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ADB Working Paper Series

**COMPARATIVE STUDY ON THE
LEGAL FRAMEWORK ON GENERAL
DIFFERENTIATED INTEGRATION
MECHANISMS IN THE EUROPEAN
UNION, APEC, AND ASEAN**

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Abstract

As an alternative to accommodate intraregional diversity in the context where organizations aspire toward more ambitious integration goals, differentiated integration has become a feature in many regional groupings. Such a mechanism allows member states that are ready and willing to move forward in the agreed fields, while the others may join later.

This paper compares the legal framework of three differentiated integration mechanisms, namely the EU's enhanced cooperation, APEC's pathfinder initiatives, and ASEAN minus X, in order to assess, from the legal perspective, the strengths and limitations of each mechanism with a view to advancing the organizations' integration objective.

The experience of the EU, APEC, and ASEAN has shown differentiated integration to be a valuable option to allow progress despite the difference in economic development and diverse interests of the member states. The main challenges consist in designing a legal framework that allows flexible cooperation among those who are willing and able while sufficiently safeguarding the organizations' and nonparticipating member states' interest. It is also vital to ensure effective implementation of the established initiatives as well as the most extensive participation with the ultimate objective of turning differentiated integration into common regional projects.

Keywords: ASEAN minus X, differentiated integration, enhanced cooperation, pathfinder initiatives

JEL Classification: K4

Contents

1.	INTRODUCTION	1
2.	DEVELOPMENT OF A GENERAL DIFFERENTIATED INTEGRATION MECHANISM IN THE EU, APEC, AND ASEAN	2
2.1	The EU's Enhanced Cooperation	2
2.2	APEC's Pathfinder Initiatives.....	3
2.3	ASEAN Minus X	4
3.	CONDITIONS OF ESTABLISHMENT AND FUNCTIONING	5
3.1	Enhanced Cooperation.....	5
3.2	Pathfinder Initiatives	6
3.3	ASEAN Minus X	7
4.	ORGANIZATIONS' IMPLEMENTATION OF THE MECHANISMS	9
5.	ASSESSING THE MECHANISMS: CHALLENGES AND SOME POLICY AND LEGAL DEVELOPMENT SUGGESTIONS.....	11
5.1	Development of the Differentiated Integration Mechanisms.....	11
5.2	Establishment of the Mechanisms.....	12
5.3	Effect of Decisions Adopted under the Differentiated Integration Framework	12
5.4	Contribution to Furthering the Integration Progress	13
5.5	Suggestions on Legal Development and Policy	13
	REFERENCES	15

1. INTRODUCTION

Unity is undeniably the ideal situation for regional integration. Progressing as a whole has nonetheless become a challenge in the context of heterogeneity of the members, especially after the enlargement as well as the widening and the deepening of the organizations' competence. The European Union (EU), which now comprises 28 member states, has achieved the highest level of economic integration by establishing an economic union, characterized by the use of a common currency among 19 member states as well as a common economic and financial policy. The EU faces the challenge of moving beyond its core integration in the economic sphere to become a political union, as well as the challenge of membership and deintegration with Brexit.

The Asia-Pacific Economic Cooperation (APEC), comprising 21 member economies, is the world's largest transregional economic forum, gathering industrialized, industrializing, and developing economies in the Pacific Rim. With the 1994 Bogor Declaration, APEC member economies have committed themselves to the goal of free and open trade and investment in Asia and the Pacific no later than 2020. As for the Association of Southeast Asian Nations (ASEAN), which consists of ten member states that differ economically, politically, socially, and geographically, the establishment of the ASEAN Economic Community has become the goal of regional economic integration. The challenge for these two regional groupings lies principally in achieving the regional liberalization goals despite the significant differences in size and the level of economic development among the member countries.

Differentiated integration refers to a "process that allows some [...] member states to go further in the integration process while allowing others to opt not to do so" (Chopin and Lequesne 2016). According to the classification proposed by Stubb in 1996, there are three forms of differentiated integration based on time, space, and matter, namely "multispeed," "variable geometry," and "à la carte."

"Multispeed integration" refers to a subintegration that occurs inside the institutional framework and in which the members pursue common objectives at a different pace. The core group of member states, which are willing and able, proceed first, and the others will follow later. The differentiation among the member states is temporary since the other member states have to implement the commitment/agreement/policy when they are able. "Variable geometry" admits a subintegration among some member states, which constitutes an integrative unit. Variable geometry does not imply a fixed composition of member states, nor specific subject matters, but different participants, cooperating on different issues, on a case-by-case basis. Other members may opt in to an existing integrative unit that has commenced a deeper integration in a specific policy area (Stubb 2002; Thym 2005). For "à la carte" beyond a minimum of common policies, member states are allowed to choose, at their discretion, the policy areas in which they want to participate. Under the à la carte model, some member states can opt out from a specific policy area, in principle, permanently (Stubb 1996).

