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Abstract

In understanding the proliferation of free trade agreements (FTAs) in Asia since 2000, it is important to distinguish between two types of FTAs in terms of a legal basis on either General Agreement on Tariffs and Trade (GATT) Article XXIV or the Enabling Clause. The latter provision can be used when an FTA involves only developing countries. While there are a total of 34 Enabling Clause-based FTAs in effect around the globe, more than half of them are located in Asia. Moreover, the way the Enabling Clause is used by developing countries in Asia is very different from other regions. Outside of Asia, the Enabling Clause is usually used to form a plurilateral FTA that has an accession clause, which envisages gradual evolution into a subregion-wide cooperative agreement. In contrast, in Asia, developing counties started to use the Enabling Clause to sign bilateral FTAs in 2000. Such an innovative way of using the Enabling Clause is one of the main contributors to the recent proliferation of FTAs in Asia. This paper also considers the implications of this proliferation in Asia on the openness of Asian regionalism.

Keywords: Free Trade Agreements (FTAs), Enabling Clause, GATT Article XXIV, open regionalism, bilateralism

JEL Classification: F13, F15

1. Introduction

Most favored nation (MFN) treatment is the most important principle of the multilateral trading system. In fact, the first Article of the General Agreement on Tariffs and Trade (GATT) is the "General Most-Favored-Nation Treatment" article (GATT Article I). It means that tariffs and other advantages given to one country with regard to trade must be given to all World Trade Organization (WTO) Members without any conditions. The prohibition of differentiated treatment across countries is the very essence of MFN treatment. The other important principle of GATT is national treatment, which is the prohibition of discrimination between domestic and foreign products.

It is widely known that a free trade agreement (FTA)[1] is a legitimate deviation from the MFN principle. As long as the conditions stipulated in WTO Agreements are satisfied, WTO Members are allowed to be contracting parties of any FTA. However, WTO Members have several options with regard to the choice of legal provisions in forming FTAs. In the case of trade in goods, GATT Article XXIV and the Enabling Clause are the two main considerations.[2] Though there are some commonalities, the conditions that need to be satisfied by each type of FTA are not identical and have different policy implications.

While many papers discuss the systemic implications of the proliferation of FTAs in Asia on the multilateral trading system, few papers distinguish between FTAs based on either GATT Article XXIV or the Enabling Clause. In arguing how to make FTAs "multilateralism friendly," many papers seem to presume that FTAs are based primarily on GATT Article XXIV, but such an assumption is not valid, at least in Asia.[3] It is a puzzle as to why the regionalism–multilateralism debate surrounding the goods trade still centers on the conditions stipulated in GATT Article XXIV, given the multitude of FTAs in Asia signed since 2000 that are based on the Enabling Clause. In general, trade economists tend to overlook the legal differences between the two types of agreements and focus only on the substance of FTAs, despite the fact that the requirements that need to be met by each type of FTA, according to the WTO, are different.[4] Trade lawyers tend to overstate potential inconsistencies between WTO rules and the conditions of each existing FTA on a case-by-case basis, rather than considering the systemic implications of those provisions.

This paper looks into FTAs in Asia, with a special reference to the Enabling Clause, and considers the implications of the proliferation of Enabling Clause-based FTAs in Asia to the openness of Asian regionalism. The systemic implications of FTAs based on either the Enabling Clause or GATT Article XXIV are very different, as we will see later. While FTAs suddenly started to proliferate in Asia after 2000 (Pomfret 2011), the choice of the

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1 This paper uses the term "free trade agreement (FTA)" to refer to trade agreement in goods based on either GATT Article XXIV or the Enabling Clause. These agreements are also sometimes called regional trade agreements or preferential trade agreements. GATT Article XXIV uses the term FTA in reference to a "free trade area," while the Enabling Clause uses the term "regional agreement." In this paper, FTAs include customs unions unless otherwise stated.

2 Another possible option is to use the GATT Article XXV waiver.

3 See for example, Lim (2007).

4 One notable exception is Park and Park (2011).

primary legal provision used in forming FTAs before and after 2000 was also very different. Moreover, the way in which the Enabling Clause is used in forming FTAs in Asia has been very different from its use in agreements outside of Asia.

In this paper, the Asian region is limited to the two subregions of wider Asia: (i) East Asia, which includes Southeast Asia and North East Asia; and (ii) South Asia.[5] In other words, the Central Asian members of the former Commonwealth of Independent States (CIS) and the Persian Gulf region (West Asia, or the Middle East) are not included. This distinction is due primarily to the state of FTAs in Central Asia and the Persian Gulf, which is very different from that of East and South Asia, as we will see later. Furthermore, the terms "FTAs in Asia" and "Asian FTAs" refer to FTAs that involve at least one Asian economy. Thus, cross-regional FTAs that include Asian economies as well as non-Asian countries, such as the Japan–Mexico Economic Partnership Agreement (EPA), are regarded as Asian FTAs. We use the terms "FTAs within Asia" and "intra-Asian FTAs" to refer to FTAs whose contracting parties are exclusively Asian economies, and the terms "FTAs outside Asia" and "non-Asian FTAs" to refer to FTAs that do not include any Asian countries.

The structure of this paper is as follows. The next section discusses the differences between the two legal provisions that are used in forming FTAs: GATT Article XXIV and the Enabling Clause. The third section presents the analytical framework for the openness of FTAs, in particular, Enabling Clause-based FTAs. The fourth section discusses the status of Enabling Clause-based FTAs in the world and identifies the common features of Enabling Clause-based FTAs outside Asia. The anatomy of Enabling Clause-based FTAs in Asia is examined in the fifth section, in particular, how Enabling Clause-based FTAs in Asia differ from those outside Asia. The sixth section considers the policy implications of the proliferation of Enabling Clause-based FTAs on the nature of trade regionalism in Asia, especially open regionalism. The final section summarizes the main discussion of this paper.

2. Difference in Multilateral Principles of Regionalism: GATT Article XXIV and the Enabling Clause

2.1 Historical Background of GATT Article XXIV and the Enabling Clause

Above all, it is important to know the historical context surrounding the negotiations of GATT Article XXIV. The proposed International Trade Organization (ITO) and, subsequently, the GATT were first negotiated in the 1940s, prior to the advent of economic debates on FTAs and customs unions. Joseph Viner's pioneer work on trade regionalism, *The Customs Union Issues*, which included one of the first theoretical analyses on trade creation and trade diversion, was published in 1950. It is not an exaggeration to suggest that trade diplomats at that time engaged in the negotiations to establish GATT without having a concrete idea of the economic implications and consequences of Article XXIV (Davey 2011; Mathis 2002, p. 103).

[5] Such a narrow focus is common in analyzing FTAs in Asia. For example, see Plummer (2007).

There are two main reasons why the GATT system allows regionalism within the multilateral trade system. First, when the GATT was negotiated, there were already several existing or proposed customs unions. For example, Benelux—comprising Belgium, the Netherlands, and Luxembourg—was proposed and established in the 1940s. Because customs unions received exemption from MFN norm long before the GATT was created, the GATT system needed to accommodate them (Mathis 2002). Second, while it is widely argued that the United States (US) was concerned with the establishment of a multilateral system (Ruggie 1992) that built on the norms of nondiscrimination, indivisibility, and reciprocity (Caporaso 1992), the US also understood the political realities of regionalism during the post-war period. The US considered trade regionalism important because (Western) European integration was deemed critical for world peace and US security during the Cold War (Bhagwati 1991). Also, the US was of the view that Britain and other developing countries would lose interest in multilateral trading systems if regionalism were not allowed. In fact, GATT Article I:2 explicitly exempts in perpetuity (i.e., "grandfathers") from the MFN requirement those preferential trade arrangements existing at the time the GATT came into effect, including the British Imperial Preferences and Benelux. However, other customs unions were expected to be created in the future and effectively governed by GATT Article XXIV.

While it is understandable that GATT negotiators decided to allow regionalism under the multilateral trade system as an exception, one critical puzzle is why GATT Article XXIV allows not only customs unions but also FTAs. Several customs unions existed before GATT, but no FTAs (Chase 2005, p. 24). Thus, the principal concern was how to reconcile existing customs unions, such as Benelux, and other customs unions that would be created in the near future with the GATT system. As the title of Viner's book suggests, the primary concern of at the time of policy makers and economists regarding trade regionalism was customs unions, which were dominant, and not FTAs. It is therefore puzzling why GATT Article XXIV allows the future creation of FTAs.

There are two main factors that explain the inclusion of FTAs in GATT Article XXIV. First, there was, in fact, an argument that supported the idea of including FTAs in GATT Article XXIV as a deviation from the MFN principle. Introducing an exception for FTAs was important for developing countries that might go on to form FTAs, especially since maintaining the delicate balance between developed and developing countries was necessary at the negotiations at Geneva (Mathis 2002, p. 42; WTO 2007). It was developing countries, not developed countries, which were expected to be signatories of FTAs. Second, and more importantly, the US' original proposal for the International Trade Organization (ITO), which ultimately led to the GATT, included an exception for customs unions only (Davey 2011, Chase 2005). A recent study[6] finds that the US insisted upon the inclusion of FTAs in Article XXIV only later, because it started to secretly pursue a possible US–Canada FTA (Chase 2005).[7] Thus, it was mainly an

[6] It was widely considered in past literature that "the United States initially opposed preferential arrangements when negotiating a post-war trade organization, but was quite willing to have the GATT articles permit customs unions. When the issue of free trade agreements was raised, the United States accepted them as well, reportedly without any significant deliberation, on the grounds that free trade agreements would be a first step towards a customs union." (Krueger 1997, p. 170).

[7] However, the plan did not ultimately materialize. It has been said that Canada rejected the proposal (Smith 1988, p. 39).

individual and self-interested political decision, rather than an economic philosophy based on trade theory, which led the US to favor the inclusion of FTAs in GATT Article XXIV.

Meanwhile, the original text of the GATT did not allow preferences in favor of developing countries, except in the case of FTAs based on GATT Article XXIV that required the elimination of trade barriers for "substantially all the trade" between members. Under GATT Article XXIV, developed and developing countries are treated equally. Because there was no system that encouraged trade integration cooperation among developing countries,[8] the granting of trade preferences to developing countries, by both developed countries and developing countries, required a waiver based on GATT Article XXV. In fact, when the Generalized System of Preferences (GSP) was adopted at the United Nations Conference on Trade and Development (UNCTAD) in 1970, a waiver was used (Tangermann 2002).

As a result of the Tokyo Round of negotiations, which sought a more permanent legal solution for trade preferences for developing countries as one of its objectives, the Enabling Clause, which is formally called "Differential and More Favorable Treatment, Reciprocity, and Fuller Participation of Developing Countries—Decision of 28 November 1979," was agreed upon. The Enabling Clause was adopted in the context of the New International Economic Order (NIEO) that sought to improve the position in the global economy of so-called Third World countries relative to developed countries.[9] The Enabling Clause allows WTO Members to grant differential and more favorable treatment to developing countries without granting the same treatment to all other WTO Members. The first paragraph of the Enabling Clause states that "notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favorable treatment to developing countries, without according such treatment to other contracting parties". This provision provides another channel for the deviation from the MFN principle of the GATT and WTO, with emphasis on the developmental aspects of developing countries.[10]

The specific situations wherein the Enabling Clause can be applied are identified in Paragraph 2, which has four subparagraphs. As we will discuss later, there has been a debate over whether the four measures are exhaustive or not. These measures include:

(i) preferential tariff treatment accorded by developed contracting parties to products originating in developing countries in accordance with the GSP (Paragraph 2 [a]);
(ii) differential and more favorable treatment with respect to the provisions of the GATT concerning non-tariff measures (Paragraph 2 [b]);
(iii) regional or global arrangements among less-developed contracting parties for the mutual reduction or elimination of tariffs, and for the mutual reduction or

8 When Part IV of the GATT on Trade and Development was negotiated in 1964, many developing countries suggested the amendment of GATT Article I so that trade preferences for developing countries would be allowed. However, such an attempt was unsuccessful (Tangermann 2002).
9 For example, see Schreuer (1990, p. 77).
10 Before the adoption of the Enabling Clause, a waiver was used to form preferential agreements.

elimination of non-tariff measures on products imported from one another (Paragraph 2 [c]); and

(iv) special treatment for the least developed countries (LDCs) among the developing countries in the context of any general or specific measures in favor of developing countries (Paragraph 2 [d]).

