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ECONOMIC INTEGRATION OF DEVELOPING COUNTRIES AND REGIONALISM IN LATIN AMERICA AND THE CARIBBEAN: PROSPECTS FOR A FREE TRADE AREA OF THE AMERICAS

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ABSTRACT

After promoting in the 1970s a more egalitarian international trade system, developing countries abandoned the prospects of finding an alternative route to their development and have massively participated in the Uruguay Round. Results have been disappointing, and developing countries, particularly in the Latin American-Caribbean (LAC) region, are now also pursuing economic integration at the regional level. The 1990s have in fact been characterised by the general revival of regionalism, a trend considered by many legal scholars and economists as dangerous for multilateralism. The debate is ongoing, and the WTO is currently attempting to better monitor the impacts of regionalism. In any case, regional integration agreements (RIAs) are now present in all parts of the world, and developing countries seem to consider that such arrangements offer promising opportunities than lack in multilateral agreements. More particularly, LAC countries are now pursuing economic integration at the bilateral, subregional, regional and even hemispheric level with the current negotiations for a Free Trade Area of the Americas (FTAA). But the creation of a FTAA faces many obstacles, caused by wide disparities in the level of economic development within the region and the incredible variety of existing RIAs throughout the Hemisphere. And it remains to be seen if equity and social concerns will be better reflected in a regional agreement than at the multilateral level.

RÉSUMÉ

Au cours des années 1970, les pays en voie de développement ont tenté sans succès de réformer le système commercial international en promouvant un modèle plus équitable pour assurer leur développement. Ces pays ont par la suite rejoint les rangs du GATT en participant massivement aux négociations commerciales multilatérales du cycle de l'Uruguay, mais les résultats se font toujours attendre. Désormais, les pays en voie de développement, particulièrement ceux de l'Amérique Latine et des Caraïbes (ALC), suivent également des processus d'intégration économique à l'échelle régionale. Le retour au régionalisme est en fait un mouvement général caractéristique de la dernière décennie, que de nombreux juristes et économistes réprouvent en raison de ses conséquences négatives sur le multilatéralisme. Le débat continue et l'OMC tente d'ailleurs actuellement de mieux superviser le régionalisme. Il n'en demeure pas moins que les accords d'intégration régionale (AIR) sont maintenant omniprésents partout dans le monde; les pays en voie de développement semblent convaincus que ces derniers leur offrent des opportunités de développement plus intéressantes par rapport à celles susceptibles de résulter des accords conclus à l'échelle multilatérale. Plus particulièrement, les pays de l'ALC concluent des accords économiques à l'échelle bilatérale, subrégionale, régionale, et même hémisphérique avec les actuelles négociations pour la Zone de Libre-Échange des Amériques (ZLÉA). Mais la création de la ZLÉA fait face à plusieurs obstacles, causés notamment par les grandes disparités au niveau du développement économique des pays de la région et par la difficulté de concilier les contenus souvent difficilement compatibles des nombreux AIRs conclus à travers l'Hémisphère au cours des dernières années. De plus, il reste à déterminer si les considérations d'équité et d'ordre social seront davantage prises en compte qu'au niveau multilatéral.

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TABLE OF CONTENTS

INTRODUCTION

The late 20th century has been characterised by an increased interdependence among nations provoked by the progressive reduction of the various barriers that traditionally distinguished and separated one national state from another. The effort was first initiated after World War II with the creation of the Bretton Woods institutions and the General Agreement on Tariffs and Trade (GATT), which has fostered an unprecedented trade liberalisation at the global scale through eight rounds of multilateral trade negotiations. The end of the Cold War and the collapse of the communist system then contributed to the consolidation of the global economic regime. Indeed, the conclusion of the Uruguay Round (UR) represented a enormous step further in the path of world-wide trade liberalisation and a consecration of multilateralism which materialised into the creation of the World Trade Organisation (WTO) in 1995, the first post-Cold War global institution. Liberal economic policies, international trade and new technologies of communication have progressively converged towards the establishment of a multi-level integrated world system.

But while free trade principles and globalisation are said to foster economic growth, until now this new wealth has been concentrated within a few players and populations have felt threatened by the phenomenon of globalisation. In fact, despite an apparent consolidation, the international system seems challenged by many areas of concerns previously neglected: social issues and the unequal distribution of the fruits of globalisation, the situation of developing countries[1] unsatisfied with the Uruguay Round results, and the incredible expansion of regional integration agreements, a phenomenon that had previously raised concerns. While such geographically discriminatory arrangements are also linked to the general process of integration, the growing importance of regionalism has been described by some as a threat to the multilateral system.

But a particularly interesting aspect of regionalism is the fact that developing countries

[1] While the term 'developing countries' will be used throughout this paper, it does not imply that there is a bloc of homogenous Third World states. But even though any attempt to divide the world along the North and South criteria is now an outdated oversimplification, the majority of the world's people is still excluded from the global economic order decision-making process and benefits. And the division between the industrialised democracies of the G-7 and the developing countries exists more than ever. Therefore, while there is no universally accepted definition of the term 'developing countries', we hereinafter generally refer to this concept as including the low-income countries.

have also entered into regional economic integration agreements and preferential schemes with other nations, thus reinforcing this disturbing trend for promoters of multilateralism. After attempting to reform a global trading system structurally flawed in the 1970s with calls for a New International Economic Order (NIEO), developing countries changed directions and decided to pursue their quest for development with freer markets and open trade policies, rejecting the hope of finding an alternative route to their socio-economic development. They massively participated in the UR and liberalised their economies. However, the practical and concrete results they obtained seem once again quite limited. The fact that the participation of developing countries into the multilateral order has consistently been characterised by false hopes and promises might explain why they have increasingly favoured regionalism to complete their integration and liberalisation efforts, and to further their socio-economic development.

In this paper we examine the economic integration of developing countries into the multilateral order and see that their interests have been consistently disregarded. We then analyse the revival of regionalism and more particularly emphasise the use of regional trading agreements between developing countries, which may find some benefits in regional liberalisation that are absent from multilateral processes. Our analysis will focus on Latin America and the Caribbean (LAC), a region very committed to the demands for an NIEO in the 1970s. LAC pursued import substitution industrialisation strategies and made many regional integration attempts starting in the 1950s that were unsuccessful. But after the so-called lost decade for development during the 1980s, enormous changes were brought to the whole region. While undergoing economic re-structuring and political democratisation, states of this region have re-entered into a multitude of preferential trading schemes, at the regional, subregional, bilateral and even hemispheric level, in addition to their adherence to the GATT/WTO framework. In addition, Canada is currently extremely interested towards these 'natural partners' as our country aspires to play a determinant role in the creation of a new free trade zone encompassing all of the Western Hemisphere, the so-called Free Trade Area of the Americas (FTAA).

After briefly reviewing some elements that characterise the current global economic order, Part I will provide an historical background of the participation of developing countries into the multilateral trading system and look back at their failed attempts to

establish more equitable economic relations. We then examine the current status of developing countries after the completion of the UR.

In Part II, the world-wide revival of regionalism will be analysed along with the debate about whether or not regionalism complements or undermines multilateralism. We then look at the interaction between developing countries and regionalism. The concept of sovereignty as it relates to developing countries and its interaction with regional arrangements in the context of globalisation is also discussed.

Particular emphasis is put upon the LAC economic integration process in Part III. After providing an introduction to the LAC region, we will review its most important regional agreements and examine their structure and the results brought by these new (or revived) trading arrangements. We will also discuss the prospects and challenges facing the currently negotiated Free Trade Area of the Americas (FTAA), this huge free trade zone that would encompass all the Western Hemisphere.

Finally in concluding, we try to determine whether or not the regional path should be further used among developing countries.

I. PARTICIPATION OF DEVELOPING COUNTRIES IN THE MULTILATERAL TRADE ORDER

Despite the tremendous changes that have characterised the last decades, one thing that did not evolve is the exclusion of developing countries from the current world order, an 'order' still characterised by the industrialised nations' domination at all levels, the power gained by their multinational business enterprises and the poverty that defines the living conditions of the people of the world's low-income countries. In an era of globalisation, market oriented integration is now presented as the only possible way to achieve further economic growth and development. Developing countries have adopted such a market-driven liberal approach after challenging the legitimacy of the international trade order in the 1970s. They have massively adhered to the GATT/WTO framework, entered into liberal restructuring and opened their economies to world trade flows in the hope of finally achieving a sustainable economic development even though their previous membership in multilateral trade agreements fostered little more than further promises of development. After the UR completion and at the ignition of the Millennium Round, has world-wide integration enhanced their prospects of development?

A) THE ORIGINS OF THE GLOBAL TRADING SYSTEM

The globalisation phenomenon that is currently reshaping our world is a multifaceted concept. While it primarily refers to an economic process related to a world-wide integration of markets,[2] it also encompasses a wide range of human activities, such as employment, technology, finance, business, politics, environment, culture and entertainment. The processes of globalisation in fact started after World War II, when governments started to open up their trade barriers, following the theory that reduced barriers to trade would result in an enhanced global welfare. Progressively, this led to

[2] See A. Y. Seita, " Globalisation and the Convergence of Values " (1997) 30 Cornell Int'l L.J. 429. In economic globalisation, " barriers to trade, investment, financial flows and technology transfers have fallen and there has been an expansion of markets for goods, services, financial capital, and intellectual property to transnational, regional and even global dimensions. " *Ibid* at 439. These economic processes in turn increase investment opportunities, competition and interdependence among nations. See *ibid* at

a process of trade liberalisation concerning not only tariffs but also other types of barriers and covering new trade areas. With the end of the Cold War, liberal economic policies installed during the 1980s in the developed world led to a further degree of economic integration because of two intertwined factors.

On the first hand, there was the arrival of the new technologies of information, now allowing speedy and cheap communication around the globe. On the other hand, favoured by those technological developments, a globalisation of production was progressively established by multinational business enterprises. They progressively relocated their industrial plants in regions of the world that permitted a larger share of profits, which in turn favoured the globalisation of investment capital. As a consequence, nations reduced their barriers to trade as a way to attract further investment, resulting in an increased competition and the appearance of global financial markets. Perhaps the most striking feature of the current borderless economy is the fundamental importance acquired by information technologies. Their exponential development (Internet, electronic trade, computerised financial markets, electronic data interchange, e-mail, etc.) indicates that "information is increasingly the critical resource and a major driving force of the integration process."[3]

The social tensions deriving from such a process are enormous. Even though it is said that "the increasing integration of the world offers unprecedented opportunities for improved growth, job creation and development,"[4] it is also possible to raise the following issues closely connected with the effects of economic globalisation: increased competition and subsequent insecurity for workers, further degradation of the environment, cultural homogenisation and further exclusion of the poor. There are also concerns relating to the loss of sovereignty of the nation state and its weakened role and capacity in the definition of national policies. The fact is that traditionally elected governments have lost the capacity to influence domains that were previously an inherent part of their sovereign attributes.

Some say that the current era of economic interdependence has enormous potential for accelerating the pace of development in developing countries. Their argument is that

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439-447.

[3] R. Ruggiero, "Whither the Trade System Next?" in J. Bhagwati & M. Hirsh, eds., *The Uruguay Round and Beyond: Essays in Honour of Arthur Dunkel*, (University of Michigan Press, 1998) [hereinafter *The Uruguay Round and Beyond*], 123 at 128-129.

[4] P. Sutherland, "Globalisation and the Uruguay Round" in *The Uruguay Round and Beyond*, supra

technology and globalisation will equalise relations between countries and regions: "Many developing countries will be able to leapfrog entire stages of development (...); soon they will have access, not just to leading-edge communications, but to the educational programmes, medical services, and technical information that flow through cyberspace."[5] The problem is that developing countries often lack the necessary basic foundations (efficient financial and legal systems, political stability, infrastructures, health services, social and educational system) to move on towards the promised land of development within the future information-based global market.

As the international trade order will gain increasing significance, covering sectors traditionally governed and regulated by domestic policies (e.g. investment, competition, taxation, labour, environment, culture, health standards, legal structures), international economic institutions will presumably grow in scope, complexity and ambition. Will they consider social issues and the particular needs of developing countries, the traditionally excluded?

It is useful to look back at the origins of the system, its principles and institutions, in order to understand its evolution and consolidation. This will provide a pertinent background to subsequently put in context the reaction of developing countries that demanded a New International Economic Order (NIEO) destined to reshape the way international economic relations were conducted for the purpose of ensuring their development. We will see that they failed and are now participating to the 'consolidation' of our global economic order, although they are also increasingly pursuing integration at the regional scale.

1) International Trade Theory

In 1776, Adam Smith published " An Inquiry into the Nature and Causes of the Wealth of Nations " where he stated that nations could engage in mutually beneficial trade,[6] contrary to the mercantilist view that assumed that international trade was a

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note 3, 143 at152.

[5] Ruggiero, *supra* note 3 at 130.

[6] Adam Smith's theory is referred to as "Absolute Advantage." Both nations can gain from trade by each specialising in the production of the commodity it produces more efficiently (absolute advantage) and then exchanging its output with the other nation for the commodity of its absolute disadvantage. " By this process, resources are utilised in the most efficient way and the output of both commodities will rise. (...) Thus free trade would cause world resources to be utilised most efficiently and would maximise world welfare. " D. Salvatore, *International Economics*, 3rd ed. (New York: Macmillan Publishing Company, 1990) at 22-23.

zero-sum game where any gain from trade had to be at the expense of the other trading partner.[7] In the 19th century, David Ricardo and John Stuart Mill then went further to formulate the principle of comparative advantage.[8] According to this theory, a nation must specialise in the production of the commodity it can produce with the greatest relative efficiency (comparative advantage), and trade freely with its partners. It will benefit from international trade even though it cannot produce the commodity more efficiently than its trading partner can.[9] International trade has since then been considered as a positive-sum interaction, which offers greater efficiency and wealth. After World War II, this theory of comparative advantage was to be put into effect by promoting a liberal trade regime. It underlies the policy of free trade, which is at the basis of international trade agreements.

2) The Bretton Woods Institutions

The creation of the United Nations, the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD, central component of the World Bank Group) and the GATT[10] may be all considered as critical components to the phenomenon of globalisation as we know it today. These international institutions were created to inaugurate a new era with increased co-operation between all nations with a type of intergovernmental management that was to favour the expansion of global production. While there was a consensus to establish a structure

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[7] The economic philosophy of mercantilism advocated that the way for a nation to become rich and powerful was to export more than it imported. The ensuing surplus would be used to acquire precious metals such as gold and silver, which consolidated the power of rulers and stimulated business activity. By encouraging exports and restricting imports, the government would also stimulate national output and employment. Since trade was viewed as a zero-sum game where a nation could gain in trade only at the expense of others, mercantilist preached economic nationalism. See *ibid.* at 20-22.

[8] David Ricardo presented the law of comparative advantage in 1817 when he published his *Principles of Political Economy and Taxation*. It is "one of the most important and still unchallenged laws of economics." *Ibid.* at 24.

[9] The law of comparative advantage states that even if one nation is less efficient in the production of commodities than its partner, there is still a basis for mutually beneficial trade. " The first nation should specialise in the production of and export the commodity in which its absolute disadvantage is smaller (this is the commodity of its comparative advantage) and import the commodity in which in which its absolute disadvantage is greater. (...) Both nations can indeed gain by each specialising in the production and exporting the commodity of its comparative advantage." *Ibid.* at 24-25.

[10] See generally *General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 187, entered into force on January 1, 1948 [hereinafter GATT]. GATT is in fact a trade treaty based on free market economy principles promoting the expansion of world trade. It aimed at increasing international trade by reducing barriers to the trade of goods by way of lower tariffs, banned quotas and banned discrimination based on foreign origin and nationality. See GATT arts. I, II, III, XI; See also J.H. Jackson & W.J. Davey, *Legal Problems of International Economic Relations*, 2nd. Ed. (St-Paul: West

of global management, the issue of international trade was much more complex. Many countries demanded an international regime to approve and co-ordinate national regulations, but the American government was pushing to eliminate national trade regulations.[11] Using their hegemonic economic power (allowing them to make threats and promises), the US managed to install an open free trade system focused on economic growth, not redistribution, that would advance their interests, leaving behind Keneysian goals such as full employment and economic development.[12]

Both the IMF and the IBRD originated from the United Nations Monetary and Financial Conference held at Bretton Woods, New Hampshire, from July 1-22, 1944. The basic rules for the new post-war economic order were to be structured between the IMF, the IBRD and the International Trade Organisation (ITO).

The primary tasks of the IMF was to maintain exchange rate stability, help members to deal with short term balance of payments problems and establish a reliable international payments system. But the IMF became increasingly linked with developing countries, and it ended up playing the role of an international financial policeman imposing compliance with IMF conditionally to those in need of financial resources to cope with the international debt crisis.[13] In practice, it meant that developing countries had to comply with the IMF directives concerning national economic policies and performance, the so-called structural adjustment programs, in order to receive loans.[14] Similarly, the IBRD was created to finance reconstruction and development, but with the introduction of the Marshall Plan in June of 1947 that undertook the task of post-war reconstruction, it also played an increasing role with the developing countries. Those Bretton Woods institutions were created by and for the industrialised countries, according to the dominant ideology of the powerful

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Publishing Co., 1986) at 362-629, describing GATT.

[11] C. Murphy, *The Emergence of the NIEO Ideology* (Boulder: Westview Press, 1984) at 10-11.

[12] *Ibid.* at 23.; The Keynesian school in the 1930s had demonstrated that free trade was not the solution to all economic problems as cyclical fluctuations in the level of output and employment were inherent to the system. Consequently there was a need for governmental actions in areas such as employment. However, with respect to world trade, "there was no corresponding enlightenment or freshness of outlook (...) and the old neo-classical precepts continued to prevail." S. Dell, "The Origins of UNCTAD" in M.Z. Cutajar, ed., *UNCTAD and the South-North Dialogue: The First Twenty Years* (Toronto: Pergamon Press, 1985) 10.

[13] See generally E. W. Robichek, "The International Monetary Fund: An Arbiter in the Debt Restructuring Process" (1984) 23 Colum. J. Transnat'l L. 143.

[14] "Given its regulatory and advisory tasks, the IMF imposes conditionally in all public policy areas that are relevant to a country's balance of payments performance. This is not only intended to ensure debt repayment, but a country's financial recovery to the point where repayment imposes less strain on it than

nations. Therefore, while these institutions increasingly dealt with the problems of developing countries, their structure reinforced the image of industrialised countries policing developing countries because their enforcement power was not exercised in a " symmetrical way."[15] Industrialised countries still possess the decisional power in any case concerning developing countries.

3) Background to the GATT

In February 1946, a United Nations Conference on Trade and Employment was called for the purpose of drafting a charter for an ITO. The ITO was intended to operate " as a permanent institution that would both promote the reciprocal removal of barriers and provide a forum for enforcing obligations in this connection and resolving disputes."[16] At the 1947 Geneva conference, the multilateral tariff negotiations were conducted and the corresponding GATT was drafted, but the final draft of the ITO convention was to be completed later at the 1948 Havana conference. It was clear that GATT was only " intended to be a subsidiary agreement under the ITO charter, and to depend upon ITO charter and the ITO secretariat for servicing and enforcement."[17] But GATT members did sign a " Protocol of Provisional Application " (PPA) by which GATT became effective on January 1, 1948.[18]

Ultimately, the US Congress did not approve the Havana Charter of the ITO that was drafted at the 1948 conference.[19] GATT became, " by default, the central organisation for co-ordinating national policies on international trade," [20] even though it was not conceived to have such a role of organising world trade. It only contained the substantive rules to trade, without institutional structure and almost without administrative, supervisory or enforcement procedures.

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does the relief from strain provided by the financial assistance." *Ibid.* at 149.

[15] B.S. Brown, "Developing Countries in the International Trade Order" (1994) 14 N. Ill. U.L. Rev. 347 at 354. The power-oriented voting structures within the World Bank and the IMF unpleased developing countries because it institutionalised the economic inequality between them and the industrialised countries since the voting power of each member countries in both institutions is proportionate to its financial contribution. *Ibid.*

[16] A. Reich " Symposium: Institutions for International Economic Integration: From Diplomacy to Law: The Juridisation of International Trade Relations " (1996-97) 17 J. Int'l L. Bus. 775 at 784.

[17] Jackson & Davey, *supra* note 10 at 295.

[18] See *Protocol of Provisional Application to the General Agreement on Tariffs and Trade*, 30 October 1947, 55 UNTS 308.

[19] See *Charter for an International Trade Organisation*, U.N. Doc. E/Conf.2/78 (1948) [hereinafter *ITO Havana Charter*].

[20] Jackson & Davey, *supra* note 10 at 295.

Many countries "expected the ITO to offer an international framework for dealing with trade-related unemployment problems and for co-ordinating government programs of restricting trade to encourage domestic investment in countries where powerful foreign firms would not invest."[21] But the dream of a strong ITO based on the Havana Charter could not survive without American support.[22]

4) The ITO and Developing Countries

The premature death of the ITO was not without consequences for the developing countries. While most of Africa and Asia had not yet achieved independence from colonial domination at that time, developing countries that were present at Bretton Woods and Havana were very sceptic of a free trade system. It was viewed as a threat to their sovereignty and an obstacle to the development of their industries that could not compete with foreign competition. Therefore, many provisions concerning especially developing countries were included in the Havana Charter. Even though the developing countries' representatives considered such provisions insufficient, a whole chapter dealt with economic development and reconstruction.[23] More particularly, it provided that the ITO would be obligated to co-operate with the UN regarding the development of countries still relatively underdeveloped, recognised that there was a potential need for special government assistance through import quotas and trade preferences in order to promote certain infant industries, and awarded special treatment for primary commodities and economic co-operation among developing countries.[24] Unfortunately, only the GATT survived, based on the principle of non-discrimination. It contained none of the measures developing countries had fought to include in the ITO Havana Charter, which recognised the principle that infant industries might be developed with the assistance of import quotas and trade preferences.

The absence of the ITO left developing countries without a place to express their

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[21] Murphy, *supra* note 11 at 20.

[22] Brown, *supra* note 15 at 351.

[23] See *ITO Havana Charter*, supra note 19, arts. 8-15.

[24] In order to benefit from to ITO provisions dealing with economic development, developing countries still had to obtain a release from their commitments, which meant that " without securing a release from the ITO or other trading partners affected, a developing country could not use any method forbidden by the charter or a trade agreement." T.N. Srinivasan, *Developing Countries and the Multilateral Trading System: From the GATT to the Uruguay Round and the Future*, (Boulder: Westview Press, 1998) at 22.

concerns in relation to the global trade regime. Even though the IMF and the World Bank constituted other intergovernmental forums of discussions for aid and development matters, their restricted areas of specialisation and their system of weighted voting concretely meant that developing countries were confined to the UN General Assembly. But since all states are equally powerful within such assembly, they would indeed use this unique forum extensively to present their call for a NIEO in the following years.

B) THE CALL FOR A NEW INTERNATIONAL ECONOMIC ORDER

The post-war independence of most former colonies (located in Africa, the Caribbean and the Pacific) set the stage for international trade relations between the developing and industrialised countries. The former progressively joined the GATT, "in pursuit of economic growth."[25] But it rapidly appeared that developed countries were the ones benefiting most of the growth deriving from the extension of trade as the 1960s were characterised by unprecedented prosperity in those nations. The system was allowing them to trade freely some items, while forcing developing countries to pay tariffs on those same products, and it also permitted them to erect protectionist barriers to southern imports.[26] In addition, the value of the principal exports of developing countries, composed of raw material, was declining at the same time prices for northern manufactured products were rising. The 'new' global system had in fact reinforced the pattern of dependence towards industrialised and former colonial powers. The resulting situation has been referred to as neo-colonialism, which was suffered by Latin America starting in 1945 and later by Asian and African nations after they too completed their political independence.[27] Developing countries reacted

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[25] Harvard Law Review Editors, " Developing Countries and Multilateral Trade Agreements : Law and the Promise of Development " (1995) 108 Harvard Law Rev. 1715 at 1717, noting that within two decades, developing countries had grown from fewer than half to two-thirds of the GATT's contracting parties [hereinafter "Developing Countries and Multilateral Trade Agreements"].

[26] See Murphy, *supra* note 11 at 63.

[27] Regarding neo-colonialism, Kwame Nkrumah, former President of Ghana, stated the following very revealing comments: " The essence of neo-colonialism is that the State which is subject to it is, in theory, independent and has all the outward trappings of international sovereignty. In reality its economic system and thus its political policy is directed from outside....Neo colonialism is also the worst form of imperialism. For those who practice it, it means power without responsibility and for those who suffer it, it means exploitation without redress. " Quoted from P.K. Kiplagat, "An Institutional and Structural Model for Successful Economic Integration in Developing Countries" (1994) 29 Texas Int'l L.J. 39 at footnote 13.

jointly in the 1970s by rejecting the status quo, insisting on the principle of state sovereignty, and by demanding a New International Economic Order (NIEO).

1) Theories of Economic Development

Before we examine the call for an NIEO and the evolution of the international system, we make a review of the different schools of economic development as they underlie the approaches and economic policies later applied or demanded by each side.[28] While numerous development models have been elaborated over the years, they can be regrouped into two distinct categories, the classical liberal economic school and the dependency, neo-Marxist radical school. The classical liberal model promotes an apolitical approach based on the private sphere of international law (focusing on market actors, liberalism and interdependence, Bretton Woods institutions and the GATT), while the radical model is based upon a public approach of international law, politically charged, which emphasises national sovereignty, state intervention and the United Nations system. We will briefly examine the different models to better understand the underlying theories, which have divided the North and South and upon which are formulated their respective economic policies. First we look at the classical liberal model with the European theory of modernisation followed by the neo-classical liberal approach that still characterises to a certain extent our current global system. Then we examine the counter-reaction of the Third World with its radical models of development, the structuralist approach developed by Raul Prebish and followed by the dependency school.

a) Modernisation

This model is based on the market-based processes of development experienced by the United States, Western Europe and Japan during the 1950s. It implies that Western modernisation is the ultimate stage of growth as it assumes that "economic development is synonymous with modernisation, which consists of definable and historically determined stages through which all countries proceed."[29] Since the cause

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[28] "Development economics was established as a sub-discipline of economics and consists of multiple paradigms for economic development, each generating its own promise for the economic betterment of developing countries in Asia, Latin America, and Africa." L. Cao, "Towards a New Sensibility for International Economic Development" (1997) 32 Texas Int'l L. J. 209 at 210-211.

[29] *Ibid.* at 234.

of underdevelopment is considered to be isolation (which explains the absence of capital surplus and investment capability), the objective of development is thus integration and stimulation of economic growth. The solution to underdevelopment is the creation of a capitalist class capable of investing capital surplus into production channels, which will progressively expand the capital sector (thus favouring investment) and reduce the population working in the agricultural sector (thus increasing wages and domestic savings). According to that theory, "capital accumulation and investment of surplus in new industries (industrialisation) remain the basis upon which stages of growth could be financed."[30] This model does not take into account the diversity of developing countries and completely bypasses the ideological tensions between the market of developed and developing countries as well as between the national and international market.

b) Neo-Classical Liberal Approach

According to modernisation theory, the solution to underdevelopment caused by isolation and rural underemployment was industrialisation. The neo-classical model adds a market-based approach to that theory, since it focuses on the creation of an efficient market with minimal state intervention and reliance on the law of comparative advantage and GATT framework. An efficient market is thus seen as the precondition and the goals of development are to be reached by the subsequent "establishment of a balanced national and international economic regime."[31] This model is still based upon the premise that 'normal' development leads to Western style industrialisation, promotes the idea that a perfect market is the only precondition for development and rejects the notion that the public sphere should intervene in the economy, arguing that a balance will be established naturally between the national and international market.[32]

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[30] *Ibid.* at 237.

[31] *Ibid.* at 238.

[32] This economic orientation thus promotes a model of economic development merely aiming "to construct the right institutional structure in order to reinforce the autonomy of the market (e.g. contract law, rules of corporate governance and international agreements) and introduce economically rational behaviours into developing countries societies. (...) The model is thus founded on an atomised market that should be insulated from the complications of tradition and politics." *Ibid.* at 252-253.

c) The Structuralist Orientation

The framework developed by ECLAC economist Raul Prebish, who would later became the first Secretary-General of UNCTAD, permitted the developing countries to explain the growing income and trade gaps between rich and poor nations. It was the first strong opposition presented to the developed countries' conception of the world economy. In 1950, after analysing the historical patterns of trade between the two worlds, Prebish concluded that the trade relations between industrialised countries and developing ones were structurally preventing the further development of the latter.[33] He observed that the prices of developing countries exports, mainly consisting of primary commodities subjected to important price fluctuations, were declining while the prices of the industrialised products they imported for the North were increasingly rising. In 1964, he was concluding that these deteriorating terms of trade were caused by the system, which needed fundamental changes in order for developing countries to achieve further economic growth.[34] Prebish considered that this structural inequity, directly related to the nature of the production (and directly linked with the colonial era), was questioning the universal application of the law of comparative advantage.

Therefore, economic development based upon non-interventionist free market policies is viewed as inapplicable to the case of developing countries. The development process should instead focus towards the implementation of inward-oriented strategies that rely upon import substitution policies to encourage industrialisation. While the aim of development is still to shift from primary commodities to manufactured products, this is to be done through import substitutes, which implies that state actors have an active role in the economy and that they put into place strong protectionist

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[33] See R. Prebish, *The Economic Development of Latin America and its Principal Problems*, U.N. Econ., U.N. Doc. E/CN. 12/89/Rev.1 (1950) at 8.

[34] " The imposing code of rules and principles (...) embodied in the GATT [...] seems to be inspired by a conception of policy which implies that the expansion of trade to the mutual advantage of all merely requires the removal of the obstacles which impede the free play of these forces in the world economy. These rules and principles are also based on an abstract notion of economic homogeneity which conceals the great structural differences between industrial centres and peripheral countries with all their important implications. Hence, GATT has not served the developing countries as it has the developed ones. In short, GATT has not helped to create a new order which must meet the needs of development (...). " R. Prebish, *Towards a New Trade Policy for Development: Report of the Secretary-General of the United Nations Conference on Trade and Development*, ECOSOC, U.N. Doc E/CONF. 46/3 (1964) at 6.

measures (high tariffs, quotas, state subsidisation) in order to protect the infant industries from the foreign international competition.[35]

The problem is that from the beginning this strategy requires important capital to finance the new industrial investments, which resulted in practice in a borrowing-for-growth strategy. Therefore, it intensified the dependence of those countries to the international market instead of the reverse.[36]

d) Neo-Marxist Dependency Orientation

The dependency school considers that the causes of underdevelopment are historically unique and rooted in the colonial past of the developing countries. After their conquest of independence, these countries inherited a completely underdeveloped economic regime, which had created none of the preconditions necessary to the establishment of capitalism and market based development. In addition, the neo-colonial mode of production that continued after independence created local elites that benefited from capital surplus without reinvesting it in productive channels and encouraged transnational corporations to take advantage of that situation.[37]

Capitalism and the international market are thus seen as inherently preventing development. Therefore, the dependency school model advocates for the complete severance of the national market from the politics of the international market controlled by developed nations and promotes heavy state involvement in the economy in order to avoid a perpetual state of dependency.[38] The policy implications of that model were "a general continuation of import substitution policies but with a new emphasis on control of the multinational corporation, support for democratisation movements, and guarantees that developed countries would not interfere with the sovereignty of developing nations."[39] The dependency school was instrumental in providing some of the core arguments that formed the basis of the NIEO ideology.

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[35] Cao, *supra* note 28 at 239-240.

[36] *Ibid.* at 241.

[37] "Early efforts at industrialisation could easily be exploited by multinational corporations, who - with the support of corrupt and avarious local elites - would build branch plant facilities in developing countries, but without contributing to development through significant technology transfer or training of local workforces." M.J. Trebilcock & R. Howse, *The Regulation of International Trade*, 2nd ed. (London and New York: Routledge, 1999) at 382.

[38] See Cao, *supra* note 28 at 243.

[39] Trebilcock & Howse, *supra* note 37 at 382.

2) Demands for a New International Economic Order

a) UNCTAD and GATT Part IV

Since the GATT was based upon a theory fundamentally favouring the exclusive development of the 'centre', this explains " why the peripheral countries did not find an effective response to their development demands in the GATT principles: hence their struggle for a new trade and development organisation which would accommodate their interests and aspirations."[40] The dissatisfaction of developing countries with the Bretton Woods system led to the creation of the first United Nations Conference on Trade and Development in 1964 (UNCTAD I). It was later institutionalised as a permanent organ of the UN, and became instrumental to the development debate by attempting to alter the structural barriers to development, more particularly by improving the terms of trade of developing countries, highly dependent upon export earnings deriving from primary commodities that faced high tariff levels under the GATT. Moreover, the development of synthetic products and the industrialisation of agriculture in developed nations had contributed to the deteriorating situation of developing countries in world trade.[41] For the first time, "developing countries forcefully articulated demands for non-reciprocal trade preferences at fair and remunerative levels."[42]

It can be considered that GATT responded to UNCTAD I with the adoption of Part IV on Trade and Development, with GATT Articles XXXVI-XXXVIII designed to recognise the need to accommodate the special trade problems of developing countries.[43] Before that, the only provision dealing with trade and developing countries was the very limited GATT Article XVIII, providing for governmental assistance to economic development.[44] GATT Part IV concerned market access, stated that the trade

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[40] R. Prebish, " Two Decades After " in *Cutajar*, *supra* note 12 at 4.

[41] See Dell, *supra* note 12 at 12.

[42] "Developing Countries and Multilateral Trade Agreements", *supra* note 25 at 1719-1720.

[43] *Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development*, GATT C.P. Dec. L/2281 (26 October 1964); Dec. L/2297 (17 November 1964); 13th Supp. B.I.S.D. (1965); 8 February 1965, 572 UNTS 320 [hereinafter GATT Part IV].

[44] Article XVIII incorporated developing countries' request for an allowance to withdraw temporarily in order to promote domestic economic development and to restrict imports for balance of payments reasons. However, it required the withdrawing country to gain explicit GATT approval through an elaborate procedure. To qualify, the country had to demonstrate that (1) its economy could support only low standards of living; and (2) it was in the early stages of development. See Jackson & Davey, *supra* note 10 at 1142; See also Trebilcock & Howse, *supra* note 37 at 369-370 for a description of Article XVIII provisions.

interests of developing countries constituted a priority and established the principle of non-reciprocity for their benefit. Article XXXVI:8 provided that those countries were exempted from the requirement of granting a reciprocal treatment to the others that were granting them a preferential treatment.[45] While the non-reciprocity principle represented a important departure from the MFN principle, GATT Part IV did not legally bind the contracting parties to accomplish its directives and contained little other concrete measures to the cause of development.[46] But at that time, such an addition did "reaffirmed the developing countries' status as a numerical majority bloc that could gain legal reform in the GATT and UNCTAD"[47] and UNCTAD I was in fact instrumental to the institutionalisation of developing countries' alliance who acknowledged the necessity of political unity and formed the G-77.[48] Unfortunately, it later appeared that the benefits deriving from the application of the non-reciprocity principle had been outweighed by the costs of the deriving disadvantages.

b) General System of Preferences and Other Unilateral Trade Preferences

Since UNCTAD I, developing countries considered that they needed to industrialise and, based on the infant industry argument, were demanding to be granted trade

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[45] Trebilcock & Howse, *supra* note 37 at 371 point out the inherent contradiction of the non-reciprocity principle: "The clear implication is that export-led growth is consistent with (...) protection of developing countries' domestic markets – a mercantilist view in profound tension with the neo-classical perspective that protectionism which distorts domestic price mechanisms and insulates industries from international competition is likely to frustrate the development of viable export industries." *Ibid.*

[46] While it eventually led to the adoption of the General System of Preferences, GATT Part IV had little substantive content and was characterised as "primarily hortatory in wording, and so without direct legal implications." Jackson and Davey, supra note 10 at 1143; See also Trebilcock and Howse, *supra* note 37 at 371, stating that "A pervasive characteristic of the substantive provisions of Part IV is that they lack the clearly binding or obligatory character of most provisions of the General Agreement."

[47] "Developing Countries and Multilateral Trade Agreements", *supra* note 25 at 1720.

[48] As the process of decolonisation intensified, there were an increasing number of new sovereign independent states, which in turn contributed to increasing the political weight of the developing countries as a whole. They all had increasing grievances towards the effects of the post war economic system, which they felted, was a repetition of the pre-war system. Also, new issues were appearing: monetary problems, technology transfer issues and problems created by foreign investment and transnational corporations that repatriated much of their profits without regards to the national development of the host country. Despite divergences and sometimes wide differences in their level of development and special interests, they succeeded into forming a formal alliance, the Group of 77. At the same time, problems with the Bretton Woods system were emerging. As Western Europeans and Japanese economies were closing the gap with the United States, and the US government suspended the dollar-gold convertibility and increased its tariff barriers for imported products, two policies that negatively affected the economies of newly independent states. These systemic problems were reinforcing the need for fundamental changes for a system producing underdevelopment and increased the legitimacy of the dependency framework originally based on Prebisch's analysis of trade dependency which considered that all developing countries were facing the same structural impediments to development. See Murphy, *supra* note 11 at 76-86, 97-99, 105-112.

preferences as a way to compensate their disadvantages.[49] Tariff preferences on manufactured and semi-manufactured products were to increase the developing countries' exports and raise price in the importing country, thus resulting in a transfer of resources from the First to the Third World.[50] The long awaited Generalised System of Preferences (GSP) constituted a temporary waiver from the GATT MFN clause for an initial trial period of 10 years.[51] It permitted developed countries to grant duty-free treatment or other non-reciprocal tariff preferences to products from developing countries, while not requiring from them to grant such trade preferences, thus waiving their right to reciprocity. Developing countries argued that the waiver approach was unsuitable for the GSP and continued to demand a permanent legal basis for preferences in the GATT System.[52] They later succeeded when the GSP became institutionalised with the so-called Enabling Clause that emerged from the Tokyo Round.[53] However, it left a huge discretionary power as " each developed country could choose the countries to be favoured, the commodities to be covered, the extent of tariff preferences, and the period for which the preferences were granted."[54] The GSP thus suffered many weaknesses such as a limited scope of application (excluding raw materials), application of non-tariffs barriers, the fact that the granting of preferences did not constitute a 'binding commitment' and the acceptance of the principle of 'self-election'.[55] In addition, some increasingly linked the preferences with non-trade related issues when the 1979 Enabling Clause introduced the 'graduation principle' by which advanced developing countries that benefited the most from GSP would no more be able to take advantage of it.[56] While in theory, it is

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[49] The 1964 Report of Prebish presented at UNCTAD had concluded that the promotion of developing countries' exports of manufactured products was necessary to end their dependence on trade in primary products, characterised by slow growth and instability. The solution was to facilitate access to developed countries' markets for exports of developing countries through a system of generalised, non-reciprocal preferences. See Brown, *supra* note 15 at 362; See also Jackson & Davey, *supra* note 10 at 1154-1159.

[50] See G.M. Meier, "The Tokyo Round of Multilateral Trade Negotiations and the Developing Countries" (1980) 13 Cornell Int'l L. J. 240.

[51] *Generalised System of Preferences*, GATT C.P. Dec. L/3545 (25 June 1971), 18th Supp. B.I.S.D. (1972) 24-26 [hereinafter GSP].

[52] See A.A. Yusuf, "Differential and More Favourable Treatment: The GATT Enabling Clause" (1980) 14 J. World Trade L. 488 at 491.

[53] See *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, GATT C.P. Dec. of 28 November 1979, 26th Supp., B.I.S.D. (1980) 203 [hereinafter Enabling Clause].

[54] Srinivasan, *supra* note 24 at 24.

[55] See Yusuf, *supra* note 52 at 493-494.

[56] See Meier, *supra* note 50 at 251-252, underlining that the Enabling Clause is vague and ambiguous in

defendable that developing countries that achieve a certain level of development should 'graduate' into the ordinary non-discriminatory GATT regime, it appears that such decisions were instead politically motivated.[57] The GSP did not impede the imposition of maximum quotas for the entry of developing countries imports, and sectors where developing countries had a comparative advantage (such as agriculture and textiles) were always exempted from GSP benefits.[58] Therefore, the limited scope of the preferences and the complexity of the different GSP schemes brought very limited results and it later appeared that the utility and effectiveness of the GSP had been minimal.[59]

Other unilateral trade preferences were granted to developing countries on a regional basis or under UNCTAD supervision. These include for instance the Lomé preferences granted by the EU and that establish preferential access for the exports of Africa, Caribbean and Pacific countries (the ACPs), the UNCTAD Global System of Trade Preferences (GSTP), a 'mini-GATT' among developing countries, and the Caribbean Basin Initiative (CBI) initiated by the US. But in the 1980s and 1990s, most developing countries lost interest in GSP and other regional unilateral trade preferences as they realised the domestic interests located in the donor country would always resist trade creation. It was strong motivation to participate in the UR.

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its recognition of the graduation concept as it merely provides that as poorer nations improve their trade situation, they would be expected to participate more fully in the GATT; See also G. O. Lunt, " Graduation and the GATT: The Problem of the NICs " (1994) 31 Colum. J. Transnat'l L. 611, at 619-624, reviewing the graduation process and its implications and mentioning that GATT did not include any guidelines as to what the process of graduation should entail and that this lack of foresight gave strength to the status quo.

[57] Brown, *supra* note 15 at 373-374. ("Few would dispute that the successful completion of development should in principle eliminate the need for these trade preferences, but some observers suspected that the tigers (South Korea, Taiwan, Hong Kong and Singapore) were graduated not so much because of their newly achieved levels of development as because of the level of their trade surpluses with the United States.")

[58] See Brown, *supra* note 15 at 362-362; See also "Developing Countries and Multilateral Trade Agreements", *supra* note 25 at 1724-1725.

[59] See Meier, *supra* note 50 at 240, stating that: "The developed countries have begrudgingly granted preferences, but have limited their effectiveness through the use of exemptions, tariff quotas, and market disruption escape clause."; See also Trebilcock & Howse, *supra* note 37 at 373-375, discussing the limited impact of preferences on economic growth; See also J.M. Finger & M. E. Kreinin, " A Critical Survey of the New International Economic Order " (1976) 10 J. World Trade L. 493 at 498-501, stating that the minimal effectivity of the GSP, whose benefits were also progressively impaired with the erosion of the highly restricted trade preferences as the MFN tariff cuts were increasing, demonstrated that the developing countries should have engaged in multilateral trade negotiations instead of insisting on non-reciprocal treatment by the developed countries.

c) New International Economic Order: Desire for Greater Equality

The NIEO was to bring an equitable approach to international trade and economic relations between developed and developing countries, ending an era of domination by the colonialist and imperialist powers. It constituted an attempt to reshape a global economic order whose structures based on free trade were impeding developing countries to attain further levels of development. Developing countries sought to reform the management of economic relations by emphasising upon national sovereignty and equality of individual states instead of private property and maximisation of production. It was a call for a redistribution of world resources through the state, as opposed to market mechanisms.

The 1973 oil crisis had caused governments to be more open towards discussing resource interdependence.[60] In 1974, the UN General Assembly announced the "Establishment of a New International Economic Order" (NIEO), based on "equity, sovereign equality, interdependence, common interest and co-operation among all States, irrespective of their economic and social system."[61] The NIEO Declaration first outlined the principles and demands for the creation of a new order[62] and the NIEO Programme of Action described the "urgent and effective measures need to be taken

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[60] "Developing Countries and Multilateral Trade Agreements", *supra* note 25 at 1720-1721, outlining that "somewhat persuaded that Northern dependence on the South was permanently increasing, the industrialised countries began to fear, particularly in the wake of OPEC and other cartels, that the South might break away from the GATT altogether, and thus, began to work more co-operatively with developing countries to implement their demands."

[61] See *Declaration on the Establishment of a New International Economic Order*, 1 May 1974, GA Res. 3201, UN GAOR, 6th Spec. Sess., Supp. No. 1, U.N. Doc. A/9559 (1974) 3, reprinted in 13 I.L.M. 715 [hereinafter *NIEO Declaration*]. The Declaration stated that: " The gap between the developed and the developing countries continues to widen in a system which was established at a time where most of the developing countries did not even exist as independent States and which perpetuates inequality. (...) The present economic order is in direct conflict with current developments in international political and economic relation. (...) The developing world has become a powerful factor that makes its influence felt in all fields of international activity. These irreversible changes in the relationship of forces in the world necessitate the active, full and equal participation of the developing countries in the formulation and application of all decisions that concern the international community". See *NIEO Declaration*, art. 1-2; See also *Programme of Action on the Establishment of a New International Economic Order*, 1 May 1974, GA Res. 3201, UN GAOR, 6th Spec. Sess., Supp. No. 1, U.N. Doc. A/9559 (1974) 5 [hereinafter *NIEO Programme of Action*].

[62] See *NIEO Declaration*, *ibid.* Article 4 of the resolution stated that the NIEO should be founded on principles such as the sovereign equality of States, broadest co-operation, full and effective participation of all countries, full permanent sovereignty over national resources (including the right to nationalisation), restitution and compensation resulting from colonial domination, regulation of the activities of transnational corporations, improving terms of trade through international regulation of trade based on equitable treatment for the prices of raw materials, primary commodities, manufactured goods, etc., preferential and non-reciprocal treatment for developing countries in all fields of

by the international community" in order to establish the NIEO.[63] A Charter of Economic Rights and Duties of Sates (CERDS)[64] was also adopted by the General Assembly and constituted an attempt to strengthen the legal principles intended to form the basis of the NIEO. These resolutions were representing radical challenges to the international economic system, particularly to the GATT. Reservations made to the adoption of the CERDS by industrialised countries had the result of rendering it completely ineffective, not to say meaningless.[65] In the long term, it appeared that the call for a NIEO did not become more than a simple political declaration, at most remaining at the level of UN resolutions 'soft law'.[66]

e) The Enabling Clause

The multilateral trade negotiations of the Tokyo Round that was held in 1979

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international economic co-operation and access to modern science and technology.

[63] See *NIEO Programme of Action*, *supra* note 61. The resolution first addressed the "fundamental problems of raw materials and primary commodities as related to trade and development" by reaffirming the principle of permanent national sovereignty over natural resources and demanding to take measures to prevent the decline in the export earnings of developing countries. The Programme of Action also demanded for improved access to markets in developed countries (through the progressive removal of tariff and non-tariff barriers and of restrictive business practices), to reform the global monetary system to include an aid component, to promote international support for industrialisation, to control the activities of transnational corporations, to expand concessionary multilateral aid, provide debt relief, and reform the United Nations system to give third world governments greater control over international economic decisions.

[64] See *Charter of Economic Rights and Duties of States*, GA Res. 3281, UN GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (1974) 50 [hereinafter CERDS]. The CERDS set out rights and obligations that developed the principles set forth in the NIEO Declaration. These include: permanent sovereignty over natural resources and economic activity (including authority over foreign investment, control of the activities of transnational corporations, right of nationalisation and expropriation) (art.2); "right to associate in organisations of primary commodity producers in order to develop their national economies" (art.5); "responsibility to co-operate in the economic, social, cultural, scientific and technological fields" (art. 9); "right to participate fully and effectively in the international decision-making process" (art.10); "right to benefit from the advances and developments in science and technology" (art. 13); duty to promote general disarmament (art.15); restitution and compensation for damages deriving from colonialism and all forms of foreign aggression (art. 16); extension of the system of generalised non-reciprocal and non-discriminatory tariff preferences (art.18); "increase the net amount of financial flows to developing countries" (art.22); "increase capacity of developing countries to earn foreign exchange" (art.27); and "duty to co-operate in achieving adjustments in the prices of exports of developing countries in relation to prices of their imports as to promote just and equitable terms of trade" (art.28).

[65] The original intent of the CERDS was to "create a document that would be binding upon the signatories and become a part of international law. (...) however, political reality eventually dictated that his would not be possible". Jackson & Davey, *supra* note 10 at 1166. Topics such as expropriation (art. 2), establishment of cartels (art. 5), price adjustments of exports in relation to imports (art. 28) and calls for restitution (art. 16), were completely opposed by developed countries. As a consequence, United States, Belgium, Denmark, Federal Republic of Germany, Luxembourg and the United Kingdom voted against the resolution and Austria, Canada, France, Ireland, Israel, Italy, Japan, the Netherlands, Norway and Spain abstained. *Ibid.* at 1167.

[66] Trebilcock & Howse, *supra* note 37 at 367.

produced the so-called Enabling Clause,[67] a permanent legal framework requiring that developing countries be provided a " differential and more favourable treatment " and be excused from having to reciprocate regarding the concessions and commitments undertaken by developed countries.[68] It was a formal legal recognition that preferences for developing countries were legitimised by their different level of economic development.[69] The Enabling Clause applied principally to the GSP, but was also designed for areas such as non-tariff barriers,[70] preferences among developing countries[71] and special treatment for the least developed developing countries (LDDCs).[72] But while reaffirming the GATT Part IV principle of non-reciprocity between developed and developing countries, it also introduced the notion of positive graduation, which ended up 'diluting' the application in trade negotiations of that principle. Therefore, while the addition of the Enabling Clause legitimised one of developing countries' traditional aspirations, it did not truly modify the legal structure of GATT to their advantage.[73]

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[67] Enabling Clause, *supra* note 53; See Yusuf, *supra* note 52 at 488: "It constituted the legal recognition in the GATT of trade preferences as a means of promoting the economic development of developing countries."

[68] See Srinivasan, *supra* note 24 at 21.

[69] See Yusuf, *supra* note 52 at 492, underlining that: "the principle of differential treatment is based on the idea that equal treatment of unequals is unjust and that the same rules can therefore not apply to countries at different stages of development. (...) Thus, [preferences] are viewed as a means of overcoming underdevelopment and economic backwardness, since their objective is to provide an equality of opportunity to the weak and poor nations by increasing their competitive power in world markets. They are also designed to correct the disadvantageous situation of those countries' exports resulting from the trade barriers of the developed states (...)."

[70] Provisions on differential and more favourable treatment for developing countries were included in most of the Tokyo Round side-agreements dealing with non-tariffs barriers such as subsidies and countervailing duties, technical barriers to trade, anti-dumping, import licensing, government procurement and customs valuation. However, since the rights and obligations of those agreements were only extended to the signatories, developing countries unwilling or unable to subscribe were excluded from their coverage. See Yusuf, *ibid.* at 495-498.

[71] The Enabling Clause included a special provision allowing developing countries to enter into preferential agreements falling short of GATT Article XXIV. See discussion on this topic below under Part II (B).

[72] See Yusuf, *supra* note 52 at 500. ("The category of LDDCs comprises those countries, which, according to critical economic and social indicators of a longer-term structural character (especially levels of income, literacy and share of manufacturing in total output), are the weakest in the international arena.")

[73] Trebilcock and Howse, *supra* note 37 at 22. (" The special and differential status secured by LDCs under the GATT reflected then widely prevalent thinking in many developing countries that import substitution policies (in effect infant industry promotion policies) were essential to the economic development of these countries, in order to diversify their economic base, provide expanding sources of employment, and reduce dependency on often highly volatile international commodity markets for primary products. ")

3) Criticism of Adopted Measures

a) Critical Survey of NIEO Ideology and Demands

From its basic origins, the call for a NIEO was flawed in three main aspects: its core principles and concepts themselves, the soft law nature of its instruments, and the limited effectiveness of the adopted measures to further development in a world economy governed by the private market.

The concept of a NIEO itself presented many normative problems. First, demanding non-reciprocal preferential treatment and calling for a redistribution of resources and income, while at the same time insisting upon the principles of sovereignty and economic independence, is contradictory.[74] Second, the NIEO program included many elements of a planned economy on an international level (which were unacceptable even for Third Word supporters), while the world economy was (and still is) dominated by market rules and private actors, so that there was no possibility of changing that fundamental aspect. Third, the heavy reliance on the concept of national sovereignty, formulated as the legal expression of the political independence of developing countries, was challenging the traditional concept of sovereignty in many aspects. According to NIEO ideology, sovereignty implied permanent national sovereignty over natural resources (which entailed a confusion between the legal and the economic aspects of the concept in international law), a right to redistribution mechanisms (which can be viewed as contradictory to the UN principle of sovereign equality of all nations), and the right to nationalise foreign owned property (confusion relating to the corresponding duties of the claiming states).[75] In addition, the NIEO concept relied on the idea that everything had to be changed because the old rules of the liberal system had served as tools for exploitation. However, maybe it went too far in completely rejecting the traditional elements of private property and contracts, which had proven to be effective instruments of development.[76]

Another fundamental obstacle to the realisation of the NIEO objectives concerned the

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[74] N. Horn, " Normative Problems of a New International Economic Order " (1982) 16 J. World Trade L. 338 at 339-341. ("Developing countries, as a rule, are careful to safeguard the principle of reciprocity in international relations in order to protect their sovereignty and their position as equal partners. The demand for non-reciprocal preferential treatment can hardly be reconciled with this attitude. A similar fundamental problem arises as to new mechanisms of direct international redistribution of resources and income. For the concepts of economic independence and world-wide redistribution are, in a way, contradictory. Any international redistribution mechanism can work only at the expense of national self-determination of beneficiary countries". *Ibid.* at 340-341)

[75] *Ibid.* at 343-344.

inherent difficulty of implementing international development law rules. The enforcement of international development law has always been problematic, because of the 'soft law' nature of its norms. From the outset, the creation of UNCTAD as a permanent institution in the field of trade and development was a compromise between those who wanted to counterbalance the absence of the ITO and those who considered the GATT to be sufficient. UNCTAD was added to the GATT but even though it became a fundamental negotiating institution for the G-77, it lacked the power to decisively influence the sphere of private international law and the global trade regime as established by GATT according to the interest of the dominant industrialised countries.[77] Fundamental problems relating to the legal rules of UNCTAD and their binding power always remained. Taking the form of principles or guidelines, those measures "often resulted in relatively mild concrete reforms" and its only enforcement mechanism was a mandate to survey and report the degree to which member nations had implemented its guidelines.[78] Similarly, the NIEO resolutions, without a formal law-making procedure, resulted in "a mixture of ethical values, political norms and claims which looks a little bit like law", but were not sources of international law.[79] The resulting *soft* law and the corresponding limited effectiveness of any instruments of international development law could not reverse or even affect significantly the dominating international trading rules. In order to have a practical effect, this soft law, not even being customary public international law, was at least supposed to influence and be implemented by national legislation,[80] which of course was not the case since developed nations had no advantages of changing a system from which they benefited. Therefore, the NIEO called for changes in public international law forums whose legal acts were without effect upon the private

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[76] *Ibid.* at 345.

[77] See R. Krishnamurti, " UNCTAD as a Negotiating Instrument on Trade Policy: The UNCTAD-GATT Relationship " in *Cutajar*, *supra* note 12 at 33. " UNCTAD had to struggle for recognition as a forum for serious South-North negotiation on trade policy matters, always over-shadowed by the presence of the longer-established institution which was the preferred forum of the most powerful trading countries. " *Ibid.*

[78] See "Developing Countries and Multilateral Trade Agreements", *supra* note 25 at 1727-1728, adding that " pressure from the industrialised countries succeeded in transforming these reports into general surveys of trends in international trade and development rather than pointed criticism. "

[79] See Horn, *supra* note 74 at 339, 347.

[80] *Ibid.* at 348-351, discussing the law transformation process and pointing out that: "the uncertain and hybrid normative nature of the NIEO texts means that there will be a slow and gradual transformation process into law, led by national legislators, national courts, commercial arbitration and practising lawyers grafting international contracts." *Ibid.* at 351.

international law of economic institutions and the private actors of the world economy.

