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# **Framework of the ASEAN Plus Three Mechanisms Operating in the Sphere of Economic Cooperation**

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## ABSTRACT

This paper is devoted to the analysis of ASEAN Plus Three (APT) grouping as a specific form of cooperation among the East Asian countries. It contains a brief historical overview of the APT creation process and reveals the content of the main stages of its member states' economic cooperation. By the example of institutional and rule-making mechanisms, operating within the APT's economic sphere, the paper shows the main differences that distinguish this grouping from various international intergovernmental organizations which possess international legal personality. The paper provides information on a detailed characteristic of these mechanisms' nature and content, and evaluates their effectiveness in solving problems and challenges faced by APT.

## INTRODUCTION

It is undoubtedly that in the XXI century the economic development of the Asia-Pacific Region (APR) will largely determine the main directions of both the development and the dynamics of evolution of the world economy as a whole.<sup>1</sup> Even today, many Asia Pacific countries show economic growth, far surpassing the growth rates of the other regions' economies.<sup>2</sup> Such state of things is determined, inter alia, by the presence in APR of actively functioning international institutions and instruments, whose activity is designed not only to develop a joint position of their member states on the prospects of their economic cooperation, but also to create all necessary legal and institutional mechanisms for its assuring and development.

The Association of Southeast Asian Nations (ASEAN) holds a special place among these regional structures. It is determined by the peculiarities of ASEAN's international legal personality, on the one hand, and by the role it plays in East Asian economic integration, on the other.<sup>3</sup> Despite the fact that the ASEAN Charter, which entered into force on 15 December 2008, stated that "ASEAN, as an inter-governmental organisation, is hereby conferred legal

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<sup>1</sup> At present, APR (in its broadest geographical sense) accounted for 44% of the Earth population, over 60% of global gross domestic product (GDP), 66% of accumulated foreign direct investment and more than half of total world trade. See Agababyan E.M., "General Characteristic of Regional Economic Development" in *Asia-Pacific: Regional Issues, International Organizations and Economic Groupings* (Moscow: East-West, 2010) at 197-198.

<sup>2</sup> For example, GDP of Asian countries is growing now by 6% per year on an average. It is in two times faster than the growth of the global economy as a whole. Furthermore, average annual growth rate of China's GDP was more than 10% during the last two decades. See Voznesenski A.D. ed., "*Great East Asia*": *World Politics and Regional Transformations* (Moscow: MGIMO, 2010) at 25-33.

<sup>3</sup> ASEAN constantly and rightly emphasizes its centrality in the evolving regional architecture and in its objectives to promote economic partnership with the external partners. See e.g., Chairman's Statement of the 18th ASEAN Summit, Jakarta, 8 May 2011 "ASEAN Community in a Global Community of Nations", paras 43, 49, 97 and 101, online: < [http://www.asean.org/Statement\\_18th\\_ASEAN\\_Summit.pdf](http://www.asean.org/Statement_18th_ASEAN_Summit.pdf)>.

personality”,<sup>4</sup> this association does not fully conform to the characteristics of a typical intergovernmental international organization.

It is particularly reflected in the process of rule-making, which exists in ASEAN and is based on consultation and consensus more than on formal procedures, as well as in the documents adopted by ASEAN, their legal force and mechanisms of their implementation. The feature of ASEAN as an international legal person also is that this entity, as a rule, is greater than the sum of its member-states in the sphere of internal issues but it is still less than such sum in respect of many directions of ASEAN's external relations.<sup>5</sup> Nevertheless there are some exceptions to the general rule that ASEAN is not a good interlocutor with external actors. A significant one is the ASEAN Plus Three forum, which functions as a coordinator of cooperation between the Association of Southeast Asian Nations and three East Asian Nations of China, Japan and South Korea.<sup>6</sup>

The root cause of such exception existence is that the acquisition of foreign capital and securing of export markets remain very important for the development of ASEAN countries, along with the capital provision and intra-regional markets securing. That is, it was vital for ASEAN to obtain financial assistance from external partners and thereby increase the level of overall cooperation.<sup>7</sup> China, Japan and South Korea in this sense are the most important figures for ASEAN countries, as they are, firstly, quite close to them geographically and culturally, secondly, have the financial and economic capacity to provide the necessary assistance and, in the third, they are interested in developing successful cooperation with ASEAN.

This interest is mainly based on the aspiration of the core states of Northeast Asia (NEA)<sup>8</sup> to steadily increase their political and economic influence on the countries of Southeast Asia (SEA), to expand sales markets in the ASEAN states and to develop industrial and financial cooperation with them. Besides, NEACS quite successfully exploit the opportunities of both ASEAN and APT for their own bilateral and tripartite relations adjustment. The latter

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<sup>4</sup> *Charter of the Association of Southeast Asian Nations*, 20 November 2007 (entered into force 15 December 2008), art. 3, online: <<http://www.aseansec.org/publications/ASEAN-Charter.pdf>>.

<sup>5</sup> See for details e.g., Simon Chesterman, “Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person” (2008) 12 SYBIL 199.

<sup>6</sup> *Ibid.* at 210.

<sup>7</sup> Kazushi Shimizu, “Deepening of Intra-ASEAN Economic Cooperation and Expansion Throughout East Asia” in Tamio Nakamura ed., *East Asian Regionalism from a Legal Perspectives: Current Features and a Vision for the Future* (London and New York: Routledge, 2009) at 12-13.

<sup>8</sup> Northeast Asia is usually understood as a region comprising Mainland China and Taiwan, Japan, Korea (North and South), Russia and Mongolia. At the same time China, Japan and South Korea are often seen as the core states of NEA (NEACS).

circumstance has significant value because still there is a lack of solid and effectively working institutional system of interstate cooperation in NEA.<sup>9</sup>

The ASEAN Plus Three grouping is a unique institution. From the legal point of view it cannot be defined either as an international intergovernmental organization or as an organ of such organization. In other words APT does not possess its own international personality. But at the same time nowadays the forum has a sophisticated organization structure and its decisions are of great practical importance for the development of political and economic relations in East Asia.

For its more than ten-years-old history, APT managed to achieve significant success on its way towards the assistance in coordinated economic growth, acting as an authoritative forum for exchange of views between the states' leaders, officials and experts. The formulation of numerous declarations, plans of actions and agreements became a result of ASEAN Plus Three forum activity. These documents have normatively traced the strategic outlook of the region's economic advancement and defined the basic mechanisms of its implementation in such important spheres as trade and investments, energy, agriculture, technological transfer and development, intellectual property, transport and tourism, environmental protection, etc.

The above mentioned regulatory documents' study, systematization and analysis are of utmost academic and practical interest from two points of view. First of all, it is connected with the necessity of such documents legal force precise definition and with the nature of their obligatory impact on the states' and other subjects' way of behavior by virtue of the fact that the majority of APT documents are of specific character as compared to traditional legal regulators for the international economic relations and to the other international law sources.

Moreover, besides all the above mentioned, the characteristic of the normative regulation of APT members' economic cooperation, the release of its weak and strong aspects, and the advancement of the request for such normative regulation perfection are important in order to give an outlook for East Asia states' economic cooperation and to ensure the effectiveness of international mechanisms essential for such cooperation realization. At last, the examination of structure, as well as forms and methods of APT institutional mechanism working have a considerable interest in this sense.

This paper examines the framework of APT's rule-making and institutional mechanisms, operating in the field of its member-states' economic cooperation. It is divided into three sections. The first one provides historical background of the origin, stages and main directions of economic cooperation between the APT countries. The second section discusses APT's

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<sup>9</sup> See for details e.g., Kent Calder and Min Ye, *The Making of Northeast Asia* (Stanford: Stanford University Press, 2010) at 27-53.

institutional structures designed to enable the elaboration, adoption and implementation of its documents. The third section analyzes the nature and types of normative sources, which determines the ASEAN economic cooperation with China, Japan and South Korea. Finally, there are the summary and the main findings of the paper in the conclusion.

## **I. HISTORICAL BACKGROUND OF APT FRAMEWORK ORIGIN AND DEVELOPMENT**

### ***A. Creation of APT***

From the late 1980s, moves to strengthen regional consolidation have gained momentum in various parts of the world. These moves led to the creation of the European Union (EU), the North American Free Trade Agreement (NAFTA) and the Southern Common Market (Mercosur). This moves stimulated regionalism in Pacific Rim with the launching of the Asia-Pacific Economic Cooperation (APEC) in 1989. However, a regional grouping involving East Asian nations alone did not evolve in the early 1990s, although practical economic linkages through trade and investment deepened and expanded. Since the mid-1990s, East Asian states have found more interests in creating a stronger manifestation of regional ties and developing multilateral institutions for this objective.<sup>10</sup>

Malaysian Prime Minister Mahathir Mohamad was one of the first, who suggested the idea of East Asian countries grouping. Addressing 23<sup>rd</sup> ASEAN Economic Ministers Meeting in Kuala Lumpur in October 1991, he noted that ASEAN on its own is not strong enough to protect free trade. In connection with this he stressed the need to work together with the East Asian Economies through the formation of the East Asian Economic Group (EAEG) which will be GATT-consistent, compatible with APEC, and not detrimental to ASEAN's cohesiveness.<sup>11</sup> From Mahathir's point of view

East Asian regional organization where the members would be entirely Asian would help promote Asian tolerance and belief in non-interference in the domestic affairs of other

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<sup>10</sup> Hidetaka Yoshimatsu, *The Political Economy of Regionalism in East Asia* (New York: Palgrave Macmillan, 2008) at 1.

<sup>11</sup> The 23rd ASEAN Economic Ministers Meeting, Malaysia, 7-8 October 1991, online: <<http://www.aseansec.org/6126.htm>>.

countries. [...] An East Asian regional grouping would centrality strengthen the bargaining clout of all the countries within it, small and big.<sup>12</sup>

However, this idea has met resistance from the USA, which feared that EAEG would become a rival for the newly formed APEC and that the creation of such a structure without the involvement of the Western nations would reduce the U.S. influence in the region. James Baker, who was then the U.S. Secretary of State, visited South Korea and Japan and told them not to have anything to do with the proposal. Certain ASEAN countries were also advised not to support EAEG. As a result, the East Asian Economic Group was not created.<sup>13</sup> It gave Mahathir Mohamad the reason to speak about the existence of double standards: “It would seem in the U.S. view that while European countries could get together, and Canada, the U.S. and Mexico could form NAFTA, East Asian countries were not even to be allowed to talk to each other”.<sup>14</sup>

But a few years later, the project of East Asian regionalism was revived. Awareness of growing economic interdependence in the region and frustration in existing international financial and economic institutions have pushed the countries of the East Asia to the practical decision of the establishment of their own structure. First Asia-Europe Meeting (ASEM), which was held in Bangkok in 1996 and was attended by the countries from EU and East Asia (ASEAN, China, Japan and South Korea), became one of the catalysts on the way to such decision. During this summit the leaders of the Asian countries held joint discussions in order to elaborate common position in the format of ASEAN +3.

A joint meeting of the heads of ASEAN member countries along with the leaders of China, Japan and South Korea, during which the decision on the creation of ASEAN Plus Three grouping was made, took place in December 1997 in Kuala Lumpur. Since then, APT summits have been held annually. At the 2<sup>nd</sup> Summit in December 1998, several specific proposals were submitted in relation to regional economic cooperation in East Asia. For instance, Japan proposed the ‘New Miyazawa Initiative’, China proposed a conference by the APT to discuss financial issues and South Korea proposed the East Asia Vision Group (EAVG: an organization to study East Asian regional cooperation).<sup>15</sup>

The grouping was institutionalized by November 1999. Its first joint communiqué was released at the 3rd APT Summit in Manila. This document was called ‘Joint Statement on East

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<sup>12</sup> Mahathir Mohamad, “Let Asians Build Their Own Future Regionalism” (2006) *Global Asia* Vol. 1 No 1 at 15.

<sup>13</sup> Artyom Lukin, *Integration Processes and Institutions in the Asia-Pacific Region: Policy, Economy, Security* (Vladivostok: FENU Publishing House, 2009) at 80.

<sup>14</sup> *Supra note* 12 at 13.

<sup>15</sup> *Supra note* 7 at 13.

Asia Cooperation' (Manila Statement) and for the first time determined the main objectives, principles and further directions of APT countries cooperation.<sup>16</sup>

The following eight priority areas for the joint efforts were specified in the Manila Statement: 1) economic cooperation; 2) monetary and financial cooperation; 3) social and human resources development; 4) scientific and technical development; 5) cultural and information; 6) development cooperation; 7) political security; and 8) transnational issues. In the sphere of economic cooperation, APT participants agreed to strengthen their efforts in order to accelerate trade, investments, technology transfer, encourage technical cooperation in information technology and e-commerce, promote industrial and agricultural cooperation, strengthen small and medium-sized enterprises (SMEs), promote tourism and encourage active participation in the development of growth areas in the East Asia. Relevant national Ministers and their senior officials were named responsible for Manila Statement implementation.

Eight years later, in November 2007 at the 11th Summit of ASEAN Plus Three in Singapore the Second Joint Statement on East Asia Cooperation called 'Building on the Foundations of ASEAN Plus Three Cooperation' was adopted.<sup>17</sup> This Statement had to ensure the renewal of strategic and practical guidance for APT process future development. The APT Cooperation Work Plan (2007-2017), in which the key measures for the deepening of East Asian countries cooperation over the next decade were highlighted, was welcomed during with summit as well.<sup>18</sup> The Work Plan set out four new areas of APT cooperation, amongst others – namely rural development and poverty eradication, disaster management, minerals and women issues. As it has been pointed out “this Work Plan is formulated to serve as the master plan to enhance ASEAN Plus Three relations and cooperation in a comprehensive and mutually beneficial manner for the next ten years (2007-2017)”.

The aforesaid allows dividing the history of APT's development into two main stages. The first one covers the period from the date of APT creation until 2007. The second lasted from the date when the Second Joint Statement on East Asia Cooperation was adopted till the present time. Let us consider more details of these stages, bearing in mind the sphere of economic cooperation between APT members.

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<sup>16</sup> *Joint Statement on East Asia Cooperation*, 28 November 1999, online: <<http://www.aseansec.org/5301.htm>>.

<sup>17</sup> *Second Joint Statement on East Asia Cooperation 'Building on the Foundations of ASEAN Plus Three Cooperation'*, Singapore, 20 November 2007, online: <<http://www.aseansec.org/21099.htm>>.

<sup>18</sup> *ASEAN Plus Three Cooperation Work Plan 2007 – 2017*, Singapore, 20 November 2007, online: <<http://www.aseansec.org/21104.pdf>>.