FTAs among developing countries can be formed based on the Enabling Clause, using the provision in Paragraph 2 (c). The Enabling Clause, which is less demanding than GATT Article XXIV, is an alternative avenue for developing countries to sign FTAs, as we will see in detail later.

The historical background of provisions regarding the formation of FTAs has important contemporary implications; the proliferation of FTAs tends to happen when clauses are used in a way the drafters did not expect (Hamanaka 2012b). So far, there have been three waves of regionalism (Baldwin and Carpenter 2011; Mansfield and Milner 1999). The first wave of regionalism surged in Europe in the 1960s, but most agreements at that time were plurilateral customs unions based on GATT Article XXIV, such as the European Community (EC) and European Free Trade Association (EFTA).[11] Thus, GATT Article XXIV was used in an expected way during the first wave. The second wave occurred in 1980s and 1990s with the Americas at the forefront. The agreements signed were usually FTAs, not customs unions, such as the North America Free Trade Area (NAFTA) and the Southern Common Market (MERCOSUR). Thus, GATT Article XXIV was first used in an unexpected way. In fact, Fiorentine, Verdeja, and Toqueboeuf (2007) suggest that the landscape of FTAs would have been very different if GATT Article XXIV covered only customs unions. Meanwhile, many South–South FTAs based on the Enabling Clause were also concluded during this period, but the way in which the Enabling Clause was used was consistent with the idea of NIEO. What about the third wave of regionalism, which was primarily driven by a surge of new Enabling Clause-based FTAs after 2000? We will attempt to answer this question in the empirical sections below.

2.2 Conditions for Forming FTAs: GATT Article XXIV and the Enabling Clause

Several conditions—both substantial and procedural—must be met by GATT Article XXIV-based FTAs, including customs unions, if they are to be regarded as being WTO consistent.[12] The first substantial requirement to be satisfied by FTAs refers to the treatment of internal trade, namely trade within an FTA (Table 1). GATT Article XXIV:8 (a) stipulates that duties and other restrictive regulations of commerce shall be

[11] There were also so-called South–South customs unions in 1961 such as the Central America Common Market (CACM).

[12] GATT Article XXIV covers free trade areas and customs unions. (Note that GATT Article XXIV uses free trade areas and not free trade agreements). A free trade area is a preferential agreement wherein tariff rates among members are zero, although external tariffs may be set at different rates by different members of an agreement. A customs union is an arrangement in which there are zero duties between members on imported goods and a common external tariff (Krueger 1997). Free trade areas and customs unions are similar in the sense that internal tariffs should be eliminated (internal requirement). The difference between free trade areas and customs unions is the members' treatment of external tariffs (external requirement). In this paper, free trade agreements (FTAs) include both free trade areas and customs unions.

eliminated with respect to "substantially all the trade." The important term in this provision is "eliminate." In the case of FTAs based on GATT Article XXIV, the elimination of tariffs and other barriers is required, unlike the case of Enabling Clause-based FTAs, where the "reduction" of tariffs and other barriers is sufficient. In the case of tariffs, elimination means the abolishment of tariffs (Gobbi, Estrella, and Horlick 2006, p. 137), while reduction means lowering the level of tariffs. Nevertheless, the concept of substantially all the trade has not been thoroughly defined and the ambiguity in its interpretation still remains. Despite the adoption of the Understanding on the Interpretation of Article XXIV to clarify stipulation 8 (a) in GATT Article XXIV when the WTO was established in 1994, this clarification still does not provide a clear definition of the term. It is unclear if this refers to FTA trade in substantially all product sectors, or substantial trade in all product sectors combined (Onguglo 2005).

Table 1: Substantial Requirements Under GATT Article XXIV and the Enabling Clause

Item	GATT Article XXIV	Enabling Clause
Barriers to Internal Trade		
Treatment	Elimination	Reduction
Coverage	Substantially all the Trade	No Stipulation
Treatment of barriers to external trade (neutrality to non-members)	Trade barriers for non-members shall not be higher than those prior to the formation of FTAs (including customs unions). Obligation to conduct ex ante and ex post level of barriers	Trade barriers for non-members shall be designed to facilitate internal trade, not to raise barriers for trade with non-parties. No obligation to conduct ex ante and ex post level of barriers
Time framework	Within 10 years	No obligation

GATT = General Agreement on Tariffs and Trade.
Source: Author's compilation.

In general, there are two ways to assess substantial coverage: through either (i) quantitative or (ii) qualitative approaches (WTO 2002). The qualitative approach assesses substantially all the trade in a sector-by-sector analysis. Under this approach, no major sector of economic activity should be excluded from coverage under FTAs or customs unions. For example, many FTAs signed by developed countries in the past have excluded agricultural sectors or certain components of it. Proponents of this approach insist that such FTAs do not conform to the substantially all the trade portion. On the other hand, the quantitative approach emphasizes horizontal trade coverage, which does not consider the coverage of specific sectors. In this case, the coverage is calculated quantitatively in a holistic manner. One option in calculating the coverage is to use the number of tariff lines whose tariffs have been eliminated. Another option, which is more popular among some WTO Members, is to calculate the coverage using actual trade volume. The majority of WTO Members are of the view that a combination of the quantitative and qualitative approaches is desirable. However, there are divergent views on the actual level of the quantitatively derived coverage that satisfy the term

substantially all the trade. Some developed members of the WTO are of the view that at least 90% of trade volume should be covered (the European Union [EU] and Japan), while others insist that at least 95% should be covered (Australia). The definition of "major sector" in the case of the qualitative approach is still far from having reached a consensus.

The second condition for forming GATT Article XXIV-based FTAs or customs unions relates to the treatment of external trade, namely duties and other barriers to trade with non-members. GATT Article XXIV:5 (a) stipulates that duties and other regulations of commerce applicable to non-members shall not be higher or more restrictive than those in effect prior to the formation of FTAs or customs unions. This provision is especially important in the case of customs unions, because contracting parties need to agree upon a common external tariff for each product, which could be higher than the lowest tariff previously applied by the customs union's members. It is understood that tariffs and non-tariff barriers applied to non-members should not be higher than the pre-union average. While the weighted average can easily be calculated in the case of tariffs and charges, it is difficult to quantify non-tariff barriers, and thus, some case-by-case examination may be required (Paragraph 2 in the Understanding on the Interpretation of GATT Article XXIV). In the case of FTAs, because there is no need to have a common external tariff, the possibility of higher tariffs and other trade barriers for non-members appears not to be large.[13]

The third substantial requirement of forming FTAs relates to the time frame for completing the project. According to GATT XXIV:5 (c), agreements on FTAs or customs union shall include a plan and schedule for their formation within a reasonable length of time. While this provision is unclear about the exact time span, the Understanding on the Interpretation of GATT Article XXIV (Paragraph 3) stipulates that a reasonable length of time should not exceed 10 years. When 10 years is insufficient, members of FTAs or customs unions shall provide a full explanation to other WTO members of why a longer period is necessary. The timely completion of the interim agreement and formation of the final FTA is a critical requirement; otherwise agreements covering only selected sectors continue to exist on the ground that they are interim agreements.

Enabling Clause-based FTAs should also satisfy some conditions, though they are less demanding than those under GATT Article XXIV. First, tariffs and other regulations should be reduced, as stipulated in Paragraph 2. Unlike FTAs based on GATT Article XXIV wherein the elimination of tariffs and other regulations is required, reduction is already sufficient in the case of the Enabling Clause.[14] Second, FTAs shall be designed to facilitate and promote the trade of developing countries and not raise barriers or create undue difficulties for trade involving any other contracting parties (Paragraph 3 [a]). However, there is no obligation to compare the ex ante and ex post levels of protection, unlike in GATT Article XXIV. Relating to this, it is required that FTAs based on the Enabling Clause shall not become an impediment to the reduction or elimination of tariffs and other regulations based on MFN treatment (Paragraph 3 [b]), although this

[13] However, as Krueger (1997, p. 177) argues, the rules of origin can act as additional trade barriers for non-members.

[14] The reduction of tariffs and other regulations should be mutual.

is hardly an operational criteria. It is important to note that the Enabling Clause makes no mention of the coverage of trade under FTAs and that there is no time limitation for completing the integration scheme.

WTO Members also have an obligation to report their FTAs to the WTO (Table 2). Participants in a prospective FTA shall promptly notify other WTO Members and make available to them such information regarding the proposed agreement (GATT Article XXIV: 7 [a]). All proposed GATT Article XXIV-based FTAs shall be examined by a working party (Understanding on the Interpretation of GATT Article XXIV, Paragraph 7), unlike the case of Enabling Clause-based FTA where only consultation is required. The working party shall produce a report and submit it to the Council of Trade in Goods (CTG), and the CTG will make the final decision on the conformity of the agreement to GATT Article XXIV. However, in reality, a decision on conformity to GATT Article XXIV based on a consensus has seldom been made.[15] Because of this consensus requirement, members of an FTA are able to reject a majority recommendation. Thus, the process of conformity assessment of GATT Article XXIV-based FTAs has not been fruitful and can be said to be "self-declaratory" (Mathis 2002, p. 82). In December 2006, a Decision on the Transparency Mechanism for Regional Trade Agreements was adopted at the General Council. It was agreed that the Committee on Regional Trade Agreements (CRTA) shall be the forum in which to examine GATT Article XXIV-based FTAs and that the WTO Secretariat shall prepare a factual presentation of a notified FTA for the purpose of examination of each FTA among members.[16] The data to be submitted by the contracting parties of FTAs to the WTO was also clarified in this decision. Basically, the contracting parties of a GATT Article XXIV-based FTA should submit detailed data on tariff rates, both FTA and MFN rates, and trade volume as well as other important information regarding the FTA (Table 3). The data should be submitted the WTO within 10 weeks.[17] It is expected that the examination of GATT Article XXIV-based FTAs will be more effective in future.[18]

Just like the case of GATT Article XXIV, Enabling Clause-based FTAs also have some WTO reporting requirements, though these are not as demanding. Members of Enabling Clause-based FTAs should notify the Committee on Trade and Development (CTD), and the CTD may establish a working party to conduct consultations on, rather than the examination of, an FTA in light of the relevant provisions in the Enabling Clause. It is argued that "a certain level" of transparency is the only obligation imposed on Enabling Clause-based FTAs (WTO 2007, p. 305; Onguglo 2005). While the recent Decision at the General Council stipulates that GATT Article XXIV-based FTAs should be examined at CRTA, the consultation on Enabling Clause-based FTAs will continue to be conducted by CTD, not CRTA.

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15 The only agreement in which consistency with GATT Article XXIV was concluded by the working party is the customs union between the Czech Republic and Slovakia.

16 See the WTO Document WT/L/671, Transparency Mechanism for Regional Trade Agreements.

17 However, special consideration is given with regard to the data to be submitted, as well as the data submission timeline, when a GATT Article XXIV-based FTA involves only developing countries. For a detailed discussion on this issue, see Section 7.

18 On the preliminary assessment of the recent achievements of CRTA, see Crawford and Lim (2011).

Table 2: Procedural Requirements Under GATT Article XXIV and the Enabling Clause

Item	GATT Article XXIV	Enabling Clause
Review of FTAs		
Forum	CTG/CRTA	CTD
Modality	Examination	Consultation
Data submission		
Data to be submitted	All data should be submitted (special consideration for GATT Article XXIV-based FTAs between developing countries)	Special considerations given in terms of data availability
Data submission timeline	10 weeks (20 weeks in the case of GATT Article XXIV-based FTAs between developing countries)	20 weeks

CRTA = Committee on Regional Trade Agreements, CTD = Committee on Trade and Development, CTG = Council of Trade in Goods, FTA = Free Trade Agreement, GATT = General Agreement on Tariffs and Trade.
Source: Author's compilation.