The measures requested and adopted pursuant to the call for a NIEO also posed problems. All the initiatives that were subsequently introduced in the international trade order for the supposed benefit of developing countries constituted only superficial departures from a international regime dedicated to intensive trade liberalisation. The greatest achievement was the introduction of special treatment in the GATT rules and as most preferential tariff schemes were of very limited value, many consider that developing countries should have instead focused on the establishment of a non-discriminatory system. Indeed, it appears that while developed countries became eventually receptive to the concept of special and differential treatment, they did not reduce the concrete barriers to trade faced by developing countries, which would have been more significant to their trade. For some, the conclusion was that NIEO proposals were economically ineffective or politically infeasible in moving the world:

> The political problem arises from the fact that practically every ingredient of the proposed New Order –be it the GSP, the integrated commodity program or increased foreign aid- depends exclusively on the economic altruism of the industrial countries. (...) Such policies would continue and intensify dependence on the industrial countries. (...) In another important respect, [such proposals] (...) divert attention from the far more crucial issue of internal development policies. Economic development is essentially a process of internal transformation of society. (...) Their final objective is, or should be, to support an acceptably high standard of living through their own productivity, rather than by continuous reliance on the infusion of foreign resources.[81]

Therefore, critics consider that developing countries should have focused more on their own productivity and support the establishment of a multilateral non-discriminatory trade system, pushing for tariff cuts for as many products as possible that were of export interest to them, instead of insisting on the principle of non-reciprocity. Moreover, the success of the South-East Asian economies, as newly industrial countries (NICs) that achieved high levels of economic growth with an export-oriented model of development, demonstrated that pursuing outward oriented policies was the best solution. However, it is fundamental to note that the NICs became successful with much more state involvement than originally prescribed by the

classical liberal model.[82] In addition, questions arise in relation to the sustainability of these successes and their 'generalisability' to other regions.[83]

b) A Cynical View of the Liberal Model and of GATT "Legality"

We mentioned above that the neo-classical liberal model relies on private international law, assumes that a natural balance will be achieved between the national and the international market once an efficient framework is established and that such economic principles are distinct from the sphere of international politics. Moreover, full employment, economic growth and optimum utilisation of resources are assured to follow naturally. However, liberal economic theory completely ignores the fact that market mechanisms are simply not sufficient to regulate the world economy.[84] Despite its promises of economic growth through undiscriminated trade liberalisation, the Bretton Woods system, the GATT in particular, have institutionalised measures that were opposite to the founding principles of the liberal order but beneficial to developed countries. While GATT (and UNCTAD) arguably attempted to increase developing countries' exports, international trading rules in fact "reinforced the North-South economic hierarchy [as] industrialised countries consistently created rules that affronted the principles upon which they had purported to establish the GATT."[85] Examples of such circumvention include agriculture, textile, NTBs, Tokyo Round side-codes, and the GATT dispute settlement provisions.

For instance, the only comparative advantage possessed by developing countries in sectors such as agriculture and textile was annihilated by GATT-inconsistent

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[81] Kreinin & Finger, *supra* note 59 at 510-511.

[82] For instance, in addition to reducing tariffs and other trade barriers, they reformed their exchanges rates regimes, and "initiated or activated a wide range of alternative government policies aimed at encouraging exports, including significant subsidies and loans to export-oriented industries." Trebilcock & Howse, *supra* note 37 at 383.

[83] Many East Asian economies are now experiencing some difficulties and some of the particular factors explaining their economic success in the past are absent in other regions. See *Ibid.* ("There are questions as to the generalisability of the East Asian experience to other contexts, such as whether the dynamic Asian economies display certain 'exceptionalist' institutional, social, or cultural characteristics that explain in large part the success of the export-led model of development, including: a relatively pragmatic, 'third-worldly' orientation in the mainstream culture; superior human resources (higher education levels among the general population); high savings rates; and a bureaucracy that is meritocratic and relatively 'autonomous' from patrimonial politics.")

[84] "There is, on the one hand, the problem of abuse and manipulation of the free trade market through restrictive business practices and through protectionist and neo-mercantilist measures of governments. On the other hand, there is the equally serious problem that many (...) [issues] such as those concerning the international monetary system, the supply of raw materials, energy, food, and the protection of the environment, need additional controls and regulations". Horn, *supra* note 74 at 342.

provisions of developed countries that " interfered with the operation of market forces to reverse the law of comparative advantage for political purposes ."[86] Therefore, it can not be seriously stated that the liberal model is non-political as reality shows otherwise. Exemptions covering trade in agriculture and textiles had a very negative impact for developing countries as their comparative advantage was in those products. In the agricultural sector, subsidies and quantitative restrictions used by developed countries to protect their own farmers provoked important price declines and were devastating for rural communities of developing countries.[87] The area of textile is even worse as developed countries went so far as to create separate agreements blatantly violating GATT principles, which resulted in the so-called Multi-Fibre Arrangement (MFA),[88] a typical case of the industrialised countries perverting the basic principles of the GATT in order to resist the penetration of developing countries exports that have become competitive.[89]

In addition, as tariffs were declining following multilateral trade negotiations, non-tariff barriers (NTBs) restricting developing countries' trade were flourishing.[90] The Tokyo Round held in 1979 was the first round of multilateral trade negotiations in which developing countries participated actively, acknowledging the need for trade liberalisation, and looking for increased market access by obtaining tariff reductions and addressing the issue of NTBs.[91] As a result, tariffs were reduced[92] and the so-

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[85] "Developing Countries and Multilateral Trade Agreements", *supra* note 25 at 1723.

[86] Cao, *supra* note 28 at 255.

[87] Agriculture was exempted from GATT Article XI prohibiting quantitative restrictions and from Article XVI prohibiting export subsidies. See GATT *supra* note 10.

[88] See *Protocol Extending the Arrangement Regarding International Trade in Textiles*, GATT C.P. Dec. L/6030 (July 1986) 33d Supp. B.I.S.D. (1987) 7.

[89] While the stated purposes of the MFA were to achieve the expansion and liberalisation of international trade in textile products and to further the economic development of developing countries, the MFA instead became an instrument restricting trade in textiles. See Brown, *supra* note 15 at 365-368; See also Trebilcock & Howse, *supra* note 37 at 375-377. ("The fundamental reality is that developing countries suffer very large losses from import restrictions imposed by developed countries in these sectors." *Ibid.* at 376.)

[90] Meier, *supra* note 50 at 241-242. Prior to the Tokyo Round, "one study of market access revealed that, overall, the most restricted products are those whose export the developing countries could most easily expand. Moreover, the most heavily protected products in the developed countries tend to be those whose impact would be most responsive to liberalisation policy (e.g. textiles, clothing, footwear, food products)." *Ibid.* at 241; See also B. Balassa, "The Tokyo Round and the Developing Countries" (1980) 14 J. World Trade L. at 93, noting that protectionist measures from developed countries continued to proliferate after the 1973 oil crisis, such as non-tariff restrictions, government aids to industry, and efforts to establish international cartels.

[91] Developing countries that had participated in the previous Kennedy Round of multilateral trade negotiations had been very dissatisfied with the outcomes as "little was done with respect to non-tariff barriers that they had complained about and the tariff cuts were mainly on goods that held little interest for them. (...) [They] entered the Tokyo Round with the hope that at last their concerns would receive

called Enabling Clause was introduced, but to avoid developing countries benefiting from further liberalisation without having to reciprocate, developed countries also managed to conclude of side agreements or codes, outside the conventional GATT framework, whose privileges and obligations were mostly restricted to the signatories of the codes. They covered issues such as subsidies, dumping and countervailing duties, customs valuation, import licensing, technical barriers to trade and government procurement. It permitted developed countries to move forward without having to address the needs or objections of developing countries, even though some agreements were of great importance to them (i.e. anti-dumping code and subsidies code).[93] This resulted into a further exclusion of developing countries.[94] Overall, the Tokyo Round brought very limited results for developing countries, and did not prevent the imposition of further restrictions to their trade during the 1980s (such as hidden measures against exports, bilateral pressures to offer trade concessions from developed countries, extension of developed countries' regional trading blocs and increasing conditional application of preferential treatment under GSP).

Another obstacle for developing countries was GATT dispute resolution system. While the enforcement procedures were used extensively against them, they were "the least likely to gain satisfactory outcomes to complaints that they had lodged against other countries for violations – even when the GATT dispute resolution system upheld those complaints."[95] Indeed, the situation of small countries in the GATT dispute resolution system was less than satisfactory and developing countries were not able to participate effectively in it.[96]

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serious attention". Jackson & Davey, *supra* note 10 at 1144.

[92] However, these tariff cuts mainly affected traditional exports of industrialised countries (such as machinery, chemical and transport equipment) and important exports from developing countries were excluded (textiles, apparel, leather goods, footwear and steel). In addition, the overall tariff cuts have the effect of weakening the trading position of developing countries because of the corresponding erosion effect it has on the GSP preference margins. See Meier *supra* note 50 at 245-246.

[93] See "Developing Countries and Multilateral Trade Agreements", *supra* note 25 at 1726; See also Trebilcock & Howse, *supra* note 37 at 372, mentioning that serious tensions arose when the United States refused to extend the benefits of the Subsidies and Antidumping Codes to non-signatories.

[94] Further exclusion is explained by the fact that such a system allowed developing countries to pursue their excessive thus harmful import-substitution strategies and permitted developed countries to keep barriers against their imports and higher tariffs on products of export interest to them. See Srinivasan, *supra* note 24 at 26.

[95] "Developing Countries and Multilateral Trade Agreements", *supra* note 25 at 1726-1727.

[96] See Jackson & Davey, *supra* note 10 at 1153-1154. The authors conclude that: "While the GATT system may work when the United States and the EC have a dispute and threaten each other with meaningful retaliatory measures, such threats are not likely to be taken seriously when made by a developing country. As such, because of their limited resources to devote to litigating trade disputes and

We see that while developed countries preached for reliance on the international market, on the other hand they were in fact blocking the trade expansion of developing countries that was supposed to foster development. As formulated by Professors Trebilcock and Howse: "Although it is fashionable to blame leftist theories of development economics and the influence of Soviet bloc central planning approaches for the protectionist follies in the developing world in this epoch, the treatment of developing countries in the Western-dominated global trading order made inward-policies easy, while it set up obstacles to export-led growth."[97]

4) Changing directions

All the efforts of developing countries for reforming the world trade regime produced few concrete results. The GSP, the creation and institutionalisation of UNCTAD, the establishment of the principle of special and differential treatment for developing countries and the major declarations of principle of the UN and UNCTAD are the main achievements of their quest for greater equality. While it did bring developing countries' concerns to the attention of the developed world, it did not produce the expected radical transformation of international economic relations. After the 1970s, "the reformist tide diminished and then ceased."[98] The fact is that while numerous statements on international co-operation had been made, they had very rarely been translated into concrete positive measures.[99] At the same time, the solidarity of developing countries started to fade away.

The debt crisis starting in the 1980s was very damaging for developing countries confronted to the 'lost decade for development'. At the beginning of the 1980s, "the developing countries, with few exceptions, faced economic obstacles as grave as those

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their limited ability to retaliate against developed countries, developing countries may not be able to obtain meaningful redress in the GATT dispute settlement system." *Ibid.* at 1154; See also Trebilcock & Howse, *supra* note 37 at 372-373, commenting such "power imbalance" within the GATT dispute settlement procedures.

[97] Trebilcock & Howse, *supra* note 37 at 368.

[98] R. Ricupero, " Integration of Developing Countries into the Multilateral Trading System " in *The Uruguay Round and Beyond*, *supra* note 3, 9 at 11.

[99] Twenty years after UNCTAD creation, Raul Prebish was stating the following: " We (...) believed that throwing light on the problems of development and international economic co-operation would gradually lead to reciprocal measures of benefit to the industrialised centres and to the vast periphery of the world economy. However, very little has been achieved despite the lengthy meetings of [UNCTAD]; and the present outlook is far from encouraging. On careful reflection, it appears that the industrial centres are generally not interested in the development of the periphery except in so far as that suits their own development, or more precisely the interests of those of their enterprises which are linked in one way or another with the peripheral countries." Prebish, *supra* note 40 at 3.

they had faced a quarter-century earlier at the dawn of their entry into the international arena as politically independent entities."[100] It appeared that the import substitution industrialisation (ISI) strategy had yield disappointing results, and had indirectly provoked the debt crisis.[101] The issue of debt relief would force developing countries to rely more heavily on the institutions they were criticising. Those countries, for the most bearing an important debt burden,[102] had to comply with the IMF requirements attached with structural adjustments programs that were very harmful, particularly for their domestic populations.[103]

Developing countries that were traditionally relying on ISI policies and protectionist measures in order to encourage their producers[104] had to change direction and go along the path of liberalisation to achieve further economic development, as proven by the success of the East Asian countries and Chile who had pursued open and liberal policies following the neo-liberal model and the Chicago School. The new approach was found in export-promotion, which required the removal of barriers and a re-

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[100] "Developing Countries and Multilateral Trade Agreements", *supra* note 25 at 1722.

[101] Countries following the ISI strategy needed external sources of foreign exchange to develop infant industries as their primary product exports were insufficient to cover their negative balance on extra-regional trade in industrial products. Starting in the 1960s, they increasingly relied on commercial bank debt provided with great flexibility by foreign banks. Bank lending then exploded in the 1970s with the massive arrival of 'petro-dollars'. Finally, "the threat by Mexico to default in August 1982, the event that finally triggered the Latin American debt crisis, reversed the net transfer of resources to Latin America". V. Bulmer-Thomas, "Latin Integration Before the Debt Crisis: LAFTA, CACM and the Andean Pact" in A. M. El-Agraa ed., *Economic Integration World-wide*, (New York: St. Martin's Press, 1997), [hereinafter *Economic Integration World-wide*], 230 at 247 [hereinafter "Latin American Integration 1"] .

[102] See Robicheck, *supra* note 13 at 144-146, reviewing the roots of the external debt servicing difficulties, and stating that bankers deserve a important share of the blame: "They are criticised for lack of prudence, and even for greed, in their cross-border lending decisions. (...) the escalation of their cross-border lending contained the seeds of its own destruction, because this escalation could not possibly have been continued indefinitely." *Ibid.* at 145. Regarding the subsequent situation of developing countries, he states the following: "They are trapped in a vicious circle of rising interest costs and increasingly negative net resources transfers from abroad, which forces them steadily to improve their trade balances at the expense of their investment capacity, their economic growth expectations and their potential for sustained export growth." *Ibid.* at 151.

[103] Such requirements are consistent with the liberal order and typically relate to the measures the borrowing country has to implement in order to receive further financial assistance by the IMF that is needed to deal with balance of payment problems. The IMF promotes an export oriented development model and a unilateral trade liberalisation by the way of reducing tariffs and eliminating quantitative restrictions on imports. Undertakings consist of privatisation, liberalisation of economic sectors, deregulation, reduced governmental spending in the social sector, thus affecting particularly health and education.

[104] Up until the 1980s, most developing countries were characterised by heavy State-ownership and intervention, over-expansive macroeconomic policies and import restrictions that were designed to foster the growth of infant industries. Import substitution policies were thought to be essential to create jobs and stability. See Z. Drabeck & S. Laird, " The New Liberalism: Trade Policy Developments in Emerging Markets " (1998) 32:5 Journal of World Trade 241.

evaluation of the international trade regime. Export-led growth became presented by the World Bank and the IMF as the only realistic alternative to ISI. Developing countries started with unilateral liberalisation, opening up their trade barriers, changing their trade policies and liberalising whole sectors of the economy according to the neo-liberal model. Greater market orientation has now become the rule in trade policy, with the deregulation of domestic markets and the lowering of tariffs.[105] Privatisation is continuing as well as legal reforms and attempts to improve the competitive and regulatory framework.

But such unilateral liberalisation had to be accompanied by increased access for developing countries products in global markets in order to be able to face the subsequent increased competition. That explains why developing countries that had not already done so massively joined the GATT/WTO framework to integrate the multilateral trading system.[106] While they do represent a wide range of interests, they are all looking to such membership to " underpin their own unilateral liberalisation efforts and to counter discrimination so that they can compete more effectively in the international market place."[107] And the phenomenon of globalisation is itself reinforcing the pressures for integration and liberalisation.[108]

The massive participation of developing countries in the UR thus reflected a global shift in trade policy (from import substitution to open market development strategies). They considered that a liberal trading order with clearer rules was necessary and wanted to negotiate reductions in MFN tariffs instead of relying on unilateral trade preferences. Participating to the UR was thus seen as a way to benefit from the expansion of trading opportunities, as well as from the strengthening of the protection of rights under the enhanced rules-based system, obtain more secure market access, consolidate local reforms and check the growth of aggressive unilateralism and the antidumping and countervailing duties in trade policy.[109]

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[105] *Ibid.* at 245.
[106] *Ibid.* at 253-258.
[107] *Ibid.* at 261.
[108] "Greater integration means that trade, capital and information flow more freely than ever before across national borders. Greater integration also means that countries all over the world, and at all levels of development are under growing pressure to secure access to foreign markets, productive investment and advanced technology if they are to share in rising global production, employment creation, and technological advancement. The result is an almost universal drive, even competition, to liberalise markets." Ruggiero, *supra* note 3 at 126.

C) POST-URUGUAY ROUND SYSTEM: FUTURE PROSPECTS

1) Consolidation of the System?

The core of the international regime was established in the period following World War II. Since then, the legal regime concerning international trade relations between sovereign nations has consistently evolved and expanded its influence in new areas not previously covered, now attempting to regulate domestic regulations. Originating from Ricardo's law of comparative advantage and the concept of reciprocity, a new body of trade treaties and legal norms has emerged with increasing importance. Such a development, particularly in the recent years, is shown by " the multiplication of legal norms and the strengthening of the binding nature of these norms and the procedures for enforcing them."[110] As states progressively found that uncertainty and too much flexibility constituted a threat to achieving the economic goals of an agreement, particularly as covered issues grew in complexity, the trend to prefer non-binding agreements gave way to the desire of establishing stronger framework of binding norms and enforcement procedures.

In the 1980s, the international trade system was characterised by instability, affected by the end of fixed exchange rates, slowdown of the world economy, rising inflation and unemployment, factors that contributed to the adoption of more protectionist measures from industrialised countries, also threatened by the emergence of new trading powers (e.g. Japan and the so-called tigers of South East Asia).[111] But at the same time, technological progress was contributing to expose national economies to international trade and investment flows. The collapse of the Soviet Block and the fact that countries like those of Latin America were switching from ISI strategies to open trade policies made the prospect of a single integrated global economy possible. But continued protectionism in agriculture, the proliferation of NTBs (e.g. quotas, variable levies) and other grey area measures (e.g. voluntary export restraint agreements ("VERs"), quantitative export targets, market sharing arrangements), showed that there was a need for a tighter management of international economic relations.[112]

The UR was the eighth round of multilateral trade negotiations to be conducted under

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[109] See Srinivasan, *supra* note 24 at 36.
[110] Reich, *supra* note 16 at 775.
[111] Ruggiero, *supra* note 3 at 123-124.

the GATT framework. It was also the most challenging as the scope of negotiations was unprecedented with an increased number of countries and numerous problems to deal with (e.g. NTBs, grey area measures, safeguards, subsidies, inclusion of agriculture and textile, problem of free rider), as well as new issues (e.g. services (GATS), intellectual property (TRIPS), investment (TRIMS), improved Dispute Settlement Understanding (DSU)). But the UR was finally completed in 1993, bringing together all GATT members under a single undertaking with a common system of rules, and succeeded in creating the World Trade Organisation (WTO).[113] The WTO in fact represents the long awaited institutional structure designed to monitor compliance with the GATT, half a century after the Bretton Woods Conference and the premature death of the 1948 ITO Havana Charter. The entry into force of the WTO on January 1st, 1995, finally completed the foreseen tripartite international legal structure of the Bretton Woods system based on the IMF, the World Bank and now the WTO.[114]

The WTO Agreement sets out the basic rights and duties of its member states in relation to the conduct of trade-related policies. Designed to " serve constitutional and rule-making functions, in addition to its executive functions, surveillance and dispute settlement functions for the foreign economic policies of member states, [it] lays the legal foundation for a new international economic order for the twenty-first century."[115] The WTO is thus emerging as a key pillar of our globalised world, defining trade rules applicable to an increasing interconnected economy, but also providing an institutional link between this economy of global dimension and the nation states.

As GATT evolved from a diplomatic compromise for co-ordination of trade policies to an organisational legal structure with enforcement powers and an expanding role in new spheres, new trade regulations (originating from GATT but also from the multiplication of regional integration agreements) increasingly created limitations on the national sovereignty of members. This is explained by the fact that " these

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[112] *Ibid.* at 125-126.

[113] See *Marrakesh Agreement Establishing the World Trade Organisation*, Apr. 15, 1994, 33 I.L.M. 13.

[114] See E-U. Petersmann, " International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction " in E-U. Petersmann, ed., *International Trade Law and the GATT/WTO Dispute Settlement System, Studies in Transnational Economic Law*, vol. 11 (London: Kluwer Law International, 1997), [hereinafter *Petersmann ITL*] 3 at 11.

[115] *Ibid.*

agreements create an international system of regulation whose purpose is to deal with national systems of regulation; the latter restrict trade and protect local industry against foreign competition, whereas the former aspire to eliminate restrictions, promote trade, and expose industry to international competition."[116] The multiplication and strengthening of substantive international norms demonstrate that countries are more willing to loose some sovereignty attributes in order to integrate and benefit from the multilateral trade order.

The evolution of GATT's enforcement mechanism is particularly revealing to that effect.[117] While nations initially preferred a flexible and non-legalistic structure to preserve their sovereignty in those highly political trade disputes, the new WTO dispute settlement mechanism[118] has now established a strong and detailed framework for resolving disputes, following a process very judicial in character and application as opposed to the previous 'diplomatic way'.[119]

On the other hand, the UN and its numerous specialised agencies such as UNCTAD also produced an imposing new " body of international law of co-operation aimed at the collective supply of international goods, such as international peace, legal security, mutually beneficial economic co-operation, human rights social and labour standards, and decolonisation."[120] However, this 'UN law' has been characterised by its limited effectiveness, and the private international law system and the governing principles of the international trade order often contradict its core principles. Many issues have recently surfaced that question the legitimacy of blind globalisation and the international trade order in relation to principles such as democracy, transparency, social concerns and equity, as demonstrated by the strong protests heard at Seattle at

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[116] Reich, *supra* note 16 at 783.

[117] See generally Petersmann, *supra* note 114 at 3-122.

[118] See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, annexed to the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, Apr. 15, 1994, Legal Instruments - Results of the Uruguay Round vol. 1 (1994), 33 I.L.M. 1125, Annex 2, 33 I.L.M. at 1226 [hereinafter DSU].

[119] As discussed by Reich, *supra* note 16 at 799-808, the changes illustrating the juridicisation of the dispute resolution system include: (1) the affirmation of the exclusive character and legal primacy of the DSU dispute resolution system (DSU art. 23); (2) the establishment of a strict time table for each stage in the dispute resolution process(DSU arts. 4, 6, 12, 16, 21); (3) the revocation of powers to block procedures (DSU arts. 6-8); (4) the duty to terminate the infringement of GATT (DSU art. 19) ; (5) the duty to adopt the panel's recommendations(DSU art. 16); (6) the establishment of an appellate body (DSU art.17) ; (7) surveillance on the implementation of recommendations and rulings (DSU art. 21); (8) restrictions on the non-legal grounds of complaint (DSU art. 26) ; and (9) possibility of cross-retaliation (DSU art.22). See also Petersmann, *supra* note 114 at 54-76.

[120] Petersmann, *supra* note 114 at 7.

the failed launching of the new Millennium Round, which galvanised public opinion against global trade pacts and financial deals. People increasingly realise that the system might discriminate by protecting the rich instead of being a truly universal order providing just access for everybody.

At the same time, more and more policy issues are seen as trade-related. Since most tariffs have been widely reduced to minimal levels, the focus of multilateral trade liberalisation will increasingly concern domestic policy divergences.[121] Consequently, it is foreseeable that the WTO will have an expanding role and influence in areas not traditionally covered by multilateral agreements. Traditional nation sate sovereignty will decline as a result and more influence will be vested within the WTO or other inter-governmental bodies.

Despite the apparent consolidation of the international system, expanding its scope and progressively moving toward greater juridicisation, we must remember that many issues pose great challenges to the future of the global economy as it is presently conceived and applied. Among those are a civil society eager to make its voice heard, asking for more transparency, as demonstrated by the recent events at Seattle, social issues, the fact that while free trade might foster economic growth, such growth does not provoke increased welfare, the growing volatility of exchange rates, etc. Other fundamental challenges are the threat posed by regionalism to the multilateral order and the situation of developing countries. Ironically, developing countries are increasingly using regional integration arrangements. We now review the situation of developing countries in the multilateral trade order after the UR.

2) Developing Countries and the Uruguay Round

Developing countries were facing various problems with the international trade regime put in place after the 1979 Tokyo Round agreements and codes (e.g. issues related to trade in agriculture, tropical products and textile, as well as safeguards). While developing countries were still struggling with the same old agenda, the US was pushing to include new issues of concern to them in the international regime: trade in

[121] See Trebilcock & Howse, *supra* note 37 at 23. ("In particular, 'system frictions', involving different traditions of government intervention in domestic economies and of forms of industrial organisation, have increasingly redirected the focus of international trade policy and conflicts beyond or within the borders of nation states and to divergences in domestic policies that arguably create 'unfair' forms of comparative advantage (or 'unlevel playing fields')".)

services, trade-related intellectual property and investment.[122] The conclusion of the UR did establish an improved market access through further tariffs reductions for manufactured goods, covered the non tariff barriers (NTBs) and did include previously exempted sectors like textile and agriculture and new issues such as services, intellectual property and investment, all being very sensitive areas for the developing countries.[123] While developing countries were given longer periods of time to implement some provisions of the Final Act, there was no tendency to grant them broad exceptions to compliance with the new rules.

The Agreement on Agriculture is presented as a major achievement. However, the extent of liberalisation is far from substantial and thus can not be expected to bring more than minimal gains, even though it is a start.[124] Concerning textile, the Agreement on Textile and Clothing (ATC) foresees the progressive phase-out of the 1974 MFA, which had become increasingly restrictive.[125] The WTO is now finally starting to integrate this sector and implemented a three-stage process over a ten-year period that foresees the progressive elimination of such textile and clothing contingents for 2005 when all products are to be integrated.[126] However, the ATC applies only to MFA restrictions and to non-GATT bilateral agreements. Therefore, for many products the MFN tariff will be unaffected and remain high.[127]

The DSU provides for special problems of developing countries (presence of a panellist from a developing country is assured as well as WTO Secretariat assistance) and will facilitate the enforcement of commitments given to them by developed

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[122] See Srinivasan, *supra* note 24 at 28-29. Countries such as India and Brazil were against the exploration of those new issues since developed countries had failed to their obligations, particularly those concerning trade in agricultural products and textile. But these objections could not hold after an US ultimatum that it would withdraw from the conference if these new issues were not included. See *ibid.* at 31-32.

[123] See generally Trebilcock & Howse, *supra* note 37 at 387-394.

[124] The Agreement merely requires that all non-tariff border measures be replaced by tariffs. Even though they provide the same level of protection, this process of tariffication will lead to a more transparent regime. But the agricultural tarriffs will then be progressively lowered over the 10 year implementation process with only minimal reductions required. And important loopholes exist in the tariffication program as well as in the implementation of reductions in domestic-support measures. In addition, subsidies for agricultural exports are still permitted. See Srinivasan, *supra* note 24 at 39.

[125] See M. Smeets, "Main Features of the Uruguay Round Agreement on Textiles and Clothing, and Implications for the Trading System" (1995) 29:5 J. World Trade at 97.

[126] But there is a danger of "backloading", which implies that the adjustment process of textiles and clothing in the importing countries is delayed. *Ibid.* at 99-102. Therefore, while the ATC may provoke an increase in textile exports for developing countries, it is unlikely to appear before the end of the ten year period.

[127] See Trebilcock & Howse, *supra* note 37 at 389-391. ("Tariff reductions achieved in the UR, while substantial, will nevertheless leave in place tariffs on many textile and apparel items that are much

countries.[128] However prosecuting a case will continue to be more burdensome for many developing countries.

The new Agreements concluded with respect to services (GATS), investment (TRIMS) and intellectual property rights (TRIPS) achieved a modest liberalisation, but these negotiations are fundamental for developing countries, fearing an irreversible technological power of developed countries to be acquired at high prices. The issue is if whether or not will such agreements allow for the accumulation of knowledge capital (now identified as the driving force of sustained growth and development) through technology transfer. It remains to be seen how future developments in those sectors will consider the needs and interests of developing countries.

While developing countries did participate actively in the UR negotiations (e.g. the importance of the Cairns Group and the Informal Group of developing countries), important shortcomings directly affected their interests.[129] For instance, the results were much less satisfactory than expected in the case of agriculture and for textiles and tropical products market access.[130] However, the UR did strengthen the multilateral trading system with the creation of the WTO, the DSU, the improvements of certain rules (e.g. NTBs under tighter control) and will also help some countries to consolidate their own reforms which will enhance their ability to benefit from market access and attract foreign investment. But many factors can reduce the benefits supposed to drive from liberalisation and some undertakings do constitute a dramatic higher level of obligations for developing countries and reduces their sovereignty.[131]

There is a general need for strengthening human resource capacity and the institutional support for trade, as well as ensuring that technology is accessible, an aspect that will become increasingly fundamental. This incredible technological expansion has been described as enabling every country to benefit from globalisation. But concrete measures need to be adopted in order to ensure that developing countries will be able

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higher than the average for industrial products generally". *Ibid.* at 390).

[128] See DSU, *supra* note 117, Articles 8(10) (panellist from a developing country), 27(2) (secretariat assistance) and 12(10) (more preparation time for developing country).

[129] See Ricupero, *supra* note 98 at 17-22.

[130] *Ibid.* at 23.

[131] New export opportunities can be affected by below the norm reduction of tariffs, the continued erosion of preferential margins granted under the GSP or other preferential schemes, the continuing decline in commodity prices, the debt burdens and the increased cost of foreign technology which all threaten further development. Also, in sectors such as intellectual property and trade in services (covering banking and investment, professional services, telecommunications), national sovereignty is reduced. *Ibid.* at 25.

to benefit 'the fruits of technological progress' and the issue of social development still has to be more thoroughly addressed in a world that now seems exclusively governed by economics.[132]

All this points out to the fact that while liberal economic trade policies may contribute to economic development, they do not constitute a sufficient condition. "Domestic policies relating to investments in education, infrastructure, health care, and the quality of a country's legal system and bureaucracy clearly also matter."[133] In a recent statement, the WTO Director-General, Mike Moore, was underlining that much progress was still needed in the areas of agriculture and services to further development.[134] At UNCTAD X held recently in Bangkok, where developing countries expressed their dissatisfaction with the results so far achieved with the UR, Mr. Moore also recognised that " trade is not enough " and that successful integration of developing countries in our globalised world constituted the challenge of the 21st century.[135]

3) Future Prospects for Development in a Globalised World

The huge inequity characterising the North-South division was deeply rooted in the colonial past and was reproduced to a certain extent in the post-war structures of

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[132] *Ibid.* at 29, stating that: "Trade policy reforms and trade liberalisation have to be further pursued in order to help improve resource allocation and competitiveness, although they would need to be linked more effectively to policies that cushion the social cost of the reform process and provide a safety net for vulnerable groups."

[133] Trebilcock & Howse, *supra* note 37 at 394.

[134] See Mike Moore, Director-General, World Trade Organisation "Prospects for the Developing Countries in the Next Round", Address to the Development Committee of the European Parliament, 21 February 2000, available online at <http://www.wto.org/wto/speeches/mm25.htm> (accessed Feb.25 2000) "The mandated negotiations in agriculture and services are of vital importance to the economic future of countries at all levels of development. In agriculture, improved market access and reduced competition from richer countries' subsidies are crucial for most developing countries, both to develop their present structure of trade and to diversify into products with potential for new development. Services trade development and diversification can also bring considerable gains to developing countries, not only in themselves, but as a precondition for efficiency enhancing reforms in main infrastructural sectors such as telecommunications, finance, insurance, and transport."

[135] See Mike Moore, Director-General, World Trade Organisation "Back On Track for Trade and Development", Keynote address, UNCTAD X, Bangkok, 16 February 2000, available online at < http://www.wto.org/ wto/speeches/mm24.htm > (accessed Feb. 25 2000) "Clearly, maintaining markets open is not enough. (...) The challenge for all of us in these first years of the 21st century is to use trade, investment and the other tools available to us to promote economic growth, social development, poverty alleviation and productive investment in a way that can make a difference to the lives of the billions of people living in poverty throughout the world. (...)Those who rail against developing countries having globalisation forced upon them are doing great mischief and a great disservice to the cause of development. The real danger is the opposite - that the benefits of globalisation may pass by many developing countries unless they can be more fully integrated into the global economy."

international economic relations established by the Bretton Woods system with the IMF, the World Bank and the GATT, ironically designed to create a "new" economic order. But the NIEO ideology, promoting an "ideal system of (...) conscious international management of global economic relations,"[136] also failed to bring significant new developments. Its conception and emphasis on national sovereignty and its call for a redistribution of resources was completely conflicting with the established order governed by industrialised countries, that on the other hand extensively used the loopholes of the system to serve their interests at the detriment of developing countries. Developed countries changed directions and now follow the prescriptions of the liberal order. However, underdevelopment is far from being resolved and it appears that the UR has failed until now to deliver its promises. Therefore, while NIEO failed, it seems that liberal economic development theory is also outdated at a time of world-wide integration.

Both models relied too heavily of the divisions between national and international market and between public and private international law.[137] The liberal model is wrong in assuming that the establishment of a perfect market is the ultimate goal to achieve, neglecting social and political structures. Similarly, the radical model was wrong in assuming that placing the market within the state as a way to ensure national sovereignty and delink from the biased international economic structures would succeed into fostering further growth and development. Now that we live in an era of increased globalisation at all levels, blurring the distinctions between national and foreign markets, private and public issues, both models seem outdated.

Taking all that into account produces two conclusions. First, developing countries, which have changed directions, followed the prescriptions of the neoliberal order, and are trying to integrate the world economy, should continue to push for greater multilateral trade liberalisation in sectors of interests to them, and use the

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[136] Murphy, *supra* note 11 at 3.

[137] See Cao, *supra* note 28 at 212-213. The author considers that the failure of both dominant models of international economic development is explained by their uncritical acceptance of two dichotomous premises : the national/international market dichotomy which is intertwined with and inseparable from the public/private international law dichotomy. " The classical liberal model is wholly immersed within the 'private' international economic order of the GATT, excludes elements considered part of the 'public' international order from its parameters, and adopts an apolitical posture towards the national and the international market. By contrast, the radical model navigates the national/international market dichotomy in the politically charged language of public international law, inhabits the 'political' public international order of nation states and of the UN, and excludes elements considered part of the 'private' international world of commerce from its parameters. " *Ibid.* at 213.

GATT/WTO framework and mechanisms such as the DSU. They must contribute to a greater institutionalisation of the global trading rules so that industrialised countries that always tried to circumvent the rules may no more cheat them, and have to organise in order to be able to obtain some of that precious knowledge capital related to the current information revolution. In other words, developing countries should not discount the legal effectiveness of multilateral trade agreements, despite disappointing results.

Second, remembering the past attempts and the fact that we are now in an era of globalisation, developing countries also have to develop other strategies in order to further economic growth and development. They can not only wait for the multilateral system to become more responsive to their needs and they have to pursue other orientations than to solely rely on their traditional demands in the multilateral sphere, hoping that their terms of trade will progressively improve. One strategy that has been increasingly used over the last years by developing countries is to form and establish regional integration arrangements. The trend toward regionalism, with the revival and emergence of numerous regional schemes among developing countries, does seem promising.[138] Some even argue that the failure of newly independent developing countries to resist the economic and political domination of developed countries in the past is explained by the fact that they did not succeed into forging closer links between themselves.[139]

Regional agreements involving emerging markets have in fact acquired a new life, as localised extensions of the unilateral trade reforms that have been taking place, with the result that in some cases trade has grown rapidly, including with third countries.[140] Use of the regional market, maintaining and improving preferential access where there is scope to do so, does provide a 'springboard' for these countries to compete on the

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[138] "Developing Countries and Multilateral Trade Agreements", *supra* note 25 at 1732, stating the following with respect to regionalism : " Developing countries must seek out strategies for attaining economic growth that do not depend solely on legal reform of the terms of trade between themselves and industrialised countries. The integration of regional markets presents a promising strategy in this regard".

[139] See Kiplagat, *supra* note 27 at 43-44 , arguing that regional economic integration supported by strong supranational institutions could have brought good economic results and that it is the developing countries' resistance to create such state sovereignty depriving institutions that explains the failure of regional groupings created at that time : " The disintegration of virtually all integration initiatives in developing countries may largely be blamed on rigid adherence to the state sovereignty doctrine and on the resulting fact that no significant regional institutions were ever formed. "

[140] Drabeck & Laird, *supra* note 104 at 249.

world market. But apart from the possible economic impact of such regional arrangements, there are also many non-economic related effects, relating for instance to greater co-operation and policy integration, which could be very useful for developing countries. In a context where integrating the world economy is the perceived goal to be achieved by every nation, regionalism could prove to be advantageous for most developing countries. By favouring trade growth *and* co-operative policies, regional integration arrangements may thus be useful transition for developing countries. In addition, since developed countries continue to use protectionist instruments that contradict their official multilateral position, regional blocs among developing countries could help to demand new rules in the international system. But the implications of regionalism for the multilateral trade order are numerous and many question the actual benefits deriving from regional schemes.

II. THE REVIVAL OF REGIONALISM

Economic integration is the process of eliminating discrimination, through the mechanism of free trade, between the economies of a group of countries. It represents the attempt of two or more states to merge their economies as to take advantage of increased trade and investment, economies of scale, and trade specialisation. Bela Balassa has described integration as a state of affairs "represented by the absence of various forms of discrimination between national economies."[141] Multilateral economic integration is regulated through the GATT-WTO framework that constitutes the basic set of rules regulating the global trading order, its core principles being non-discrimination, reciprocity and transparency. However, numerous states are also members of geographically discriminatory arrangements, i.e. preferential trade agreements among a subset of countries, which in fact discriminate trade of non-members. Therefore, economic integration is also pursued at the regional scale.

Preferential trading agreements (PTAs) among countries in a region, where signatories grant to each other lower tariffs on their imports, have been a feature a the world trading system for a long time.[142] They are now also called regional trading arrangements (RTAs), or increasingly regional integration agreements (RIAs) when they include objectives going beyond the goal of free trade. Such geographically discriminatory arrangements are varied in structure and significance, as are the motives for creating such a grouping. These variations include for instance the extent of liberalisation of trade in goods, services and factors of production, whether they involve policy actions and a common external trade policy. Such regional arrangement may not cover all trade in goods (e.g. many exclude agriculture) and still allow for protection covering intra-area trade flow (e.g. antidumping actions permitted, rules of origins). Regionalism can thus be defined as the preferential reduction of trade barriers

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[141] B. Balassa, The Theory of Economic Integration (Lloyd Reynolds ed., Richard Irwin, Inc. 1962) 1.

[142] See B. Hoekman, M. Schiff & L.A. Winters, *Regionalism and Development : Main Messages From Recent World Bank Research*, Development Research Group, World Bank, September 1998, available online <http://www.wto.org/develop/rtasem.rta>[hereinafter *Regionalism and Development*] at 2. " Regionalism in the sense of preferential trade arrangements between distinct customs territories has been prevalent throughout much of the last three centuries. Preferential trade arrangements characterised the 18th and 19th centuries, being a key characteristic of colonial empires as well as the trade relationships of sovereign kingdoms (e.g. the Austro-Hungarian customs union). They have played a key role in the process of state formation (...). "; See also Srinivasan, *supra* note 24 at 59.

among a subset of countries (the constituent members of the regional grouping) that might be geographically contiguous, its characteristic being discrimination in liberalisation. It can also be considered as "an outgrowth of government policies intended to increase the flow of economic or political activity among a group of states in close geographic proximity."[143] However, geographic proximity may not be an essential factor in the current context as other factors like politics, cultural affinity, languages, ethnic background and importance of the trading relationship can prove to be more determinant.

Four stages of regional economic integration schemes have traditionally been identified: (1) a free trade agreement (FTA) providing for the free circulation of goods and commodities through the elimination of tariffs and non tariffs barriers to trade; (2) a customs union (CU) which adds a common external tariff to the FTA base, centralising the group's external trade policies; (3) a common market involving free movement of additional factors like labour and capital and the harmonisation of some economic policies; (4) an economic union which is a common market with substantial harmonisation of economic and monetary policies.[144] They are different than trade preferences such as the GSP since the preferential treatment is reciprocal.

In order to explain the current existence and revival of regional trade preferences (at a time where it is considered that trade discrimination distorts efficient resource allocation and thus economic growth), it is important to remember that preferential agreements within Europe were already in place before the drafting of the GATT and that in the post-war reconstruction context, it was thought that such arrangements would be beneficial to those countries deeply affected by World War II. Therefore, a special provision was made with GATT Article XXIV to allow for the existence of such arrangements inconsistent with the non-discrimination principle. It was never

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[143] E.D. Mansfield and H.V. Milner, " The Political Economy of Regionalism : An Overview " in E.D. Mansfield and H.V. Milner, eds., *The Political Economy of Regionalism*, (New York: Columbia University Press, 1997) 1 at 3.

[144] See F.J. Garcia, " Americas Agreement : An Interim Stage in Building the Free Trade Area of the Americas " (1997) 35 Colum. J. Transnat'l L. 63 [hereinafter "Americas Agreement"] at 70, referring at Balassa, *supra* note 141 at 2-3. (According to Balassa: "In a free trade area, tariffs (and quantitative restrictions) between the participating countries are abolished, but each country retains its own tariffs against non-members. Establishing a customs union involves, besides the union, equalisation of tariffs in trade with non-member countries. A higher form of economic integration is attained in a common market, where not only trade restrictions, but also restrictions on factor movements are abolished. An economic union, as distinct from a common market, combines the suppression of restrictions on commodity and factor movements with some degree of harmonisation of national economic policies".)

thought that RTAs would have such an increasing influence on international trade. In fact, it appears that trade liberalisation under the GATT paralleled a process of increasing economic integration among contracting parties. Nearly all of the WTO's 134 Members have now concluded RTAs with other countries. From 1948 to 1994, 118 RTAs relating to trade in goods, of which 38 in the five years ending in 1994, were notified to the GATT and since the creation of the WTO in 1995, 80 additional RTAs have been notified.[145] Out of the total of 198 RTAs notified under the different provisions allowing such a formation in GATT/WTO (e.g. GATT Article XXIV, the Enabling Clause and GATS Article V), 119 are presently in force.[146]

RTAs always played an important role, but in the current global environment, their revival is characterised by the fact that many of them are seeking to achieve a *deeper* level of integration,[147] or at least include some elements of policy integration.[148] Another contrast with the past is that those arrangements are said to be more *open*, as opposed to the inward looking integration of the 1950s and 1960s, and also in relation to the possibility for outsiders to apply for membership.

Despite the unexpected success of the UR and the establishment of the WTO said to consolidate the multilateral trade order, regional agreements are now an integral part of the international trading order and the WTO has recently come to acknowledge a certain complementarity between regional and multilateral integration since the consolidation of the multilateral trade order did not put to rest the appeal of regional integration. In the Singapore Ministerial Declaration in December 1996, the WTO members expressed the following with respect to RTAs[149]:

> We note that trade relations of WTO Members are being increasingly

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[145] See WTO, Regional Integration and the Multilateral Trading System, information available at <http://www.wto.org/wto/develop/regional.htm#2> (last update Nov. 10, 1999).

[146] For the list of regional trade agreement (in force in November 1999), go see <http://www.wto.org/wto/develop/webrtas.htm> for RTAs notified under GATT Art. XXIV; go see <http://www.wto.org/wto/develop/webrtasb.htm> for RTA notified under the Enabling Clause; go see <http://www.wto.org/wto/develop/webrtasc.htm> for RTAs notified under GATS Art. V (last update Dec. 10, 1999). All lists provide the examination status of the agreements by the Committee on Regional Trading Arrangments (CRTA) (see discussion on the CRTA below under Part II(A)3 (b.2)).

[147] The new regionalism includes attempts to liberalise trade in services, factor movements, harmonisation of regulatory regimes, environmental and labour standards, in fact all domestic policies perceived as affecting international competitiveness. See Srinivasan, *supra* note 24 at 61.

[148] " Policy integration can be defined as actions by governments to reduce the market segmenting effect of differences in national regulatory regimes through either co-ordination, harmonisation, or mutual recognition of national laws, regulations, and enforcement mechanisms." *Regionalism and Development*, *supra* note 142 at 7.

[149] See WTO, *Singapore Ministerial Declaration*, 18 December 1996, WT/MIN(96)/DEC, online at <http://www.wto.org/wto/archives/wtodec.htm >, at par. 7 (accessed Feb. 25, 2000).

> influenced by regional trade agreements, which have expanded vastly in number, scope and coverage. Such initiatives can promote further liberalisation and may assist least-developed, developing and transition economies in integrating into the international trading system. (...) We reaffirm the primacy of the multilateral trading system, which includes a framework for the development of regional trade agreements, and we renew our commitment to ensure that regional trade agreements are complementary to it and consistent with its rules. (...)

Regional trading arrangements are now present in every part of the world, be it in Europe (with the EU being the deepest regional scheme at the moment) [150], the Americas[151], Asia[152], Africa[153] and even in the Middle East. Currently, Latin America

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[150] The European Union is currently the most advanced example of deep integration. But it was a long road since the French Minister of Foreign Affairs Schulman signed in 1951 with the German Chancellor Adenauer the European Coal and Steel Community. This sectoral agreement would then become a common market in 1957 with the signature of the Treaty of Rome. The period 1957-1966 would be a good one for the six members (France, West Germany, Italy, Belgium, Netherlands, Luxembourg) with a strong economic growth that favoured the elaboration of a common agricultural policy (a kind of uniform protectionism) and the abolition of certain commercial tariffs within the territory of the members. However the following period (1966-1985) would be much more tumultuous because of the economic problems of the 1970s and the tensions between members, particularly with England who became a member in 1973 at the same time as Ireland and Denmark. To the commercial and agricultural policies was also added a common monetary system (the " tunnel ", the " snake " and then the European Monetary System in 1979) in order to reduce fluctuations and install a certain monetary discipline. Greece joined in 1981 followed by Spain and Portugal in 1986. Optimism was back at that time with the common industrial policy and finally the creation of a common social policy, historically a typical national government domain. The Single European Act of 1987 and the Maastricht Treaty in 1992 further consolidated the European integration by fostering inter governmental co-operation in the fields of foreign policy and Justice. It came into force in 1993 and now the Euro currency was recently launched on January 1st 1999, with the foreseeable end of national currencies in 2002.
The European Union, with its strong institution building at the legislative, judicial and executive level, remains an example of profound integration, going from the objectives of economic co-operation to the formation of a political union. The European Union also has a number of free trade agreements and association agreements with numerous other European countries, particularly with the transition countries in Central and Eastern Europe. These countries have already concluded their regional agreement: the Central European Free trade Area (CEFTA) which seeks for the establishment of a free trade area in the region and foresees the opening of their market to third countries. The resulting picture is a complex network of free trade agreements and customs unions as well as schemes for preferential access to the EU market.

[151] We examine the different regional schemes of the Americas below under Part III (A).

[152] The Association of Southeast Asian Nations (ASEAN) was created in 1967 among Indonesia, Brunei, Malaysia, the Singapore, Thailand and Vietnam. ASEAN relies on the private ordering of business circles for making macroeconomic decisions affecting international trade and other economic exchanges within and outside of ASEAN. It does not create any organs with supranational powers nor supranational rules and members keep their freedom to conduct international investment, trade and commercial policies with each other and with third countries. It was only in 1979 that a preferential trade arrangement was established in order to reduce trade barriers on specific products. ASEAN represents the trend towards open regionalism, which is centred on the creation of larger economic units to facilitate the insertion of national economies into the global markets. Members of ASEAN finally signed in 1992 the Singapore Declaration which foresees the establishment of an ASEAN FTA within fifteen years with the objectives of enhancing intra-ASEAN economic co-operation to sustain the economic growth of member countries and improving efforts to remove tariffs and non tariffs barriers impeding intra-ASEAN trade and investment flows. ASEAN encourages co-operation and exchanges among the private sectors of ASEAN and non-ASEAN countries and policies that promote greater investment.

and Europe are leading in terms of numbers of new regional initiatives, with Asia and Africa coming last, even though at that time, many agreements are put in place at least on paper in Africa. The trend is toward the creation and consolidation of three major trading blocs: Europe, the Western Hemisphere and the Pacific region.[154]

Another regional forum existing within Asia is the Asia-Pacific Economic Co-operation (APEC) that can be considered as a new type of international institution. APEC was first established in 1989 between Australia, Japan, US and the members of the Association of Southeast Asian Nations (ASEAN) as a vehicle for Australia to enter Asia through an informal consultative forum for non binding discussion.. APEC's purposes were to lend support to the push for world-wide trade liberalisation and to simultaneously assess trade, investment and other common economic interests in the Asia Pacific region. While the United States tried to direct APEC into the area of regional trade liberalisation at the Seattle Summit of 1993, that effort failed with APEC making global trade liberalisation its highest priority. Through 1994 and 1995, APEC would settle on what can be termed as a Trade Facilitation and Business Promotion Association, a new form of regional co-operation focusing on trade facilitation in the form of a non binding investment code and on business promotion through the adoption of informal promotion plans. APEC is therefore an outward looking regional block promoting concerted unilateralism in trade liberalisation, trade facilitation and business promotion. See A.A. Faye, " APEC and the New Regionalism: GATT Compliance and prescriptions for the WTO " (1997) 28 Law and Pol'Y in Int'l Bus. 175. See also M.E., Jarrow, "Symposium: Institutions for International Economic Integration: Assessing APEC's Role in Economic Integration in the Asia Pacific Region" (1996-97) 17 J. Int'l Bus.L. 947.

[153] Most of the least developed countries of the world are located in Africa. Now that the Cold War is over and that the former superpowers do not need Africa as a discrete battlefield anymore, it seems like the problems confronting development in some areas are insurmountable. While some regional groupings were formed in the 1970s, many collapsed while Africa accounts for a declining share of world trade. Currently, African economic regional integration arrangements, referred to as the Regional Economic Communities (RECs) are on the rise again and are numerous. There is for instance the Arab Maghreb Union (AMU), the Common Market for Eastern and Southern Africa (COMESA), the Intergovernmental Authority on Development (IGAD), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC). These RECs are perceived in the Treaty Establishing the African Economic Community (AEC) as the " building blocks " of the said AEC. The RECs are then to " develop gradually and progressively into free trade areas, customs unions and, through horizontal co-ordination and harmonisation, eventually evolve into a common market embracing all of Africa."
However the integration processes followed by the RECs are not similar and may differ in approaches and procedures. At the time being, the rise of those agreements did not really help the constituent members. The biggest problem may be that the institutions, mechanisms and activities implemented on paper are not operational because they are underfunded or limited by the lack of complementary development in other areas. In addition to serious financial problems, integration processes are slowed down by the political instabilities in some member states. Another problem relates to the multiplicity of RECs and other intergovernmental organisations as there is more than one organisation in each geographical subregion of Africa. The resulting simultaneous membership and overlapping commitments does provoke management complications, increases the costs of integration and adjustments and makes the task of horizontal co-ordination and harmonisation very difficult. The problem with regionalism in Africa is that the basic conditions for truly implementing an operational regional integration agreement are absent because of the complete lack of resources and unstability. See generally T. Mulat, " Multilateralism and Africa's Regional Economic Communities " (1998) 32(4) Journal of World Trade, 115-138. See also Demske, S., "Trade Liberalisation: De Facto Neocolonialism in West Africa" (1997) 86 Geo. L. J. 155.

[154] "The evidence is indisputable that intra-regional trade is growing rapidly in each of the three geographic areas – Western Europe defined as the EU, North America defined as NAFTA, and East Asia. (...) Whether or not 'bloc' is the appropriate word to describe what is happening in the three major regions, the fact speaks for themselves – a tripolar trading world is emerging". S. Weintraub, "The North American Free Trade Agreement" in *Economic Integration World-wide*, supra note 101, 203 at 220.

Reasons and motives explaining the phenomenon are multiple, as well as its effects. In addition, these agreements are far from being uniform as each one of them has its particular characteristics which depend upon the degree of integration looked for, the reasons having motivated the formation of the regional grouping, the areas that are covered by it, the nature of the countries composing it and their respective level of economic development. Another fundamental element of regionalism is the degree of national sovereignty delegation to which the members agree upon when they implement supranational institutions that are to govern such regional arrangement. Presumably, the more national sovereignty delegation there is, deeper will be the economic integration sought by the regional grouping.

But the relationship between RIAs and the multilateral trade order is complex, economically as well as legally, and multiple scholars have debated these issues in the last decades, mainly attempting to determine whether or not regionalism was undermining multilateralism. Economists study regional integration by analysing its static effect (does it create or divert trade) and more recently its dynamic effect (does it positively influence economic growth for the members). Legal scholars in turn consider current GATT provisions dealing with FTA and CU, such as Article XXIV, to be ill-equipped to prevent the negative effects of regionalism for the multilateral system. The fundamental issue now is really whether or not proponents of the "new" regionalism are right in considering that "total trade creation will outweigh trade diversion in most cases, that the multilateral process is too slow to produce substantial progress toward further trade liberalisation, and that regional free-trade arrangements will allow nations to speed up liberalisation and ultimately produce a self-reinforcing process toward open markets."[155] While no clear answer to this undergoing debate seems possible, the reasons explaining the revival of regionalism in the 1990s are multiple. In addition, a particular feature of such a revival is that developing countries have re-embraced this trend at the same time they were changing directions in trade policy, leaving behind inward oriented strategies to plunge into market driven economy and free trade policies.

[155] Srinivasan, *supra* note 24 at 61.

A) THE RELATIONSHIP BETWEEN REGIONAL INTEGRATION ARRANGEMENT AND THE MULTILATERAL TRADE ORDER

Responding to the current world-wide drive towards regionalism which has now proven to be a lasting phenomenon instead of the transitory phase it became in the 1950s and 1960s, the controversy over the potential impact of regional groupings on the multilateral system has been dividing the international trade community for some years now. Those who argue against regionalism suspect that regional groupings will gain too much importance and will become stumbling blocks to multilateralism, causing the collapse of multilateral free trade and the decline of political stability. On the other hand there are those who argue in favour of regionalism, holding that regional free trade areas will foster multilateral free trade globally and should thus be considered as building-blocks to multilateralism. In other words, is the regional integration phenomenon of the 1990s a stimulation or a threat to the multilateral trading system?[156] First, we review the elements that have motivated states to enter into such geographically discriminating arrangements when the principle of non-discrimination is supposed to be the cornerstone of the international trade system. We will then examine how economists consider RIAs and how the GATT and the WTO have reacted to this lasting phenomenon. We conclude by looking at the arguments dividing scholars in the regionalism versus multilateralism debate.

1) Motives Behind the Revival: Explaining Current World-wide Regionalism

States have always found it effective to form such regional integration agreements in order to further lower trade barriers among neighbour states (traditional trade gains), encourage producers consequently benefiting of the advantages of a larger regional market (thus able to benefit from economies of scale and enlargement of market access and distribution), attract more foreign investments by the prospects of a larger market and deal with issues not currently covered by the WTO/GATT framework.[157] But other factors also contribute to explain the resurgence of regional integration

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[156] See H.G. Preuse, " Regional Integration in the Nineties : Stimulation or Threat to the Multilateral Trading System " (1994) 28 :4 Journal of World Trade 147.

[157] J.C. Castel, A.L.C. de Mestral & W.C. Graham, *The Canadian Law and Practice of International Trade* (2nd ed.) (Toronto: Montgomery Publications, 1997) at 109.

agreements in the 1990s.

The fact that the future of the multilateral trading order was uncertain during the 1980s with stagnating UR negotiations also explains the revival of regional arrangements. The GATT system had been increasingly threatened by the erosion of the non-discrimination principle in the 1980s (with the proliferation of GATT inconsistent measures such as NTBs) and "that threat was highlighted as the two largest trading units embarked on major regional initiatives, completing the European common market and establishing the NAFTA."[158] Regionalism was viewed as allowing faster and deeper integration among a smaller group of countries with consequently easier negotiations. Indeed, the success of the EU and the change in attitude of the United States with respect to regionalism favoured the revival of regionalism. The shift in US policy, the traditional main supporter of multilateralism, is said "to have led to a proliferation of regional arrangements around the world."[159] The US started in the late 1980s to pursue liberalisation on a preferential basis, as demonstrated notably by the 1984 launching of the Caribbean Basin Initiative (CBI), the conclusion of the Canada-United States Free Trade Agreement (CUSFTA) in 1989, the 1990 Enterprise for the Americas Initiative (EAI) and the conclusion of NAFTA in 1994 . In fact, " the establishment of NAFTA is widely viewed as a turning point in international trade relations confirming the shift towards regional blocs."[160]

GATT was successful in reducing tariffs at the multilateral level, but the proliferation of NTBs and behind the border barriers under the multilateral trade order, and the administrative protection related to aggressive use of anti-dumping actions and safeguard measures, all appeared as annihilating some of the tariffs cuts negotiated in multilateral trade negotiations.[161] Eventually, these discriminatory measures provoked the need for deeper integration, a process whose complexity increases exponentially with the number of countries involved.[162] Thus the advantage of concluding RIA with a limited number of important trading partners, where the agenda of negotiations can

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[158] R. Pomfret, *The Economics of Regional Trading Arrangements*, (Oxford: Clarendon Press, 1997) at 2.

[159] A. Panagariya & T.N. Srinivasan, " The New Regionalism : A Benign or Malign Growth ? " in *The Uruguay Round and Beyond*, *supra* note 3, 221 at 223.

[160] Preusse, *supra* note 156 at 148.

[161] See Panagariya & Srinivasan, *supra* note 159 at 237.