## **B. Stages of APT Members' Economic Cooperation**

### *1. Period between 1997 and 2007*

One important feature of East Asia is that in this region, cooperative and integrative initiatives are undertaken through 'pragmatic functionalism'. 'Pragmatic' means that cooperative initiatives are need-driven actions that produce immediate and realistic products. Such an action-oriented, result-based approach is conducive to fostering a continuous willingness for further cooperation. Towards this objective, non-political, functional areas are selected for cooperation because these areas easily produce practical outcomes. The pragmatic functional approach is suitable for East Asia because it is characterised by diversities.<sup>19</sup> The above indicated circumstances have determined two main lines of cooperation which became the focal points for APT grouping straight after its formation: the strengthening of regional financial stability and liberalization of APT member states' trade relations.

Through the experience of the Asian Currency Crisis in 1997, East Asian countries learned the lesson that their monetary authorities should undertake the regional currency cooperation. That is why in May 2000, the 'Chiang Mai Initiative' (CMI) was agreed upon at the APT Finance Ministers Meeting in Chiang Mai, Thailand.<sup>20</sup> It established a network of bilateral swap and repurchase agreements for managing currency crisis in a member country. Although CMI was an extension of the ASEAN Swap Arrangements signed in 1977, it was a new development in monetary and financial cooperation for the East Asian Region. CMI provides the supply of immediate short-term swap facilities to participating ASEAN member countries with temporary international liquidity problems. Under the arrangements, US dollars shall be exchanged against the domestic currency of a requesting participant.<sup>21</sup>

Three years later, APT countries agreed to make efforts to develop regional bond markets at both domestic and regional levels under the 'Asian Bond Market Initiative' (ABMI). The development of these bond markets was expected to strengthen the financial systems of APT members "by better utilizing the aggregate savings in the region and minimizing the risk of maturity and currency mismatches".<sup>22</sup> Lastly they also agreed to creation of regional monetary units.

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<sup>19</sup> *Supra* note 10 at 14.

<sup>20</sup> *The Joint Ministerial Statement of the ASEAN + 3 Finance Ministers Meeting*, 6 May 2000, Chiang Mai, Thailand, online: <<http://www.aseansec.org/635.htm>>.

<sup>21</sup> *Supra* note 7 at 13, 21.

<sup>22</sup> *The Joint Ministerial Statement of the ASEAN + 3 Finance Ministers Meeting*, 7 August 2003, Makati, Philippines, online: <<http://www.asean.org/15032.htm>>.

Due to the above mentioned initiatives the countries of APT received ability to use their common huge financial resources more effectively, obtained additional guarantees against periodically arising crises and reduced regional dependence from the Western financial markets.

Fully understanding that the coordination of monetary policies must be accompanied by the coordination of economic policies, ASEAN Plus Three countries, in addition to CMI and ABMI initiatives, confirmed the importance of the 'Economic Review and Policy Dialogue' (ERPD), which is cooperation to strengthen regional economic and financial surveillance. But the task of ERPD remains limited to the detection of irregularities to give early warning to the country in trouble.<sup>23</sup>

The APT work on trade liberalization between its member countries, in the first period of its development, became another important ASEAN Plus Three branch of activity. At the 2001 APT Summit, the report of EAVG was submitted. The report contained key proposals and concrete measures to broaden East Asia cooperation. One of them was devoted to East Asia Free Trade Area (EAFTA) establishing. A year later, the task of EAFTA creation was reaffirmed in the Final Report of the East Asia Study Group (EASG), submitted to the 6th APT Summit in Phnom Penh, among other nine important medium-to-long-term measures to move East Asian cooperation significantly forward. As it was noted in this document «EASG recommends that the governments of East Asian countries consider the establishment of an EAFTA as a long-term goal, taking into account the variety of differences in developmental stages and the varied interests of the countries in the region».<sup>24</sup>

Bearing in mind the idea of a united free trade zone creation within East Asia as a long-term goal and looking into the possible ways and stages of its construction, APT members followed the path of bilateral preferential trade agreements (PRAs) creation. As Hidetaka Yoshimatsu notes

their interests in PTAs began as bandwagoning with and hedging against intensive trends on a global scale. At the same time, East Asian states might find value in formal PTAs as the base for stimulating further economic transactions, as well as for political and social linkages and further cooperation.<sup>25</sup>

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<sup>23</sup> Takao Suami, "Community Policies in the Draft Charter of the East Asian Community: How Will Regional Cooperation Be Organized within the Community Framework" in Tamio Nakamura ed., *East Asian Regionalism from a Legal Perspectives: Current Features and a Vision for the Future* (London and New York: Routledge, 2009) at 226.

<sup>24</sup> *Final Report of the East Asia Study Group*, ASEAN+3 Summit, 4 November 2002, Phnom Penh, Cambodia, online: <<http://www.aseansec.org/viewpdf.asp?file=/pdf/easg.pdf>>.

<sup>25</sup> *Supra note 10* at 14.

China acted as the initiator of such practical approach. This country was in the process of its economy strengthening after WTO accession in 2001, and became more confident in respect of the regional trade cooperation issues. At the 6th ASEAN-China Summit in November 2002, ASEAN and Chinese leaders signed the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and China. This agreement both became a legal instrument of government in relation to ASEAN-China economic cooperation and laid down overriding principles and general pattern for ASEAN-China Free Trade Area (ACFTA). The Framework Agreement contained guidelines and principles, scope and modalities for establishing a free trade area taking into account the different levels of development between ASEAN countries and China.<sup>26</sup>

The Framework Agreement provided, inter alia, the Early Harvest Programme (EHP), which committed ASEAN and China to reduce their respective tariffs for certain products from January 2004. All products that were not covered by the EHP were put into the normal track and sensitive track. The timetable for tariff elimination in the normal track would be completed by 2010 for the old ASEAN members and by 2015 for the new ASEAN members. In addition, China agreed to extend most-favoured-nation (MFN) status to the new ASEAN members who were not yet WTO members, and to implement capacity-building and technical assistance to these members. The strengthening of ASEAN-China cooperation in the areas of trade in services, investment, agriculture, electronic commerce, technology transfer, dispute settlement mechanism etc. was also stipulated in the Framework Agreement.<sup>27</sup>

Practical considerations in the subsequent negotiations required slight changes in the framework agreement. In October 2003 and December 2006, Protocols to Amend the Framework Agreement were signed. These amendments aimed to further regulate the acceleration of tariff reduction and elimination for products under the EHP and finalize the rules of origin. At the 8th APT Summit in November 2004 in Vientiane, ASEAN and China endorsed the Agreement on Trade in Goods and the Agreement on Dispute Settlement Mechanism of the Framework Agreement. The Agreement on Trade on Goods contained operational rules and annexes that consist of the lists of products under the normal and sensitive tracks, safeguard provisions, general and security exceptions, and the recognition of China's market economy status. In July 2005, China announced the expansion of the scope of special preferential tariff treatment for Cambodia, Laos and Myanmar. In January 2007, leaders from China and ASEAN

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<sup>26</sup> Qingjiang Kong, "China's WTO Accession and the ASEAN-China Free Trade Area: The Perspective of a Chinese Lawyer" (2004) 7 J. Int'l Econ. L. 836 at 853.

<sup>27</sup> *Framework Agreement on Comprehensive Economic Cooperation Between ASEAN and the People's Republic of China*, Phnom Penh, 4 November 2002, online: <<http://www.aseansec.org/13196.htm>>.

signed the Trade in Services Agreement under the Framework Agreement. Thus, China took the lead in developing a free trade area with ASEAN, and provided various incentives for the new ASEAN members. The negotiations have steadily advanced from the framework agreement to more specific agreements.<sup>28</sup>

Steps made by South Korea on its path of trade liberalization with ASEAN were largely similar to those of China. The Framework Agreement on Comprehensive Economic Cooperation and Agreement on Dispute Settlement Mechanism under this Framework Agreement were signed between them at the 9th ASEAN-Korea Summit on 13 December 2005 in Kuala Lumpur. The Framework Agreement covered the establishment of ASEAN-Korea Free Trade Area (AKFTA) through a number of additional agreements on the trade in goods, trade in services and investment as well as the development of treaty countries' cooperation in the sphere of relations. In accordance to this document Korea, following China, undertook to provide MFN status to all ASEAN countries which are not WTO members as well.<sup>29</sup>

Specific terms of AKFTA establishing in regard of each contracting party were identified in the Agreement on Trade in Goods under the ASEAN-Korea Framework Agreement, which was signed by nine ASEAN Member Countries and South Korea on 24 August 2006 in Kuala Lumpur. Thailand signed the Protocol on the accession to this agreement later at the 14th ASEAN Summit on 27 February 2009. Moreover, for the development of Framework Agreement provisions, the ASEAN-Korea Agreement on Trade in Services was signed on 27 November 2007 in Singapore.

Japan carefully watched the progress of China and Korea in the integration space formation with ASEAN, but moved along this path with more caution, preferring to conclude bilateral free trade agreements (FTAs) with specific ASEAN countries individually. This can be probably explained by the fact that Japan, unlike China, has never been an ardent proponent of regional economic integration and has evinced anxiety about the rise of regionalism. Japan worried that heightened trade protectionism and regional economic groupings will have negative impact on international free trade.<sup>30</sup> But as the sense of regionalism grew and the trend of regional integration deepened in various parts of the world, including East Asia, the overall approach of Japan's foreign economic policy also has underwent some changes.

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<sup>28</sup> *Supra note 10* at 111.

<sup>29</sup> *Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea*, Kuala Lumpur, 13 December 2005, online: <<http://www.aseansec.org/18063.htm>>.

<sup>30</sup> Lai Foon Wong, "China-ASEAN and Japan-ASEAN Relations during the Post-Cold War Era" (2007) 1 (3) *Chinese Journal of International Politics* 373 at 389.

As a result, Japan and ASEAN leaders signed a Joint Declaration and Framework for their comprehensive economic cooperation respectively in 2002 and in 2003, and they agreed to establish ASEAN-Japan free trade area in principle by 2012. Developing these arrangements, ASEAN and Japan signed the Agreement on Comprehensive Economic Partnership on 14 April 2008. It was comprehensive in scope, covering trade in goods, trade in services, investment and economic cooperation. The Agreement stipulated the strengthening of economic ties between ASEAN and Japan and creation of a larger and more efficient market with greater opportunities in this region. It entered into force on 1 December 2008.<sup>31</sup>

Besides the conclusion of PTAs between the ASEAN member countries and the Plus Three countries, which were seen as future EAFTA building blocks, sectoral cooperation actively developed inside APP grouping at that period. Such cooperation became more and more diversified and multi-layered from year to year, covering new areas of APT members joint efforts (Table 1). For the purpose of its institutional support under the annual ASEAN Plus Three summit framework, East Asian nations also created a series of ministerial and senior-level meetings, which multiplied and diversified mechanisms for consultation and cooperation.<sup>32</sup> For example, APT countries began to hold annual meetings of their Ministers of Economic, Finance, Energy, Environment and other as well as APT senior officials' and experts' meetings in main areas of cooperation, in addition to the initial APT Foreign Ministers' Meeting. The setting up of the ASEAN Plus Three Unit at the ASEAN Secretariat in December 2003 also promoted the strengthening of the institutional base of cooperation within the APT grouping.

**Table 1 Expanding the Scope of APT Cooperation (2000-2004)**

|   | <b>Area of Cooperation</b>        | <b>Year of Establishment</b> |
|---|-----------------------------------|------------------------------|
| 1 | Political and Security            | 2000                         |
| 2 | Economic, Trade and Investment    |                              |
| 3 | Finance and Monetary              |                              |
| 4 | Agriculture, Fishery and Forestry | 2001                         |
| 5 | Human Resources                   |                              |
| 6 | Science and Technology            |                              |
| 7 | Environment                       | 2002                         |
| 8 | Tourism                           |                              |
| 9 | Culture and Art                   | 2003                         |

<sup>31</sup> ASEAN-Japan Dialogue Relation, online: <<http://www.aseansec.org/5740.htm>>.

<sup>32</sup> *Supra note 30* at 386.

|    |   |      |
|----|---|------|
| 10 | Energy                                    | 2004 |
| 11 | Health                                    |      |
| 12 | Information Technology and Communications |      |
| 13 | Social Welfare and Development            |      |
| 14 | Transnational Crime and Counter-Terrorism |      |
| 15 | Youth                                     |      |

Source: <http://www.aseansec.org/AR05/PR-partnership.pdf>

One of the most significant events at the end of the first period of APT development occurred at its 9th Summit in December 2005, when the ‘Kuala Lumpur Declaration on the ASEAN Plus Three Summit’ was adopted. The Declaration summed up the results of the traversed path and outlined the future directions of APT development. At the same time the APT members reiterated their “common resolve to realize an East Asian community as a long-term goal that would contribute to the maintenance of regional and global peace and security, prosperity and progress” and declared that they were “convinced that the ASEAN Plus Three process will continue to be the main vehicle in achieving that goal, with ASEAN as the driving force and with the active participation of the ASEAN Plus Three countries in order to promote a sense of shared ownership”.<sup>33</sup>

In January 2007, at the 10th APT Summit the heads of the states agreed on the expansion of APT cooperation to the following new areas: women, poverty alleviation, disaster management and minerals. They welcomed EAFTA as a fruitful avenue of integration. At the same time, they noted that it was necessary to continue to examine other possible FTA configurations such as the East Asia Summit (EAS), which first meeting was held in 2005.

Thus, the main results of the first period of APT development were the determination of the priority directions of its member-states cooperation and creation of the necessary institutional base for such cooperation ensuring. As they were aware of being the subjects of one region, the APT countries together learned to resist crises, to harmonize their policies in economic, political and social spheres, and to simplify their relationships in trade and investment. In addition to that, for the reasons of 'pragmatic functionalism', they clearly determined for themselves the short-term and the long-term tasks and resolved them sequentially using the most appropriate methods and means, including, among other things, the possibilities of the ASEAN +1 mechanism.

<sup>33</sup> *Kuala Lumpur Declaration on the ASEAN Plus Three Summit*, Kuala Lumpur, 12 December 2005, online: <<http://www.aseansec.org/18036.htm>>.

## *2. Period from 2007 to present*

The 11th APT Summit, which took place in November 2007 in Singapore, became the starting point for the second period of development. The Second Joint Statement on East Asia, 'Building on the Foundations of ASEAN Plus Three Cooperation' (SJS), and 'ASEAN Plus Three Cooperation Work Plan 2007-2017' (AWP), which had special importance for the further progress of APT, were adopted there.

