. More seriously, unlike international organizations, neither APEC nor its Secretariat is entitled to assert privileges and immunities in foreign courts. This defect poses legal risks to Secretariat employees, many of whom undertake tasks in APEC host countries that lack well-developed legal systems. A case comparable to the distinction between APEC and its Secretariat is ASEAN. The ASEAN Secretariat was once only recognized as a legal person under the law of Indonesia, where the Secretariat sits.¹⁹⁵ However, the ASEAN Charter provides a legal basis for obliging 10 member states to recognize privileges and immunities of ASEAN and its affiliated personnel. This issue, which is of pragmatic significance, reinforces my previous argument for the APEC Charter.

Other than strengthening its legal status, the APEC Secretariat should engage in further reform. In the initial era, members' reluctance to institutionalize APEC led to the weakness of the Secretariat. As illustrated in Table 1 below, the financial support and staff of the APEC Secretariat are far more limited than their WTO, OECD and ASEAN counterparts. Its annual budget of USD 5 million accounts for less than one-third of the ASEAN Secretariat's budget.¹⁹⁶

¹⁹⁰ Bangkok Declaration on Asia-Pacific Cooperation (APEC): Institutional Arrangement – 1992 APEC Ministerial Meeting, Article A.1.

¹⁹¹ The International Organizations (Immunities and Privileges) (APEC Secretariat) Order 1993, Article A.3.

¹⁹² See generally Agreement between the Government of Singapore and the Secretariat of the Asia Pacific Economic Cooperation Organization Relating to the Privileges and Immunities of the APEC Secretariat (1993); Supplemental Agreement between the Secretariat of the Asia-Pacific Economic Cooperation Organization (APEC) Relating to the Privileges and Immunities of the APEC Secretariat (2005).

¹⁹³ Article VII of the 1946 Convention on the Privileges and Immunities of the United Nations authorizes the issuance of UN laissez-passers.

¹⁹⁴ Interview with APEC officials [names withheld], 12 March 2012.

¹⁹⁵ Agreement between the Government of Indonesia and ASEAN Relating to the Privileges and Immunities of the ASEAN Secretariat (1979), Article 2.2.

¹⁹⁶ Kavi Chongkittavorn, 'ASEAN Secretariat Must Be Empowered', *The Nation*, 21 May 2012, <http://www.nationmultimedia.com/opinion/Asean-Secretariat-must-be-empowered-30182419.html> (visited 1 July 2012); APEC – Frequently Asked Questions, <http://www.mfat.govt.nz/Trade-and-Economic-Relations/APEC/5-APEC-FAQs.php> (visited 17 June 2012).

Table 1. Selected information on the Secretariats of International Organizations

Organization	Annual budget	Number of staff
OECD	EUR 347 million	2500
WTO	CHF 196 million	677
ASEAN	USD 15.8 million	260
APEC	USD 5 million	60

Sources: OECD Week 2012: Secretariat-General's Report to Ministers 2012 (2012), at 33; Who Does What?, http://www.oecd.org/pages/0,3417,en_36734052_36761791_1_1_1_1_1,00.html (visited 7 June 2012); World Trade Organization: Annual Report 2012 (2012), at 140; Kavi Chongkittavorn, 'ASEAN Secretariat Must Be Empowered', *The Nation*, 21 May 2012, <http://www.nationmultimedia.com/opinion/Asean-Secretariat-must-be-empowered-30182419.html> (visited 1 July 2012); APEC – Frequently Asked Questions, <http://www.mfat.govt.nz/Trade-and-Economic-Relations/APEC/5-APEC-FAQs.php> (visited 17 June 2012); Frequently Asked Questions, <http://www.apec.org/FAQ.aspx> (visited 17 June 2012).

In addition to locally recruited administrative personnel, 19 of 60 staff members are 'seconded diplomats' who primarily serve as program directors.¹⁹⁷ This system reflects some countries' mentality to have 'their own people' in the Secretariat, but hinders institutional independence. As part of their diplomatic career, the seconded diplomats are posted to the APEC Secretariat usually on a three-year basis and financed by their respective governments rather than the Secretariat.¹⁹⁸ The APEC tasks to which the diplomats are assigned are not necessarily based on their expertise. Another structural abnormality is that the APEC executive director has no right to discipline or promote diplomats, although he may 'occasionally involve' himself in their evaluation upon respective ministries' request.