[162] See C.P. Braga, " Comments on the Proliferation of Regional Integration Arrangements " (1996) 27 Law & Pol'Y in Int'l Bus. 963.

focus on the specific interests of the participants.[163]

Such arrangements may also relate to some strategic linkage (e.g. political and security issues in the formation of the EU), the desire to increase one's multilateral bargaining power (e.g. EU and MERCOSUR now having a better leverage towards the United States), permit a secure guarantee of entry on a dominant foreign market (e.g. Latin America and the US), and 'lock-in' unilateral reforms (e.g. Mexico entering in NAFTA to secure its access to the American market under clear rules but also to prevent a reversal in trade policy). Recently, another fundamental factor emerged: the demonstrated lack of stability in market exchange rates. Such a "volatility of values among the principal currencies tends to reinforce the incentives for focusing trade on regional partners."[164] This regionalisation of trade in turns favours regionalism. The formation of regional trading blocs can also be viewed as a transition towards multilateral liberalisation, helping member states to deal more progressively with the challenges of insertion into the world economy and increased competition.[165] And as globalisation increases competition, the potential of regional arrangement to bring foreign direct investment also becomes an important factor.[166] However, many emphasise that the current proliferation of regional arrangements is threatening the multilateral trade order.

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[163] See C.P. Braga & A.J. Yeats, "Minilateral and Managed Trade in the Post-Uruguay Round World" 3 Minn. J. Global Trade (1994) 231, at 233-234, noting that the slow pace of GATT negotiation, the fact that they involve a large number of participating countries with very diverse interests and that GATT decisions are made by consensus of all members might explain the growing interest for regional schemes.

[164] P.A. Volcker, " Regionalism and the World View of Arthur Dunkel " in *The Uruguay Round and Beyond*, *supra* note 3, 215 at 218.

[165] This is often referred to as the 'bicycle theory' of trade liberalisation. See Trebilcock & Howse, *supra* note 37 at 27.

[166] See generally V.N. Balasubramanyam and D. Greenaway, "Regional Integration Agreements and Foreign Direct Investment" in K. Anderson & R. Blackhurst, eds. *Regional Integration and the Global Trading System* (New York: St. Martins Press 1993), 147-166.

2)Elements of Economic Theory Regarding FTA and CU

Countries enter into regional economic integration schemes for different reasons, depending upon particular circumstances and political motives. But there are important economic implications, and the potential economic gains deriving from membership to a regional arrangement often constitute the main argument presented by the authorities to convince public opinion that such a membership would yield positive results. According to Professor Ali M. El-Agraa,[167] the possible sources of economic gain for FTA and CU can be attributed to the following factors:

> (a) enhanced efficiency in production made possible by increased specialisation in accordance with the law of comparative advantage; (b) increased production levels due to better exploitation of economies of scale made possible by the increased size of the market; (c) an improved international bargaining position, made possible by the larger size, leading to better terms of trade; (d) enforced changes in economic efficiency brought about by enhanced competition; and (e) changes affecting both the amount and quality of the factors of production due to technological advances.
> Beyond the CU level towards economic union level, further sources of gain become possible due to: (f) factor mobility across the borders of member nations; (g) the co-ordination of monetary and fiscal policies; and (h) the goals of near full employment, higher rates of economic growth and better income distribution becoming unified targets.

We now review how has economic theory approached the relation between preferential regional schemes and the multilateral liberalisation process, which is the only one supposed to foster global allocation of resources and maximised welfare. It was first considered that since FTA and CU represented a move towards free trade, they would also lead towards increased welfare. This is the theory behind GATT Article XXIV, based upon the policy that world welfare can be enhanced by trade regimes that eliminate restrictions within a group of countries.[168] But regional trading blocs rapidly started to be negatively analysed by trade economists.

The traditional integration theory estimates that multilateral free trade is better than discriminatory policy because the latter brings discriminatory effects against non-members, which leads to a possible misallocation of global resources. Viner

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[167] See A. M. El-Agraa, " The Theory of Economic Integration " in *Economic Integration World-wide*, supra note 101, 34.

[168] Pomfret, *supra* note 158 at 74, stating that: "Article XXIV represents the GATT-drafters' attempt to resolve the potential conflict between their ultimate goals of freer and non-discriminatory trade policies: as long as trade barriers exist, a preferential tariff reduction is a step towards the first goal and away from the second goal."

established in 1950 with its famous customs union theory, that such arrangements were in fact a combination of free trade (between the members) and protectionism (towards non-members), resulting in trade creation (the replacement of expensive domestic production by cheaper imports from a partner) and/or trade diversion (the replacement of cheaper initial imports from the outside world by more expensive imports from a partner).[169] The central concepts of the mainstream CU theory are Viner's trade creation/trade diversion and it is the balance between those concepts that is to determine whether or not the preferential scheme is beneficial.

Such an analysis then led to the general theory of second-best: removing all distortions was considered the first-best solution and geographically discriminatory arrangements were only second-best.[170] Economists that elaborated upon this issue mostly emphasised the costs of discrimination, by comparing unilateral tariff reduction with preferential tariffs. Following the Vinerian sceptical view, most international economists considered that discriminatory arrangements could be explained only by non-economic motives.[171]

More positive approaches of regionalism were elaborated in the 1980s and 1990s, which emphasised upon new concepts such as *open regionalism* and *deeper integration* instead of discriminatory trade policies. Compared to the old mainstream theory mostly preoccupied with *static* effects (trade creation/trade diversion), the *dynamic* effects of regional integration were increasingly taken into account. New elements such as geographic proximity, importance of national boundaries, location of economic activity, imperfect competition, regulatory harmonisation, monetary integration, NTBs now outweighing tariffs in significance, and considerations of non-trade matters were included in the integration analysis.[172]

The new theoretical and empirical work on the dynamic effects of integration emphasises the growth impact of regional integration, an element that was neglected

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[169] Jacob Viner's seminal contribution is contained in the fourth chapter of *The Customs Union Issue*, (New York: Carnegie Endowment for International Peace, 1950). See A. M. El-Agraa, *supra* note 167 at 35.

[170] Meade introduced the theory of second-best in 1955. Pomfret, *supra* note 158 at 182-183. But Trebilcock & Howse point out that: "compared to complete, undistorted global free trade, regional trading blocs are clearly second-best. But compared to the world trading system that actually prevails, or is likely to prevail in the foreseeable future, the case against regional trading blocs is not so clear."

[171] That theory is referred to as the Jonhson-Cooper-Massell (JCM) proposition, introduced in 1965, which implies that preferential trading arrangements are economically irrational and can be explained only by non-economic motives. See Pomfret, *ibid.* at 185.

[172] See *ibid.* at 207-238, describing the New Regionalism.

by the traditional integration school.[173] These dynamic growth effects would counteract the negative effects of trade diversion by fostering co-operation, harmonisation and attracting foreign investment.[174] In addition, the empirical question about whether or not regional arrangements lead to a large diversion of trade becomes less important in our current global context where MFN tariffs are constantly reduced. Therefore, even if there is evidence that trade within regional areas is growing faster than trade with non-members, when tariffs are low and declining, the possibility of really dangerous trade diversion becomes limited.[175]

Economists began to consider RTAs not only on the basis of national welfare benefits, but also as stepping-stones to multilateral trade liberalisation.[176] Promoters of regional integration argue that its positive effects (i.e. regionalism becomes a promoter of multilateral free trade) are linked to the new regionalism which is characterised by *deep* integration, for instance within a common market (which includes free flows of capital and labour and a comprehensive harmonisation of institutions and regulations) and by the *openness* of the regional markets against non-members (presented as a condition for the dynamic gains from integration to become effective).[177] Therefore, regional groupings may be considered as stimulating or detrimental depending on their level of integration and their openness. They must achieve deep integration, remain open to non-member and avoid protectionism to be considered " building blocks " or " stepping stones " towards multilateralism.

Some are still critical of the *open* regionalism and *deep* integration concepts, and

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[173] Preuse, *supra* note 156 at 150; But in 1962, Balassa had already examined the dynamic effects of regional integration, showing that apart from economies of scale, other factors deriving from integration would influence the members' GNP, but that those gains were long term in nature and could not be described in orthodox economic terms such as economic efficiency, business practices, polarisation effect, influence on investment, etc. See A.M. El Agraa, *supra* note 167 at 46-47.

[174] Two recent theoretical approaches support the hypothesis of a positive link between integration and growth. Krugman's model (1991) is based on the new theories of international trade and assumes that economic integration and trade liberalisation will foster regional concentration and act as a catalyst for the evolution of the area and thus stimulate the " regional growth pool ". Lorenz (1992) emphasises that integration processes breed increasing interdependencies between economic and political systems, fostering deeper co-ordination, harmonisation and deregulation, all of which will help to strengthen the multilateral system. But Lorenz explicitly states that his evaluation is based on an open regionalism, this openness applying to new entrants as well as to trade and capital flows. Also, the importance of foreign direct investment attracted by a regional grouping and its impact on the economies of the member states can not be overlooked (Baldwin, 1992). See Preuse, *supra* note 156 at 150-153.

[175] See Volcker, *supra* note 164 at 127.

[176] See Pomfret, *supra* note 158 at 236, quoting Larry Summers (soon to become senior economic policymaker under US President Clinton) : " Economists should maintain a strong, but rebuttable, presumption in favour of all lateral reductions in trade barriers, whether they be multi, uni, bi, tri, or plurilateral. Global liberalisation may be best, but regional liberalisation is very likely to be good. "

reiterate that any preferential trading area possesses key flaws that are detrimental to global welfare.[178] These regional groupings may be seen as threatening for the multilateral order, despite the recent emphasis on policy integration and on the positive dynamic consequences of RIAs. Concerns were raised regarding the protectionism brought by such regional integration agreements, like in the case of the EU.[179] But there are many other important aspects of regional agreements that do not relate to economic considerations, which are difficult to measure in our world governed by economics. For instance, "the EU and ASEAN have important and legitimate non-economic goals, so that even if the economic consequences were found to be negative, they might well be outweighed by the positive benefits from regional concord."[180] In any case, "it is clear (..) that quantification of the effects of integration has been relatively rudimentary partly due to the lack of consideration of the many problems involved, but more importantly due to the inherent complexity of the effects."[181]

Overall, regional groupings have thus increasingly been considered as an additional instrument of trade liberalisation almost as good as multilateral liberalisation. However, it is still a contentious issue on which economists and legal scholars continue to differ.

3) Regional Integration Agreements and the GATT/WTO

The growing importance of those agreements in the last years demonstrates that for the immense majority of nations regional integration does bring advantages, not necessarily all economic, that can not be neglected in our competitive environment. Regionalism is now an unquestionable and irreversible fact and numerous are those who now perceive it as an essential step to the process of complete globalisation. But

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[177] Preuse, *supra* note 156 at 153, 160.

[178] See *e.g.* Panagariya & Srinivasan, supra note 159; See also J. Bhagwatti "Regionalism and Multilateralism: An Overview" in J. De Melo & A. Panagariya, eds. *New Dimensions in Regional Integration* (Cambridge University Press, 1993) at 22.

[179] The problem is that it is difficult to evaluate protectionism. As it is the case within the multilateral trade order, while the tariffs imposed by regional groupings have declined, a new form of protectionism appeared in the 1980s, based on NTBs. Therefore the impact of NTBs must be taken into account when assessing the degree of openness of any regional arrangement. And when studying the case of Europe, it appears that the external protection of the Common Market in the early 1990s tends to be higher than it had been during the 1960s. See Preusse, *supra* note 156 at 158-159.

[180] Pomfret, *supra* note 158 at 3.

[181] D. G. Mayes, " The Problems of the Quantitative Estimation of Integration Effects " in *Economic*

regionalism, as it inherently implies discrimination, does constitute a challenge for the multilateral trading system. Numerous experts consider that GATT Article XXIV is too loosely drafted and insufficient to counter the potentially negative effects of regionalism for multilateralism. The WTO is currently attempting to better monitor the phenomenon.

a) GATT Article XXIV

The non-discrimination principle has often been circumvented, on the one hand by developed nations using loopholes in GATT rules (e.g. grey-area measures), but on the other hand by some of GATT's provisions that specifically provide exceptions to the principle.[182] GATT Article XXIV provides the discipline for forming CU and FTA and is said to contain the most significant exception to MFN.[183] States members of RIA grant to each other a special form of preferential treatment, and then within the GATT/WTO framework, grant to outsider third countries separate level of MFN. By definition, CU and FTA are thus violating the principle of non discrimination by granting preferential treatment to their members. There is therefore an outward contradiction between regionalism and the multilateral order as the non discrimination principle is fundamental to multilateralism while discrimination constitutes an inherent feature of any CU or FTA.

GATT Article XXIV does authorise the formation of FTA or CU provided that certain conditions are met. Paragraph 4 sets out the basic purpose of CU and FTA: they should facilitate trade between constituent members and not raise barriers to the trade of other WTO members. Paragraph 5 and 8 outline the specific requirements: *the duties and other regulations of commerce* imposed at the institution of the CU or FTA shall not be *on the whole* higher or more restrictive than those that prevailed before the institution of the CU or FTA and the duties and other restrictive regulations of

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Integration World-wide, *supra* note 3, 74 at 94.

[182] See e.g. historical preferences grandfathered under Article I (e.g. Commonwealth Preference Systems), the General System of Preferences (GSP) for developing countries (Part IV), quantitative restrictions for reason of balance of payment (articles XII or XVIII), safeguards (article XIX), general exceptions (article XX), national security exceptions (article XXI), authorised retaliation measures pursuant to article XXIII (nullification or impairment provision), and the various non-tariff codes introduced at the Tokyo Round.

[183] See Trebilcock & Howse, *supra* note 37 at 129, stating that: "The emergence of regional trading blocks, most prominently the European Union and the Canada-US FTA, and now NAFTA, in the post-war period, collateral to the evolution of the GATT and sanctified by Article XXIV of the GATT, constitutes easily the most important exception to the MFN principle of non-discrimination embodied in

commerce must be eliminated between the members with respect to *substantially all trade* between them. In other words, the new regional arrangement should provide that *most of the trade* be subjected to the lowering of intra-regional trade barriers and that external tariffs applying to the outside world *on the whole* cannot be raised to the trade of outsiders. Paragraph 5(c) also foresees that any interim agreement to permit scheduling of the a FTA or CU must be completed over a *reasonable period of time*.

Economists have criticised GATT Article XXIV for failing to take into account preferential trading theory by focusing on "the reduction of barriers to *substantially all trade* between members" instead of requiring a trade creation effect,[184] and deplore the fact that there was no attempt to revise it.[185] But it should be remembered that the trade creation/diversion effect can not be transformed into a rule capable of guiding governments as the economic impact of a trade preference can not be determined in advance.[186]

Article XXIV was also criticised for being bad law in addition to bad economics, since the stated conditions for forming the FTA or CU appear in practice to be too vague and imprecise. Many problems arise with the application of those provisions. Regarding Paragraph 5, the rule for duties is understandable as it is possible to determine if duties went up or down after the formation of the arrangement. But comparing the average height of trade barriers on the whole can be done in many ways. It is also unclear what the term 'other regulations of commerce' means and measuring whether or not the incidence of those regulations went up or down or became more restrictive is also a problem. For instance, Article XXIV does not deal

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the GATT (...)."

[184] "Economists –following Viner's (1950) theory of customs unions- have analysed RIAs primarily by comparing the relative efficiency of preferential and multilateral trade liberalisation, their standard conclusion being that tariff preferences may or may not increase welfare depending on whether they divert or create trade. From that perspective, the substantially-all-trade criterion makes little sense, because it obliges contracting parties to include in their RIAs preferences that divert trade from more efficient producers in third countries to less efficient producers in the preference-receiving country, thereby reducing world welfare. (...) Rather than requiring that the discrimination in favour of the regional partners be complete, [some argue that] the GATT should insist that RIAs do not divert trade or at least do not divert more trade than they create." F. Roessler, "The Relationship Between Regional Integration Agreements and the Multilateral Trade Order" in Anderson & Blackhurst, *supra* note 166, at 312.

[185] Pomfret, *supra* note 158 at 75, concluding that: "In sum, Article XXIV as drafted was a useless guide to the desirability or undesirability of a PTA, and remained so."

[186] Determining such an impact in advance is very difficult as the result depend on many factors, such as the quantitative general equilibrium analysis, elasticities of supply and demand, market conditions, subsequent economic policies of third countries and impact of foreign direct investment. See F. Roessler, *supra* note 184 at 313.

with the fundamental question of rules of origin, by which members to a regional agreement determine whether goods are entitled to receive the preference of their arrangement in order to avoid trade deflection.[187] Rules of origin determine which products receive duty-free status depending if a specified proportion of value-added in the product does originate from one of the member countries. They are thus often complicated, difficult to enforce, and can be very damaging to the trade of third parties if the rules are designed to strongly favour products manufactured within the preferential area. Many consider them as tools of covert protectionism.[188] Another problem with Paragraph 5 is that it focuses on the wrong variable as tariffs do not directly affect welfare. For instance, even if the FTA or CU does not raise its external trade barriers, outsiders may still suffer as the preferential arrangement can cause reduction of previous imports in favour of imports originating from the FTA or CU (e.g. Mexico now exporting to the US products that the latter previously imported from the Caribbean because of NAFTA).[189]

Another problem relates to the definition of what is 'substantially all trade' under Paragraph 8. It is not clear if the regional arrangement has to cover all sectors of trade according to some kind of qualitative test or if merely addressing a particular sector without liberalising it extensively is sufficient (for instance in the case of agricultural products where agricultural trade is usually so restricted that there is no trade at all at the beginning). In addition, the reasonable period of time for the duration of an interim agreement leading to the formation of the integration arrangement is not determined.

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[187] See Volcker, *supra* note 164 at 217, noting that " those rules are designed to prevent circumvention of national tariffs or other restrictions by, in effect, laundering an export from outside the regional through a regional partner without equivalent or greater restraints."; See also Pomfret, *supra* note 158 at 185. In a FTA, members keep their own external barriers as opposed to a CU where all member impose a CET which applies to all the imports of the regional grouping. Therefore, imports from outside the FTA might be deflected through the lowest-tariff member when they enter the FTA. "Such trade deflection affects the distribution of benefits since the low-tariff member receives all of the FTA's tariff revenue. " *Ibid.*

[188] Content rules of origin may be viewed as threatening by some economists who fear " that their opaqueness and discretionary nature make them attractive vehicles for protectionist and bureaucratic interests to pursue their goals to the detriment of national welfare ". Pomfret, *supra* note 158 at 238; Panagariya and Srinivasan agree with Bhagwatti on that issue and refer to rules of origin as "the spaghetti-bowl phenomenon", noting that apart from the complexity of such regimes, "the rules of origin themselves can be manipulated by lobbies to keep imports out". They then outline the perverse effect such regimes can have in the case of overlapping FTAs: "For example, once Chile, which already has an FTA with MERCOSUR, joins NAFTA, a Chilean firm will have to buy components in Brazil if it wants to take advantage of the preferential tariff in MERCOSUR, and in the US if it wants to exploit the preference in NAFTA, notwithstanding the fact that the most efficient supplier of the components may be located somewhere in Asia." Panagariya & Srinivasan, *supra* note 159 at 227.

[189] See J. McMillan, "Does Regional Integration Foster Open Trade? Economic Theory and GATT's

These imprecisions contributed to render Article XXIV unenforceable.

Still the most important failure of Article XXIV relates to the enforcement of those rules by GATT. Overall, it can be said that GATT's rules have had little impact on the structure and scope of the various RIAs entered into force.[190] While Paragraph 7 requires the parties forming such a regional arrangement to notify GATT (now the WTO), GATT practice was limited to the establishment of a working party whose recommendations had to be by consensus. While working parties were unable to reach unanimous conclusions regarding their GATT consistency, they did not disapprove them. This review process was thus quite ineffective as only a minimal number of agreements were found to be in conformity with Article XXIV rules by the contracting parties.[191] After notification of the Treaty of Rome in 1957, Article XXIV provisions confronted their first real applicability test. However, the subsequent examination of RTAs notified to the GATT by working parties lead to the explicit approval of such arrangements only in one case, and the all the others were found to be...no one can say as no consensus was reached.[192]

b) WTO Reaction

1) Understanding on the Interpretation of Article XXIV

The Final Act of the UR Agreements of April 1994 included an Understanding on the Interpretation of Article XXIV which tried to add rigor to the provisions of Article XXIV.[193] The most significant step achieved by this Understanding was that a 'reasonable length of time' is specified as no more than ten years, except in exceptional cases, which are not defined. It also established a tariff averaging procedure for comparison of post CU/FTA tariffs barriers level (Paragraph 5) and specified that negotiations for compensation of third countries must begin before the

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Article XXIV" in Anderson & Blackhurst, *supra* note 166, 293 at 298-299.

[190] *Ibid.* at 297-298.

[191] Prior to the 1957 Treaty of Rome, only three agreements were declared fully compatible: the South African-Rhodesian Customs Union (1948) BISD II/176 and corresponding Decisions BISD II/29 and 3S/47, the Nicaragua-El Salvador Agreement (1951) BISD II/30, Nicaraguan participation in the Central American Free Trade Area (1958) BISD 5S/29.

[192] This was the case of the Customs Union between the Czech Republic and the Slovak Republic (see *Working Party Report*, GATT document L/7501, dated 4 October 1994).

[193] See Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade, available online at <http://www.wto.org/wto/develop/gattwto21.doc> . Although there had been discussion during the Uruguay Round negotiations over the need to clarify not only Article XXIV, but also the provisions of Part IV and the 1979 Enabling Clause on preferences for developing countries, they remained unchanged. Pomfret *supra* note 158 at 159.

CET is implemented (Paragraph 6). But the UR did not solve Article XXIV's deficiencies and GATS Article V shares these unsolved problems.[194] The WTO still leaves to the regional integration arrangement a wide discretion over the manner to operate an integration plan. However, it did provide that the WTO dispute settlement procedures could be invoked with respect to any matter arising under Article XXIV (this was an issue in the Banana case against the EC as well as in the Canada-US dispute concerning the Autopact).

At least, the Final Act included an Agreement on Rules of Origin, which are used for instance in FTA to avoid trade deflection but are considered by some as disguised protectionist measures.[195] While promoting transparency, it remains very imprecise as it merely calls for the establishment of harmonised rules of origin to be applied by WTO members in connection with discriminatory trade policies such as preferences for developing countries, anti-dumping and countervailing duties, or other safeguard measures.[196] Commenting on the issue of rules of origin, an author states: "Failure to address such a blatant challenge to the principles of transparency and of non-discrimination represents a serious challenge to the WTO's credibility with respect to regional trading arrangements."[197]

However, the WTO did recognise the importance of further examining the impacts of RIAs for the multilateral trade order. One of the first WTO Secretariat's publication

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[194] Article V provides similar conditions for regional agreements on trade of services to those in GATT XXIV for trade of goods. Trade in services is actually a more complex issues than trade in goods because persons are not subject to border measures like tariffs. It rather poses the question of nationality, which can be disguised through measures relating to licensing or other regulatory requirements. GATS Article V permits special and differential treatment of regional integration arrangement services sectors provided that there is substantial sectoral coverage, absence or elimination of discrimination, no subsequent raise of barriers to trade in services and that third country service providers already established within the RIA territory receive the preferential treatment established under the Agreement ("established enterprise exception"). GATS Article V shares the same inadequacies of GATT Article XXIV as services barriers are very difficult to quantify and "substantial sectoral coverage" could be interpreted as allowing further liberalisation in a limited number of sectors (not all sectors).

[195] See *Agreement on Rules of Origin*, Apr. 15, 1994, *Marrakesh Agreement Establishing the World Trade Organisation*, *supra* note 60 (this agreement applies only to non preferential rules of origin between WTO members countries). Within the GATT, rules of origin are defined as "those laws, regulations and administrative determinations of general application applied by any member to determine the country of origin of goods provided such rules of origin are not related to contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of paragraph 1 of Article 1 of GATT 1994."

[196] For a description of the approach adopted by the Agreement on Rules of Origin, see Trebilcock & Howse *supra* note 37 at 128.

[197] Pomfret, *supra* note 158 at 161, also noting that "such tailor-made rules are the modern counterpart to the tailor-made tariff categories which undermined the MFN principle earlier in the twentieth century, and are clearly against the spirit of the GATT." *Ibid.*

did focus on the issue of regionalism.[198] The WTO also created the Committee on Regional Trading Arrangements (CRTA). And another change brought by the WTO could lead to some improvement. The new dispute settlement system, under which panel reports are adopted automatically unless a consensus agrees not to adopt them, means that a party complaining about a regional trading arrangement that adversely affected its trade will be able to get a panel report.[199]

2) Committee on Regional Trading Arrangements

A recent positive measure is the creation of the Committee on Regional Trading Arrangements (CRTA) appointed by the WTO General Council on February 6 1996.[200] The CRTA has taken over the review function of working parties that monitored RIAs under GATT with little effectiveness. The CRTA will now examine all the RTAs notified under Article XXIV to the Council for Trade in Goods (CTG), under the Enabling Clause to the Committee on Trade and Development (CTD) and under GATS Article V to the Council for Trade in Services (CTS).[201] The new Committee is also charged with making systemic studies of how regional agreements affect trade. Particularly, a key task is to determine whether regional arrangements are compatible with multilateralism.

The CRTA produced a Report to the General Council in 1998, describing the work achieved so far with respect to the examination of the agreements and outlining that discussions on the systemic issues involved were progressing.[202] But no report concerning the regional agreements had been adopted. The 1999 CRTA Report stated

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[198] WTO, *Regionalism and the World Trading System* (Geneva: WTO Secretariat, 1995).

[199] There has been very few complaints brought under GATT Article XXIV. In 1982, the US citrus industry complained about the preferential treatment of Mediterranean suppliers to the EC, but the EC and the Mediterranean countries blocked the panel's report. The only two other complaints related to the EC banana regime. Central and South American countries challenged EC's preferential treatment of bananas imported from Lomé Convention beneficiaries in 1993. The panel found in favour of the complainants but the report was blocked. Complete resolution of that dispute is still pending under DSU new rules. See *European Communities- Regime for the Importation, Sale and Distribution of Bananas*, complaints by Ecuador, Guatemala, Honduras, Mexico and the United States, (WT/DS27) (WT3DS158/1). Pomfret, *supra* note 158 at 157-158.

[200] WTO, *Committee on Regional Trade Agreements – Decision of 6 February 1996*, WTO Doc. WT/L/127, online: World Trade Organisation <http://www.wto.org/wto/ddf/ep/public.htm>

[201] Pomfret recalls that the creation of one single committee " arose out of discussions over the reporting body for the working party on MERCOSUR : the Committee on Trade and Development (which oversees the Enabling Clause) or the Goods Council (which manages Article XXIV) ? " Pomfret, *supra* note 158 at 161.

[202] See WTO, Committee on Regional Trading Arrangements, *1998 Report to the General Council*, 30 November 1998, WTO Doc. WT/REG/7 online: World Trade Organisation <http://www.wto.org/wto/ddf/ep/public.htm> par. 6, 15.

that although more than thirty draft reports had been prepared, they were still under examination (!), and that recommendations on systemic issues still had to be adopted.[203] Therefore, even though some of the RTAs examination have nearly been concluded, "reports are yet to be finalised and transmitted for adoption to the relevant WTO bodies."[204] It appears that CRTA action is currently blocked because of the diverging views of WTO members concerning RTAs.

3) Improved WTO Dispute Settlement and Article XXIV

Very recent Reports issued by WTO DSB Panels and the Appellate Body have discussed the application of Article XXIV and shed some light on its key requirements in two distinct cases.

The first one is about the EU-Turkey CU that was challenged by Hong Kong and India.[205] They complained that subsequently to implementing its regional agreement with the EU, Turkey had imposed quantitative restrictions on imports of a broad range of textile and clothing products, which were inconsistent with GATT Articles XI and XIII, as well as ATC Article 2.[206] Turkey's defence was that the contested measures it had adopted did not violate any provisions because they were implemented in relation to the formation of its CU with the EC and that they were justified by Article XXIV.

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[203] See WTO, Committee on Regional Trading Arrangements, *1999 Report to the General Council*, 11 October 1999, WTO Doc. WT/REG/8 online: World Trade Organisation <http://www.wto.org/wto/ddf/ep/public.htm> Paragraph 5 states that: "To date, 118 RTAs have been notified to the GATT/WTO: 93 under GATT Article XXIV; 14 under the Enabling Clause; and eleven under GATS Article V. The Committee has currently under review a total of 72 agreements. The examination of 64 of these agreements has been referred to the Committee by the Council for Trade in Goods (CTG), seven by the Council for Trade in Services (CTS) and one by the Committee on Trade and Development (CTD). Draft reports on the examination of 30 agreements are currently under consideration; for 31 other agreements, reports are being drafted or factual examinations are currently underway. There are eleven RTAs for which factual examination has not yet started." Paragraph 15 concludes that: "The Committee has made substantial headway in the factual examination of a number of RTAs, but has been unable to finalise reports on any of these examinations. Progress in this regard was slowed, *inter alia*, by disagreement among Members on the interpretation of certain elements of those rules relating to RTAs, as well as on procedural aspects. Similarly, the Committee is not in a position to make recommendations to the General Council under item 1(d) of its Terms of Reference."

[204] See WTO, Regional Integration and the Multilateral Trading System, information available at <http://www.wto.org/wto/develop/regional.htm#2> (last update Nov. 10, 1999).

[205] See *Turkey-Restrictions on Imports of Textile and Clothing Products* (complaint by India (WT/DS/34). At India's request, the DSB established a panel on March 13th 1998. Earlier, India had requested to be joined in the consultations between Hong Kong and Turkey on the same subject matter, but this particular case is still pending (see complaint by Hong Kong WT/DS/29, request dated Feb. 12 1996), as is Thailand's complaint regarding the same issues (see complaint by Thailand WT/DS/47, request dated June 20, 1996).

[206] Subsequently to a decision of Turkey and the EC setting the rules for implementing the final phase of their CU, Turkey had to apply "substantially the same commercial policy" as the EC on trade in textiles and clothing. Turkey then introduced, as of 1 January 1996, quantitative restrictions on imports from

Turkey first argued that Article XXIV was the sole the provision foreseeing the rights and obligations of WTO Members at the time of formation of a regional trade agreement, thus excluding the other GATT provisions. It considered that the consistency of the challenged measures depended in fact on the consistency of the Turkey-EC CU (as an integral part of it), and that the consistency of both the CU and the challenged measures was to be only determined by the provisions of paragraphs 5 to 9 of Article XXIV only. In addition, Turkey submitted that Article XXIV allowed for the imposition of GATT inconsistent measures, provided that the 'unified regulations are not on the whole more restrictive than the previous regulations of the constituent members', as required by Paragraph 5. And it also submitted that without introducing the contested quantitative restrictions on textile, the EC would have excluded these products and that as a consequence, the requirements of Paragraph 8 (that duties and other restrictive regulations of commerce be eliminated with respect to 'substantially all trade') could not have been fulfilled, thus preventing it from forming the CU.

The first panel report found that Turkey's new restrictions were GATT inconsistent and concluded that Article XXIV did not allow Turkey to adopt such quantitative restrictions upon the formation of a CU with the EC.[207] First, it found that the provisions of Article XXIV are to be applied together with and not separately from the rest of the WTO Agreement which constitutes a single undertaking, thus rejecting the proposition that Article XXIV was *lex specialis*. They refused to consider that the 'conditional right' established in Article XXIV authorised a departure from the 'clear and unambiguous' obligations contained in Article XI and XIII, and underlined that it was necessary to interpret Article XXIV in a way to avoid conflicts with other GATT prescriptions. The panel then examined Paragraphs 5 and 8, which provide for 'parameters for the establishment and assessment of a CU but allow flexibility in the choice of measures to be put in place'. They concluded that these provisions, even though flexible, did not authorise violations of other GATT provisions, and that therefore even on the occasion of the formation of a CU, members can not impose incompatible quantitative restrictions.[208] They also mentioned that Turkey had other

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India on 19 categories of textile and clothing products.

[207] See *Turkey – Restrictions on Imports of Textile and Clothing Product* (Complaint by India) (1999), WTO Doc. WT/DS34/R31 (Panel Report), online: World Trade Organisation <http://www.wto.org/wto/dispute/1229d.doc> (accessed Feb. 25 2000).

208 They also noted that while paragraph 6 provides for a specific procedure for the renegotiations of

alternatives to implement the CU.[209]

Turkey appealed that decision, and the Appellate Body produced a report that upheld the panel's conclusion, but considered that it had committed errors in interpreting GATT Article XXIV and thus modified the legal analysis of Article XXIV.[210]

The Appellate Body analysed the text and the context of the chapeau of paragraph 5 of Article XXIV, and determined that Article XXIV might in fact justify a measure that was inconsistent with certain other GATT provisions. However, they underlined that two conditions had to be fulfilled in order to benefit the defence under Article XXIV: " First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue." They first recalled that in that case, the Panel had not addressed the question of whether the CU was in fact meeting the requirements of paragraphs 8(a) and 5(a) of Article XXIV. It had simply assumed it did since that particular issue was not argued by the parties and limited its examination to the question of whether Turkey was permitted to introduce the challenged quantitative restrictions. With respect to the second condition, the Appellate Body agreed that Paragraphs 5 and 8 did offer some flexibility to the CU members when liberalising their internal trade. But it specified that in that case there were other alternatives available to Turkey (e.g. rules of origin) to meet its requirement under Paragraph 8 than to apply quantitative restrictions otherwise prohibited. Therefore, it concluded that Article XXIV did not justify the adoption of the quantitative restrictions since Turkey had not fulfilled the second of the two necessary conditions. But the Appellate Body did specify that it had not determined

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tariffs which are increased above their bindings upon formation of a customs union, no such provision exists for quantitative restrictions.

[209] "We consider that means for securing the objectives of Turkey in relation to the specific circumstances of forming its customs union with the European Communities, exist in the form of alternatives (e.g. increased tariffs, rules of origin, early phase-out, tariffication) to the imposition of quantitative restrictions imposed against imports from third countries, thereby interpreting Article XXIV in such a way as to avoid such conflict with other WTO provisions".

[210] See *Turkey – Restrictions on Imports of Textile and Clothing Product*, (Complaint by India) (1999) WTO Doc. WT/DS34/AB/R (Report Appellate Body), online: World Trade Organisation <http://www.wto.org/wto/disputes/ds34abr.doc> (accessed Feb. 25 2000). At its meeting on 19 November 1999, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

the issue of whether inconsistent quantitative restrictions would *ever* be justified by Article XXIV.

The Appellate Body Report was finally adopted and Turkey agreed to comply with the rulings and has until Feb 19, 2001 to implement them.[211]

Another Panel Report dealing with the application of Article XXIV was recently circulated. The case concerns certain Canadian measures affecting the automotive industry that were challenged by Japan and the EC.[212] We will only mention here the arguments and findings in direct relation with Article XXIV.[213] The issue was to determine if the discriminatory duty treatment Canada was granting to a limited number of motor vehicle manufacturers was justified by GATT Article XXIV, since most of the vehicles that received duty-free treatment came from NAFTA parties, the US or Mexico. Canada argued that granting duty-free treatment to products of its NAFTA partners was exempt from MFN clause under Article I:1 by reason of Article XXIV.

The Panel concluded that the conditions under which Canada granted its import duty exemption were inconsistent with Article I:1 of GATT 1994 and not justified under Article XXIV of GATT 1994. The Panel first found that the import duty exemption granted by Canada (in violation of ArticleI:1) could also apply to non members of NAFTA. The Panel underlined that a measure granting WTO-inconsistent duty-free treatment to products originating from outsiders constituted a violation that Article XXIV clearly could not justify. They also noted that the challenged import duty

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[211] At the DSB meeting of 19 November 1999, Turkey stated its intention to comply with the recommendations and rulings of the DSB. On 7 January 2000, the parties informed the DSB that they had agreed that the reasonable period of time for Turkey to implement the DSB's recommendations and rulings would expire on 19 February 2001. See Implementation Status of Adopted Report, WT/DS/34, online at World Trade Organisation, "Overview of the State-of-play of WTO Disputes" <http://www.wto.org/dispute/bulletin.htm> (last modified March 14, 2000).

[212] See *Report of the Panel, Canada -Certain Measures Affecting the Automotive Industry* (Complaints by Japan and EC) (2000), WTO Doc. WT/DS139/R and WT/DS142/R (Panel Report), online: World Trade Organisation <http://www.wto. org/dispute/6100d.doc>. The first complaint was brought by Japan (request dated July 3rd 1998) and the DSB later agreed to examine at the same time the complaint of the EC (request dated August 17, 1998) on the same measures and invoking to same provisions (except for GATT Article XXIV). Following Japan request dated November 12 1998, the DSB established a panel on February 1st 1999.

[213] Japan argued that under Canadian legislation implementing the Auto Pact between the US and Canada, only certain motor vehicle manufacturers are eligible to import vehicles into Canada duty free and to distribute them at the wholesale and retail distribution levels. Japan further submitted that this duty-free treatment is contingent on two requirements: (i) a Canadian value-added (CVA) content requirement that applies to both goods and services; and (ii) a manufacturing and sales requirement. Japan alleged that these measures were inconsistent with Articles I:1, III:4 and XXIV of GATT 1994, Article 2 of the TRIMs Agreement, Article 3 of the SCM Agreement, and Articles II, VI and XVII of GATS.

exemption did not even provide for duty-free importation of all like products originating from NAFTA members. It depended on whether the producers in these countries had relationships with certain motor vehicle manufacturers in Canada who were eligible for the exemption. In consequence, they concluded that the import duty exemption was not a measure that provided for duty-free treatment of imports originating from parties to a FTA and that Article XXIV did not provide a justification for the inconsistency with Article I of this import duty exemption.

Canada has very recently notified its intention to appeal certain issues of law and legal interpretations developed by the Panel.[214]

4) The Multilaterism vs. Regionalism Debate

a) RIA as Detrimental

Regional integration arrangements can be seen as a threat to multilateralism because they undermine the MFN principle and affect the operation of the global comparative advantage by allowing trade preferences on a regional basis, thus challenging the multilateral trading order and the global process of liberalisation.[215] Such a departure from the MFN principle has economic and political consequences.

First, RIAs may divert trade from the international level towards the regional level.[216] However, even though empirical evidence of trade diversion has accumulated[217], trade diversion is less damaging in the current context of extensive multilateral tariff reductions.[218] Second, it may foster competitive bargaining and cement spheres of influence which "add to mercantilist tendencies to see international trade as a zero-sum game, in contrast to the GATT/WTO philosophy of promoting mutual gains through freer trade."[219]

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[214] See World Trade Organisation, "Overview of the State-of-Play of WTO Disputes" online <http://www.wto.org/wto/dispute/bulletin.htm> (last update March 14 2000).

[215] Panagariya & Srinivasan, *supra* 159 at 223.

[216] *Ibid.* at 154; See also Trebilcock & Howse, *supra* note 37 at 130-132.

[217] A World Bank Study by Yeats (1996) provides systematic evidence of trade diversion in MERCOSUR. Trade diversion has also been observed with the EU and NAFTA in the case of clothing. Panagariya & Srinivasan, *supra* note 159 at 225-226.

[218] See Volcker, *supra* note 164 at 217; See also Roessler, *supra* note 184 at 315-316, noting that in a zero-tariff world, the MFN principle would automatically re-establish itself. ("Tariff preferences accorded by developed countries in the framework of RIAs can generate only limited benefits for the beneficiary countries (...) as the multilateral market access commitments exchanged in the framework of the GATT have undermined these regional preferences".)

[219] See Pomfret, *supra* note 158 at 8, underlying that " such a change in attitude opens up the prospect

It is also often argued that regionalism will impede further multilateral liberalisation. Negotiations for regional schemes could distract policymakers from the goal of global free trade, while simultaneously creating new domestic interests groups that oppose liberalisation and consequently the multilateral system.[220] Countries already satisfied with their regional market access would have no more incentives for entering into multilateral negotiations and states members of powerful RTAs will lose interest in multilateral negotiations.[221]

In addition, RIAs can be seen as creating a separate international rule system that may diverge from the WTO's, thus creating potential conflict regarding governance issues and the settlement of international disputes.[222] The differences in institutional structure imply uncertainty, which is arguably bad for international trade. Overlapping commitments impede the establishment of clear multilateral trading rules, create competition and can cause tension between the old and the new generation of treaties.[223] Consolidating the commitments resulting from a multitude of overlapping commitments could prove to be quite onerous on the long term as administrative controls would have to take into account different obligations. Each regional block would thus remain attached to its closest rules and not aim at the establishment of global principles that would imply reviewing all the administrative regulations already in place.[224] "Ultimately, large regional arrangements carry the threat of dividing the world into three or four or five large trading blocs, with political as well as economic consequences."[225]

In the context of globalisation, which accelerates the race for competition for production location and enhances the threat of continued exclusion for disadvantaged areas, there is an increased insecurity that could foster a rise in protectionist regionalism. In bad times, regional integration arrangement could lead to increased

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of economic disputes leading to potential conflict, as happened in the 1930s."

[220] Srinivasan, *supra* note 24 at 64.

[221] "These established arrangements provide a disincentive for members to engage in multilateral negotiations that will lower MFN tariffs since these reductions would reduce the established preference margins they receive in each other's markets as a result of minilateral negotiations." Braga & Yeats, *supra* note 163 at 241-242.

[222] J.H. Jackson, "Perspectives on Regionalism in Trade Relations" (1996) 27 Law & Pol'Y in Int'l Bus. 873.

[223] Braga, *supra* note 162 at 966.

[224] See Volker, *supra* note 164 at 218, arguing that "the proliferation of partly overlapping trade agreements gives rise to confusion and complications that can be a breeding ground for conflicting and self-serving rulings and negotiations."

[225] *Ibid.* at 217.

protection against non-member countries.[226] For instance, there could be more trade disputes alleging anti-dumping and subsidy cases, protectionist misuse of environmental and social provisions, and protectionist rules of origins. Therefore it is argued that there is a risk that each regional block aims at its own consolidation by way of restrictive approaches instead of looking forward to the establishment of a truly global trading regime. The presence of strong competing hegemonic blocs would then threaten further global co-operation.[227]

But many supporters of regionalism have pointed out that there is a large difference between the past relatively closed trading areas and the new regional agreements that are characterised as promoting open regionalism and deeper integration. Sceptics argue that the open regionalism concept is not an antidote to discriminatory PTAs since there is always a demand for reciprocity (which demonstrates a fear of extending unconditional preferential access to non-members) and that membership in a regional trading block is never free (since it may include trade-unrelated side-payments such as acceptance of product standards or particular intellectual property regime).[228] In addition, while regional agreements were originally permitted in order to foster greater co-operation, it is arguable that few regional trading blocks will achieve deep integration as most are merely free trade agreements.[229] Therefore, without the purpose of deep integration, which would justify discrimination, it may be considered that regional groupings are merely side-stepping the application of the non-discrimination principle for the exclusive benefit of their members. And regarding the fact that deep integration promotes harmonisation of policies such as competition, investment, regulatory regimes, environmental and labour standards, sceptics argue that "even if co-ordination or harmonisation of such non-trade related policies are desirable, such

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[226] See Panagariya & Srinivasan, *supra* note 159 at 226, noting that this happened in Israel and Mexico after they concluded FTAs with the United States. "In bad times, pressures for protection grow and when a PTA member is unable to raise trade barriers against a partner, the burden of increased trade barriers falls disproportionately on the outside world." *Ibid.*

[227] See Braga & Yeats, *supra* note 163 at 241, considering that a threat posed by the further spread of regional efforts is that they could turn hostile to each other.

[228] See Panagariya & Srinivasan, *supra* note 159 at 230-234; Trebilcock & Howse, supra note 37 at 134, underlining the "sequencing problems in maintaining an open regional trading bloc, in the sense of remaining open to third parties."

[229] At the time being most regional arrangements are constituted of a FTA and only include a few elements characteristic of a deeper level of integration (e.g. NAFTA). Others do intend to create a common market among the participating members but are mostly at the level of simply establishing a common external tariff (CET), thus creating a customs union (e.g. MERCOSUR). Others are merely focusing towards the establishment of trade facilitation and business promotion measures (e.g. ASEAN

co-ordination could be pursued without having to engage in preferential trade."[230]

b) RIA as Positive

Because of the increasing number of WTO members within which considerable disparity in the levels of economic development exist, states have found in the establishment of regional trade arrangements an expedient way to realise deeper and faster economic integration as a smaller group of nations may more easily negotiate and agree upon rules governing trade in multiples areas and corresponding enforcing and regulatory institutions. The formation of regional trading blocs can therefore be viewed as contributing effectively to international economic relations by allowing smaller groupings of economies to achieve speedily more significant levels of co-operation.

Regional approaches can also be used to implement new type of policies, covering issues not dealt with at the multilateral level, since RIA may provide an opportunity for a smaller but more homogenous forum to deal more rapidly with new complex issues (e.g. environment, competition and investment policy). Also, as the impact of preferences exchanged in RIAs has declined (because of MFN reductions), an important issue has arisen regarding the importance of "efforts to harmonise domestic regulations and to co-ordinate domestic policies in the framework of RIAs."[231] Such efforts have become an important part of RIAs negotiations.[232] The resulting agreement may then influence co-operation at the global scale and in such a case, regionalism can been seen as a laboratory experiment favouring the expansion of multilateral rules.[233] However, it is fundamental to acknowledge such a practice may be dangerous since drafters that are outside the WTO supervision will determine the new rules. On new issues such as investment and competition, this could be threatening to developing countries.[234]

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and APEC).

[230] Panagariya & Srinivasan, *supra* note 159 at 235.

[231] Roessler, *supra* note 184 at 316.

[232] *Ibid.* at 324. "Given the declining importance of border measures restricting trade, and the more and more frequent references to domestic policy measures in RIAs, the question of the proper distribution of roles between RIAs and the multilateral trade order is no longer merely one of whether regional or multilateral trade liberalisation is more efficient, but raises above all the question of whether the international harmonisation of domestic regulations or co-ordination of domestic policies is best achieved regionally or multilaterally."

[233] Jackson, *supra* note 222 at 874.

[234] Pomfret, *supra* note 158 at 164. For instance, the author mentions the case of international

RIAs can also serve as a transition towards globalisation, helping member states to deal with the challenge of insertion into the world economy and allowing them to enact rules that respond to specific regional needs.[235] For instance, regionalism could prove to allow for a more rational division of labour where each regional grouping attains a mutually beneficial balance in production locations in order to satisfy for the employment needs of the member states constituting the regional arrangement. Because regional negotiations are conducted between a reduced number of states and since countries sharing common characteristics (e.g. historic links, cultural affinities, common natural resources) or having existing closer links will arguably have more co-operative policies, it may be foreseeable that regional groupings will be more attached to the particular needs of the different members than it is the case at the global level. Members of a regional arrangement would then further co-operate to find a balance allowing for a more equitable allocation of employment potential and revenues between themselves. Such a result could not be negative for global welfare.

It can also be argued that an open regionalism aimed at improving a state's international competitiveness in the world markets (like it is the case in Asia) would not constitute a challenge to the multilateral trading order as it is directly aimed at favouring global integration introduced by the multilateral trading order.

In any case, while discriminatory regional arrangements may be theoretically against the global interest, they lead to a variety of economic and non-economic consequences that may be beneficial for the members of such groupings. The trade and welfare effects of such arrangements are difficult to determine and require the examination of a broad set of variables. Such agreements have to be evaluated from a political, social, economic and legal perspectives, not only by regulating their potential economic impact.[236] As outlined by an author: " We often identify the links between the rules of trading blocs and investment, monetary policy, and environmental quality, for example, but clearly there are also links to political issues such as human rights,

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investment : " Investment codes drawn up by the leading home countries of multinational enterprises will differ from foreign investment codes drawn up by groups weighted towards the host countries, and presumably the most appropriate drafting committee would be more balanced."

[235] Braga, *supra* note 162 at 968.

[236] "To propose that regional agreements be examined in the GATT solely in the light of economic efficiency considerations is thus to ignore the fact that most RIAs are not concluded solely for those reasons and that the main function of the GATT rules governing such agreements is o permit contracting parties to pursue regional trade liberalisation for non-economic purposes". Roessler, *supra* note 184 at 313.

democratisation, demilitarisation, and arms control." [237]

Some of these aspects are of particular interest to developing countries facing the challenge of insertion in a globalised economy and concerned with lack of employment issues and unresponsiveness of the developed world to their interests.

B) REGIONALISM AND DEVELOPING COUNTRIES

There have been many preferential trading arrangements among developing countries starting in the 1950s. When GATT Part IV was introduced, some developing countries interpreted paragraph 4 of Article XXXVII as allowing them to conclude trade agreements on a preferential basis, even though it did not provide the correspondent legal framework.[238] After the Tokyo Round of 1979, the GATT Enabling Clause provided that preferential trade arrangements between developing countries were exempted from the GATT Article XXIV requirements to cover substantially all trade or to reduce internal tariffs to zero. It also permitted them to grant preferences to one another in order to promote economic development, which legitimised preferential trading arrangements failing to meet the Article XXIV conditions. Regional arrangements among them are permitted "as long as they facilitate trade, do not create undue difficulties for the trade of other countries, and do not act as an impediment to the reduction or elimination of trade barriers on a MFN basis." [239]

In the late 1960s, disappointments with the post-colonial economy have led to regionalism in parts of the Third World like Africa and Latin America. The purpose was to encourage South-South trade and economic co-operation among developing countries but these arrangements did not succeed into fostering economic growth.

Since the collapse of the communist ideology and the consolidation of the multilateral trading order through the auspices of the GATT-WTO, there was a revival of both multilateralism and regionalism, a general trend to which developing countries adhered. Developing countries are also creating or consolidating regional trading

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[237] Jackson, *supra* note 222 at 874.

[238] Australia implemented in 1966 a limited scheme of tariff preferences in favour of developing countries only. See GATT Doc. L/2443. The following year, India, the United Arab Republic and Yugoslavia concluded a trade agreement on a preferential basis. See "Trade Expansion and Economic Cooperation Agreement between India, The United Arab Republic and Yugoslavia" signed on December 1967, GATT Doc. L/2980/Add.1.

[239] Braga & Yeats, *supra* note 163 at 237.

schemes in order to integrate the world economic order, in addition to joining the GATT at the multilateral level. Recently, a new wave of regionalism has indeed surfaced in the Third World. Old treaties were brought to life again and there was a remarkable movement from small and loosely binding agreements towards larger free trade areas with a deeper degree of integration.[240] It is particularly the case for instance in Latin America and the Caribbean where states are pursuing economic integration at multiple levels: multilateral, regional, subregional, bilateral and even hemispheric. Those developing countries have acknowledged that in order to attract investment, they require practical, market-responsive institutional and legal structure, and seem to consider that regional schemes might be helpful to achieve such goals.

1) RIAs Among Developing Countries: From ISI to New Regionalism

Following the prescriptions of the ISI model, many developing countries tried to overcome the problem of small domestic markets by regional integration schemes, which were to foster increases in intra regional trade, encourage investment for the entire regional market and at the same time provide protection from extra-regional imports by constructing barriers against industrialised countries. Examples in LAC included the Latin American Free Trade Area (LAFTA), the Central American Common Market (CACM), the Andean Pact, the Caribbean Free Trade Association (CARIFTA) and the Caribbean Community (CARICOM), all of which were not successful in fostering further economic development.[241] A profusion of similar preferential schemes were also implemented in Africa, again with very limited impact, and in Asia with the Association of Southeast Asian Nations (ASEAN). The communist bloc also put in place a regional arrangement in 1949. The Council for Mutual Economic Assistance (CMEA, also known as Comecon) was characterised by intense inward-looking national development strategies and by the USSR domination. In fact, the CMEA " turned into a forum for bilateral bargaining where the important negotiations were between the USSR and each individual CMEA member " and left CMEA members on the margin of the global economy.[242] The end of communism and the decision to abandon central planning policies finally brought an end to the CMEA

[240] Preusse, supra 156 at 149.
[241] See the description of those arrangements below under Part III(A).

in 1991.

Developing nations changed directions and adhered to open trade policies when it became apparent that the inward-looking ISI orientation of their regional schemes had failed. Integration was characterised by high level of protection coupled with other protectionist measures designed to exclude extra-regional imports, which ultimately led to unproductive industries and ineffective markets. As stated by Bhagwatti: "The problem was that, rather than use trade liberalisation and hence prices to guide industry allocation, the developing countries attempting such unions sought to allocate industries by bureaucratic negotiation and to tie trade to such allocation, putting the cart before the horse and killing the forward motion."[243] The reliance of developing countries on ISI also implied that they imposed high barriers on imports and " disagreements arose over the distribution of benefits (i.e. the location of protected industries) and of the costs (i.e. paying higher prices for what were often lower-quality goods from PTA partners) associated with the ISI strategy."[244] Other factors explaining their failure are the fact that most integration schemes were poorly implemented, and that the member states were not capable of preventing polarisation (i.e. the concentration of gains from integration in the most advanced cities or regions).[245] In addition, most of those schemes lacked the preconditions normally identified for the success of a RIA, which relate to the structural characteristics of the members (e.g. large intra-regional trade before the creation of the RIA, a low CET, similar production and price structures).[246] Macroeconomic problems and the resistance of developing countries' to create strong and significant supranational institutions necessary for the establishment of a successful regional trading area were also fundamental factors that negatively affected those RIAs.

The debt crisis also negatively affected all regional schemes since intra-regional trade entered a "downward spiral" caused by the necessity to give priority to servicing the

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[242] See Pomfret, *supra* note 158 at 115-116.

[243] Bhagwati, *supra* note 178 at 28.

[244] Pomfret, *supra* note 158 at 103.

[245] *Ibid.* at 301-302. " The practical experience (...) in integration schemes involving developing countries has been of distributional conflicts outrunning either the desire of the main beneficiaries for change or the members' capacity to administer redistributive measures. "

[246] See H. Genberg and F. Nadal de Simone, "Regional Integration Agreements and Macroeconomic Discipline" in Anderson & Blackhurst, *supra* note 166, 167 at 170-173, discussing the importance of those factors in the failure of past Latin American regional agreements such as LAFTA and the CACM.

external public debt.[247] The debt crisis caused LAC countries to re-evaluate the inward-looking model. While import suppression had been effective, it had brought recession and was only a short term solution. The new approach was found in export promotion; this model had been used by Chile starting after 1973 with a radical programme of trade liberalisation measures. This ideology was implemented in Costa Rica and Ecuador in 1984, spread to Bolivia and Mexico in 1985 and had reached Argentina and Brazil by 1990.[248]

Accordingly, most developing countries changed directions, unilaterally liberalising trade and undergoing profound internal restructurations according to market forces, and then actively participated in the multilateral trading system. Of course, all those changes had a negative impact on regional integration as "integration schemes were seen as part and parcel of the inward-looking model of import-substituting industrialisation that had rendered Latin America so vulnerable to the reversal of capital flows."[249] But as protectionism in the EU, US and Japan continued to impede multilateral trade liberalisation, the idea of increasing intra-regional trade became attractive once again. "The general ineffectiveness of GATT, and a fear of being unable to compete with other North-South agreements in Europe and Asia has led to a notable increase in the number and quality of regional trade agreements [among developing countries]."[250]

The move from inward-looking regionalism to more liberal arrangements is most evident in the LAC region, as demonstrated by the liberal orientations recently undertaken by existing agreements (LAIA, CACM, CARICOM, Andean Pact) , the multiplication of bilateral free trade agreements negotiated in the region, especially by Mexico and Chile, and the coming into existence of MERCOSUR and NAFTA. Similar patterns are observable in Africa, West Asia and South Asia, as well as in Europe where the former communist countries now facing the challenges of economic transition have linked themselves with the EU and seek membership.[251] Therefore, " the new wave of RTAs among developing countries in the 1990s differ in that most of the participants are now pursuing outward-oriented rather than inward-oriented

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[247] See " Latin American Integration 1", *supra* note 101 at 249.
[248] *Ibid.* at 250.
[249] *Ibid.*
[250] J.M. Tate, "Sweeping Protectionism Under the Rug: Neoprotectionist Measures among MERCOSUR Countries in a Time of Trade Liberalisation", 27 Ga. J. Int'l & Comp. L. 389.

development strategies."[252]

They pursue regional integration among themselves but also by seeking membership in regional arrangements of industrialised countries. Both NAFTA and the EU are significant in that those schemes integrate low and middle income countries with highly developed economies. The foreseen advantages of such membership are "a greater and preferential access to large markets, a lower probability of being denied such access by gray-area protectionist measures such as VERs or by anti-dumping duties regional agreements, and for governments of countries undergoing unilateral economic reforms, a means of reducing the risk that political pressures from interventionists at home will in the future cause a reversal of that reform process."[253]

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[251] See Pomfret, *supra* note 158 at 145-148.

[252] *Ibid.* at 297.

[253] K. Anderson & R. Blackhurst, "Introduction", in Anderson & Blackhurst, *supra* note 166 at 3.