These documents have clearly demonstrated that cooperation between APT countries has reached a new level, and began to pursue the aim of solution of much more important and complicated tasks than ever before. It suffices to compare the text of the First and the Second joint statements on East Asian Cooperation to be sure it is right. For example, in the Manila Statement of 1999 the APT countries “agreed to promote dialogue and to deepen and consolidate collective efforts with a view to advancing mutual understanding, trust, good neighborliness and friendly relations, peace, stability and prosperity in East Asia and the world”. At the same time in the similar Statement of 2007, the East Asian countries declared the formulation of much more ambitious goals. As they emphasized in this document:

We reiterated that East Asian integration is an open, transparent, inclusive, and forward-looking process for mutual benefits and support internationally shared values to achieve peace, stability, democracy and prosperity in the region. Guided by the vision for durable peace and shared prosperity in East Asia and beyond, we will stand guided by new economic flows, evolving strategic interactions and the belief to continue to engage all interested countries and organisations towards the realisation of an open regional architecture capable of adapting to changes and new dynamism.<sup>34</sup>

SJS determined the scope of APT future cooperation, which would include, but not be limited to, the following four enlarged areas: 1) political and security; 2) economic and financial; 3) energy, environment, climate change and sustainable development; 4) socio-cultural and development. Each of these areas has a qualitatively new content. This fact can be proven, for example, by the description of the prospects of APT members' economic cooperation, which provides the unification of their efforts to

promote economic growth and sustainable development towards a more prosperous East Asia with a free flow of goods and services and easier movement of capital and labour by

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<sup>34</sup> *Supra note 17.*

promoting economic liberalisation, economic integration, transparency and free trade consistent with WTO agreements, pursuing structural reforms, encouraging investment, promoting transfer and upgrading of technology, protecting intellectual property rights, improving research and policy-making capacity [...] <sup>35</sup>

The fact that the 'institutional support and relations with wider cooperative frameworks' were for the first time indicated in this Statement as a separate sphere of cooperation can also be deemed a distinctive feature. Within this direction the APT countries agreed, inter alia, to establish an ASEAN Plus Three Cooperation Fund, to strengthen the ASEAN Plus Three Unit of the ASEAN Secretariat and to enhance cooperation projects through rationalization and pursuing synergy.

The APT Cooperation Work Plan was adopted in order to achieve the goals and objectives set forth in the Second Joint Statement. This document is formulated to serve as the master plan to enhance ASEAN Plus Three relations and cooperation in a comprehensive and mutually beneficial manner for the period of 2007-2017. <sup>36</sup> AWP contains concrete priority activities and flagship projects, which should be included by relevant APT sectoral bodies in their respective programs and plans of action for the further implementation. As it was mentioned in SJS: "Progress in the implementation of the Work Plan will be monitored by the ASEAN Plus Three Directors-General and reported to the annual ASEAN Plus Three Ministerial Meeting and ASEAN Plus Three Summit". It is also estimated that AWP will be subject to a mid-term review and may be revised for purposes of more efficiently and effectively accomplishing the purposes of SJS.

The Section 'B' of AWP is devoted to economic and financial cooperation. It indicates detailed measures, by the use of which the APT states can enhance their collaboration and strengthen their joint efforts in the areas of trade and investment; finance; standards and conformance; intellectual property rights; transport; tourism; food, agriculture, fisheries and forestry; minerals; SMEs; information and communication technology (ICT); and development cooperation. Among the most important measures mentioned in this section, the completion of the ASEAN+1 FTAs negotiations and ensuring of their smooth implementation; the continuation of efforts towards construction region wide FTA; the facilitation of trade through the customs procedures improving; the harmonization of IP law and systems; the conducting of comprehensive studies on the possible establishment of an East Asia Investment Area by

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<sup>35</sup> *Ibid.*

<sup>36</sup> *Supra note 18.*

expanding the ASEAN Investment Area; the development of a regional liquidity support mechanism and many others can be named.

In general, the ASEAN Plus Three Cooperation Work Plan showed the APT countries' high-degree readiness to deal not only with intra-regional issues but also with the external ones and to act during the decision making process as a whole unit. Confirmation of this view comes, for example, from the 'Joint Press Statement on ASEAN +3 Cooperation in Response to the Global Economic and Financial Crisis', which was adopted in Bangkok on 3 June 2009.

During last three years the progress of the APT countries' finance and monetary cooperation was steady and continued with the focus on the implementation of the Chiang Mai Initiative Multilateralisation (CMIM) and ABMI. At the 13th APT Summit held in October 2010, the Leaders welcomed the realization of CMIM on 24 March 2010 and the operationalization of the APT Macroeconomic Research Office (AMRO) in early 2011. The AMRO will be located in Singapore to monitor and analyze regional economies, which contributes to the early detection of risks, swift implementation of remedial actions, and effective decision-making of CMIM. The APT countries also welcomed the establishment of the APT Bond Market Forum (ABMF) and the Credit Guarantee and Investment Facility (CGIF).<sup>37</sup> The adoption of the ASEAN Plus Three Comprehensive Strategy on Food Security and Bio-energy Development and the elaboration of the APT Emergency Rice Reserve Agreement as well should be noted among the other important initiatives taken over the recent years.

APT countries also have come a long way in the study of ways and means of their trade relations liberalization. After two EAFTA reports examination (i.e. the Phase I and Phase II reports), it was decided to continue this problem research within the four APT special working groups: on the rules of origin, tariff nomenclature, custom procedures, and economic cooperation. In this case two possible formats for the further collaboration are studied in parallel: the establishment of EAFTA and organization of the Comprehensive Economic Partnership in East Asia (CEPEA).

During the second period of APT cooperation development, the NEACS individual cooperation with the ASEAN members also obtained its next step forward. The ASEAN-China and ASEAN-Korea agreements on investment under the respective framework agreements on comprehensive economic cooperation were signed respectively on 15 August and 2 June 2009. Moreover ACFTA and AKFTA were put into practice on 1 January 2010. Beside this, the normative regulation of the cooperation between China, Japan, South Korea and ASEAN in various fields, found its reflection in numerous joint declarations, memorandums of

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<sup>37</sup> Overview: ASEAN Plus Three Cooperation, online: < <http://www.aseansec.org/16580.htm>>.

understanding and plans of action, designed and signed by the officials of these countries.<sup>38</sup> Their analysis shows that the interaction between NEACS and ASEAN has reached a level of strategic partnership and develops rapidly in many areas.

Thus, since the process began in 1997, the ASEAN Plus Three process has broadened and deepened. Cooperation is now being pursued in more than twenty areas, having a priority importance for the East Asia countries. For the years of their cooperation the APT countries created a solid legal and institutional framework which ensures the formulation and implementation of their joint objectives. In order to create the rules of their economic cooperation they have adopted dozens of documents, from political declarations to legal agreements. There are also 64 mechanisms coordinating APT cooperation: 1 summit, 16 ministerial, 23 Senior Officials, 1 Directors-General, 17 technical level meetings and 6 other tracks meetings.<sup>39</sup> Mentioned documents and institutions have their own specific character in comparison with the acts and organs of typical international organizations. That is why it is necessary to enlarge upon these features.

## II. INSTITUTIONAL MECHANISM OF APT COOPERATION

### *A. Nature of APT Institutional Mechanism*

The characteristic feature of the present-day international rule-making process is in the trend to increase the participation of international bodies and organizations in it. International institutions achieve this in two main ways.

Firstly, they render assistance to the states in the process of agreements' and other documents' working out, and often serve as the initiators of such acts elaboration. Organizational capability of international institutions helps the countries to find an agreed decision more easily, and, as a consequence, they greatly accelerate the procedure of agreements acceptance. Many international organizations have a special mechanism, subdivisions of which are engaged in future normative acts preparation and examination. Such documents are then to be considered and approved by the respective international organization, or by a specially convened international conference. In the latter case, international organizations usually provide the conference with various kinds of services and technical assistance, realized by their subsidiary bodies and secretariats. It is obviously that by doing this the international institutions do not

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<sup>38</sup> The detailed list of main ASEAN-China, ASEAN-Japan and ASEAN-Korea bilateral documents in the economic area presents in Appendixes II-IV to this paper.

<sup>39</sup> *Supra note 37.*

carry out the real rule-making functions and perform the actions which can be defined as supporting or quasi-normative.

In contrast to the above mentioned, the second way is to create by the international organs or organizations their own binding regulations. It can be, for example, international agreements with their participation or resolutions and declarations, adopted by international institutions within the scope of their competence. However, certain international structure can realize the rule-making functions only if it meets at least two requirements: it should have its own international legal personality and it should be entitled by its member-states to create its own legal and political acts.<sup>40</sup>

It is clear that ASEAN Plus Three does not match these conditions. This grouping does not have a charter which might confirm the APT status of independent subject of international relations and international law. Moreover, all APT statements and declarations virtually are the documents of its member-states. These facts show that APT must not be considered as a subject, which vote is different from the votes of its participants, but as a platform to facilitate the elaboration and adoption of ASEAN, China, Japan and South Korea joint decisions. Besides, the APT members, by all appearances, are not going to change the status quo, restricting themselves to continual statements concerning the necessity "to strengthen the ASEAN Plus Three Unit of the ASEAN Secretariat".

In my opinion, there are several possible explanations of such state of things. First of all, it is worth remembering that in this case it is referred to the countries, most of which prefer to build their relations with partners on the base of the principles of informality and consensus. This consensus approach has become known as the ASEAN Way<sup>41</sup> which, in many instances, is opposite to formal legalism of most Western international institutions. Describing its peculiarities, Paul Davidson noted that

[this] concept involves processes including intensive informal and discreet discussions behind the scenes to work out a general consensus which then acts as the starting point around which the unanimous decision is finally accepted in more formal meetings, rather than across-the-table negotiations involving bargaining and give-and-take that result in deals

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<sup>40</sup> For details see Vyacheslav Gavrilov, *The UN and Human Rights: Mechanisms of Creation and Realization of Legal Acts* (Vladivostok: FENU Publishing House, 1998) at 38-48.

<sup>41</sup> A similar approach to decision making process is also used by some other international institutions, attended by ASEAN, such as, for example, APEC and East Asia Summit.

enforceable in a court of law. The “ASEAN way” relies to a large extent on the personal approach in contrast to the Western way of dependence on structures and their functions.<sup>42</sup>

Consensus prevents the danger of hegemony and guarantees the right of vote even to the weakest members. Adherence to the principle of consensus requires a non-confrontational and compromise approach, allowance of differences and willingness to find a mutually acceptable basis for understanding.<sup>43</sup> Obviously such a mechanism may not always be used within "rigid and formal" international institutions, which have their international legal personality and take their decisions by the majority of votes.

Another reason of APT's being among the "institutions without legalization" is determined by low functional needs of its members in such legalization. Given the distinctions between the countries in the region, even from one another, much less the rest of the world, the East Asian countries have faced lower demands for international law and institutions.<sup>44</sup> Furthermore, there is a huge asymmetry of power among member-states pursuing regional integration and so far there is still no consensus on the final goal of integration.<sup>45</sup> It is worthy of mention that the majority of APT countries appreciate their sovereignty and consistently stand for non-interference in the internal affairs of the states.

The above gives grounds to assert that the institutional framework of APT will remain relatively weak in the nearest future in comparison, for instance, with the respective mechanisms of universal inter-governmental international organizations. Nowadays, there is no objective as well as subjective preconditions for its nature and content fundamental change.

The current APT institutional framework fully corresponds to the aims and format of this grouping, which was originally created as a platform to promote collaborative projects and to sustaining the solidarity necessary for increasing the mutual understanding among members, but not as an organization which independently determines the way of development for its members. That is why the institutional mechanism of APT was established just to coordinate the activity of the East Asia countries, and its units cannot adopt decisions legally binding for its member-states. Today, ASEAN Plus Three is a forum, a stage to develop joint positions on issues, first of all, of economic integration and its member states are interested in having such a tool for their joint

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<sup>42</sup> Paul J. Davidson, “The ASEAN Way and the Role of Law in ASEAN Economic Cooperation” (2004) 8 SYBIL 165 at 167.

<sup>43</sup> *Supra note* 13 at 59-60.

<sup>44</sup> José E Alvarez, “Institutionalised Legalisation and the Asia-Pacific ‘Region’” (2007) 5 NZJPIL 9 at 16.

<sup>45</sup> Nam-Kook Kim, “Europe and East Asia: Holistic Convergence or Fundamental Skepticism” in Nam-Kook Kim ed., *Globalization and Regional Integration in Europe and Asia* (Farnham: Ashgate Publishing Ltd., 2009) at 87.

international policy implementation which will be positive for them by being voluntary and non-mandatory.

Thus, the APT members

prefer to develop a system of coordinated regulatory networks and mutual recognition. This approach is more flexible and might allow ASEAN [NEACS] countries to maintain their respective national laws and regulations as well as their legal requirements, if they are consistent with and complementary to the ASEAN [APT] integration schemes, and if they are implemented harmoniously to facilitate regional integration.<sup>46</sup>

Of course, there are some elements of subordination within the APT institutional framework, but generally it has a coordination rather than subordination nature. It currently includes a large number of multilevel and branched bodies, meetings and groups, practically created in all areas of APT activity. Now we turn to a more detailed description of their system and practices in the sphere of economic cooperation.

## ***B. Units of APT Institutional Mechanism in Economic Cooperation***

### *1. Formation of the APT economic institutional framework*

Despite the fact that the first discernible event, that has consolidated the ASEAN Plus Three members, was their leaders' summit in December 1997, informal meetings between their foreign ministers had been organized even before it. During the 27th ASEAN Ministerial Meeting (AMM) in Bangkok in July 1994, ASEAN foreign ministers met with the foreign ministers of China, Japan and South Korea at the so-called informal '6+3' lunch, the first ministerial encounter combining Northeast and Southeast Asia. The 1996 AMM in Jakarta reached an agreement that henceforth the meetings of the ASEAN plus China, Japan and South Korea would be included in the programme of all ASEAN Ministerial Meetings.