The APEC Secretariat has been impeded from giving APEC projects constructive guidance due to limited financial support, professionalism and institutional memory. Its role is therefore confined to passive coordination. In practice, APEC's primary administrative tasks are undertaken by host economies, committees and working groups. This horizontal designation of tasks led to 'a proliferation of uncoordinated projects' and the fragmentation of APEC resources.¹⁹⁹ In addition, because of insufficient analytical capacity, APEC research projects are often 'outsourced' to the Pacific Economic Cooperation Council (PECC), which is a tripartite partnership among governments, businesses and academics.²⁰⁰ Ironically,

¹⁹⁷ Frequently Asked Questions, <http://www.apec.org/FAQ.aspx> (visited 17 June 2012); APEC Secretariat Report on Key Developments in 2011, 2012/SOM1/SCCP/002, 9–11 February 2012, at 4.

¹⁹⁸ Interview with APEC officials [names withheld], 12 March 2012.

¹⁹⁹ Ravenhill, above n 23, at 132; McKay et al., above n 181, at 10.

²⁰⁰ For information on APEC-commissioned projects, see Mignon Chan, The Role of PECC in Support of APEC: Problems and Prospects, paper presented at the 'APEC Update 2000: The Role of Institutions in Support of APEC' conference (2000), at 3 (on file with the author).

with similarly limited resources for its Secretariat, the PECC projects are in fact supported by national committees, many of which are financed by their governments. This potential conflict of interests makes it doubtful whether their research projects reflect objective assessments that examine the shortcomings of governmental measures. These examples highlight the importance of enhancing the APEC Secretariat's pragmatic function by expanding financial support and the number of professionals it encompasses.²⁰¹

The reform of the APEC Secretariat has been discussed since 2000 but has yielded limited results.²⁰² Two noteworthy milestones are the creation of the fixed-term executive director position and the Policy Support Unit (PSU). Prior to 2010, the APEC executive directors and the deputy executive directors were on a rotating basis among 21 members.²⁰³ The executive director came from the economy that hosted the APEC meetings in that year and the deputy executive director, who would be the next executive director, came from the next host economy.²⁰⁴ The fact that these ambassador-level officials led the APEC Secretariat for no more than two years hindered the implementation of any reform plans. The change to a three-year executive director position was implemented in 2010 and is expected to strengthen leadership of the APEC Secretariat.²⁰⁵

The establishment of the PSU in 2008 enhances the APEC Secretariat's objective assessment of the APEC's trade and investment agenda.²⁰⁶ The PSU's empirical analyses are of particular importance to APEC's policy decisions. The PSU is not yet integrated into the APEC Secretariat and is structurally distinguishable from the Secretariat. The PSU's mandate focuses solely on APEC-related research rather than the implementation of substantive projects. The APEC Secretariat's budget is based on 21 members' mandatory contributions, whereas the PSU is supported by voluntary contributions. The increased number of contributors from two to seven major

²⁰¹ See Richard Feinberg and Joyce Lawrence, 'Improving APEC's Coherence', Paper presented at the APEC Study Centre Network Conference for APEC 2007 (2006), at 4 ('An increase in professional and administrative staff by 50 percent would cost about US\$20 million per year, which is a small fraction of [the budget of the annual leaders' meetings].').

²⁰² For example, three policy reports of the APEC International Assessment of Network since 2000 and APEC leaders' discussions since 2003. McKay et al., above n 181, at 7; APEC Reform 2006 Deliverables, above n 181.

²⁰³ Ravenhill, above n 23, at 131.

²⁰⁴ Ibid.

²⁰⁵ The first fixed-term executive director is Ambassador Muhamad Noor Yacob from Malaysia. APEC Secretariat, <http://www.apec.org/About-Us/APEC-Secretariat.aspx> (visited 22 July 2012).

²⁰⁶ Annual Report 2011, APEC Policy Support Unit, Mar. 2012 [PSU Annual Report 2011], at 1.

economies shows increasing support for the PSU.²⁰⁷ Finally, unlike the APEC Secretariat, PSU officials have no government affiliation. To maintain its autonomy, the PSU has independently recruited economics and public policy-trained professionals from its inception. The *Governance Arrangements* authorize the PSU's mandate to extend to 2013 and the feasibility of its integration into the APEC Secretariat was discussed.²⁰⁸ The PSU should become a permanent division within the APEC Secretariat because the PSU strengthens APEC's transparency and accountability. As APEC was originally modeled on the OECD, the PSU will help overcome APEC's inability to provide high-quality research and policy recommendations.