2) Impact of Regionalism on Development

The new wave of regional trading arrangements in the Third World is part of a general process of trade liberalisation and other transformations in economic policy. But the economic impact of regionalism for developing countries is difficult to determine. Empirical evidence on the economic effects of trade preferences for developing countries yields two general conclusions.[254] First, trade preferences can have an impact on the volume of developing countries' exports, as any export incentive (depending on the preference margin, product coverage, etc.). Second, they may foster trade creation and the welfare implications will be greater in the case of free trade with a large country. But in any case, the preference margins brought by such regional scheme are reduced as multilateral tariffs decline. There is therefore a need to consider the impact of regionalism for developing countries in a broader context.

A recent World Bank Study presented at the latest WTO Conference on Regionalism focuses on the issue of regionalism and development by intending to provide developing country policy makers with new tools and information to analyse the benefits and costs of RIA membership.[255] This Study underlines that not enough attention was paid to "the non-economic objectives that frequently underlie RIAs, and the role of trade preferences in achieving these objectives."[256] First, they recall that it is difficult to determine the static effect of RIA and that there is no presumption that RIAs are welfare enhancing (i.e. fostering more trade creation than diversion). However, they note that the dynamic effects deriving from RIA, which some argue may be very positive and much larger, have the potential to bring important gains to developing countries. For instance:

> (1) regional arrangement may generate economies of scale and competitive gains under imperfect competitive market structure. (...); (2) the flow of FDI to some or all of the RIA member countries will increase because of bigger market size, the elimination of contingent protection, etc. (..); (3) a reduction in uncertainty about policy reform associated with the "locking-in" or "anchoring" of policy reforms

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[254] See Pomfret, *supra* note 158 at 305-316, assessing the body of empirical evidence on this issue.

[255] See *Regionalism and Development*, *supra* note 142. For information on the WTO Seminar on Regional Trade Agreements (Geneva, June 30, 1999), see information available online at <http://www.wto.org/develop/rtasem.htm.> (last update April 1999).

[256] *Regionalism and Development*, *ibid.* at 1. "Understanding the potential linkages between favouritism in trade and the pursuit of non-economic political and social objectives is crucial in deciding whether to participate and in developing policy recommendations for participating governments."

> through the RIA may increase investment from all sources (and change behaviours too).; (4) the location of industry among member countries will be affected in a manner that enhances growth potential; and (5) there may be permanent effects on the rate of economic growth through higher rates of transfer of technology and greater investment in research and development.[257]

But those potential gains depend on a variety of factors. For instance, the Study outlines that a developing country may obtain more investment and dynamic gains if the RIA is designed in a way that increases the credibility of its own reforms, especially if it is linked with a more developed open economy.[258] With respect to regional trading arrangements between developed and developing countries, it is also argued that regional liberalisation may bring adjustment and technical assistance from the more developed members of the grouping. However, form the point of view of the developing country, there is also the threat that the more powerful member "will exercise overwhelming influence over the way in which the arrangement is implemented." [259]

Another aspect is that policy integration measures may foster important economic benefits by realising economies of scale and increased competition on domestic markets.[260] However, most "deep" RIAs are still more aspiration than reality and many of the domestic regulatory issues that are on the agenda of RIAs are also being discussed in the WTO. It is argued that "harmonisation, if required, is best done around a global standard or norm."[261]

But it is acknowledged that the non-economic benefits of regional integration may in practice be among the more important motivations behind the formation of RIAs. For instance, some issues are better dealt with at the regional scale when they involve neighbouring countries, and political and social objectives (e.g. lessen hostility between neighbours, create counterweight to some hegemons, cultural affinity, political co-operation, environment and infrastructure, etc.) may be best pursued

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[257] *Regionalism and Development, ibid.* at 5.

[258] "North-South RIAs are much likely to confer dynamic benefits than South-South Agreements" and that "credibility will be enhanced in policy areas covered by the agreement (including requirements for democracy), but only if partners have sufficient interest and influence to enforce their rights." *Ibid.* at 6.

[259] Trebilcock & Howse, *supra* note 37 at 387.

[260] *Regionalism and Development*, supra note 142 at 7-8, noting that many governments involved in RIA have negotiated disciplines for domestic regulatory regime, and that an increasing number of recent and prospective RIAs with developing country membership, such as MERCOSUR and FTAA, have broad policy integration objectives.

[261] *Ibid.* at 9.

within a regional arrangement that helps to put in place the desired reforms.[262] Developing countries seem to consider that the adoption of measures favouring the development of the private sector and technological advancement is made easier in a regional context. By fostering greater co-operation, regionalism may also eventually favour the introduction of measures designed to increase living conditions of the people.

The World Bank Study concludes by recalling that determining whether regionalism and multilateralism are complementary in a dynamic sense is a very complex question. The Study emphasises that the final goal of trade policy should be unrestricted trade, that small countries should lower all barriers to imports for competition to replace protection and that the multilateral system is the key to keep all markets open to exports.[263] However, it also recognises that RIA may facilitate liberalisation for activities currently highly restricted, providing "blueprints" for future multilateral liberalisation. It thus advocates for RIA to go beyond WTO coverage into new areas, go "all the way" in WTO areas already partially covered, and eliminate all restrictions to trade, such as instruments of contingent protection (safeguards, antidumping and countervailing duties).[264]

With respect to the current developments in the Western Hemisphere where the creation of a huge free trade zone is contemplated under the FTAA project, the OAS also examined the relationship of regionalism and the multilateral trading system. The report first emphasised that almost all agreements in the region could meet Article XXIV requirements, even though some had been notified to the GATT under the Enabling Clause, such as MERCOSUR and the Andean Group. The report most notably underlined the positive aspects of regionalism in the Americas, stating the following:

> Regional agreements can constitute 'building blocs' for multilateralism when regional disciplines are multilateralised or are used as a basis for multilateral agreements. Multilateral disciplines can also become building blocs for regional agreements when used as a basis for liberalising trade among a limited number of countries. Within the Americas, establishment of the proposed FTAA can benefit from using multilateral disciplines as a foundation for hemispheric free trade. Moreover, the adoption of hemispheric agreements on areas not covered

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[262] *Ibid.* at 11, recognising that " the conclusions that are drawn are that in some areas of politics and diplomacy, regional trade solutions are likely to be superior to multilateral ones. "

[263] See *Ibid.* at 13-14.

[264] See *ibid.* at 13.

by multilateral rules and disciplines can help promote consensus-building on these issues at the international level.[265]

Therefore, we conclude that regionalism in developing countries may provide static and most importantly dynamic gains that can be beneficial for development. However, it is underlined that those regional arrangements must be consistent with the multilateral system.

3) Institutional Framework for Developing Countries

One central requirement for a successful regional economic integration is the presence of a strong institutional mechanism in order to ensure progress, monitor developments and prevent disintegration. But as it involves the vital economic and political interests of member states, national institutions may resist the effective implementation of regional institutions. Historically, developing countries have been very reluctant to create strong supranational institutions because they deprive them of a certain amount of national sovereignty.[266] While regional integration made economic sense according to some economic theories, past dictatorial governments representing the interests of the elites often considered that ceding some sovereignty to a regional body would negate their own exercise of absolute power.[267]

a) From Colonialism to Independence: Sovereignty Implications

While sovereignty has been a key concept in the foundation of international relations, it meant very little during the era of colonialism when colonies were only used as a source of primary commodities and the industrialised colonial powers kept them at the periphery of their economy by not developing any local industry and using them as a market for their own industrialised products. Keeping that in mind, it becomes understandable why developing countries, which were the ones subjected to colonialism, became so attached to the principle of state sovereignty after their conquest of independence. Those states were in fact deprived from exercising their sovereignty attributes as they could not influence an international economic system

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[265] See OAS Trade Unit, "Toward Free Trade in the Americas – Regionalism and the Multilateral Trading System" 1995, available online at <http://www.sice.oas.org/Tunit/tftr/ftrade4.asp> (accessed Feb. 25 2000).

[266] See Kiplagat, *supra* note 27 at 40, arguing that "national sovereignty presents the chief barrier to achieving regional economic integration between developing countries."

[267] *Ibid.* at 43.

that confined them to poverty. Developing countries reacted by attempting to restructure the international order to a more egalitarian line, and state sovereignty became a core principle of the NIEO ideology. However, post-colonial leaders also used that principle in some cases in order to ensure their domination over the national wealth of newly independent states. The result was that the concept of sovereignty had complex ties with the issue of development in the Third World. Eventually, the reformist efforts based on sovereignty failed and were replaced by adherence to the liberal economic approach, a sovereignty depriving process.

b) Sovereignty in a Global World

The concept of sovereignty has now undergone important changes due to globalisation, a phenomenon transforming economies, societies and cultures, and that has the effect of diminishing the importance of the state in international affairs. The fact that countries may no more treat their populations as they please or go to war for purposes of simply acquiring new territory demonstrates the evolution of the principle, explained by the importance of human rights organisations and the development of a body of international law with growing influence. But local governments are also increasingly deprived of their prerogatives and can no longer define their own political or economic agendas.

The consolidation of the international trade order, with the advent of the WTO and the multiplication of institutionalised regional organisations, is an indication that national governments have indeed loss part of their original sovereign attributes to various forms of supranational bodies. Non-state actors have also acquired an increasing role in the definition of international rules that are in fact truly transforming the significance of "national" policies. Nations can no longer implement their own national economic regulations (addressing areas such as interest rates, banking measures, labour standards, fairness in the stock markets) without taking into account international constraints to such measures.[268] Employment, savings, exchange rates, currency reserves and fiscal and budgetary policies can no longer be wholly determined by democratically elected national governments. The fact that international trade regulations are increasingly preoccupied with domestic policies will reinforce that trend.

The problem is that the states do not have their interests affected in the same way. The powerful members of the exclusive club of industrialised democracies leading globalisation are much more likely to see measures promoting their interests and reflecting their needs being adopted by the international community than the developing countries. The current reality of our inequalitarian world with its disproportionate pattern of wealth concentration confirms that states have differing degrees of independence and sovereignty. While industrialised countries continuously push for the inclusion of new issues such as services and technology information within the multilateral trade order, they still adopt a protectionist attitude regarding the liberalisation of sectors of fundamental importance for developing countries, which are also particularly dependent upon foreign investment.[269]

The result is that developing countries still feel deprived of some fundamental sovereignty attributes and threatened by industrialised entities imposing their interests. Indeed, "widespread poverty and a scramble for international investment have given multinational corporations more power to intervene in the domestic economic and political processes of these countries." [270] In addition, it is important to realise that developing countries have lost even greater sovereignty attributes because of the influence of international institutions upon their policies. Indeed, the lending practices and policies of the IMF, the World Bank Group and other non-state organisations have the effect of depriving the borrowing states, which are developing countries, from their liberty to choose their priorities.

Therefore, in such of context of impotence, it is understandable why they are now more ready than ever to seek the creation of strong regional mechanisms since "after all, it is psychologically more tolerable to succumb to influence from an indigenous body than from an external one."[271] For the least, they may consider that their particular interests and needs (non necessarily all economics) will be better reflected within a regional grouping.

c) Regional Institutional Issues

The evaluation of economic integration processes occurring within developing

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[268] Jackson, *supra* note 222 at 873.
[269] H.A. Grigera Naon, " Sovereignty and Regionalism " (1996) 27 Law & Pol'Y in Int'l Bus. 1073.
[270] Kiplagat, *supra* note 27 at 45.
[271] *Ibid.*

countries has traditionally focused upon economic considerations, since regional arrangement were supposed to be the solution to their economic problems. The result is that the institutional, political and legal machinery has not received enough attention in the case of developing countries, to the contrary of developed countries' integration schemes which are economically successful.[272] A basic problem with the design of RIA among developing countries was that they took the EC as a model, while the initial conditions of formation were completely different. Necessary conditions include "an initial high level of intra-regional trade, the capability and willingness to provide intra-regional transfer payments in case of uneven distribution of the costs of integration, the development of supranational institutions, the similarity of income and industrialisation levels, and a certain congeniality of macroeconomic policy."[273] This indicates that while institutional and legal issues have formally been disregarded, new approaches in those areas should be considered for developing countries as the type of suitable institutions can not be the same as those of rich nations.[274] Particular attention should therefore be paid to the institutional structure of RIAs.

C) CONCLUSION

The global integration movement goes along two tracks: integration on a global scale under the multilateral system (GATT/WTO, IMF, World Bank) while at the same time there is an increasing geographic concentration of trade under regional schemes. Are regional trading blocks stumbling or building blocks towards global free trade? While regional agreements complement multilateral liberalisation efforts, at the same time they can be seen as undermining the multilateral trade order. The issue of whether regionalism is detrimental or not to multilateralism is far from being resolved and managing the interrelationship between preferential regional schemes and the multilateral system constitutes in fact one of the major challenges facing the area of international trade. Will future developments bring regional arrangements towards open regionalism or protectionism? Will the WTO be able to maintain the discipline

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[272] *Ibid.* at 50-52.

[273] Genberg & Nadal De Simone, *supra* note 246 at173.

[274] See Kiplagat, *supra* note 27, at 52-68, advocating that among other things, regional groups adopt an external system of guarantees, taking into account risk factors, problems of guarantees, institutional size, form and stability, and address the dilemma of losers and gainers.

of broad multilateral rules in the face of increasingly important and competing regional rule systems?

But we see that the arguments against regionalism mostly relate to the well-being of the multilateral trading order. However, we established that this system has not so far responded to the particular needs and legitimate concerns of developing countries, to the contrary. Therefore, if regionalism proves to be advantageous to developing countries, why shouldn't we consider it as a true mean of integration instead of endlessly debating whether it is beneficial to the multilateral system, whose rules have always been more preoccupied with the economic development of those who created it in the first place, namely developed nations and their multinational enterprises. As stated by an author: "Industrialised countries, given both their own history and their own current scramble toward regional integration, would be hard-pressed to locate viable objections, legal or political, to similar initiatives by developing countries."[275]

Regional initiatives from developing countries have at least a chance of increasing economic growth, will strengthen their bargaining power in multilateral trade negotiations, may favour co-operation and further policy integration, and can also be used as a mean to reaffirm some degree of sovereignty that has been lost along the liberalisation process. Indeed, regionalism might allow constituent members to address issues that they can no longer influence in the international and national contexts, which can be of considerable interest to developing countries. Moreover, if protectionism does increase to the point of threatening global trade in the next years, developing countries will have protected themselves against an inward-looking international trade environment. Regionalism thus offers the advantage of mixing a trade strategy with policies that might be beneficial not only to economic welfare, but also potentially to living conditions.

We now examine the case of LAC region and the prospects for an FTAA.

[275] "Developing Countries and Multilateral Agreements", *supra* note 25 at 1732.

III. A FTAA IN THE WESTERN HEMISPHERE: OBSTACLES AND PROSPECTS

Most people think of LAC as a homogeneous continent. However it is probably one of the most diverse regions of the world. In addition to cultural and linguistic differences, there are great contrasts in terms of geography, history, social attitudes and politics which all influence the way of living of these populations.[276] From the economic point of view, we have an area composed of numerous unrelated states: on one hand there are giant countries like Argentina, Brazil, Mexico and Chile with well developed industrial sectors and on the other hand there are many small states whose economies are dependent on the exportation of a single commodity.[277] However most of these states have some disturbing characteristics in common which all contribute to the poor living conditions of their populations.[278] But over the past decade, a significant number of social indicators have improved: illiteracy and infant mortality rates are down in every country and nutrition, health and life expectancy have also improved. Recent elections in several countries have provoked a gradual opening of political space for civil society and demilitarisation efforts are underway in most of them. But the persistent marginalisation of large segments of population compromises the movement towards democratic consolidation. In fact, " all serious students of Latin American political systems recognise that most fail to deliver a high level of protection for civil liberties, fail to guarantee anything approximating the rule of law, and fail to provide all sectors of the society a reasonable opportunity to participate in the formation and implementation of public policy."[279]

Like the rest of the world, Latin America is facing economic challenges because of the

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[276] M. B. Baker, " Integration of the Americas: A Latin Renaissance or a Prescription for Disaster? " (1997) 11 Temple Int'l. & Comp. L.J. 309 at 311.

[277] *Ibid.* at 318.

[278] These are for instance: long tradition of presidential regimes with a strong tendency to concentrate power, omnipresence of a military institution which alienates civil society and has legal impunity, high degree of state involvement in the economy, political parties incapable of converting population demands into political programs that are anyway not implemented once the party is elected, state bureaucracy inefficient and easily corrupted since public service has no prestige and poor remuneration, weakness of the rule of law and very unequal distribution of wealth. See T. Farer, " Consolidating Democracy in Latin America: Law, Legal Institutions and Constitutional Structure " (1995) 10:4 Am. U.J. Int'l. & Pol.Y 1295 at 1300-1301.

[279] *Ibid.* at 1299.

effects of globalisation. The establishment of a single world market economy without barriers to international trade and investment ultimately reduces the role of the state. For instance, NGOs have criticised NAFTA as they feel that the entire neo-liberal order, of which NAFTA is a part, emasculates the Mexican government's regulatory capacity, lowering social and environmental protection in favour of transnational corporate agenda.[280] Economic liberalisation, free markets and the establishment of trading relationships are not sufficient to improve the standards of living nor to the human rights situation. Therefore, the prospects offered by a regional economic integration of the Americas have to be tempered as such a process will by no mean directly lead to an improvement of the standards of living for ordinary people.[281]

But the opening of economies is no longer questioned in Latin America and entering the global economy is considered essential.[282] This new opening was collateral to the resurgence of integration arrangements in the region. Some agreements were strengthened (New Andean Free Trade Area, CARICOM, CACM), numerous bilateral agreements were concluded, and new structures were established (MERCOSUR, G-3) in order to revitalise trade liberalisation. There was therefore a clear shift toward more open trade regime in LAC, with an economic policy now focused on ensuring their insertion into the world economy, while at the same time taking advantages of regional markets. Despite ongoing divergences, these new arrangements have greater potential as they have more political credibility since they consolidate the unilateral domestic reforms that were undertaken. However, the result is a complex web of overlapping agreements within which exists very important diversity in structure and scope as states have simultaneously pursued global, regional, subregional and bilateral approaches to economic integration. This proliferation of regional schemes might therefore impede future efforts toward the hemispheric integration arrangement foreseen with the FTAA project. For instance, Mexico has indeed taken the regional route, concluding a number of preferential agreements at all levels in order to become

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[280] E.J. Dosman, " Managing Canadian-Mexican Relations in the Post-NAFTA Era ", in J. Daudelin & E.J. Dosman, eds., *Beyond Mexico* (Ottawa : Carleton University Press, 1995) [hereinafter *Beyond Mexico*] 81 at 95.

[281] See generally E. Gottfried, "MERCOSUR: A Tool to Further Women's Rights in the Member Nations" (1998) 25 Fordham Urb. L. J. 923. The author argues that MERCOSUR should be used to aid women in the member countries and to improve their societal position within the region. MERCOSUR should thus make women's issues a higher priority, while continuing the other positive consequences from the trade agreement.

[282] A.M. de Aguinis, " The Future of Free Trade in the Americas: Can MERCOSUR accede to

a hub in the Hemisphere, which could complicate the FTAA negotiations and threaten the establishment of clear trading rules.

We now examine the process of trade liberalisation in the LAC region and the prospects for the creation of a FTAA encompassing all the Western Hemisphere . The FTAA is to build upon the CACM, CARICOM, Andean Pact, MERCOSUR and NAFTA and a complex network of bilateral arrangements. We will therefore first review the most important regional trading groups of the region and then examine the process of negotiating the FTAA. Finally, we outline the diverse obstacles facing the creation of a FTAA and try to determine whether it could foster more than little economic growth and enhance welfare for people.

A) REGIONAL ECONOMIC INTEGRATION IN LATIN AMERICA AND THE CARIBBEAN

In the post-war period, some LAC countries sought to establish a counterweight against the US dominant economic power by concluding economic arrangements among themselves, based on ISI strategy and the dependency model. A key role was played by ECLA, which considered that "intra-regional trade liberalisation would allow for exports of manufactured goods to neighbouring countries while extra-regional trade barriers would continue to provide a stimulus to ISI."[283]

The conclusion of bilateral free trade agreements or sub regional group began even in the 1940s and 1950s but ended in failure and trade did not increase significantly among the participating states.[284] It took until the 1960s for the regional integration idea to become a reality with the establishment of the Latin American Free Trade Association (LAFTA). However, this attempt and other groups that were established during the 1960s (CACM, the Andean Pact) all experienced great difficulties that became exacerbated by dramatic subsequent events such as the debt crisis and political unstability. The ISI strategy proved incompatible with development and provoked

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NAFTA: A Legal Perspective " (1995) 10 Conn. J. Int'l L. 597 at 601.

[283] "Latin American Integration I", supra note 101 at 233.

[284] For instance, Argentina and Brazil negotiated a treaty of industrial complementation and free commerce in 1939 ; Argentina, Brazil, Bolivia, Paraguay and Uruguay attended a Regional Conference in 1941 ; El Salvador negotiated bilateral trade agreements with its neighbours from 1951 to 1954. See R. Bernal, "Regional Trade Arrangements in the Western Hemisphere" (1993) 8 Am. U.J. Int'l L. & Pol'Y 683 at 684-686.

large trade diversion effects. The rise of nationalistic totalitarian regimes throughout the region, which created walls of protectionism around certain industries and prevented civil society participation, hindered the integration process.[285] The reduction in trade barriers foreseen by those arrangements was on a product by product basis, thus resulting in many exceptions and favouring delays when the products examined were goods in which member countries were competing. In addition, NTBs were used extensively, specially in the form of broad based licensing systems under which almost all imports needed a license that provided administrative controls with a way of controlling the level of imports according to the state of the balance of payments.[286] Other causes of failure relate to the asymmetries between the different members of the regional grouping, the ensuing unequal distribution of costs and benefit, and the difficulty at implementing effective regional institutions due to the inherent conflict between integration and nationalism.[287]

Ironically, it is the negative impact of the subsequent debt crisis that eventually provided the basis for the renewed and successful attempts at integration in the 1990s. The debt crisis forced LAC to abandon the protectionist ISI policies upon which these regional arrangements were based and that failed to foster economic growth. To remedy the catastrophic economic situation, LAC had to pursue export-led growth that implied extensive trade liberalisation.[288] That liberalisation process in turn transformed the prospects for regional integration: "by the mid-1990s integration was seen not so much as an instrument for promoting industrialisation, but as a stepping stone towards

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[285] P.A. O'Hop, " Hemispheric Integration and the Elimination of Legal Obstacles under a NAFTA-Based System " (1995) 36 Harv. Int'l L.J. 127 at 131.

[286] S. Laird , "Latin American Trade Liberalisation" (1995) 4 Minn. J. Global Trade 195 at 205.

[287] See Genberg & Nadal De Simone, *supra* note 246 at 175-180, providing the following explanations for the failure of RIAs among developing countries : (1) unbalanced distribution of the costs and benefits of adjustment ; (2) losses of fiscal revenue by administrations with an inadequate taxation capacity ; (3) large trade diversion effects ; (4) persistent macroeconomic imbalances ; (5) high and variable inflation generating instability; (6) domestic policy responses to external economic environment ; (7) import substitution policies delaying adjustment to external shocks ; (8) exchange rate misalignment ; (9) lack of policy co-ordination ; (10) divergent views about the degree of market decentralisation and government intervention ; (11) absence of adequate regional institutions.

[288] See V. Bulmer-Thomas, "Regional Integration in Latin America since 1985: Open Regionalism and Globalisation" in *Economic Integration World-wide, supra* note 101, 253 [hereinafter "Latin American Integration 2"] at 254. ("The deep recession in Latin America after 1982, provoked by the need to generate a trade surplus to service the public external debt, had emphasised the need to promote exports. (...) Export promotion therefore obliged Latin American countries to bring domestic costs and prices closer into line with international costs and prices. A necessary condition for this was a reduction in tariff and non-tariff barriers, so that export promotion implied trade liberalisation. Throughout Latin American, therefore, the elaborate quantitative barriers constructed over more than half a century were dismantled, while tariff barriers fell to an average of 10-15 per cent".)

export promotion and export-led growth (...) and firms needed to use the regional market as a first step towards exports to the rest of the world."[289] Since the new goal of regional integration is the promotion of export led growth, what matters now is "the ability of each integration scheme to contribute to the international competitiveness of firms through cost reductions, increased marketing skills, enhanced bargaining power, etc."[290] The aim of trade liberalisation by economic integration is not only to increase foreign investment but also to compete in global markets, taking into account the asymmetries of the various economies with a flexible integration process. This renewed evolution toward regionalisation could ultimately provide the catalyst to free trade throughout the Western Hemisphere.

Therefore, the changes in LAC's regional trade policies now focused on export led growth and build around open markets and competition are part of a larger mechanism. Regional integration at that time consists of FTAs and CU. Even though some of the LAC arrangements provide for the establishment of a common market, that stage has not yet been completed. We provide a brief review of the LAC regional agreements and their later evolution in order to better understand the "liberal" transformation they all experienced, which symbolises the *change of directions* that most developing countries underwent at the end of the 1980s: from import substitution to export orientation, from local protection to market openness and adoption of the neo-liberal approach. We also examine new initiatives such as the MERCOSUR and the G-3 and briefly review NAFTA as it relates to the establishment of the FTAA.

1) A New Life for Past Regional Integration Agreements

a) LAFTA-LAIA

Following ECLAC suggestion to integrate in the form of a regional association and motivated by the creation of the EEC with the 1957 Treaty of Rome, Argentina, Brazil, Chile, Paraguay, Peru, Uruguay (with Mexico and Venezuela as observers) attended a conference in 1959 and agreed to the formation of a regional group.[291] The signing of the Treaty of Montevideo in February 1960 established the Latin American Free Trade Area (LAFTA), encompassing all countries cited above, except Venezuela,

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[289] *Ibid.* at 255.
[290] *Ibid.* at 273.
[291] Bernal, *supra* note 284 at 688.

but Colombia and Ecuador joined in 1961, Venezuela in 1966 and Bolivia in 1967.[292] But from the outset, the initial conditions in the region were almost opposite to those advocated by economic theory to foster welfare, since trade diversion was to follow (as external tariffs were raised to balance tariff revenue losses due to internal liberalisation), distribution of benefits could not be equal (due to the differences in the level of industrialisation) and extra regional trade would continue to dominate balance of payments (because of the low initial base for intra-regional trade).[293]

While LAFTA provided for the elimination of all intra regional trade barriers over a period of 12 years in order to form a free trade area[294], negotiations stalled and countries resisted trade liberalisation when came the time to reduce trade barriers upon products in which the participating countries competed among themselves. The problem related to the lack of complementarity between the economies of the members. Less developed members were afraid that the opening of their market to the much larger economies of Argentina, Brazil and Mexico would be detrimental to them.[295] In addition, the lack of political will impeded the establishment of a true free trade area as all members possessed a right to veto all decisions, as opposed to the EEC where that obstacle to integration was resolved.[296] In 1969, participating countries, with the exception of Colombia and Uruguay, signed the Protocol of Caracas, which aimed at the creation of the free trade area for 1980 (instead of the previous 1973 deadline).[297]

In 1980, LAFTA was replaced by the Latin American Integration Association (LAIA), a much more informal arrangement eventually foreseeing a Latin American common

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[292] See *Treaty Establishing a Latin American Free Trade Area and Instituting the Latin American Free Trade Association*, Feb. 18, 1960, 2 M.I.G.O. 1575 ; reprinted in 1 *Instruments of Economic Integration in Latin America and in the Caribbean* 3 (1975). The Treaty of Montevideo (1960) went into effect on June 1, 1961. See "Latin American Integration I", supra note 101 at 134, noting that membership eventually embraced all of the Latin American republics in South America along with Mexico.

[293] *Ibid.* at 234 detailing those initial conditions.

[294] *Ibid.* at 234-237. Intra-regional trade liberalisation was promoted through an annual round of tariff negotiations on national schedules (listing commodities on which the member countries separately made concessions applicable to other countries) and a triennal round of tariff negotiations on common schedules (listing commodities on which free trade was to be established in four rounds of negotiations).

[295] See R.A. Toro, "La Integracion en America Latina y el Caribe" (1999) 68 Rev. Jur. U.P.R. 119 at 142-143. The Treaty of Montevideo recognised the problem of asymmetries between the economies of its members and provided for preferences to the benefit of the least developed (Bolivia, Uruguay, Ecuador and Paraguay) but it was insufficient to remedy the problem.

[296] *Ibid.* at 143.

[297] Protocol Amending the Treaty of Montevideo, Dec. 12, 1969, reprinted in 1 *American Institute of International Legal Studies* 3 (1975) at 26.

market but allowing different forms of economic co-operation, without any particular strategy, quantitative or temporal targets.[298] A new Treaty of Montevideo was signed by former LAFTA members (Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela) on August 12, 1980, with no schedule for formal implementation but rather the long term objective of a "gradual and progressive formation of a Latin American common market."[299] LAIA is in fact a preferential trade agreement providing for "regional scope" and "partial scope" agreements which permits members to grant preferences to certain members countries without having to extend same to all members (exception to the MFN treatment).[300] LAIA does not intend to become itself a FTA or CU, but rather establishes a basic framework of regional concessions and the infrastructure for negotiation and dispute resolution among its members.[301] The debt crisis had a negative impact on regional integration, but LAIA has recently proven useful by favouring tariff concessions renegotiations and by providing advice, information and proposals to its members.[302]

b) Central American Common Market

The idea for an Central American grouping emerged of a ECLAC meeting held in 1951 at a time where intra-regional trade among the small economies of Central America was negligible. But as their terms of trade were declining, interest grew toward an industrial strategy not limited to their small national market, actively supported by ECLAC.[303] Costa Rica, El Salvador, Guatemala, Honduras and

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[298] See "Latin American Integration I" , *supra* note 101 at 238, outlining that by 1980, " (...) most LAFTA countries had fallen under military rule with governments showing no enthusiasm for any form of regional co-operation that could be construed as a diminution of national sovereignty. The 1980 treaty of Montevideo (...) captured the new mood of scepticism towards regional integration."

[299] *Treaty of Montevideo (1980) Establishing the Latin American Integration Association*, Aug. 12 1980, 20 I.L.M. 672. Entered into force on March 18, 1981 [hereinafter Treaty of Montevideo of 1980]. See art. 1. Available online at <http://sice.oas.org/trade/Montev_tr/indice.stm>.

[300] *Treaty of Montevideo of 1980*, arts. 6-9, 15-23. The partial scope agreements can be of many types but must comply with certain general rules: (1) They must be open to membership, with prior negotiation, by the other member countries of LAIA; (2) They must contain clauses that provide for the progressive multilateralisation of the partially taken actions with the other Latin American countries; (3) They must contain differential treatment favouring the less developed countries. For instance, the Treaty of Asuncion establishing MERCOSUR among Brazil, Argentina, Paraguay and Uruguay is a partial scope agreement which takes into account the differences in development of Paraguay and Uruguay.

[301] See "Americas Agreement", *supra* note 144 at 41; See also Toro, *supra* note 295 at 150-152.

[302] O'Hop, *supra* note 285 at 137-138.

[303] See "Latin American Integration I", *supra* note 101 at 239-240, noting that: "Regional integration had, and still has, special significance in Central America because of the existence of a Central American Federation from independence until 1838. The knowledge that the five republics had once

Nicaragua finally joined in 1960 to conclude the General Treaty to establish the Central American Common Market (CACM).[304] However, despite its name, the CACM never intended to become a true common market as it did not permit the free movement of factors of production such as labour. The Treaty of Managua provided for the gradual elimination of internal trade barriers to create a free trade zone, the implementation of a CET for the creation of a CU and finally greater co-ordination of trade and fiscal policies.[305] The CET set high external tariffs, following the ISI orientation underlying this arrangement. At the institutional level, the organs that were created also aimed more toward economic unification and improvement of regional development than the establishment of a common market.[306] The Central American Economic Council (CAEC) was charged as the primary consultative forum to direct integration and co-ordinate the economic policies of the members while the Executive Council (EC) was to apply and administer the Treaty with a certain power of initiation, sharing its executive powers with the Permanent Secretariat.[307] However, even though the CAEC and EC could produce decisions by majority vote (instead of consensus), their supranationality was undermined by the fact that the Treaty of Managua did not provide for their decisions to be binding.[308] The CACM DSM provides for binding arbitration if the disputes can not be first resolved with the Council. Interestingly, the arbitral panel report has an adjudicatory nature and a supranational character since the panel is constituted of justices of the highest court of each member and its decisions will bind all member states (not only the parties to the dispute).[309]

Despite extreme local strife, great poverty and agricultural based economies, by 1969 almost all trade within the region had increased and achieved duty-free status.[310] The

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been united provided a strong incentive for integration, although previous attempts had always collapsed under the weight of sub-regional fear of supra-national sovereignty in general and Guatemalan hegemony in particular. Economic integration, as proposed by ECLA, at least offered the chance of regional co-operation without the need to surrender national sovereignty."

[304] *General Treaty of Central American Economic Integration*, Dec. 13, 1960, 455 UNTS 3. [hereinafter *Treaty of Managua*]. Costa Rica joined on July 23, 1962, 2 *Inter American Institute of International Legal Studies* at 397, available online at <http://www.sice.oas.org/trade/camertoc.stm>. Nicaragua later withdrew. Panama joined in 1991.

[305] See *Treaty of Managua*, *Ibid.* Arts I-XIV, XIX.

[306] The institutions in fact elaborated a 'program' that was to be implemented by various specific agreements between the parties. Binding enforcement of decisions was not foreseen and the common market had no juridical personality. See Toro, *supra* note 295 at 130-131.

[307] See *Treaty of Managua*, *supra* note 305, arts. 20-24.

[308] *Ibid.* art. 21.

[309] *Ibid.* art. 26.

[310] Bernal, *supra* note 284 at 684; See also Toro, *supra* note 295 at 131, noting the short term success of

first decade was thus successful with remarkable increases in intra-regional trade almost entirely concentrated in manufactured goods.[311] However, CACM's inherent problems related to trade diversion, declining tariffs revenues and small size of the market deeply affected its second decade.[312] In addition, "intra-regional trade in agricultural products continued to be subject to restrictions and NTBs remained a formidable obstacle for the expansion of manufactured exports."[313] CACM then rapidly started to weaken because of economic, political and ideological differences. Wars (El Salvador-Honduras, Nicaragua, Guatemala), macroeconomic problems like balance of payments deficit, declining demand for the region's products and the debt crisis worsened the situation. Political tensions in the mid-1980s annihilated efforts to revive the CACM.

Finally, in June 1990, the CACM members agreed to create a new integration scheme and a Central American Free Trade Zone came into effect in April 1993 with a limited range.[314] In October 1993, the six Central American countries signed an agreement to gradually establish a Central American Economic Union based on the elimination of trade barriers and monetary and fiscal integration, but no deadline was set up.[315] However, the new CACM is unlikely to become more than a free trade area as numerous problems remain, such as the reluctance of Costa Rica to enter a CU (it rather concluded a FTA with Mexico in 1994), the weakness of the regional institutions, and Honduras and Nicaragua remaining at the margin of trade expansion as the weakest economies of the grouping.[316]

But these recent initiatives are still remarkable in that they promote an outward oriented development. Noting the threat posed by the creation of NAFTA (with Mexico now providing textiles formerly exported from Central America), the CACM

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the Central American integration efforts.

[311] "Latin American Integration I", *supra* note 101 at 241.

[312] First, trade diversion occurred on a large scale, which was particularly burdensome to countries such as Honduras, subject to a structural deficit in intra-regional trade due to the fact that agricultural products were excluded from the CACM and faced important trade restrictions. As a result, Honduras withdrew from the group in 1970. Second, the growth of duty-free imports, the low CET for intermediate and capital goods and the numerous tax holidays to attract foreign investment all had serious fiscal impacts for governments' revenues. Third, the small size of the market could not provide a level of demand sufficient to support an optimal scale of production, which further impeded attracting new investments into the manufacturing sector. See *ibid.* at 241-243.

[313] *Ibid.* at 243.

[314] See O'Hop, *supra* note 285 at 140.

[315] Toro, *supra* note 295 at 133.

[316] See "Latin American integration 2", *supra* note 288 at 262-264.

members have also sought to conclude other free trade arrangements, for instance with the European Union and the G-3 (Mexico, Colombia and Venezuela).[317]

c) The Andean Pact-Andean Community

The six Andean countries decided to form a subregional group in order to achieve a further level of integration than within LAFTA, dominated by Argentina, Brazil and Mexico. Bolivia, Chile, Colombia, Ecuador and Peru signed the 1969 Andean Pact, also called the Cartagena Agreement, and Venezuela joined the group in 1973.[318] Much more ambitious than LAFTA, the Andean Pact aimed not only at a faster trade liberalisation but also to establish the conditions for the formation of a common market, and addressed the issue of asymmetries more thoroughly than within LAFTA with industrial programming schemes under the Sectoral Programme of Industrial Development (SPID).[319] It provided for the reduction of tariff and NTBs to intra Andean trade by 1982, a CET by 1976, establishment of sectorial industrialisation programs, harmonisation and co-ordination of economic policies and development plans, and Articles 27 and 28 were foreseeing a common regime for the treatment of foreign investment and technology, which resulted in the controversial Decision 24.[320] Similarly to the CACM, multinational corporations in fact controlled a very important share of the industrial capacity in the region. The Andean Pact thus sought to favour the development of intra-regional industries by protecting the Andean Group markets from the aggressive US multinational corporations with Decision 24, which placed severe restrictions on them. It limited the share of profits distributed abroad (to a maximum of 14%, later 20%), obliged them to sell equity to local partners to ensure local majority shareholding and also banned foreign investment from certain sectors

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[317] Toro, *supra* note 295 at 134.

[318] *Agreement on Andean Subregional Integration*, May 26, 1969, 8 I.L.M. 910, available online: <http://www.sice.oas.org/trade/junac/carta_Ag/index.asp> [hereinafter *Cartagena Agreement*]. It went into force in 1971 and was negotiated under LAFTA as a subregional agreement. See also Final Act of Negotiations on Entry of Venezuela to the Cartagena Agreement, Feb. 13, 1973, 12 I.L.M. 344.

[319] See *Cartagena Agreement*, *ibid.* arts. 1 and 3. The Cartagena Agreement emphasised on industrial development through joint programming of activities, so that all members would benefit form intra-regional trade expansion. The SPID was designed to "distribute new industrial capacity among the member countries in such a way as to exploit economies of scale and ensure the participation of all countries." "Latin American Integration I", *supra* note 100 at 246. Also, the Andean Pact gave "special treatment to Bolivia and Ecuador, the least developed members of the Andean Pact, in the hope that the benefits of membership would be equitably shared. Market forces were not trusted to achieve a satisfactory division of the gains from trade." *Ibid.* at 244.

[320] Common Regime of Treatment of Foreign Capital and Trademarks, Patents, Licenses and Royalties (Decision 24), Dec. 31, 1970, 11 I.L.M. 156 (as amended).

(such as banking and insurance, the media, marketing, transport and public services). Therefore, the Andean Pact was viewed "not only an instrument of industrial development but also as a counterweight to the power of foreign capital."[321] The Andean Pact in fact incarnated the ideology favouring state-directed industrialisation and hostility towards foreign capital.

Annex II of the Cartagena Agreement, which provided for the CET and the rules of origin regime, also put in place a mechanism that in practice prevented a member to use its veto for blocking of a decision.[322] The two principal organs were a Commission empowered with political and legislative capacities as the highest body, and a Board ("Junta"), being the technical organ possessing normative, executive and administrative powers with possibility for juridical innovation.[323] These bodies were authorised to interpret the Treaty of Cartagena and produce new binding norms, with decisions mostly taken by majority vote.[324] But the supranational aspect of the Andean Pact provoked conflicts and the Commission had difficulty with the execution of its decisions. While the Cartagena Agreement did not specifically provide for the judicial area, an Andean Court was finally created in 1979, but the binding effect of the decisions remained unclear, even though it provided for direct applicability of the Commission's decisions in the jurisdictions of members.[325] With respect to disputes, the Andean Court possessed significant supranational authority, with a broad jurisdiction and its judgements had to be implemented by members.[326] But despite its attempt to follow the successful EEC judicial model, the Andean Court's effectiveness was undermined by the lack of co-operation among members.[327] Still attempting to follow the European example, an Andean Parliament was also established, but as an advisory body with no direct legislative role or capacity .[328]

Numerous problems quickly affected the Andean Group, which was not capable of

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[321] "Latin American Integration I", *supra* note 101 at 244.

[322] *Ibid.*

[323] See *Cartagena Agreement*, *supra* note 318, arts. 5-7; See also Toro, *supra* note 295 at 144-145.

[324] See *Cartagena Agreement*, *ibid.* arts. 11, 14, 17.

[325] See *Treaty Creating the Court of Justice of the Cartagena Agreement*, May 28, 1979, 18. I.L.M. 1203 (1979), available online at <http://www.sice.oas.org/trade/junac/tribunal/indexcar.asp> art. 3; see also Toro, *supra* note 295 at 145, 149.

[326] See *Treaty Creating the Court of Justice of the Cartagena Agreement*, *supra* note 325, arts. 1, 19, 25, 27, 29, 31, 33.

[327] See O'Hop, *supra* note 285 at 160.

[328] *Constituent Agreement of the Andean Parliament*, 19 I.L.M. 269 (1980), available online at <http://www.sice.oas.org/trade/junac/Carta_Ag/parla_s.asp>.

getting closer to economic integration than LAFTA did. It appeared that the Andean market was not large enough to provide significant economies of scales for producers, the industrial programming foreseen under the SPID failed, no CET was established unlike in the CACM, and political and territorial disputes all affected the process.[329] The US considered Decision 24 with hostility since it attacked foreign private capital and Chile's example further demonstrated that there was no space for socialism in legal regimes. Chile definitively withdrew from the Andean Group in 1976 after Pinochet's arrival and initiated much more liberal economic policies consistent with neoliberalism and the Chicago School.[330] The subsequent economic success of Chile provided another reason to discredit the Andean Pact. Further economic and political problems within the region impeded any progress throughout the 1980s. Like LAFTA and the CACM, the Andean Pact was further affected by the debt crisis.

The Andean Group finally abandoned the measures that hindered the liberalisation of trade and Decision 24 was annulled in 1987 by the Quito Modifying Protocol.[331] A new CET went into effect on February 1, 1995 and a renewed Andean Community was established with the Trujillo Protocol of March 10, 1996, designed to change its original policies in favour of market forces, foreign investment and trade liberalisation.[332] The US also granted limited trade preferences in 1991 under the Andean Trade Preference Act (ATPA).[333] Recently, intra-trade increased, the bloc's institutions and rules were strengthened with a protocol modifying the treaty creating the Andean Court and the commitment to establish a common market by 2005 was reaffirmed.[334] Most significantly, the Andean Community is now negotiating with MERCOSUR. After experiencing difficult negotiations with MERCOSUR as a bloc, the Andean nations are now negotiating agreements with each of MERCOSUR member countries.[335]

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[329] "Latin American Integration I", *supra* note 101 at 244-246.

[330] Toro, *supra* note 295 at 147.

[331] See Official Codified Text of the Cartagena Agreement Incorporating the Quito Protocol, July 26, 1988, 28 I.L.M. 1165; See also O'Hop, *supra* note 285 at 146.

[332] See *Trujillo Protocol Establishing the Andean Community and the Andean System of Integration*, 10 March 1996, available online at <http://www.sice.oas.org/trade/promod_s.asp>.

[333] See "Americas Agreement", *supra* note 144 at 40.

[334] Lama, A., "Trade-Latam: Andean Community Moving Ahead Despite Economic Woes", Inter Press Service, Dec. 20, 1999, available at LEXIS CRT NEWS file.

[335] See *ibid.*; See Framework Agreement for the Creation of a FTA between the Andean Community and MERCOSUR, 10 April 1998, available online <http://www.sice.oas.org/trade/Mrcsr/ MeAnCo_s.asp> and Partial Scope Complementation Agreement between Andean Community and MERCOSUR, available online <http://www.sice.oas.org/trade/acecabrs.asp> (accessed Feb.25 2000).

d) CARICOM

The Caribbean zone is constituted by numerous isolated mini-states that early recognised that they needed some sort of mechanism to allow them benefit from economies of scale and ensure viable transportation services fundamental for effective production and distribution.[336] After the creation in the late 1960s of two distinct trade associations within the region, the Caribbean countries later decided to join all together to improve their integration process.[337] The Caribbean Common Market (CARICOM) was formed as part of the Caribbean Community Treaty signed in 1973 that provided for the creation of a common market.[338] It stated broad integration objectives, provided for the elimination of trade barriers and the establishment of a CET setting high tariffs.[339] CARICOM also intended to pay special attention to the limitations of the small developing island states and emphasised development objectives and equitable gain distribution.[340] The principal organs are the Conference of Heads of Government, the decisional body, and the Common Market Council, which has a power of initiative and shares a supportive role with the Administrative and Technical Secretariat.[341] While the bodies could produce binding decisions, their

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[336] Toro, *supra* note 295 at 134; See also A.M. El-Agraa & S. M.A. Nicholls, "The Caribbean Community and the Common Market" in *Economic Integration World-wide*, supra note 101, 278 at 280. ("In general, the Caribbean region is characterised by underdevelopment, fragmentation and a high degree of external dependence (...) with foreign ownership and control playing a dominant role in sectors such as manufacturing and tourism".)

[337] See *Agreement Establishing the Caribbean Free Trade Association* (CARIFTA), Apr. 30, 1968, 772 U.N.T.S. 2, 7 I.L.M. 935. The smaller Caribbean states preferred to form their own CU with the *Agreement for the Establishment of an Eastern Caribbean Common Market* (ECCM), June 9, 1968.

[338] *Treaty Establishing the Caribbean Community*, July 4, 1973, Annex to the Caribbean Common Market, 946 U.N.T.S. 17, 12 I.L.M. 1033. [hereinafter *CARICOM Treaty*], available online at<http//www.sice.oas.org/trade/ccme/ccmetoc.stm>. It took effect in August 1973. The community is composed of Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, San Cristobal-Nevis, St. Kitts and Nevis, St. Lucia, St. Vincent, the Grenadines, Trinidad and Tobago. Surinam and Haiti are observers; See also Toro, *supra* note 295 at 136. Most of these states benefit form various trade preferences such as the EU Lomé Agreement, the US Caribbean Basin Initiative, the Canadian CaribCan and other non-reciprocal preferences granted by the biggest Latin American markets..

[339] *CARICOM Treaty*, *supra* note 338, art. 4 (foreseeing economic integration through CARICOM, regional co-operation in infrastructure and basic services projects including health, education, information and broadcasting and the co-ordination of foreign policy), arts. 15 and 31.

[340] See El-Agraa & Nicholls, *supra* note 336 at 280-281. CARICOM was in fact divided into two groups: the more developed countries (MDCs) comprising Barbados, Guyana, Jamaica and Trinidad and Tobago, and the less developed countries (LDCs) constituted of the other nations, to which were granted a series of concessions. *Ibid.* at 282.

[341] *CARICOM Treaty*, *supra* note 334, arts. 5-6, 12.

supranational character was in practice limited.[342] Similarly, disputes are resolved through negotiations and ultimately by an arbitral procedure, however final recommendations of the Council are not binding to the parties, thus leaving members with direct control over the dispute.[343]

Since CARICOM formation, intra-regional trade was characterised by high fluctuations and was not very significant overall.[344] Progress quickly stalled in the 1970s and 1980s because of the weakness of the regional institutions[345], difficulties at implementing the CET and the complex rule of origins regime, and the severe economic problems (such as declining terms of trade and foreign exchange earnings) that affected the region.

CARICOM countries started to re-experience economic growth from the late 1980s and renewed efforts toward deeper integration led the Secretariat to consider the creation of a single market and a closer monetary union (with free movement of goods, services, capital and labour, monetary integration and a new CET).[346] In 1994, the members set up of a timetable for the establishment of the common market and negotiated on the clarification of rules of origin.[347]

Until now, CARICOM's achievements concerned functional co-operation and external policy co-ordination, but its future will depend "on its ability to find a policy mix in which trade and monetary integration can be combined with an outward integration geared in the longer term to multilateral free trade."[348] The threat posed by NAFTA also led in 1993 to the creation of the Association of Caribbean States (ACS) in order to improve functional co-operation and increase economic integration of all countries surrounding the Caribbean basin. The formal agreement constituting the ACS that is to favour the smaller economies by creating a larger regional market was signed in July

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[342] *Ibid.* arts. 4,8.

[343] *Ibid.* art. 11.

[344] See El-Agraa & Nicholls, *supra* note 336 at 283-286, concluding that "CARICOM trade has four characteristics: (i) regional trade is largely dominated by the MDCs; (ii) intra-regional trade remains, (...) insignificant in relation to total trade; (iii) the bulk of trade is in a few commodity groups; (...)." *Ibid.* at 286.

[345] *Ibid.* at 287, underlining the bureaucratic inertia of Caribbean politicians and institutions. ("Lack of viable and stable commitment by member countries to meaningful integration and sweeping changes in political leadership, coupled with ideological pluralism, affected the commitment to and continuity of regional economic goals and policies".)

[346] *Ibid.* at 289-295.

[347] See Toro, *supra* note 295 at 137.

[348] El-Agraa & Nicholls, *supra* note 336 at 296.

1994 in Colombia by CARICOM, the G-3 and the CACM[349].

2) Emergence of New Regional Integration Arrangements

a) The Group of Three (G-3)

The Group of Three or G-3 is constituted of Mexico, Colombia and Venezuela who signed in 1994 an agreement for the creation of a free trade area between them by 1995.[350] This agreement can be traced back to frustration of Colombia and Venezuela with the slow pace of liberalisation within the Andean Pact. The Agreement covers energy resources, culture, communications and transport, finances, tourism as well as market access, investment, services, government procurement and intellectual property. No provision foresees the establishment of a CET or provides for deeper level of integration. It is interesting to underline that while the three countries are members of ALADI, Colombia and Venezuela are also part of the Andean Pact (and Mexico of NAFTA). Therefore the G-3 Agreement recognises that Colombia and Venezuela are bound by previous obligations under the Andean Pact. As a result, these two countries do not exchange between them new obligations in the areas of national treatment, market access for goods, rules of origin, safeguards, trade remedies, agriculture and automotive sectors, government procurement and intellectual property, all sectors already covered by the Andean Pact.[351] This illustrates the problems arising from the overlapping of agreements for countries bound under different subregional groupings.

The G-3 is governed by one Commission, which has a power of initiative but remains relatively weak.[352] Disputes are settled through a binding arbitral process following negotiations and the intervention of the Commission, and the G-3 Treaty, like NAFTA, gives the parties the option to use the WTO dispute resolution process.[353]

The G-3 is member of ACS, concluded with CARICOM a free trade agreement in

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[349] See *Constitutive Convention of the Association of Caribbean States*, available online at <http://sice.oas.org/GEN_COOP /ACSTOC.asp>. 25 heads of states signed it and 12 countries are associate members.

[350] *Grupo de los Tres*, June 13, 1994, 197 Integracion Latinoamericana 41 (1994) [hereinafter G-3 Treaty]. Available online at <http://www.sice.oas.org/trade/G3 E/G3E TOC.stm> .

[351] *G-3 Treaty*, *ibid.* art. 1-03; See also "Americas Agreement", *supra* note 144 at 73.

[352] *G-3 Treaty*, *ibid.* art. 2001. The G-3 Commission oversees the Treaty's elaboration, evaluates the results achieved, recommends modifications, suggests implementing measures and establishes policies regarding sectoral prices. But its decisions must be made by consensus and its enforcement powers are limited, even though its decisions are said to be binding.

1994 covering investment, services, intellectual property and government procurement and there are also plans to merge with the revitalised CACM.

b) MERCOSUR

Argentina, Brazil, Paraguay and Uruguay signed the Treaty of Asuncion in 1991[354] which provided for the establishment of a common market by December 31, 1994, time where MERCOSUR members had undertaken to eliminate any duties, charges and restrictions applied in their reciprocal trade. The Treaty of Asuncion is the result of Argentina and Brazil's efforts to "establish successful trade relations as part of a larger process of stabilising their overall economic and political relations."[355] It foresees the free circulation of goods, services, labour and capital through the gradual elimination of barriers and any other measures having equivalent effect, provides for co-ordination of macro and micro-economic policies and the adoption of sectoral policies in the areas of foreign trade, agriculture, industry, fiscal and monetary matters, foreign exchange and capital, services, customs, transport and communications. Other factors of integration included are the implementation of a CET, the adoption of a common trade policy, and the harmonisation of corresponding legislation. Reciprocity, transparency, NT and MFN clauses are also included.[356] The Treaty of Asuncion is in

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[353] *Ibid.* arts. 19-05 to 19-19.

[354] See *Treaty Establishing a Common Market Between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay*, March 26, 1991, 30 I.L.M. 1044 [hereinafter *Treaty of Asuncion*], available online at <http://www.sice.oas.org/trade/mrcsr/mrcsrtoc.stm>, see art. 1. It entered into force on November 29, 1991. The Treaty of Asuncion was negotiated under the LAIA and its objectives are consistent with those of the 1980 Montevideo Treaty.

[355] Bernal, *supra* note 284 at 701. The origin of this subregional integration scheme can be traced back to the Act of Cooperation and Integration of 1986, signed at a time where both Argentina and Brazil faced balance of payments problems. See *Agreement on Argentine - Brazilian Economic Integration*, July 29, 1986, 27 I.L.M. 901 [hereinafter Declaration of Buenos Aires]; See Aguinis, *supra* note 279 at 598; See also "Latin American Integration 2", *supra* note 285 at 256-257. The legal framework for bilateral co-operation was provided by the twenty four protocols that were added to the Declaration of Buenos Aires in relation to sectoral co-operation, capital goods, tariff reduction, the elimination of non tariff measures on certain products, etc. Then, the Argentina-Brazil Treaty of Integration, Development and Cooperation, signed in November 1988, provided a specific timetable for the elimination of trade barriers between the two countries. See *Agreement on Argentine-Brazilian Integration*, Nov.29, 1988, 27 I.L.M. 901. This was followed by the Act of Buenos Aires in July 1990, which committed both countries to the creation of a customs union within 5 years with the elimination of all internal trade barriers. See Act of Buenos Aires, July 6, 1990, Arg.-Braz. But Uruguay and Paraguay, between which intra-regional trade was already important, feared the creation of a neighbour CU that would lead to trade and investment diversion, and ask to reopen the negations. The result was the 1991 Treaty of Asuncion between the four countries.

[356] Article 2 of the *Treaty of Asuncion* provides that the Common Market "shall be based on reciprocity of rights and obligations between the Parties". Unfair trade practices (e.g. subsidies influencing the

fact a relatively small trade treaty constituted of 24 Articles complemented by four important Annexes detailing the trade liberalisation programme. Annex II deals with the general rules for classification of origin of goods and products[357] while Annex IV provides for Safeguard Clauses, for which an application could not be extended beyond December 31, 1994, as the purpose was to aid during the transition period. The Asuncion Treaty is therefore a very comprehensive agreement, like the Treaty of Rome, but MERCOSUR lacks the EU's powerful supranational institutions, as will be discussed below.

In August 1994, a consensus was reached among participating countries regarding the level and nature of the CET that was to be effective starting January 1995. What came into effect on January 1st 1995 is in fact an imperfect CU with the introduction of a CET for 85% of extra-regional imports (the main exceptions were capital goods, computers and automobiles). The free trade zone is to be established by the year 2001 (final elimination of internal barriers) and the CU by 2006 (final elimination of the exceptions to the CET).[358] At that time, free trade within MERCOSUR is still subject to certain exceptions (e.g. in the areas of information technology and telecommunications), but internal trade is mostly free. It is remarkable that MERCOSUR did succeed to speedily establish a CU, even if still qualified, as many considered that target too ambitious. This success can be attributed to the speed with which intra-regional trade increased after 1990, explained by the massive trade liberalisation occurred within MERCOSUR.[359] But it may be argued that MERCOSUR has not really proven that a CU can be an effective mechanism to promote exports to the rest of the world. Many other factors can explain the dynamism of MERCOSUR and it remains to be seen if its early success will be sustained.[360]

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price of a product to be exported) are prohibited and Article 4 states that the Parties "shall co-ordinate their respective domestic policies with a view to drafting common rules for trade competition." A national treatment clause is provided in Article 7 which foresees that "taxes, charges and other internal duties, products originating in one State shall enjoy, in other States Parties, the same treatment as domestically produced products". In addition, the clause found in Article 8 (d) grants most-favoured-nation treatment, but in relation to LAIA Members. It states that the Parties "shall extend automatically to the other States Parties any advantage, favour, exemption, immunity or privilege granted to a product originating in or destined for third countries which are not Members of the Latin American Integration Association".

[357] See Tate, *supra* note 250 at 400-402, discussing classes of origin for intra-zone trade.

[358] *Ibid.* at 395-400, detailing the various exceptions; Aguinis, *supra* note 282 at 607.