The informal lunches and the unofficial gatherings at the ministerial meetings helped ASEAN and the ministers and the officials of the three Northeast Asian states to establish mutual institutional connections, creating an atmosphere conducive to an open and frank discussion of regional issues. This discreet but ongoing process by which the ministers

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<sup>46</sup> Lawan Thanadsillapakul, "Legal and Institutional Frameworks for Open Regionalism in Asia: A Case Study of ASEAN" in Tamio Nakamura ed., *East Asian Regionalism from a Legal Perspectives: Current Features and a Vision for the Future* (London and New York: Routledge, 2009) at 135.

became accustomed to dealing with each other helped to generate a growing consciousness of a shared East Asian identity, which in turn laid the basis for the ASEAN+3 framework.<sup>47</sup>

While the East Asian concept was becoming increasingly accepted, Singaporean prime minister in 1995 and Malaysian foreign minister in 1996 suggested that ASEAN members should invite three NEACS leaders to take part in an informal summit. The first such summit was held in 1997 in Kuala Lumpur.

But, in fact, the APT forums began in quite a low-key way. No joint statement was issued by the first APT informal summit meeting. Instead of that, separate statements were made by ASEAN and each of the NEACS leaders. Moreover, the term 'ASEAN Plus Three' was used only rarely and cautiously at the first two meetings, much less in the agenda for the meeting. At first, among the APT members was not consensus on the periodicity of their meetings as well. Only at summit in 1998, a consensus was reached that APT summit meetings would be convened annually back-to-back with ASEAN formal and informal summits. The leaders also resolved that the ASEAN Plus Three meeting should not be formalized and that the process should be pursued at various levels.<sup>48</sup>

The first step towards achieving this objective was made in March 1999, when the APT Deputy Finance Ministers and Deputy Central Bank Governors gathered for their first meeting in Hanoi in order to «exchange views on the ways to monitor short-term capital flows and on the subject of international financial architecture».<sup>49</sup> Later such meetings began to be carried out at the level of the APT finance ministers once a year.

However, the idea of 'multilevel interaction' among the APT members took its shape after the adoption of the Manila Statement in 1999. Paragraph eight of this document defined two types of institutions, which, in addition to the leaders' summits, were aimed to realize the East Asia cooperation in the various areas: the meetings of APT ministers and their senior officials.<sup>50</sup> Since 2000 such meetings have been held annually by the ministries of foreign and economic affairs of the APT member countries. Later, while the APT sphere of action was expanding, the meetings of ministers and senior officials have also been held in other areas of cooperation (Table 2).

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<sup>47</sup> Takashi Terada, "The Birth and Growth of ASEAN+3" in Bertrand Fort and Douglas Webber eds., *Regional Integration in East Asia and Europe: Convergence or Divergence?* (London and New York: Routledge, 2006) at 222.

<sup>48</sup> *Ibid.* at 224-230.

<sup>49</sup> Chairman's Statement of the First ASEAN + China, Japan, Korea (ASEAN+3) Deputy Finance Ministers and Deputy General Bank Governors Meeting, Ha Noi, Viet Nam, 18 March 1999, online: <<http://www.aseansec.org/6336.htm>>.

<sup>50</sup> *Supra note* 16.

**Table 2 Establishment of APT ministers and senior officials meetings**

|  | <b>Area of Cooperation</b>                  | <b>Levels</b>  | <b>Year</b> | <b>Frequency</b>      |
|--|---|--|-------------|-----------------------|
| <b>Ministers and Senior Officials Meetings</b> |   |  |             |                       |
| 1  | Macroeconomics/<br>Currency/ Finance        | Finance Ministers  | 1999        | Annual                |
|  |   | Vice-Ministers of Finance Ministries<br>and Deputy Governors of Central<br>Banks | 2002        | Twice a year          |
| 2  | Policy Coordination                         | Foreign Ministers  | 2000        | Annual                |
|  |   | Senior Officials   | 2000        | Twice a year          |
| 3  | Economic/ Trade/<br>Investment              | Economic Ministers   | 2000        | Annual                |
|  |   | Senior Officials   | 2000        | Three times a<br>year |
| 4  | Agriculture/ Fishery/<br>Forestry           | Ministers on Agriculture and<br>Forestry   | 2000        | Annual                |
|  |   | Senior Officials   | 2001        | Annual                |
| 5  | Labour                                      | Labour Ministers   | 2001        | Biannual              |
|  |   | Senior Officials   | 2001        | Annual                |
| 6  | Environment                                 | Environment Ministers  | 2002        | Annual                |
|  |   | Senior Officials   | 2004        | Annual                |
| 7  | Tourism                                     | Tourism Ministers  | 2002        | Annual                |
|  |   | Senior Officials   | 2002        | Twice a year          |
| 8  | Culture and Arts                            | Ministers of Culture and Arts  | 2003        | Biannual              |
|  |   | Senior Officials   | 2003        | Biannual              |
| 9  | Social Welfare                              | Ministers of Social Welfare and<br>Development                                   | 2003        | Every three<br>years  |
|  |   | Senior Officials   | 2003        | Annual                |
| 10   | Transnational Crime                         | Ministers of Public Security, Interior,<br>Internal Security                     | 2004        | Biannual              |
|  |   | Senior Officials   | 2003        | Annual                |
| 11   | Energy                                      | Ministers of Energy  | 2004        | Annual                |
|  |   | Senior Officials   | 2002        | Annual                |
| 12   | Information Technology<br>and Communication | IT Ministers   | 2004        | Ad hoc                |
|  |   | Senior Officials   | 2003        | Annual                |

|                                  |   |                                       |      |          |
|----------------------------------|---|---------------------------------------|------|----------|
| 13                               | Health                                    | Health Ministers                      | 2004 | Biannual |
|                                  |   | Senior Officials                      | 2003 | Biannual |
| 14                               | Science and Technology                    | Ministers for Science                 | 2006 | Ad hoc   |
|                                  |   | Senior Officials                      | 2006 | Ad hoc   |
| 15                               | Youth                                     | Ministers on Youth                    | 2007 | Biannual |
|                                  |   | Senior Officials                      | 2004 | N/A      |
| 16                               | Information                               | Ministers Responsible for Information | 2009 | N/A      |
|                                  |   | Senior Officials                      | 2009 | N/A      |
| <b>Senior Officials Meetings</b> |   |                                       |      |          |
| 1                                | Natural Disaster                          | Senior Officials                      | 2006 | Annual   |
| 2                                | Minerals                                  | Senior Officials                      | 2006 | Annual   |
| 3                                | Women                                     | Senior Officials                      | 2006 | N/A      |
| 4                                | Rural Development and Poverty Eradication | Senior Officials                      | 2006 | Biannual |
| 5                                | Education                                 | Senior Officials                      | 2009 | N/A      |

Source: ASEAN Plus Three Cooperation Database, <http://www.aseansec.org/22206.pdf>

In accordance to APT leaders' arrangements, the discussing of regional, international political and economic questions along with the digest of present and future directions for APT cooperation were added to the issues of APT foreign ministers' and their senior officials' annual meetings. In its turn, potential and current projects of cooperation in different areas, proposed by the member countries, were considered at the meetings of sectoral ministers and officials. In case of need, special expert groups or additional meetings of the APT officials were established in order to examine the acceptability of such projects or, vice-versa, to monitor their implementation.

Because of CMI (CMIM) and ABMI adoption and development, the institutional framework of the APT cooperation in its financial sector is currently one of the most developed. Here, in addition to Finance Ministers meetings, the regular meetings of Finance and Central Bank Officials have been held since 2000 in order to review the Chiang Mai Initiative implementation process. The institutional mechanism for the Asian Bond Markets Initiative realization is even more branched. By the 2003 APT meeting, six voluntary working groups had been established in this field to further discuss a range of key issue areas, such as a credit guarantee mechanism in order to develop regional bond markets.

Following the new ABMI Roadmap endorsed by the 11th APT Finance Ministers Meeting in Madrid in May 2008, the four ABMI Working Groups have evolved into Task Forces addressing the four key areas namely: 1) promoting key issuance of local currency-denominated bonds; 2) facilitating the demand of local currency-denominated bonds; 3) improving regulatory framework and 4) improving related infrastructure for the bond markets. There is the Technical Assistance Coordination Team, which provides technical assistance in bond markets to the members concerned. One of the key initiatives under the ABMI framework is the establishment of the Credit Guarantee and Investment Facility aimed at supporting the issuance of local currency-denominated bonds in the region.<sup>51</sup>

There also exists the APT special Research Group, within the frame of which the officials of the member states' finance ministries and central banks discuss the long-term and mid-term challenges for further regional financial cooperation, drawing on the intellectual resources of the region's research institutions. Since the establishment of the Research Group in 2004, a network of 22 such research institutes in the APT countries has been established, resulting in the conduct of major studies focusing on financial stability issues. For instance, in 2009/2010, the Research group has concluded research on two topics namely: 1) Ways to Promote Foreign Trade Settlements Denominated in Local Currencies in East Asia; and 2) Regulation and Supervision for Sound Liquidity Risk Management for Banks.<sup>52</sup> All such studies' findings and recommendations are discussed and endorsed by the APT finance ministers.

A large number of working and research groups were created under the control of APT economic ministers for detailed study and monitoring of the projects in the fields of trade, investment and other areas of economic cooperation. Among them are, for example, the e-APT Working Group, which serves as a forum for ICT collaboration between ASEAN and Northeast Asia; the Joint Expert Group for Feasibility Study on EAFTA; the APT Project of Logistics Cooperation for Future Trade Facilitation; the APT Project of Cooperation for Internationally Comparable Statistics and others. Special four ASEAN Plus Working Groups were also set up. They were tasked to look into the recommendations in the studies on the East Asia Free Trade Area and the Comprehensive Economic Partnership in East Asia in parallel.

Similar structures were formed within the APT grouping and in other areas of cooperation, as well as in the 'ASEAN+1' format, where there are separate meetings in different levels of all ASEAN members and one of the three non-ASEAN members in the APT framework: ASEAN-China, ASEAN-Japan or ASEAN-Korea. Besides, the APT was a good basis for the institutionalization of relations among the Northeast Asian countries.

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<sup>51</sup> ASEAN Finance Ministers Meeting (AFMM), online: <<http://www.aseansec.org/19588.htm>>.

<sup>52</sup> *Ibid.*

The ASEAN+3 mechanism provided the Northeast Asian countries with valuable opportunities to develop their own institutions. The tripartite summit was organised on the fringes of the ASEAN+3 summit meeting. These talks offered an easy and natural opportunity for the gathering of the three leaders. [...] The meetings of trilateral foreign ministers and economic ministers were also organised on the fringe of the ASEAN+3 ministerial meetings. The ministerial meetings at the ASEAN+3 level provided additional chances to exchange views and opinions for ministers and senior officials from the three Northeast Asian countries. Moreover, China, Japan and South Korea developed their own cooperative schemes by taking advantage of the ASEAN+3 framework.<sup>53</sup>

Despite the large number of various meetings and working groups, which provide the cooperation between the APT countries, the level of such cooperation's legalization remains low, because there is still no permanent international body to coordinate the work of APT institutional structure. In this case we are dealing with the situation where the 'conference diplomacy'<sup>54</sup> has a clear priority over the 'diplomacy of international institution'. Nevertheless, the question, concerning the creation of APT secretariat, repeatedly arose while this grouping was working.

Initially, the cooperation in the APT framework has been dealt with in the External Relations and Coordination Bureau in the ASEAN Secretariat. But in 2001, Malaysia proposed to establish an APT secretariat and one year later it was intended to offer seed funding in the amount of 10 million US dollars to cover the first five years of its operation. Senior officials of the other ASEAN members expressed reservations on Malaysia's proposal, insisting that they preferred to strengthen the ASEAN Secretariat in order to promote cooperation in the APT framework. ASEAN Secretariat also showed its support in the question of the APT Unit setting up within itself. It considered that the creation of APT Unit is more feasible than to establish another new bureau such as an APT Bureau relating to the shortage of ASEAN Secretariat staff and budget.<sup>55</sup> As a result, the participants of the 8th APT Summit in Vientiane "welcomed the setting up of the ASEAN+3 Unit in the ASEAN Secretariat" in 2003 and "expressed the need to

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<sup>53</sup> *Supra note* 10 at 70.

<sup>54</sup> See for details Sanae Suzuki, "East Asian Cooperation through Conference Diplomacy: Institutional Aspects of the ASEAN Plus Three (APT) Framework" (2004), Working Paper, Institute of Developing Economies, APEC Study Center, JETRO, Tokyo, online: <[http://www.ide.go.jp/English/Publish/Download/Apec/pdf/2003\\_07.pdf](http://www.ide.go.jp/English/Publish/Download/Apec/pdf/2003_07.pdf)>.

<sup>55</sup> *Ibid.* at 8-9.

strengthen the ASEAN+3 Unit in coordination and implementation of the cooperation and welcomed the Plus Three countries assistance to the Unit”.<sup>56</sup>

Instituting of the regular APT Directors-General Meetings (DGM) was a kind of alternative to a new secretariat establishing. They were endorsed by the ASEAN Plus Three Foreign Ministers on 30 July 2002 as a coordinating mechanism to ensure coherence, efficiency and progress of the APT process. The inaugural meeting of the APT Directors-General was held in Seoul, Korea on 30 August 2002. Later, in accordance to the Second Joint Statement on East Asia of 2007, the APT Directors-General were entrusted with the responsibility to monitor the process of the APT Cooperation Work Plan implementation and to inform the annual meetings of the foreign ministers and summits of APT about its success.

In 2009, the leaders of the APT countries came to the conclusion that the role and responsibility of the APT DGM as a monitoring and coordinating body of the ASEAN Plus Three Process would be transferred to the ASEAN’s Committee of Permanent Representatives and the ambassadors of China, Japan, and Korea to ASEAN.<sup>57</sup>

## *2. Functional features of the APT’s institutional structures*

Taking into account the above, it should be noted that although the ASEAN Plus Three grouping is fairly defined as 'institution without legalization', at the same time it has a well-developed institutional framework. We will not find any contradictions within this statement if we, following many present-day researches, will associate the existence of international institutionalization primary-level not with an independent international body creation but with the agreed behavior among the members of the group.

As Yoshinobu Yamamoto notes: “If nations repeat the same or similar behavior in relation to each other, we can say that the institution exists”.<sup>58</sup> He distinguishes six levels of institutionalization, depending on the degree of the joint states’ behavior harmonization and its incidence. There are no institutions and nations that behave solely on the basis of narrow national interests at the first level. The second level is characterized by the presence of the circumstances under which the states repeatedly balance each other by virtue of alliances and in order to maintain peace. The balance of power here “is considered to be an institution defined by

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<sup>56</sup> Chairman’s Statement of the 8th ASEAN+3 Summit, Vientiane, 29 November 2004, online: <<http://www.aseansec.org/16847.htm>>.

<sup>57</sup> Chairman’s Statement of the 12th ASEAN Plus Three Summit, Cha-am Hua Hin, Thailand, 24 October 2009, online: <<http://www.aseansec.org/23594.htm>>.