In order to accelerate the progress toward the integration goal, the European Union, APEC, and ASEAN have all experimented with various forms of differentiated integration. Multispeed integration takes the form of a transition period, in principle limited in time, granted to new member states as well as a two-tier timeline in the realization of the common goal. In recognition of the different levels of economic development as well as the different levels of preparedness of the members to open up their markets, ASEAN's four new member states (Viet Nam, Myanmar, the Lao PDR, and Cambodia) were given a more extended period to meet the ASEAN Free Trade Area's (AFTA) requirement for

the elimination of tariff barriers in intra-ASEAN trading of goods. The principle of the different timetables for developed and developing member economies is also recognized in APEC for the realization of the Bogor objective. The “industrialized economies” were supposed to achieve the goal by 2010 while the “developing economies” were given until 2020.

The *à la carte* model takes the form of permanent derogation based on policy areas. Starting from the 1992 Treaty of Maastricht, the EU has allowed individual member states to opt out from predetermined policies, such as the single currency (UK and Denmark), the social policy, free movement of people, and the immigration and asylum law, as well as police cooperation and criminal justice (UK). The opt-out regime has created closer cooperation among member states that are not opting out. All decisions taken in these policy areas are EU decisions, and they become part of the EU *acquis*, which is binding on the new member states. The only difference with other EU decisions is that they are not applicable in the member states that have opted out (Piris 2012; de Witte 2018).

This paper will not consider these two specific modes of differentiation, in which the time, the participants, and the policy areas have already been predetermined. It will focus on the general mechanism to allow subintegration, within the organizational framework, on a case-by-case basis, among some member states that are willing or ready to move forward, while the others that are not yet ready may join later.

Using the functional method in comparative law (Zweigert and Kötz 1998), the paper compares the legal framework of three differentiated integration mechanisms, namely the EU’s enhanced cooperation, APEC’s pathfinder initiatives, and ASEAN minus X, to draw lessons as well as policy and legal development suggestions.

Section 2 traces the development of the three differentiated integration mechanisms. Section 3 examines the conditions of their application. Section 4 considers the organizations’ implementation of the differentiated integration mechanisms. The last part discusses the strengths and limitations and suggests some possible policy and legal developments for each mechanism.

2. DEVELOPMENT OF A GENERAL DIFFERENTIATED INTEGRATION MECHANISM IN THE EU, APEC, AND ASEAN

2.1 The EU’s Enhanced Cooperation

In its early years, European integration had been characterized by the “dogma of unity” (Piris 2014). The construction of the common market justified every member state being subject to the same rules and being expected to implement the same policy at the same pace. However, the successive enlargements starting from the mid-1980s as well as the widening of the competences of the Union beyond the internal market have created the need for differentiation among the member states (Piris 2014).

The idea of a case-by-case differentiation in the EU was put forward by France and Germany. A joint letter dated 6 December 1995, from the French President Chirac and the German Federal Chancellor Kohl to the President of the European Council, proposed that “where one of the partners faces temporary difficulties in keeping up with the pace of progress in the Union, it would be desirable and feasible to introduce a general clause in the Treaties enabling those member states that have the will and the capacity to do so to develop closer cooperation among themselves within the single institutional framework of the European Union” (EU 1996).

This proposal was institutionalized by the 1997 Amsterdam Treaty under the name “closer cooperation,” later renamed “enhanced cooperation” by the Treaty of Lisbon. This enhanced cooperation went beyond the temporary derogation granted to new member states to catch up with the older member states (multispeed) or the permanent derogation on the basis of policy area that allows a predetermined policy to be dealt with on a different basis (*à la carte*) (Piris 2012). With the enhanced cooperation, the Treaty provides for general rules to allow, on a case-by-case basis and using the EU framework and institutions, a group of member states to proceed to further their integration without the need for any time limits and without the requirement that other members have to follow (Philippart and Edwards 1999).

2.2 APEC’s Pathfinder Initiatives

To achieve the Bogor goal of free and open trade and investment in Asia and the Pacific no later than the year 2020 (APEC 1994), three pillars of APEC’s work agenda include trade and investment liberalization, business facilitation, and economic and technical cooperation (ECOTECH) (APEC 2018a). APEC is based on cooperation and consensus decision-making. APEC relies on voluntary, nonbinding commitments and the logic of “open regionalism,” which treats members and nonmembers in a nondiscriminatory manner under the assumption that trade liberalization primarily benefits the country that undertakes it (Beeson 2008). The concerted unilateral liberalization approach allows member economies to liberalize economic sectors at their own comfortable pace. The Individual Action Plans (IAPs) require members to periodically report on the liberalization of 15 policy areas, while the Collective Action Plans (CAPs) provide the participating countries with best practice and databases (Hsieh 2013).