[359] See "Latin American Integration 2", *supra* note 288 at 257-258.

[360] *Ibid.* at 258-259, underlining that Brazil's export performance was due more to currency devaluation and recession than to MERCOSUR trade liberalisation, that Argentina is still dependent on traditional

As demonstrated by the maxi-devaluation of the Brazilian Real in 1999 (that caused a 30% reduction of intra-regional trade), there is a growing need for further co-ordination and harmonisation of macroeconomic policies.[361] And MERCOSUR will have to deepen its integration and approve treaties in sectors such as services and government procurement in order not to be bypassed by certain FTAA rules that would cover those sectors.[362] Therefore it is arguable that MERCOSUR has to move fast towards deeper integration to ensure its future success. But protectionism and the weakness of MERCOSUR's institutional framework could seriously threaten achieving deeper integration and establishing a common market.

The formation of a CU with a CET was designed to be a step toward the ultimate goal of a common market, but this achievement will depend "on the ability and willingness of the member states to let go of individual protectionist policies."[363] A recent World Bank study alleged that MERCOSUR was in fact creating trade diversion and compared it to protectionist fortress of regional trade.[364] The individual members have indeed used selective protectionist instruments (e.g. exceptions to CET, use of quotas and other non tariff measures such as broad licensing systems) in order to protect their individual market (for instance, Brazil has made an extensive use of safeguard measures to protect certain sectors of its economy like in the case of automobile), and MERCOSUR countries did manipulate the tariff structure according to their will.[365] In addition, as tariff and non tariff barriers were reduced, there has been an increase in the use of other protectionist devices such as anti-dumping and countervailing actions, price systems, discriminatory charges on imports, domestic tax structures and technical barriers.[366] However, it remains questionable that MERCOSUR as a region has become a fortress that diverts trade from the outside world since MERCOSUR has

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agro-industrial products for its extra-regional exports and that Paraguay and Uruguay benefited from factors that had nothing to do with MERCOSUR. "[MERCOSUR] has certainly contributed to a rapid increase in intra-regional trade, but part of this was simply a recovery of the trade lost as a result of the debt crisis, while part has been due to the growth of imports made possible by net capital inflows at the beginning of the 1990s." *Ibid.* at 259.

[361] T.A. O'Keefe, "Why a MERCOSUR Currency May Not Be Far Off", Journal of Commerce, Feb. 10, 2000, available in LEXIS CRT NEWS file, arguing that nothing would be better than for MERCOSUR members to have a single currency.

[362] "FTAA Pressures MERCOSUR Pace", Gazeta Mercantil Online, Feb. 25, 2000, available in LEXIS CRT NEWS file.

[363] Tate, *supra* note 250 at 402.

[364] A. J. Yeats, "Does MERCOSUR's Trade performance Justify Concerns About the Global Welfare Reducing Effects of Regional Trade Arrangements?...YES!", World Bank Report, 1998.

[365] See Tate, *supra* note 250 at 406-412.

made tremendous progress in opening its markets.[367]

Perhaps the most serious threat for the future of MERCOSUR is the absence of a fully developed institutional structure. The structure created by the Treaty of Asuncion was provisional until 1995, with two principal organs.[368] First, the Common Market Council (CMC), comprised of the Ministers of Foreign Relations and Economics of each of the member states, which is responsible for compliance with the Treaty of Asuncion and implementation of MERCOSUR policy, but possesses minimal executory power to enforce its directives.[369] Second, the Common Market Group (CMG), co-ordinated by the Foreign Relations Ministers, is the executive organ of the Common Market and shares with the CMC the task of administering and implementing the Treaty through the adoption of resolutions.[370] A Joint Parliamentary Commission was also created to facilitate implementation of MERCOSUR norms in national law.[371]

The Asuncion Treaty was not clear regarding the settlement of questions of law and of disputes for which the negotiation approach has been privileged. The Brasilia Protocol[372], in force as of 1993, established a dispute resolution system articulated on a combination of administrative and arbitral procedures and based on the following characteristics: flexibility, speed of procedure, binding nature of the arbitral remedy and non-permanent system.[373] Its aims are to solve conflicts between member states and problems arising form the private sector. States disputes are to be resolved by means of direct negotiations and a conciliation process within the CMG, and only in

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[366] *Ibid.* at 413-414.

[367] *Ibid.* at 408, 421-422.

[368] During the so-called " transition period " (between 1991 and 1995), the Parties were to meet to " determine the final institutional structure of the administrative organs of the common market, as well as the specific powers of each organ and its decision making procedures ". See *Treaty of Asuncion, supra* note 354, art. 18.

[369] *Ibid.* art. 11; See also Tate, *supra* note 250 at 403.

[370] See *Treaty of Asuncion, supra* note 350, arts. 9, 13-14. The duties of the CMG are as follows: (i) to monitor compliance with the Treaty; (ii) to take necessary steps to enforce decisions adopted by the Council: (iii) to propose measures for the implementation of the trade liberalisation programme, co-ordinate macro-economic policies and negotiate agreements with third parties; and (iv) to draw up the programmes of work deemed necessary to ensure progress towards the formation of the Common Market.

[371] *Ibid.* art. 24; See also Toro, *supra* note 295 at 154, noting that although the Parliamentary Commission has a consultative character, and that the individual members function with Congresses and not Parliaments, there a possibilities for a future MERCOSUR Parliament.

[372] See *Protocol of Brasilia for the Solution of Controversies*, Dec. 17, 1991, 6 Inter-Am. Legal Mat. 1, available online at <http://www.sice.oas.org/trade/mrcsrs/decisions/AN0191e.asp>[hereinater *Brasilia Protocol*].

[373] See R.A. Etcheverry, "Settlement of Disputes in the South American Common Market" in

case of failure will be dealt through a non permanent ad hoc Arbitral Tribunal, with ipso facto obligatory jurisdiction.[374] Chapter 5 of the Brasilia Protocol also provides that private persons ("state independent physical or juridical persons") may benefit from the dispute resolution system when a member state enacts or implements legal or administrative measures that may have a restrictive or discriminatory effect by submitting their claims to the corresponding CMG or MERCOSUR Trade Commission (MTC) National Agency.[375] This arbitral process produces final and binding decisions.[376] This system was to remain in force until the permanent dispute settlement system was set up.[377]

The 1994 Ouro Preto Protocol (that in case of conflict supersedes the Treaty of Asuncion) finally enforced the legal-institutional structure of MERCOSUR, provided that MERCOSUR was a legal person of international law, and "legitimised what was put in place by the intergovernmental institutions of MERCOSUR and established the legal bases to give continuity to the process."[378] The provisory dispute settlement system established by the Brasilia Protocol was extended, the CMC and CMG were formally institutionalised and other organs were created.[379] The CMC and CMG are empowered to produce binding decisions and the CMC is charged with political leadership and decision-making powers.[380] However, these organs are not truly supranational as they remained controlled by the members' representatives and decisions have to be made by consensus.[381] Final implementation remains with national governments since the members refused to provide the administrative bodies with substantial power.[382] The standards established by the MERCOSUR institutions (even those issued during the transition period) have an obligatory character and must

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Petersmann ITL, *supra* note 114, 545 at 547.

[374] *Brasilia Protocol*, *supra* note 372, art. 9; See Etcheverry, *supra* note 373 at 549-551.

[375] *Brasilia Protocol*, *ibid*, arts. 25-32; Etcheverry, *ibid.* at 551-552.

[376] *Brasilia Protocol*, *ibid.* arts. 21-22.

[377] Treaty of Asuncion, *supra* note 350 art. 3 and Annex III.

[378] See *Ouro Preto Protocol to the MERCOSUR Agreement*, Dec. 17, 1994, available online at <http://www.sice.oas.org/trade/Mrcsrs/ourop/index.asp> [hereinafter *Ouro Preto Protocol*], art. 53; See also Aguinis, *supra* note 282 at 606.

[379] See *Ouro Preto Protocol*, ibid. arts. 16-21 and 14, 33. The Ouro Preto Protocol also created a MERCOSUR Trade Commission (MTC), and an Administrative Secretariat.

[380] *Ibid.* arts. 3, 9, 15.

[381] *Ibid.* art. 37.

[382] See Tate, *supra* note 250 at 404.

therefore be incorporated into domestic law when necessary.[383] More particularly, Article 38 of the Ouro Preto Protocol provides that " the Party States agree to adopt the necessary means to ensure, in their respective territories, compliance with the standards issued by the MERCOSUR institutions established in Article 2 of the Ouro Preto Protocol ". However, the hierarchy of the MERCOSUR standards (as established in agreements, protocols, CMC decisions and other resolutions and directives) and their relation to the domestic order has still not been clearly established. This could easily result into confusion since their operative force and self executability will vary.[384] MERCOSUR must rely on the executory powers of each member states and only the Paraguayan Constitution of 1992 and the Argentinean Constitution modified in 1994 recognise the transfer of competencies and jurisdiction to the MERCOSUR organisation.[385] Therefore, while MERCOSUR bodies have the potential regulatory power to modify the domestic legal order of its members, there is still an imperfect delegation of the national sovereignty to the intergovernmental bodies of MERCOSUR.[386] MERCOSUR lacks the EU's powerful supranational institutions.

The administrative shortcomings were not resolved with the Ouro Preto Protocol and these deficiencies could threaten the establishment of an effective common market since MERCOSUR standards will apply only secondarily to national laws. There is no supremacy of community law over domestic legislation. And "given the lack of supranational institutions for the creation of the MERCOSUR law, the absence of a supranational dispute settlement institution is not surprising."[387] Contrary to the EU, no supranational authority was established like a MERCOSUR tribunal, despite the fact that an institutional framework for the settlement of disputes is a mandatory requirement for any co-operation-integration model to be effective.[388] The problem

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[383] Ouro Preto Protocol, *supra* note 378 art. 42

[384] See Aguinis, *supra* note 282 at 612, adding that " this is the weakest aspect of the integration process from a legal perspective, because one cannot definitively affirm that all the rules issued by the common bodies are community law, nor that they are effective, invokable, and applicable without going through an internalisation process in the national legal systems."

[385] See C. O'Neal Taylor, "Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?" (1996-97) 17 Nw. J. Int'l L. & Bus. 850 at 871.

[386] Aguinis, *supra* note 282 at 614.

[387] O'Neal Taylor, *supra* note 385 at 869.

[388] See P.B. Casella, "From Dispute Settlement to Jurisdiction? Perspectives for the MERCOSUR" in *Petersmann ITL*, supra note 114, 553 at 555. ("Whether and how far this so-far successful [MERCOSUR] integration effort may reach the level of an effective common market is closely related to the stipulation of an adequate and performing dispute settlement mechanism. Both theoretically and

with the actual uncertain MERCOSUR dispute settlement system is that arbitration panels can tend to resort to 'political' arrangements and that it is "too loose to enable consistent case law and legal rules to emerge."[389]

MERCOSUR's DSM is unified and ultimately issues binding determinations (once the arbitral tribunal is established after failure of the negotiations, its decisions are binding). MERCOSUR provides for state as well as private parties claims, but the possibility to make a private party claim will depend on the government's willingness to support the claim of the private party whose place of business is located within its territory.[390] Therefore, direct access for private parties is in practice limited within MERCOSUR. MERCOSUR's mechanism possesses a wide scope since it may resolve disputes concerning the interpretation, application or non-compliance not only of the Treaty of Asuncion and its related Protocols, but also of all the other legislative standards issued by MERCOSUR bodies (CMC decisions, CMG resolutions, MTC directives, etc.).[391] In making its decision, the panel may consider all MERCOSUR instruments, general principles of international law and even equitable principles.[392] Contrary to NAFTA, MERCOSUR does not refers to the GATT. Arbitral tribunals established under MERCOSUR' DSM issue binding reports and may even grant provisional relief.[393] However, the Brasilia Protocol does not specify how the system is supposed to interpret MERCOSUR law and it does not provide "for true enforcement within the domestic legal system of the offending country."[394] Therefore, decisions are not integrated into the domestic legal system, which demonstrates that the MERCOSUR's mechanism as it is presently conceived, will be of no help to further the goal of economic integration.

The continued absence of supranational institutions dealing with decision-making and dispute settlement could therefore prevent the establishment of an effective common market.[395] It further impedes to remedy the current lack of structural harmonisation

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conceptually dispute resolution should pave the way for an institutional mechanism, leading to a supranational jurisdiction, for all matters related to the integration process, among the member states engaged in such integration effort".)

[389] *Ibid.* at 557.

[390] See *Brasilia Protocol*, *supra* note 372 at Chapter V, and *Ouro Preto Protocol*, *supra* note 378 at Annex, arts. 1-2.

[391] See *Brasilia Protocol*, *ibid.* art. 1 and Ouro Preto Protocol, *ibid.* art.43.

[392] See *Brasilia Protocol*, *ibid.* art. 19 (1) and 19 (2).

[393] *Ibid.* arts. 18, 22.

[394] O'Neal Taylor, *supra* note 385 at 888.

[395] "An institutional mechanism for the settlement of disputes is not per se a guarantee that adequate and

and co-ordination among each member's policies.[396] For instance, disputes relating to sugar tariffs, milk and automobiles have emerged between MERCOSUR members, and were finally resolved by diplomatic means.[397] But further integration will undoubtedly require more effective and non-political means of resolving disputes.

Despite those problems, MERCOSUR has been very successful in attracting foreign investment and has continuously pursued a policy of trade expansion. Like the EU, MERCOSUR has notably become a successful club that others want to join. For instance, Chile and Bolivia are now associate members, which is particularly remarkable as "the Chilean policy-makers had argued for years that the country did not need to participate in regional integration schemes."[398] Similarly, other Andean countries are seeking associate membership with MERCOSUR.[399] In addition, MERCOSUR has now links with the countries of the G-3, the European Union[400], which is MERCOSUR's number one trading partner, Canada[401], and is also negotiating with South Africa. However for the moment, it must be remembered that while there is now many protocols, little concrete progress has really been made until

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effective results will be achieved –as the experience in the Andean Pact bears evidence to- but it may be an effective tool for keeping a good level of balance in the political dynamics of economic integration, provided that the conceptual and operational gap from a transitional dispute settlement mechanism towards an institutional jurisdictional level may be bridged, within a foreseeable future (...)." Casella, *supra* note 388 at 558.

[396] See Tate, *supra* note 250 at 417-421.

[397] *Ibid.* at 422-423.

[398] "Latin American Integration 2", *supra* note 288 at 260; *Bolivia-MERCOSUR Economic Complemetarity Agreement*, available at <http://www.sice.oas.org/trade/mrcsbo/merbo_s.asp>; *Chile-MERCOSUR Economic Complemetarity Agreement*, available at <http://www.sice.oas.org/trade/msch/mschind.asp>.

[399] See generally Jorge M. Guira, "MERCOSUR as an Instrument for Development" (1997) 3 NAFTA L. & Bus. Rev. 53. Through associate membership, "states join and receive the benefits of free trade without being locked into the CET". *Ibid.* at 54.

[400] See *Mercosur European Union Agreement, Interregional Framework Cooperation between the European Community and its members States, of one part, and The Southern Common Market and Its Party States, of the other part*, Oct. 6, 1995, available online at <http://www.sice.oas.org/root/trade/mrcsr/merco eu/M EU e2.stm>. While this agreement is not a true trade pact, Article 2 does provide for the eventual creation of an inter regional trade association that would cover the fields of commerce, economy and regional integration. It is important to note that MERCOSUR's number one trading partner is in fact the European Union, far ahead from the US as MERCOSUR trades 48% more with Europe than with the United States.

[401] Canada has intensified its ties with MERCOSUR by the signature of a Trade and Investment Cooperation Agreement (TICA) on June 16, 1998 in Buenos Aires, Argentina. TICA with MERCOSUR is available at <http:www.dfait-maeci.gc.ca/tna-nac/tieca-e.asp> The TICA establishes that Canada and MERCOSUR are to identify measures that distort or impede trade and investment and encourages greater Cooperation at the WTO and in the FTAA. It also provides an action plan foreseeing the negotiations of foreign investment protection agreements, co-operation on customs matters and increased co-operation on labour and environment issues. See DFAIT, Press Release N0. 160 (June 17,

now, reflecting the complexity of the underlying issues. But this trend does indicate that MERCOSUR is now a major player in international trade and that its position could affect the FTAA negotiations since Brazil seems more encline to fortify the MERCOSUR position at the same time the US are loosing the upper hand in shaping the future largest free trading zone due to the Washington political gridlock. Brazil in fact launched its own idea for a South American Free Trade Area (SAFTA) as a geopolitical counterweight to NAFTA.

3) NAFTA

NAFTA is significant in three main aspects: it reinforced an emphasis on regionalism by the United States (eager to counterbalance the expanding EEC and dissatisfied with the slow pace of the UR negotiations and difficulty of negotiating new areas in the multilateral forum), brings together two high income countries with a developing country and includes one dominant economic power, which "was decisive in shaping the form of the agreement as FTA as opposed to a CU."[402]

A bilateral free trade agreement was first established between Canada and the US in order to facilitate the trade relationship (the most important of the world) and the resulting Canada-US Free Trade Agreement (CUSFTA) entered into force on January 1st 1989.[403] Mexico also desired a free trade agreement with the US in order to consolidate its recent policies of economic and trade liberalisation (lock-in process), improve its access to the US market with clear rules (made critical by the expansion of Mexican exports under trade liberalisation), and attract further foreign investment. For Mexico, it meant definitively leaving behind its past reliance on dependency theory and ISI, and its traditional fear of US power dominating its internal affairs.[404]

1998).

[402] Weintraub, *supra* note 154 at 203.

[403] *Canada-US Free Trade Agreement*, Jan. 2, 1988, 27 ILM 281 (entered into force Jan., 1, 1989) [hereinafter CUSFTA]. A previous sectoral agreement concerning the automobile industry had been concluded in 1965 (the well known "Autopact"), but CUSFTA now provided for the progressive complete elimination of customs tariffs and for a better market access relating to goods, services and investment. It also established dispute settlement mechanisms in order to remedy any breach under CUSFTA due to the adoption of protectionist measures violating the CUSFTA provisions. No supranational court was created since CUSFTA rather provided for the establishment of ad hoc panels composed of experts for the resolution of specific disputes.

[404] Weintraub, *supra* note 154 at 209. For the United States, supporting free trade with Mexico was a way to ensure that is multinational corporations would benefit the security of low barriers (after the 1982 peso crisis, Mexico had reacted by raising its import barriers), facilitate FDI and co-production by affiliated firms. This rationale was a more or less the same than with Canada, but free trade with Mexico

On June 11, 1990, the US and Mexico announced that they would enter into negotiations for the creation of a bilateral free trade agreement. A few days later, President Bush was also launching the EAI based upon a free trade policy to be developed between the US and the LAC countries. Consequently, Canada, fearing the establishment of a hub and spoke system to the benefit of the US, insisted upon its inclusion in the negotiations with Mexico.[405] This approach finally prevailed and Canada, US and Mexico signed the North American Free Trade Agreement (NAFTA) in December 1992.[406] Political controversy arose in the three countries, especially in the US, but NAFTA entered into force on January 1st 1994.

NAFTA is based upon CUSFTA, however certain provisions were added or refined, in particular relating to intellectual property rights, services and terrestrial transport. NAFTA's core is a ten year tariff elimination program with rules of origin to monitor access to the preferential tariff.[407] Precisions were thus added relating to the rules of origin regime that is now very complex and detailed in order to avoid trade deflection and foreign companies using one of the member country as an export platform.[408] It is a complex and lengthy agreement with very detailed provisions contained in several thousand pages of text, annexes and tariff schedules. It provides for the removal of tariff and NTBs and deals principally with trade in goods under a national treatment standard, technical barriers to trade, investment and services, telecommunications, finance, competition policy, government procurement, intellectual property, and establishes a compulsory dispute settlement mechanism. Another important feature of NAFTA relates to the fact that for the first time, a free trade agreement dealt with

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also had an important political component. *Ibid.* at 205-206.

[405] A hub and spoke system is established when only one country becomes the centre of the free trade system (composed by a web of bilateral free trade agreements), thus encouraging investors to establish within its territory since from there they can benefit from all the bilateral free trade agreements and have preferential access to all the peripheral countries. In comparison, investors establishing in one of the peripheral countries would only benefit from one bilateral agreement since these countries do not communicate in such a system. Canada therefore advocated for a more equitable plurilateral approach where all contracting parties have preferential access to the market of others, even if at that time recession was causing unemployment and the effects of CUSFTA were controversial. Canada considered that as an exporting country, it could not afford wasting the opportunity to have access to an enlarged market encompassing 380 millions people, even though Canadian exports to Mexico were insignificant at that time (less than 1% of total exports).

[406] *North American Free Trade Agreement*, Dec. 17, 1992, 32 I.L.M. 289 (1993), available online at <http://www.dfait-maeci.gc.ca/nafta-alena/agree-e.asp>[hereinafter NAFTA].

[407] *Ibid.* at Chapters 3-4.

[408] *Ibid.* at art. 401

labour rights and environment protection.[409] But it is fundamental to recognise that these agreements lack the legal status to make binding decisions and to enforce them. But NAFTA is very much an agreement in formation and not a "finished product."[410] It is a lengthy agreement, but much of the space is taken by transition arrangements placed in annexes, which demonstrates that NAFTA is drafted in a way facilitating future negotiations with other applicant countries.[411] It is notable that an accession clause without geographical limitation was added, requiring an unanimous approval of new members by the existing members but no application procedure or criteria that new members would have to meet are foreseen.[412]

NAFTA also includes some elements characteristic of deeper integration, that go beyond the traditional goals of a FTA, such as the free movement of capital, and the progressive harmonisation of working standards and environmental rules. But while NAFTA is clearly a broad covering FTA, it does not provide for the formation of CU or a CM that would permit free movement of labour, which symbolises the practical reality of economic integration between a low income and two developed countries. There are no provisions foreseeing an eventual co-ordination of monetary or economic policies, which would be politically infeasible, and no CET with the notable exception of trade relating to computers.[413] NAFTA does not require positive integration such as the adoption of harmonised standards. The establishment of common supranational institutions such as a central executive arm (like the EU Commission) was clearly rejected, the parties preferring the creation of joint committees, thus consistent with the light institutional structure adopted under the CUSFTA. However, some institutional elements were created, such as the Commissions for Labour and

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[409] See *North American Agreement on Labour Cooperation*, 14 Sept. 1993, 32 ILM 1502 [hereinafter NAALC]; *North American Agreement on Environmental Cooperation*, 14 Sept. 1993 (1993) 32 ILM 1482 [hereinafter NAAEC]. NAFTA did not originally dealt with those issues. But after his election, US President Clinton asked for the inclusion of labour and environment standards in the Agreement. Mexico and Canada refused to reopen NAFTA but agreed to the adoption of side agreements relating to those issues.

[410] Weintraub, *supra* note 154 at 210-211.

[411] *Ibid.* at 217, noting in that respect that "[Other applicant countries], presumably, would be expected to accept the core document but seek their own transitional arrangements".

[412] See NAFTA, *supra* note 406 art. 2205. This Article provides that: "Any country or group of countries may accede to this agreement subject to such terms and conditions as may be agreed between such country or countries and the Commission and following approval in accordance with applicable approval procedures of each country". Furthermore, "This agreement shall not apply as between any party and any acceding country or group of countries if, at the time of accession, either does not consent to such application."

[413] *Ibid.* Annex 308 (A).

Environmental Co-operation, the establishment of many working groups, and dispute resolution mechanisms foreseeing arbitration processes for trade, financial, and agricultural disputes as well as for anti-dumping and countervailing duty cases.[414] The principal decision-making body is the NAFTA Commission, but with reduced powers as it plays a consultative role as a forum for regular ministerial meetings overseeing the various working groups.[415] The independent authority of the Commission is quite limited (decisions are taken by consensus of the members) and it is not empowered to establish new norms through its decisions.

The simple elimination of trade barriers without positive integration arguably does not require high level of institutionalism, and this is reflected in the minimal and practical approach adopted by NAFTA for its dispute settlement system since it is a FTA. NAFTA DSM is decentralised (with 5 different arbitral proceedings) and most arbitral reports do not produce binding decisions (there is only a direct effect in cases involving investor-state disputes (Chapter 11) and anti-dumping and countervailing duty cases (Chapter 19)).

NAFTA provides that only the state parties can benefit from the arbitral proceedings, except for Chapter 11 dealing with investors-state disputes.[416] Although Chapter 19 concerning anti-dumping and countervailing duties as well as the NAALC and NAAEC may allow for indirect individual participation, there is no direct access for private parties in the major dispute mechanism under Chapter 20.[417] Regarding subject-matter jurisdiction, four of the five NAFTA mechanisms have narrow jurisdiction (Chapter 19, NAALC and NAAEC's mechanisms are limited to review internal laws of the parties and Chapter 11 only deals with substantive violation of its own provisions).[418] But the dispute settlement system provided for under Chapter 20 has a broad scope and is not limited to the case of a specific breach of a NAFTA's

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[414] NAFTA dispute settlement system is decentralised with five different specialised mechanisms to resolve disputes with limited jurisdiction and powers, constituted of ad hoc arbitral panels. The mechanisms deal with the following types of disputes: general disputes under Chapter 20 (with no direct effect on domestic law); antidumping and countervailing duty determinations under Chapter 19 (binding panel report replacing domestic judicial review) ; investor-state dispute under Chapter 11 (binding arbitration); and labour and environmental disputes under the NAALC and the NAAEC (no binding effect with panel report only making findings and recommendation). See infra notes 416-422 and accompaning text; See also O'Neal Taylor, *supra* note 385 at 854-860.

[415] NAFTA, *supra* note 406 art. 2001.

[416] See *Ibid.* art. 2004 and arts. 1116, 1120-1122 and 1139.

[417] See *Ibid.* art. 1904.5; NAALC, *supra* note 409, arts. 16, 21-22; NAAEC, *supra* note 409,art. 14.

[418] See NAFTA arts. 1102-1103, 1106, 1109-1110, 1116-117, art. 1904 (2) and (8), NAALC arts. 29 (1), 49 and NAAEC arts. 24 (1) and 45.

provision (i.e. NAFTA interpretation and application, alleged violation or nullification or impairment of NAFTA benefits). [419] NAFTA also refers to the GATT settlement mechanism.[420]

With respect to enforcement and legal status of decisions, NAFTA's arbitral reports have a binding effect only in the case of disputes under Chapter 11 and 19, but Chapter 20 also possesses a coercive element (loss of NAFTA benefits through retaliatory measures) when the parties do not reach a mutually satisfactory arrangement.[421] However, they have a legal effect "only regarding the particular administrative determination issued and do not have precedential value in the domestic legal systems of the participating countries."[422] Therefore, NAFTA's system, particularly under Chapter 20 that foresees the principal DSM, is not supranational as its panel reports do not authoritatively resolve the dispute.

The most important shortcomings of NAFTA in fact relate to the lack of NAFTA rules for anti-dumping and countervailing duty actions, which have become protectionist devices to exclude competitive products, and the extremely complex rules of origin regime, which can also be easily transformed from a practical necessity to a protectonist tool.[423] The complexity of the rules of origin could even prevent future accession of other members.[424] Another critical aspect of NAFTA is that, contrary to the case of the EU, no provisions foreseeing transfer of resources to the benefit of the economically weakest economy were included. NAFTA was clearly created mainly for market reasons, and accordingly provisions dealing with regional development were not included. However, Mexico did obtain an unprecedented rescue package supported by the US to overcome its financial crisis at the end of 1994, which would probably not have been made in the absence of NAFTA.[425] But it can be argued that the existence of an independent NAFTA secretariat could have predicted the crisis, and it also highlighted the fact that the fundamental area of macroeconomic policy had

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[419] See NAFTA art. 2004.
[420] *Ibid.* at art. 2005.
[421] *Ibid.* at arts. 1904, 1136 and 2018-2019.
[422] O'Neal Taylor, *supra* note 385 at 894.
[423] See Weintraub, *supra* note 154 at 218-219, detailing the issues of rules of origin and AD and CVD actions.
[424] See generally D.A. Gantz, " Implementing the NAFTA Rules of Origin: Are the Parties Helping or Hurting Free Trade? " (1997) 14 Ariz. J. Int'l & Comp. Law 381.
[425] See Weintraub, *supra* note 149 at 213-217, discussing Mexico's 1995 economic crisis, its causation

been left out of NAFTA coverage. Nevertheless, such mechanisms would have demanded a political commitment that none of the three NAFTA members were ready to make. But as NAFTA evolves and maybe enlarges, there is no doubt that its institutional structure will have to become more elaborate.

While trade between the US and Mexico increased, Mexico now being the US second largest trading partner after Canada, a study demonstrated that NAFTA's effects were in fact negligible and attributed more influence to Mexico's internal economic liberalisation and meanwhile in Mexico, NAFTA did not prevent a deterioration in living conditions.[426] NAFTA did not eliminate US protectionism and trade unilateralism, and while it facilitated growth, those benefits were distributed very unevenly. So far, NAFTA is far from being a device for development.

4) Conclusion: RIAs Results and Prospects for an FTAA

Since 1990, intra regional trade has increased positively within the LAC trading arrangements as reported by the OAS Trade Unit in its 1995 Report.[427] Financial links and cross-border investments have also increased within the region. The general change in economic thinking throughout LAC towards trade liberalisation is key factor explaining this success.[428] But some important problems remain, related for instance to the fact that most intra-regional trade is always dominated by bilateral exchanges between the two most powerful members (e.g. El Salvador-Guatemala in CACM, Colombia-Venezuela in the Andean Pact, Brazil-Argentina in MERCOSUR), that extra-regional trade continues to dominate in all countries (which can damage regional integration in case of problems since intra-regional trade will not have priority), the fact that the number of regional initiatives prevents the possibility of reconciling them (e.g. Colombia and Venezuela being members of the G-3 impedes the establishment of a CET, thus the formation of a CU, despite the stated objective of the Andean Pact), and the general weakness of the regional institutions which

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and financial response.

[426] P. Costantini, "Trade Outlook: NAFTA Slouches Toward FTAA" Inter Press Service, Dec. 20, 1998, available in LEXIS, NEWS file.

[427] See OAS Trade Unit, *Towards Free Trade in the Americas*, 1995 Report, available online at <http://www.sice.oas.org/Tunit/tftr/ftrade4.asp>. Intra-regional trade among the various RTAs, a key indicator of the economic health of these arrangements, has increased since the 1990s. The Report indicates that the share of intra-regional exports in total exports more than doubled from 1990 to 1994.

[428] See Bhagwati, *supra* note 178 at 29-31.

prevents the removal of obstacles to further integration (i.e. absence of community law).[429]

Despite those problems, the negotiation process towards the FTAA is well engaged, demonstrating that regionalism is increasingly seen as a fundamental step towards economic growth and development, particularly in the LAC region. However, significant changes have occurred throughout the region due to the conclusion of NAFTA and the proliferation of RTAs, which have a significant impact for the prospects of creating a FTAA.

The conclusion of NAFTA was very significant as it caused challenges to the rest of LAC and had an important impact on Mexican trade policy. In the LAC region, the launch of NAFTA had the effect of eroding the margins of trade preferences previously benefiting those countries under the complex US system of preferences, and it also raised great concerns relating to subsequent trade diversion (e.g. the Caribbean fearing that NAFTA firms would replace their previous textile imports with NAFTA inputs) and investment diversion.[430] With respect to Mexico, NAFTA had the effect of transforming it into the "bridge" towards US market. Following NAFTA, Mexico started to actively pursue the conclusion of a wide range of trade agreements and new associations. Examples include new FTAs with Bolivia, Chile, Costa Rica, Ecuador, the G-3 with Colombia and Venezuela (with ties with ACS), which include some NAFTA level provisions, however they do not cover extensively investment protection, financial services and telecommunications and use differing rules of origin.[431] Mexico is also an APEC participant country, an OECD member, and has very recently concluded a FTA with the EU.[432] Negotiations are also underway with Nicaragua, Peru, El Salvador, Guatemala, Honduras and MERCOSUR.

The launch of the 1990 EAI and the subsequent proposal for creating a FTAA further

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[429] See generally "Latin American Integration 2", *supra* note 288 at 274-275.

[430] *Ibid.* at 267-268, noting with respect to investment diversion that "the rest of Latin America feared both that existing investment might be relocated to take advantage of Mexico's unique access to the US and that future investment might be diverted for the same reason". *Ibid.* at 267. For instance, the Caribbean countries benefiting form the US CBI sought to obtain parity of treatment with Mexico by reforming the CBI in a way that would reduce the threat of trade and investment diversion caused by NAFTA. While the Clinton administration did draft a bill providing for such NAFTA parity for Caribbean countries, the bill was subsequently dropped because of the US Congress. See *ibid.* at 271.

[431] Gantz, *supra* note 424 at 408.

[432] The negotiations between Mexico and the EU were concluded on November 24, 1999. The Text of the Free Trade Agreement between the EU and Mexico is available online <http:www.secofi-snci.gob.mx/Negociaci_n/Uni_n_Europea/texto_TLCUE/texto_tlcue>.

complicated future prospects of economic integration within the Hemisphere for the rest of LAC countries.[433] But NAFTA membership was still considered the "greatest prize" and Chile was formally invited to join NAFTA at the First Summit of the Americas held in December 1994. Eager to reinsert the global community after 17 years of military rule under Pinochet, Chile, similarly to Mexico, had already concluded many free trade agreements with its neighbours, thereby demonstrating that it was recovering from political isolation while maintaining its export led growth.[434] But Chile lost interest and suspended the NAFTA negotiations when the US administration failed to obtain fast track authority from the Congress.[435] However, it is remarkable that Canada, who had strongly advocated for Chile to join NAFTA by way of the accession clause, wished to pursue bilateral negotiations with Chile in order to reach a free trade agreement that would be NAFTA consistent.[436] Canada wanted to secure a better protection of its mining investments but was mainly seeking to consolidate its image as a promoter of trade liberalisation at the hemispheric level, even though trade between the two countries was insignificant.[437] The resulting Chile-

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[433] See "Latin American Integration 2", supra note 288 at 269: "Each Latin American country had to evaluate the prospects for a free trade agreements with the US, Mexico and Canada through NAFTA membership, as well as for bilateral free trade agreements with each of the NAFTA countries and sub-regional agreements in Latin America itself."

[434] Chile negotiated free trade agreements with Peru, Bolivia, Ecuador, Venezuela, Argentina, Costa Rica, Paraguay and Brazil, Malaysia, New Zealand and was accepted in the Asia Pacific Economic Co-operation (APEC) in 1993.

[435] The fast track negotiating authority expired on June 30, 1994 and has not been renewed since. Fast track is an expedited procedure for congressional consideration of a trade bill where Congress must vote within 90 legislative days. Fast Track authority prevents the Congress from amending parts of a trade agreement that it considers not favourable (thus forcing the reopening of negotiations) since fast track only allows the Congress to approve or reject in block such an agreement. While it is the US President who has the constitutional competence to negotiate international trade agreements, it is the Congress that has the authority to enact legislation that relates to trade. Therefore if an agreement modifies domestic legislation or tariff schedule, Congress has the authority to require amendments unless it has previously granted fast track authority to the President. See U.S. Constitution, art. 2, sec. 1 and art. 1, sec. 8.

[436] Canada, still afraid of the prospect of a hub and spoke system in the Hemisphere with the US as the powerful centre, strongly advocated for Chile to consider joining NAFTA instead of seeking the conclusion of a separate bilateral agreement with the United States. See G. Bailey, "Canadian Diplomacy as Advocacy: The Case of Chile and the NAFTA" (1995) 3:3 Canadian Foreign Policy at 97.

[437] In 1990, Canada's presence in Chile was minor and trade exchange between the two countries completely insignificant. However at that time, the Canadian mining sector wished to diversify its operations geographically which made the deposits of ore in Chile more attractive while Chile was looking for Canadian expertise in the fields of salmon fish farming and forest industries. During the 5 following years, Canadian exports rose and investment in mining significantly increased, contributing to make Canada the largest source of new foreign investment in 1994 and 1995. Stronger ties developed between the two countries with the creation of the Canada-Chile Chamber of Commerce in 1991, closer co-operation within the OAS framework, both countries sitting together during the Uruguay Round negotiations, Canada advocating for Chile's admission into the APEC, major mining expansion

Canada FTA, clearly based on NAFTA, entered into force on July 5, 1997.[438] Chile has also concluded free trade agreements with Mexico and has very significantly entered into an association with MERCOSUR as well as concluding a framework agreement with the European Union. But despite the failure of Chilean accession to NAFTA, Colombia has recently indicated that it would like to negotiate NAFTA entry before FTAA conclusion in order to preserve and strengthen the advantages of ATPA.[439]

On the other hand, Brazil, as the main driving force behind MERCOSUR, reacted quite differently to the possibility of joining NAFTA. It rather started to promote its own project of regional integration with the creation of SAFTA, a scheme "that would be free of US interference and in which the hegemonic role would inevitably be played by Brazil."[440] Even in 1994, Brazilian officials argued that joining NAFTA would cause Latin American countries to "lose their capacity for adopting autonomous policies in sensitive areas such as investment, services and intellectual property."[441] Brazil has consistently said that it wanted to move slowly toward the conclusion of a hemispheric free trade agreement. Brazil is mostly interested in the consolidation and expansion of MERCOSUR in South America, contemplating the eventual formation of a South American Free Trade Area (SAFTA) that would have considerable leverage power in any future negotiations. Therefore it prefers to see its neighbouring countries joining MERCOSUR first, instead of considering any NAFTA type accession. Accordingly, Chile, Bolivia, and Andean nations have reached association agreements with MERCOSUR. It becomes more and more probable that a Brazil dominated MERCOSUR will end up representing all South America through full membership or association agreements, with "Brazil leading LA away from overwhelming US

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projects, etc. See *Ibid.*, 103-108.

[438] See *Canada-Chile Free Trade Agreement*, available online at <http://www.dfait-maeci.gc.ca/tna-nac/cda-chile/menu.asp>. The Agreement deals with trade in goods, investment, services, telecommunications, temporary entry for business purposes and contains detailed rules of origin. Side agreements covering labour and environment were also included. But the Agreement does not cover financial services nor government procurement. However, it notably foresees that Canadian investors will be treated similarly to Chilean investors and will receive benefits equivalent to those Chile may grant to other countries in future agreements. Also, contrary to NAFTA, it does foresee the elimination of anti-dumping and countervailing duty cases relating to trade of duty free goods between the two countries. This is significant since the US has consistently refused to incorporate under NAFTA special substantive rules for the treatment of disputes relating to unfair trade cases.

[439] "Colombia to Ask USA For Quick NAFTA Entry, says Pastrana", BBC Summary of World Broadcasts, Feb. 19, 2000 (AL/W0628/S1), available in LEXIS CRT NEWS file.

[440] "Latin American Integration 2", supra note 288 at 271.

[441] Laird, supra note 286 at 215.

hegemony into a new future of Latin American economic Cupertino."[442] Brazil President Cardoso is clearly seeking the formation of a wider grouping in South America not only as an economic move but also as a political statement demonstrating Brazil's strong influence and giving it more power in front of the US. Those two countries are sharing a difficult relationship filled with tensions relating to protectionist policies. Brazil is particularly dissatisfied with US trade barriers on Brazilian imports of steel, orange juice, sugar, coffee, tobacco, etc.[443]

The failure of the WTO Ministerial meeting in Seattle provided another impetus for strengthening MERCOSUR by seeking closer ties with Bolivia and Chile and reaching a wide agreement with the Andean countries.[444] Brazil now expects Chile and Bolivia to become full MERCOSUR members in order to consolidate the subregional bloc.[445] Chile President Lagos recently stated that Chile now wanted to become a full member, and sceptical of the FTAA becoming a reality by 2005, he emphasised that 'regional reality' for Chile lied with MERCOSUR and that only after taking this step Chile would think about reaching an agreement within the FTAA.[446] The linkage between MERCOSUR and the rest of South America will most probably become reality at one point.

This failure to obtain fast track authority clearly has a dampening effect on the momentum for the creation of a FTAA.[447] The fact is that without fast track status, trade negotiations with the US are viewed as a waste of time by the rest of the Hemisphere, particularly aware of the Congress hostility. And no fast-track authority will be granted within a foreseeable future.[448] But LAC countries have continued to pursue economic arrangements despite the adverse political debate in the US. For the

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[442] M. Rich, J. Jarrods & F. Vimeux, "No Hablo Espanol: America's Failure to Achieve Preferential Trading Status with Latin America" (1998) 6 D.C.L. J. Int'l L. & P. 413.

[443] M. Osava, "Trade Brazil: Protectionism Overshadows US Officials Visit", Inter Press Service, Feb. 15, 2000, available in LEXIS CRT NEWS file.

[444] "Cardoso's New MERCOSUR Strategy", Latin American Newsletters, Regional Reports: Brazil, Jan. 4, 2000, available in LEXIS CRT NEWS file.

[445] "Brazil expects Chile, Bolivia to join MERCOSUR", Worldsources Inc., Emerging Markets Datafile, XINHUA, Feb. 12, 2000, available in LEXIS, CRT NEWS file.

[446] "Chile now wants to Become Full MERCOSUR Member says President Ricardo Lagos", BBC Summary of World Broadcasts, March 11, 2000 (AL/W0631/S1), available in LEXIS CRT NEWS file.

[447] Gantz, *supra* note 424 at 399.

[448] "US Congress Unlikely to Quickly OK Fast Track for Free Trade in the Americas: Dalley", Agence France-Presse, Feb. 14, 2000, available in LEXIS CRT NEWS file. US Commerce Secretary William Davey said the US Congress is unlikely to give President Clinton fast track authority to negotiate the

first time, the lack of US leadership will not result in the abandonment of the trade liberalisation process " as many LA governments, particularly Mexico, Argentina, Chile and Peru, have an enormous economic and political commitment to increased trade and competition market opening, and encouragement of foreign investment."[449] All this in turn has triggered a renewed focus of the EU on LAC, which had already concluded trade and co-operation agreements with the CACM and the Andean Pact. The conclusion of NAFTA and the successful establishment of MERCOSUR further led to new initiatives such as the EU-MERCOSUR agreement and the recent agreement with Mexico.

The resulting picture is therefore a very complex web of overlapping agreements diverging in scope and coverage, which could ultimately prevent the creation of a FTAA. While the FTAA negotiations are currently underway, it is self-evident to conclude that achieving the task of economic integration in the Western Hemisphere faces great challenges.

B) THE NEGOTIATION PROCESS: TOWARDS A FTAA

Associating the concept of integration with the idea of a American union dates back to the end of the XVIII century in Latin America, and was elaborated as an attempt to form political alliances in America to defend the continent from the aggressive European expansionism at that time.[450] But the aspirations of Simon Bolivar with its 1826 Pan American Congress were not fulfilled. In the 1880s, the United States also started to consider the possibility of creating a hemispheric CU with Latin America in order to counterbalance the European influence in the region and expand their own market.[451] However the project rapidly vanished because of rising US protectionism.

FTAA in the last eight months of his administration.

[449] Gantz, *supra* note 424 at 407.

[450] See Toro, *supra* note 295 at 121-125, recalling the 1791 proposal from Francisco Miranda to form an American Union, followed by Simon Bolivar' Jamaica letter and its ideal Congress of Panama proposing a perpetual confederation in 1826. The Argentinean Juan Bautista Alberti was also advocating for a commercial continental union that would include customs uniformity, similar commercial laws and legal harmonisation in 1844; See also "Latin American Integration I", supra note 101 at 230, providing other examples of integration attempts. "(...) Justo Rufino Barrios, ruler of Guatemala, invaded neighbouring El Salvador in 1876 under the banner of Central American Unity; Victor Raul Haya de la Torre, charismatic leader of Peru's Alianza para la Revolucion Americana (APRA), proclaimed an anti-imperialist rhetoric designed to unite all Latin America in the 1920s".

[451] For instance, the idea was on the agenda at the first Conference of American States in 1890. The agenda included issues like "the establishment of regular communications between American ports,

Starting in 1941, South American countries were also contemplating the formation of a CU among them.[452] Periodically, the United States continued to consider Hemispheric integration[453], but it took until 1990 for the idea to truly rebirth with President Bush's Enterprise for the Americas Initiative (EAI).[454] The process established ad hoc consultative committee to encourage trade and investment opportunities. At the same time, the launching of free trade negotiations with Mexico eventually led to NAFTA.

The FTAA process can be seen as the continuation of the EAI under which the creation of a Western Hemispheric free trade zone was contemplated. However, serious doubts existed regarding US commitment to further trade liberalisation in the Hemisphere as the difficult congressional passage of NAFTA and the debate over the ratification of the UR both demonstrated important internal political divergences over such issues.[455] When President Clinton announced his support for the beginning of the negotiations to create a FTAA, it brought new assurances that the goal of the EAI would be pursued. However, the fact is that currently the US seems once again to turn its back on this Hemisphere option.

In any case, negotiating a FTA encompassing all the Western Hemisphere is a arduous and very complex task, considering the number of regional agreements in existence within the region. We examine how the FTAA negotiations process is structured, but first we provide brief comments on the role of the OAS and on Canada's implication

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building of a Pan-American railway, setting up of customs regulations, standards of weights and measures, laws to protect copyrights and trademarks and institution of a common silver coin". J. Grunwald, "The Rocky Road Toward Hemispheric Integration: A Regional Background with Attention to the Future" in R.E. Green, ed., The Enterprise for the Americas Initiative: Issues and Prospects for a Future Trade Agreement in the Western Hemisphere (Westport: Praeger, 1993) 123 at 125. See also Toro, supra *note* 295 at 126-127, noting that the US were also considering the possibility of establishing an American Zollverein in the region, based on the German model.

[452] See Toro, *supra* note 295 at 128-129, discussing the "Conferencia Regional de los Paises de la Plata" held in Montevideo, Uruguay in 1941.

[453] The idea had re-emerged in 1961 with the Alliance for Progress said at the time to represent the "triumph of Pan-Americanism". While it called for reforms in a vast amount of sectors (land, tax, education and administration), it consequently was not taken seriously as the US motivation for granting aid assistance was mainly resulting from US fear of Communist penetration and the necessity of having a secure a secure Hemisphere. In addition, military coup in the region and US dislike of subregional group like ANCOM led US to put aside the idea. Then, the 1967 Punta del Este summit brought together the heads of states of the Americas and was to promote integration through the establishment of a common market. But this initiative also failed as the US aid proposal was not supported by Congress and also because LAC realised the threat posed by US economic penetration with its tendency towards unilateral economic moves designed to protect its own investors to the detriment of the sovereign states policies. See Grunwald, *supra* note 451 at 126.

[454] *Ibid.* at 17-128; See also O'Hop, *supra* note 285 at 151-152 (discussing the EAI).

[455] Laird, *supra* note 286 at 214.

in this process.

1) The Role of the Organisation of American States

The Organisation of American States (OAS) can be said to be the world's oldest regional organisation since the idea of creating an association of states in the Americas came from the Liberador Simón Bolívar at the beginning of the 19th century. On April 30, 1948, twenty Latin American republics and the US signed the OAS Charter. Fifty years later, all 34 sovereign States of the Americas are members of the OAS with the exception of Cuba and Canada is an official member since 1990. Despite the idealistic mandate entrenched in its Charter, the OAS has a past of criticised and non effective organisation because of its failure to play a significant role in hemispheric affairs for a long time, due in part to US domination. But the OAS greatly improved since the end of the Cold War, the internationalisation of democracy issues, and arguably because of the entry of Canada.[456] The importance and significance of the OAS has also been particularly enhanced by the prospects of creating a FTAA. At the Summit of the Americas held in Miami in December 1994, the OAS was said to be the principal hemispheric body for the defence of democratic values and institutions. The leaders underlined that the OAS had a particularly important role to play in supporting the strengthening of democracy; the promotion and protection of human rights, the telecommunications and information infrastructure and the establishment of free trade in the Americas.

The OAS has focused upon the legal aspects of integration through the Inter-American Juridical Committee (IAJC) which concentrates on the elimination of legal obstacles (by the formation of a Working Group) and harmonisation through the development of private international law (by the Inter American Specialised Conferences on the Development of Private International Law). The OAS assists the countries in their trade liberalisation efforts through the Special Committee on Trade (SCT), which offers a multilateral forum of discussion, and the OAS Trade Unit created in 1991 in order to provide technical assistance, notably by way of maintaining the Foreign Trade Information System (SICE) which centralises trade related information. For instance, the Trade Unit has produced in 1995 a very substantive report called "Toward Free Trade in the Americas " which directly addresses the

[456] See generally P. McKenna, " Canada-OAS Relations: More of the Same? " in *Beyond Mexico*, *supra*

issues facing the creation of a FTAA.[457] It also produced a comprehensive Compendium for the FTAA negotiating groups that puts together all the regulations of the countries of the Hemisphere for sectors under negotiation such as competition policy, government procurement, investment, services, standards, etc.[458]

2) The Relationship Between Canada and the LAC Region

In every region of the world, countries join regional economic integration agreements in order to strengthen their economies and be inserted in the new interdependent world economy governed by free trade and global markets. Canada has indeed taken this path, as demonstrated by its concluding of numerous trade agreements and membership in regional organisations while continuing to promote multilateralism. As a major exporting country highly dependent on trade to ensure its economic prosperity, Canada has recently focused on the LAC region in order to form closer links with the Southern part of the Hemisphere. While Canada and LAC relationship has been that of distant neighbours for a long time, Canada is now committed to take a leadership role within the Western Hemisphere region. As Latin America slowly emerged from the debt crisis and was freeing itself from the dictatorial regimes, Canada realised that LAC might well be Canada's region of the future. "Natural partner" of the rest of the Hemisphere, Canada will certainly move closer to LAC in the coming decade, underlining their common concerns: " like Canada, those nations face the challenge of finding and maintaining new trade and investment partners, of coping with US power and hegemony in the post-Cold War era, and of acting effectively as middle powers in the international system."[459] This renewed interest was therefore motivated by multiple reasons: the constant need to find new trading partners, the fact that LAC has undergone major changes since the 1980s lost decade (political democratisation and economic restructuring based on the progressive

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note 280 at 151 ss.

[457] See OAS Trade Unit, "Toward Free Trade in the Americas", 1995 available online at <http://www.sice.oas.org/Tunit/tftr/ftrade>. The Report addresses the following issues: Trade in the Americas; Trade and Integration Agreements; Commonality and Divergence in the Agreements; Protection, Preferential Tariff Elimination and Rules of Origin; Regionalism and Multilateral Rules; Less Developed Countries; The Road Ahead; and The Role of the OAS.

[458] See OAS Trade Unit, "Analytical Compendium of Trade and Integration Arrangements in the Americas", available online at <http://www.sice.oas.org/cp061096/english/toc.asp> .

[459] Canadian Foundation for the Americas, *Toward A New World Strategy: Canadian Policy in the Americas Into the Twenty First Century* (Focal Papers: Ottawa, 1994) at 13.

opening of domestic markets) and Canada's desire to become a leader in trade promotion while at the same time promoting social issues. Canada thus jumped on the opportunity offered by the proposed creation of a FTAA to demonstrate its willingness to become a truly important actor, not only as a middle power but also as a leader in the Hemisphere and at a global level. The opportunity to establish closer ties with emerging markets in the South could not be missed, even if at the time being, Canada's exports to the region are still completely insignificant compared to the overwhelming importance of the US market.

Accordingly, Canada became much more implicated in the Hemisphere's affairs, as demonstrated by the final accession to the OAS in 1990, NAFTA negotiations with US and Mexico, the commitment to expand NAFTA to LAC countries, the subsequent conclusion of a *Canada-Chile Free Trade Agreement*, the Team Canada mission to Latin America in January 1998, and the multitude of various agreements recently concluded with LAC countries.[460] Canada also symbolically hosted the 1999 Pan American games in Winnipeg and will chair in June 2000 the next OAS General Assembly in Windsor. Canada has taken a prominent role in the FTAA negotiation process, reinforced by the current absence of US leadership. Canada chaired the FTAA negotiations for the first 18 months and hosted the fifth meeting of the hemisphere 's trade ministers held on November 3-4, 1999 in Toronto. In addition, the third Summit of the Americas in 2001 will be held in Quebec City. International Trade Minister Pettigrew was also recently on tour in South America to discuss the FTAA with officials in Uruguay, Argentina and Chile and to promote Canadian know-how in key sectors such as mining, information technology and services.[461] Canada strongly supports the idea that the FTAA can help strengthen democratic principles in the Hemisphere and promote Canadian interests.[462]

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[460] In addition to the MERCOSUR TICA, Canada has signed a variety of Foreign Investment Protection and Promotion Agreements (FIPAs) with Argentina, Venezuela, Ecuador, Panama, Uruguay and Costa Rica. See text of the agreements online at http://www.dfait-maeci.gc.ca/tna-nac/fipa-e.asp. Canada also concluded a Memorandum of Understanding on Trade and Investment (MOUI) with the CACM. See text of the agreement online at http://www.dfait-maeci.gc.ca/tna-nac/tieca-e.asp.

[461] "Pettigrew Promotes Canadian Business Expertise During Visit to Argentina and Uruguay", Canadian Corporate Newswire, March 9, 2000, available in LEXIS CRT NEWS file.

[462] See "The FTAA: Towards a Hemispheric Agreement in the Canadian Interest", First Report of the Standing Committee on Foreign Affairs and International Trade (SCAIT), Bill Graham, M.P., Chair, Tabled in the House on Oct. 29, 1999. Available online at <http://www.parl.gc.ca/ infocomdoc/ 36/2/fait/studies/reports/faitrp01-e.htm> (accessed Feb. 25 2000).

3) The Summit of the Americas

a) From Miami to San Jose

The Summit of the Americas is an international conference between all the countries of the Hemisphere, all members of the OAS (except Cuba ejected in 1962), but which is not held under the OAS authority and has no solid structure.

The First Summit of the Americas took place in Miami, Florida on December 9-11, 1994 and brought together the 34 elected leaders of the Western Hemisphere for the first time since the 1967 Punta del Este meeting. The leaders released a Declaration of Principles and a Plan stating the broad themes of the Summit: preserving and strengthening the hemisphere's institutions of democratic government; promote economic growth through hemispheric integration and free trade; eradicating poverty and discrimination; and guaranteeing sustainable development. But under a broad political and social agenda, the true centrepiece of the Summit was in fact the future formation of a free trade area encompassing all the Americas from Alaska to Tierra, to be concluded no later than 2005. According to the Miami Declaration, the objective of such a free trade zone is to foster social and economic development through the elimination of customs barriers relating to goods, services and investments that is to increase international trade. It was also stated that the FTAA should build on existing arrangements in order to strengthen hemispheric economic integration. The Miami Summit Plan of Action covered the four theme areas with twenty-three proposals to achieve the Declaration's objectives. With respect to the FTAA, the Plan foresaw comprehensive agreements on tariff and non-tariff barriers to trade, agriculture, subsidies, investment, intellectual property, rules of origin, antidumping duties, sanitary standards, dispute settlement and competition policy, with some issues to be given more importance than in the UR.[463]

Following the Miami Summit, the Hemisphere's Trade ministers met four times to prepare a work plan for the FTAA. The 1995 Denver Ministerial Declaration[464] provided that the systemisation of regional trade data would be undertaken by the Tripartite Committee, consisted of the OAS Trade Unit, the Inter American

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[463] See Summit of the Americas, *Miami Declaration of Principles and Plan of Action*, 34 I.L.M. 808, 811 (1995), available online at <http://www.ftaa_alca.org>.

[464] See Summit of the Americas Trade Ministerial, *Denver Ministerial Declaration*, available online at <http://www.ftaaalca.org/EnglishVersion/denver_e.htm> [hereinafter *Denver Declaration*].

Development Bank (IADB) and ECLAC.[465] The Denver Declaration also concluded that the FTAA should represent a "single undertaking comprising mutual rights and obligations" and seven working groups were established[466], to which were added four others at the 1996 Cartagena Ministerial.[467] At the 1997 Belo Horizonte Ministerial, preceded by four vice-ministerial meetings, it was specified that the FTAA could co-exist with bilateral and subregional agreements and that each country could negotiate individually or as a member of a regional group.[468] The 1998 San Jose Ministerial Declaration prepared for the Santiago Summit that was to be held one month later.[469] It was decided that alternate chairs and vice-chairs would monitor the FTAA negotiations with the re-stated objective that the negotiations be concluded no later than 2005.[470] Working groups were transformed into nine negotiating groups under the supervision of the Trade Negotiations Committee (TNC) with an agreement on business facilitation measure to be concluded by 2000 by the Commercial Trade Committee (CTC). The negotiating groups deal with (1) market access; (2) investment; (3) services; (4) government procurement; (5) dispute settlement; (6) agriculture; (7) intellectual property rights; (8) subsidies, antidumping and countervailing duties; and (9) competition policy.[471] Technical and analytical support for the negotiations is provided by the Tripartite Committee, which plays a fundamental role for ensuring effective participation of the smaller economies.[472]

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[465] These organisations are all devoted to the political and economic well-being of the Hemisphere. See their world wide web sites at: OAS <http://www.oas.org>; IADB <http://www.iadb.org>; ECLAC <http://www.eclac.org>.