<sup>58</sup> Yoshinobu Yamamoto, “Institutionalization in Northeast Asia: Is outside-in regionalization enough?” in Martina Timmermann and Jitsuo Tsuchiyama eds., *Institutionalizing Northeast Asia: Regional Steps towards Global Governance* (Tokyo, New York, Paris: United Nation University Press, 2008) at 22.

patterned behavior”. In addition to agreed behavior, nations create sets of rules and norms in specific topic areas, being at the third level of institutionalization. The next level can be defined as ‘governance without government’ when, in addition to rules and norms, a special framework is created to solve a wide range of common problems through a variety of means and by a variety of actors. “If governance is taken further, we achieve an authoritative decision-making body within a certain set of issue area (government without state) and, finally, an authoritative decision body including foreign and military affairs that comes close to the state”.<sup>59</sup>

Thus, the level of interstate relations’ institutionalization is variable and is determined by the real needs of these states’ interaction for common goals and common problems achievement and solving. Besides, the current level of institutionalization in many respects determines the nature and content of norms and rules created by nations. The development is possible here too: from the absence of rules to the norms of soft law, and from the soft law to the imperative norms of hard law. In this case, however, it should be borne in mind that the use of hard law norms for the regulation of relations among states, as well as the use of intergovernmental organization format for the provision of individual countries cooperation is not the only correct choice. In some cases, arrangements can be much more effective than the norms of international conventions, and the ‘conference diplomacy’ will bring more results than the work of international body which possess international legal personality. Therefore, the evaluation of success and effectiveness of cooperation between different states cannot be done solely on the basis of institutional level, which was reached by the relevant countries, or on the grounds of the nature of norms governing their relations.

The above-mentioned fully refers to the ASEAN Plus Three grouping. It is our opinion that the degree of its institutionalization corresponds approximately to the fourth level in the Yamamoto’s scale. An authoritative international decision-making organ is not created in this case, but there exists a vast network of meetings, working groups and other institutions, which operate on governmental and non-governmental levels and provide coordination of the member states activity in a wide spectrum of areas of common interest. It seems that such ‘governance without government’ is optimal now for East Asian countries which have a need for moving forward together, especially in economic area, but at the same time are not ready to sacrifice their sovereignty and to submit to another subject. The format of the structures, which forms the APT institutional framework, and the content of their activity fully meet the expectations and needs of its members as well.

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<sup>59</sup>*Ibid.* at 22-23.

The analysis presented above shows that three main levels can be singled out within the APT framework. Each of them is responsible for solving its own task. The first level is the level of APT's development strategy determination. It covers annual summits of the member states' leaders, which have become the most important organizational form of the grouping work. The results of such meetings can be found in declarations and statements, which determine the objectives and future directions of APT activity, as well as the measures for their implementation. As it was mentioned above, among the most significant documents the Joint Statement on East Asia Cooperation of 1999, the Kuala Lumpur Declaration on the ASEAN Plus Three Summit of 2005 and the Second Joint Statement on East Asia Cooperation of 2007 can be called.

Leaders meetings, taking place in an informal atmosphere, give the heads of state an excellent opportunity to exchange their views not only on the issues, inscribed on the official agenda of APT, but also about a wide range of other important regional and global problems. An important advantage of leaders meetings is that just the fact of their presence in annual calendar makes government officials act more responsibly towards the implementation of the initiatives, previously proposed by the leaders, and focuses their attention on the problems of APT and the entire region. The political weight of the summits makes it possible to overcome bureaucratic barriers and to solve difficult issues, which sometimes cannot be resolved at the ministerial or lower levels.

The second level of the APT institutional framework can be defined as the level of 'operational management' of the processes, taking place in this grouping, and the projects, realizable within its limits. It is the level of the APT ministers meetings, among which the annual meetings of economic ministers are the most important in the economic sphere. The APT countries' financial and monetary cooperation is coordinated, respectively, at the level of their finance ministers meetings. The same approach applies to the other areas of common interest.

The most important tasks of the APT economic ministers' consultations are to determine the priority directions of the APT member states cooperation in this area, to approve their joint economic projects and to monitor them. For example, at the second meeting in 2000, the APT members' economic ministers identified the following priority areas for cooperation: strengthening efforts in accelerating trade, investment and technology transfer; encouraging technical cooperation in information technology and e-commerce; and strengthening small and medium sized enterprises (SMEs) and supporting industries.<sup>60</sup>

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<sup>60</sup>Joint Press Statement of the 2nd Meeting of the ASEAN Economic Ministers and the Ministers of People's Republic of China, Japan and Republic of Korea, Chiang Mai, Thailand, 7 October 2000, online: <<http://www.aseansec.org/607.htm>>.

Furthermore, the third APT economic ministers' meeting in 2001 adopted six economic projects. After the third meeting in Bandar Seri Begawan in 2002, their number increased to 12, and after the tenth ministerial meeting in 2007 up to 25. By this time they have covered a wide range of areas including information technology, small and medium-sized enterprises, standards and quality conformance, environment, and logistics management. The APT economic ministers closely watch the progress of each project's implementation and consider the question of each of them at every meeting.

Clearly understanding the necessity of broad approval of all such projects by the APT participating countries, the ministers endorsed the criteria for their adoption and implementation. As it was mentioned at the Joint Press Statement of the 2nd Meeting of the APT Economic Ministers on 7 October 2000:

The Ministers considered and endorsed the following criteria for deciding on project proposals to implement the priority areas of cooperation:

- (i) Projects should be regional in nature and benefit all member countries under the framework of the AEM+3 cooperation;
- (ii) The projects could be implemented with the participation of as many member countries as possible (based on 13-X principle). However, these projects should involve, at the minimum, participation by any two (2) ASEAN member countries and any two (2) countries from People's Republic of China, Japan and Republic of Korea;
- (iii) Projects should be implemented on a cost-sharing basis. Nevertheless some flexibility could be provided to the new members of ASEAN namely Cambodia, Lao PDR, Myanmar and Viet Nam; and
- (iv) Project proposals should be approved by the Senior Economic Officials.<sup>61</sup>

The "13-X principle", mentioned in paragraph (ii), has a decisive importance for the mechanism of economic projects implementation. It means that the concerned projects can be launched even if some of the members are not ready for or resist the implementation of those projects. The project is desirable to be implemented by all the members of APT ("13"), but, at the same time, this principle encourages the participation of as many members as possible. Furthermore, it also allows some members ("X") not to participate in the projects.<sup>62</sup> Thus, on the one hand, the project should be approved by a maximum possible number of the APT members for its implementation but, on the other hand, the refusal of any of these member countries to participate in such a project will not put any insuperable obstacles for its realization. Later in

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<sup>61</sup> *Ibid.*

<sup>62</sup> *Supra note 54 at 20.*

2005 “the ministers endorsed the recommendations of the senior officials on measures to enhance management of economic cooperation projects and that all economic cooperation initiatives and projects shall have a common unifying vision towards an East Asian Community”.<sup>63</sup>

The meetings of the member states’ senior officials, which are responsible for the practical implementation of various projects and programs within specific areas of economic cooperation, make the core of the third level of the APT functioning, which can be defined as the level of research and implementation. As a rule, these officials appear to be the heads or deputy heads of ministerial departments. In the scope of their competence, they carry out all the necessary measures for the preparation of annual ministers meetings, for the working agenda formation and documents drafting, as well as for the recommendations drawing up. Besides, they supervise and coordinate the work of the working and study groups and other units of APT. The work of senior officials and functional groups results in reports, which they submit to higher APT institutions for consideration and approval.

Another important feature of the APT institutional framework is the active use of non-state actors’ and organizations’ possibilities in order to achieve the goals of this grouping. In other words, participating countries, in their desire to find common ground and effective solutions, do not only rely on the facilities of their governmental structures (Track I), but also attract the intellectual potential of individual researchers and institutions, which are not bound by any formal limits of political expediency or national interests (Track II). In my opinion, such approach to Track I and Track II unification, which is also broadly used in other institutions and organizations in Asia-Pacific Region, significantly increases the practical value and applicability of the decisions taking by the APT structural units.

Among the most famous institutions of the Track II, which activities had a significant impact on the work of APT, were East Asia Study Group and East Asia Vision Group, recommendations of which have largely determined the strategy of the grouping development, as well as East Asia Business Council, Network of East Asian Think-tanks, Economic Research Institute for ASEAN and East Asia and others. A large number of individual experts and non-governmental research organizations have been also involved in the deepening of the APT members cooperation within the ‘ASEAN +1’ format.

Thus, instead of having formal organizational structure, APT has formed an interesting broadly-structured institutional framework, which is composed of three levels of cooperation: 1)

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<sup>63</sup>Joint Media Statement of the Eight ASEAN Economic Ministers and the Ministers of People’s Republic of China, Japan and Republic of Korea Consultation (AEM Plus 3), Vientiane, 29 September 2005, online: <<http://www.aseansec.org/17783.htm>>.

the level of strategic development; 2) the level of operational management; and 3) the level of researches and implementation of joint projects. In order to be implemented any project or initiative, proposed by a member state, shall more or less go through each of these levels and, and, as a result, obtain other APT participants' approval. Such scheme, that converts "the idea of one into coordinated behavior of many" and, moreover, includes non-state actors, substantially raises the importance of APT as a regional center for the effective cooperation on a wide range of issues. In addition, the informality of the APT structures allows the states, which are not ready yet or do not want to present their ideas and plans for grouping members' consideration, to implement them within the 'ASEAN +1' or other mechanisms.

At the same time, APT remains to be an example of intergovernmental form of cooperation, guided and controlled by its member states, in accordance with the objective needs of their development and development of the whole region. However, the above mentioned shows that APT cannot serve as a confirmation, for example, of the neofunctionalism theory, which emphasizes that any integrative action in one sector steps down actions in related sectors, and this integration process creates new problems that can be solved only by further cooperation. Sequentially, according to this theory, the beginning of cooperation in technical and non-controversial issues would lead to cooperation in high politics areas, and eventually general integration would be achieved by a whole new range of supranational institutions.<sup>64</sup>

The alternative theory, developed from the critiques of neofunctionalism and known as intergovernmentalism, cannot be fully applied to APT as well. It points to heads of state and government as central and ultimate players, and argues that regional integration can best be understood as a series of bargains between heads of government backed by a small group of ministers and advisers in a region.<sup>65</sup> As Hidetaka Yoshimatsu notes, "intergovernmentalism has been contrasted with supranationalism in explaining the principal factors promoting the integration process, and deals with the 'thick' international institutions. Intergovernmentalism also puts stress on relative power among states and the dominant role of the largest states in the integration process".<sup>66</sup> As it was argued above, cooperation within the APT framework has another basis and involves the participation of both public and private actors of different levels and nature.

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<sup>64</sup>See for details e.g. Ernst Haas, *Beyond the Nation State: Functionalism and International Organization* (Stanford: Stanford University Press, 1964).

<sup>65</sup>See for details e.g. Paul Taylor, "Intergovernmentalism in the European Communities in the 1970s: Patterns and Perspectives" (1982) *International Organization* 36 (4) at 741–66.

<sup>66</sup>*Supra note* 10 at 63–64.

### III. RULE-MAKING ACTIVITY WITHIN THE APT FRAMEWORK

The ASEAN Plus Three forum, like any other international institution, was created, maintained and strengthened to achieve certain common objectives of the member states. It was shown above, how APT, while solving specific issues within the economic area, tried to reduce transaction costs and to create an infrastructure and business event locations for the member states to take joint actions in order to deal with a variety of issue. But at the same time, “given that the basic purpose of institutions is to achieve common purposes, we have to pay close attention to how institutions (a set of rules and norms) influence the behavior of their member states - which is related to the issue of internationalization of the norms and compliance with the rules established by the institution”.<sup>67</sup>

Bearing this circumstance in mind, the third part of the paper will be devoted to the examination of the rule-making mechanism, operating within the APT framework. The classification and specific characteristics of various regulatory documents, adopted by the structural units of APT and its member states, will also be presented here. However, before we proceed any further, it is necessary to give a brief outline of the international rule-making process nature and content.

#### ***A. Essence of the International Rule-making Processes***

The main feature of the international rule-making process is that in it, unlike the similar national rule-making procedures, a legislative body, which could approve the rules and regulations obligatory for all subjects, is absent.<sup>68</sup> Existing international bodies, which are entitled to make decisions binding on the states (for example, the UN Security Council or the European Court of Human Rights), act only in the legal norms application sphere, but not in the sphere of their creation. Therefore, the international norms are created by the states themselves and appear to be a result of their wills harmonization. Such harmonization may be achieved through a variety of forms and methods in bilateral and multilateral negotiations, international conferences and organizations or just by the agency of interstate communication everyday practicing. The results of such coordination are the rules, agreed and fixed by the states in certain documents, or the rules, which had not been fixed in them, but have become the norms of customs.

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<sup>67</sup> *Supra note 58* at 23-24.

<sup>68</sup> European Union is an only exception here in respect of a number of issues.

There are two key stages of the states' wills harmonization within the international rule-making process. During the first, the harmonization of wills on the norms' content takes place. In this context, depending on the number of contracting countries, the presence or absence of contradictions in their attitude towards the subject of agreement and area of cooperation, in which this agreement will be created, the relevant norm can have concrete or abstract character, be mandatory or dispositive. The detail of the international rules of conduct elaboration, as well as the level of their obligatoriness can also be determined by the goals and tasks, set by the states and realizing the rule-making process.

During the second stage, the harmonization of the states' wills on the agreed norms' legal force determination takes place. Its main content is that the states recognize the binding power of international instruments (or customs), containing such norms. This process is called *opinio juris*. After its completion, new international treaties, conventions and other sources of international law appear. However, the creation of sources of international law is not the only result of the international rule-making process. If the states did not pass the stage of *opinio juris*, the rules, which impose legal obligations upon them, cannot be created. In this case norms and documents appear which regulate the behavior of states and other actors, but not at the legal level. Such instruments do not have the nature of international treaties but of arrangements, and their norms have a political force rather than a legal one.

Thus, norms and documents of different nature and content can be a result of the international rule-making process: from abstract and dispositive political declarations to imperative self-executing legal international treaties, which have a direct effect on the territory of participating countries. As it was emphasized above, in each case the rule-making process is determined by a created document destination and by an achieved level of coordination of contracting states' positions concerning its content and mechanism of its implementation. In some cases, regulation at political level may be preferable to legal and in other cases only a legally binding document can be required.