Beyond the different timelines among developed and developing economies, APEC first initiated the Early Voluntary Sectoral Liberalization (EVSL) scheme in 1997 to remediate the slow progress toward the realization of the Bogor goal. According to the EVSL scheme, developed member economies would voluntarily lower tariff and nontariff barriers for 15 sectors. However, this experience was not successful due to its voluntary nature as well as the opposition from Japan and the skepticism toward the liberalization proposal of other Asian countries after the financial crisis. After the failure of the EVSL, APEC shifted its focus toward trade and investment facilitation to lower transaction costs, while continuing the removal of trade barriers through bilateral or multilateral FTAs outside APEC’s framework (Su 2007; Hsieh 2013).

The 2001 Shanghai Accord marked an important stage of APEC's reform after the Asian financial crisis. APEC's leaders strongly endorsed the "pathfinder initiative" concept as one of the ways to invigorate progress toward the Bogor goal of free and open trade and investment, by providing "a framework to encourage broader participation through enhanced capacity building programmes" (APEC 2001). The pathfinder approach allows "economies that are ready to initiate and implement the cooperative arrangements to proceed to do so, while those who are not yet ready may join at a later date" (APEC 2014). The pathfinder has become the main approach in advancing business facilitation in APEC.

2.3 ASEAN Minus X

As for ASEAN, after the end of the Cold War, the organization shifted its focus from ensuring regional peace and security to strengthening economic cooperation. In response to the Asian financial crisis in 1997–1998, as well as to the new global economic system with the rise of the People's Republic of China (PRC) and India as economic powers, the ASEAN leaders agreed to deepen regional economic integration by establishing the ASEAN Economic Community (AEC), which aims, among other things, to transform ASEAN into a single market and production base (Yue 2013).

ASEAN's approach to cooperation, known as the "ASEAN Way," is characterized by "a high degree of discreetness, informality, pragmatism, expediency, consensus building, and nonconfrontational bargaining styles," which is "often contrasted with the adversarial posturing and legalistic decision-making procedures in Western multilateral negotiations" (Archarya 1997). The principle of consultation and consensus has been the principle of decision-making in ASEAN. This loose and flexible method of cooperation allows ASEAN member states to be comfortable in terms of approach, scope, and pace of implementation (Stubbs 2000).

For the establishment of the ASEAN Free Trade Area (AFTA), ASEAN agreed on the gradual reduction and elimination of tariff barriers in intra-ASEAN trading of goods. The member states' obligation was temporarily asymmetrical since the ASEAN-6 were obliged to reduce their tariffs for the benefit of all the ten member states, while the new four member states were exempted from this obligation for a certain period. The differentiation was agreed upon in recognition of the development gap as well as the different levels of preparedness and comfort of the member states in opening up their markets.

The concept of the subregional arrangement, later known as "10 minus X" or "ASEAN minus X," as a way to accommodate the different economic interests of the member states appeared even before the accession of the four newest member states. The concept was sanctioned for the first time in the 1992 Framework Agreement on Enhancing ASEAN Economic Cooperation, as a mode of implementation of economic arrangements. Article 1(3) of the framework lays down the principle that "all member states shall participate in intra-ASEAN economic arrangements. However, in the implementation of these economic arrangements, two or more member states may proceed first if other member states are not ready to implement these arrangements" (ASEAN 1992).

ASEAN minus X was recognized in the ASEAN Framework Agreement on Services (AFAS) as amended by a protocol in 2003 as a new approach to service sector liberalization beyond the GATS framework (ASEAN 1995, 2003). As an exception to Article 4(1) of AFAS, the ASEAN minus X formula allows two or more member states to liberalize a set of agreed service sectors without having to extend the concessions to nonparticipating member states on a most-favored-nation (MFN) basis. Others may join at a later stage or whenever ready (ASEAN 2017).

With the 2007 ASEAN Charter, ASEAN minus X was recognized as a mode of flexible participation for the implementation of economic commitments (ASEAN 2007). The insertion of Article 21(2) in the ASEAN Charter created the potential to extend the scope of ASEAN minus X, beyond service liberalization, to other areas of economic integration. The 2007 ASEAN Economic Community Blueprint provides for the application of the ASEAN minus X formula regarding the liberalization of professional service subsectors (AEC Blueprint 2007, Art. 21), and the liberalization of financial service subsectors (AEC Blueprint 2007, Art. 22), as well as in order to accelerate the implementation of agreed economic initiatives (AEC Blueprint 2007, Art. 72 V).