[466] See *Denver Declaration*, *supra* note 464 at Item 2, 5 and Annex I.

[467] See Summit of the Americas Second Trade Ministerial, *Cartagena Ministerial Declaration*, available online at <http://www.ftaaalca.org/EnglishVersion/carta_e.htm> at Item .9 and Annex II.

[468] See Summit of the Americas Third Trade Ministerial, *Belo Horizonte Ministerial Declaration*, available online at <http://www.ftaaalca.org/EnglishVersion/belo_e.htm> at Item 5.

[469] See Summit of the Americas Fourth Trade Ministerial, *San Jose Ministerial Declaration*, available online at <http://www.ftaaalca.org/EnglishVersion/costa_e.htm>.

[470] The chair and vice-chair countries will be: (1) Canada and Argentina, May 1, 1998 – October 31, 1999; (2) Argentina and Ecuador, Nov. 1, 1999 – April 30, 2001; (3) Ecuador and Chile, May 1, 2001 – October 2002; and finally from November 1, 2002 – December 31, 2004, Brazil and the US will both co-chair the negotiations. The chair country is to also chair the Trade Negotiations Committee and host the corresponding ministerial meeting. *Ibid.* at Item 12.

[471] *Ibid.* at Item 13. It was also established that all negotiating groups would meet at the same place for each negotiating period: Miami, Florida May 1, 1998 – February 28, 2001; Panama City, Panama, March 1, 2001 – February 28, 2003; and Mexico City, Mexico, March 1, 2003 until the end of negotiations. See *ibid.* at Item 11.

[472] The OAS serves the FTAA process with its Special Committee on Trade (SCT), a policy-making body which promotes trade liberalisation, and the Trade Unit, which provides technical support to the SCT and analyses hemispheric trade relations. The IADB supports the SCT and its integration division helped the OAS Secretariat with a trade compendium of the Hemisphere. ECLAC provides technical assistance to the governments in the region in the form of economic and legal analysis.

There was also the creation of three special committees: the Consultative Group on Smaller Economies, the Committee on Civil Society and the Expert Committee on Electronic Commerce.[473]

The San Jose Declaration also included provisions addressing the foreseen relationship between the FTAA and the WTO[474], the existence of multiple overlapping trade agreements in the same region[475] and restated that "countries may negotiate and accept the obligations of the FTAA individually or as members of a subregional integration group negotiating as a unit."[476]

b) The Santiago Summit and Recent Developments

The second Summit of the Americas was held in Santiago, Chile, on April 18-19, 1998 and brought together again the leaders from the 34 countries. The agenda for the Santiago Summit included the following areas: education; preserving and strengthening democracy and human rights; economic integration and free trade; and eradication of poverty and discrimination. A Declaration of Principles and Plan of Action were also released and formal negotiations for the creation of the FTAA were launched on the last day of the Summit. However it was widely noted that the Santiago Summit did not focus on the FTAA, but rather on education. This could be explained by two critical reasons: the US' lack of fast track authority and Brazil's reluctance to engage too rapidly in the FTAA process since it first prefers to consolidate its influence in Latin America.[477]

Members of MERCOSUR, ANCOM and CARICOM chose to co-ordinate their actions and each group is represented by a single spokesperson in all negotiations.

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[473] See *San Jose Declaration*, *supra* note 469 at Item 13, 17 and 19.

[474] Noting " the progress achieved in trade liberalisation as a result of the implementation of the obligations assumed by the Governments in the context of the Uruguay Round of Multilateral Trade Negotiations and of the WTO ", the Declaration affirms that the FTAA Agreement will be consistent with the rules and disciplines of the WTO. Item 3 states that " with the intent of contributing to the expansion of world trade, we reaffirm our commitment that the FTAA shall not raise additional barriers to other countries, and we will continue to avoid to the greatest extent possible the adoption of policies that adversely affect trade in the Hemisphere ", thereby retiring commitment to multilateral rules and more particularly Article XXIV of the GATT. See *ibid.* Item 2, 3, 9 and Annex I, General Principles c).

[475] Recognising the " widening and deepening of existing subregional and bilateral integration and free trade agreements and the signing of new agreements [within the Hemisphere]", the Declaration further provides that the " FTAA can co-exist with bilateral and subregional agreements, to the extent that the rights and obligations under these agreements are not covered by or go beyond the rights and obligations of the FTAA ". See *ibid.* Item 2, 9 and Annex I, General Principles f).

[476] *Ibid.* Annex I, General Principles g).

[477] See J. S. Jarreau, "Negotiating Trade Liberalisation in the Western Hemisphere: the Free Trade

The meetings of the negotiating groups started in August 1998 with seven hundred and fifty negotiators form all thirty four countries, but the achievements of the first round of formal negotiations concluded in September 1998 (taken place in Miami which will host FTAA negotiations until February 28, 2001), was described as "organisational type of work", simply outlining the methods and objectives of each groups.[478] 'Real' negotiations were to begin on January 6, 1999 between the nine negotiation groups and three consultative groups (committees on electronic trade, treatment of small economies and participation of civil society).

This initial negotiating period culminated with the Ministerial Meeting held in Toronto on November 3-4, 1999. It was widely noted that senior trade officials from the US and Mexico were missing from the conference and disagreements arose between the large and small economies over the pace of negotiations.[479] During the Meeting, it was recognised that only modest progress towards negotiations for the FTAA had been made until now but the Trade ministers instructed their negotiators to begin drafting the chapters that will constitute the FTAA. The Parties committed to have a draft treaty by the Spring of 2001 and to jointly oppose farm exports subsidies in the next WTO round (a position primarily directed against the EU).[480] It was also decided that labour and environment standards would be discussed during the next round of negotiations and that consultations with civil society organisations involved in labour, environmental and social issues would be pursued.

The most significant commitment was reached within the Business Forum held previously to the Ministerial Meeting where it was agreed to simplify customs and business practices within the Hemisphere with an agreement providing for 18 measures designed to facilitate cross-border trade.[481]

C) OBSTACLES TO THE INTEGRATION OF THE WESTERN

Area of the Americas", (1999) 13 Temp. Int'l & Comp. L.J. 57 at 70-72.

[478] *Ibid.* at 72-73, noting that at the beginning of the negotiations, the TNC had not yet established the FTAA Administrative Secretariat and that the problem of funding also confronted the negotiators.

[479] Ian Jack, "Opposing Agendas Trip up Americas Trade Talks: Small v. Large Economies: Top officials from US, Mexico Absent From Meeting" , Financial Post Datagroup, Nov. 4, 1999, available in LEXIS CRT NEWS file.

[480] See Summit of the Americas, *Toronto Ministerial Declaration*, available online at <http:www.alca_ftaa.org/ ministerials/minis_e.asp>, Item 8-9; See also P. Weinberg, "Trade: Heavy Going at FTAA Negotiations", Inter Press Service, Nov.7, 1999, available in LEXIS CRT NEWS file.

[481] "Trade Promotion Accord Reached Before FTAA Meeting", BBC Summary of World Broadcasts, Nov. 9, 1999, (AL/W0614), available in LEXIS CRT NEWS file.

The creation of a FTAA is facing a multitude of obstacles -legal, structural, geopolitical-, which will continuously arise as the negotiations proceed. Like in any integration process, the elimination of legal obstacles to same is critical. However, in the Western Hemisphere context, it becomes a fundamental issue considering the number and diversity of the states and regional groupings involved, not mentioning the different domestic legal systems. Legal obstacles arise when the obligations under an economic integration agreement conflict with the national legislation or with the obligations under pre-existing bilateral or multilateral agreement. There is also the issue of enforcement where states need to implement the actions of the institutional bodies established under an economic agreement. The fact that most LAC countries have weak institutions further impedes their ability to achieve greater integration. In such a context, legal harmonisation within the Hemisphere constitutes a very difficult and complex task especially considering that the areas needing harmonisation are very differently treated under the various agreements. While progress has been made, it appears that the 2005 deadline set for the creation of the FTAA is unrealistic in view of the complexity of the issues that will have to be addressed, relating for instance to rules of origin regimes, institutional framework, treatment of foreign investment, intellectual property rights, labour and environment, etc. The inherent complexity of such an agreement that is supposed to group 34 nations is further accentuated by the fundamental problem characterising the Americas: the "lack of equilibrium in size and economic development among the states involved."[482] The North-South linkage that is contemplated under the FTAA is also hampered by internal political debates, notably in the US where no fast track authority will be granted in a close future, and by Brazil's desire to consolidate and expand MERCOSUR.

1) The Path to Follow

Not only the creation of such a huge free trade area brings problems relating to the substance of the agreement but also a key issue relates to how will it be formed? The FTAA negotiating process can be viewed as advancing two parallel tracks: one is the

[482] Canadian Foundation for the Americas, *Towards A New World Strategy: Canadian Policy in the Americas Into the Twenty-First Century*, (Ottawa: FOCAL, 1994) at 9.

establishment of a structure for negotiations (discussed above) and the other is to build upon existing trade relationships and arrangements in the Hemisphere.[483] However, the number and complexity of the already existing trade agreements makes it very complicated to see how such an agreement could be put in place. Without a doubt, the path to achieving such broad integration is complex and since the First Summit of the Americas in Miami, the process of achieving an FTAA has considerably evolved since the first proposals. At the beginning of the FTAA process, the NAFTA expansion option to establish the hemispheric wide free trade zone was widely considered.[484] But the idea of proceeding by expanding NAFTA to the LAC countries has progressively been abandoned.[485] The lack of US leadership and fast track authority coupled to the fact that Chile's attempt to join NAFTA did not success were of course significant.[486] In addition, LAC could not be expected at this time to meet NAFTA's intellectual property, services, labour or environmental policy standards with little variation.

MERCOSUR now being the LAC'S most dynamic sub regional economic integration project, it is very likely that a new scenario will emerge with a MERCOSUR led SAFTA, constituted of MERCOSUR and the Andean Community, which would then negotiate an arrangement with NAFTA members. Whatever the form the FTAA ultimately takes, it is foreseeable that a certain linkage between NAFTA and MERCOSUR will be explored. And regardless of the path chosen, consensus is that existing RTAs will form an important element in the configuration of free trade in the Hemisphere. But considering the wide divergence of goals, scope of substantive rules and depth of integration provided in those arrangements, there will be a need for considerable co-ordination and harmonisation. In fact, this situation shares some

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[483] See generally Jarreau, *supra* note 477.

[484] See O'Hop, *supra* note 282 at 128; Bernal, *supra* note 281 at 712-13 .

[485] See F.J. Garcia, " NAFTA and the Creation of the FTAA: A Critique of Piecemental Accession " (1995) 35 Va. J. Int'l L. 539; See also T.A. O'Keefe, "Potential Conflict Areas in Any Future Negotiations Between MERCOSUR and the NAFTA to Create A Free Trade Area of the Americas" (1997) 14 Ariz. J. Int'l & Comp. L. 305.

[486] See generally R. X. Zahralddin-Aravena, "Chilean Accession to NAFTA: US Failure and Chilean Success" (1997) 23 N.C.J. Int'l L. & Com. Reg. 53; L. Anderson, "The Future of Hemispheric Free Trade: Towards a United Hemisphere?" (1998) 20 Hous. J. Int'l L. 635, commenting on the unsuccessful expansion of NAFTA to Chile; See also Jarreau, *supra* note 473 at 75, commenting the fact that the US is not an active participant in the process of hemispheric integration. ("While the US is a strong advocate of the FTAA, it is not providing leadership for its development nor is it engaging in negotiations on a bilateral or subregional level. (...) The lack of fast track authority has inhibited the US from actively pursuing enhanced trading relationships and has deterred others in the hemisphere from actively negotiating with the US".).

similarities with the EU integration.[487] Some have even proposed to "develop the concept of an interim association stage in American integration by studying the EU model of incremental integration through association agreements."[488]

We examine what areas of negotiations are likely to be the biggest obstacles for the creation of a FTAA by comparing how the various existing arrangements deal with certain sectors, particularly MERCOSUR and NAFTA, and we also address the issues related to the establishment of a FTAA institutional framework.

2) Trade Liberalisation

There are substantial differences between the various RIAs in the Hemisphere. For instance, MERCOSUR is not as broad as NAFTA since it does not deal with government procurement, services or telecommunications and is little concerned with the protection of intellectual property rights.

While government procurement is covered under NAFTA Chapter 10, the Treaty of Asuncion does not deal with the issue of access to government procurement contracts in one member states by companies from other member states. In addition, Brazil specifically reserved the right to discriminate in favour of its nationals for the attribution of government contracts.[489] NAFTA provides that telecommunications business can go anywhere in the NAFTA territory[490], but MERCOSUR members can exclude foreign competition completely from the telecommunication sector as MERCOSUR provides that each member states may limit investments to its own nationals.[491] Since it is evident that Canada and the US telecommunication sector have a very important advantage in this area over LAC countries, " any attempts to open up the telecommunications field to the same extent the NAFTA does in North America, are likely to encounter substantial resistance from the MERCOSUR countries."[492]

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[487] See "Americas Agreement", *supra* note 144 at 68. ("In Europe, the deep level of integration sought, and largely achieved, among EU members, together with the number of outside countries seeking closer ties with the EU, have forced European integration planners to develop a number of tools to manage relationships between the centre and the periphery involving different levels of integration, and work towards harmonisation and disparate legal regime".)

[488] See *ibid.* at 70, and 86-127, examining the EU approach to integration through association agreements with non-members and discussing the implications of the EU experience for the FTAA.

[489] See the Annex to the Protocol of Colonia for the Promotion and Reciprocal Protection of Investments within MERCOSUR, Jan. 1994; See O'Keefe, *supra* note 485 at 311.

[490] See NAFTA, *supra* note 406 art. 1301.

[491] See O'Keefe, *supra* note 485, at 311.

[492] *Ibid.*

With respect to financial services, NAFTA has established that providers of financial services have the right to serve clients in another member states and that they cannot be treated less favourably than domestic firms.[493] This issue is not broadly considered in the MERCOSUR context.[494] However, since as noted above the MERCOSUR countries can restrict investment to their own nationals under the Protocol of Colonia, MERCOSUR will certainly not desire to abandon its right to restrict investment on financial services.

Another aspect relates to the issue of investment protections. While NAFTA deals with it and includes binding international arbitration of disputes between foreign investors and host countries,[495] it is very unlikely that most of LAC countries would accept to be bound by a regime imposing international arbitration in such cases.

With respect to intellectual property, it is well known that many developing countries are reluctant to establish strong intellectual property laws, and this is particularly true of Latin America. More particularly, the Treaty of Asuncion does not provide for an intellectual property regime within MERCOSUR, to the exception of minimal rules for the protection of trademarks.[496] Trademarks, patents, trade secrets, copyrighted literary and artistic works lack effective protection. While some countries have adopted stronger laws, there is a lack of enforcement and harmonisation to ensure respect of the works protected. This is in sharp comparison to Chapter 17 of the NAFTA which deals extensively with the protection of intellectual property rights, going beyond the level of protection awarded by international agreements covering this issue such as the TRIPs negotiated under the GATT, and providing that each member states must ensure adequate and effective protection and enforcement of intellectual property rights. Considering that much conflict between the US and states like Brazil and Argentina has already occurred relating to the lack of adequate domestic laws to protect intellectual property rights owners,[497] this issue will surely be very much debated, especially if we take into account the fact that traditionally, developing countries see intellectual property protection as a tool for developed

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[493] See NAFTA, *supra* note 406 arts. 1403, 1405 and 1406.

[494] O'Keefe, *supra* note 485 at 311.

[495] See NAFTA, *supra* note 406 Chapter 11.

[496] L.L. Hicks, J.R. Holbein, "Convergence of National Intellectual Property Norms in International Trading Agreements" (1997) 12 Am. U. J. Int'l L. & Pol'Y 769 at 804.

[497] See O'Keefe, *supra* note 485 at 311; See also "US Commerce Secretary Threatens to Refer Patents Issue to WTO", BBC Summary of World Broadcasts, Feb. 26, 2000 (AL/W0629/S1), available in

countries to keep them dependent of the Northern technology.[498]

Another issue is the treatment of anti-dumping and countervailing duty actions. Even within NAFTA, the US has consistently refused to eliminate unfair trade actions where it is still the substantive domestic law of the importing country which applies since the treatment foreseen in NAFTA for such disputes only deals with procedural issues.[499] It is likely that Canada and Mexico's desire to establish special unfair trade rules under the Agreement (which Canada was able to obtain in the Canada-Chile Free Trade Agreement) would be widely supported by other LAC countries weary of the long standing aggressive US policy regarding unfair trade cases. In effect, protectionist pressure from US producers have already resulted in Argentina and Brazil having to face US anti-dumping and countervailing duty actions. Such a situation will surely contribute to further complicate FTAA negotiations.

3) Institutional Issues

Any economic integration arrangement must have political institutions (to reach decisions about how to implement the agreement's obligations and objectives and oversee that implementation) and a dispute settlement mechanism (to resolve disputes about the meaning and application of the agreement's legal obligations and objectives).[500] The level of institutional development of an integration arrangement typically reflects the degree of unity of the members. Although some RIAs in LAC foresee deep level of integration, we saw that they generally lack the EU's supranational structure. The establishment of institutions capable of effectively making decisions and resolving disputes concerning the implementation and interpretation of the future FTAA agreement constitutes one of the most challenging issue facing the FTAA negotiations, complicated by the wide differences in the governance mechanisms of the various RIAs in force throughout the Hemisphere. Wide disparities exist in the goals and objectives motivating the formation of those RIAs, their resulting institutional framework and the subsequent degree of national

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LEXIS CRT NEWS file.

[498] See generally O. Lippert, "One Trip to the Dentist is Enough: Reasons to Strengthen Intellectual Property Rights Through the Free Trade Area of the Americas" (1998) 9 Fordham L.P., Media & Ent. L.J. 241. The author argues that the FTAA should negotiate higher than TRIPs level of intellectual property rights protection and that developing countries will subsequently gain considerable benefits in new trade and investment opportunities as a result.

[499] See NAFTA, *supra* note 406, art. 1904 (2).

[500] O'Neal Taylor, *supra* note 385 at 851.

sovereignty delegation.

The NAFTA and G-3 both function with one governing body with limited powers (but the G-3 Commission does have the power to issue binding decisions, contrary to NAFTA[501]), reflecting the fact that no positive integration is sought under those FTAs. By contrast, the other RIAs of the Hemisphere foresee a deeper level of integration (i.e. formation of a CU or CM), and accordingly present different approaches to decision-making since some degree of state power has to be transferred when there is a commitment to positive integration.[502] MERCOSUR, CACM, the Andean Pact and CARICOM all function with a two-tier decision-making mechanism, consisting of two organs which together take decisions and produce norms or legislation of varying authority. Generally, the decision-making bodies are constituted of "an 'executive' organ with some degree of independence that is broadly overseen by a 'policy-making' organ, which remains expressively in the control of the state parties."[503] Overall, there is very limited supranationality.

Regarding DSM, most systems established by the various RIAs are constituted of an arbitral procedure. While these DSMs may share some similarities (e.g. avoidance of institutionalism and preference for political resolution),[504] there are some important differences. The structure and effective operation of a dispute settlement system depends on a broad set of variables. These include: the overall design (power given to the institutions to interpret and create law), jurisdiction (how far the arrangement may intrude into the domestic legal system of the members), scope (role of the rule of law in the integration relationship), enforcement mechanism (power given to the supranational authority) and the legal status of the decisions (intent to create law).[505] NAFTA and CARICOM's system are mainly facilitative models, while the G-3 and MERCOSUR establish binding arbitration. On the other hand, CACM and the Andean

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[501] See G-3 Treaty, *supra* note 350 art. 20-01.4.

[502] See F.J. Garcia, "Decision Making and Dispute Resolution in the Free Trade of the Americas: An Essay in Trade Governance" (1997) 18 Mich. J. Int'l L. 357 at 372-373 [hereinafter "Trade Governance in the FTAA"].

[503] *Ibid.* at 382.

[504] O'Neal Taylor, *supra* note 385 at 862. With respect to NAFTA and MERCOSUR model, she states the following: "Neither integration arrangement establishes a supranational institution, such as a court, authorised with the power to resolve disputes. Instead of an adjudicatory institution, the NAFTA and MERCOSUR have put into place dispute settlement processes that culminate in arbitral panels and panel rulings. For the major trade disputes – those going to the meaning and application of the agreement's obligations – both systems emphasise negotiated solutions rather than adjudication".

[505] *Ibid.* at 853.

Pact's DSM provide for quasi-judicial or judicial procedures. We see that the correlation between the level of integration sought by the RIA and the adopted DSM is less clear than it is the case for the decision-making process. But the emerging trend in the Hemisphere is clearly a dispute resolution in an arbitration model, with the most important variable being the willingness of members to empower the arbitral panel with making binding decisions.[506]

In order to address the issue of the FTAA institutional design, we have to determine "whether the FTAA will be created merely to facilitate the parties' integration goals, or actually empowered to produce substantive integration results in forms such as new norms, dispute resolution decisions, and harmonisation legislation."[507] In other words, what degree of supranationality will be considered necessary for effective integration at the hemispheric level? The FTAA, as its name suggests, is not intended to be more than a FTA. However, even though deep integration is not foreseen, there is still a need to establish a governance mechanism that can manage the decision-making and dispute resolution requirements of so large and complex agreement. The FTAA parties have underlined that they "recognise that decisions on trade agreements remain a sovereign right of each nation", therefore indicating that FTAA's decision-making institutions are unlikely to be supranational.[508] In connection to a DSM, the parties affirmed that they "recognise the importance of effective enforcement of international commitments."[509]

These statements suggest that the parties will establish only one decision-making body with a consultative role and limited powers.[510] The issue of representation will arise as some parties may wish to be represented through their RIAs (e.g. MERCOSUR, Andean Pact and CARICOM that currently negotiate as blocs), while some will likely prefer individual representation (e.g. US). It also remains to be determined if the institutional body will be similar to NAFTA's Commission or empowered with more influence such as the G-3 Commission that possesses some degree of power of

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[506] See "Trade Governance in the FTAA", *supra* note 502 at 383. ("(...) parties face a decision involving the costs of such binding dispute resolution (loss of discretion, increased institutional costs, etc.) and its benefits (predictability, stability, legitimacy) against the costs and benefits of resolving disputes more informally and diplomatically".)

[507] *Ibid.* at 359-360.

[508] See *Miami Declaration of Principles*, *supra* note 463, Item 9 (4).

[509] *Ibid.*

[510] See "Trade Governance in the FTAA", *supra* note 502 at 388.

initiative.[511] Another issue relates to the voting procedures (consensus or majority) and the power of making binding decisions. While the consensus approach is likely to be adopted because of general reluctance to the concept of supranationality, it may be argued that "with such a large number of representatives on the FTAA Commission, the existing consensus practice followed in the single-tier systems of NAFTA and the G-3 would be difficult to implement and could easily frustrate the Commission."[512] In addition, it should be stated that decisions are binding.[513]

With respect to a FTAA DSM, we mentioned that the main issue will likely revolve around the binding impact of an arbitral proceeding that would be established after failure of negotiations and consultations.[514] The effectiveness of NAFTA's DSM depends "on the willingness of the participating countries to cooperage on a settlement and thereby preserve the advantages of the free trade arrangement."[515] While a body issuing non-binding findings and recommendations (such as the DSM provided for under NAFTA Chapter 20) is more foreseeable in the hemispheric context considering NAFTA's influence and the wide divergences that exist between the parties, binding arbitral decisions would be necessary for the effective functioning of such a huge agreement.[516] It will also have to be determined if the FTAA DSM should provide that the parties may bring their dispute under the GATT/WTO dispute resolution system

Another issue relates to the authoritativeness of the arbitral panel reports and whether or not their findings concerning the FTAA will be binding on the all the parties. Providing that FTAA arbitral decisions establish authoritative interpretations would be a significant step towards supranationality and for this reason such a proposal is likely to be rejected by FTAA parties.

A new level of trade governance for the FTAA will also pose the problem of

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[511] *Ibid.* at 391.

[512] *Ibid.* at 392.

[513] See "Americas Agreement", supra note 144 at 115. ("For the purpose of effectively driving the hemispheric integration process forward, stronger institutions should be considered. (...) Even if national action remains necessary to implement these decisions on a national level, the Americas Agreement should clearly state that the decisions of the Americas Commission are binding on the parties as a matter of treaty obligation, and that the parties are required to take all necessary steps to implement these decisions in their jurisdiction".)

[514] *Ibid.* at 120, noting that "The main issue of contention would likely be the binding character of the decisions of the arbitral panel."

[515] O'Neal Taylor, *supra* note 385 at 897.

[516] See "Americas Agreement", *supra* note 144 at 121. ("Despite NAFTA's influence, the FTAA parties should attempt to create a FTAA DSM providing that arbitral decisions be binding on the parties. This would seem a minimal condition for effective dispute settlement in a agreement of this scope.")

conflicting norms in the case of overlapping agreements. The complex web of RIAs in the Hemisphere does present the potential for cross-institutional conflicts. The relative priority between FTAA institutions and those of the various RIAs will have to be determined.[517]

4) Legal Harmonisation

To function effectively, an integration system needs a certain co-ordination and harmonisation of the various laws of its members. Legal harmonisation in the Hemispheric context faces many difficulties: the number of states, the different legal traditions, and wide disparities in the levels of economic development, traditional notions of sovereignty and protectionist tendencies. The OAS IAJC is promoting the progressive development and codification of private international law and drafts uniform laws designed to serve as the basis for harmonised national legislation. But we will only briefly overview the difficult and complex issues of rules of origin and environmental and labour standards.

a) Rules of Origin

Rules of origin are particularly important in trade agreements as they form an essential component to determine the appropriate duty treatment for a good entering a country that is integrated in a FTA or a CU. Preferential treatment will be granted only to goods that comply with the rules of origin regime established by the particular agreement, thus preventing that preferential tariff be granted to a non member country. Origin issues have become fundamental as the globalisation process has the effect of favouring successive stages of production in different countries.[518]

The procedures used to determine the origin of a particular good have varied over the years. After the " 'substantial transformation' criteria, there has been a shift toward the product's tariff classification under the Harmonised Tariff System, the rule being that a change in the product's origin will take place in the country where, as a result of manufacturing or other processing, the tariff classification of the article changes from

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[517] O'Hop, *supra* note 285 at 162, discussing the unprobable option that all RTAs obligations be transferred to the FTAA and considering the other possibility that RTAs incorporate rules to the FTAA in order to distribute competencies.

[518] M. C. Silveira, " Rules of Origin in International Trade Treaties: Towards the FTAA " (1997) 14 Ariz. J. Int'l & Comp. Law 411 at 413.

one category to another. When the classification changes, then the product becomes a product of the country where the change occurred."[519] Other approaches foresee the origin determination of a product according to the origin of one of its component that gives the product its 'essential character'. There is also the approach of utilising the 'value added' requirement which means that if a good's increased value following its manufacturing exceeds a specified percentage, the origin of the good will correspond to the country where the manufacturing took place.

The numerous regional arrangements in the Hemisphere have all determined a set of rules of origin which renders the task of harmonising such rules very complex as a product will not receive the same treatment depending on under what agreement it is examined. The complexity of such divergent regimes inherently conspires against the establishment of transparent and clear trade regimes, especially in countries participating in overlapping agreement, which is often the case in the LAC. Therefore, establishing clear and simple rules of origin constitutes one of the greatest challenge of the FTAA negotiating process.

NAFTA's Chapter 4 establishes a very complex and detailed regime for rules of origin. In summary, the general rules provide that goods will meet the NAFTA requirement if: (1) they are wholly produced or obtained in the NAFTA region (case of raw materials); (2) they contain non originating inputs that experienced a change in tariff classification; (3) they were produced in NAFTA from materials meeting the NAFTA rules of origin; (4) there is sufficient North American content (value-added approach). The calculation of regional value content is based on the transaction-value or net-cost. In addition, NAFTA provides for specific and special rules of origin.

NAFTA's complex regime might well be explained by the fact that protectionist interests wanted to ensure that Mexico would not become an export platform, particularly for Japan products.[520] But with such a detailed regime, it becomes difficult and onerous for business to demonstrate compliance. In order to receive NAFTA benefits, complex set of calculations and paperwork are needed in order to prevent the imposition of penalties.[521] Moreover, this type of 'heavy' process has a discriminating effect since only Canada and the US possess sufficient resources to ensure that

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[519] *Ibid.* at 417.

[520] Gantz, *supra* note 427 at 377.

[521] See Silveira, *supra* note 518 at 448-449.

customs services deal effectively with non-NAFTA originating goods. It is evident that a regime similar to that of NAFTA would be too burdensome for the LAC countries.

Since MERCOSUR is a CU with a CET (which all member countries apply to foreign products), the possibility of trade deflection is greatly reduced since the treatment is uniform. Consequently, MERCOSUR regime of rules of origin is more liberal and less complicated.[522] Rules of origin are still necessary to determine if a good can freely circulate throughout the union. The general rule is that there must be a shift in the tariff classification and in some cases that 60% of the value be added locally, with special rules of origin applying to certain goods like high tech products.[523]

Not only NAFTA and MERCOSUR regimes widely differ, but the issue of a CET will also complicate the negotiations since it is very unlikely that MERCOSUR countries would agree to abandon their CET. On the other hand, NAFTA members currently fix their own level of import duties and the subsequent adoption of a CET would be difficult because according to GATT Article XXIV, this could not have the effect of increasing the duties to the trade of non-members. The problem is that because the level of import duties differs a lot between the three countries, with the US tariffs being substantially lower than those of the other countries, Mexico and Canada would have to reduce most of their import duties to an extent that is probably impossible, especially for Mexico at that time.[524]

A FTAA will require its own set of rules of origin, which will be difficult to achieve considering the substantial differences between a FTA and a CU. Since the GATT/WTO system has been pointed out as a fundamental basis for the making of the FTAA, it is likely that future progress in this area will be based upon the new WTO rules with the tariff shift classification method. What has to be remembered is that "the success in expanding preferential markets depends heavily on the way rules are established in terms of rigor, transparency, selectivity and administrative simplicity."[525]

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[522] The original rules were established in the Treaty of Asuncion (Annex II) and have been subsequently modified by Decisions 6/94 and 23/94 adopted by the CMC. See O'Keefe, *supra* note 485 at 309.

[523] Aquinis, *supra* note 282 at 618.

[524] Gantz, *supra* note 424 at 402.

b) Labour and Environment Issues

The issue of whether it is appropriate to address labour and environmental issues in a free trade agreement has been widely discussed within the international community and the WTO framework, however without a final position being reached.[526] The broad debate concerning the linkage between trade and social issues, like labour standards and environmental protection, is far from over as new issues continue to surface, such as bio-diversity protection. Public opinion might have an increasing influence in those sectors. For instance, the treatment of environmental and labour issues was in fact the largest controversy in the US when came the time to adopt NAFTA and it was under the public insistence that newly elected President Clinton pushed for their inclusion in the trade deal, which ultimately resulted in the adoption of the two side agreements addressing those issues. Regarding the FTAA, a foreseeable significant concern in the US will be that " weak environmental and labour requirements will create an inappropriate competitive disadvantage for US businesses."[527]

It is now somewhat recognised that the core labour standards as identified by the International Labour Organisation (ILO) conventions (freedom of association, right to unionise and bargain collectively, prohibition of forced labour and child labour as well as non discrimination and equality of treatment in employment) have to be considered in order to further protect worker's rights and prevent a race to the bottom where industries re-implement in those countries not enforcing adequately their own labour regulations. The problem of worker's rights not adequately protected is particularly acute in Latin America. With respect to the environment, the LAC countries, which often savagely exploited their natural resources in order to remedy immediate financial difficulties, have realised that such practices are not viable through the long term. Tropical deforestation, desertification and pollution are now very serious problems in the South. But it should be remembered that the massive exploitation of natural resources has often been provoked by a demanding foreign capital. It will take a long

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[525] Silveira, *supra* note 518 at 459.

[526] See e.g. S. Charnovitz, " Trade, Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labour Standards Debate " (1997) 11 Temp. Int'l & Comp. L.J. 131.; P.J. Yehout, In the Wake of Tuna II: New Possibilities for GATT Compliant Environmental Standards, (1996) 5 Minn. J. Global Trade 247.

[527] C. Tiefer, " Alongside the Fast Track: Environment and Labour Issues in FTAA " (1998) 7 Minn. J. Global Trade 329, at 353.

time to establish and enforce effective protection rules in those sectors.

Labour and environment will surely at one point become central for negotiations toward the FTAA and will undoubtedly be hotly debated. Indeed, "as the emphasis in trade agreement negotiations shifts to participation in regional trading blocs, integration among participants deepens, which brings to the fore environmental and labour issues that developed and developing countries handle differently."[528] While the inclusion of provisions dealing with labour and environment may now be considered mandatory when negotiating a trade deal with the US, it is most likely that many Latin American nations will resist such an inclusion.[529] The fact is that LAC countries will be very reluctant to link free trade and those issues as they fear -arguably not without reason- the protectionist effect that such inclusion could have, particularly with respect to the US and its propension to adopt unilateral protectionist measures. LAC countries which seek in the FTAA the opportunity to secure an enhanced access to US markets will not be willing to let this advantage go because of the fact that they currently have lower labour and environment protection standards. This issue will surely become increasingly complex as environment trade activists have already started to closely monitor FTAA negotiations in order to ensure it does not become a "little WTO" or a "bigger and meaner NAFTA."[530]

D) FUTURE AND PROSPECTS FOR A FTAA

The LAC region has placed great emphasis upon regional and subregional trade agreements. After past attempts that ended in failure, the current trend to further liberalise trade and promote export led growth through revitalised regional arrangements seems firmly established. The FTAA is considered as an opportunity to enjoy a secure access to the US markets. But there will be a long way before such an agreement is concluded. The huge diversity within the countries of the Hemisphere

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[528] *Ibid.* at 330.

[529] See e.g. P. Villegas, "The Environmental Challenge of the Common Market in South America: REMA Under MERCOSUR" (1999) 29 Golden Gate U.L. Rev. 445. The author argues that MERCOSUR members have been reluctant to incorporate stringent environmental policies for reasons relating to the traditional North-South debate on development. He further considers that NAFTA and MERCOSUR both illustrate the problem of environmental policy asymmetry for inter-American trade integration since MERCOSUR economic integration has left environmental policy far behind.

[530] Danielle Knight, "Environment-Trade: Activists Take Aim at Americas Trade Pact", Inter Press Service, Feb. 9, 2000, available in LEXIS CRT NEWS file.

and the complex set of already existing and overlapping agreements with different scope and purposes will not help. Negotiations of some issues are likely to be very difficult, for instance in the areas of services, intellectual property, labour and environment, rules of origin, etc. Moreover, the continuous lack of US fast track authority and the emerging possibility that a SAFTA encompassing all South America be formed with MERCOSUR further complicate the future for a FTAA. At the least, it seems probable that the 2005 agreement deadline for full trade liberalisation within the hemisphere will not be met.

Latin America is seen as a key battleground for world trade and investment. The FTAA would have a combined GDP of $ 15 trillions CDN, an area of 40 million square kms with a huge market of 800 million people.[531] However, it should not be forgotten that beyond the prospects offered by a preferential access to such an enormous market, LAC will need further assistance in dealing with some of its social problems, particularly in the fields of education, democracy and eradication of poverty. It is remarkable that a recent ECLAC study found that industrial growth in Latin America during the past 10 years has " generally favoured subsidiaries of foreign companies " to the detriment of domestically-owned companies.[532] It should not be surprising that the strongest support for the FTAA comes from major corporations.[533] Therefore, not only arises the question as to how can Western Hemispheric integration be achieved and if indeed it will ever become a reality, but also as to whether freer trade will truly contribute to the improvement of the living conditions of the populations of the Western Hemisphere. It is remarkable that "events in Latin America already are being shaped by adverse reaction to globalisation, whether it's the Zapatista rebel uprising in Mexico or the election of radical President Hugo Chavez in Venezuela."[534]

Those issues were fiercely discussed at the November 1999 Toronto Ministerial Meeting. While the Trade Ministers talked proudly of "putting a humane face to globalisation" with the FTAA, the civil society groups building a Hemispheric Social

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[531] J. Hodgson, "Free Trade Meeting: Myths and Motives", Catholic New Times, Nov. 28, 1999, available in LEXIS CRT NEWS file.

[532] Regional Update, Newsletter Database Luxner News, South America Report, No. 4. Vol. 4., Dec. 1998, available in LEXIS, NEWS file.

[533] M. Rich, J. Jennings & F. Vimeux, *supra* note 442 at 419.

[534] L. Diebel, "Seattle Fallout Drifts South", Toronto Star Newspapers, Dec. 26, 1999, available in LEXIS CRT NEWS file.

Alliance (HSA) underlined the consequences of free trade for the poor, farmers, small manufacturers, workers, the environment and human rights, and recalled that the most recent United Nations Development Program's 1999 Human Development Report had found that economic globalisation has produced 'grotesque' inequalities between rich and poor countries.[535] Indeed, trade enrichment and economic growth did not foster a more equal distribution of wealth nor the improvement of general welfare, particularly in LAC countries which remain mostly characterised by poverty with large sectors of population being increasingly marginalised. Civil society groups stated that implementation of economic liberalisation policies has coincided with growing social inequities, and pointed out to the other negative effects of free trade relating to foreign investment, national control, and intellectual property.[536] The HSA made key demands for inclusion of civil society concerns in the FTAA negotiation process, but while business leaders had the chance to present at length their wish lists, the HSA was only awarded a 90 minute session with the Trade Ministers.

[535] See Hodgson, *supra* note 531.

[536] *Ibid.* These include "provisions on investment that increase the advantage of speculative capital over productive national investment; loss of national control over environmental protection and social programs; and the extension of intellectual property rights into areas that could not be imagined a few years ago –such as genetically modified food and ownership of human genetic material – which threaten bio-diversity."

During its presentation, the HSA stated the following:

> We refuse to be mere spectators of decisions that are so influential and broad in scope. Despite the promises that these changes are good for all of us, the gap between the rich and the poor has become wider. The reality of liberalisation and free trade has meant liberal treatment and freedom only for investors and transnational corporations. (...) Therefore, the negotiations should not proceed until mechanisms are in place for the democratisation of the process to ensure that the concerns of civil society regarding the social, labour, environmental and gender dimensions of trade can be addressed. [537]

It is notable that the Trade Ministers only agreed to continue consultations with the HSA. It remains to be seen to what extent their point of view will be taken into account as the Ministers of course made it clear that they did not endorse any of the recommendations made by the HSA.[538]

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[537] "FTAA Negotiations Must not Proceed Unless Process is Democratised, say Labour, Human Rights and Civil Society Representatives", Canada NewsWire, Nov. 3 1999, available in LEXIS CRT NEWS file.

[538] P. Weinberg, "Trade: Heavy Going at FTAA Negotiations", Inter Press Service, Nov. 7, 1999, available in LEXIS CRT NEWS file.

CONCLUSION

After having experienced important loss of sovereignty within the multilateral sphere dominated by the interests of developed countries, developing countries' use of regional economic agreements might allow them to gain influence and control over certain areas as well as to benefit from increased bargaining power in multilateral trade negotiations. In our opinion, this constitutes an indication that developing countries will continue to work on the creation and consolidation of regional trade blocks, where their concerns and interests may be best reflected, ensuring a smoother transition to liberalisation and global markets and also serving as a powerful mean to attract investment and reach greater influence in subsequent multilateral negotiations. Regionalism also has many ties with non-economic policies, such as linkages with political issues such as human rights, democratisation, environmental and labour standards, greater co-operation, etc., which can all produce positive results for developing countries.

Looking at the general process of regionalisation of the 1990s shows that not only did the number of regional arrangements rise in every part of the world, but also that integration progressively tends to go beyond the simple goal of internal trade liberalisation or the introduction of a CET. Positive integration is more sought than before and many arrangement foresee the eventual inclusion of free factor movement, institutional harmonisation, elements of a common approach in the formulation of trade, and the coverage of areas traditionally described as 'social issues'. Preferential trading arrangements can therefore have profound effects in the member societies. For example, they may alter government structures, change culture and require new standards of governmental regulation, which can be viewed as positive changes. Such changes may be easier to 'sell' to the public when they are part of a regional integration arrangement, which will in turn be 'sold' with the prospects of economic benefits. The case of MERCOSUR is particularly significant in that aspect as this new regional arrangement in South America is presented not only as a powerful tool to achieve economic growth but also as a driving force for democratisation in the region. Its importance is further reflected by the fact that an expansion of MERCOSUR in the rest of South America becomes increasingly foreseeable.

At the same time, the international trade order is now expanding its scope and

influence under the GATT/WTO framework. Modern capitalism has put in place a truly global economy functioning with transfers of digital information, international trade, cross-border capital flows and foreign subsidiaries, all resulting in an immensely competitive environment. Industrialised democracies and especially their powerful multilateral business enterprises will thus ultimately strengthen their domination over global affairs, helped by their controlling interests in new fundamental sectors such as telecommunications, biotechnology, media and entertainment. Domestic policy issues have become increasingly linked with trade and international economic institutions will have a growing influence upon matters traditionally located within the sovereignty attributes of the nation state. Hopefully, the integration of developing countries into the world economy and trading system in a way ensuring more equitable and sustainable development will be regarded as a fundamental component of any truly successful global economic order. However, looking back at the past shows that developed countries have often use multilateral agreements for their exclusive benefit and that the attempt of developing countries to reform the system with demands for a NIEO had a very limited impact. There is now a growing necessity to look for the establishment of a safety net designed to protect the weakest trading nations in the process of globalisation and trade liberalisation. Meanwhile, the reports about negotiations behind closed doors in Seattle and the general dissatisfaction expressed at Bangkok during UNCTAD X does not seem very promising at the multilateral level.

At the same time public opinion is increasingly sceptical of the benefits deriving from globalisation and aware of growing inequalities. While free trade might be good for everyone in theory, in practice it appears that a minority only enjoys the economic growth it spurs as economic growth does not translate into further development. The problem might not be free trade in itself but rather the total absence of any mechanism that would encourage a more equitable redistribution of growth or a better allocation of world-wide resources. The widening social gap and the problem of growing inequalities are experienced along the North-South division but also between the rich and poor within developed nations.

People feel that they don't have any form of control on the decisions taken by international organisation such as the WTO whose rules have an increasing influence in their everyday life. That explains why a myriad of civil society groups and social organisations of all types and ideologies showed up at Seattle to demonstrate their

opposition to globalisation. It shows that there is a necessity to discuss the balance between the role of the nation state and the ever growing importance of the competencies of the international organisations perceived to be lacking transparency and democratic principles and be blind to the need for more social justice.

In such a context, the negotiations for a FTAA can be seen as a 'test-case' for many reasons. The idea of hemispheric integration dates back to a long time and its resurgence in very significant historically as it brings together LAC and the US, the long time interventionist power. In addition, the countries of the LAC region were previously deeply engaged in ISI strategies and followed the prescriptions of the structuralist approach and the dependency school. These countries also made attempts at regional integration, however many basic conditions were lacking for those schemes to foster growth at that time. The LAC region was then very deeply affected by the debt crisis, and many local governments had to follow the prescriptions of international institutions such as the IMF, which deprived them of important sovereignty attributes. Following those events, a profound shift in economic thinking has transformed the whole region. Those States are now pursuing an outward oriented development, integrating economic arrangements at multiple levels, and consider the FTAA as a tool to stimulate further growth and access the US market. The FTAA would become the largest free trade zone of the world, but it would also encompass the widest disparities in economic development as it would include industrialised countries such as the US and Canada, developing countries gaining increasing economic importance such as Brazil, Mexico, Chile and Argentina, and small countries depending on few resources. In addition, the Western Hemisphere is a region encompassing an incredible number of RIAs, such as NAFTA, MERCOSUR, the Andean Community, CACM, CARICOM, etc., which are very different from one another.

Those divergences create many obstacles to the formation of a FTAA as the legal aspects of hemispheric liberalisation, the number of overlapping agreements and the institutional framework all pose great challenges. Political obstacles are also very important, such as the absence of fast track authority for US President, the fact that Brazil first wants to consolidate and expand MERCOSUR, and the fact that countries such as Chile and Mexico are now members of a multitude of RTAs and do not feel

that the immediate formation of a FTAA is fundamental for their development. And the issue of social concerns is also emerging within the FTAA with civil society groups calling for more democracy, transparency and respect for the poor and the middle-income class, and demanding that they be included in the negotiations. Indeed, regional economic integration, particularly at that scale, remains based on free trade principles and there is no demonstration that such an arrangement will contribute to reduce the social gap. For instance, Mexico is now becoming a hub with RTAs that create links with the US and Canada, many countries and groupings in Central and South America and the EU. Has it really enhanced domestic living conditions? Is it a viable way to ensure development?

However, as discussed above, even though regional integration among developing countries might not directly reduce inequalities, such arrangements do provide advantages that are not available within the multilateral trading system. But it is arguable that regionalism should be used not only as a way to achieve further integration leading to economic growth but also as a tool for addressing urgent social issues arising from the competitive global marketplace. If the FTAA does become a reality, we will see in the future if it succeeds in fostering economic growth and if it does contribute to the improvement of the living conditions of the people in LAC, which is the region with the most unequal pattern of wealth concentration in the world.

The WTO is therefore facing great challenges with an angry civil society, the situation of developing countries and the revival of regionalism with the expansion of geographically discriminatory agreements in all parts of the world. While many economists and legal scholars continue to question the effect of regionalism on multilateralism, the WTO currently seems incapable of dealing with the diverging views of its members concerning such arrangements, as demonstrated by the fact that no CRTA report has been adopted despite the fact that more than thirty examination reports are drafted. Regionalism does constitute a great challenge for the WTO and it remains to be seen if the organisation will be able to effectively monitor the growing number of RIAs, which are now increasingly dealing with policy integration. Arguably the revival of regionalism could eventually force the WTO to acknowledge the benefits of those agreements to remedy the deficiencies of the multilateral system, use

the experience of RIAs in integrating economies at different level of development and become more responsive to social issues and development.

It is therefore appropriate to put in context the statement that the international trading system is consolidating itself. While a consolidation is indeed taking place, many issues will have to be dealt with by the WTO and its member countries more effectively than in the past for it to remain a credible global institution. Two fundamental areas of concerns are the prospects for development in a globalised world and the expansion of regionalism. The problem is that despite more promises given at the multilateral level, things are moving very slowly. But it must be remembered that any type of profound change always takes time to be established, especially at the global scale, and that therefore it is not possible to expect a rapid evolution. Overall, regionalism is undoubtedly a good thing if it brings a new balance of forces within the multilateral sphere, and the negotiations towards the establishment of the FTAA could accelerate the pace of changes as well as increase the level of implication and awareness of civil society towards the impacts of globalisation.

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Certain Aspects of Intellectual Property Rights

In Outer Space

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ABSTRACT

This study analyses Intellectual Property Rights related to space activities and Space Law. The potential contradictions between these two laws are of specific interest. Besides the different approaches on which their legislation has been established, the increasing role of private companies as space actors calls for the adoption of a strong legal framework for Intellectual Property.

The issue of Intellectual Property Rights in outer space will be examined within the first Part, with a focus on Patent Law. The second Part explores the specific rules contained in the International Space Station Intergovernmental Agreement, on Intellectual Property and exchange of data and goods. Although there is some legal mechanism, no protection capable to meet the space industry's current and future needs.

RESUME

Cette thèse analyse le Droit de la propriété Intellectuelle au regard des activités spatiales et du droit de l'Espace. La confrontation des principes de base qui gouvernent respectivement chacun de ces droits revêt en effet un intérêt particulier. Outre une philosophie différente dans l'approche des questions juridiques, la participation croissante du secteur privé dans les activités spatiales nécessite de créer un cadre juridique solide en matière de Propriété Intellectuelle.

La première partie est consacrée à l'analyse du droit de la Propriété Intellectuelle, et plus spécifiquement le droit des brevets dans le cadre des activités spatiales. La seconde porte sur le cadre juridique de la station spatiale internationale, et notamment, la propriété intellectuelle et l'échange des biens et des données. Nous verrons que malgré l'existence de mécanismes juridiques, il n'existe pas à l'heure actuelle de protection qui soit suffisamment efficace pour répondre aux besoins croissants de l'industrie spatiale.

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TABLE OF CONTENTS

INTRODUCTION

The period prior to the fifteenth Century is of specific interest in the history and evolution of patent. At that time, privileges were accorded by the sovereign, affording a special right to an individual; the concept of utility and sometimes favoritism playing an important role. The "Parte Veneziana," the first form of privilege, was adopted by the Republic of Venice in 1474.[1] This anecdote is relevant for a study on intellectual property rights in outer space: Although non-governmental actors are increasing, the space business remains government related as any space activity carried in outer space requires a government level approval. One of the most important manifestation of space law is the international responsibility borne by States Parties to the Outer Space Treaty[2] for national activities in outer space. As a consequence, and in the concern of avoiding the existence of any privilege or abuse in the grant of rights, it is important to guarantee a fair and protective legal framework.

[1] See *Introduction to Intellectual Property, Theory and Practice*, Ed. by the World Intellectual Property Organization (Kluwer Law International, 1997), at 17.

[2] The pillars of the international space law are the five following treaties: The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, hereafter the Outer Space Treaty, or OST (1967), the Agreement on the rescue of astronauts, the return of astronauts and the return of objects launched into outer space (1968), the Convention on the international liability for damage caused by space objects (1972), the Convention on Registration of Objects Launched into Outer Space (1974) and the Agreement governing the activities of states on the moon and other celestial bodies. See in *Annals of Air and Space Law*, ICASL McGill University, (Pédone Ed., vol. XVIII, Part II, 1993).

First, in order to have a clear understanding of the questions dealing with intellectual property, it is useful to recall some definitions. Intellectual property comprises of two main branches: "Industrial property" embraces the protection of inventions by means of patents, protection of certain commercial interests by means of trademark law and the law on protection of industrial designs. In addition, industrial property addresses the repression of unfair competition. "Copyright" grants authors and other creators of works of the mind (literature, music, art), certain rights to authorize or prohibit, for a certain limited time, certain uses made of their works.[3] A patent, related to the first branch, is a document issued by a government office which describes the invention and creates a legal situation in which the patented invention can normally only be exploited (made, used, sold, imported) by, or with, the authorisation of the patentee. The protection of inventions is limited in time (generally twenty years from the filing date of the application for the grant of a patent).[4] An invention is a novel idea that permits in practice the solution of a specific problem in the field of technology.[5]

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[3] See supra note 1. at 3.

[4] It is estimated that the number of patents granted world-wide in 1995 was about 710,000. Furthermore, it is estimated that at the end of 1995 about 3.7 million patents were in force in the world, online: The World Intellectual Property Organization Homepage<http://www.wipo.org/eng/main.htm>

[5] Under most legislations concerning inventions, the idea, in order to be protected by law ("patentable"), must be *new* in the sense that it has not already been published or publicly used; it must be *non-obvious* ("involve an inventive step") in the sense that it would not have occurred to any specialist in the particular industrial field, had such a specialist been asked to find a solution to the particular problem; and it must be *capable of industrial application* in the sense that it can be industrially manufactured or used. For further developments, *ibid.*

The intellectual property law is usually limited to the boundaries of the country whose government grants the rights. In order to receive protection in several countries, the owner of the invention will have to seek protection in these places. To guarantee the possibilities of obtaining protection in foreign States for their own citizens, in 1883, eleven States established the International Union for the Protection of Industrial Property, by signing the Paris Convention for the Protection of Industrial Property.[6] The World International Property Organization, hereafter WIPO, was established on July 14, 1967 to promote the protection of intellectual property rights throughout the world.[7] Although the Paris Convention required the filing of a patent in each foreign country, the concept of "international application" was introduced by the Patent Cooperation Treaty of June 19, 1970, providing a great simplification in the first steps of the procedure. However, national or regional patent agency retains the final responsibility for the grant of the patent.

The relevance of intellectual property in the space sector was examined with more accuracy for about ten years. This tendency corresponds to the current evolution of this sector. "New entrants and interests are taking shape and already today there is more private than public investment in space systems. The trend will continue strongly into the

[6] *Ibid.*

[7] "In many ways, the WIPO is one of the most effective and well managed agencies of the United Nations. In addition to raising the level of protection for intellectual property generally, the WIPO has played a vital role in helping countries set up effective intellectual property regimes." G. J. Mossinghoff and V. S. Kuo, World Patent System Circa 20XX, A.D., in *Journal of the Patent and Trademark Office Society*, (August 1998, vol. 80, No 8), at 528.

next century, when it will be foreseeable to have more purpose for private enterprise than for State activity in outer space."[8]

This phenomenon already started with the commercialization of the International Space Station,[9] hereafter, the ISS. Due to the extremely high costs required to realize the biggest international technology project, a close cooperation between States was necessary, such as the introduction of an aerospace industry. The US Commercial Space Act of 1998[10] establishes the economic development of Earth orbital space as a priority goal.[11] Space Agencies, like NASA are preparing by developing a Commercial Development Plan for the ISS. Intellectual property is therefore of great relevance. It should be noticed here that a "derogatory regime" will apply to the space station. Although the space treaties will find application, a legal framework has been created to address specific questions to the Partners. The intellectual property is a part of the International Space Station Intergovernmental Agreement,[12] hereafter IGA.

Apart from the IGA, the problem of patent protection could be divided into two parts. On the one hand, although the space treaties do not contain any explicit regulation on intellectual property, there is no total vacuum as such in the international legal

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[8] M. Ferrazzani, "Space practices on the move," in *Proceedings of the 3rd ECSL Colloquium on International Organizations and Space Law*, Perugia, 6-7 May 1999, (ESA SP-442, June 1999).

[9] See infra Part II, introduction.

[10] Commercial Space Act of 1998, October 21, 1998, (Public Law 105-303).

[11] M. Uhran, "Commercial Development of the International Space Station", online: International Space University Homepage <http://www.isunet.edu/Symposium/Symposium99/Oral%20Abstracts/Uhran.html>

[12] Signed on January 29, 1998 in Washington D.C., between the European Partner (eleven Members), Russia, Japan, United States and Canada.

framework. As will be seen in the further developments,[13] outer space cannot be appropriated. Consequently, it is prohibited to exercise any sovereignty in this area. Nevertheless, through the jurisdiction and control mechanism, an artificial link will be established between a space object[14] and a State. For example, if a company plans to launch satellites containing high technology that has been protected by a patent, or even containing no specific patent, the company will have to register at a national and international level its space object. Under Article VIII of the Outer Space Treaty,[15] the Registration State will exercise its jurisdiction and control over that space object. In case of litigation, the law of that State will apply in the absence of specific provision on intellectual property.[16] The question of the validity of a patent for an invention created in outer space does not create difficulty: for most of the countries, as patent regulation is governed by the first-to-file system. As a consequence, no matter where the invention took place, the protection belongs to the first who files the invention. In a first-to-invent system, the date of invention is of important relevance and questions of evidence will arise. On the other hand, questions remain, such as ownership and use of rights in outer space, or infringement of an existing patent of a third party.

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[13] See infra 2.2. Intellectual Property and Non-appropriation.

[14] Although the notion of space object was subject of a great controversy, especially to know as to whether a space station is a space object (see infra Part II, Chapter I, Section I, 1.), it could be defined as follows: "generic term used to cover spacecraft, satellites, and in fact anything that human beings launch or attempt to launch into space, including their components and launch vehicles, as well as parts thereof." B. Cheng, in *Studies in International Space Law* (Clarendon Press, Oxford, 1997), at 463.

[15] Article VIII OST: "A State Party to the Treaty on whose registry an object is launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body." See supra note 2.

[16] We will see in the course of the study that the United States have adopted a special law in 1990, extending the applicability of their Domestic law to outer space. 35USC 105, added by Public Law 101-580, Section 1(a), 15 November 1990, 104 Stat. 2863, with retroactive effect.

In the report of the third United Nations Conference on the Exploration and Peaceful Uses of Outer Space,[17] the title "Harnessing the potential of space at the start of the new millenium" expresses the issue of intellectual property in outer space. "The feasibility of harmonizing international intellectual property standards and legislation relating to intellectual property rights in outer space should be further explored with a view to enhancing international coordination and cooperation at the level of both the State and the private sector."[18] This thesis illustrates that even if no legal vacuum exists, the current system is not satisfying enough and does not give safety and trust to the industry.

In a first part, this study highlights the current framework and future issues of intellectual property rights in outer space with a focus on patent. The second part explores the specific-project agreement, the intergovernmental agreement, signed the 29th January 1998, and governing the relations between the Partners of the International Space Station.