Nevertheless, a distinguishing feature of recent decades has been a considerable increase in the number of international political documents in comparison with international treaties and other international legal acts. The opinion exists that states have lost their enthusiasm for international treaties' conclusion. Moreover, self-executing treaties containing not abstract but concrete obligations is the least popular now because the framework document can be conveniently interpreted in domestic act.<sup>69</sup> As the famous Russian scholar Georgy Tunkin notes,

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<sup>69</sup> Vorob'ev V., "International personality of APEC" in Vyacheslav Gavrilov ed., *Michailov's Scientific Readings of 2010. Actual Problems of the Theory and Practice of International Law* (Vladivostok: FEFU Publishing House, 2011) at 23.

this tendency can be explained by two main reasons: 1) the necessity of the rule-making activity intensification at the international level, which cannot be achieved nowadays exclusively through an ordinary process of international treaties' conclusion; and 2) the drive of states to create norms, which do not impose strict legal obligations on them but, at the same time, have some regulatory effect on their behavior.<sup>70</sup> At the same time, practice shows that sometimes political norms are more effective and states follow them with more prudence in comparison with legal norms.

A detailed examination of this problem is not the task of this paper. Therefore, it just should be mentioned that it is prospectless to talk about the undoubted advantages of legal norms over the political ones or vice versa. Each result of the international rule-making process, depending on the circumstances, has its strengths and weaknesses. Therefore, they should not be opposed to each other but skillfully combined in order to solve the challenges facing the international cooperation today. It would seem that the ASEAN Plus Three grouping follows precisely this path.

### ***B. Rule-making Mechanism of APT***

Possibilities and content of the APT rule-making mechanism's activity, like mechanism of any other institutional entity, are determined by the needs of its member states and by the peculiarities of their relationships. Even quick and shallow analysis of these features shows that the APT member states at the present time are not ready to create an extensive network of international treaties in the main trends of cooperation. The reason of this, in particular, is that there still exist a lot of diversities and differences in East Asian regional identity development.

East Asians may agree on peace, coexistence, prosperity and progress, but they disagree, for instance, on human rights and democracy. [These facts] reflect a normative order of East Asian regionalism with several features: democracy is not a normative value for regional organizations; national sovereignty should not be sacrificed for a regional order; and Asian regionalism is a progress of elite-led, market-driven and ideologically biased movement against the West. These Asian normative ideas have informed and affected regionalization in East Asia, as illustrated by the developments of Asian intergovernmental forums [...] and informal networks between non-governmental organizations.<sup>71</sup>

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<sup>70</sup> Tunkin G., *Law and Force in the International System* (Moscow: International Relations, 1983) at 58.

<sup>71</sup> Baogang He, "Normative Regionalism in East Asia" in Martina Timmermann and Jitsuo Tsuchiyama eds., *Institutionalizing Northeast Asia: Regional Steps towards Global Governance* (Tokyo, New York, Paris: United Nation University Press, 2008) at 70.

Taking this into account, there are no prospects in the nearest future for a normative development of Asian countries, including APT, towards the acceptance of pooling their sovereignty, as it was seen in a case of Europe. Quite the contrary, the development of East Asian regionalism reveals a completely different approach to this issue. Rather than pooling sovereignty, national sovereignty has been strengthened in process. From the beginning, East Asian regionalism has been based on respect for and consolidation of national sovereignty and it was an attractive incentive to encourage national leaders to support and push regionalism. Besides, their colonial past has made ASEAN states “sensitive to relinquishing any degree of national sovereignty, and, given their current weak position in world politics, sovereignty is seen as necessary to prevent foreign powers from intervening in their domestic affairs”.<sup>72</sup> That is why the preference of East Asian states to be independent rather than bound by a supranational power is a deep sentiment among Asian peoples.<sup>73</sup>

The above once more explains why APT has not been created in the form of an international organization with a supranational authority, and why its institutional framework is first of all designed to coordinate independent states’ activities and does not have a rigid subordination structure. Another consequence of these circumstances is that the results of the APT rule-making activity in most cases have political rather than legal nature. In other words, the APT member states prefer to harmonize their wills only within the first stage of the international rule-making process and very rarely reach the stage of *opinio juris*.

Commenting on this situation, Tamio Nakamura notes that “the East Asian style of flexible political arrangement may be seen as a feasible and pragmatic way to reach region-wide agreements against the background of the huge diversity of East Asian states in their economies, political systems and socio-cultural traditions”.<sup>74</sup> That is why, according to some researchers, most of the East Asian regional mechanisms do not necessarily constitute legally binding reciprocal commitments, or instruments for their enforcement. Moreover, “it is to be expected that institutions in the region will remain relatively weak. ASEAN Plus Three will not be an exception, given the existing differences in national interest and the limits to the institutional capability of the countries in the region”.<sup>75</sup>

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<sup>72</sup> *Ibid.* at 71.

<sup>73</sup> *Supra* note 46.

<sup>74</sup> Tamio Nakamura, “Proposal of the Draft Charter of the East Asian Community: An Overview and the Basic Principles” in Tamio Nakamura ed., *East Asian Regionalism from a Legal Perspectives: Current Features and a Vision for the Future* (London and New York: Routledge, 2009) at 198.

<sup>75</sup> Tsutomu Kikuchi, “The Political Economy of ‘East Asian’ Cooperation: Towards Better Regional and Global governance” (2002) *The Japanese Economy* 29 (3) at 15.

On the other hand, there are some misgivings that without proper political and legal mechanisms to reinforce agreements, flexible agreements could soon and substantially lose their effectiveness and credibility.

Flexible visionary arrangements between states that insist on their unqualified sovereignty, would allow member states to act according to their convenience, and not according to the plans that they had earlier agreed upon. If diversions from agreements because of reasons of convenience happen frequently, the credibility of the agreements would be substantially damaged; there would be fewer prospects for the few remaining rules and principles in the agreements maturing to be principles and norms universal to the East Asian region.<sup>76</sup>

It is obvious that there is some truth in these misgivings. However, it seems that much more fears will be caused by a situation when a rigid and legally binding treaty will be concluded between states, which do not have the desire or ability to implement its provisions. In the same way, a supranational body to oversee international instruments implementation, invested with wide powers, can be created. But its work will be ineffective until it is supported by the respective states. Therefore, the effectiveness of a certain international normative instrument will depend not only on its nature, form and even content but, first of all, on its conformity with the real wills of the participating states and on the current level of their relations development.<sup>77</sup> With the course of time these indicators will change, and, consequently, the nature and content of international instruments, adopted by states, will also be changed. A good example of this is ASEAN. Its member states began their collaboration in 1967 with the adoption of political declarations. In 2007 they endorsed the ASEAN Charter – a legally binding international agreement, which had granted an international legal personality to this organization.

It may happen that the same future is expected for APT. Meanwhile it works on today problems and uses different mechanisms and procedures which meet the realities of its member states' present-day relations. Nevertheless, even nowadays, its role as a framework for East Asian cooperation is essential. This forum serves to create possible patterns of dialogue and cooperation, and thus to promote mutual confidence-building through an intergovernmental network within the region. These efforts are critically important for the diversity of the regional

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<sup>76</sup> *Supra* note 74 at 202.

<sup>77</sup> Therefore, it is necessary to agree with José E Alvarez, who writes: “There is considerable truth to the proposition that states cooperate (or not) depending on whether they perceive that it is in their interests to do so, and this must surely apply to some extent when it comes to choosing whether or not to engage in formal treaty-making or legalised dispute settlement. But seeing the choice to legalise from the standpoint of rational choice theory does not lead to the conclusion that “Asian” legalisation does not occur. On the contrary it suggests that some Asian/Pacific governments may sometimes, on some issues, find it in their interests to legalise”. *Supra* note 44 at 22.

countries, and essential for the avoidance of a certain North-South division within East Asia. It is also important that private actors and transnational bodies within the APT framework such as multinational corporations, transnational groups, and social movements, contribute to better governance for the future East Asian community building.<sup>78</sup>

Thus, if APT and other Asia-Pacific international institutions prefer to carry out their activities with the help of various committees, meetings and working groups, including non-governmental representatives, and by virtue of non-binding declarations' adoption, thereby demonstrating an example of low legalization. It does not mean that they show an explicit 'aversion to legalization' or offer to move away from international organizations possessing international legal personality.<sup>79</sup> It simply means that they go their own way of institutionalization and normative ensuring of their member states' cooperation and just correct it when necessary.

Generally speaking, this path can be defined as '*Down-Up way*'. At first, during a long period of time, a common position among the states on a specific issue is developed at the lower level, and then the first steps towards its solving are made. The countries elaborate institutional and normative mechanisms to improve their collaboration in the respective area only after the appearance of a joint movement through this path and if necessary. This approach is significantly different from the position of Europe and North America, which clearly demonstrate their adherence to formal procedures and high level of legalization. Their behavior in this case can be defined as '*Up-Down way*', when creation of institutional structures and elaboration of rules and norms at the highest level are put on the first place. The work on the desired goal implementation begins only after the mentioned frameworks are created and only in accordance with them. Such implementation is realized by the subjects of lower levels, whose behavior must conform to the reached agreements. Therefore, the degree of these subjects' discretionary power and freedom of actions are relatively low.

One of the key features of the '*Down-Up way*' is the wide use of a decision-making principle on the basis of consensus, which is also typical for APT. At the first APT summit in 1997, its members did not discuss whether to regularize the summits. Therefore, the procedures of the meetings holding such as formalities of filing documents and decision-making rules were not settled during the first summit. But, step by step the members have recognized that the APT framework relies on the consensus decision-making in its meetings.

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<sup>78</sup> *Supra note 75* at 19.

<sup>79</sup> See more about that in Alison Duxbury, "Moving Towards or Turning Away from Institutions? The Future of International Organizations in Asia and the Pacific" (2007) 11 SYBIL 177.

The consensus approach to the decision-making came from Malay terms *musyawarah* and *mufakat*, which relied largely on an unhurried way of common ground finding in order to gain informal understandings or loose agreements.

*Musyawarah*, the process of decision-making through discussion and consultation, and *mufakat*, the unanimous decision that is arrived at, are associated with the traditional approach to decision-making in the region and have played a role in village politics for centuries and, culturally, can be identified as part of the regional social system.<sup>80</sup>

As the former Prime Minister of Singapore, Lee Kuan Yew, has commented, “we have made progress in an Asian manner, not through rules and regulations, but through *musyawarah* and consensus”.<sup>81</sup>

Nowadays the principle of consensus is fairly often utilized by international organs and conferences. It means that the decision will be made only if all participants agree. Consensus does not always stand for a unanimous consent and support: it is primarily the absence of objections. Therefore, according to the consensus procedure, decisions are often postponed if there is any objection. The means for these objections overcoming within the consensus decision-making process largely depends on the kinds of agreements to be reached.

Two typical examples can be singled out to illustrate this situation. The first is the establishing of mutual understanding that will be recorded in ‘declarations’ or ‘chairman statements’. In these documents, the members declare their willingness to cooperate but do not specify what measures shall be implemented. The decisions made by virtue of willingness or mutual understanding are taken by consensus both when the opposing members can overcome their objections and when conflicting sentences of the documents are adjusted in order to satisfy those members. However, this case permits different interpretations and understandings of the documents by different members and leads to ‘pseudo-consensus’.<sup>82</sup> The second case “concerns making decisions on agreements that require implementation by the members. Such agreements are likely to be decided by consensus if the members attempt to find compromises by changing implementation procedures in order to satisfy opposing members”.<sup>83</sup>

Since the APT framework relies on the consensus decision-making, examples of two cases described above can be found in its decisions. The first case, where decisions, which

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<sup>80</sup> *Supra* note 42.

<sup>81</sup> Joint Communique of the Fifteenth ASEAN Ministerial Meeting, Singapore, 14-16 June 1982, online: <<http://www.aseansec.org/3677.htm>>.

<sup>82</sup> Johan Kaufmann, *Conference Diplomacy: An Introductory Analysis* (London: Macmillan Press Ltd, 1996) at 29.

<sup>83</sup> *Supra* note 54 at 30.

illustrate mutual understanding, are taken by consensus, can be revealed at all three levels of the APT institutional framework: from working and experts groups to ministerial and leaders meetings. However, the leaders' summits are the most famous and significant in this sense. They operate as the channels, which help to exchange views and gain understanding at the highest level, and adopt statements and declarations, which outline prospective ways and areas for cooperation. However, disagreements are possible even with such broad framework of the states' positions. That is why reaching a consensus may require some correcting in order to satisfy the opposing members. Suzuki Sanae gives an interesting example in this regard.

At the 1999 ASEAN+3 summit, the Philippines insisted on including its initiative of an East Asia Security Forum in the joint statement. This initiative aims to institute the ASEAN+3 summit as a political and security forum. But, some ASEAN+3 members objected to this proposal and supported utilizing the existing political and security mechanisms such as the ARF. Faced with objections, the Philippines changed its proposal from establishing the ASEAN+3 as a new forum for political and security issues to including such issues on the agenda of ASEAN+3 meeting (Baja 2000); there was general agreement on this revised proposal.<sup>84</sup>

By the nature of the first type decisions, the APT members can strike a compromise relatively easy in this case by the use of unprincipled mutual concessions or just by the revision of declarations or statements. The negative point here is that such documents can be differently interpreted by the participants. Another situation arises when APT considers documents and decisions which require measures' elaboration for their implementation. It is obvious that these instruments should be less open to onerous interpretation. Therefore, the process of consensus achieving is much more complex in this case and it requires serious efforts in order to reach a compromise among the contracting parties. Institutional arrangements, which decrease the level of disagreements among the participants or even the number of these participants, can also be used.

Multi-level and dynamic institutional mechanism of APT, which brings together the efforts of public and private entities and can be adapted to find an agreed decision on any level of the problem's specification, is perfect for a compromise achieving goal. But if the level of disagreements is too significant and joint efforts fail to arrive at a coordinated decision, other mechanisms for the member states' positions coordination can be used within APT. Among them the '13-X principle' can be named, which is used during the APT economic projects preparation

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<sup>84</sup> *Ibid.* at 31.

and launching. The Chiang Mai Initiative is also an interesting example of different rule-making schemes' combination within APT. It was approved by all members of the grouping, but its implementation procedures had to rely on signing bilateral swap agreements among them. Another feature of APT institutional and normative mechanisms is that they allow unrestricted implementation of its decisions that create a positive example for the others.