3. CONDITIONS OF ESTABLISHMENT AND FUNCTIONING

3.1 Enhanced Cooperation

The conditions of the establishment and functioning of the mechanisms reflect primarily the perception toward differentiated integration inside the organization. In the EU, due to the fear of a “two-tier Europe” expressed by some member states, the initial conditions for applying the enhanced cooperation were so restrictive that it was impossible to implement the mechanism. For instance, at least a majority of member states was required to set up an enhanced cooperation, the authorization was subject to unanimity, and further cooperation among some needed authorization by all (de Witte 2004). With France and Germany threatening to cooperate outside the EU framework if a more flexible mechanism of enhanced cooperation inside the treaties framework was not in place (de Witte 2004), the Nice Treaty and then the Lisbon Treaty further relaxed the conditions.

Article 20 of the Treaty on European Union (TEU) and Title III of Part VI of the Treaty on the Functioning of the European Union (TFEU) currently regulate the enhanced cooperation mechanism. Enhanced cooperation is only possible in the areas where the EU does not have exclusive competence. It does not, however, allow for an extension of EU competence beyond the areas defined by the Treaties. The enhanced cooperation must aim to further the objectives of the EU, protect its interests, and reinforce its integration process (Article 20, para. 1 TEU). It must not undermine the internal market or economic, social, and territorial cohesion. It shall not constitute a barrier to, or discrimination in, trade between member states, nor shall it distort competition between them (Article 326 TFEU). At least nine member states must participate in the enhanced cooperation.

The main EU institutions are closely involved in the authorization procedure. The EU Commission has the competence to evaluate the member states' request with the conditions and limitations laid down by the Treaty. The EU Parliament consents to the enhanced cooperation as proposed by the Commission. The Council gives authorization with a formal decision adopted through its ordinary decision-making procedure. The authorization can be subject to judicial review by the Court of Justice (CJEU) (Fabbrini 2012).

The authorization procedure is adopted by the Council based on a qualified majority voting. One exception is the Common Foreign and Security Policy where unanimity is required. However, the condition of last resort limits the use of the enhanced cooperation only to cases where the Council has established that the objective of such cooperation cannot be attained within a reasonable period by the EU as a whole (Article 20, para. 2 TEU). This condition requires enhanced cooperation to be preceded by genuine attempts to adopt the legislation applicable to all the member states (de Witte 2004).

With regard to the implementation of the enhanced cooperation, the participating member states make use of the institutions of the EU. The EU Parliament and the Commission exercise normal power and in the standard composition (Article 20, para. 1 TEU). As for the Council, however, all member states participate in its deliberations, but only the members representing the participating states take part in the vote (Article 20, para. 3 TEU). Acts adopted in the framework of enhanced cooperation are regular European laws with the same legal effect as any other European laws, but with a geographically limited applicability scope since they bind only the participating members (Thym 2005). Such acts are not part of the *acquis* and will not bind the new member states (Article 20, para. 4 TEU). Once established, the cooperation shall be open at any time to all member states (Article 328, para. 1 TFEU). Moreover, the Commission and the participants who form an *avant-garde* must ensure the promotion of the participation to include as many members as possible (Article 328, para. 2 TFEU).

3.2 Pathfinder Initiatives

The 2001 APEC Shanghai Accord states that pathfinder initiatives have to be consistent with the Bogor goals and contribute to advancing APEC initiatives. They have to observe the APEC principles of voluntarism, comprehensiveness, consensus-based decision-making, flexibility, transparency, and open regionalism. They also have to be transparent and open to encourage the broadest participation (APEC 2001).

The conditions for establishing the pathfinder initiatives were specified by the APEC Committee on Trade and Investment (CTI) in 2007 and recently updated in 2017. The pathfinder initiative guidelines aim to address two major preoccupations, namely low participation in, and stalled implementation of, some pathfinder initiatives (APEC 2014). Before the adoption of a pathfinder initiative, interested member economies (at least three) need first to establish an "interim pathfinder" to allow a discussion and an exploration of likely participation (APEC 2017b). The interim pathfinder will be subject to a review by the CTI and it can obtain pathfinder status, with the approval of the Senior Officials' Meeting (SOM), if, after one year, more than 25% of the member economies (currently six members) participate and the rest support the launch of the initiative, including through participation in capacity-building activities. If at least 50% of the members (currently 12 members) participate in the initiative, such an interim pathfinder can be fast-tracked to become a pathfinder immediately. In both cases, the lead economies have to elaborate a proposal document detailing the objectives,

implementation, and outcomes of the initiative. The proposal needs to include, among other things, detail on how to reach the objective of full participation by APEC members as well as a detailed plan for capacity building to secure wide participation (APEC 2014, 2017a).