Table 3: Data Submission Requirements for FTAs

Item	Detail
Tariff concessions under the FTA	a. A full listing of each party's preferential duties applied in the year of entry into force of the FTA b. A full listing of each party's preferential duties to be applied over the transition period if the FTA is to be implemented in stages
MFN duty rates	a. A full tariff listing of each FTA party's MFN duties applied in the year of entry into force of the agreement b. A full tariff listing of each FTA party's MFN duties applied in the year preceding the entry into force of the agreement
Other data, where applicable	a. Preferential margins b. Tariff rate quotas c. Seasonal restrictions d. Special safeguards e. Ad valorem equivalents for non ad valorem duties, if available
Product-Specific Preferential Rules of Origin as Defined in the FTA	
Import statistics (the most recent 3 years)	a. The value of each party's imports from each of the other parties b. The value of each party's imports from the rest of the world, broken down by country of origin

FTA = Free Trade Agreement, MFN = Most Favored Nation, WTO = World Trade Organization.
Source: Author's compilation based on WTO Document WT/L/671.

The difference between GATT Article XXIV and the Enabling Clause in terms of the conditions to be satisfied in forming FTAs are summarized as follows. The legal requirements of the two types of FTAs look similar but are actually very different. First, in the case of internal trade (trade within an FTA), while the elimination of tariffs on

substantially all internal trade is required in the case of GATT Article XXIV, the reduction of tariffs is enough in the case of Enabling Clause. There is no requirement on products coverage of tariff reduction for Enabling Clause-based FTAs. Second, as to trade barrier to non-members, in the case of GATT Article XXIV, there is an obligation to compare ex ante and ex post levels of protection to non-members. However, there is no such requirement in the case of the Enabling Clause. Third, GATT Article XXIV-based FTAs should be completed within 10 years, while there is no time limit in the case of the Enabling Clause. Finally, GATT Article XXIV-based FTAs shall be notified and examined by the WTO based on the detailed data submitted by the contracting parties, while notification and consultation is sufficient in the case of the Enabling Clause. In short, the level of multilateral governance for Enabling Clause-based FTAs is much lower than for GATT Article XXIV-based FTAs.[19]

2.3 Developmental Levels and Legal Choices

WTO Members are allowed to sign FTAs that cover trade in goods based on either GATT Article XXIV or the Enabling Clause.[20] Such a situation is in sharp contrast to an agreement covering trade in services in which only the General Agreement on Trade in Services (GATS) Article V can be used. (The use of the Enabling Clause in forming services agreement is impossible irrespective of developmental level). While we tend to focus our argument on GATT Article XXIV when discussing the relationship between regionalism and the multilateral trading system, it is important to note that FTAs can also be formed based on the Enabling Clause, as long as all members included in the FTA are developing countries (Table 4). In fact, there are many existing Enabling Clause-based FTAs in the world, particularly in Asia.

Table 4: Usage of GATT Article XXIV and the Enabling Clause

Item	Use of GATT Article XXIV	Use of Enabling Clause
FTA including only developed countries	possible	impossible
FTA including both developed and developing countries	possible	impossible
FTA including only developing countries	possible	possible

Source: Author's compilation.

Whether the Enabling Clause can be used for the formation of FTAs between developing and developed countries is an important question. International trade lawyers have argued that there are three ways to interpret the legal implications of the Enabling Clause on FTAs between developed and developing countries (Irish 2008). The first

[19] However, note that the lower discipline is applied to a GATT Article XXIV-based FTA if it involves only developing countries with regard to the date of submission. See Section 7 for more detail on this issue.

[20] When all contracting parties of FTAs or customs unions are non-members of the WTO, such an integration scheme is not subject to WTO disciplines. When an FTA or customs union includes WTO members and non-members, such an agreement should be based on either GATT Article XXIV or the Enabling Clause.

possible interpretation is that the list of measures permissible under the Enabling Clause spelled out in Paragraph 2 is non-exhaustive (see above), and that forming a mixed FTA based on the Enabling Clause is possible. The second interpretation is that the list is exhaustive and that the Enabling Clause is applicable to forming FTAs comprising only developing countries because Enabling Clause paragraph 2 (c) covers such agreements only. In this case, the Enabling Clause cannot be invoked in mixed FTAs. The third interpretation is that a mixed agreement between developed and developing countries is possible through a combination of GATT Article XXIV, which allows discrimination among members and non-members, and Enabling Clause paragraph 2 (a) and 2 (b), which justify non-reciprocal treatment among members in terms of trade negotiations. In practice, however, it seems that the dominant view among practitioners as well as some WTO staff is that the Enabling Clause cannot be used for a mixed FTA. In fact, many practitioners, including WTO staff, openly argue that mixed FTAs should be based on GATT Article XXIV.[21]

While GATT Article XXIV presumes that FTAs are formed between developed countries, it is important to note that any WTO member can sign an FTA using GATT Article XXIV. FTAs between developing countries and those between developed and developing countries can also be based on GATT Article XXIV. Thus, while developing countries can use the Enabling Clause when they jointly form FTAs, this does not mean that FTAs between these countries must be based on the Enabling Clause. The use of the Enabling Clause is optional and not mandatory for developing countries when signing FTAs among themselves. In contrast, it is imperative that FTAs between developed countries be based on GATT Article XXIV and not on the Enabling Clause.

It is worth considering GATT Article XXIV-based FTAs that are formed between developed and developing countries. The question here is whether non-reciprocal preferential access for the products of developing country partners is acceptable in the case of GATT Article XXIV-based FTAs. In the *Bananas II* case, the relevancy of the special trading preferences granted to bananas from the African, Caribbean, and Pacific Group of States (ACP) by the European Community (EC) under the Lomé Convention was disputed. The EC was of the view that non-reciprocal treatment under GATT Article XXIV-based FTAs is possible because GATT Article XXXVI:8 states that "developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties." The panel's view was that GATT Article XXXVI:8 is not applicable to FTAs based on GATT XXIV because such is not listed in the Interpretative Note of Article XXVI:8. Also, if such was justifiable based on GATT XXXVI:8, there would have been no need for GATT members to adopt a scheme for GSP (Irish 2008). Thus, if FTAs are formed based on GATT Article XXIV, all contracting parties' measures should be compatible to the three conditions stipulated in the Article, irrespective of developmental level (Fiorentino, Verdeja, and Toqueboeuf 2007). In fact, in order to maintain the trading preference of ACP countries, the EU would eventually request a waiver based on GATT Article XXV, which was granted in 1994.

[21] See presentation by Roberto Fiorentin. Available at: http://www.hss.ed.ac.uk/ila/pp/Notification_and_Review.ppt

Finally, the relation between the two provisions in forming FTAs is unclear. There is uncertainty if the two provisions are mutually exclusive in terms of the notification to the WTO in the case of FTAs formed by developing countries. It seems that the WTO Secretariat expects members to choose between them when signing agreements. However, in reality, member countries of some FTAs submit notifications under both GATT Article XXIV and the Enabling Clause for the same FTA.

The legal choice of forming FTAs can be summarized as follows. While GATT Article XXIV presumes that FTAs are formed between developed countries and the Enabling Clause presumes that FTAs are formed between developing countries, in reality, there are many mixed FTAs that involve both developed and developing countries. Mixed agreements cannot be based on the Enabling Clause and should be based on GATT Article XXIV, while reciprocal arrangements between developed and developing members are necessary. In addition, FTAs between developing countries can be based on GATT Article XXIV as the use of the Enabling Clause is optional.

3. Analytical Framework for Assessing the Openness of Enabling Clause-Based FTAs

This research puts special emphasis on Enabling Clause-based FTAs in considering the openness of trade regionalism in Asia. In other words, the legal stands of each FTA in Asia are the primary concern of the analysis and it attempts to identify common institutional features of Enabling Clause-based FTAs in Asia in comparison with those in other regions. However, the analysis is not limited to the question of which clause is used by each FTA, and we will also examine the tendency of each developing country in Asia to use either GATT Article XXIV or the Enabling Clause. Whether developing Asian countries' legal choice when forming FTAs is consistent or not is an important question in considering the implications of the legal basis of FTAs in Asia.

In considering the openness of Enabling Clause-based FTAs, we need to consider not only technical-level, but also system-level, questions. This is because developing countries are allowed to form FTAs among themselves, using the Enabling Clause, that do not satisfy the conditions stipulated in GATT Article XXIV and thus technical-level methods to minimize the negative externalities of Enabling Clause-based FTAs—such as insubstantial coverage and large preferential margins—are limited. While we can always recommend that the contracting parties of Enabling Clause-based FTAs should make efforts to satisfy the conditions in GATT Article XXIV to reduce externalities (UNCTAD-JETRO 2008, p. 53; Plummer 2007), there is no mechanism that guarantees this will happen. Despite the fact that many empirical studies find that Enabling Clause-based FTAs are not economically ideal (Park and Park 2011; Rajapatirana 1994), the matter of fact is that developing countries are entitled to do pursue them. Thus, rather than contemplating detailed techniques that make FTAs open, the system-level approach to securing the open aspect of regionalism is useful, especially in the cases of FTAs based on the Enabling Clause.

The open accession policy is the core of the system-level method to make regionalism open. When the technical details of FTAs that may entail some negative external effects—such as insubstantial coverage and large preferential margins—are already present, accepting new members is an effective way to solve these negative externalities of regional cooperation and keep trade regionalism open. Several institutional features that we will discuss below are closely related to an open accession policy and the expansiveness of an agreement in general.

3.1 Number of Participants

The number of participating members is critical in considering the openness or exclusiveness of an agreement. International relations scholars have argued that agreements between two parties and those among three or more parties are critically different in nature. A bilateral agreement is an arrangement between two parties that is based on specific reciprocities, wherein the simultaneous balancing of specific quid-pro-quos by each party is required (Ruggie 1992). It is premised on the assumption of a specific exchange between the two in each dyadic relationship. Thus, bilateralism is regarded as exclusive by definition (Capie and Evans 2002, p. 39). Krauss and Pempel (2004, p. 5) summarize bilateralism as being when "two countries cede particular privileges to one another that they do not give to other countries." Note, however, that the degree of bilateralism depends on the design of each agreement. As Brian Job discusses, there is "expansive bilateralism," which contributes to cooperation among a wider membership (Capie and Evans 2002, p. 40). In fact, in the case of trade, Menon (2009) argues that a bilateral agreement between a member of a plurilateral agreement and a non-member that seeks membership in the plurilateral agreement may have good external effects, calling such an arrangement a "plurilateral-agreement-facilitating bilateral agreement." Nevertheless, it is undeniable that bilateralism tends to be non-expansive because it tries to address the specific needs and concerns of the two members. In fact, even if a bilateral agreement has an accession clause, a country that is interested in membership tends to suggest the establishment of a new agreement, rather than simply joining an existing bilateral agreement. For example, the idea of a Pacific Three (P3) agreement involving Singapore, New Zealand, and Chile was launched in the early 2000s when they decided to negotiate a new agreement, despite the fact that there was already a bilateral FTA between New Zealand and Singapore that included an accession clause.[22] This episode implies that bilateral agreements are designed to serve the specific needs of members and the level of "defused reciprocity," which will be discussed in more detail below, tends to be low by nature.

John Ruggie (1992, p. 571) defines multilateralism as an "institutional form which coordinates relations among three or more states on the basis of generalized principles of conduct, that is, principles which specify appropriate conduct for a class of actions, without regard to the particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence."[23] He argues that an agreement that simply has more than three members may not be worth calling multilateral and insists that Nazi pre-

[22] The Pacific Four (P4) agreement including Brunei Darussalam was ultimately signed in 2006 and is known formally as the Trans-Pacific Partnership Agreement (TPP). For details, see Hamanaka (2012a).

[23] Keohane (1990) also discusses the nature of multilateralism. However, he defines multilateralism in a nominal manner as institutions with three or more members.

war trade and monetary arrangements were bilateral in nature though the number of the concerned parties was large. What is called defuse reciprocity is the key to multilateralism, which means that an arrangement is expected to yield rough equivalence of benefits over time, unlike specific reciprocity. Although, in theory, multilateral agreements can be used to refer to non-global arrangement among parties of three or more, we will used the term plurilateral (rather than multilateral) FTA to refer to an FTA among three or more parties for two reasons. First, the term multilateralism is usually used to refer to a multilateral arrangement at the global level—such as the WTO—and thus referring to a multilateral FTA would be confusing from a practical perspective. Second, agreements among three or more parties do not always entail multilateralism in Ruggie's sense. Whether an agreement of three or more parties entails a generic nature, versus a specific nature, is an empirical question and thus it is inappropriate to automatically assume that agreements among three or more parties are expansive agreements; therefore, plurilateral is better than multilateral when referring to non-bilateral agreements.