A more professionalized APEC Secretariat will increase APEC's relevance in economic integration and its comparative advantage over other regional undertakings. It can further streamline the coordination of the fragmented committees and working groups that have overlapping mandates. For instance, as economic and technical cooperation underpins one of APEC's three pillars, ECOTECH projects have rapidly proliferated. Although regional economic integration is the first priority under the funding criteria, only 8% of APEC-funded ECOTECH projects addressed this end.²⁰⁹ To efficiently utilize APEC's resources, the APEC Secretariat should be the gatekeeper to evaluate their actual performance and recommend that some projects merge or cease.

With the assistance of the enhanced secretariat, APEC can strengthen the public-private partnership by responding timely to business needs and civil society.²¹⁰ Given the escalating Eurozone crisis, an imminent challenge to APEC is financial cooperation. APEC's incapability of handling the Asian financial crisis led to its own credibility crisis. APEC finance ministers' meetings that began in 1994 achieved no deliverable results.²¹¹ To avoid being marginalized by emerging financial frameworks, APEC should focus on financial cooperation from a business perspective. One key task is to address

²⁰⁷ 2009 contributors include Australia and Hong Kong and 2011 contributors include Australia, Japan, the United States, Taiwan, Korea, Indonesia, and Malaysia. Ibid at 11; Annual Report 2009, APEC Policy Support Unit, February 2010, at 13.

²⁰⁸ PSU Annual Report 2011, above n 206, at 2 and 12.

²⁰⁹ APEC Senior Officials' Report on Economic and Technical Cooperation 2011 (2011), at 23 and 95. See also Richard E. Feinberg, 'Project Selection and Evaluation: APEC's Budget and Management Committee and the Secretariat', in Richard E. Feinberg (ed.), *APEC as an Institution: Multilateral Governance in the Asia-Pacific* (Singapore: Institute of Southeast Asian Institute, 2003) 73, 80 (arguing that the APEC Secretariat should improve evaluation of APEC programs).

²¹⁰ See Richard E. Feinberg, 'Voluntary Multilateralism and Institutional Modification: The First Two Decades of Asia Pacific Economic Cooperation (APEC)', 3 *The Review of International Organizations* 239 (2008) 247 ('ABAC would issue periodic reports with specific recommendations, but would be frustrated by official APEC's lack of responsiveness and inability to make hard decisions...').

²¹¹ For information on APEC's discussions on finance issues, see 1994 APEC Finance Ministerial Meeting, http://www.apec.org/Meeting-Papers/Ministerial-Statements/Finance/1994_finance.aspx (visited 22 July 2012).

the ABAC's concern about the impact of regulatory requirements of the G20 and Basel III on SMEs' access to finance.²¹² This is particularly significant to the APEC region because more than 90% of the companies are SMEs and cover 25% of the work force.²¹³

C. Enhanced IAP peer review process

Individual Action Plans, which commenced in 1996, are at the core of the Manila Action Plan to implement the 2010/2020 target under the Bogor Goals.²¹⁴ APEC members report their progress in 15 areas covered under the Osaka Action Agenda in their respective IAPs, which are subject to peer review. Comparable systems that ensure transparency include the WTO's Trade Policy Review Mechanism (TPRM) and the OECD's peer review system, conducted by the Economic and Development Review Committee (EDRC).²¹⁵ Although all APEC economies are WTO members, only the USA, Japan, and China are under TPRM review every two years; the remaining members are reviewed every four or six years, depending on their share of global trade.²¹⁶ In every 18-month cycle, the EDRC also reviews the economic policy of 11 APEC members, including eight OECD countries plus China, Indonesia, and Russia.²¹⁷ APEC's IAP peer review mechanism nonetheless applies to all 21 members and covers APEC-designated trade areas beyond the WTO and the OECD. There are necessary reforms for the IAP mechanism to make it a more effective monitoring system that 'hardens' the soft-law nature of APEC's concerted unilateral liberalization.

APEC introduced the IAP peer review system to allow additional exertion of peer pressure in 1998 and involved independent experts who have examined members' IAPs since 2002.²¹⁸ Every three to four years, each APEC member is required to submit a full IAP and provide an update in intervening years.²¹⁹

²¹² Letter to The Honorable Francisco Sanchez, 29 April 2011, in Annex B, APEC Business Advisory Council Report to APEC Economic Leaders (2011), at 59.