The pathfinder initiatives are reviewed on an annual basis in accordance with the proposal document. Given that limited membership and implementation may undermine the credibility of the initiatives and of APEC, and to optimize the resources, the SOM, on the basis of the CTI's recommendation, can decide to terminate the pathfinder or invite the lead economy to revise the initiative if, after four consecutive years, the rate of participation is below 50% or if there appears to be little prospect of increasing participation or of achieving concrete progress (APEC 2017a).

3.3 ASEAN Minus X

The conditions for the establishment and implementation of the ASEAN minus X formula are defined by the 2003 protocol to amend the AFAS, as well as the ASEAN Charter (Article 21 (2)). In terms of its scope, the use of the ASEAN minus X formula pertains to the implementation of the arrangements that have been previously agreed upon by all the member states. In contrast to the EU and APEC, ASEAN has not defined a high threshold as two member states suffice to launch the cooperation. Nevertheless, the establishment of ASEAN minus X is subject to the consensus of all the member states. This condition implies that some members can proceed first toward the liberalization goal only when there is consensus among all the member states to do so (Woon 2016).

Once established, the benefit of concession is limited to the participants. The extension of the preferential treatment to the remaining member states on an MFN basis is only voluntary. In order to facilitate the expansion of the cooperation, the participating member states have an obligation to inform the other member states, through the ASEAN Secretariat, about the progress of negotiations (including the scheduling of commitments for the specific sectors or subsectors concerned) and the agreements reached (ASEAN 2003).

The nonparticipating states may join any ongoing negotiations among the participating member states, in consultation with the participating member states. The remaining member states may "in due course become a party to such an agreement upon making offers at similar or acceptable levels to the participating member states" (ASEAN 2003). The admission of the other member states requires the unanimous consent of the participating member states. In determining the acceptability of the offer, the participating member states shall nonetheless take into account "developmental differences, both in terms of economic and stage of development of the particular sector" and cannot "require a higher level of commitments from the remaining member states than their respective commitments under the agreement" (ASEAN 2012).

Table 1: Conditions of the Establishment and Functioning of the Mechanisms

	Enhanced cooperation	Pathfinder initiatives	ASEAN minus X
Legal basis	Art. 20 TEU and 326–334 TFEU	Shanghai Accord 2001 Pathfinder initiative guidelines 2017	Art. 21(2) ASEAN Charter Protocol to amend AFAS 2003
Minimum participants	9 (from 28)	Interim pathfinder: 3 (lead economy + 2 others) Pathfinder: <ul style="list-style-type: none"> • 1st year 25% (6) • 4th year 50% (11) 	2
Scope	Areas of nonexclusive competence of the EU	Initiation and implementation of cooperative arrangements	Implementation of economic arrangements Service liberalization
Conditions	Not undermine the internal market or economic, social, and territorial cohesion Prohibition of barrier or discrimination in trade or distortion of competition between member states	Consistency with the Bogor goals Principles of voluntarism, consensus-based decision-making, flexibility, transparency, and open regionalism	
Authorization	Condition of “last resort” Qualified majority vote in the Council (Unanimity for Common Foreign and Security Policy)	Consensus of all member economies	Consensus of all member states
Effect of acts or decisions adopted under the framework	Regular EU law but applicable only to the participating member states Not part of the EU acquis	In principle, no requirement for reciprocity (except some) Open regionalism	Concession limited to the participating member states
Relationship with nonparticipating member states	All member states may participate in the deliberation of the Council in the area of enhanced cooperation. Only participating member states can vote. Respect the competences, rights, and obligations of nonparticipating member states Promotion to ensure the most extensive participation Nonparticipating member states shall not impede the implementation of enhanced cooperation	Capacity-building program to ensure broad participation	Information, through the ASEAN Secretariat, on the progress or result of the negotiations (ex. the scheduling of commitments)
Admission of new participants	Accession open to all member states Conditions set in the authorization decision	Accession open to all member economies Adoption of policies compatible with the arrangements	Accession open to all member states Offer of same or acceptable level of commitments

4. ORGANIZATIONS' IMPLEMENTATION OF THE MECHANISMS

In the EU, the enhanced cooperation was implemented for the first time more than ten years after its introduction. Prior to its application, it was suggested, however, that the possibility of other member states initiating enhanced cooperation had contributed to softening Italian opposition to the adoption of the framework decision on the European Arrest Warrant in 2001 (Thym 2005).