3.2 Labeling an Agreement

Relating to the above argument on the number of participants is the name or label of an agreement, which is equally important when considering the expansiveness of agreements. Some agreements spell out the participants in the name of the agreement, while other agreements use a geographical label. The latter case tends to be more open to the accession of other countries in the region. Bilateral agreements usually take the name of the two members and this makes it difficult for non-members to join. In fact, the FTA between Singapore and New Zealand mentioned above, which Chile ultimately decided not to participate in, proposing instead a new agreement among the three, is called the New Zealand–Singapore FTA. In contrast, plurilateral agreements tend to use a geographical label. This may facilitate the participation of regional countries. However, the use of a particular geographical label may prevent non-regional countries from participating, because a geographical label implies which countries are inside versus outside and, as a consequence, which are welcome and which are not (Hamanaka 2009). For example, while Singapore was once interested in membership in NAFTA, it finally decided not to join for a simple reason: Singaporeans did not regard themselves as North Americans (Haas 1994; Bergsten 1994, p. 25).

3.3 Vision and Ultimate Output

The vision of an FTA in terms of the comprehensiveness of the ultimate output of the agreement is important in assessing the openness of cooperation, at least from a regional perspective. While examining the vision per se is a difficult task, the form an FTA takes implies a vision of the agreement that members intend to achieve over the long-run in terms of comprehensiveness. Trade agreements sometimes take the form of customs unions, and, moreover, they sometimes mention an ultimate goal of regional cooperation beyond trade integration (e.g., monetary union). Agreements sometimes take the form of a partial scope agreement (PSA). In these cases, the sectoral coverage is very limited and we can argue that the agreement attempts to serve the specific needs of contracting countries. The membership that the agreement intends to achieve in the long-run also relates to the comprehensiveness of an agreement. In short, whether or

not the agreement envisages itself evolving into a subregion-wide cooperative arrangement with comprehensive issue coverage is the question.

3.4 Accession Clause

An accession clause is the fundamental institutional parameter in considering the open membership policy of regional projects. There are four types of agreements with regard to the accession of new members (Fon and Parisi 2005).[24] The first possibility is that the FTA does not have any accession clause (closed agreement). Note, however, that this scenario does not exclude the possibility of accession, which may be achieved by amending the original agreement. Second, there is semi-closed type of agreement for which acceptance of a new member requires the unanimous approval of the current signatory states. A semi-open agreement is an agreement where acceptance of a new member depends on approval by a majority of the existing signatory states. Finally, there is a (truly) open agreement in which all states that are willing to agree to the terms of treaty can join. In addition, whether accession criteria are clear or there is room for discretion is an important question. When incumbents have discretion, this becomes a source of influence and the agreement becomes less open (Findlay 2003, p. 218; Kelley 2010; Hamanaka 2012a). However, the accession clause is one aspect of open membership and the agreement can be non-expansive in terms of membership even if it has an accession clause. [25]

Thus, the empirical sections of this research analyze FTAs in terms of the (i) number of members (two versus three or more), (ii) name of the agreement, (iii) comprehensiveness of the agreement, and (iv) accession clause. A plurilateral agreement with a geographical label that has a liberal accession clause and envisages itself evolving into pan-regional cooperation can be said to be fairly open. In contrast, a bilateral agreement with a partial scope, a name that includes only two contracting countries, and without an accession clause can be deemed to be less expansive. Note, however, that I do not argue that plurilateral agreements include geographical labels and accession clauses, and vice versa, with regard to bilateral agreements. Actual openness and exclusiveness depend on institutional design.[26]

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[24] Fon and Parisi (2005) do not distinguish between closed and semi-closed agreements, and put them together under the classification of closed agreement. Although they define a closed agreement as an "agreement for which acceptance of a new member requires the unanimous approval of the current signatory states," they also consider that an agreement without an accession clause that ultimately accepts a new member by amending the original treaty should be classified as a closed agreement. Rather than assessing the openness regarding membership based on results, this study distinguishes between a (real) closed agreement without an accession clause (to which a new member may be accepted by amending the agreement) and a semi-closed agreement that requires unanimous approval for accession.

[25] For example, suppose a situation where a certain regional (bilateral or plurilateral) agreement excludes the agricultural sector because the member countries have a specific interest in protecting their respective agriculture sectors. Then, even if the membership of this regional agreement is open to anyone, such an agreement cannot be said to be fully open.

[26] For example, Findlay (2003) argues that plurilateral agreements in the field of services initiated by the US are not particularly open based on an examination of several institutional parameters.

4. Overview of FTAs Around the World

4.1 The Universe of Enabling Clause-Based FTAs

As of December 2011, there were a total of 316 notifications of regional agreements in force that had been submitted to the GATT and WTO, counting goods and services notifications separately.[27] However, there are some regional agreements that have not been notified to the WTO, which is outside the scope of this analysis.[28]

Among the 316 notifications, 11 notifications relate to accession to existing regional agreements, although there were many instances where membership expansion was achieved without notifying the WTO.[29] The other 305 notifications were for the establishment of new regional agreements. Among them, there were 213 FTAs covering trade in goods and 92 on trade in services.

Among the 213 FTAs covering trade in goods, 179 FTAs have been notified under GATT Article XXIV and 34 under the Enabling Clause. It is interesting to note that three FTAs have been notified under both GATT Article XXIV and Enabling Clause: (i) ASEAN–Republic of Korea FTA, (ii) Gulf Cooperation Council (GCC); and India–Republic of Korea FTA. Thus, only about 16% of FTAs worldwide have been notified under the Enabling Clause.[30] Figure 1 provides a summary of the universe of FTAs with different legal backgrounds.

Among the 34 Enabling Clause-based FTAs, 18 FTAs are located in Asia, and only 14 located outside Asia. (Two agreements do not have regionally based membership.) Thus, the majority of Enabling Clause-based FTAs signed worldwide is located in Asia. Among the 14 Enabling Clause-based FTAs located outside Asia, five are located in Africa, three in Latin America, three in the Pacific Islands region, and three in the Middle East.[31] Thus, Enabling Clause-based FTAs exist all over the world and each region has several Enabling Clause-based FTAs whose memberships overlap with one another.

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27 The number of FTAs has been determined using a notification basis. Thus, very recent FTAs that have not yet be notified to the WTO, such as the Republic of Korea–US FTA, are not included here.

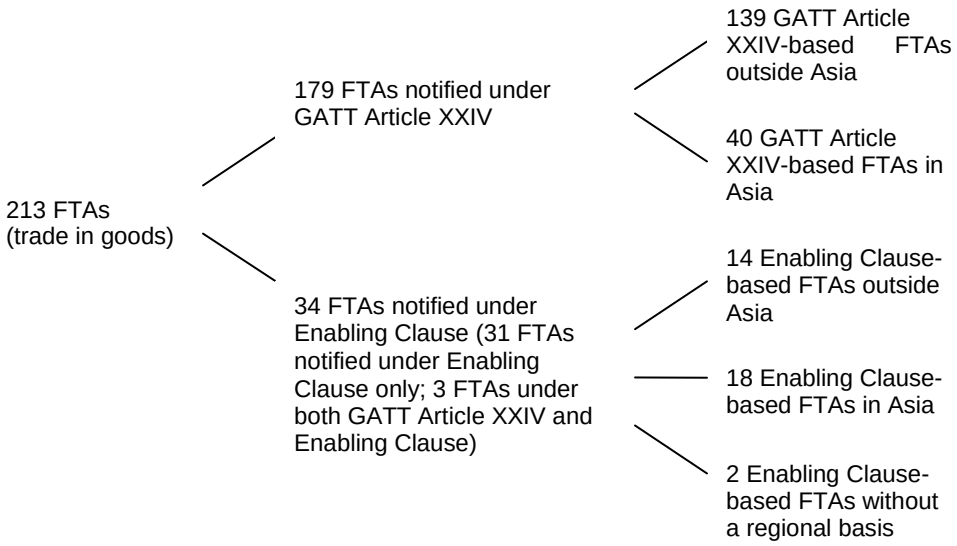
28 For more on FTAs that have not been notified to the WTO, see Hamanaka (2012c). In Asia, a notable example of a regional agreement not notified to the WTO is the ASEAN Framework Agreement on Trade in Services (AFAS), which covers the services trade rather than goods trade.

29 Seven notifications were for accession to GATT Article XXIV-based RTAs: (i) EFTA Accession of Iceland, (ii) EC (9) Enlargement, (iii) EC (10) Enlargement, (iv) EC (12) Enlargement, (v) EC (15) Enlargement, (vi) EC (25) Enlargement, (vii) EC (27) Enlargement. Three notifications were for accession to GATS Article V-based Economic Integration Agreements (EIAs): (i) EC (15) Enlargement; (ii) EC (25) Enlargement; and (iii) EC (27) Enlargement. One notification was for accession to an Enabling Clause-based RTAs: the People's Republic of China's (PRC) accession to the Asia–Pacific Trade Area (APTA).

30 FTAs notified under both GATT Article XXIV and the Enabling Clause are counted as Enabling Clause-based RTAs, because the focus of this research is the use of the Enabling Clause and the possibility that these FTAs would not have been formed if there were no Enabling Clause.

31 The Egypt–Turkey FTA is counted as a Middle Eastern FTA.

Figure: The Universe of FTAs



Source: Author's compilation.

Two FTAs based on the Enabling Clause do not have any regional basis. The first one is the Global System of Trade Preferences among Developing Countries (GSTP), which has more than 40 members from Africa, South America, West Asia, the Caribbean, Europe, East Asia, the Middle East, North America, and Central America. The second one is the Protocol on Trade Negotiations (PTN), which has 15 members from West Asia, South America, Africa, the Middle East, East Asia, North America, and Europe.

4.2 Common Features of Enabling Clause-Based FTAs Outside Asia

As previously explained, the number of Enabling Clause-based FTAs outside Asia is very limited at only 14. Because there are 134 GATT Article XXIV-based FTAs outside Asia, the share of Enabling Clause-based FTAs of those outside Asia is about 9%. Enabling Clause-based FTAs are a minor subcategory of FTAs outside Asia. Below is an exhaustive list of the 14 Enabling Clause-based FTAs outside Asia:

(i) Southern Common Market (MERCOSUR)
(ii) Pacific Island Countries Trade Agreement (PICTA)
(iii) Egypt –Turkey FTA
(iv) Economic Community of West African States (ECOWAS)
(v) East African Community (EAC)
(vi) Economic and Monetary Community of Central Africa (CEMAC)
(vii) Latin American Integration Association (LAIA)
(viii) South Pacific Regional Trade and Economic Cooperation Agreement (SPARTECA)
(ix) West African Economic and Monetary Union (WAEMU)

(x) Melanesian Spearhead Group Trade Agreement (MSGTA)
(xi) Andean Community (CAN)
(xii) Common Market for Eastern and Southern Africa (COMESA)
(xiii) Economic Cooperation Organization (ECO)/ECO Trade Agreement (ECOTA)[32]
(xiv) Gulf Cooperation Council (GCC)

It is interesting to note that non-Asian Enabling Clause-based FTAs share several common features (Table 5). First, in terms of the size of membership, the majority of Enabling Clause-based FTAs outside Asia are plurilateral agreements. Signed in 2007, the Egypt–Turkey FTA is the only bilateral FTA based on the Enabling Clause outside Asia. All other such FTAs are plurilateral and it seems that these FTAs eventually expect to include additional members from within their respective regions. (See below for more details on their accession clauses). However, subregional groupings are not mutually exclusive and they sometimes overlap with each other. For example, the African continent has four Enabling Clause-based FTAs: (i) ECOWAS, (ii) COMESA, (iii) CEMAC, and (iv) WAEMU. Several of these FTAs have common members.