²¹³ The Kyoto Report on Growth Strategy and Finance, 2010/FMM/010, 5–6 November 2010, at 5.

²¹⁴ The Individual Action Plan (IAP) and IAP Peer Review, 2011/SOM2/021anx2, 17–18 May 2011 [IAP Peer Review], at 1.

²¹⁵ Overseeing National Trade Policies: The TPRM, http://www.wto.org/english/tratop_e/tp_r_e/tp_int_e.htm (visited 26 July 2012); Peer Reviews in Economic Surveys, <http://www.oecd.org/site/peerreview/peerreviewsineconomicsurveys.htm> (visited 26 July 2012).

²¹⁶ Overseeing National Trade Policies: The TPRM, above n 215.

²¹⁷ Peer Review in Economic Surveys: The Role of the EDRC, <http://www.oecd.org/site/peerreview/peerreviewineconomicsurveystheroleoftheedrc.htm> (visited 26 July 2012); OECD Economic Surveys: List by Country, <http://www.oecd.org/eco/economicsurveysandcountry/surveillance/oecdeconomicsurveyslistbycountry.htm> (visited 28 July 2012).

²¹⁸ Stages of the IAP peer review process include (i) Origin and Pre-launch (1994–1997), (ii) Voluntary Peer Review of IAPs (1997–2002), (iii) First Cycle of Enhanced Peer Review (with report by one independent expert) (2002–2006), and (iv) Second Cycle of Enhanced Peer Review (with report by two independent experts) (2007–2009). Soesastro, above n 84, at 78.

²¹⁹ *Ibid.*

It generally takes 16 months to complete the entire review process.²²⁰ The procedure includes the compilation of comments and questions by representatives from APEC governments and the ABAC, two experts' on-site visits in the country under review, and peer review sessions.²²¹

Based on the IAPs, APEC was able to provide quantitative and qualitative analysis of the progress towards the Bogor Goals. APEC members subject themselves to voluntary review for two reasons. First, the review process helps governments to understand their overall trade policies and consider the adoption of cutting-edge trade measures such as computerized customs facilitation.²²² From the capacity building perspective, independent experts may function as policy consultants at a limited cost. Second, in countries with a complex bureaucracy, egocentrism of decentralized ministries often poses a political hurdle to structural reform. The policy-makers may utilize recommendations that APEC reviewers provide as external pressure to overcome domestic opposition to trade liberalization.²²³

In 2011, APEC adopted the revised IAP review process to improve the mechanism. The new process includes the reporting expansion of OAA areas such as transparency and FTAs, and the PSU's report on IAP assessments that will go public.²²⁴ The review schedule from 2012 to 2020, the Bogor Goals' deadline, is also provided.²²⁵ While the operation of the updated system remains to be seen, additional reforms are essential. For example, the IAPs' format inconsistency obscures the actual trade liberalization process. Under the positive-list modality, the IAPs only show what measures the members implemented rather than areas to be improved.²²⁶ Despite the IAP template that was introduced to promote consistency and transparency, APEC members have a large degree of discretion to list OAA-related regulatory changes and other APEC voluntary measures. In some cases, members even keep reporting areas blank in their IAPs.²²⁷ In practice, APEC members often copied and pasted their own WTO TPRM reports. The fact that WTO reports cover additional WTO-plus issues makes the IAP's

²²⁰ For example, IAP Peer Review: Review Teams, Timeline and List of Experts, 2008/SOM1/014, 2–3 March 2008, at 3.

²²¹ *Ibid.*

²²² IAP Peer Reviews: APEC Member Economies Make Process, 1 March 2007, http://www.apec.org/Press/Features/2007/0301_IAP_Peer_Reviews_APEC_Member_Economies_Make_Progress.aspx (visited 1 July 2012).

²²³ *Ibid.*

²²⁴ The areas to be reports increased to 17. IAP Peer Review, above n 214, at 2.

²²⁵ See *ibid.* ('Economies would report in: 2012, 2014, 2016 and 2018; in 2020, economies would undertake the final assessment.').

²²⁶ Yamazawa, above n 61, at 13.