The relaxation of the conditions, especially since the Lisbon Treaty, has enabled the application of the mechanism. The enhanced cooperation was first implemented in 2010 in the field of transnational divorce and legal separation. It was then implemented in 2011 for the creation of the unity patent system, in 2016 for the marital property regime in transnational situations, and last in 2017 for the establishment of the European public prosecutor. The adoption of enhanced cooperation for the financial transaction tax and for the project of European supercomputer infrastructure is an ongoing process (EU 2019b). The four experiences of the enhanced cooperation in the EU since 2010 have been encouraging. As of March 2019, the enhanced cooperation in place includes the majority of the member states.

Table 2: Established Enhanced Cooperation in the EU

Enhanced Cooperation	Year Adopted	Participating Member States (as of March 2019)
Law applicable to divorce and legal separation	2010	17 (Belgium, Bulgaria, Germany, Estonia, Greece, Spain, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, Austria, Portugal, Romania, Slovenia)
European unitary patent	2011	26 (Belgium, Bulgaria, the Czech Republic, Denmark, Germany, Estonia, Ireland, Greece, France, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, the Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden, the United Kingdom)
Property regime rules	2016	18 (Belgium, Bulgaria, the Czech Republic, Germany, Greece, Spain, France, Croatia, Italy, Cyprus, Luxembourg, Malta, the Netherlands, Austria, Portugal, Slovenia, Finland, Sweden)
European public prosecutor	2017	22 (Belgium, Bulgaria, the Czech Republic, Germany, Estonia, Greece, Spain, France, Croatia, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Austria, Portugal, Romania, Slovenia, Slovakia, Finland)

Source: (EU 2019b).

As for APEC, the pathfinder approach has allowed the advancement of diverse APEC initiatives principally concerning business facilitation. After the endorsement of the concept by the leaders in the 2001 Shanghai Accord, eight pathfinder initiatives were endorsed between 2002 and 2003 (Su 2007; APEC 2014). Successive initiatives were launched afterward, and the number increased to 12 in the period 2015–2017. After the recent review in accordance with the 2017 updated guidelines, some initiatives were terminated due to the absence of further development. As of August 2018, seven initiatives retain the status of pathfinder initiatives with participation from 11 to 20 member economies (APEC 2018b).

The initiatives include the use of electronic certificates of origin (e-COs) (11 APEC members), adherence to International Electrotechnical Commission (IEC) standards (16 APEC members), mutual recognition arrangements for conformity assessment (18 APEC members), and exemption of customs duties for shipments under the De Minimis value of \$100 (11 APEC members) (Hsieh 2013; APEC 2018b). The most recent one concerns an “Inclusive Trade Initiative,” which aims “to better communicate the benefits and challenges of trade and to explore policy assistance to widely distribute the benefits of trade” (APEC 2017a).

It has been suggested that the pathfinder initiatives, along with the collective actions on trade facilitation, contributed to reducing transaction costs among the APEC member economies by 5% between 2007 and 2010 (APEC 2012; Hsieh 2013).

Table 3: Status of APEC’s TILF-Related Pathfinder Initiatives

Pathfinder Initiatives	Lead Economies	Year Launched	Participation Status (as of August 2018)
Advance Passenger Information (API)	Australia	2002	Terminated
Electronic SPS Certificates	Australia and New Zealand	2002	Terminated
Kyoto Pathfinder (participation in the revised Kyoto Convention on the Simplification and Harmonization of Customs Procedures)	Australia	2002	has become a Collective Action Plan (CAP) under Sub-Committee on Customs Procedure (SCCP)
Food MRA	Thailand	2003	Terminated
Data Privacy	Australia, Canada, and United States	2007	Terminated
Mutual Recognition Arrangement of Conformity Assessment on Electrical and Electronic Equipment	JRAC	1999	8 (part I) 4 (part II) 3 (part III)
Trade and the Digital Economy	United States	2002	20
Technology Choice Principles	United States	2006	15
Self-Certification of Origin (participants agreeing to practice self-certification with FTA partners based on a set of common operating guidelines)	Australia, New Zealand, Singapore, and United States	2009	11
Facilitating Trade in Remanufactured Goods	Japan and United States	2011	12
APEC Baseline De Minimis Value	United States	2011	11
Permanent Customs Duty Moratorium on Electronic Transmissions, Including Content Transmitted Electronically	United States	2016	12
Inclusive Trade Initiative	Rep. of Korea and Chile	2017	11

Source: (APEC 2017a, 2018b).

In ASEAN, only two ASEAN minus X agreements have been concluded under the ASEAN minus X formula, in accordance with Article IV bis of AFAS. Singapore is party to both agreements. The first one is the agreement between Singapore and the Lao PDR on education services concluded in 2005, which provides for preferential

treatment between the parties on trading of education services. The other one is the 2014 agreement between Brunei Darussalam and Singapore to further liberalize trade in telecommunication services and to reduce the international roaming rates between Singapore and Brunei Darussalam (ASEAN 2015).