The EAFTA project is among the normative acts, in respect of which the APT countries still cannot reach an agreement. Despite the fact that the necessity of such agreement elaboration has been discussed practically since the foundation of APT, it has not been adopted yet. Among the reasons for this are: different levels of economic development of the contracting countries, their diverse industrial and agricultural specialization, as well as the contradictions of national interests associated with it.

Nevertheless, the work in that direction has been insistently and purposefully carried out for more than ten years with the use of the possibilities of various levels bodies and institutions, and with the discussion of alternative options such as Comprehensive Economic Partnership in East Asia. There is no doubt that the progress will be reached in this direction as well. In some specified sense, the success, achieved nowadays in signing and implementation of bilateral free trade agreements and a series of related documents among NEACS and ASEAN, can be indicative of this statement.

The above-mentioned enables us to come to the conclusion that the APT rule-making mechanism quite successfully solves the issues faced by this grouping and corresponds to the current level and nature of its member-states relationship. Basing on a wide range of multi-level methods and means of the states' wills harmonization, this mechanism enables to pass this way 'down-up' and, therefore, to elaborate a decision that will have a real benefit to all contracting parties. That is why the APT rule-making mechanism is based on the principle of consensus, in accordance with which the decisions can be adopted only if there is no objection from the each member of the grouping.

But this principle can be realized differently, depending on the type of decisions and their content. Therefore, in the case of acts adoption, which requires the approval of detailed implementation measures, the principle of consensus can be combined with other rule-making and institutional mechanisms and procedures. This is another advantage of the APT framework, which permit the use of those methods and tools that are better suited for a particular problem solving.

### *C. Normative Sources of APT Members' Economic Cooperation*

As it was emphasized above, the maintenance and development of economic cooperation among the APT members is a 'cornerstone' of its activity, and APT was created, basically, for this purpose. At the same time, as practice shows, the international normative regulation of interstate economic cooperation covers two key areas: 1) resource transfer management, 2) determination of legal regimes for such resources' cross-border movement. In the first case we are talking about the regulation of relations between states and international organizations regarding exchange of goods (including investments and objects of intellectual property) and services. The second sphere deals with the establishment and change of customs, currency, tax and other regimes and procedures applicable to these resources.<sup>85</sup> All these relations are within the scope of international economic law, among the sources of which treaties and customs, as well as the soft law can be named. But in contrast to other areas of public international law, international economic law tends to be positive rather than customary.<sup>86</sup>

Despite the fact that APT, to a wide extent, coordinates the interstate cooperation in the sphere of international economic law, the results of this grouping rule-making activity can be relegated to its sources only to a small extent, because the most significant of them are political documents. Bearing in mind the current level of economic relations between the APT members, as well as the features of its institutional and rule-making mechanisms, it seems to be quite natural. Nevertheless, successful examples of legally binding agreements' conclusion between the East Asian countries in the economic domain, as was already described above, has already existed for ten years within the 'ASEAN +1' format.

However, in any case, both political and legal documents, concluded within the sphere of APT economic activity, have normative nature, and, consequently, exercise regulatory effect on the states' conduct. That is why, it is essential to consider their meaning and content in more details.

#### *1. Political instruments*

Units of the APT institutional structure issue a large number of different documents: reports of working and expert groups, summary reports of senior officials' meetings and joint ministerial statements or chairman's statements, which are a result of sectoral ministers' meetings and meetings of the APT leaders. These acts contain information on the amount of the

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<sup>85</sup> Kuzmin E., *International Economic Law* (Moscow: Prospect, 2007) at 26-29.

<sup>86</sup> Steve Charnovitz, "What is International Economic Law?" (2011) 14 J. Int'l Econ. L. 3 at 5.

executed work, approved and implemented projects, introduced initiatives or undertaken researches. Therefore, they obviously reflect the achievement of a certain level of states' positions harmonization in specific areas of cooperation. However, at the same time, these documents do not have normative character and cannot serve as sources for the states' conduct regulation, even at the political level. The reason for this is that they do not have any rules or norms, with which the APT members could check their behavior. In other words, these documents are designed to demonstrate the progress, achieved by the APT members, to themselves or to the outside world, but they fail to be normative sources for such relations' regulation and development.

Within the APT format, only joint statements of the member states and documents annexed to them have such a nature. Among them are the Joint Statement on East Asia Cooperation of 1999, the Kuala Lumpur Declaration on the ASEAN Plus Three Summit of 2005, the Second Joint Statement on East Asia Cooperation and ASEAN Plus Three Cooperation Work Plan of 2007. Content of these documents has already been analyzed above in detail, that is why we will make just a few remarks about their purpose and normative framework as for the promotion of economic cooperation among the APT members.

For example, in the Manila Statement of 1999 the following four main tasks were set and solved:

1. The objective reasons, which determine the importance of the APT members' cooperation deepening, were identified, and related benefits for the participating countries were shown.
2. The list of priority areas for the APT members' cooperation, in which economic and financial cooperation has been put on the first place, was agreed. Moreover, the list of more specific projects and tasks was given on each direction and that greatly increased the practical significance of the Statement.
3. The APT institutional and rule-making mechanisms' basic parameters were fixed. Among such mechanisms special importance was given to consultative and cooperative processes of the states' wills harmonization, as well as to the meetings of leaders, ministers and senior officials.
4. The APT member states' commitment to pursue the implementation of this Statement, and the principles, according to which this commitment must be carried out, were defined.<sup>87</sup>

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<sup>87</sup> *Supra note 16.*

Thus, the Manila Declaration of 1999 represents a classic normative document, which possesses political nature, and can be clearly defined as the result of international rule-making process, within which the participants have harmonized their wills, concerning certain rules of conduct, and have incurred a political commitment to implement them.

Such political obligations of the APT member states were to a lesser extent expressed in the Kuala Lumpur Declaration of 2005. But even here we can find their “common resolve to realize an East Asian community as a long-term goal”; further recognition “the important role played by the ASEAN Plus One processes to the overall cooperation within the APT framework”; and confidence “that the growing interactions among the APT countries will help promote greater dialogue and collective efforts to both harness opportunities and meet the challenges posed by a fast-changing and globalizing world”.<sup>88</sup>

In the Declaration the APT members also, among other things, clearly showed their common intention to “continue to hold the ASEAN Plus Three Summit annually in conjunction with the ASEAN Summit in order to guide and provide political momentum to East Asian community building under the APT cooperation”; to “speed up the implementation of short-term, medium and long-term measures of the EASG Final Report”; and to “conduct regular exchange of intellectuals, members of think tanks, religious personalities and scholars”.<sup>89</sup> That is why it should be noted that the Kuala Lumpur Declaration of 2005, on the one hand, reaffirmed the goals and objectives of the APT grouping, which had been consolidated in the Manila Declaration, and, on the other hand, identified new pivot points for its members’ cooperation.

Another important document containing political commitments of the APT members was the Second Joint Statement on East Asia Cooperation of 2007.<sup>90</sup> The higher level of mutual understanding and specification in each of the four above-mentioned areas of the APT members’ positions harmonization was reached there. This particularly concerns a more precise definition of the APT objectives in the modern context, acknowledgement of the significant contribution made by ‘ASEAN +1, and ‘+3’ countries to overall cooperation within the APT framework as well as more comprehensive determination of the future scope of the APT cooperation and creation of a more detailed mechanism for the SJS purposes’ implementation.

The basis of this mechanism is the APT Cooperation Work Plan 2007-2017, which was adopted together with SJS. It contains specific priority activities and flagship projects, which shall be implemented by relevant sectoral bodies through their respective programs and plans of action. It should be also noted that the AWP peculiarity was not only in the determination of the

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<sup>88</sup> *Supra note 33.*

<sup>89</sup> *Ibid.*

<sup>90</sup> *Supra note 17.*

list of no longer general but specific cooperation projects, but also in the establishment of states obligations for their realization. In this regard AWP provides that “the APT countries shall pursue [...] joint actions and measures as well as capacity building activities, through closer consultation and coordination with sectoral bodies, in accordance with their respective law and regulations”.<sup>91</sup>

The diversity of the APT members’ interstate cooperation provided an opportunity for them to elaborate common solutions and mutual political obligations also in other formats. Among them, as it was repeatedly emphasized above, cooperation within the frameworks of ‘ASEAN +1’ is of particular importance. A large number of documents defining the perspective lines of the contracting states’ cooperation and specific methods and tools for such cooperation promotion and development were accepted within this format as well. Among the most important are the following: the Joint Declaration of the Leaders of ASEAN and Japan on the Comprehensive Economic Partnership of 2002; the Joint Declaration of the Heads of State/Government of ASEAN and the People's Republic of China on Strategic Partnership for Peace and Prosperity of 2003; and the Joint Declaration on Comprehensive Cooperation Partnership between ASEAN and the Republic of Korea of 2004. At the same time, special plans of action were adopted (ASEAN-China in 2004 and 2010; ASEAN-Korea in 2004) in order to facilitate the implementation of these documents, just as in the case with SJS. Despite the fact that the cooperation within the ‘ASEAN+1’ format in a number of areas, including the economic sphere, was regulated in these documents in more detail, generally these instruments did not differ from the APT documents by their nature and implementation mechanisms.

Finally, among the most important political documents at this time defining the purposes, direction and scope of the East Asian states’ behavior in their mutual relations are the Joint Declaration on the Promotion of Tripartite Cooperation among the People's Republic of China, Japan and the Republic of Korea, which was issued by the three leaders at their fifth summit in October 2003 in Bali. This China-initiated declaration recognized that a solid foundation should be laid for the promotion of the tripartite cooperation among NEACS and stated that “China, Japan and Korea share responsibilities to maintain regional peace and stability and promote common development for all countries”.<sup>92</sup> It also identified 14 areas, including trade and investment, where triangle cooperation should expand and deepen “in a steadfast manner, starting with easier projects and gradually expanding the scope and depth of this cooperation”. The leaders also reached an agreement to set up a three-party committee to study, plan,

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<sup>91</sup> *Supra note 18 at 1.*

<sup>92</sup> *Joint Declaration on the Promotion of Tripartite Cooperation among the People's Republic of China, Japan and the Republic of Korea*, Bali, 7 October 2003, online: <<http://www.aseansec.org/15284.htm>>.

coordinate and monitor cooperation activities and to submit progress reports to subsequent summit meeting.

## 2. *Legally binding agreements*

If joint statements and reports contain information on the dynamics of the APT members' wills harmonization process and declarations represent the documents of a general nature containing these members' political commitments, then legally binding agreements are the result of a full-scaled international rule-making process, which consists both of the stage of the wills harmonization regarding the rules of conduct (norms) and the stage of the wills harmonization concerning such norms validation. In this case, states are "*legally* bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well".<sup>93</sup> Moreover, legal norms, in contrast to political norms, as a rule, "unambiguously define the conduct they require, authorize, or proscribe".<sup>94</sup>

Making legally binding agreements, states bind themselves by stricter obligations and can be brought to various forms of liability for their violations. That is why it is an important decision and should be based on a firm and objective foundation motivating states to make it.

The financial crisis of 1997 played a pivotal role for East Asia countries in this sense. It increased their awareness of and confidence in the need for regional cooperation to avoid another crisis and to promote regional economic growth. As a result the ASEAN Plus Three grouping was created, which began to take active participation in the process of its members' economic cooperation development. But in order to arrive at real results in this direction it was not enough to make just political arrangements, which were examined above. Specific steps to liberalize trade, promote investment and technical cooperation required relevant normative support, which could be achieved just through legal instruments. All that served as a stimulus for the conclusion of a large number of international legally binding agreements by Asian countries in the form of economic free trade agreements or economic partnership agreements (EPA).

Explaining the difference between them, Shujiro Urata notes that "under an FTA, members remove tariff and non-tariff barriers on trade among themselves while maintaining their own tariff and non-tariff barriers on trade with non-members". In its turn, EPA "not only

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<sup>93</sup> Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Shidal, "The Concept of Legalization" (2000) *International Organization* 54 (3) at 401.

<sup>94</sup> *Ibid.*

includes removing tariff and non-tariff barriers, but also liberalizes foreign direct investment (FDI), and provide for trade and FDI facilitation, economic and technical cooperation”.<sup>95</sup>

The idea of an FTA covering all East Asian countries arose right after the formation of APT. At the summit of this grouping in 1998,

the leaders decided to set up the East Asia Vision Group to study the long-term vision for economic cooperation. The group have presented the leaders with recommendation including the establishment of an East Asian Free Trade Agreement [...] The Expert Group, which was set up at the recommendation of ASEAN+3 Economic Ministers, presented its recommendations to the Economic Ministers in 2006 to start the process in 2007 toward establishment of an East Asian FTA. The recommendations by the Expert Group, however, were not adopted and the Expert Group was asked to conduct further study.<sup>96</sup>

At the present time, the study of this problem is still ongoing and therefore, within APT, the real steps for the EAFTA conclusion have not been done yet. The main reason for this is the presence of strong opposition from non-competitive sectors in each APT member country. The political and economic contradictions between NEACS also prevented them from a trilateral FTA creation in accordance with the proposal of China, which it had made to Japan and South Korea in 2002. The process of international economic agreements conclusion between the APT countries was much more successful within the ‘ASEAN +1’ format, which required much less efforts to harmonize their positions and to elaborate mutual legal obligations.

It was China that succeeded most in this area. When China joined WTO in 2001, it established an access to the global market and started to pursue regional strategies by using FTAs. China signed a framework agreement on comprehensive economic cooperation with ASEAN in November 2002, treating it as a group. Responding the ACFTA, Japan quickly approached ASEAN with a proposal to work out a Japan-ASEAN FTA, but the agreement on comprehensive economic partnership between them was signed not until April 2008. South Korea followed these movements and set up FTA with ASEAN in 2005. Now these treaties together with other international agreements, which specify and complement their content, have formed a solid legal basis for the economic cooperation between ASEAN and NEACS. Therefore, it is important to briefly review such documents’ characteristics and content, paying

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<sup>95</sup> Shujiro Urata, “Free Trade Agreements: A Catalyst for Japan’s Economic Revitalization” in Takatoshi Ito, Hugh Patrick and David E. Weinstein eds., *Reviving Japan’s Economy* (Cambridge and London: The MIT Press, 2005) at 386.

<sup>96</sup> Shujiro Urata, “Exclusion Fears and Competitive Regionalism in East Asia” in Mireya Solis, Barbara Stallings and Saori N. Katada eds., *Competitive Regionalism: FTA Diffusion in the Pacific Rim* (New York: Palgrave Macmillan, 2009) at 46-47.

special attention to the subject of these agreements, the nature of obligations that they impose on the contracting states, and the way of disputes resolution fixed in them.

