Part III World Trade Law and Regional Trade Agreements, XXIII The Regional Integration of Markets

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(p. 319) XXIII The Regional Integration of Markets

1. Forms of Regional Market Integration (Free Trade Areas, Customs Unions, and Economic Communities)

The basis of all forms of regional or bilateral economic integration is the elimination or progressive reduction of tariffs and of other trade restrictions between the contracting States. The elimination of such ‘internal barriers’ to the trade between the Member States characterizes the elementary type of regional economic integration: the free trade area or free trade zone. A more advanced form is the customs union. Whilst the free trade area merely eliminates tariffs in between members, the customs union additionally establishes a single external tariff for imports from third countries. This single external tariff avoids problems with the movement of imported goods associated with individual tariffs. The General Agreement on Tariffs and Trade 1994 (GATT) defines the terms ‘free trade area’ and ‘customs union’ in Article XXIV:8:

> (a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that
>
> > (i) duties and other restrictive regulations of commerce […] are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and
> >
> > (ii) […], substantially the same duties and other regulations of commerce are applied by each of the Members of the union to the trade of territories not included in the union […];
>
> (b) A free-trade area shall be understood to mean a group of two or more customs territories in which the duties and other restrictive regulations of commerce […] are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

In a free trade area, the lack of a common external tariff makes the State with the lowest tariff the first choice for the import of foreign goods. Complicated mechanisms are designed to neutralize possible distortions resulting from different external tariffs. So-called rules of origin determine whether a good shall benefit from the advantages of the free trade agreement or not. An example for such ‘rules of origin’[1](p. 320) can be found in the Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy. Article 84 of the Treaty provides:

Community Rules of Origin

> 1. Subject to the provisions of this Article, goods that have been consigned from one Member State to a consignee in another Member State shall be treated as being of Community origin, where the goods:
>
> > (a) have been wholly produced within the Community; or
> >
> > (b) have been produced within the Community wholly or partly from materials imported from outside the Community or from materials of

undetermined origin by a process which effects a substantial transformation characterized:

(i) by the goods being classified in a tariff heading different from that in which any of those materials is classified; or

(ii) in the case of the goods set out in the List in Schedule I to this Treaty (hereinafter referred to as 'the List'), only by satisfying the conditions therefor specified.

2. Goods that have been consigned from one Member State to a consignee in another Member State for repair, renovation or improvement shall, on their return to the Member State from which they were exported, be treated for the purpose of re-importation only, in like manner as goods which are of Community origin, provided that the goods are reconsigned directly to that Member State from which they were exported and the value of materials imported from outside the Community or of undetermined origin which have been used in the process of repair, renovation or improvement does not exceed:

(a) in the case where the goods have undergone the process of repair, renovation or improvement in a More Developed Country, 65 per cent of the cost of repair, renovation or improvement;

(b) in the case where the goods have undergone the process of repair, renovation or improvement in a Less Developed Country, 80 per cent of the cost of repair, renovation or improvement […].

The rules of origin shall ensure that only products which originate in the territory of the Member States benefit from the reduction of internal tariffs. Possible criteria are a given ratio of domestic and foreign components of a product, the place where the product is finished, or the place where crucial steps of the production process are undertaken.[2] Rules of origin will not entirely eliminate the distortion of trade between the Member States of a free trade area caused by different tariffs. Therefore, in the long run, there is a strong pull for free trade areas to develop into customs unions. The Common Market for South America (MERCOSUR) and the Caribbean Free Trade Association (CARIFTA), which became the Caribbean Community (CARICOM), have moved in this direction. The Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy introduced a common external tariff for certain goods:(p. 321)

Article 82

Establishment of Common External Tariff

The Member States shall establish and maintain a common external tariff in respect of all goods which do not qualify for Community treatment in accordance with plans and schedules set out in relevant determinations of COTED [Council for Trade and Economic Development].

Sometimes, the effective realization of a free trade area is hampered by lasting difficulties. An example is the Commonwealth of Independent States (CIS) which was formed by the now independent republics of the former Soviet Union. The economic relations between the CIS States could only be stabilized by a number of bilateral and multilateral agreements.[3]

The WTO encourages the regional integration of markets.[4] Article XXIV:4 of the GATT provides:

> The contracting parties recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements. They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories.