²²⁷ For example, in its 2010 IAP update, Vietnam did not enter any information on government procurement, deregulation/regulatory review and dispute mediation. Individual Action Plan Update for Vietnam for 2010, http://www.apec-iap.org/document/VN_2010_IAP.htm (visited 22 July 2012).

transparency function largely marginalized.²²⁸ Consequently, it is recommended that the IAP process incorporate a more detailed reporting requirement with the negative-listing approach.²²⁹

The APEC Secretariat's minimum support in the IAP review process led to incoherent methodologies used in review reports, thus counteracting the monitoring effectiveness. The use of independent experts ensures objective assessment. The two experts for each country under review are nominated by APEC members and selected by the review teams.²³⁰ They are often academics with limited APEC and industry experience. The composition of experts varies each time. Given their diverse expertise, experts pose different questions during on-site visits and their drafted study reports also vary in format and content. Some review reports follow the 'no name, no shame' custom by explaining that the IAP peer review process should be more lenient than the TPRM as the former does not aim at 'quick harmonization'.²³¹ This interpretation should be qualified. I do not challenge that the Bogor Goals contain constructive ambiguity, but to ensure the OAA principles of comprehensiveness and comparability, utilizing certain benchmarks in assessment is necessary. Such benchmarks may be based on APEC-developed soft-law guidance such as the *Non-Binding Investment Principles* or derive from the scoreboard system modeled on the mechanisms adopted by the EU and ASEAN.²³²

Under the TPRM, the Trade Policy Review Division of the WTO Secretariat prepares the drafted Secretariat Report based on the Government Report and on-site visits by experienced WTO officials. The OECD has a comparable mechanism under which its secretariat prepares the drafted Economic Survey with assessment and recommendations.²³³ In comparison, the APEC Secretariat plays a rather limited role in the peer review process other than compiling and forwarding materials. The one to two-day review sessions under the WTO and the OECD also cover more substantive issues than the APEC's review sessions, which often form part of

²²⁸ For instance, when compared China's IAP update with its WTO trade policy review report in the same year, 'additional' information the former provides are primarily limited to APEC initiatives such as paperless trading and ABTC. Individual Action Update for China for 2010, http://www.apec-iap.org/document/PRC_2010_IAP.htm (visited 22 July 2012); Trade Policy Review Report by the Secretariat: China, WT/TPR/S/230, 26 April 2010.

²²⁹ Ipei Yamazawa, 'APEC's New IAP Process', 17 February 2012, <http://www.pecc.org/blog/2012/02/17/apec%E2%80%99s-new-iap-process/> (visited 1 July 2012).

²³⁰ See generally IAP Peer Review: Review Teams, Timeline and List of Experts, above n 220.

²³¹ Yamazawa, above n 229; Yue Pau Woo, 'A Review of the APEC Individual Action Plan Peer Review Process', in Mark Borthwick et al. (eds), *The Future of APEC and Regionalism in Asia Pacific: Perspectives from the Second Track* (Washington, DC: Center for Strategic & International Studies, 2005) 73, 77.

²³² See generally Internal Market Scoreboard, European Commission, http://ec.europa.eu/internal_market/score/index_en.htm#score (visited 30 July 2012); Charting Progress towards Regional Economic Integration: ASEAN Economic Community Scoreboard (2010).

²³³ MacDuff and Woo, above n 12, at 57.

SOMs and last only 90 minutes for each economy.²³⁴ Based on the analysis above, APEC should learn from the WTO and OECD lessons and enhance the IAP review peer review process, which is essential to the Bogor Goals and an FTAAP.

V. CONCLUSION

By assessing APEC's role as a *de facto* institution, this article examined a unique case study in international economic law and trade policy. The article provided the most up-to-date examination of APEC's evolution as a trans-regional economic architecture and its implications for fast-growing Asian regionalism. It argued that while APEC has contributed to trade liberalization and facilitation, its soft-law mechanism should undergo reforms. Such reforms are vital to meet challenges posed by the fragmentation of regional FTAs and to accelerate toward the Bogor Goals so as to create an FTAAP. Tackling next-generation trade and investment issues will also escalate APEC's relevance amid competing regional undertakings.