Nevertheless, the possibility of implementing the economic agreements under the ASEAN minus X formula has facilitated the adoption of the agreements; member states are more inclined to give their consensus to the adoption of the agreements despite not being ready knowing that they can delay the implementation of the commitments they have agreed to. Members that are ready and willing may implement such arrangements first and others may implement them later (Tevini 2018). For instance, the ASEAN Tourism Agreement requires ratification by all the member states to enter into force. Nonetheless, under the ASEAN minus X formula, the implementing agreements may be concluded by just two member states (ASEAN 2002; Severino 2006). In recent ASEAN economic agreements, ASEAN minus X has been expressly recognized as the formula for implementing the agreed commitments, as demonstrated, for instance, by the Implementation Framework of the ASEAN Single Aviation Market (ASEAN 2011).

5. ASSESSING THE MECHANISMS: CHALLENGES AND SOME POLICY AND LEGAL DEVELOPMENT SUGGESTIONS

This part comparatively summarizes the conditions and analyzes the strengths and limitations of each mechanism with regard to the advancement of regional cooperation/integration. It suggests some possible legal and policy developments to improve the effectiveness of the mechanisms.

5.1 Development of the Differentiated Integration Mechanisms

The EU has chosen the supranational approach to achieve the economic union, while ASEAN and APEC have opted for the intergovernmental approach to, respectively, establish a common market in Southeast Asia and to liberalize trade and investment in Asia and the Pacific. Despite the different modes of cooperation, all three regional groupings have embraced the differentiated integration concept to accommodate the heterogeneity of levels of economic development and of the diverse interests of the member states.

The introduction of the enhanced cooperation mechanism in the EU has been the most challenging due to the predominance of the concept of uniformity. Nonetheless, the differentiation inside the regional framework is preferable to international agreements, since it allows the involvement and control of the EU institutions. It is also characterized by the principle of openness and nondiscrimination, thereby preventing the participating member states from discriminating against, or rejecting the admission of, remaining members who satisfy the conditions (de Witte 2004).

In APEC and ASEAN, cooperation among the members has been characterized by a certain degree of flexibility to accommodate diverse national interests. The concept of flexibility is not unfamiliar and is viewed as allowing the safeguarding of the sovereignty and autonomy of their members. The cooperation among some member states has been accepted as far as such cooperation respects the principle of consensus decision-making and is not perceived as prejudicing the interests of the other member states.

5.2 Establishment of the Mechanisms

The organizations' experience has demonstrated that the conditions for the establishment of differentiated integration have to find the right balance: While adequate substantial and procedural conditions are necessary to protect the interest of the organizations as well as of the nonparticipating member states, too restrictive conditions will render the mechanism impracticable.

In the EU, the application of enhanced cooperation was possible after the relaxation of its requirements, especially the reduction of the minimum threshold of participants from a majority to nine as well as the abandonment of the right to veto. At present, a qualified majority vote in the Council suffices to authorize the enhanced cooperation among some member states, provided that other conditions laid down by the Treaties are respected. Moreover, the relaxation of the conditions is counterbalanced by the condition of last resort. To be precise, such a requirement ensures that an enhanced cooperation among some is only possible after genuine attempts to adopt the legislation applicable to all the member states have failed. In APEC and ASEAN, a consensus among the member states is required to establish a pathfinder initiative or an ASEAN minus X.

In the EU, the safeguarding of the Union's as well as the nonparticipating member states' interest is ensured through a precise set of conditions laid down in the TEU and TFEU, as well as through control of the EU institutions, especially the EU Commission, the Council, and the European Court of Justice. In APEC and ASEAN, with their loose institutionalization, the members' interests are primarily safeguarded through the consensus decision-making. The requirement for consensus implies the right to veto of the potential nonparticipating members when they consider that cooperation among other members may undermine their national interest. Such a requirement implies thus that the organizations cannot "advance without all [member states] being satisfied that their interests [are] being safeguarded" (Stubbs 2000).

It has been suggested that in APEC, the developing economies do not generally oppose the launch of a pathfinder initiative because they do not want to be seen as posing an obstacle to the progress of the group (Su 2007). In ASEAN, the requirement for the consensus of all the member states to launch an ASEAN minus X can be questioned. Taking into account the fact that the use of ASEAN minus X is currently limited to the implementation of economic arrangements to which all the member states have already agreed, the consensus requirement should be reviewed. Such a reform is necessary to ensure that ASEAN's "progress toward regional economic integration is no longer held at the pace of the slowest" or the least willing member (Severino 2006).