Related to this point is the fact that the names of these plurilateral FTAs usually include a geographical label rather than the names of the participating countries, which is common in the case of bilateral FTAs. The use of a geographical label makes it easy for non-members to join the group. The name of a subregion—such as West Africa or the South Pacific—is usually used as a geographical label.[33]

The second important common feature is that most plurilateral FTAs based on the Enabling Clause are customs unions and not FTAs in the narrow sense. This means members not only liberalize internal trade, but also harmonize external barriers. While the Enabling Clause does not distinguish between FTAs and customs unions, unlike GATT Article XXIV, and there is no obligation to harmonize external trade barriers among members of an Enabling Clause-based FTA, the reality is that developing countries outside Asia tend to sign Enabling Clause-based FTAs that include the harmonization of external trade barriers. Moreover, some of the Enabling Clause-based trade integration schemes outside Asia are part of more comprehensive projects of regional community building, including monetary integration, labor market integration, and even future political integration.[34]

[32] ECO was established in 1985 with three founding members: Iran, Pakistan, and Turkey. The preferential tariff protocol among the three ECO members was signed in May 1991 and an additional protocol was signed in February 1992. The agreement notified to the WTO was the trilateral preferential tariff agreement. Meanwhile, ECO expanded its membership in 1992 when seven additional members joined. The ECOTA agreement, which can be regarded as a successor to the early trilateral preferential tariff scheme, was signed by 10 members in 2003.

[33] There are several agreements that spell out the name of participating countries even though these are plurilateral agreements. One example is the El Salvador–Honduras–Taipei,China Agreement.

[34] However, it should be noted that the visions of the framers of the agreement and its actual implementation of trade liberalization are often different. This is especially true in the case of FTAs in Africa. See Khadiagala (2011) for more details on unsuccessful trade integration cooperation in Africa.

Table 5: Exhaustive List of 14 Enabling Clause-Based FTAs Outside Asia

Agreements	Membership	Type	Date of Entry Into Force
SPARTECA	Australia, Cook Islands, Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, New Zealand, Niue, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu	FTA (PSA)	01-Jan-1981
LAIA	Argentina, Venezuela, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, Mexico, Paraguay, Peru, and Uruguay	FTA (PSA)	18-Mar-1981
CAN	Bolivia, Colombia, Ecuador, Peru, and (Venezuela)	CU	25-May-1988
MERCOSUR	Argentina, Brazil, Paraguay, and Uruguay	CU	29-Nov-1991
ECOTA	Afghanistan, Azerbaijan, Iran, Kazakhstan, Kyrgyz Republic, Pakistan, Tajikistan, Turkey, Turkmenistan, and Uzbekistan	FTA (PSA)	17-Feb-1992
ECOWAS	Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo	CU	24-Jul-1993
MSGTA	Fiji, Papua New Guinea, Solomon Islands, and Vanuatu	FTA (PSA)	01-Jan-1994
COMESA	(Angola), Burundi, Comoros, Congo, D. R., Djibouti, Egypt, Eritrea, Ethiopia, Kenya, (Lesotho), Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, (Tanzania), Uganda, Zambia, and Zimbabwe	CU	08-Dec-1994
CEMAC	Cameroon, Central African Republic, Chad, Congo, and Equatorial Guinea, Gabon	CU	24-Jun-1999
WAEMU	Benin, Burkina Faso, Côte d'Ivoire, Guinea Bissau, Mali, Niger, Senegal, and Togo	CU	01-Jan-2000
EAC	Burundi, Kenya, Rwanda, Tanzania, and Uganda	CU	07-Jul-2000
GCC	Bahrain, Saudi Arabia, Kuwait, Oman, Qatar, and United Arab Emirates	CU	01-Jan-2003
PICTA	Cook Islands, Fiji, Kiribati, Federated States of Micronesia, Nauru, Niue, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu	FTA	13-Apr-2003
Egypt – Turkey	Egypt and Turkey	FTA	01-Mar-2007

CAN = Andean Community, CEMAC = Economic and Monetary Community of Central Africa, COMESA = Common Market for Eastern and Southern Africa, CU = Customs Union, EAC = East African Community, ECO = Economic Cooperation Organization, ECOTA = ECO Trade Agreement, ECOWAS = Economic Community of West African States, FTA = Free Trade Agreement, GCC = Gulf Cooperation Council, LAIA = Latin American Integration Association, MERCOSUR = Southern Common Market, MSGTA = Melanesian Spearhead Group Trade Agreement, PICTA = Pacific Island Countries Trade Agreement, PIF = Pacific Island Forum, PSA = Partial Scope Agreement, SPARTECA = South Pacific Regional Trade and Economic Cooperation Agreement, WAEMU = West African Economic and Monetary Union, WTO = World Trade Agreement.

Notes:

1. Original members of the agreement are underlined. Parentheses signify withdrawal from the agreement.
2. While the WTO is of the position that the Melanesian Spearhead Group Trade Agreement has four original members, Fiji is not included as an original member because the treaty that established the Melanesian Spearhead Group Trade Agreement gives only Papua New Guinea, Solomon Islands, and Vanuatu as the original members. The group accepted Fiji in 1998.

Source: Author compilation based on the WTO FTA database and various agreements.

Third, the majority of the 13 plurilateral Enabling Clause-based FTAs outside Asia include an accession clause. Based on available data, we confirmed that all non-Asian plurilateral FTAs based on the Enabling Clause include provisions on the accession of new members, except GCC and ECOWAS.[35] Among the remaining 11 Enabling Clause-based plurilateral FTAs outside Asia, membership in three—SPARTECA, ECOTA, and MSGTA—requires accession to the umbrella institution. Being a member of the Pacific Island Forum (PIF), formerly known as the South Pacific Forum (SPF), is a prerequisite for SPARTECA membership (Article XIV of SPARTECA). However, membership in PIF is open to the territories of the Pacific Islands region (Article I of the Agreement Establishing the Pacific Island Forum). In the case of ECO, though the original trilateral preferential tariff protocol under ECO signed in 1991 was open to any developing country (Article IV of the 1991 Protocol), being a member of ECO is a prerequisite for membership in ECOTA, which was established in 2003 (Article 1 of ECOTA). The accession policy of ECO is liberal because it is open to any state enjoying geographical contiguity with ECO members and/or sharing the objectives and principles of ECO (Article XIII of Treaty of Izmir). Being a member of the Melanesian Spearhead Group (MSG) is a prerequisite for MSGTA membership (Article 16 of MSGTA). The accession procedure for MSG is unclear, though it accepted a new member, Fiji, in 1998.[36]

Other than the five cases mentioned above—GCC, ECOWAS, SPARTECA, ECOTA, and MSGTA—the eight plurilateral FTAs directly accept members based on the accession clause in their respective agreements.[37] The accession rules of those FTAs are expansive in nature in terms of membership policy, though the details of the accession procedure are often determined and assessed by subsidiary bodies such as a council. All have clear stipulations on application eligibility, which contributes to the transparency and openness of the agreement. In many cases, the provision states "the agreement shall be open to the accession of the rest of" the countries in a particular region (or even any country). Some FTAs consider geographical proximity and economic interdependence as the critical elements of eligibility, which implies that nearby countries affected by the FTA are allowed to join the agreement (e.g., COMESA and EAC). In terms of the procedures of approval made by incumbents, some agreements (e.g., COMESA) adopt an open accession principle, but other agreements (e.g., CAN) make a decision on whether to accept new members by voting (semi-open). There are agreements (e.g., CEMAC[38]) that require unanimous concurrence to accept new members. The accession rules of each FTA are summarized in Table 6.

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35 ECOWAS includes a provision on withdrawal (Article 91).

36 Article I.3 of the Agreement Establishing the Melanesian Spearhead Group states "the Leaders' Summit may determine from time to time, the criteria for observers and associate members… or whereby other governments, territories or organizations may be admitted to observer and associate membership of MSG."

37 Conceptually, this can be classified into two groups: (i) direct accession to an FTA, and (ii) direct accession to a "package agreement" that includes an FTA. In the latter case, members cannot be a member of an FTA only, because the FTA is an inseparable part of the package agreement. For example, MERCOSUR falls under the first category since this agreement mainly covers only trade, while COMESA falls under the second category because it covers a wide range of issues including a customs union. However, distinguishing between the two is difficult in reality because some FTAs have comprehensive coverage, which can be regarded as a package agreement.

38 While CEMAC uses "Central Africa" in its name, membership is, in fact, open to any African country.

Table 6: Accession Rules of Non-Asian Enabling Clause-Based FTAs

Agreements	Countries Who May Apply	Accession Procedures	Article
LAIA	Open to accession by all Latin American countries	Accession shall be adopted by the Council of Foreign Ministers, which requires two-thirds majority vote	Article 43 and 58 (of the Montevideo Treaty)
CAN	Open to accession of the rest of Latin American countries	Affirmative vote of the absolute majority	Article 151 (of the Cartagena Agreement)
MERCOSUR	Open to accession of other members of LAIA	Unanimous decision of members	Article 20
COMESA	Open to immediate neighbors of a member state	Automatic accession provided that terms and conditions are met	Article 1 and Article 194
CEMAC	Open to any other African states	Unanimous agreement of the members	Article 6
WAEMU	Open to all West African states	Agreement between member states and the applicant state	Article 103
EAC	Geographical proximity to and inter-dependence with members	Approval given by members	Article 3
PICTA	Open to Any State, Territory or Self-Governing Entity	Unanimous agreement by members	Article 27

CAN = Andean Community, CEMAC = Economic and Monetary Community of Central Africa, COMESA = Common Market for Eastern and Southern Africa, EAC = East African Community, LAIA = Latin American Integration Association, MERCOSUR = Southern Common Market, PICTA = Pacific Island Countries Trade Agreement, WAEMU = West African Economic and Monetary Union.
Source: Author's compilation.

Below are illustrative examples of accession clauses in agreements from three regions (Africa, the Pacific Islands, and South America).

MERCOSUR
CHAPTER IV: Accession
Article 20

1. This Treaty shall be open to accession, through negotiation, by other countries members of the Latin American Integration Association[39]; their applications may be considered by the States Parties once this Treaty has been in force for five years.

2. Notwithstanding the above, applications made by countries members of the Latin American Integration Association who do not belong to subregional integration

[39] The membership of LAIA is also open to non-members.

schemes or an extraregional association may be considered before the date specified.

3. Approval of applications shall require the unanimous decision of the States Parties.

PICTA
Article 27: Accession by Other States, Territories or Self-Governing Entities

1. By unanimous agreement the Parties may permit any State, Territory or Self-Governing Entity not listed in Paragraph 1 of Article 26 to accede to this Agreement.

2. The terms of such accession shall be negotiated between the Parties and the State, Territory or Self-Governing Entity desiring to accede to this Agreement pursuant to Paragraph 1 of this Article.

CEMAC
Article 6

1. Any other African state, sharing the same ideals as those which the founding members declare solemnly committed, may apply for membership in the Economic and Monetary Community of Central Africa.

2. This membership not be made until unanimous agreement of the founding members.
   Any subsequent accession of a new state will be subject to the unanimous agreement of members of the Community.

Fourth, most Enabling Clause-based FTAs have a relatively long history. Among the 14 Enabling Clause-based FTAs outside Asia, three FTAs came into force in the 1980s and six in the 1990s. Only four entered into force after 2000. Thus, we can say there are no recent proliferation of Enabling Clause-based FTAs outside Asia. This is mainly because most subregions in the world already have Enabling Clause-based FTAs that have an accession clause and non-members can simply join those existing FTAs, rather than establish a new Enabling Clause-based FTA. In fact, since most of these FTAs have been in effect for a long period, existing agreements experience fluctuations in membership across time. Among the 13 plurilateral FTAs outside Asia based on the Enabling Clause, four underwent membership expansion while two experienced a withdrawal of members.