[17] Vienna from the 19th to the 30th of July 1999, online: The United Nations Committee on Peaceful Uses of Outer Space, UNISPACE III Report at <http://www.un.or.at/OOSA /unisp-3/docs/docs.htm>

[18] Chapter II. Background and recommendations of the Conference G. Harnessing the potential of space at the start of the new millenium 8. Promotion of international cooperation (c) State and perspectives of international cooperation (ii) §405-407, at 71. *Ibid.*

PART I

INTELLECTUAL PROPERTY AND SPACE ACTIVITIES

The study of Intellectual Property Rights in outer space is relevant in regard of several aspects. However, Intellectual Property Rights on one side, and Space Law on the other side, both rest on different approaches, thus leading to potential conflicts.

CHAPTER 1

RELEVANCE OF THE INTELLECTUAL PROPERTY IN SPACE ACTIVITIES

The development of space business in the coming years will face tremendous growth. In 1998, worldwide space revenues rose to $97.593 Billion. The forecast for 1999 is $105,012 Billion and $137,822 Billion in 2002. These statistics[19] suggest an estimated $577,1 Billion in worldwide Space revenue, with a forecast growth of 9.01%. Why does intellectual property rights have a great role to play?

Any activity, when taking place in outer space, usually requires large amount of money as the cost of a launch remains very high, and except the US Space shuttle, the launch vehicles are expendable. A completely reusable launch vehicle will revolutionize space activities as it will considerably decrease the cost of achieving access to space NASA and Boeing have recently signed a four-year agreement to build a fly and single

[19] State of the Space Industry, Outlook 1999, *Summary of statistics*, (prepared by Space Publications in collaboration with International Space Business Council, 1999) at 5, 7.

X-37 reusable vehicle in orbit. "It would cut the cost of accessing space from $10,000 to $1,000 per pound."[20]

Any industry needs to be protected through the creation of patents, and especially in the high technology area, as the vast amount of money involved requires achieving a trusting relationship with the investors. It is necessary to guarantee safe investments, not only for current space activities but also for future ones.

Manufacturing in space, either for scientific or commercial purposes, underlines the significance of Intellectual Property Rights. In addition, issues such as transfer of technology and national secrecy are also closely linked to this notion.

Section 1. Commercial and Scientific Space Research and Manufacturing:

Scientific research in space activities will affect several fields. If we consider the medical field, for example, new experiments will be realized in microgravity, on the human body itself, but also on its psychological effects on the astronauts. Several parameters affect the human body in space, such as microgravity, solar radiation, extreme temperatures, and motion sickness. The bone intensity is modified. For example, during short-term flights, both cosmonauts on the 18-day Soyuz 9 flight lost 8-10% of their calcareous density.[21] Muscles, bones and the cardiovascular system are also deeply affected.

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[20] "X-37 Explores Reentry Risks," Aviation Week and Space Technology (McGraw-Hill Companies Pub., August 9, 1999), at 72.

[21] C. Cann, S. Churchill & R. Edgerton, "Response of Bones and Muscle Systems to Spaceflight" in A. Houston and M. Rycroft Ed., *Keys to space, an interdisciplinary approach to space studies* (McGraw-Hill 1998), 18-23.

Although these phenomena have been studied in the course of space lab experiences, most of the former space mission took place in Low Earth Orbit, where astronauts did not experience the effect of deep space radiation. This question is an important stake for the future space missions in order to make possible human space flights in deep space. Furthermore, with the longer missions that will take place in the International Space Station, we will have to take into account the effects of longer periods of time under microgravity and the consequences of isolation and confinement.

Commercial space research in a microgravity environment will also give the opportunity to test improved and new materials (e.g. biomedical drug development). The Research and Development technology will be improved thanks to research on propulsion systems, thermal control, optics or high-temperature materials. Furthermore, telecommunications, spacecraft manufacturing, launch vehicles, ground equipment, and global positioning system services are part of the current and planned commercial applications that underline the importance of intellectual property in outer space. On the commercial side of space activities, these prerequisites seem naturally essential, as we are in a highly competitive environment.

In the telecommunications sector, for example, even if the satellite infrastructure has to be completed by a fiber network, a large range of opportunities will be offered to the space industry. The mobile satellite services and fixed satellite services represent an important part of this market. With the fixed satellite, multiple services will be available for the customer, such as telephony transmission, cable & video transmission, broadband services, private business network, Internet access, telemedecine and tele-education. Thanks to the development of high-resolution data, remote sensing will also be used in

many applications, such as agriculture, civil planning, and mining. The Geographical Information Systems (GIS), combined with different kinds of data, are also of great interest for the industry.[22]

In order to materialize these projects, vast investments are necessary. Since states are no longer the sole partner in the space sector. There is a growing tendency toward the involvement of private companies. As their investments are essential, these companies will look for strong protection of their interests. The importance of the return on investment may be illustrated by the recent difficulties met by the company Iridium. This company has launched its constellation of mobile satellites, offering to the customers the possibility to be reached in remote areas thanks to powerful cellular networks.[23] The cost related to the manufacture and launch of satellites was very high, and unfortunately the return on investment too slow. As a result, the commercialization did not reach the level that was expected by its managers. and Iridium is now under the US procedure of Bankruptcy, attempting to have a recovery package or to be transferred. "Iridium's filing for Chapter 11 bankruptcy buys the troubled venture some more time, but analysts say the company must move swiftly to survive."[24]

Although in this case, the difficulties have nothing to do with intellectual property aspects, the lesson of this failure is that in order to create a business in space, the return on investment has to be taken into account. "With the shift toward private entrepreneurial

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[22] See generally supra note 19.

[23] "One of the key features that the new services will offer is the option to link a satellite phone with terrestrial wireless services. The integration of the satellite component will allow phones to operate in developing countries, in the mountains, on the oceans, in aircraft or anywhere traditional cellular services are not available." See supra note 19, at 43.

[24] "Iridium's Future Up in the Air," *Aviation Week and Space Technology*, August 23, 1999.

space ventures foreseen for the next few decades, industry will be looking for, and the law will evolve toward, means to protect private creative endeavors in space."[25] In any venture, detailed provisions on proprietary rights are stated. The consequence of any unfair practice related to the protected rights must be considered. This protection requires extending it in all the countries where the proprietor considers his patent shall have an effect. The choice of the country will depend on its level of involvement in the space arena. For example, if the future commercialization of an invention made in the space station is to take place in a certain country, its initiators had better file a patent in that country. These questions lead us to examine the problem of technology transfer and national secrecy, which are closely related to Intellectual Property aspects.

Section 2. Question of Transfer of Technology in the Private Sector and National Secrecy:

The intellectual property is a significant issue, and according to Mrs. Balsano and M. Smith, "we deal with Intellectual Property as a tool for controlling the transfer of technology."[26]

The existence of companies such as INTOSPACE proves the significance of intellectual property protection. This German company, defines its activities as follows: To promote, initiate, and support microgravity space activities such as research, development and commercial production tasks to be carried out in space, as well as to

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[25] B. Luxenberg and G.J. Mossinghoff, "Intellectual Property and Space Activities," in *Journal of Space Law* Vol. 13, No 1, (1985), at 8.

[26] Anna-Maria Balsano & Bradford Smith, "Intellectual Property and Space Activities: A New Role For COPUOS," in *Outlook on Space Law over the 30 years*, G. Lafferranderie Ed. (Kluwer Law International, 1997), at 364.

render assistance and consultation with respect to such space activities.[27] These measures will ensure the confidentiality of the scientific data through a contractual protection as the interests of each party are quite specific and often polar opposites. INTOSPACE helps the parties to reach a compromise.[28] In the space industry, the players are governments, institutions, and private companies, which are usually working together but representing different countries and consequently specific interests. It will be tricky to entrust a satellite just manufactured to a company that will be in charge of the launch. Suspicions and conflicts could quickly arise. In order to prevent them, trade secret considerations are established in common law as well as civil law countries, through the statement of nondisclosure agreements. Consequently since the United States have accorded a specific importance on intellectual property considering it in the context of technology transfer, they have adopted a specific legislation: The oversight of the international contracts has been transferred from the Department of Commerce to the Department of State and provides a specific procedure in case of a satellite hardware and systems sale to a non-US contractor. Through this obligation, the US government exercises its control over that type of commercial operation, assuring the protection of the national technology. On the other hand, this policy might be an obstacle in the course of the satellite commercialization if the level of control exercised by the government is too high.

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[27] A. Lemius, "INTOSPACE: Applied Research in Space – Experience and Prospects of Contractual Practice," in *Proceedings of the Workshop Intellectual Property Rights and Space Activities*, European Centre for Space Law ESA Headquarter Paris, 5 & 6 December, 1994, (ESA SP-378, January 1995).

[28] "On the one hand, the launch service entity needs a maximum of information about the experimenter's payload sent into space in order to assure the security and the success of the mission, as well as information about the results obtained to be able to evaluate the efficiency of its launch or space experiment facility. On the other hand, the researching company desires to keep its efforts and scientific results secret in order to secure its investments. The confidentiality is essential for a future commercial application and exploitation of the scientific results. Therefore the access to and the disclosure of the results must be restricted", ibid, at 134.

Having examined the relevance of intellectual property, we will further precise its content in relation with space law in order to have a critical view of the different approaches.

CHAPTER 2. INTELLECTUAL PROPERTY RIGHTS AND SPACE LAW: DIFFERENT APPROACHES

It is important to keep in mind that safe rules applied to the space industry can create a conducive environment for current and future commercial successes. "The only sectors in which commercial activities have been sustained for a period long enough to allow for reasonable predictions on an empirical basis concern space transportation and communications satellites."[29] We will see that the main characteristic of intellectual property law is that this concept is based on territoriality, while the main feature of outer space is that it is outside any sovereignty. The problem is to determine how a patent can be protected in outer space. After a review of the basic legal principles concerning intellectual property law, we will examine how may difficulties arise when dealing with outer space.

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[29] P. Malanczuk, "Actors: States, International Organizations, private entities," see supra note 26, at 35.

Section 1. Legal Principles of Intellectual Property Rights and Outer Space May Lead to Potential Contradictions:

This section will emphasize on intellectual property rights principles that may have an impact on space law and *vice versa*.

1. Intellectual Property Rights and Patent Law:

1.1 Basic Mechanism:

Intellectual Property Rights have evolved for centuries,[30] based on a terrestrial context, without concern about their application in outer space. The main forms are: Trademark, trade secret, copyright and patent protection.[31] "When appropriate protection is obtained and maintained under law, the proprietor (or owner) of the right may exclude others from its practice, has legal redress in the event of misappropriation or unauthorized practice (infringement), and/or may authorize or permit (license) others to practice the right under acceptable terms and conditions. The exclusive rights afforded under a patent include the right to make, use and sell the patented invention."[32] In order to be patented, the invention must be new, must involve an inventive step, and must be industrially

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[30] The history of intellectual property could be divided in three main periods, distinction made by the World Intellectual Property Organization: a system based on privileges granted by the sovereign (15th to 18th Centuries), the national patents (1790 to 1883, the United States first patent law was in 1790 and the French law, in 1791) and the internationalization starting in 1883, "History and Evolution of Intellectual Property," see note 1, at 17.

[31] Despite that each of them can find application with space activities, however we will only focus on patent.

[32] R.F. Kempf, "Proprietary rights and commercial use of space stations," *International Colloquium on Commercial Use of Space Stations*, Hanover, Federal Republic of Germany, June 12-13, 1986.

applicable.[33] Patent law is thus fundamentally national in its origin and in the scope of its application; albeit, there exist efforts toward international harmonization. Finally, following the appropriate Patent Office procedure and the grant of the patent, the patentee receives the exclusive right to exploit his invention. In order to determine a link between a patentee or inventor and a country through which jurisdiction will be exercised, two main criteria can be taken into account: The territory or the nationality.

1.2 Types of Jurisdiction:

Jurisdiction is traditionally divided in three parts: Personal, territorial and quasi-territorial. In the case of personal jurisdiction, the State will exercise its jurisdiction depending on the nationality of the individuals or corporate bodies having its nationality; even if they are on the territory of that State. This question will create some difficulties when, for example, in the International Space Station, the experiences will be led by more than one person. Under the territoriality jurisdiction, a State will exercise its governmental powers within the territory over all persons and things. In international law, a territory includes the land, the territorial waters and the airspace above and parts on which the State exercises its sovereignty. The quasi-territorial jurisdiction is the sum total of the powers of a State in respect of ships, aircraft, and spacecraft having its nationality.[34]

Apart from these terrestrial mechanisms, there are also models of terrestrial cooperation, which recognize the existence and protection of joint inventions. In this case,

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[33] "General principles applying to patents," in *Intellectual Property Rights and Space Activities in Europe* (ESA, February 1997), at 13.

[34] For more details on this distinction, see supra note 14, at 72.

each party will ensure the protection of the invention in its own country on behalf of both parties, and has an exclusive right to use it in the territory of its own country.[35] Since outer space is under any jurisdiction, the protection does not extend to it. It is difficult to refer to a specific territory in outer space as activities may occur on orbit, on a space station, or on a different planet. However, this rule contains exceptions: For technical reasons, extra-territorial aspects of national law are applied. The classic example concerns the ships (national flag) and the airplane (national registration). We will see that space treaties do not give clear answers concerning the legal regime of intellectual property in outer space. Nevertheless, specific mechanisms contained in space law are used to respond to this problem.

2. Place of Intellectual Property in International Space Law:

The main principles governing space law can be synthesized as followed: Outer space can be used but not appropriated,[36] and must be used for peaceful purposes.[37] The State is responsible for the activities of its private sector entities,[38] and the "launching

[35] Dr. O. Vorobieva, "Intellectual Property Rights with respect to Inventions Created in Space", in S. Mosteshar, *Research and inventions in outer space, liability and intellectual property rights*, (Dordrecht, 1995), at 180.

[36] Outer Space Treaty, Art. II, see supra note 2.

[37] Outer Space Treaty, Art. IV: "States parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner. The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes." *Ibid.*

[38] Outer Space Treaty, Art. VI: "States Parties to the Treaty shall bear international responsibility for national activities in outer space (...) whether such activities are carried on by governmental agencies or by non-governmental entities." *Ibid.*

state"[39] is internationally liable for damages to a third Party.[40] The Registration Convention provides an obligation to register a space object[41] on which the State of registry retains the jurisdiction and control.[42] Space activities are conducted in respect of international law, "including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding."[43] The United Nations play an important role in space activities, since space treaties were elaborated by the United Nations Committee on Peaceful Uses of Outer Space, and most decisions in this field are made through this international organization.

Conferences took place within the United Nations, called the United Nations Conference on the Exploration and Peaceful Uses of Outer Space (hereafter UNISPACE). UNISPACE I (1968), UNISPACE II (1982) and UNISPACE III (1999)[44] in Vienna focused on the benefits that space could bring to developing countries. An important issue

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[39] Liability Convention, Art. I (c): "The term "launching State" means: (i) a State which launches or procures the launching of a space object; (ii) a State from whose territory or facility a space object is launched." *Ibid.*

[40] Outer Space Treaty, Art. VII: The launching State "is internationally liable for damage to another State Party to the Treaty or to its natural or juridical persons by such object or its components parts on the Earth, in air space or in outer space, including the moon and other celestial bodies." *Ibid.*

[41] Registration Convention, Art. II: "When a space object is launched into earth orbit or beyond, the launching state shall register the space object by means of an entry in an appropriate registry which it shall maintain." *Ibid.*

[42] Outer Space Treaty, Art. VIII: "A State Party to the Treaty on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object and over any personnel thereof, while in outer space or on a celestial body". *Ibid.*

[43] Outer Space Treaty, Art. III. *Ibid.*

[44] UNCOPUOS Homepage, see supra note 17.

concerned the implementation of Article I of the Outer Space Treaty,[45] as its provisions are very broad and the obligations not clearly stated.

In 1996, a United Nations Committee on Peaceful Uses of Outer Space conference led to the adoption of the "Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interests of All States, Taking into particular Account the Needs of Developing Countries," Paragraph 2 states as follows: "States are free to determine all aspects of their participation in international cooperation in the exploration and use of outer space on an equitable and mutually acceptable basis. Contractual terms in such cooperative ventures should be fair and reasonable and they should be in full compliance with the legitimate rights and interests of the parties concerned, as, for example, with intellectual property rights."[46] This text tends also to promote international cooperation and facilitate the exchange of expertise and technology among states on a mutually acceptable basis. Consequently, the important role of Intellectual Property was fully recognized for the first time in a United Nations Space Resolution.

There are no provisions in the space treaties or in the recent resolutions adopted by the United Nations General Assembly dealing with the protection of intellectual property in outer space. Nevertheless, there are two space law principles that are directly connected with this problem: The non-appropriation rule and the benefits clause.

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[45] Outer Space Treaty, Art. I.: "Outer space (...) shall be free for exploration and use by all States" and art. II, it "is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means." See supra note 2.

[46] Text of Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefits and in the Interests of all States, Taking into Particular Account the Needs of the Developing Countries, A/AC.105/L.211 (06.11.96)

2.1 Intellectual Property and the Benefits Clause, Article 1 of the Outer Space Treaty:

Article I of the outer space treaty states that "the exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind." "Outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on the basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies." This principle titled as "Space benefits," has been affirmed for the first time in the United Nations Resolution of 1963.[47]

Paragraph 5 of the 1996 Declaration[48] states that "International cooperation, while taking into particular account the needs of developing countries should aim, inter alia, at the following goals (...) Facilitating the exchange of expertise and technology among States on an mutually acceptable basis." These provisions underline again the role of intellectual property, and reinforce the necessity to have a strong legal regime on this matter.

The protection granted, through intellectual property rights to the space industry cover the following consequences: Invention secrecy, exclusivity of rights and appropriation of technical experiments results realized in outer space. Article I of the Outer Space Treaty provides that the exploration and use of outer space is for the benefit

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[47] Resolution 1962 (XVIII) of 13 December 1963, in *Space Law and Institutions*, Documents and Materials, edited by Ivan A.Vlasic, Institute of Air and Space Law, McGill University, 1997.

[48] See supra note 46.

and in the interest of all countries, implying a sharing of information. "The practical realization of the principle, however, depends on the operation of cooperation and knowledge-transfer mechanisms."[49] It is more protection's excesses that is critical. States and industries, through the appropriation of trade secret for example, prevent other group of people to develop the same technology.

2.2 Intellectual Property and the Non-Appropriation Principle, Article II of the Outer Space Treaty:

Before the Outer Space Treaty was adopted in 1967, the General Assembly of the United Nations established fundamental basic rules into two resolutions included in the Outer Space Treaty of 1967. In 1961, Resolution 1721 (XVI) stated that "Outer space and celestial bodies are free for exploration and use by all states in conformity with international law and are not subject to national appropriation."[50] The fact that this type of resolution is not binding does not prevent certain States[51] to consider them as recommendations. The second, Resolution 1962,[52] constitutes an important aspect in the Cold War development, because the United States and the USSR mainly initiated this agreement. This article raises the same question as did Resolution 1721. "Outer space,

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[49] F. Marcelli, "Space Research and Common Benefits for the Humanity," in *Il Diritto Industriale E Le Attività Spaziali in Europa / Intellectual Property and Space Activities in Europe*, Osservatorio di Proprietà Intellettuale Concorrenza & Telecomunicazioni (CERADI) LUISS - GUIDO CARLI & the European Centre for Space Law/European Space Agency, Roma, November 11, 1996, at 79.

[50] Resolution 1721 (XVI) of the 20 December 1961, "International cooperation in the peaceful uses of outer space," 108th plenary meeting, see supra note 47.

[51] Romania and France.

[52] See supra note 47.

including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."[53]

The principle of non-appropriation could be defined as the absence of territorial jurisdiction, implying also the absence of appropriation under private law. During the negotiations of the Treaty, the Belgium delegation reminded the interpretation of this principle, explaining that it is "covering both the establishment of sovereignty and the creation of titles to property in private law."[54] For the French delegation, "non-appropriation is merely the logical consequence of non-appropriation under international law. Non-appropriation in the treaty refers to national appropriation under the international law."[55] Under international law, outer space constitutes a *re extra commercium*, since no one can appropriate this area. Article II of the Outer Space Treaty is often cited as the non-appropriation principle; also interpreted as the non-sovereignty provision.

If there is no territorial sovereignty in outer space, this does not mean that States can not exercise their authority at all over this area. Professor Bin Cheng distinguishes the traditional aspects of sovereignty that are prohibited (national appropriation) and the functional aspects of sovereignty (the exercise of sovereign rights); distinction which is especially important in Intellectual Property matters.[56] States are prevented on a uniform

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[53] See supra note 2.

[54] (4.8.66) A/AC.105/C.2/SR.71 in *Studies in International Space Law*, by M. Bin Cheng, Clarendon Press Oxford, 1997, see supra note 14.

[55] (17.12.66) A/C.1/SR.1492, see note supra 14.

[56] S. Gorove, "Sovereignty and the law of outer space re-examined", *Annals of Air and Space Law*, vol II, 1977), at 320.

basis from establishing "proprietary links."[57] Although outer space is not subject to territorial jurisdiction, there are sovereign types of jurisdiction that can be exercised in certain conditions. The non-appropriation principle and the benefits clause[58] are two pillars of the outer space treaty; thus it is necessary to take them into consideration as well.

2.3 Jurisdiction and Control:

Article VIII of the Outer space Treaty states that "a State party to the Treaty on whose registry an object is launched into outer space is carried shall retain jurisdiction and control over such object, and over any personnel thereof, while in outer space or on a celestial body." In the international conventions, "space object" is the term used for spacecraft and satellites, and in fact "anything that human beings launch or attempt to launch into space, including their components and launch vehicles, as well as parts thereof."[59] As the jurisdiction applies not only to spacecraft but also to the personnel on board, it is to be considered as a quasi-territorial jurisdiction. This provision constitutes an extension of a specific national law to permit its applicability over these space objects and astronauts through national and international registration requirements.[60] The State party to the treaty that shall retain jurisdiction and control over space objects and over any

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[57] Dr. K. H. Böckstiegel, Dr. P. M. Krämer, "Patent Protection for the Operation of Telecommunication Satellite Systems in Outer Space?" (Part II), *Zeitschrift fur Luft und Weltraumrecht (ZLW)*, German Journal of Air and Space Law, 1998.

[58] See infra further developments on the developing countries and space in Section 3. Future trends.

[59] B. Cheng, supra note 14, at 463.

[60] Outer Space Treaty, Art. VIII. Supra note 2.

personnel thereof, while in outer space or on a celestial body, is the State in which the object was registered.

In a certain way, we can consider that through this artifice, the sovereign rights of a State will apply outside its territory. In a recent article,[61] Dr. K. H. Böckstiegel, argues that thanks to this mechanism, space objects and their crew maintain a link with a State because they "do not pass into a legal vacuum during their sojourn in the extraterrestrial zone." Such a proposition is valid as long as space activities are related to earth (telecommunications, remote-sensing satellite, or use of a space station). In these conditions, the State of Registration is admitted to use its national patent law for a specific space activity. Although this artifice is very practical and necessary because it renders the law applicable in the absence of unified Intellectual Property space law; the situation may evolve in the future when we will have to deal with space to space activities, for example, the launch of a space object occurring from a planet different from Earth.

It is clear that a patent on a satellite can be granted for the safe use of its new technology, but as outer space is governed by the non-appropriation principle, "the real issue is whether patents can be protected in outer space as outer space is outside any state's sovereignty."[62] The jurisdiction that can be exercised concerns only the objects or the person (this will be the case in the new International Space Station).[63] As outer space

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[61] "What has been prohibited under the clear language of Article II of the Outer Space Treaty is "national appropriation" of outer space." Dr. K. H. Böckstiegel, Dr. P. M. Krämer, "Patent Protection for the Operation of Telecommunication Satellite Systems in Outer Space? (Part I)", *Zeitschrift fur Luft und Weltraumrecht (ZLW)*, German Journal of Air and Space Law, 1998, at 15.

[62] See supra note 26, at 367.

[63] See infra Part II.

is not a territory, and a patent has the attributes of personal property, how can a patent receive any protection?

The main inadequacy of space law relates to the lack of international bodies. There is no national or international regulator of intellectual property in outer space. As a matter of fact, when a patent is filed in a national agency, no research is made concerning the opportunity of the patent in regard to space law. This field is never taken into account. The question was resolved in the United States by the creation in 1990 of a specific domestic law for space.[64] A couple of real cases illustrate this issue which also demonstrate conflict of law.

Section 2. Illustration of the Problem:

1. Consequences of the Potential Contradictions:

The potential contradictions can be explained as followed: On one hand, Outer space, under an international statute, is a *res extra commercium*,[65] and the main rule governing this extra-atmospheric area is that it shall be free for use on a peaceful basis and shall not be appropriated. Consequently, its use cannot be restricted. On the other hand, we have a tremendous development of commercial space activities involving ventures that require high financial support. As a consequence, protection of these operations through intellectual property will become more and more relevant: How can we conciliate the exclusive right granted to an inventor and the benefit clause of the outer space treaty or the non-appropriation principle? The debate simultaneously involves

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[64] See supra, note 16.

[65] See supra 2.2 Intellectual Property Rights and Non-Appropriation Principle.

public international law, the freedom of use of outer space, public interest, and the large expectations of the space industry.

When outer space became part of international public law, most of the players were States and International Organizations. The space law magna carta[66] was elaborated during the Cold War and most of its provisions relate to States. The philosophy under these space treaties is to prevent the States to commit any claim of sovereignty over this area. In fact, the entire spirit of the space treaties differs from what happens on earth. As we have seen above,[67] the non-appropriation principle and the space benefit clause are two main rules governing space law. There are also provisions in the outer space treaty that share the same goal: for example, the principle of co-operation and mutual assistance,[68] that is expressed in the outer space treaty, contains the rule of dissemination of information. State Parties conducting activities in outer space have agreed to inform the Secretary-General of the United Nations, as well as the public and the international scientific community, when feasible and practical, of the nature, conduct, locations and results of such activities.[69] Although this obligation is not clearly defined,[70] we can see that this type of requirement is specific to space activities. Article I goes further, requiring

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[66] The five main space treaties, see supra note 2.

[67] See supra 2. Intellectual Property Rights and Space Law.

[68] Outer Space Treaty, Art. IX: " In the exploration and use of outer space, including the moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of co-operation and mutual assistance and shall conduct all their activities in outer space including the moon and the celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty." See supra note 2.

[69] Outer Space Treaty, Art. XI. *Ibid.*

[70] Article XI OST is often criticized, "an absolute supine provision, which in due course, proves to be even an embarrassment." B. Cheng, see supra note 14, at 404.

the share of the benefits. Even if this provision is intended to assure States act in good faith, and not to share the financial benefits of their activity, what we could call the "space treaties spirit" remains. Art. XV of the Moon Treaty contains a provision that would also be surprising if it had to do with earth activities: it allows a State Party to the Treaty to visit the facilities of one another on the moon, subject to reasonable notice and the taking of maximum precautions to assure safety, and to avoid undue interference. It is clear that the intend is to avoid competition, and to promote international cooperation.

The goal of intellectual property rights, and especially patent law is to protect a specific interest through the grant of an exclusive right. Once an invention has been made, the inventor will of course not share his work, nor open his door to let his competitor have a look at it; the disclosure will intervene only when he will apply for a patent, not before. As the invention was developed on earth, the question of ownership, except when it is the result of a joint development, does not create any specific difficulty. In outer space, ownership is prohibited. Consequently, in order to safely materialize the progress of science, it will be necessary to conciliate these principles that may appear to be antagonistic.

In fact, the legal technique should be a tool to encourage such developments. Depending on the interpretation that is given to the Outer Space Treaty, we could consider that in the early ages of space law, the place of private companies was foreseen: Reference is indirectly made to the private sector in article VI on the responsibility, providing that States Parties to the Treaty shall bear international responsibility for national activities in outer space (...) whether such activities are carried on by governmental agencies or by non-governmental entities. "National activity" could be

interpreted as covering all the activities that are within its territorial or quasi-territorial jurisdiction.[71]

When we explore the question of intellectual property in space activities, we deal with a growth of private companies' involvement, but also the application of concepts of private law in a public field. "Private actors will bring with them into outer space a range of legal instruments and practices to which they are used and more confident, ranging from private property to economic and financial law up to trade issues."[72] Illustration of these questions can be seen through recent cases.

2. Cases:

As a preliminary, we will have to look at a specific patent rule: The temporary presence doctrine. As seen above,[73] a patent confers to his inventor an exclusive right. This principle contains exceptions. "One of these exceptions is the temporary presence that provides for certain limitations on exclusive rights in case where ships, aircraft or land vehicles temporally visit foreign countries. Such temporary presence is not considered as an infringement[74] of a patentee."[75]

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[71] *Ibid*, at 238.

[72] M. Ferrazzani, "Space practices on the move", see supra, note 8, at 334.

[73] See supra 1.1 Basic mechanisms of Intellectual Property Rights.

[74] "Infringement of a patent consists of the authorized making, using, offering for sale or selling any patented invention within the United States or United States Territories, or importing into the United States of any patented invention during the term of the patent." Infringement of a patent, US Patent and Trademark Office, online: <http://www.uspto.gov/web/offices/pac/doc/general/infringe.htm>

[75] R. Oosterlinck, "Intellectual Property and Outer Space Activities," (Lecture on Space Law, Institute of Air and Space Law, McGill University, 1998) [unpublished], at 36.

The question has been raised as to whether this doctrine would apply in the case of spacecraft. Before the question of applicability of patent law on spacecraft was raised, courts had to look at claims concerning ships. The Federal Court held in 1865 that US Patent Law applies to a US merchant vessel on the high seas.[76] The 1952 amendments to the Patent Code included a definition of the United States that limited the patent laws to the fifty States, territories and possessions of the United States. The question was formulated by the Court of Claims[77] as to whether US Patent law would apply to ships. Concerning the spacecraft based on the "integrated instrumentality" criteria, the Court held in 1966[78] that US Patent law applies to an invention practiced on an orbiting spacecraft because the control stations are located on the US territory.[79] In 1981, US Congress stated that spacecraft are vehicles and consequently, their presence is temporary.[80] Until more recently, the main cases dealing with the problem of intellectual property in outer space are Hughes Aircraft Co. v. United States and TRW v. ICO Global Communications.

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[76] Gardiner v. Howe, 9 Fed.Cases 1157 (1865).

[77] Decca Ltd v. United States, 544 F. 2d 1070,1073 (Ct.Cl. 1976).

[78] Rosen v. NASA, 152 USPQ 757.

[79] See generally J. B. Gantt, "Space Station Intellectual Property Rights and US Patent Law", in *Proceedings of an international Colloquium on the Manned Space Stations* – Legal issues, Paris 7-8 November 1989 (ESA SP-305 February 1989).

[80] 42 USC Enactment, § 2457 (1).

2.1 Hughes Aircraft Co. v. United States 29 Fed. Cl. 197 (1993):

- **Patent description**: A US patent[81] was filed in April 1960 by Hughes Aircraft Co. (HAC). This patent was aimed at creating a system to get and maintain a satellite attitude on orbit. It covered an apparatus for the spin axis orientation of spin-stabilizes space vehicles.[82] Proper attitude is necessary in order to allow the satellite to properly aim its directional antennas in order to fulfill communications missions, and in some platform architectures, to orient the solar energy collectors to supply electrical energy to the payload.[83] The Patent was issued on 11 September 1973, receiving the name of his inventor, Williams. Between 1974 and 1984, NASA used this technology in several spacecrafts which had no link with the US territory except that they were launched by NASA. This international program contained several spacecraft; Helios (Germany and US), ISEE[84] (ESA and US), Ariel (NASA and the Science Research Council of the UK) and AMPTE[85] (Germany and US, Germany and UK).

- **Lawsuit**: An action has been brought by HAC against the United States pursuant to 28 USC 1498 seeking just compensation for unlicensed use or manufacture of

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[81] (US 3.758051) "Velocity control and orientation of a Spin Stabilized Body."

[82] See in Copyright © 1998 The Bureau of National Affairs, Inc. BNA, TRADEMARK & COPYRIGHT LAW DALY (April 24, 1998).

[83] B. L. Smith, E. Mazzoli, "Problems and Realities in Applying the Provisions of the Outer Space Treaty to Intellectual Property Issues", Paper presented at the 1997 International Institute of Space Law Colloquium during the International Astronautical Federation Congress in Turin, (IISL-97-IISL-3.05).

[84] The International Sun-Earth Explorer Program.

[85] The Active Magnetospheric Particle Tracer Explorer.

fourteen spacecrafts containing the patented device. The litigation lasted ten years before the first decision was finally reached.

- **Legal issues involved**: Section 1498(a) of title 28 of the United States Code contains the following provisions: "Whenever an invention described in and covered by a patent of the US is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the US in the US Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture." It imposes liability on the government if three conditions are met. There must be use (1), use must be "by or for" the US (2), and the use must be within the US[86] (3).

(1)As the word "use" was not defined by Congress, the US Court of Federal Claims stated: "For purpose of this case, it is important to consider whether launching a spacecraft constitutes a use of the patent. Hughes Aircraft makes clear that the availability of the attitude control system on the spacecraft at a time when the spacecraft is being operated constitutes a use of the patent." It also had to be determined whether the spacecraft used by the government constituted an infringement of the Williams patent: Spacecraft were foreign-manufactured, foreign-owned and launched from the US territory but from command centers outside the US. For the government, there was no "use" within the US as it concerned foreign satellites and if by any chance, the "use" was established the

temporary doctrine would prevent the qualification of infringement to apply. For the Federal Court of Claim, "it is the spacecraft as a whole whose use constitutes a use of a patent."[87]

(2) Considering the control exercised by the government over this project, the Federal Court also held that "those cases stand for the principle that US involvement in a joint international space program will be sufficient to make any use of the spacecraft a use "by" or "for" the government within the meaning of §1498 (a) if the project is a cooperative one with the potential of substantial benefits to the US."[88] As we can see this is a very broad interpretation of the law that is allowed here, following one goal: the applicability of the US Patent Law.

(3) Finally, the judges had to determine the applicability of §1498 to activities in Outer Space: "We need not decide whether international law prohibits the extension of our patent laws to activities in outer space on foreign spacecraft because we conclude that Congress has not extended §1498 to cover those activities. Part of §1498 states that it "shall not apply to any claim arising in a foreign country". As outer space is not a foreign country, the question was raised as to whether the article would apply or not. Based on the decision Smith v. United States,[89] it was decided not to apply this provision to outer space.

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[86] *See* supra note 33, at 108.

[87] Hughes Aircraft Co. v. United States, 29 Fed. Cl. 197 (1993), *Journal of Space Law*, 1996, at 185.

[88] Ibid, at 187.

[89] About §1498 (a), "the presumption is rooted in a number of considerations, not the least of which is the common-sense notion that Congress generally legislates with domestic concerns in mind." Smith v. United States, 113 S. Ct. 1178, 1184 (1993).

The Court also did an analysis of the US Code and held that the patent law has no extraterritorial effect. Finally, the government was declared liable for three of the spacecraft.

This case encouraged the adoption of the US Space Bill: In 1990, section 105 was added to Chapter 10 of title 35 United States Code, called "inventions in outer space"[90] extending the applicability of US Patent Law to US registered space objects.[91] In fact, this Act does not apply to "any process, machine, article of manufacture, or composition of matter, an embodiment of which was launched prior to the date of enactment of this Act." It is highly plausible that the Court would have applied the Space Bill if the launch had occurred before the enactment of the Act. But even in that case, there is no definition of what constitutes an infringement.

It is clear that the US domestic law does not resolve all the problems. Moreover, we will see in TRW v. ICO Global Communications, that although the US Space Bill authorizes the extra-territorial application of US Patent Law on space objects, it does not cover every situation.

2.2 TRW V. ICO Global Communications:

- **Patent protection**: The company TRW, partner with Teleglobe in the Odyssee project, planned to launch twelve satellites in medium earth orbit in order to start the commercial exploitation in 1999. ICO Global Communications, whose major investor is the International Maritime Satellite Organization (INMARSAT), also,

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[90] See supra note 16.

[91] See infra the Chapter 3, Section 1, the United States.

planned to launch twelve satellites on the medium earth orbit and start in the year 2000. TRW filed a first patent with the United States Patent and Trademark Office, as a way to protect its systems.[92] The company decided in 1992 to extend the protection in Europe by filing a European Patent.[93] In 1995, a new US patent,[94] concerning this time the use of medium Earth orbit was created. The European corresponding patent was also filed.[95]

- **Lawsuit**: At that time, ICO Global Communications, a British company, planned to launch its satellites on the same altitude, 6,300 miles. TRW decided in 1996 to sue ICO in Los Angeles Court, claiming that ICO had infringed on its patent.

- **Legal issues**: The elements of the claim had the following characteristics:[96] Launch of a constellation of satellites to between 5, 600 and 10, 000 nautical miles above the Earth, at least one satellite to have a reduced antenna field of view, less than full earth average, the satellites to be oriented in a plurality of predetermined orbital planes, receiving radio frequency signals by at least one satellite from a plurality of mobile handsets with omni-directional antennas, overlapping of a portion of the coverage region of a departing satellite with a portion of the coverage region of an arriving satellite, and predetermined criteria for the

[92] serial patent n. 07/688,412 (04.22.91)

[93] application n. 92300781.9 (01.30.92)

[94] serial patent n. 5,433,726 (05.16.95)

[95] European Patent EP 510 789 (March 1997)

[96] See supra, note 83, at 5.

assignment of calls to or from users within the coverage overlap region from a departing satellite to an arriving satellite. The first part of the claim, the location of the satellites, is the most critical point of this case in regard to the intellectual property problem.

The TRW mobile communications system has been protected in such a way that it would have been impossible to launch satellites on the same orbit.[97] As a consequence, ICO Global Communications would be prevented from realizing its project. The TRW patent constitutes a clear violation of the Outer space Treaty:

- **Patent and OST**: Article I provides that the "use of outer space...shall be carried out for the benefit and in the interest of all countries", and on article II, "Outer space...is not subject to national appropriation." Not only TRW's patent would prevent a British competitor to develop its own system, but it also attempts to reserve an "orbital shell"[98] around the earth through its patent. The patent provides a monopoly over the use of the earth orbit.

This case was dismissed in the first instance, as no infringement had yet occurred because the satellites were still under construction. A judgment against ICO Global Communications would have resulted in an injunction, which would have enhanced a tremendous loss as this project was evaluated at $US 4 Billion in installation and five to ten times that sum in revenues.

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[97] "The main claim of this patent may be interpreted as reserving an orbital "shell" surrounding the earth between the altitudes of 5600 and 10,000 nautical miles, for virtually all conceivable practical applications in the field of satellite-based communications to mobile handsets." See supra note 81, at 5.

[98] See supra, note 83, at 5.

The parties finally came to an agreement: On December 1997, TRW decided to drop its patent infringement lawsuits against ICO in return for a seven-percent share in ICO. However, it would have been interesting to see if the courts had invalidated the patent or not from the outer space Treaty viewpoint. Not only did the United States ratify the Treaty, but this convention is also considered as international customary law. "In view of the broad adherence to the Outer space Treaty, including all States having significant space capabilities and the absence of any objection to its principles, it is persuasive that most of the provisions of the treaty have now become part of the customary international law, binding upon States which have not ratified the treaty, or even upon any state which might choose to withdraw."[99] In the current development of the satellites telecommunications system, the intellectual property might be used strategically by States. "Beyond the TRW granting controversy and its dispute with ICO Global Communications, any future grant of exclusive rights over any part of outer space by a national agency may be contrary to international law."[100]

Section 3. Future Trends:

Considering the future of space law and the current status of satellite constellations, there are two main aspects, which have to be examined: The impact of the satellite space infrastructure and the role of the developing countries. There are numerous

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[99] Citation of a 1989 report to NASA by a team headed by R.B. Bilder, a professor of Law at the University of Wisconsin, by Harrisson H. Schmitt, "Space Treaty Permits Resource Use", *Space News*, No.22 (June 17, 1998).

[100] S. Mosteshar, "Satellite Constellation Patent Claim, Some Space Law Considerations," in *Telecommunications and Space Journal*, (Serdi Publshing Company, vol.4, 1997), at 252.

projects[101] implying the launch of satellites constellation on outer space, and the number of satellites involved differs from one constellation to another. Usually, a constellation is made up of ten to twenty satellites. In some cases, it can be more. For example, Teledesic[102] includes more than 200 satellites. As they will need a lot of place in outer space, a difficulty will arise for the companies planning to launch their own system in the same area; such as in the case of TRW v. ICO. The place taken will be such that it will generate a de facto "appropriation" of outer space. Moreover, in coming years, the number of satellites will undoubtedly increase the dilemma of space debris. The Subcommittee of the Committee on the Peaceful Uses of Outer Space[103] recently focused its attention on space debris mitigation measures. If we take into account future trends, even if such measures are applied, it is hard to believe that the debris will substantially decrease.

The current tendency in space activities is to mark a distinction between the "space powers" and the States, which are currently not dealing with space. It is difficult to reconcile the "free exploration and use by all States" of outer space and its use and exploration "for the interests and in the benefit of all countries."

"Space could be of help if the interpretation of terms such as "common heritage" were agreed on and sensible rules for the regulation of competition in space elaborated."[104] Space law could also be used to prevent the appropriation or the disrespect of the benefit

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[101] For example: Globalstar, Skybridge, Teledesic, Ellipso, Orbcomm.

[102] The major investors are MM. Bill Gates and Craig McCaw.

[103] Report of the Scientific Committee on the Work of its thirty-fifth session, GA Res. A/AC.105/697, (02.25.98)

[104] E. D. Gaggero, "Developing countries and space, from awareness to participation," *Space policy*, May 1989.

clause by the files of patent or by any other means. The question of space benefits is a current issue with the Committee on Peaceful Uses of Outer Space, and the UN Declaration adopted in 1996 is expected to have a great impact between States in the near future.[105] The Declaration expressly mentions the intellectual property rights[106] and also recommends a cooperation in "promoting the development of space science and technology and of its applications."[107] This Declaration "cements the freedom of the exploration and utilization of outer space but at the same time reminds the space powers to fulfill their obligations to conduct their activities for the benefit of all countries in a productive and mutually acceptable basis."[108] Finally, we can also expect that the recommendation adopted at UNISPACE III will be implemented in the near future to have the fastest practical application.[109]

Considering the questions raised previously, what type of legal framework should be adopted? Prior to a proposal attempt, we will review and criticize the levels of harmonization, i.e. national, regional and international.

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[105] *Ibid.*

[106] Paragraph 2 of the Declaration, see supra, note 46.

[107] Paragraph 5 of the Declaration, *Ibid.*

[108] M. Benkö and K.-U. Schrogl, "*Free use of outer space*" *v.* "*Space Benefits*", supra note 26.

[109] See supra note 17.

CHAPTER 3. FOR A LEGAL FRAMEWORK ON INTELLECTUAL PROPERTY RIGHTS

In order to protect the space industry and to limit conflicts of law, it is necessary to apply an intellectual property law to outer space. Since the United States have chosen to elaborate a national Space Bill, it is now appropriate for other countries to have a regulation. The main problem is to determine the level of regulation: Will this law be governed at the national, regional or international level?

Section 1. The National Level:

The elaboration of national policy and law related to space activities is an increasing phenomena.[110] However, most of the countries involved in this area of practice did not adopt specific regulations. Intellectual property is of course a great concern for the States, considering their space program and space industry; and appropriate measures should be taken for countries which will be implicated in the near future.

After a short review of Intellectual Property Domestic law, we will see how uniform rules of law could take place at this level. We will also look at the wishes formulated by States in the course of the ESA questionnaire that was sent to space

[110] A recent Act, the Australian Space Activity Act (No 123, 1998), was assented to 21 December 1998. The objects of this Act are:

(a) to establish a system for the regulation of space activities carried on either from Australia or by Australian nationals outside Australia; and

(b) to provide for the payment of adequate compensation for damage caused to persons or property as a result of space activities regulated by this Act; and

(c) to implement certain of Australia's obligations under the UN Space Treaties.

industry actors,[111] and whose conclusions were presented at the Madrid Workshop in 1993.[112] With the exception of the United States (US Space Bill), there is no legal regime governing the extension of national Intellectual Property law to registered or non-registered space objects. This question is controversial for Germany (due to a special ratification of the International Space Station Intergovernmental Agreement), and Russia (with its Russian Law on Space Activities).

1. European Countries:

In Belgium, the Intellectual Property law could be applicable to outer space if the extra-territoriality of the law was admitted, because the place of the invention is not linked to the patentability conditions. In Denmark, national patent law is applicable for an invention created in outer space but not for its utilization in outer space.[113] The Dutch Patent Act[114] does not extend to outer space, and in the case of an infringement, protection can be granted by Domestic law exclusively on Earth. In France, the French Patent Act[115] does not apply to space activities. The CNES policy is to elaborate the legal framework on a bilateral and multilateral basis and case by case. Even though intellectual

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[111] Industries, governmental agencies, scientific community, legal practitioners and scholars

[112] The Workshop on Intellectual Property Rights organized by the European Centre for Space Law was hosted by the Spanish Centre for Space Law; see the questionnaire and the review of the answers in *Proceedings of the First ECSL/Spanish Centre for Space Law, Workshop on Intellectual Property Rights in Outer Space, Madrid, Escuela Diplomatica*, (May 26, 1993), at 106.

[113] See Kobenhavns University, *ibid.*

[114] The contents of the Dutch Patent Act (December 15,1994, entered into force in April 1995) are now closer to the EPC, see supra note 32, at 79.

[115] French Intellectual Property Act, introduced by Law No. 92-597 of July 1992.

property law can apply through the registration - and it is considered by CNES that no difference exists between experiment results obtained in space or on Earth - vacuums are regulated by contracts. For example, in the legal protection of remote sensing data with regard to intellectual property: A copyright protection is granted by CNES to Spot Image through contracts.[116]

Some problems remain, such as the determination of the applicable law to an infringement in outer space. In Sweden, the exclusive right is also limited to the territory, but the temporary presence doctrine seems to have a broad application. Section 5 of the Swedish Patent Act states as follows: "The utilization of a patented invention in a foreign vessel, aircraft or other foreign means of communication for its own needs when temporarily entering Sweden in regular traffic or otherwise is not considered an infringement." As a consequence a broad interpretation of "other foreign means of communications" could lead to include space objects.[117] The German Patent Act,[118] like United Kingdom, does not provide any patent extra-territorial application. However, the German Act of 13 July, 1990, was enacted following the implementation of the 1988 IGA. With the new IGA,[119] Germany modified this ratification.[120] This provision does not mean that any space object registered by Germany should be under the jurisdiction of that country. The Intergovernmental Agreement is a specific agreement only applicable to the International Space Station. The same principle governs European countries; the

[116] C. Blemont, G. Oscar, C. Thibault, "The Practical and Legal Viewpoint of the French Space Agency," CNES, see supra, note 26.

[117] See supra note 33, at 82.

[119] See infra, Part II.

[120] "Any activity occurring in or on the ESA registered element is - for the purpose of the protection of industrial property rights and copyrights - deemed to have occurred in Germany."

protection of the exclusive right limited within the boundaries of the country and their national patent does not apply to outer space except through the registration mechanism. In that case, a country will exercise its control over the space object.

2. The non European Countries:

2.1 Canada:

Like European countries, Canada is governed by a first-to-file system. There is no Act related to space activities. The protection of Intellectual Property is made in bilateral agreements and in the contracts. In the case of research and Development contracts, Canada has adopted a policy on ownership of Intellectual Property Rights[121] which is limited to government legislation contracts.

2.2 Japan:

In Japan, once again, there is no specific law dealing with outer space. NASDA shall transfer an ownership of an industrial property right from the contractor and obliges the contractor to disclose all technical information derived under contract to NASDA.[122] Article 26 of the Japanese Patent Act[123] states that "if a special provision is provided for in a Treaty with respect to a patent, such provision shall govern."[124] Although this provision is not useful at present, as there is no treaty dealing with the question of

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[121] Under the new policy (1991) on ownership of intellectual property ("IP") arising from Government contracts involving R&D, IP resulting from the performance of the contracts is presumed to vest with the contractor, unless the contracting department determines that Crown ownership is justified. See R. S. Lefebvre, "Intellectual Property Rights and Space Activities Canadian Perspective and Point of View: Canadian Laws, see supra note 26.

[122] T. Yokoo, NASDA's Activities and Intellectual Property Rights, *ibid*, at 54.

[123] "The Patent Law and the enforcement law thereof" (Law No, 121 of 13 April 1959, as last amended in 1987) ("Japanese Patent Act"), see supra note 33.

[124] *Ibid*, at 58.

intellectual property rights in outer space, we can imagine that the situation may be different in a couple of years. It would happen if, for example, an international law of patent in outer space was elaborated through the World Intellectual Property Organization. In that case, such a provision becomes highly intriguing, because once Japan has ratified the international agreement, the provisions on patents become directly applicable through article 26 of the Japanese Patent Act.

2.3 Russia:

The Russian patent law is based, like the European countries, on a first-to-file system. The entire legislation was modified in 1992[125] as a step toward the market economy. In 1992, the Russian Federation adopted a law on Space Activities. This text contains specific provisions on patent law: Reference is made to the respect of intellectual property legal requirements of the Russian Federation,[126] and the property rights are regulated.[127] Following article 17 (2), "the Russian Federation shall retain jurisdiction and control over space objects registered in it during the ground time of such objects, at any stage of a space flight or stay in outer space, on celestial bodies as well as on their return to the Earth outside the jurisdiction of any State." Despite the existence of these rules, can we consider the Russian Patent Law applicable to an infringement occurring in outer

[125] Effect of the Patent Law on September 23, 1992.

[126] Article 4 (3) of the Russian Law on Space Activities of 1993 provides that "space activities as well as dissemination of information of space activities shall be carried out with the observation of the requirements stipulated by the legislation of Russian Federation on the protection of intellectual property rights, state (military including) and commercial secret act."

[127] Article 16 (4) of the Russian Law on Space Activities of 1993 provides that "the property rights over the physical product created in outer space shall belong to the organizations and citizens possessing property rights in the components of space techniques used to create such products, unless otherwise specified by relevant agreements. The property right over the information product created as a result of space activities shall belong to the organizations and citizens that have created that information product unless otherwise specified by relevant agreements."

space? Considering article 4 (3) and 17 (2), Dr. Olga Vorobyera considers that there is enough legal basis to admit the applicability of the Russian legislation "to the use of inventions and other objects of intellectual property protected under Russian laws."[128] This interpretation is easily accepted as The Russian Space Act contains some provisions to assure the protection of intellectual property rights and we could logically consider that the use is included in this protection. Nevertheless, if a conflict arises between two countries, for example the US and Russia, since US Space legislation is already established, the interpretation of the Russian Space Act is too uncertain to convince a judge. The law here should be more precise to ensure its applicability to the use of patent in outer space, and to be sure that any unlawful could permit to go to a Russian Court. An important provision should finally be recalled here: In case of conflict between the rules of the Russian legislation and that of a foreign State as they apply to space activities with the participation of Russian firms and citizens, the legislation of the Russian Federation shall prevail.[129]

Taking into account the provision of the space treaties relating to jurisdiction and control,[130] the United States have elaborated specific legislation on patents in outer space. The adoption enhanced some debates between lawyers from Europe and the initiators of the reform.[131] In 1990 the United States passed the Space Patent Act[132] which added

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[128] O. Vorobyera, "Intellectual Property Rights and Space Activities: Russian Experience and point of view, see supra note 26, at 49.

[129] Article 28 (2) of the Russian Law on Space Activities.

[130] See supra, note 15.

[131] See infra Part II, debate about the Space Bill.

[132] See supra note 16.

Chapter 10 of title 35 of the US Code. The US Space Bill[133] introduces article 105 in title 35 U.S.C: Inventions in Outer Space: "Any invention made, used or sold in outer space on a space object or component thereof under the jurisdiction or control of the United States shall be considered to be made, used or sold within the United States for the purposes of this title, except with respect to any space object or component thereof that is specifically identified and otherwise provided for by an international agreement to which the United States is a party, or ...carried on the registry of a foreign state in accordance with the Convention of Registration of Objects Launched into Outer Space." This provision follows the "flagship principle"[134] as applied to vessels on the high seas, or aircraft flying over international waters.

The aim of this Bill was to extend the patent law protection extra-territorially. As a consequence, it is a unilateral extension of a national law, which usually only applies to a certain territory.[135] Nevertheless, such an extension will only apply to space objects, not to outer space itself. This type of legislation contradicts the international cooperation that takes place in space activities. The Intergovernmental Agreement containing the rules applicable to the Partners of the International Space Station is an illustration of this cooperation.[136] It becomes difficult to conciliate the preexisting international rules and the contents of a domestic law. Similar conflicts to the TRW case may start again in the near

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[133] S.459, Nov.16, 1990. Published in BNA's Patent, Trademark & Copyright Journal, vol.41, 90-93 (111.22.90).

[134] US Senate report on S 459, P.91, "Extraterritorial application of the patent laws," 1990.

[135] "(...) *it may be seen that US patent law may be applied to the widest territory out of this world, and potentially even to foreign-owned and operated spacecraft which have never even touched US soil* !", by A.M. Balsano and B. Smith, supra note 26.

[136] As for example the article 16 establishing a cross-waiver system of liability.

future. In order to constitute a violation of the law, an act of infringement must take place in the United States of America, its territories and possessions,[137] but the US patent law does not give any precise definition of infringement.

Even if the US Space Bill appears to solve the question of applicable law in a majority of situations, we still do not know which acts constitute infringement in the territory. In addition, there is also a perceived negative role which can play in the transfer of technology, and the fear of monopoly of space technologies by a few countries is not unique to space activities. Consequently, a clear definition, a sanction, and a way to enforce that sanction should be provided in order to apply the same rules to all States without consideration of their domestic law.

As seen above, the place where the invention was made is not relevant in most of the countries. In some cases, there are interesting elements in the Domestic legislation of Japan (article 26 of the Japanese Act), Swedish law (with its broad interpretation of the "temporary doctrine"), but none of them contain sufficient rule to assure the protection of the use of the patent.

At a national level, at least two issues could be discussed: The adoption of specific laws dealing with Intellectual Property in outer space, or amendments to Domestic laws for an extra-territorial application. The first solution would lead undoubtedly to a mosaic of national laws and enhance conflicts. This uncertainty will not provide trust in space investments. The second solution will render each law applicable to space objects launched into outer space. This situation is already covered through the registration procedure, and such a solution is insufficient, as there is no way to solve the unlawful use

[137] US Patent Law, Section 100 (c).

of a patent. We would come up to a level of protection that would be completely different from one country to the next. Notions such as "infringement" or "use" would be interpreted with different approaches.

In the second and third levels of approach, we will try to determine, on the basis of current rules, how a uniform solution could take place, either at a European level, or at an international level.

Section 2. The Regional Level:

Anticipating the necessity to protect the internal market that was starting to take place in Europe, a European Patent system was elaborated in 1973, entering into force in 1977, the European Patent Convention, hereafter the EPC. With one application, the protection is granted in each individual Signatory State of the Convention thanks to standards rules. The territorial limits are maintained as opposed to the Community Patent Convention, hereafter the CPC providing a supranational patent within the European Union.

The CPC, dated December 1989, is still not entered into force. "The crucial significance of the Community patent for the European internal market lies precisely in providing protection which traverses the internal borders in this market, embracing and covering the entire internal market of the European Union."[138] The European Patent Office will have a great role to play in the implementation of this mechanism.

[138] A. Krieger, "When Will the European Community Patent Finally Arrive,?" in *International Review of Industrial Property and Copyright Law*, (Vol. 29, No. 8, 1998), at 857.

The space agencies, and especially the European Space Agency, have been considering the problem for a couple of years. As a result, some initiatives have been taken through this Agency. In June 1997, The European Commission adopted a Green Paper on the Community Patent.[139] The parties were invited to offer any suggestions. The European Space Agency replied through its Director General, urging the European Commission to take into consideration these issues by adopting a specific legislation on inventions in Outer Space.

That same year, a resolution on the Green Paper was adopted by the European Parliament, with on the 9th paragraph a specific provision for space activities. It is considered that the European Patent should assure the protection of inventions that are made or used onboard spacecraft and satellites, protection is not guaranteed by the current European legislation. This resolution is a plea for the creation of Community Patent regulation.

More recently, in a Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, actions and recommendations were elaborated on the community patent and the need of complementary harmonization of national legislation.[140] The main features of a Community patent are exposed in §2.3 of the Communication[141] and the question of inventions made or used in space is directly addressed. Their protection through

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[139] Green Paper on the "Community Patent and the Patent Protection System in Europe - Promotion of Inovation Through Patents," June 24, 1997, COM (97) 314 final.

[140] "Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, Promoting innovation through patents, the follow-up to the Green Paper on the Community Patent and the Patent system in Europe," COM (99) 42.