The divergent agendas of APEC's key stake-holding countries may have handicapped APEC's development. Nonetheless, APEC's incremental achievements in WTO-plus arenas can be demonstrated through reinvigorating ITA negotiations, promoting supply-chain facilitation, and enacting guidance on trade and investments measures. Marching into its third decade, APEC should become an active incubator for the pathways to an FTAAP, including the TPP and the 'ASEAN plus N' framework. Therefore, to remedy APEC's institutional weaknesses, this article called for transforming APEC into a full-fledged organization by ratifying the APEC Charter, which will enable it to introduce binding resolutions. APEC's institutional capacity should be fortified by strengthening the PSU's mandate and integrating the proliferating ECOTECH projects. Furthermore, the enhanced IAP review process will increase the transparency of the APEC members' trade and investment liberalization processes and APEC, as an institution, can competently complement the WTO and harmonize regional FTAs. These structural improvements will reinvigorate the public-private partnership in trans-Pacific integration and buttress APEC's position as an indispensable framework under the multilateral trading system.

²³⁴ The IAP review sessions usually take place in the first three Senior Officials' Meetings. Ibid; Interview with a former IAP independent expert (name withheld), 4 May 2012.

Annex 1. Selected Information of APEC Member Economies (2012)

Member Economies	GDP per capita (US\$)	Year joined APEC	Year joined the WTO	OECD member	G20 member	ASEAN member	TPP member	Number of FTAs in force
Australia	55,150	1989	1995	✓	✓		✓	8
Brunei Darussalam	29,675	1989	1995			✓	✓	8
Canada	46,148	1989	1995	✓	✓		✓	7
Chile	11,888	1994	1995	✓			✓	22
China	4,393	1991	2001		✓			11
Hong Kong, China	31,758	1991	1995					2
Indonesia	2,946	1989	1995		✓	✓		8
Japan	43,137	1989	1995	✓	✓			13
Korea	20,757	1989	1995	✓	✓			12
Malaysia	8,373	1989	1995			✓	✓	11
Mexico	9,166	1993	1995	✓	✓		✓	16
New Zealand	32,163	1989	1995	✓			✓	9
Papua New Guinea	1,382	1993	1996					5
Peru	5,291	1998	1995				✓	14
Philippine	2,140	1989	1995			✓		9
Russia	10,440	1998	2012		✓			7
Singapore	43,867	1989	1995			✓	✓	19
Taiwan (Chinese Taipei)	18,588	1991	2002					4
Thailand	4,613	1989	1995			✓		11
USA	47,184	1989	1995	✓	✓		✓	13
Vietnam	1,191	1998	2007			✓	✓	8

Sources: APEC Outcomes & Outlook 2011/2012 (2012), at 23; World Trade Organization: Annual Report 2012 (2012), at 6-7; List of OECD Member countries – Ratification of the Convention on the OECD, http://www.oecd.org/document/58/0,3746,en_2649_201185_1889402_1_1_1_00.html (visited 7 June 2012); Members, <http://www.g20.org/index.php/en/members> (visited 7 June 2012); ASEAN Member States, <http://www.aseansec.org/18619.htm> (visited 7 June 2012); Participation in Regional Trade Agreements, http://www.wto.org/english/tratop_e/region_e/rta_participation_map_e.htm?country_selected=KOR&sense=b (visited 7 June 2012); News: TPP Stakeholder Meeting, see footnote 153.

Annex 2. Selected list of abbreviations

ABAC	APEC Business Advisory Council
ABTC	APEC Business Travel Card
ACTA	Anti-Counterfeiting Trade Agreement
AEC	ASEAN Economic Community
APEC	Asia-Pacific Economic Cooperation
ASEAN	Association of Southeast Asian Nations
ASEM	Asia-Europe Meeting
CAP	Collective Action Plan
CEPT	Common Effective Preferential Tariff
CUL	Concerted Unilateral Liberalization
EAEC	East Asia Economic Caucus
ECFA	Economic Cooperation Framework Agreement
e-Co	Electronic Certificates of Origin
ECOTECH	Economic and Technical Cooperation
EDRC	Economic and Development Review Committee
EVSL	Early Voluntary Sectoral Liberalization
FTAAP	Free Trade Area of the Asia-Pacific
HS	Harmonized System
IAP	Individual Action Plan
IEC	International Electrotechnical Commission
ITA	Information Technology Agreement
NTB	Non-Tariff Barriers
OAA	Osaka Action Agenda
PECC	Pacific Economic Cooperation Council
PSU	Policy Support Unit
SOM	Senior Officials' Meeting
TFAP	Trade Facilitation Action Plan
The P4 Agreement	The Trans-Pacific Strategic Economic Partnership Agreement
TILF	Trade and Investment Liberalization and Facilitation
TPP	Trans-Pacific Partnership
TPRM	Trade Policy Review Mechanism