Interestingly, it is rare that a developing country outside Asia signs both GATT Article XXIV-based and Enabling Clause-based FTAs. Usually, a developing country outside Asia signs more than one FTA of the same kind, either Enabling Clause-based or GATT Article XXIV-based. For example, Fiji has membership in three FTAs based on the Enabling Clause: (i) South Pacific Regional Trade and Economic Cooperation (SPARTECA), (ii) Melanesia Spearhead Group Trade Agreement (MSGTA), and (iii) Pacific Island Countries Trade Agreement (PICTA). Likewise, Kenya is a member of the Common Market for Eastern and Southern Africa (COMESA) and East African Community (EAC).[40]

[40] What is unique about Africa is that some countries have membership in multiple customs unions, which is theoretically very difficult (Krueger 1997). This is perhaps because the nature of an Enabling Clause-based customs union is very different from a GATT Article XXIV-based customs union, and the former

There are also cases of non-Asian developing countries signing several FTAs based solely on GATT Article XXIV. For example, the Central America Common Market (CACM) is based on GATT Article XXIV[41] and all other FTAs signed by members of CACM are also based on GATT Article XXIV.[42] Although some countries sign both Enabling Clause-based and GATT Article XXIV-based FTAs, their choice of legal provision is fairly consistent—all plurilateral agreements that have subregional membership are based on the Enabling Clause, while all bilateral agreements are based on GATT Article XXIV.[43] Thus, outside Asia, developing countries consistently decide to use only one of the two provisions, either the Enabling Clause or GATT Article XXIV.

In summary, the Enabling Clause is used outside of Asia as the legal basis for forming plurilateral (not bilateral) FTAs with the objective of achieving deeper integration (including customs unions) in future, and subsequently covering all countries in a subregion. Most Enabling Clause-based FTAs have been in effect for a long period and have managed to expand their respective memberships using accession clauses. As a result, proliferation of Enabling Clause-based FTAs outside of Asia has not occurred in recent years. Finally, among non-Asian developing countries, the choice of a legal provision in forming FTAs is fairly consistent.

5. Anatomy of Enabling Clause-Based FTAs in Asia

5.1 Use of the Enabling Clause by Developing Asian Countries

As we have seen, in Asia there are a total of 18 Enabling Clause-based FTAs (Table 7), and a total of 40 FTAs based on GATT Article XXIV (Table 8). As stated already, FTAs that involve at least one Asian country are regarded as Asian FTAs, including cross-regional FTAs in which the contracting parties include both Asian and non-Asian countries. (For a discussion of cross-regional agreements, see Katada and Solis 2011.)

The worldwide share of Enabling Clause-based FTAs is only 16%, as we have already confirmed. However, simply considering Enabling Clause-based FTAs to be a minor subcategory in the universe of FTAs is not accurate. If we compare Asian and non-Asian FTAs, the composition of various types of FTAs is very different (Figure 1). In Asia, there are 18 Enabling Clause-based FTAs and 40 GATT Article XXIV-based FTAs, and thus the share of Enabling Clause-based FTAs is as high as 31%. As we saw, outside Asia, the share of Enabling Clause-based FTAs is as low as 9%. We can conclude that the number of Enabling Clause-based FTAs is significant only in Asia.

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does not function well economically. (For a discussion on dysfunctional economic integration schemes in Africa, see Khadiagala 2011.)

41 However, some are of the view that members of those agreements are perceived to be able to renege on MFN obligations (Ng and Yeats 2003).

42 CACM includes Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.

43 For example, many Latin American countries

Table 7: Enabling Clause-Based FTAs in Asia

Agreements	Membership	Type	Entry Into Force
Asia Pacific Trade Agreement (APTA)	Bangladesh, People's Republic of China, India, Republic of Korea, Lao People's Democratic Republic, Sri Lanka	FTA (PSA)	17-Jun-1976
Lao People's Democratic Republic–Thailand	Bilateral (intraregional)	FTA (PSA)	20-Jun-1991
ASEAN Free Trade Area (AFTA)	Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand, Viet Nam	FTA	28-Jan-1992
South Asian Preferential Trade Arrangement (SAPTA)	Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, Sri Lanka	FTA (PSA)	07-Dec-1995
India–Sri Lanka	Bilateral (intraregional)	FTA	15-Dec-2001
India–Afghanistan	Bilateral (intraregional)	FTA (PSA)	13-May-2003
ASEAN–People's Republic of China	Bilateral (intraregional)	FTA (PSA)	01-Jan-2005
Pakistan–Sri Lanka	Bilateral (intraregional)	FTA	12-Jun-2005
South Asian Free Trade Agreement (SAFTA)	Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, Sri Lanka	FTA	01-Jan-2006
India–Bhutan	Bilateral (intraregional)	FTA	29-Jul-2006
Chile–India	Bilateral (cross-regional)	FTA (PSA)	17-Aug-2007
Pakistan–Malaysia	Bilateral (intraregional)	FTA	01-Jan-2008
MERCOSUR–India	Bilateral (cross-regional)	FTA (PSA)	01-Jun-2009
India–Nepal	Bilateral (intraregional)	FTA (PSA)	27-Oct-2009
ASEAN–India	Bilateral (intraregional)	FTA	01-Jan-2010
ASEAN–Republic of Korea	Bilateral (intraregional)	FTA	01-Jan-2010
India–Republic of Korea	Bilateral (intraregional)	FTA	01-Jan-2010
India–Malaysia	Bilateral (intraregional)	FTA	01-Jul-2011

ASEAN = Association of Southeast Asian Nations, FTA = Free Trade Agreement, PSA = Partial Scope Agreement.
Note: In the case of plurilateral FTAs (e.g., APTA, AFTA, SAPTA, and SAFTA), original members are underlined.
Source: Author's compilation based on WTO RTA Database.

Table 8: GATT Article XXIV-Based FTAs in Asia

Agreements	Membership	Entry Into Force
New Zealand–Singapore	Bilateral (cross-regional)	01-Jan-2001
Japan–Singapore	Bilateral (intraregional)	30-Nov-2002
EFTA–Singapore	Bilateral (cross-regional)	01-Jan-2003
Singapore–Australia	Bilateral (cross-regional)	28-Jul-2003
People's Republic of China–Macau, China	Bilateral (intraregional)	01-Jan-2004
People's Republic of China–Hong Kong, China	Bilateral (intraregional)	01-Jan-2004
US–Singapore	Bilateral (cross-regional)	01-Jan-2004
Republic of Korea–Chile	Bilateral (cross-regional)	01-Apr-2004
Thailand–Australia	Bilateral (cross-regional)	01-Jan-2005
Japan–Mexico	Bilateral (cross-regional)	01-Apr-2005
Thailand–New Zealand	Bilateral (cross-regional)	01-Jul-2005
India–Singapore	Bilateral (intraregional)	01-Aug-2005
Jordan–Singapore	Bilateral (cross-regional)	22-Aug-2005
Republic of Korea–Singapore	Bilateral (intraregional)	02-Mar-2006
Trans-Pacific Strategic Economic Partnership	Brunei Darussalam, Chile, New Zealand, Singapore	28-May-2006
Guatemala–Taipei,China	Bilateral (cross-regional)	01-Jul-2006
Japan–Malaysia	Bilateral (intraregional)	13-Jul-2006
Panama–Singapore	Bilateral (cross-regional)	24-Jul-2006
EFTA–Republic of Korea	Bilateral (cross-regional)	01-Sep-2006
Chile–People's Republic of China	Bilateral (cross-regional)	01-Oct-2006
Pakistan–People's Republic of China	Bilateral (intraregional)	01-Jul-2007
Chile–Japan	Bilateral (cross-regional)	03-Sep-2007
Japan–Thailand	Bilateral (intraregional)	01-Nov-2007
Nicaragua–Taipei,China	Bilateral (cross-regional)	01-Jan-2008
Honduras–El Salvador–Taipei,China	Honduras, El Salvador, Taipei,China	01-Mar-2008
Japan–Indonesia	Bilateral (intraregional)	01-Jul-2008
Brunei Darussalam–Japan	Bilateral (intraregional)	31-Jul-2008
People's Republic of China–New Zealand	Bilateral (cross-regional)	01-Oct-2008
ASEAN–Japan	Bilateral (intraregional)	01-Dec-2008
Japan–Philippines	Bilateral (intraregional)	11-Dec-2008
People's Republic of China–Singapore	Bilateral (intraregional)	01-Jan-2009
Peru–Singapore	Bilateral (cross-regional)	01-Aug-2009
Japan–Switzerland	Bilateral (cross-regional)	01-Sep-2009
Japan–Viet Nam	Bilateral (intraregional)	01-Oct-2009
ASEAN–Australia–New Zealand	ASEAN, Australia, New Zealand	01-Jan-2010
Peru–People's Republic of China	Bilateral (cross-regional)	01-Mar-2010
Hong Kong, China–New Zealand	Bilateral (cross-regional)	01-Jan-2011
EU–Republic of Korea	Bilateral (cross-regional)	01-Jul-2011
India–Japan	Bilateral (intraregional)	01-Aug-2011
Peru–Republic of Korea	Bilateral (cross-regional)	01-Aug-2011

ASEAN = Association of Southeast Asian Nations, EFTA = European Free Trade Association, EU = European Union, FTA = Free Trade Agreement, US = United States.
Note: All agreements listed in this table are FTAs.
Source: Author's compilation based on WTO RTA Database.

If we distinguish between intraregional FTAs and cross-regional FTAs in Asia, very interesting observations can be made (Table 9). The share of Enabling Clause-based FTAs is considerably different between intraregional FTAs (all contracting parties are Asian economies) and cross-regional FTAs (contracting parties involve both Asian and non-Asian countries). Among the 58 FTAs in Asia, 31 are intraregional and 27 are cross-regional. Out of 31 intraregional FTAs, 16 are Enabling Clause-based and 15 are GATT Article XXIV-based. This means that more than half of intraregional FTAs in Asia are based on the Enabling Clause. The predominance of Enabling Clause-based FTAs is evident if the samples are limited to intra-Asian FTAs. Interestingly, there are only two cross-regional FTAs in Asia that are based on the Enabling Clause.

Table 9: Breakdown of FTAs in Asia

Agreements	Intraregional	Cross-Regional	Total
Plurilateral	4 FTAs in total - 0 GATT Article XXIV - 4 Enabling Clause	3 FTAs in total - 3 GATT Article XXIV - 0 Enabling Clause	7 FTAs in total - 3 GATT Article XXIV - 4 Enabling Clause
Bilateral	27 FTAs in total - 15 GATT Article XXIV - 12 Enabling Clause	24 FTAs in total - 22 GATT Article XXIV - 2 Enabling Clause	51 FTAs in total - 37 GATT Article XXIV - 14 Enabling Clause
Total	31 FTAs in total - 15 GATT Article XXIV - 16 Enabling Clause	27 FTAs in total - 25 GATT Article XXIV - 2 Enabling Clause	58 FTAs in total - 40 GATT Article XXIV - 18 Enabling Clause

FTAs = Free Trade Areas, GATT = General Agreement on Tariffs and Trade.
Source: Author's compilation based on WTO RTA database.

In addition, it is important to remember that, FTAs involving developed countries shall be based on GATT Article XXIV, not the Enabling Clause. In the case of Asia, FTAs including Japan shall be based on GATT Article XXIV. Of the 15 intraregional FTAs based on GATT Article XXIV in Asia, six involve Japan (Japan–Singapore, Japan–Malaysia, Japan–Thailand, Japan–Indonesia, ASEAN–Japan, and India–Japan). These six FTAs are thus ineligible to apply the Enabling Clause. Among the 25 intraregional South–South FTAs in Asia not involving Japan, 16 are based on the Enabling Clause. The Enabling Clause is the dominant tool when signing South–South FTAs in Asia, which is in sharp contrast to the situation outside Asia described in the previous section.

Which Asian countries have signed the most intraregional Enabling Clause-based FTAs in Asia? In fact, almost all developing countries in Asia have signed them (Table 10), including the People's Republic of China, India, Indonesia, Republic of Korea, Malaysia, Pakistan, Philippines, Sri Lanka, Thailand, Viet Nam, and ASEAN as a group. While the majority of FTAs signed by South Asian countries are based on the Enabling Clause, Southeast and Northeast Asian countries are also regular users of the Enabling Clause. Thus, we can say that heavy usage of the Enabling Clause is a common feature throughout Asia.