[141] "The nature of the Community patent must be unitary, it must be affordable, it must guarantee legal certainty and must coexist with existing patent systems," *Ibid.*

legislation is considered as an important step forward for the space industry: "It is vital, given the substantial European involvement in the International Space Station and the absence of specific European legislation defining the protection of commercial rights in the case of value added technologies applied or developed in orbit, that such legislation be introduced for patents and licenses, as has been done in the United States, and is currently being prepared in Japan and Russia."[142]

What kind of approach should be adopted regarding space activities? Shall we create a Directive, an EC Regulation specific to outer space related inventions, keep the European Patent Convention, the Community Patent and include provisions on this matter?[143] An interesting suggestion was made by O. Bossung[144] that would simplify the entire system: The replacement of the CPC and the EPC by only one European patent. The need for a unitary system of protection by patent is expressly mentioned in the 1999 Commission Communication.[145]

Almost all the European countries, when answering to the ESA study, agreed on the necessity to harmonize the European law although the choice of forum was different. For Belgium, Germany, Ireland and the Netherlands, the PCT does not seem to be a good solution, as the validity of the patent will be limited to earth,[146] for Italy, an international code of conduct should be adopted.

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[142] §2.3 of the Communication, *Ibid.*

[143] M. Schmittmann, "Conclusions of the study for the European Space Agency," supra note 113, at 59.

[144] O. Bossung, "Return of European Patent Law to the European Union," *International Review of Industrial Property and Copyright Law*, 27 IIC 287 (1996).

[145] Commission Communication §2.2, see supra note 142.

[146] See answer of the Belgium delegation, see supra note 113, at 119.

The forum of harmonization could be ESA (Belgium, Germany, UK), the European Patent Office (Denmark, Netherlands), EC Regulation (Germany, UK) or a cooperation between the two (University of Amsterdam, Netherlands). The main problem concerning the PCT is the fact that its application is restricted to the territory and does not regulate the effects of the patent, as it is limited to the grant. The CPS has many advantages: It will contribute to the free movement of goods,[147] prevent the "forum-shopping," ensure uniform protection, and guarantee lower fees.

Prior to this chapter conclusion, we will examine the eventuality of an international regulation.

Section 3. Common Regulation at an International Level?

The idea to create a world patent is not a new phenomenon. Among the studies that have been written on this topic, a world patent applicable to space has emerged. This section is not aimed at reiterating the different regional patent systems that exist on earth and the international conventions on this topic. We will focus on some of them which are of particular interest in the course of the present study, and see if this level of regulation is desirable.

[147] Article 30 of the European Union Treaty, online: <http://www.europa.eu.int/eur-lex/en/treaties/index.html>

1. Through Global Initiatives: The 21st Century as "Era of Intellectual Creation"[148]

Patent protection practice is mostly used in European countries, Japan and the United States, as approximately 85-90% of total patent activity in the world takes place in these nations.[149] The globalization of the law of patent is a phenomenon that is taking place in most of the intellectual property legal framework.

In Europe, the Paris Convention could be considered a pioneer in the elaboration of the international law of patent; the main drawback being the obligation to file in each country where protection is needed. The concept of a unitary patent was born in Europe with the European Community Patent Convention.[150] In the United States, the integrated system was planned to take place through the North American Free Trade Agreement, whose approach went far ahead of the Paris Convention.[151] In Japan, a recent report by the Commission on "Intellectual Property Rights in the twenty-first Century"[152] to the Japanese Patent Office conclusion was based on the insufficiencies of the current legislation as restricted by a country's boundaries. Among the Commission's proposals was the creation of a global patent. Apart from these three main players, it is crucial to mention the Eurasian Patent Convention ("EAPC"), created by twelve countries of the

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[148] Toward the Era of Intellectual Creation. Challenges for Breakthrough. Report of the Commission on Intellectual Property Rights in the Twenty First Century to the Commissioner of the Japanese Patent Office (April 7,1997), cited by G. J. Mossinghoff and V. S. Kuo, World Patent System Circa, 20XX, A.D., see supra note 8, at 523.

[149] M. N. Meller, "Planning For A Global Patent System," in *Journal of the Patent and Trademark Office Society*, June 1998, vol.80, No.6, at 381.

[150] See supra Section 2

[151] NAFTA extends the concepts of national treatment under the Paris Convention across all fields of intellectual property. See supra note 8, at 532.

[152] *Ibid*, note 8, at 150.

former USSR.[153] The filing of a Eurasian patent can be done with a single application, with a single payment at the time of the filing and in a single language. This patent could serve as a "model for the next generation of multinational patent systems."[154]

The question came to its apogee with the Trade-Related Aspects of Intellectual Property Rights ('TRIP's"). "By harmonizing substantive patent rules among the world's major nations, TRIP's clearly set the stage for the next steps in effective multinational patent protection."[155] With the development of international commerce and the development of electronic commerce, the protection of a patent restricted to the country's borders will become less and less justified. Moreover, if requirements to file a patent may differ from one country to another, the basic rules governing the protection is more or less similar. This reasoning led Intellectual Property authors,[156] followed by the patent agencies, to defend the idea of a global patent. This will be of course an ideal situation, where a patent will be granted on a worldwide basis, under the supervision of an international organization.

Such a reform has already started through the coordinated work of national and regional agencies. Considering the task that has to be accomplished, the implementation of the world patent will not take place overnight.

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[153] Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyz, Moldova, The Russian Federation, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

[154] Supra note 8, at 540.

[155] Supra note 8, at 532.

[156] L. C. Thoreau, "Needed: A New System of Intellectual Property Rights," *Harvard Business Review*, Sept-Oct 1997, at 95. M. N. Meller, see supra note 123, G. J. Mossinghoff, see supra note 8.

The Patent Cooperation Treaty[157] allows the applicant to file an "international application" in several countries. The harmonization is more on the form, content and procedure though, the final grant still belongs to the national or regional patent office. In order to get closer to a real uniform system in the substantive part of the law, the PCT will link to the Patent Law Treaty (PLT). A Diplomatic Conference will take place from May 11 to June 2, 2000 that will lead to the possible adoption of this Treaty.[158] The World Patent system, which will start with common rules on the procedure is coming up soon.

And now this question comes into play: If we take the hypothesis of an invention made or used in outer space, is the elaboration of such a system desirable?

2. Shall We Have a Specific International Intellectual Property Law For Space Activities?

The proposition that dealt with the creation of a specific regulation did not plan to integrate the new system in a future world patent, but to adopt specific rules to outer space. In the conclusions of the study for the European Space Agency,[159] it was proposed to regulate this question through WIPO, in combination with World Trade Organization and with the assistance of the United Nations Committee on the Peaceful Uses of Outer Space. It was also proposed to consider outer space as an area where a unique set of international rules would apply. The WIPO would be in charge of the important issues

[157] The Patent Cooperation Treaty is entered into force on January 24, 1978. It also deals with standardization of administrative procedures.

[158] See www.wipo.org/eng/pressupd/1999/upd99_70.htm

[159] M. Schmittmann's , see supra note 143, at 59.

such as grant and infringement.[160] The centralization of the legal matters would limit the conflicts and help avoid the delicate question of territory.

The implementation in the near future of these provisions is less probable, as a lot of time will first be required to elaborate the new treaty, and establish the responsibilities at national and international level. In addition, the process of ratification is always very long, and since the United States patent system is based on a different approach, (the first-to-invent rule), the bringing together of this legal system with the first-to-file is desirable. This evolution is being implemented.

Finally, in case of an unlawful act sanctioned by a Court, this question, unfortunately, the same one concerning international law arises: How to enforce the decision? It will be hard to mobilize the "patent community" for the question of invention in outer space. However, debates on the question of a world patent might be easier.

Furthermore, in the course of a study led by WIPO in 1997, the conclusion was that no specific provision were absolutely needed, and "due to other priorities, no specific project relating to outer space is foreseen in the current budget and program of WIPO."[161]

As a consequence, in a first step, favor should be given to large regional systems (e.g. NAFTA, Europe, Eurasia, South East Asia) in which a specific legal framework on intellectual property in outer space could be implemented. In Europe, protection of inventions made or used in outer space through the Community Patent would guarantee a

[160] R. Oosterlinck, "Tangible and intangible property in outer space," in *Proceedings of the 39th Colloquium on the law of Outer Space*, 271-283 (1996).

[161] T. Miyamoto, "Space-related Aspects of Intellectual Property: WIPO's Role and Activity," see supra, note 8, at 107.

good legal framework. In one hand, it would avoid the problem of extra-territorial application of national law in space, enhancing the absence of conflict of law, and on the other hand, bring a uniform enforcement of patent in the European Union. Space patent could be part of this framework: The Community Patent regulations could be considered applicable to any invention made or used in outer space on a space object registered in a European country. This provision should provide the sanction of an unlawful infringement by a European Court.

During a transition period (about one to five years), patent agencies will closely collaborate on the elaboration of the world patent treaty, which will apply to all kinds of application. Special attention will have to be made to high technology (computer copyright software, space technology). In a second step, it will be necessary to explain and convince the countries to take part into a world patent system.

We should keep in mind that most of country's legislation is becoming similar. For example, Russia and China have adopted standards similar to the US, Europe or Japan.[162] This will favour the evolution expected.

The International Space Station legal framework is a tool that will also encourage the standardization of Intellectual Property Rights. Although the international agreement governing the relationship between the participants to the International Space Station provides specific rules about intellectual property, it provides only the basic principles.

PART II

INTELLECTUAL PROPERTY AND THE INTERNATIONAL SPACE STATION

The civil International Space Station, hereafter ISS, constitutes one of the most ambitious projects between countries in terms of international cooperation. In the 1950's, the US government considered building a space station. The project Skylab was initiated under the Nixon Presidency, and was placed into orbit in 1973. Although this laboratory had a short life span, it gave the opportunity to astronauts, who later became scientists, to experience this station in space until eighty-four days.[163] Several missions were then elaborated for human space flight: Space shuttle, Spacelab, Salyut and Mir. The scientific community agrees that the experiences realized in the Russian station are a significant source of information for the future ISS. A great amount of work was done on human behavior during long space missions and further studies are now necessary, for example, for future Mars missions.

In the state of the Union Address of January 2, 1984, President Reagan gave to the National Aeronautics and Space Administration (NASA) the responsibility to build and put into orbit a manned space station. He also offered member States of the European Space Agency, Canada and Japan to participate in this project. Negotiations started and the Agreement[164] was finally signed four years later in Washington D.C. on September 29, 1988.

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[162] See supra, note 150.

[163] W. Astore and J. Sellers, "Entering Space", see supra note 22.

[164] Agreement among the Government of the United States of America, Governments of Members States of the European Space Agency, the Government of Japan, and the Government of Canada on Cooperation in

With Russia's inclusion in the project,[165] new negotiations took place between the former participants and Russia through a succession of meetings between 1994 and 1997. The aim of these meetings was to come up with the "new IGA in 1998,"[166] which displayed a significant evolution between the different partners relationships.[167]

Located between 335 and 460 km above the earth, with a mass of 400 tons, the space station is considered as a multi-use facility in low earth orbit with the specificity to be evolutionary. Forty-six launches are planned between 1998 and 2004 to assemble the modules. Because of this long period of time, it will be necessary to add some elements on the existing one before the launches are complete, and after the completion, because the life span of the station has been fixed at around fifteen years. The main interest of the ISS is to work for a long period of time under microgravity conditions. The concept of a new space station was, and still is highly criticized. The project is costly, ($20B to $100B), and part of the scientific community is skeptical concerning the practical applications of the space station. Moreover, solar radiation and space debris constitutes an important risk for this infrastructure.

In a more optimistic light, this project is a fantastic opportunity for research. Activities on board the space station will include "fluid and materials science experiments, crystal growth for commercial application,[168] combustion experiments to

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the Detailed Design, Development, Operation and Utilization of the Permanently Manned Civil Space Station, hereafter the "Intergovernmental Agreement", or "IGA".

[165] On December 17th, 1993.

[166] The second agreement was signed in Washington D.C. on the 29th of January, 1998.

[167] This Agreement will replace the 1988 IGA.

[168] On the specific question of protein crystal experiments, see M. Harrington, "Protein Crystallography Services on the International Space Station," the paper summarizes previous results from microgravity

improve energy and propulsion systems, human physiology experimentation for long duration flights and for actual medical research, biological research and bioengineering."[169] Simulation of Flight for International Crew on the Space Station[170] started during the summer 1999 at the State Research Center in Moscow to study the effects of isolation in the hermetic chamber. In fact, the analysis of the physiological and psychological effects before and after the flight are simultaneously for space and earth applications.[171]

An interesting cross-cultural experience was conducted concerning the integration of Russian Soyuz Spacecraft for the ISS. Among the differences that will have to be taken into account (e.g. units of measure), the notion of leadership is seen differently: Americans are used to distributed management and frequent changes in personnel, whereas Russians are more accustomed to centralized management, a single spokesperson and few changes in personnel.[172] On earth, the preparation of ISS missions will also require qualified people from a diversity of professions, who can create new opportunities for futures generations. The ISS has become more political tool, since Russia entered the program in 1993. Nevertheless, the international exchange generated by the project will have positive consequences on the international scene.

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protein crystal growth experiments and describe the facilities envisioned for the International Space Station. <http://www.isunet.edu/Symposium/symposium99/Oral%20Abstracts/Harrington.html>

[169] R. Monti and R. Savino, "Microgravity Sciences", supra note 22, at 17-58.

[170] SFINCSS'99, see infra note 171.

[171] For example, investigations are made on the effectiveness of equipment and the interaction of several international groups. See "SFINCSS Project Scenario", Paper delivered at the International Space University Summer Session Program, on August 14, 1999, [unpublished].

[172] Andrew Petro, NASA Johnson Space Center, Houston, "Integration of Russian Soyuz Spacecraft for the International Space Station," (International Space University Summer Session Program on August 14, 1999), [unpublished]

Finally, the International Space Station also constitutes an important commercial project. The US 1998 Commercial Space Act requires NASA to encourage commercial utilization of the ISS. This objective is clearly stated in the executive summary[173] prepared by the NASA Office of the General Counsel in September 1999: "The long term objective of the commercial development plan for the International Space Station is to establish the foundation for a marketplace and stimulate a national economy for space products and services in low earth orbit, where both demand and supply are dominated by the private sector." Several provisions of this unique text of international law are original. Questions related to Intellectual Property have this feature.

CHAPTER 1. THE LEGAL FRAMEWORK

The legal framework governing the International Space Station is composed of three levels: The Intergovernmental Agreement, four Memoranda of Understanding between the Space Agencies, and the Implementing Arrangements. The Intergovernmental Agreement[174], hereafter, IGA, contains the main principles that guide the five Partners participating in this unusual project. The Five Partners are Russia, United States, Japan, Canada and Europe, with eleven States.[175] An international agreement creates the same rights and obligations as a Treaty made but the choice, by the

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[173] NASA Office of the General Counsel, executive summary on "Intellectual Property and the International Space Station: Creation, Use, Transfer, and Ownership and Protection" http://www.hq.nasa.gov/ogc/iss/exec_summary.html

[174] See supra note 166.

United States for an executive agreement, was essentially to avoid the Congress ratification.

Section 1. A Unique Framework Under International Law:

1. Main Legal Provisions of the IGA:

In order to fully examine the question of intellectual property, we must first look at the main legal features governing the space station, to better understand the spirit of this Agreement. The first point of this study is to determine whether a space station can be qualified as a single space object. Under article II of the Registration Convention: "When a space object is launched into earth orbit or beyond, the launching State shall register the space object."[176] Can we consider that a space station is one space object? Since any space object has to be registered (article VIII OST),[177] the whole space station would be registered by a single procedure. The consequence of this qualification should not be neglected as the registration determines the jurisdiction and control over the space object.[178] In such an international program, it would mean the jurisdiction by a single State over the modules belonging to the fifteen contracting States.[179] Past experience has shown that it is a delicate matter: When United States started the construction of the shuttle, a memorandum of understanding was signed with Europeans to construct a space

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[175] We will see in Chapter II Section II that the qualification of "Partner" for Europe involves important consequences at the level of the member States.

[176] Convention on Registration of Objects Launched into Outer Space, see supra, note 2.

[177] See supra, note 15.

[178] Article VIII of the Outer Space Treaty, see supra note 15.

[179] Every time a new module is added to the space station, new registration will be required.

laboratory. The Spacelab was under the jurisdiction of the United States, and some "flight opportunities" were offered to Europeans. "Another lesson of national self-interest and maneuvering appears here: The shuttle four years late had created some animosity between allies. When the first Spacelab succeeded, the Europeans still complained that they had not gotten their money's worth out of the venture."[180] In that kind of hypothesis, a State is best to not be under the jurisdiction of another one involved in the same project. The fact that these space programs are of an international dimension does not prevent conflicts of interest.

This is why the drafters of the IGA chose a separate registration by each Partner.[181] According to article V of the IGA, "each partner shall register as space objects the flight elements listed in the Annex which it provides." Consequently, "each Partner shall retain jurisdiction and control over the elements it registers and over the personnel in or on the Space Station who are its nationals." This rule enhances specific consequences for the European Partner.[182] The utilization of the station is characterized by a sharing system. The use of each part of Partners 'module is determined by a specific allocation[183] and "the Partners have the right to barter or sell any portion of their respective allocations."[184]

Furthermore, the provisions on the utilization of the space station are unusual too. Partners who provide resources in the stations shall be given a fixed percentage of the use

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[180] N. C. Goldman, "International Affairs and NASA", *in American Space Law*, (Iowa State University Press, 1988), at 145.

[181] ESA is in charge of the registration for the European partners.

[182] See infra Chapter II, Section II.

of any of the other modules. Consequently, non-partners will have to negotiate with the partners as to how they can utilize the specific allocations.[185]

In order to assure the continuity of the program, as many space agencies and contractors are involved, Partner States agree to a cross waiver of liability.[186] The system applies not only on at the partners' level, but also for the cooperating agencies, contractors, subcontractors, etc.... There are a few exceptions to this rule, and one of them concerns intellectual property claims.[187] This provision underlines once again the relevance of the required level of protection.

In addition, article 1 of the IGA, covering the entire agreement, states that "this Agreement is to establish a long-term international cooperative framework among the partners, on the basis of genuine partnership." Like the question of cross waiver of liability, this provision constitutes a transposition of private law to public international relations.[188] The legal framework is more a juxtaposition of rules as each Partner State exercises its jurisdiction and control over its module. Nevertheless, the wish contained in the IGA remains the pursuance of a genuine partnership despite the political

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[183] For example, the Japanese Agency received 51% of the user accommodations on the Japanese Experiment Module (JEM).
[184] IGA Article 9.

[185] For e.g., concerning the ESA module, Europe is entitled to use 51% and the US 46.7%, while Russia retains 100% utilization over its own module. The utilization repartition is determined in the Memorandum of Understanding.

[186] "Although these provisions are far from being tested by national courts, they would constitute at this point, the "state of the art" liability provisions in an international space endeavour, and they are already finding their way into other international agreements."A. Farand, "The legal regime applicable to the space station cooperation: a canadian perspective, *Annals of Air and Space Law*, 1992 Part I, vol. XVII, at 299.
[187] See IGA Article 16.

[188] "In order to really get to the roof of it, we have to think of a private partnership transposed or translated into the partnership of nations." K. J. Madders, "The partnership Concept and International Management and the debates concerning Partnership", in *the Proceedings of the Colloquium on Manned Space Station, Legal Aspects* (1989), at 82.

consideration.[189] "The IGA contains rules which, taken together, could be seen as constituting a particular legal regime for the Space Station."[190] Although overall management of the space station has been entrusted to the United States,[191] Russia will have a role to play. "The new IGA is still consistent with the closed partnership approach."[192]

Finally, financial obligations are subject to a Partner's funding procedures and the availability of appropriated funds.[193] The same type of agreement was signed between the European Partners and the United States concerning the spacelab.[194]

2. IGA and Intellectual Property Rights:

The IGA contains the main feature on Intellectual Property and exchange of data and goods. However, work on their implementation at national level and modalities of application remain to be done.

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[189] "European Partners" did not seek to participate in the "American space station" program with international participation but to assure a "genuine partnership" for the international space station." K. Tatsuzawa, "the International cooperation on the space station," in *Proceedings of the 33d Colloquium on the law of Outer Space* (American Institute of Aeronautics and Astronautics, 1990).

[190] A. Farand, "The International Space Station and the Protection of Intellectual Property Rights," see supra note 27.

[191] Art. 1.2: "The Partners will join their efforts, under the lead role of the United States for overall management and coordination, to create an integrated international Space Station."

[192] A. Farand, "Space Station Cooperation", in *ESA Bulletin*, (No. 94, May 1998), at 51.

[193] IGA Article 15

[194] "The obligations of the Government of the United States of America and of the European Partners shall be subject to their respective funding procedure." Spacelab Agreement, see N. C. Goldman, *American Space Law* (Iowa State University Press Ed., 1988), at 146.

2.1 Mechanism of Article 21:

The IGA refers[195] to article II of the Convention Establishing the World Intellectual Property Organization[196] to define "intellectual property."[197] The choice of this definition will assure stability in case of any misunderstanding concerning the intellectual property. In the case that experiments would take place aboard the space station with great commercial applications, the question of the benefits would be raise and consequently, this article has been the source of long discussions in the course of its adoption.

2.1.1 General Procedure:

IGA Partners States have chosen a multi-territorial approach. The principle governing IPR in §2 is that "an activity occurring in or on a Space Station flight element shall be deemed to have occurred only in the territory of the Partner State of that element's registry." Consequently, each Partner will be able to apply its domestic law to its element and personnel. With this mechanism, national legislation is extended extra-territoriality through public international law and the nationality of the inventor is not taken into account.

In the case of ESA Member States, the situation is very original: "for the elements registered by ESA," art. 21§2 states "any European Partner may deem the activity to have occurred within its territory". A legal fiction has been elaborated to solve this question in

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[195] See Article 21§1

[196] Stockholm, July 14, 1967.

[197] "Intellectual Property shall include rights relating to: [1] literary, artistic, and scientific works; [2] performances of performing artists, phonograms and broadcasts; [3] inventions in all fields of human endeavor; [4] scientific discoveries; [5] industrial designs; [6] trademarks, services marks, and commercial names and designations; [7] protection against unfair competition; and all rights resulting from intellectual activity in industrial, scientific, literary or artistic fields."

Europe, but in practice, this provision generates complications[198] and involves important consequences at a European level[199].

In case of an invention by a non-national of the flight element, "a Partner State shall not apply its laws concerning secrecy of inventions so as to prevent the filing of a patent application in any other Partner State that provides for the protection of the secrecy of patent applications containing information that is classified or otherwise protected for national security purposes."[200] For example, if an European astronaut, an ESA employee, makes an invention in the US module, he or she has the choice of the place to file the patent without consideration of the US Inventions Secrecy Act.[201] The condition he has to follow is that the legislation of the country chosen must contain provision for the protection of the secrecy of patent applications containing information that is classified or otherwise protected for national security purposes.[202] This rule can be explained by the fact that in the United States, during the six months following the filing of a patent in the US, the filing in a foreign country is prohibited.[203]

To avoid the risk of multiple recoveries in Europe, a special provision[204] was elaborated by the IGA's Drafters. For example, if a patent is protected in two or more

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[198] See infra Section 2

[199] See infra Chapter II Section 2

[200] Article 21 § 3

[201] US Inventions Secrecy Act, 35 U.S.C. Secs.184.

[202] See generally J. B. Gantt, "Space Station Intellectual Property Rights and US Patent Law", in *Proceedings of an International Colloquium on the Manned Space Stations, Legal issues*, Paris 7-8 November 1989 (ESA SP- 305, February 1989), at 79.

[203] See supra.

[204] "Where a person or entity owns intellectual property which is protected in more that one European Partner State, that person or entity may not recover in more that one such State for the same act of infringement of the same rights in such intellectual property which occurs in or on an ESA-registered element." Article 21 § 4

European countries, a patentee will not be able to recover in more that one European country when dealing with an act of infringement. As a result, the patentee has the opportunity to choose where the procedure will start. Here again, the difference between national laws will have a great impact, because the patentee will choose the State whose legislation is the most favorable for him. In a case when the invention is owned in two or more European Partners, the court may grant a temporary stay of proceedings in a later-filed action pending the outcome of an earlier filed action.

Finally in order to avoid litigation, and "with respect to an activity occurring in or on an ESA-registered element, no European Partner State shall refuse to recognize a license for the exercise of any intellectual property right if that license is enforceable under the laws of any European Partner State, and compliance with the provisions of such license shall also bar recovery for infringement in any European Partner State."[205] As a consequence, a license granted in one European country should also be recognized in other European countries. The protection of intellectual property must receive the same protection in each of them.

The last paragraph of article 21 contains an innovative provision. Indeed, it provides that it will not only apply to activities in or on the station flight element, and also to transitory activities such as the launch or the return from the station. The temporary presence doctrine, based on the Paris Convention, is consequently extended in article 21 §6[206] to flight elements. Usually, limitations on the exclusive rights given to the inventor

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[205] Article 21 § 5.

[206] "The temporary presence in the territory of a Partner State of any articles, including the components of a flight element, in transit between any place on Earth and any flight element of the space station registered by another State or ESA shall not in itself form the basis for any proceedings in the first Partner State for patent infringement."

are afforded in the case of ships, aircraft and land vehicles that visit temporally foreign countries..

2.1.2 Hypotheses of Application:

We will first consider situations where ESA member States and ESA registered element are not involved, and where a Partner, Japan, United States, Russia or Canada has an activity in its own module: That Partner will be able to apply its own Domestic law because the module and its components were registered in his country. If a Partner has an activity in or on a flight element that do not belong to his country, the activity shall be deemed to have occurred only on the territory of the Partner State where the element is registered. Consequently, a Russian astronaut making a revolutionary discovery on the development of plants in the US module would be considered to have realized it on the US territory. In these cases, there is no choice concerning the applicable law of space activities. Moreover, there might be no link between the nationality of the owner of the rights and the State where the applicable law will take place.

Now, we will introduce the ESA-registered elements: A Partner has an activity in or on ESA-registered element. Although article 21 does not contain provisions on this hypothesis, we can consider that the Partner has the choice of the European partner State jurisdiction.

Finally, ESA member States are directly involved in the following situations: An ESA member State has an activity in or on a flight element of a non-European Partner.

Here, the law of the State that registered the flight element where the activity occurred is applicable. And if finally, an ESA member State has an activity in or on an ESA-registered element, any European Partner State may consider the activity to have

occurred within its own territory.[207] This solution is the most unusual and of great interest on an European viewpoint.[208]

2.2 Practical Consequences Enhanced by Article 21:

The law of the State of jurisdiction will apply to the IPR and to the infringement. In this case, a problem will arise: How will the different partners deal with the scientific activities having commercial applications? Although cooperation and genuine partnership characterize the "IGA spirit," what kind of behavior will astronauts adopt during the experiments? It will be extremely important not to divulge any experience prior the filing of a patent.

Conflicts of law between domestic laws will probably arise. With each Partner exercising its jurisdiction and control over its flight element, we will have a kind of legislation "patchwork," and we will probably be confronted with conflicts of law. In order to reach a uniform application of the IGA between the member States, harmonization of Intellectual Property law is required. Concerning Europe, Mrs. Balsano underlined the fact that the unification of the general problem of intellectual property rights in outer space in Europe should, at the same time, take into account the requirements included in the IGA.[209] Since it is stated in article 16 that the cross-waiver of liability do not apply to article 21, the clarification of the applicable law in each Partner is especially relevant in Europe.

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[207] See infra Section 2.1

[208] See infra, Chapter 2, Section 2.

[209] "As a first step, the States concerned will have to proceed with the identification of possible obstacles to be surmounted if harmonization is to be achieved and, as a second step, they must assess the results of the harmonization process already underway in Europe in the field of IPRs in order to determine whether such a process can influence or respond to the need for the protection of IPRs designed or used onboard the Space Station". "Intellectual Property Rights and Space Activities, in *ESA Bulletin* (No. 79, 1993-94), at 40.

An other issue concerns inventions that can only has space applications, what will happen, as sale is not permitted in outer space? Moreover, if the invention can only be used in outer space, what can be done in the case of infringement?

Moreover, in order to implement §3 of article 21 on secrecy, which states are considered by the US to "provide for the protection of secrecy of patent applications containing classified information or otherwise protected for national security purposes." Under which criteria will these States be selected? The choice might be very subjective. Moreover, since the cross waiver of liability do not apply to article 19, it is important to clarify the law applicable to each Partner and also in Europe.

Finally there is no regulation on the sharing of rights. This hypothesis could happen if nationals of several countries make an invention. For example, an American and a Japanese making an important discovery in the Russian module. A national involved in a joint program will meet the same problem. As it is impossible to elaborate uniform system of sharing of rights, solutions will have to be determined on a case by case basis. Even though, an a priori agreement will have to be created, common basic rules could be elaborated as a first step.

As a result, many questions still need to retain the attention of the Partners since the legal aspects of intellectual property are not completely resolved. This work constitutes however a great challenge and will probably contribute to ameliorate every national law systems in Europe.

3. IGA and Data Protection, Article 19:

Considering the design and the goal of the international space station, the difficulties which might arise because of the protection of confidentiality may be illustrated by M. R. F. Kempf's comment: "The closeness or commonality of the structuring of space station elements or modules, the complex logistics needed to support activities in outer space, and the diversity of interests of the involved participants, are going to make the confidentiality requirements needed for trade secret protection much more difficult and sensitive from an administrative and management viewpoint."[210]

3.1 General Mechanism:

Like article 21, article 19 is formulated in general terms. Consequently, the provisions dealing with its practical implementation are of great importance; "Except as otherwise provided in this paragraph, each Partner, acting through its Cooperating Agency shall transfer all technical data and goods considered to be necessary (by both parties to any transfer) to fulfill the responsibilities of that Partner's Cooperating Agency under the relevant MOUs and implementing arrangements. Each Party undertakes to handle expeditiously any request for technical data or goods presented by the Cooperating Agency of another Partner for the purposes of Space Station cooperation." This obligation is limited in its scope.

Firstly, the transfer of data and goods are the one "necessary to fulfill the responsibilities of that Partner's Cooperating Agency" and secondly this transfer is limited to data and goods considered to be necessary to fulfill these responsibilities. Under this principle, Agencies do not have any obligation to transfer the data and goods

[210] Speech at the International Colloquium on Commercial Use of Space Stations, Hanover, Germany, June 12-13, 1986.

of their contractors.[211] The transfer of data and goods by persons or entities other than the Partners or the Cooperating Agencies shall be supported by the Partners, but will be covered by national laws and regulations.[212]

The third paragraph of article 19 establishes a distinction: Some data and goods shall be transferred with restrictions,[213] and the others, without restrictions.[214] The Furnishing Cooperating Agency shall mark with a notice the technical data and goods that are to be protected for export control purposes,[215] for proprietary rights[216] and classified data and goods.[217] In these three hypotheses, the cooperating agency shall include through the notice or identification, the specific conditions regarding how these specific categories may be used by the receiving cooperating agency, its contractors or subcontractors.[218] "Guidelines for security of information" will also have to be established by the Partners through their Cooperating Agency.[219] Consequently, this protection will have to be implemented in the national law of the Partner State and it will be up to that State to ensure that the notice conforms with the IGA. This provision is reinforced in the provision on "Communications" in the Space Station.[220] It will be necessary to ensure

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[211] A. Farand, "The international space station project and the protection of intellectual property rights," see supra, note 27, at 159.

[212] See IGA Article 19§2.

[213] In that case, the transfer is restricted by national laws and regulations.

[214] "The transfer of technical data for the purposes of discharging the Partners' responsibility with regard to interface, integration and safety shall normally be made without the restrictions set forth in this paragraph."

[215] See IGA Article 19 §3 (a).

[216] See IGA Article 19 §3 (b).

[217] See IGA Article 19 §3 (c).

[218] See IGA Article 19 §3, a, b, c.

[219] See IGA Article 19§8

that every national law assures a safe protection through its own Communication Law. If this is not the case, specific provisions will be implemented to guarantee the respect of article 13 of the IGA. Here again, we might meet different level of protection.

Although the IGA was elaborated to have a common framework, an important part of the regulation will take place at a national level.

3.2 Practical Consequences:

Regarding these provisions, we can make the same remark as we did for article 21: Although the IGA is a specific agreement that will govern the Space Station, in many cases, it is up to the Partner State to provide specific Domestic law that will be consistent with the IGA. In article 19, the enforcement and remedies that have to be implemented will take place at a national level, assuring flexibility but also requiring the same degree of protection as in the Domestic law of the Partners. Article 19 is very general and as the data and goods that will be transferred may be of high potential on a scientific and commercial point of view, it is necessary to maximize information security. Article 8.4 of the Memorandum of Understanding between ESA and NASA provides that "in order to protect the intellectual property of Space Station users, procedures covering all personnel, including Space Station crew, who have access to data are developed by the Mulitlateral Coordination Board."[221] Article 12.1.k. of the same MOU states that "Each Partner will respect the proprietary rights in, and confidentiality of, appropriately marked data and goods to be transported on its launch and return transportation system." The Multilateral

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[220] IGA Article 13, Communications; "Each Partner shall respect the proprietary rights in, and the confidentiality of, the utilization data passing through its communication systems, including its ground network and the communication systems of its contractors, when providing communication services to another Partner."

[221] This Board is composed of representatives of the Space Agencies and is chaired by a NASA representative.

Coordination Board task is to "ensure coordination of the activities of the partners related to the operation and utilization of the Space Station."[222] The MOU provides that decisions of the MCB "should be made by consensus."[223]

When dealing with sensitive topics such as data confidentiality, we can imagine that consensus is hard to reach. What type of provisions will have to be introduced to assure the security of the data transfer? If we suppose that an experience has taken place aboard the space station by a Japanese team in the US module. Once the Japanese are back on earth, what can be done to assure the protection of their data?

Finally, Partners will also have to take into consideration the question of conflict of law if the protection of the confidentiality is solved at a contractual level. The following question would be: Could we adopt classical conflict of law rules, such as a prior agreement on the choice of forum? The choice of one forum is not the solution adopted by the drafters of the IGA. In those conditions, under which law would the conflict of law be solved? The case by case solution could be adopted: For each contract dealing with the protection of a specific right, a choice of one place of forum could be given.

Prior to the analysis of the implementation of these provisions in the Domestic law of the Partners, we will briefly examine the last two level of regulation.

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[222] Article 8.1.b. (Management aspects of the Space Station Program Primarily Related to Operations and Utilization) of the MOU.

[223] Art. 8.1.b. "Where consensus cannot be achieved on any specific issue within the purview of the MCB within the time required, the Chairman is authorized to take decisions."

Section 2. Intellectual Property, Memoranda of Understanding and Implementing Arrangements:

1. Memoranda of Understanding:

Memoranda of Understanding are at the second level of the Space Station's legal framework. These international agreements "constitute today the principal expression of international cooperation in the space field."[224] Usually, a MOU do not generate the same rights and obligations as an international agreement. In the course of a symposium that took place in May 1999, M. André Farand stressed that "the memorandum of understanding is considered to be a type of arrangement that registers a political and moral commitment on the part of an international organization, a government, or a constituent part of the latter, to conduct itself in a certain way. Because of their close link with the IGA, it would appear that the Space Station MOUs will have acquired the status on international agreement, as an exception to the general practice in this field."[225]

Four MOUs have been elaborated between the main space agencies.[226] For matters of Intellectual Property, the MOU between ESA and NASA states that the IGA applies

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[224] G. Lafferranderie, "the United States Proposed Patent in Space Legislation, an International Perspective," *Journal of Space Law* (vol 18, Numbers 1 & 2, 1990), at 8.

[225] A. Farand, "Legal environment for exploitation of the International Space Station (ISS)," *4th ISU Symposium, ISS: The Next Marketplace*, 26-28 May 1999, Strasbourg, France, online <http://www.isunet.edu/Symposium/home.html>

[226] See the Preamble of the IGA: "Recognizing that NASA and CSA, NASA and ESA, NASA and the Government of Japan, and NASA and the Russian Space Agency (RSA) have prepared Memoranda of Understanding in conjunction with their Governments' negotiation of this Agreement, and that the MOUs provide detailed provisions in implementation of this Agreement."
See also IGA article 4.1: The Cooperating Agencies shall implement Space Station Cooperation in accordance with the relevant provisions of this agreement, the respective Memoranda of Understanding (MOUs) between NASA and CSA, NASA and ESA, NASA and the Government of Japan, and NASA and RSA concerning cooperation on the civil international Space Station, and arrangements between or among NASA and the other Cooperating Agencies implementing the MOUs (implementing arrangements). The

with respect to exchange of data and goods and intellectual property[227]. These bilateral agreements contain more developments on the respective obligations of the Partners, but the specific information which implies more details are enunciated in "implementing arrangements."

2. Implementing Arrangements:

The implementing arrangements are considered to be the third level of the ISS's legal framework. The MOUs shall be subject to the IGA and the Implementing Arrangements shall be consistent with and subject to the MOUs.[228] Because of this link, the United States will always have to be part of these arrangements. There has been, until now, only one implementing arrangement between NASA and ESA regarding the shuttle launch of Colombus orbital facility and its offset by ESA provision of goods and services.[229] More arrangements will be established between in the future the Cooperating Agencies.

Future provision on the allocation of risks, patent and data rights and disputes settlement, will be determined in "the Launch Services Agreement." Concerning intellectual property, the parties have agreed that all data and inventions will be kept confidential and no dissemination to third parties shall be permitted without a specific

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MOUs shall be subject to this Agreement, and the Implementing arrangements shall be consistent with and subject to the MOUs.

[227] See article 15 of this MOU.

[228] IGA Article 4.2 *in fine*.

[229] The purpose of the Arrangement is to establish, pursuant to Articles 6.3, 12.1 and 16.4 of the MOU, and consistent with the provisions of the 1988 MOU, terms and conditions for an equitable barter of the Shuttle launch of the integrated COF, as specified in Article 2, through provision by ESA of goods and services, on the basis of no exchange of funds, within the framework on the International Space Station Program.

protection.[230] Furthermore, in the hypothesis of an invention performed in the course of this arrangement, Parties have agreed to report any inventions conceived or developed by its employees or by employees of its contractors or subcontractors. The provisions dealing with intellectual property were an important concern for the drafters, and remain a deciding factor for the following steps.

The elaboration of the legal framework of the International Space Station is a progressive process and provisions on intellectual property and data protection will be implemented in the near future containing more detailed requirements. Since each Domestic law may apply, its implementation is not an easy process.

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[230] Article 6.1 Intellectual Property Rights, Arrangement between the NASA of the United States of America and the ESA regarding shuttle launch of Columbus orbital facility and its offset by ESA provision of goods and services.

CHAPTER 2. IMPLEMENTATION OF INTELLECTUAL PROPERTY PROVISIONS IN DOMESTIC LAW

The IGA will enter into force as soon as the last instrument of ratification, acceptance, or approval of Japan, Russia and the United States has been deposited,[231] the Depositary State being the Government of the US.[232] Ratification of the 1988 IGA had already started, but with the new IGA, a new procedure has to take place. Japan and United States have ratified the IGA on the 9th of November 1998; but Russia did not. Once the Duma will have made a decision and the Russian ratification will be effective, IGA will enter into force. In Canada, the procedure should be completed by the end of January 2000, as required by the international commitments.

The analysis of the implementation of the IGA in Europe will be seen separately, as it involves specific consequences for a legal point of view.

Section 1. The Individual Partner States:

As explained in the first chapter[233], the Partners chose to extend their Domestic law to the flight element provided by them because each of them retains jurisdiction and control over it. Consequently, prior to the ratification, the participating States in the IGA will have to make sure their legislation is not in contradiction with the international agreement.

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[231] IGA Article 25.3(a)

[232] IGA Article 25.2

1. Canada:

In Canada, no specific law to implement a Treaty is required. However, following a parliamentary tradition, Canadian laws have to be modified to permit the application of the international provisions. As a consequence, the Canadian House of Commons has elaborated an Act to implement the IGA, whose first reading took place in the 15th of October 1999.[234]

The Canadian Space Agency is in charge of the design, manufacture and operation of a robotics system, the Mobile Servicing System. This participation in the International Space Station is of particular importance because, what is commonly called the "Canadian Arm" will be useful during the first steps of the Station assembly, as well as in the course of its utilization. The main contractor is MacDonald Dettwiler and Associates Ltd. The CSA has to ensure that this project will generate benefits for Canada. That is why the CSA will be able to own all the Intellectual Property realized in the execution of the contracts. "CSA was successful in obtaining a derogation to the new Government's Policy[235] on ownership of intellectual property.[236] Consequently, it is the CSA that is licensing the contractors. In order to coordinate this function, an Intellectual Property Management and Commercialization Committee has been created within the CSA.[237] We should keep in mind that the Partners did not always accept the principles on which the

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[233] See supra, Chapter I

[234] The House of Commons of Canada, Bill C-4: "An Act to implement the Agreement among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America concerning Cooperation on the Civil International Space Station and to make related amendments to other Acts."

[235] September 19, 1991, Policy on ownership of intellectual property arising from Governments contracts involving research and Development (R & D), See supra, note 27.

[236] R. Lefebvre, "Canadian Perspective and Point of View, Canadian Laws", see supra note 27.

[237] Its first mandate was to prepare a CSA policy statement on the commercialization of CSA's IP. *Ibid.*

IGA is based as such. The question of the extra-territoriality of the law was a source of disagreement between Canada and United States, as the Canadian government did not share this artificial extension of national law that was encouraged by the US government in specific cases of international law.[238]

2. Japan:

Japan ratified the IGA on the 9th of November, 1998. This partner will furnish the Japanese Experimental Module (JEM), the JEM Exposed facility, the JEM Remote Manipulator System, the JEM Experiment Logistics Module and the Centrifuge Accommodations Module[239] Like for most of the Partners, the Domestic law of Japan does not apply to outer space, except in the International Space Station. Nevertheless, in Japan, the IGA is self-executing. For matters of intellectual property, NASDA shall be transferred an ownership of an industrial property right from the contractor, making the contractor disclose all technical information derived under contract to NASDA. In the utilization of the space station, following this standard of contract, such a disclosure does not guarantee any confidentiality for the contractor. Here again, the question of confidentiality of data will be very relevant. Finally, to co-operate with a private entity, NASDA use its national policy and joint research guidelines.[240]

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[238] See A. Farand, "The legal regime applicable to the space station cooperation: A Canadian perspective, *Annals of Air and Space Law*, 1992 Part I, vol. XVII, at 298-299.

[239] The JEM will utilize the space environment for many applications in varied fields such as micro-gravity science, biological science, space science and astronomy, Earth science and Earth observation. See M. Matsubara, "Japanese Experiment Module (JEM) and its Utilization Plan," (Space Engineering Department Student /Faculty Workshop, International Space University Summer Session Program, Suranaree University of Technology, Nakhon Ratchasima, Thailand, August 5, 1999) [unpublished].

3. Russia:

This Partner still did not ratify the IGA. However, we will see that the Domestic Law has taken space law into account. The Russian Law on Space Activity of 1993 contains some provisions on Patent Law. As seen above,[241] only a broad interpretation of this National law would lead to consider this legislation applicable in outer space. As a consequence, Domestic law should be created. However, if we consider the question of property rights protection, article 16§4[242] of the Russian law could be a basis on which further agreements may be adopted. The content of further contracts between the Russian Space Agency and its contractors and subcontractors could include additional provisions that would assure them the confidentiality and protection of their data.

4. United States:

The Drafters of the Intergovernmental Agreement decided to create an "Executive Agreement" instead of a Treaty since this type of agreement do not need to be ratified by the Senate.[243] However, the IGA generates the same rights and obligations as any other international agreement, and the Partners have to depose instruments of ratification.[244]

Although the space station is an international program, the US Partner remains the leader of this project and furnishes the major flight element of the space infrastructure. As a consequence, the US law is very relevant. The introduction of the US Space Bill during

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[240] For eg. The royalty income are shared among the owners according to their share and all technical information necessary to implement joint research are transferred to each other on a royalty free base.

[241] See supra, note 35.

[242] Article 16§4: "The property rights over the information product created as a result of space activity shall belong to the organizations and citizens, that have created such information, product, unless otherwise specified by relevant agreements."

IGA negotiations was a matter of great concern to the other Partners. In 1990, article 35 USC 105 is added to US Patent Law.[245]

This text was the source of important discussions that may be summarized as follows: The US Space Bill was to extend the US Patent Laws to inventions made, used, or sold in outer space on a space object, or components thereof under the "jurisdiction or control of the United States," modifying, by a Domestic law, the concept of jurisdiction and control, pillar of space law. The debate that took place prior to and after the adoption of this provision raised several legal difficulties: The use of "jurisdiction or control" instead of "and control" might enter into conflict with the IGA, international agreement to which the US had become Party. The expression "jurisdiction and control" mentioned under article 5 of the IGA is the result of a long process approved in the course of the elaboration of the IGA and whose implications are of high importance.[246] Although flight elements would be registered in a non-US country, US Patent law would be applicable to the Space Station on the basis of the US control. Since the control would be sufficient for the US to apply its law, the scope of the Domestic law would not only contravene the international agreement, but also be have a broader application.[247]

These discussions led the US to propose a new draft to meet European concerns.[248] This episode stresses the difficulties that the Partners experienced in order to reach a

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[244] A. Farand, "The Space Station Cooperation," *ESA Bulletin*, No 94, May 1998.

[245] See supra, note 16.

[246] See supra Part II, Chapter I, Section I.

[247] "In a letter to the US State Department dated 6 March 1989, the ESA Director General addressed these concerns. He noted that an assertion based on the sole technical control (implied by the use of ""or control"" would be inconsistent with the letter and spirit of article 21 of the IGA." See G. Lafferranderie, the United States proposed patent in space legislation, an international perspective," *Journal of Space Law* (vol 18, Numbers 1 & 2, 1990), at 5.

consensus on article 21. The wording of a legal text is, as shown here, extremely delicate. We can imagine that in the adoption of more specific provisions (in the future implementing arrangements), as the commercialization of the space station becomes a reality, debates will become more complicated. A second problem concerns the establishment of the date of invention,[249] as the US law is based on a first-to-invent system. Precautionary measures were proposed, such as a system of reports to a US location, either on Earth or on a US flight element. This process, found to be useful in a trial case, would ensure proof of the creation of the invention in the United States.[250] However, since the United States seem to be in the way to modify their system to a first-to-file principle, these considerations may loose their significance in the future.

Section 2. The Specificity of the European Partner States:

On the European side, involving eleven Signatories,[251] the IGA will enter into force for the European Partner (the member States that will have ratified by that time) when the instruments of ratification of at least four European States will have been received by the Depository. Following IGA article 25.3 (b) "a formal notification by the

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[248] For a more detailed explanation of the debate between the US government and ESA, see G. Lafferranderie, *Ibid.*

[249] Article 35 USC 104 states as follows: "In proceedings in the Patent Office and in the courts, an applicant for a patent, or a patentee, may not establish a date of invention by reference to knowledge or use thereof, or other activity with respect thereto, in a foreign country, except as provided in sections 119 and 365 of this title".

[250] J. W. Goans, C. V. Horn, R. Brumley, "Consequences of 35 USC 104 on non-US flight elements of the proposed space station."

[251] Belgium, Denmark, France, Germany, Italy, Netherlands, Norway, Spain, Sweden, Switzerland, and the UK.

Chairman of the ESA Council" has been given. In December 1997, it has been decided by the ESA Council that this notification would not be sent prior to the ratification by the three main European Member States ratification: Germany, France and Italy. We will see that the implementation of the IGA is far from satisfactory. Not only has the IGA not been ratified by the four States as required, but there is also no provision in European Domestic law that ensure the protection of intellectual property in outer space.

1. Situations of the European Member States:

To implement the IGA and assure at the same time cohesion between European Partners, harmonization of the law is a major stake for Europe. Although merging the law is necessary, it will not solve all problems. Japan, the United States, Russia and Canada also have their own provisions on intellectual property which may enter into conflict with European legislation and IGA. The procedure of ratification differs from one country to another in order to integrate an international obligation in internal law. The question of the implementation of the IGA in national law was debated during workshops involving Intellectual Property experts: Lawyers, professors, and personnel of the industry, of the space agencies and Patent Offices.[252] IGA will be directly applicable in some countries, unlike others which will have to go through a legislative process. For the moment, Norway is the only European country that has ratified the IGA. Germany enacted legislation in 1991 after having incorporated the text of the 1988 IGA. If a German provision contradicts or creates a conflict with the IGA, this provision will not apply. The German government amended the 1988 ratification law in order to make the 1998

[252] See Review of the Answer to the Questionnaire sent to the European Industry by the European Centre for Space Law, see supra, note 113, 118-137.

ratification possible. "Any activity occurring in or on the ESA registered element is-for the purpose of the protection of industrial property rights and copyrights-deemed to have occurred in Germany."[253] In this case, if there is an infringement, prosecution will be brought about in Germany. Nevertheless, except for the IGA, the Domestic law does not extend to outer space.

Most of the European countries did not elaborate specific provisions to implement the IGA. For example, although the UK deposited its instruments of ratification, it did not modify its national law. The UK applicable law to patent is limited to the territory. In principle, the UK jurisdiction does not extend to spacecraft. Nevertheless, there is no provision that prevents an invention made in outer space to be patented in the United Kingdom. The IGA will improve this country patent system, but as it does not extend to outer space, the question of enforcement of the law remains. The territorial application of patent law will also not help the resolution of infringement issues. In most of the European countries: Belgium Denmark, France, Germany, the Netherlands, Sweden and Italy, no matter where that invention was made, the Domestic law of Patent will apply to an invention created in Outer Space. As the exclusive rights will receive a protection only within the boundaries of the country, legal uncertainty remains in the case of infringement. Here again, the ratification will not ensure the protection of future inventions in the space station. Nevertheless, with a broad interpretation of the temporary presence doctrine in Sweden and Netherlands' laws, the use of a patented invention (in the respective States) will not constitute an infringement. Article 21 of the IGA gives the main principles dealing with intellectual property.

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[253] See response of the German Ministry of Justice. *Ibid*, at 121.

However, many problems have not been solved.[254] In respect to European Member States, the main issue is the possibility to go to a court in the case of infringement. At this stage of the European legislation, a patent can be granted for an invention in outer space. In the absence of enforcement of this provision, the protection is not effective. This point has less to do with the State of jurisdiction than the fact that space industry wants to carry out space activities safely. The legitimacy of article 21 will depend on its availability to answer to practical situations that will arise, as the International Space Station will become a reality.

The last aspect of this discussion is related to the fiction elaborated for Europe in the Intergovernmental Agreement. As only a few countries have ratified the IGA in Europe, the opportunity should be taken to encourage a uniform way of ratifying. The solution adopted by Germany is interesting, because it offers the possibility to go to a German Court if necessary, assuring an effective legal protection.

2. The "European Partner," an Innovative Notion in International Law:

The European Member States are composed of eleven entities which, in the International Space Station Agreement, are represented only by one Partner. Some are ESA members but not EU members.[255]

2.1 IGA and the European Partner Legal Fiction:

The concept of European Partner has a deep impact when related to specific provisions of the Intergovernmental Agreement. This notion appears at different places in the IGA, among others: The European Partner has delegated to ESA, acting in its name

[254] See supra Practical consequences enhanced by article 21.

and on its behalf, the responsibility to register as space objects the flight elements,[256] this Partner shall entrust ESA, acting in its name and on its behalf, with ownership over the elements it provides,[257] through ESA, he shall be responsible for management of its own program,[258] the Partners, as well as ESA, shall remain liable in accordance with the liability Convention.[259] As seen above the European Member States are considered as one single State for the application of article 21. The notion of European Partner is also stressed in Art. 19§7 where "any transfer of technical data and goods by a Cooperating Agency to ESA shall be deemed to be destined to ESA, to all the European Partner States, and to ESA's designated Space Station contractors and subcontractors." The goal here is to also consider European Member States as a single entity. Every time rights and obligations are provided to a Partner in the Agreement, it is deemed to be accorded to the European Partner, taken as a whole, and represented by ESA.

2.2 Justification of the Fiction:

This fiction could be interpreted as a way to increase two levels of cooperation, European and International. Europe is becoming more and more involved in space projects, where ESA is the representative of the European Member States. The weight of countries is heavier when they are involved together in negotiations and furthermore, it is desirable to have several partners in the space program, as the cost is often important. Article II ESA Convention defines the purpose of ESA as to "provide and promote, for exclusively peaceful purposes, cooperation among European States in space research and

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[255] Switzerland and Norway.

[256] IGA Article 5, Registration; Jurisdiction and Control.

[257] IGA Article 6, Ownership of Elements and Equipment

[258] IGA Article 7, Management

technology and space applications, with a view to their being used for scientific purposes and for operational space applications systems.[260] Although consensus is very hard to reach between European Member States, every time a decision has to be taken, the fact that Europe is represented by one Partner will oblige them to have a common policy.

The IGA will aim at increasing the international cooperation between space agencies. "This is done not only to permit the sharing of the significant costs involved in large programs, but also to take advantage of existing know-how and facilities, including launching capabilities, that could be provided by one Partner."[261]

2.3 Consequence of the Qualification:

At European law level, with the legal fiction elaborated in article 21, participating States will have the choice of the law that will apply in the case of an invention in the space station. As a consequence of the applicability of different Intellectual Property law by each European Member State, although Europe is considered as a unique Partner, European judges might be confronted with conflicts of law. To avoid such a problem and limit the difficulties enhanced by this multi-territorial approach, common solutions should be adopted at a national level.[262] The harmonization of European Intellectual Property law shall ensure the same level of protection among the European Member States. Although much work remains to be done, to provide detailed provisions for IGA's application

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[259] IGA Article 17, Liability Convention

[260] Reference ESA Convetion, online: EU Treaty, online at <http://www.europa.int/eur-lex/en/treaties/index.html>

[261] A. Farand, Legal Aspects of the International Space Station and Other Facilities for Microgravity Research, see supra note 110, at 58.

[262] See Supra PartI, Chapter III.

(implementing arrangements, Code of Conduct, contracts), this is a challenge for Europe that could be useful for future international projects.

This fiction is also of specific interest from an international point of view. Like individuals in Domestic law, States are normal subjects of international law. The most important part of space law includes the "attribution, regulation of the competence of States in their mutual relations.[263]

When a State takes part in space activities, it does so as a sovereign State. "Space activity is the object of legal relations which emerge between the subjects of international law on the basis of the norms of space law, i.e. space activity causes states to enter into legal relations.[264] Usually, these legal relations emerge between States as a single entity. It is more in the private practice area that projects involve companies whose nationality is different, as in the case of joint venture.

In the Intergovernmental Agreement, Partners look like a multinational public company, except that it is led by public entities, rather than by companies. A multinational venture is becoming a reality with the commercialization of this International Space Station.

As a consequence, even if each State remains sovereign, under the leadership of the European Space Agency, a common spirit will animate the European Member States.

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[263] B. Cheng, see supra, note 14, at 72.

[264] E. Konstantinov, "Space Law as a Branch of International Law," in *Proceedings of the Colloquium on the law of outer space*, IISL, American Institute of Aeronautics and Astronautics, 1992, at 383.

CONCLUSION

Space continues to offer short-term and long-term investors tremendous opportunities. Firstly through increases in satellite traffic from the Internet, new data and video applications, secondly through continued growth forecast for remote-sensing, GPS applications and the manufacturing of ground equipment, and finally a combination of stable revenues from the manufacturing and launch of satellites and from government R&D contracts.[265]

As a consequence, the role of Intellectual Property in outer space shall not be neglected. It has been, and is still sometimes considered that Intellectual Property questions should be treated as any other Intellectual Property matter since a patent can receive protection on Earth. However, outer space has a special statute under international law which has to be respected, whatever the level of involvement of the private sector will become.

Harmonization of the law of Intellectual Property should be a major topic whose elaboration should start as quickly as possible. As a first step, this evolution could take place at a regional level, in order to concentrate the rules of law that are applicable: in Europe (the European Community Patent could be a good start), in the East-European countries, in Asia, North America and South America. The second step would be the

[265] See supra, note 20, at 6.

creation of a world patent system, where the space patent would be a part of it. This evolutionary law-making process will have to be made in the respect of the space law principles established in the five space treaties, and especially the Outer Space treaty.

This obligation is expressly mentioned in the preamble of the Intergovernmental Agreement. Although the IGA codifies principles on Intellectual Property and Exchange of data and Goods, we have seen that implementation rules are required.

In the course of a colloquium held in May 1999, N. Jasentuliyana,[266] did a presentation on the role of the United Nations in strengthening international space law. "Matters such as international commercialization launching services and the liability aspects thereof as well as intellectual property rights, insurance, the growing interest in space tourism and the mining of asteroids are only a few of the new legal issues requiring examination."[267] Such a progress, through the United Nations and the World Intellectual Property Organization, would contribute without any doubt, to simplify the rules of law, limit the conflicts of law, as well as enhance the international cooperation.

[266] Deputy to the Director-General, United Nations Office at Vienna; and Director, Office for Outer Space Affairs

[267] N. Jasentuliyana, "Strengthening International Space Law, the Role of the United Nations, see supra, note 8.

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