5.3 Effect of Decisions Adopted under the Differentiated Integration Framework

In the EU, the decisions adopted under the framework of enhanced cooperation apply only to the participating member states. They are considered normal EU legislation, but with a limited geographic scope. They do not form part of the Union *acquis* and, as such, do not bind the new member states.

The concession established under the ASEAN minus X formula is also limited to the participating members. The participating member states can extend the benefits of the concession to the other member states on a voluntary basis. However, such an extension must be "unconditional, nondiscriminatory, and without the need for reciprocity" (ASEAN 2012).

In contrast, in APEC, “only a few initiatives are conducted on the basis of reciprocity” (Hsieh 2013). The benefit of the initiatives can be subject or not to the requirement for reciprocity. It is thus important to ensure the most extensive participation in the pathfinder initiatives through the requirement of a progressive threshold in order to maintain the initiatives.

5.4 Contribution to Furthering the Integration Progress

The success of a differentiated integration mechanism may be measured not only by its application but also by its nonapplication. The existence of the possibility of forming cooperation only among some members under the framework of the organization can facilitate the adoption of the decision as a whole. In the EU, since the readjustment of the conditions, enhanced cooperation has become an effective instrument for overcoming paralysis in decision-making. It has allowed the advancement of integration among some in fields where a unanimous vote is required by overcoming the blockage by some countries not wishing to participate in the initiative. The process is nonetheless designed to allow the inclusion of nonparticipants, as observers, in the decision-making process under the framework of enhanced cooperation to avoid splitting Europe (Ondarza 2013).

Since 2001, APEC’s experience with the pathfinder approach has allowed the initiation of various cooperative arrangements to facilitate trade and investment in APEC. Among the three differentiation mechanisms, the use of APEC’s pathfinder initiative has been the most active. The reason for this may reside in the fact that the pathfinder mechanism is used in APEC for business facilitation and the experience of APEC has shown the most cooperative arrangements for facilitating trade and investment to be beneficial for the participating members (PECC 2002).

In ASEAN, the more limited use of the ASEAN minus X formula may be explained by the fact that the deepening and widening of service liberalization beyond the multilateral framework, to which ASEAN minus X is assigned, is more sensitive. Nevertheless, the existence of a form of flexibility, including ASEAN minus X, for the implementation of economic agreements has facilitated the adoption of the agreements themselves. The challenge remains to find a reasonable limit to the postponed implementation of the agreements the member states have previously agreed to. Otherwise, such agreements will remain without effect.

5.5 Suggestions on Legal Development and Policy

As the EU has widened and deepened its competences and has become centralized and rigid, it has been suggested that different forms of flexibility may have become more prominent to accommodate the growing anti-Europe sentiment of many European citizens in the post-Brexit EU (de Witte 2018). The enhanced cooperation has a role to play in accommodating greater heterogeneity inside the EU with the perspective of future enlargement to include Macedonia, Montenegro, Serbia, and Turkey (EU 2019a). As envisioned by the Commission in its proposal, one very probable scenario of the enlarged EU is “those who want more do more” (EU 2017). The challenges remain the “recalibration of the dogma of unity” (de Witte 2018), so that the differentiated integration is no longer seen as an integration gone wrong, and turning the enhanced cooperation into EU projects that include all the member states.

In APEC, since the cooperation among the member economies is based on the principle of open regionalism and only some arrangements are subject to the reciprocity requirement, APEC's preoccupation with ensuring the largest participation of the member economies in the established pathfinder initiatives is a necessity. The possible developments may focus on: first, ensuring the most extensive participation in the initiatives, through the requirement of a progressive threshold of participants as well as capacity-building programs; and second, ensuring the effective implementation of established pathfinder initiatives, possibly through a "voluntary but binding approach" (Shaolian 2005); and third, addressing, through the pathfinder approach, the liberalization of sensitive sectors that were the object of the previous EVSL.

The ASEAN minus X formula remains an important alternative for flexible participation in the implementation of economic commitments, by allowing member states that are not yet ready or willing to delay the implementation of the commitment they have agreed to. In the context where ASEAN aspires to become a more rule-based community that functions more on binding commitments, the ASEAN minus X formula will likely be more frequently used. Further developments could consist of the following. First, the use of the mechanism should be encouraged through relaxation of its conditions. Since ASEAN minus X only pertains to the implementation of the economic arrangements to which all the member states have previously agreed by consensus, the requirement for a unanimous consensus to allow cooperation under the ASEAN minus X formula should be reviewed and replaced by a majority vote. Second, to ensure that the economic arrangements are not left without effect, the possibility of the member states delaying the implementation, under the ASEAN minus X formula, should have a reasonable limit. Third, bearing in mind the diversity of the ASEAN member states, ASEAN may explore the potential of ASEAN minus X as an alternative mode of decision-making, especially in the field of economic cooperation

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