Table 10: FTAs Signed by Developing Countries in Asia

Country	Enabling Clause-Based FTAs	GATT Article XXIV-Based FTAs
People's Republic of China	APTA, ASEAN–People's Republic of China	People's Republic of China–Macau, China; People's Republic of China–Hong Kong, China; Chile–People's Republic of China; Pakistan–People's Republic of China; People's Republic of China–New Zealand; People's Republic of China–Singapore; Peru–People's Republic of China
Republic of Korea	APTA, ASEAN–Republic of Korea, Republic of Korea–India	Republic of Korea–Chile, Republic of Korea–Singapore, EFTA–Republic of Korea, EU–Republic of Korea, Peru–Republic of Korea
Malaysia	AFTA, ASEAN–People's Republic of China, Pakistan–Malaysia, ASEAN–India, ASEAN–Republic of Korea, India – Malaysia	Japan–Malaysia, ASEAN–Japan, ASEAN– Australia–New Zealand
Thailand	AFTA, ASEAN–People's Republic of China, ASEAN–India, ASEAN–Republic of Korea	Thailand–Australia, Thailand–New Zealand, Japan–Thailand, ASEAN–Japan, ASEAN–Australia–New Zealand
Indonesia	AFTA, ASEAN–People's Republic of China, ASEAN–India, ASEAN–Republic of Korea	Japan–Indonesia, ASEAN–Japan, ASEAN–Australia–New Zealand
Philippines	AFTA, ASEAN–People's Republic of China, ASEAN–India, ASEAN– Republic of Korea	ASEAN–Japan, Japan–Philippines, ASEAN–Australia–New Zealand
Singapore	AFTA, ASEAN–People's Republic of China, ASEAN–India, ASEAN–Republic of Korea	New Zealand–Singapore, Japan–Singapore, EFTA–Singapore, Singapore–Australia, US–Singapore, India–Singapore, Jordan–Singapore, Republic of Korea–Singapore, Trans-Pacific Strategic Economic Partnership, Panama– Singapore, ASEAN–Japan, People's Republic of China–Singapore, Peru–Singapore, ASEAN–Australia–New Zealand
Viet Nam	AFTA, ASEAN–People's Republic of China, ASEAN–India, ASEAN–Republic of Korea	ASEAN–Japan, Japan–Viet Nam, ASEAN–Australia–New Zealand
India	APTA, SAPTA, SAFTA, India–Sri Lanka, India–Afghanistan, India–Bhutan, Chile–India, MERCOSUR–India, ASEAN–India, Republic of Korea–India, India–Malaysia	India–Singapore, India–Japan
Pakistan	SAPTA, SAFTA, Pakistan–Malaysia	Pakistan–People's Republic of China
Sri Lanka	APTA, SAPTA, SAFTA, India–Sri Lanka	None

AFTA = ASEAN Free Trade Area, APTA = Asia Pacific Trade Agreement, ASEAN = Association of Southeast Asian Nations, EFTA = European Free Trade Association, FTA = Free Trade Agreement, SAPTA = South Asian Preferential Trade Arrangement, SAFTA = South Asian Free Trade Agreement.
Source: Author's Compilation.

It is important to note that some contracting parties of Enabling Clause-based FTAs in Asia also sign GATT Article XXIV-based FTAs. Almost all developing countries in Asia, other than the least developed countries (LDCs) and the notable exception of Sri Lanka, have signed both types of FTAs.[44] For example, the People's Republic of China has signed two Enabling Clause-based FTAs (Asia-Pacific Trade Agreement [APTA] and the ASEAN–People's Republic of China FTA) and seven GATT Article XXIV-based FTAs (People's Republic of China–Macau, China; Chile–People's Republic of China; People's Republic of China–Hong Kong, China; People's Republic of China–Pakistan; People's Republic of China– Singapore; People's Republic of China–New Zealand; People's Republic of China–Peru). Moreover, some FTAs between developing countries are based on the Enabling Clause even when both contracting parties have signed GATT Article XXIV-based FTAs with another trading partner. For example, although both Malaysia and India have signed GATT Article XXIV-based FTAs with other parties (e.g., Japan–Malaysia EPA, India–Singapore EPA), the FTA between Malaysia and India is based on the Enabling Clause. Obviously, one of the reasons behind the parallel usage of the two legal provisions is that many developing countries in Asia sign FTAs with nearby developed countries such as Japan and Australia; therefore, these FTAs should be based on GATT Article XXIV. However, even we limit our analysis to South–South FTAs in Asia, the choice of legal provision is not as homogenous as is the case with non-Asian developing countries. For example, while the ASEAN–People's Republic of China and Malaysia–Pakistan FTAs are based on the Enabling Clause, the People's Republic of China–Pakistan FTA is based on GATT Article XXIV. This parallel usage of the two provisions could be one of the reasons why there are so many Enabling Clause-based FTAs in Asia.

5.2 Bilateral Enabling Clause-Based FTAs in Asia

The most unique aspect of Enabling Clause-based FTAs in Asia is that the majority of them are bilateral FTAs.[45] Among the 16 (intraregional) Enabling Clause-based FTAs in Asia, 12 are bilateral. This is in sharp contrast to the situation outside Asia where almost all Enabling Clause-based FTAs are plurilateral. As aforementioned, there is only one bilateral FTA based on the Enabling Clause outside Asia. As a result, almost all bilateral Enabling Clause-based FTAs are located in Asia. Two-thirds of Enabling Clause-based FTAs in Asia (12 out of 18) are intraregional as well as bilateral. Thus, the most distinctive feature of FTAs in Asia can be summarized as follows: Asia is home to many bilateral South–South FTAs that are based on the Enabling Clause.

As far as bilateral Asian FTAs based on the Enabling Clause are concerned, most of them are relatively new. Among the 14 bilateral Enabling Clause-based FTAs, only one was signed before 2000, four were signed between 2001 and 2005, and nine were signed between 2006 and 2011. Thus, we can say that Enabling Clause-based FTAs are the principal contributor to the recent proliferation of FTAs in Asia. As discussed, outside Asia the number of new Enabling Clause-based FTAs has been limited, while GATT

[44] There are four LDCs in East and South Asia: Bangladesh, Bhutan, Cambodia, and Lao People's Democratic Republic. None of them have signed a GATT Article XXIV-based FTA. However, for example, the Japan–ASEAN EPA covers LDCs in ASEAN.

[45] One of the parties of bilateral agreement can be a regional entity like ASEAN or MERCOSUR. These agreements are classified as bilateral by the WTO.

Article XXIV-based FTAs have proliferated. It is also important to note that the predominance of bilateral FTAs in Asia that are based on the Enabling Clause is a recent phenomenon, which became evident only after 2000.

All bilateral FTAs based on the Enabling Clause in Asia are FTAs, and none of them include a customs union. Sometimes, FTAs take the form of a partial scope agreement (PSA), with limited product coverage. At present, no bilateral Enabling Clause-based FTAs in Asia, except several agreements signed by Singapore, have an accession clause[46] (The exceptions involving Singapore being New Zealand–Singapore FTA Article 79, Australia–Singapore FTA Chapter 17 Article 4, Singapore–US FTA Article 21.6.) Furthermore, all bilateral Enabling Clause-based FTAs spell out the participating countries in the name of the agreement. As a result, none of them experienced a change in membership, whether the accession of a new member or the withdrawal of an existing one. In short, the nature of bilateral FTAs based on the Enabling Clause is not expansive, which is not surprising, since bilateralism is exclusive by definition.

5.3 Plurilateral Enabling Clause-Based FTAs in Asia

In Asia, there are four plurilateral FTAs based on the Enabling Clause: (i) Asia-Pacific Trade Agreement (APTA), (ii) ASEAN Free Trade Area (AFTA), (iii) South Asian Preferential Trade Arrangement (SAPTA), and (iv) South Asian Free Trade Agreement (SAFTA).

The fundamental features of plurilateral FTAs based on the Enabling Clause in Asia are similar to such FTAs outside Asia, albeit with a few differences. The period in which plurilateral Enabling Clause-based FTAs in Asia were signed is almost the same period that such FTAs were signed outside Asia. Except for SAFTA, which was signed in 2006, all plurilateral Enabling Clause-based FTAs in Asia were signed in the 1970s and 1990s. One interesting issue relating to this is that the first Enabling Clause-based FTA, APTA, was signed in Asia. In addition, there was only one bilateral Enabling Clause-based FTA in Asia before 2000. Prior to that year, the Enabling Clause was applied to FTAs in a similar manner in Asia as in other regions. Thus, Asian countries have also used the Enabling Clause as the basis for their regional cooperation projects.

All four of the plurilateral Enabling Clause-based FTAs in Asia mentioned above have a strong subregional basis. Membership in these FTAs usually includes many countries in a subregion. A geographical label is also used in the name of these FTAs, specifically, the name of a subregion such as Southeast Asia or South Asia. Similar to Enabling Clause-based FTAs outside Asia, such FTAs in Asia also overlap with each other in terms of geographical scope and membership. For example, India has membership in both APTA and SAFTA.

However, there are some critical differences between Asian plurilateral Enabling Clause-based FTAs and similar non-Asian FTAs. First, with the notable exception of APTA, no

[46] The number of bilateral FTAs that have an accession clause is limited outside Asia as well. Examples include Australia–US (Article 23.1), Australia–Chile (Article 23.2), Peru–US (Article 23.5), and the Closer Economic Relations (CER) Agreement between New Zealand and Australia (Article 24 in goods and Article 22 in services). See Lewis (2010).

plurilateral FTA in Asia based on the Enabling Clause includes an accession clause (APTA's accession clause is provided below for reference.)

> **APTA**
> **Chapter VII – Accession and Withdrawal**
> **Article 30 Accession to the Agreement**
> 1. After its entry into force, this Agreement shall be open for accession by any developing member country of ESCAP.
>
> 2. After due negotiations, the applicant country may accede to the Agreement by consensus. If consensus is not reached, however, the applicant country may accede to the Agreement if at least two thirds of the Participating States recommend its accession. If any of the Participating States objects to such accession, however, the provisions of the Agreement shall not apply as between that country and the acceding country.

It seems that plurilateral FTAs in Asia, other than APTA, adopt relatively exclusive membership policies. It may be the case that it is necessary for an applicant to first be a member of, for example, ASEAN in order to become an AFTA member, although this is not mentioned in the agreement.[47] Thus, for non-members that are interested in AFTA membership, there is no indication on how to become an AFTA member. Likewise, SAFTA does not have an accession clause, though it has a clause on withdrawal of membership (Article 21).[48]

Second, for plurilateral Enabling Clause-based FTAs in Asia, the creation of future customs unions does not seem to be a possibility. It can be said that the integration scheme of economies for Enabling Clause-based FTAs in Asia is not as bold as Enabling Clause-based FTAs outside Asia, where customs unions, not FTAs are common. Moreover, many of them are PSAs, in which only a limited number of sectors are covered.

In summary, among plurilateral FTAs formed before 2000, Asian developing countries used the Enabling Clause in a similar manner as non-Asian countries, although Asian plurilateral FTAs based on the Enabling Clause seldom had clear accession rules, unlike such non-Asian FTAs. It was only after 2000 that Asian developing countries started to use the Enabling Clause to form bilateral FTAs.

6. Implications for Open Regionalism in Asia

The proliferation of Enabling Clause-based FTAs has important implications for Asian regionalism, whose nature has mainly been described as being open. The number of Enabling Clause-based FTAs is significant in Asia but not elsewhere. While there is no doubt that developing countries are entitled to sign Enabling Clause-based FTAs, it is another matter whether or not these FTAs are consistent with open regionalism. As

[47] Moreover, it is widely recognized that ASEAN adopts a relatively exclusive membership policy. While the ASEAN Charter has an accession clause, it does not say to whom that the membership is open. For an assessment of the membership policy of ASEAN, see Fon and Parisi (2005, p. 3).