One of the characteristic features of free trade agreements, concluded between ASEAN and NEACS, is that they are comprehensive in their content. As such, these agreements are called Framework Agreements on Comprehensive Economic Cooperation (ASEAN-China and ASEAN-Korea), or Agreements on Comprehensive Economic Partnership (ASEAN-Japan). “These new types of FTAs [...] include facilitation of foreign trade, liberalization and facilitation of FDI, economic and technical cooperation, in addition to trade liberalization, which is included in traditional FTAs”.<sup>97</sup> Furthermore, the agreements pay particular attention to the development of economic and technical cooperation between ASEAN and NEACS because many countries of the region are developing and they need economic and technical cooperation in order to promote their growth.

That is why each of the treaty concerned contains an additional list of agreed priority and prospect areas for the future economic cooperation of the contracting parties. For example, Article 7 of ACFTA identifies the following five priority sectors of cooperation: a) agriculture; b) information and communications technology; c) human resources development; d) investment; and e) Mekong River basin development. Moreover, it also stipulates that cooperation between ASEAN and China “shall be extended to other areas, including, but not limited to, banking, finance, tourism, industrial co-operation, transport, telecommunications, intellectual property rights, small and medium enterprises (SMEs), environment, bio-technology, fishery, forestry and forestry products, mining, energy and sub-regional development”.<sup>98</sup> Nineteen lines of economic cooperation similar to the above-mentioned were determined in AKFTA, and thirteen – in the respective agreement signed between ASEAN and Japan.<sup>99</sup>

Comprehensive character of the relevant FTAs caused the framework character of obligations, which these agreements impose on the contracting states, as well as these obligations’ different nature and content, depending on the particular area of cooperation. For example, in the area of trade in goods, all three FTAs and additional agreements connected with them (agreements on trade in goods, special annexes etc.) stipulate the obligations of the contracting states on tariff rates’ and non-tariff barriers’ reducing (eliminating). The level of such reduction depends on the sort of goods these rates and barriers are applied to. Moreover, the adaptable time schedule of these obligations discharge by the state parties, depending on the

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<sup>97</sup> *Ibid.* at 47.

<sup>98</sup> *Supra* note 27.

<sup>99</sup> *Agreement on Comprehensive Economic Partnership among Member States of ASEAN and Japan*, Bandar Seri Begawan, 14 April 2008, online: <<http://www.aseansec.org/agreements/AJCEP/Agreement.pdf>>.

level and peculiarities of their economic development, is also fixed in the agreements. Such an approach is quite effective because, on the one hand, it imposes legal obligations on all parties to the agreements to liberalize trade, but on the other hand, it takes into account the possibilities of individual states to perform them.

Another situation exists in the area of trade in services and investment. In this case, FTAs stipulate only very general obligations of states to liberalize trade in services, including the elimination of discriminatory measures, existing among them, as well as to create a liberal, facilitative, transparent and competitive investment regime with business-friendly environment. Specific legal and institutional measures, which should be undertaken by states to meet these goals, were reflected in the agreements on trade in services and investment, which were concluded among ASEAN, China and South Korea respectively in 2007 and 2009. Such agreements between ASEAN and Japan have not been signed yet.

Commitments of the parties in other areas of economic cooperation, which have found their reflection in international economic agreements between ASEAN and NEACS, are sufficiently wide in content as well. Exact dates and arrangements are not fixed in these agreements, but, nevertheless, it is stipulated that the parties shall undertake specific economic cooperation projects and implement capacity building programs and technical assistance in order to adjust the economic structure of the ASEAN countries and expand their trade and investment with NEACS. Moreover, FTAs provide for a special implementing committee (sub-committee) creation, which, *inter alia*, will monitor such projects and programs, as well as for the conclusion of additional agreements on the various areas of economic cooperation. In their turn, such agreements shall include timeframes for the performance of commitments fixed therein. By now, several of such agreements had already been concluded between ASEAN and China. They are called ‘memorandums of understanding’ and contain specific measures designed to strengthen cooperation between the parties especially in the fields of agriculture, standards, technical regulations and conformity assessment, intellectual property.

Finally, it should be noted that international economic agreements between ASEAN and NEACS provide for the establishment of a formal dispute settlement mechanism (DSM), which is one of the mandatory general conditions of interstate relations’ legalization.<sup>100</sup> The achievement of such an arrangement in respective FTAs is quite remarkable, because the avoidance of formal legal mechanisms for the process of dispute resolution for many years has been considered to be one of the main features of East Asian regionalism.

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<sup>100</sup> *Supra note 93.*

In relations between ASEAN and Japan, such mechanism was fixed in their Agreement on Comprehensive Economic Partnership of 2008. In their turn, ACFTA and AKFTA stipulated for these purposes the conclusion of special agreements on dispute settlement mechanism, which were signed respectively in 2004 and 2005. As a general rule, these three DSMs were intended to resolve all disputes between the parties concerning the interpretation or application of respective FTAs. For these purposes the parties, first of all, should act by mutual consultations, conciliation or mediation. If these measures fail to settle a dispute, DSMs provide for the creation of special arbitral tribunals or panels. The agreements stipulate the process of these bodies' creation and activity, including the rights of third parties, which can have a substantial interest in a dispute. According to FTAs, the decisions of arbitral tribunals or panels shall be final and binding for the parties.

Agreements on investments between ASEAN, China and South Korea stipulate another kind of DSM when a dispute arise "between a Party and an investor of another Party concerning an alleged breach of an obligation of the former Party [...], which causes loss or damage to the investor in relation to its investment with respect to the management, conduct, operation, or sale or other disposition of an investment".<sup>101</sup> According to the agreements, the parties to a dispute shall, as far as possible, resolve it through consultations and negotiation. Where this dispute cannot be resolved through such procedures it "may be submitted to the courts or administrative tribunals of the disputing Party provided that such courts or tribunals have jurisdiction over such claims or for the arbitration".<sup>102</sup> Besides, according to the choice of investor, a dispute may be submitted under the International Centre for Settlement of Investment Disputes (ICSID) Convention and the ICSID Rules of Procedure for Arbitration Proceedings or under some other famous international dispute settlement mechanisms.

Although DSMs of the 'ASEAN+1' international economic agreements are less legalistic in nature than the WTO dispute settlement mechanism and sometimes they leave more discretion to the political bodies of East Asian countries, their establishment is a proof of growing legalism in the field of international economic cooperation and a promising development towards a more transparent approach to dispute settlement in the region.<sup>103</sup> The same can be said of the other provisions of international economic agreements concluded between ASEAN and NEACS. By now, they had laid a firm and predictable foundation for long-term cooperation in East Asia. And

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<sup>101</sup> *Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People's Republic of China*, Bangkok, 15 August 2009, article 14 (1), online: <<http://www.aseansec.org/22974.pdf>>.

<sup>102</sup> *Agreement on Investment Under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of ASEAN and the Republic of Korea*, Jeju-Do, Republic of Korea, 2 June 2009, article 18 (5), online: <<http://www.aseansec.org/22973.pdf>>.

<sup>103</sup> *Supra note* 42 at 173.

there is no doubt that over time these agreements will become region-wide through their further development within the APT institutional and rule-making mechanisms.

**CONCLUSION**

The undertaken study allows coming to a conclusion that the ASEAN Plus Three grouping has significant features in comparison with ‘typical’ international organizations. Among the most important of them are: the lack of the APT international legal personality; multilevel and coordination character of its institutional units’ activity, which does not assume the possibility of taking decisions legally binding for the member states; the consensus-based rule-making mechanism, which uses the ‘Down-Up way’ and generally focuses on political documents’ adoption and elaboration. The following Table 3, which is based on the scheme provided by José E Alvarez,<sup>104</sup> illustrates these and some other points in this respect.

**Table 3 Differences between ‘Typical’ International Organizations (TIO) and APT**

|  | <b>TIO</b>   | <b>APT</b>  |
|--|--|---|
| <b>International Legal Personality</b> | <ul style="list-style-type: none"> <li>• Yes</li> </ul>  | <ul style="list-style-type: none"> <li>• No</li> </ul>  |
| <b>Organization</b>                    | <ul style="list-style-type: none"> <li>• Top-down hierarchy of organs</li> <li>• Formal</li> </ul>   | <ul style="list-style-type: none"> <li>• Multilevel network of coordinating units</li> <li>• Informal</li> </ul>  |
| <b>Central Actors</b>                  | <ul style="list-style-type: none"> <li>• State/public</li> </ul>   | <ul style="list-style-type: none"> <li>• Multiple levels of government officials</li> <li>• Multiple public and private actors</li> </ul>                   |
| <b>Rule-making Process</b>             | <ul style="list-style-type: none"> <li>• Up-Down way</li> <li>• Static</li> <li>• One-shot</li> <li>• Rigid &amp; fixed</li> </ul>                 | <ul style="list-style-type: none"> <li>• Down-Up way</li> <li>• Iterative/repeat learning</li> <li>• Experimental</li> <li>• Promotes innovation</li> </ul> |
| <b>Nature of Normative Instruments</b> | <ul style="list-style-type: none"> <li>• Centralized</li> <li>• Command and control</li> <li>• Rigid and fixed</li> <li>• Uniform rules</li> </ul> | <ul style="list-style-type: none"> <li>• Decentralized</li> <li>• Coordination</li> <li>• Flexible and adaptable</li> <li>• Diversity</li> </ul>            |

<sup>104</sup> *Supra note 44 at 27.*

In other words, the APT framework is a shining example of ‘governance without government’ and can be defined as a system, which governance is relation-based rather than rule-based. Such governance represents an informal approach to international cooperation, placing greater reliance on informality and relations between the parties. It relies on personal relationship of the actors to establish the parameters of their cooperation; agreements are based on mutual relations of the actors, and depend on their knowledge of and familiarity with each other. Formalities are avoided, and the maintenance of good relations is relied on for the ‘enforcement’ of commitments.<sup>105</sup>

However, it does not mean that the APT members demonstrate an ‘aversion to legalization’ and that their cooperation is chaotic and has no regulatory foundation. On the contrary, the level of their relationship’s legalization increases gradually and constantly with the expansion of the range of issues, on which the APT members come to a common ground, and with the narrowing of the development gap between them. The APT members just do not want to run ahead. That is why, for the coordination of their cooperation, they elaborate and use only those normative documents, which have the nature and character corresponding to real needs of the APT members and, more importantly, to their opportunities. Depending on the circumstances, in one case, it can be joint statements and political declarations, in the other – detailed and legally binding international agreements. The latter are especially used for the APT members’ economic cooperation supporting, which, by virtue of such agreements, is expanding from year to year and is becoming more and more transparent and predictable.

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<sup>105</sup> Paul J. Davidson, “The Role of International Law in the Governance of International Economic Relations in ASEAN” (2008) 12 SYBIL 213 at 214.

**LIST OF MAIN APT DOCUMENTS**

**1999**

- *Joint Statement on East Asia Cooperation*, 28 November 1999 (3<sup>rd</sup> APT and the 3<sup>rd</sup> Informal ASEAN Summits, Manila, Philippines).

**2001**

- *Report of the East Asia Vision Group* “Towards an East Asian Community: Region of Peace, Prosperity and Progress”, 5 November 2001 (7<sup>th</sup> ASEAN Summit and the 5<sup>th</sup> APT Summit, Brunei Darussalam).

**2002**

- *Final Report of the East Asia Study Group*, 4 November 2002 (8<sup>th</sup> ASEAN Summit and the 6<sup>th</sup> APT Summit, Phnom Penh, Cambodia).

**2003**

- *Joint Declaration on the Promotion of Tripartite Cooperation among the People's Republic of China, Japan and the Republic of Korea*, Bali, 7 October 2003.

**2005**

- *Kuala Lumpur Declaration on the ASEAN Plus Three Summit*, Kuala Lumpur, 12 December 2005 (11<sup>th</sup> ASEAN Summit and the 9<sup>th</sup> APT Summit).

**2007**

- *Second Joint Statement on East Asia Cooperation* “Building on the Foundations of ASEAN Plus Three Cooperation”, 20 November 2007 (13<sup>th</sup> ASEAN Summit and the 11<sup>th</sup> APT Summit, Singapore).
- *ASEAN Plus Three Cooperation Work Plan 2007 – 2017*, Singapore, 20 November 2007 (13<sup>th</sup> ASEAN Summit and the 11<sup>th</sup> APT Summit, Singapore).

**2010**

- *Luang Prabang Joint Declaration on ASEAN Plus Three Civil Service Cooperation*, Luang Prabang, Lao PDR, 29 October 2010.

## LIST OF MAIN ASEAN-CHINA DOCUMENTS

### Agreements:

#### 2002

- *Framework Agreement on Comprehensive Economic Cooperation Between ASEAN and the People's Republic of China*, Phnom Penh, 4 November 2002.

#### 2004

- *Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Cooperation Between ASEAN and the People's Republic of China*, Vientiane, Lao PDR, 29 November 2004.
- *Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People's Republic of China*, Vientiane, 29 November 2004.

#### 2007

- *Agreement on Trade in Services of the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People's Republic of China*, Cebu, Philippines, 14 January 2007.

#### 2009

- *Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People's Republic of China*, Bangkok, 15 August 2009.

### Protocols:

#### 2003

- *Protocol to Amend the Framework Agreement on Comprehensive Economic Cooperation Between ASEAN and the People's Republic of China*, Bali, Indonesia, 6 October 2003.

#### 2006

- *Second Protocol to Amend the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People's Republic of China*, Cebu, Philippines, 8 December 2006.

- *Protocol to Amend the Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People's Republic of China*, Cebu, Philippines, 8 December 2006.

#### **2010**

- *Second Protocol to Amend the Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People's Republic of China*, Kuala Lumpur, 29 October 2010

#### **Others:**

#### **2001**

- *Forging Closer ASEAN-China Economic Relations in the 21st Century*. A Report Submitted by the ASEAN-China Expert Group on Economic Cooperation, 7th ASEAN Summit, Bandar Seri Begawan, 5-6 November 2001.

#### **2002**

- *Memorandum of Understanding between ASEAN Secretariat and the Ministry of Agriculture of the People's Republic of China on Agricultural Cooperation*, Phnom Penh, 2 November 2002.

#### **2003**

- *Joint Declaration of the Heads of State/Government of ASEAN and the People's Republic of China on Strategic Partnership for Peace and Prosperity*, Bali, Indonesia, 8 October 2003.

#### **2004**

- *Plan of Action to Implement the Joint Declaration on ASEAN-China Strategic Partnership for Peace and Prosperity (2005-2010)*, Vientiane, 29 November 2004.
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