[48] Moreover, the South Asian Association for Regional Cooperation (SAARC) does not have an accession clause.

weaker disciplines are required for signing Enabling Clause-based FTAs, it is very important to closely examine the openness of Enabling Clause-based FTAs. Because Asian developing countries use the Enabling Clause to form bilateral FTAs, unlike countries outside Asia, a central question is the openness of an FTA that is both bilateral and Enabling Clause-based, a combination popular in Asia since 2000. Has the nature of Asian regionalism been altered by the rise of bilateralism, especially bilateral Enabling Clause-based FTAs? Can we still say that Asian trade regionalism is open despite the fact that many bilateral Enabling Clause-based FTAs have been signed by Asian countries? How should bilateral Enabling Clause-based FTAs be made more open?

Open regionalism has three variations with regard to trade in goods liberalization (Bergsten 1997).[49] The first definition of open regionalism is "open membership," which suggests that any country that is willing to accept the rules of the institution can be invited to join (Soesastro 2003). The second variation is the unilateral and unconditional reduction of MFN tariffs. This is widely considered the truest interpretation of open regionalism, although it is difficult to be achieved in reality given the risk of free riding. This option is sometimes referred to as the unilateral "multilateralization" of preferential tariffs. The third type of open regionalism is the commitment to global liberalization, which is mainly achieved at the multilateral negotiations of the WTO. These are not necessarily mutually exclusive ideas. It is useful to analyze bilateral Enabling Clause-based FTAs in terms of open regionalism from three different angles that will be discussed in turn below.

First, in relation to the membership policy of FTAs, it seems safe to say that the manner in which the Enabling Clause is used in Asia is not as open as that outside Asia. Asian developing countries use the Enabling Clause to form bilateral FTAs. Outside Asia, the Enabling Clause is commonly used to form plurilateral FTAs under which all countries in the subregion are expected to join. As such, these plurilateral FTAs have an accession clause. Because weaker disciplines are required for signing Enabling Clause-based FTAs than GATT Article XXIV-based FTAs, there is always the risk of negative externalities for non-members. The potential adverse effects of weakly disciplined FTAs can be mitigated by the inclusion of an accession clause, with outsiders that are negatively affected by an agreement are able to become insiders. In short, bilateral Enabling Clause-based FTAs, which are popular in Asia, are less open than plurilateral Enabling Clause-based FTAs that have accession clauses, which are common outside Asia. The formation of bilateral FTAs based on the Enabling Clause that do not include an accession clause is not an ideal situation as far as the openness of FTAs is concerned.[50]

How should bilateral Enabling Clause-based FTAs be made more open? One way to solve this problem is to include an accession clause in FTAs so that they adhere to an open membership policy (Soesastro 2003). In reality, however, this can be difficult to achieve (Bergsten 1997). Another more viable solution is the effective use of APTA, which is based on the Enabling Clause. APTA is the oldest FTA in Asia and it is a

[49] Another possible definition of open regionalism is trade facilitation, which is not in the scope of this paper (Bergsten 1997).

[50] This type of bilateral agreement cannot be said to be "expansive bilateralism" (Capie and Evans 2002, p. 40).

plurilateral FTA. APTA has an accession clause through which all developing countries of ESCAP can obtain membership. Moreover, no country can exercise a veto over the accession process of other states, instead a two-thirds majority vote is used to confirm accession. As far as the membership policy is concerned, APTA can be deemed the most liberal agreement in the world. If APTA were used effectively, there would be no need for developing countries in Asia to sign bilateral FTAs based on the Enabling Clause. (It is important to note that the two giant economies in Asia—the People's Republic of China and India—are both members of APTA.)

Second, on the relation between an FTA and the MFN rate, it is not easy to empirically examine whether Enabling Clause-based FTAs in Asia facilitate or prevent the unilateral MFN rate reduction of FTA members compared with GATT Article XXIV-based FTAs. In general, however, Enabling Clause-based FTAs seem to be less effective in achieving the unilateral reduction of the MFN rate than GATT Article XXIV-based FTAs. Many economics studies find that Enabling Clause-based FTAs are more trade distortive than GATT Article XXIV-based FTAs (Park and Park 2011). In fact, after the establishment of many FTAs based on the Enabling Clause in the 1980s and 1990s, Latin American countries faced the risk of significant trade diversion (Rajapatirana 1994).

There are at least two reasons for explaining why Enabling Clause-based FTAs do not generate sufficient incentives for MFN rate reduction. The first point relates to the direct force brought about by the signing of FTAs in reducing the MFN rate.[51] In the case of GATT Article XXIV-based FTAs, there is an obligation to conduct a comparison of ex ante and ex post levels of protection against non-members (GATT Article XXIV:5 [a]). Thus, the external tariffs of members of GATT Article XXIV-based FTAs tend to be lower. However, the Enabling Clause simply requires that FTAs not raise barriers to trade with non-members without conducting ex ante and ex post assessments. Thus, the external trade barriers of the group can even be higher after the implementation of Enabling Clause-based FTAs, which is contradictory to a unilateral MFN rate reduction. Another reason is that in the case of GATT Article XXIV-based FTAs, the protection of sensitive sectors is basically prohibited due to the "substantially all the trade" rule (GATT Article XXIV:8 [a]). FTA members tend to fully liberalize a sector to all countries once it is opened to regional members. Thus, it is GATT Article XXIV-based FTAs that can create an incentive for the unilateral reduction of the MFN rate (ibid). In contrast, the signing of Enabling Clause-based FTAs may not lead to unilateral reductions of the MFN rate because the protection of sensitive sectors is possible (ibid). In short, the problem of Enabling Clause-based FTAs is not limited to their weaker requirements for trade liberalization per se. Rather, Enabling Clause-based FTAs do not create an incentive (or even create any disincentive) for unilateral MFN rate reduction among participating countries, unlike GATT Article XXIV-based FTAs.

How can Enabling Clause-based FTAs trigger unilateral MFN tariff reduction? It is not easy to achieve this goal. The only way to solve this problem completely is for FTAs between developing countries to be based on GATT Article XXIV, rather than the

[51] The treatment of not only internal tariffs within FTAs, but also external tariffs against non-members (namely MFN rates), are critical for FTAs to avoid being trade distortive. In terms of welfare effects, it also critical to determine if FTAs lead to an increase or decrease in external tariffs for non-members (El-Agraa 2002).

Enabling Clause (Park and Park 2011; Rajapatirana 1994). At the very least, when signing Enabling Clause-based FTAs, it is important for developing countries to bear in mind that FTAs should be designed to avoid (i) raising barriers to trade with non-members (Enabling Clause Paragraph 3 [a]) and (ii) giving preferential treatment to FTA members that may supersede unilateral MFN rate reduction.

Third, in relation to the commitment to global liberalization through the multilateral negotiations of the WTO, it is still too early to make any definitive statement because the Doha Round negotiations have yet to be concluded. However, the future result of the Doha Round will be a good test to determine whether the commitment of Asian countries to global liberalization is real. In order for Asian countries to be called pursuers of open regionalism, the MFN bound rates after the Doha Round should be much lower than the current MFN applied rates. Moreover, the MFN bound rates should be significantly lowered for products that are covered by FTAs.

The policy prescription for making Asian trade regionalism more open can be summarized as follows. Enabling Clause-based FTAs do not seem to be as desirable as GATT Article XXIV-based FTAs in terms of the economic effects on third parties. Moreover, Enabling Clause-based FTAs are unlikely to lead to MFN reductions among member countries; this manner of achieving open regionalism—through the multilateralization of FTA tariff rates—seems to be difficult. If Enabling Clause-based FTAs inevitably entail large negative externalities, accepting negatively affected non-members to the group is an effective method to minimize the cost of FTAs. This is a more realistic way of achieving open regionalism.

7. Summary

We have witnessed the proliferation of FTAs in Asia since 2000. One of the critical (and often overlooked) features of these newly signed FTAs is that many of them are based on the Enabling Clause and not GATT Article XXIV. While many analysts implicitly assume that FTAs are based on GATT Article XXIV when discussing how to make FTAs multilateralism-friendly, such an assumption is not valid in the case of Asia. In fact, the heavy use of the Enabling Clause is one of the critical reasons behind the recent proliferation of FTAs in Asia.

It is important to note that the manner in which the Enabling Clause is used in Asia is very different from its use in other regions. Above all, the number of Enabling Clause based-FTAs is very limited outside Asia. If the Enabling Clause is used to form plurilateral FTAs among non-Asian developing countries, the agreements often take the form of customs unions. Moreover, Enabling Clause-based FTAs outside Asia usually have an accession clause, with the objective of developing into a subregion-wide trade or economic agreement. Because Enabling Clause-based FTAs inevitably entail negative effects for non-members, outside Asia there are attempts to solve this problem by accepting a new member that would otherwise suffer from the FTA. In other words, Enabling Clause-based FTAs outside Asia attempt to minimize negative external effects by adhering to the principle of open membership. While developing countries outside Asia also sign bilateral FTAs, these are usually based on GATT Article XXIV, not the

Enabling Clause; in these cases, members attempt to minimize the negative external effects by satisfying conditions similar to those required in North–North FTAs.

In contrast, Asian developing countries began using the Enabling Clause to form bilateral FTAs after 2000. The Enabling Clause is no longer used in the traditional way in Asia: small developing countries envisaging the creation of subregion-wide economic or trade cooperation. Currently, more than half of intra-Asian South–South FTAs are based on the Enabling Clause, and the majority of these are bilateral. The critical feature of FTAs in Asia is the predominance of bilateral agreements that are Enabling Clause-based. One should also note that bilateral FTAs based on the Enabling Clause exist only in Asia. It is important for Asian policy makers to realize that their innovative use of the Enabling Clause has led to the proliferation of FTAs in Asia, but this approach is far from optimum in terms of fostering an open platform of economic and trade cooperation in the region.

Enabling Clause-based FTAs may not be economically as desirable as those based on GATT Article XXIV, and they may also generate large negative externalities. FTAs based on the Enabling Clause tend to have trade-distorting effects and carry the risk of welfare deterioration for non-members because the requirements of Enabling Clause-based FTAs are much weaker than those of GATT Article XXIV. Moreover, Enabling Clause-based FTAs are unlikely to lead to MFN tariff reduction among member countries. Thus, it is too optimistic to expect that open regionalism through the multilateralization of preferential tariffs can be achieved as far as bilateral Enabling Clause-based FTAs are concerned. Although we should not forget that developing countries are legally entitled to sign Enabling Clause-based FTA among themselves, signing politically driven bilateral FTAs that have economically poor effects can be described as a “deviation from WTO norms” (Bergsten et al. 2008, p. 16). This is especially so if bilateral FTAs are based on the Enabling Clause.

There are two ways to solve this problem. The first possible option is to pursue FTAs that are plurilateral, not bilateral, if the Enabling Clause is to be used. Such plurilateral FTAs should also have an accession clause. Because we cannot expect that Enabling Clause-based FTAs will have as few trade-distorting effects as GATT Article XXIV-based FTAs, and thus they may entail large negative externalities, there should be opportunities for affected developing country non-members to join such FTAs. In practical terms, Asian developing countries joining APTA would be a better option than signing a new bilateral South–South Enabling Clause-based FTA in Asia. The second possible solution is that if developing countries in Asia still want to pursue bilateral FTAs they should use GATT Article XXIV, not the Enabling Clause, in order to minimize negative externalities. Thus, countries in the region seeking open regionalism should pursue either plurilateral Enabling Clause-based FTAs or bilateral GATT Article XXIV-based FTAs, rather than bilateral Enabling Clause-based FTAs.

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Anatomy of South–South FTAs in Asia
Comparisons with Africa, Latin America, and the Pacific Islands

The majority of literature on FTAs in Asia overlooks the differences between FTAs in terms of their legal basis. Two-thirds of Intra-Asia South-South FTAs are based on the Enabling Clause, not Article XXIV of the General Agreements on Tariffs and Trade. Given the fact that how Asian FTAs use the Enabling Clause differs from its use in other regions, we should reconsider the openness of Asian regionalism.

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ADB's vision is an Asia and Pacific region free of poverty. Its mission is to help its developing member countries reduce poverty and improve the quality of life of their people. Despite the region's many successes, it remains home to two-thirds of the world's poor: 1.8 billion people who live on less than $2 a day, with 903 million struggling on less than $1.25 a day. ADB is committed to reducing poverty through inclusive economic growth, environmentally sustainable growth, and regional integration.

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