As an exception to the most-favoured-nation treatment, Article XXIV:5 of the GATT accordingly allows customs unions and free trade areas. Articles V and V *bis* of the General Agreement on Trade in Services (GATS) similarly endorse bilateral or regional economic integration of markets for services. This endorsement of preferential trade agreements reflects the widespread, though controversial, understanding that economic cooperation on the regional level also has a stimulating effect on the global economy. As a precondition, the GATT requires that the preferential arrangements extend to 'substantially all the trade' (Article XXIV:8).[5] The last decades have witnessed a proliferation of free trade areas and customs unions. Both the United States and the European Union have concluded a number of so-called 'Preferential Trade Agreements' (PTAs). The importance of PTAs essentially depends on the volume of the internal trade between the State Parties. Preferential trade relations on a regional or bilateral basis do not only increase the welfare of the respective nations.[6] The creation of large trading blocs might also threaten to fragment the global economy and to disadvantage the countries whose exports do not significantly benefit from preferential arrangements.

The European Union, which emerged from the European Communities, is based upon a customs union (Article 28(1) of the TFEU). As a very advanced system of economic integration, the European Union has established an internal market (p. 322) with free movement of goods, persons, services, capital, and payments and with the power to harmonize national laws in the interest of a functioning internal market. Moreover, the European Union has a common agricultural policy, a competition regime, and a common commercial policy which covers trade and investment relations with other States, a close economic coordination with a regime of fiscal discipline, and a common currency (European Economic and Monetary Union). Implementing its 2006 Global Europe[7] vision, the European Union has pursued a rather active strategy by negotiating a number of trade agreements or comprehensive economic agreements (including investments), whilst other negotiations are still ongoing. The European Union became a model for 'economic communities' in other regions of the world. However, the degree of economic and political integration of the European Union, so far, stands unparalleled. Examples of an increased economic integration are the common market of the parties to the Andean Community of Nations (Comunidad Andina, CAN), the Central American Common Market (CACM; Mercado Común Centroamericano, MCCA), and the Economic Community of West African States (ECOWAS). Some of these communities have to date achieved only a rather modest degree of integration. Often, the lack of true political commitment among governments as well as the low volume of trade between the Member States hamper further integration.

2. The Free Movement of Goods and Services in the European Union

(a) Free movement of goods

The European Union has accomplished an internal market (Article 3(3) of the TEU, Article 26(2) of the TFEU) with a number of components beyond free movement of goods and services (including free movement of workers, freedom of establishment, free movement of payments and capital). Still, the free movement of goods is a central element of the European internal market. According to Article 28(1) of the TFEU,

> [t]he European Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

The basic rule on the elimination of non-tariff barriers to trade is enshrined in Article 34 of the TFEU which states that '[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States'.

(p. 323) Article 35 of the TFEU contains a similar prohibition for the export of goods. In contrast to the GATT, European Union law does not only prohibit discriminating restrictions on import or export within the common market, but also non-discriminating measures affecting trade between Member States, unless they can be justified as necessary means to satisfy a recognized interest. The famous '*Dassonville* formula' of the European Court of Justice defines the term 'measures having equivalent effect' within the prohibition of Article 34 of the TFEU as broadly as possible:

> All Trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions.[8]

Under this broad understanding, Articles 34 and 35 of the TFEU apply to any conceivable, discriminatory and non-discriminatory, direct and indirect hindrances to trade within the internal market. The prohibition of 'measures having equivalent effect' extends to statutory rules on the ingredients of products,[9] on returnable bottles for certain beverages,[10] on medical prescription for certain drugs and exclusive sale of drugs in pharmacies,[11] as well as to governmental support for campaigns in favour of domestic products.[12] Even restrictions on the use of goods (as environmental conditions for the use of private watercraft) qualify as hindrance to trade under Article 34 of the TFEU if they affect consumer decisions.[13]

The European Court of Justice exempts selling arrangements which affect domestic products in the same way as imported products (such as the prohibition on a resale at a loss or closing hours) from the prohibition in Article 34 of the TFEU.[14] The Court states that '[i]t follows that Article 30 of the Treaty is to be interpreted as not applying to legislation of a Member State imposing a general prohibition on resale at a loss'.[15]

(p. 324) The effects of this case law, which meant to limit the scope of Article 34 of the TFEU,[16] in some cases can be difficult to ascertain.[17] Very often, selling arrangements are closely connected with the Community-wide distribution of certain goods. Consequently, the European Court of Justice has put some restrictions on the movement of goods, which purported to protect the integrity of competition, under the scrutiny of Articles 34 and 36 of the TFEU.

The prohibition of non-tariff barriers to trade is not absolute. Member States may justify restrictions if they apply indiscriminately and are necessary to satisfy a mandatory requirement like an effective fiscal supervision, the protection of public health, environmental protection, fair trading, and consumer protection. These 'inherent limits' to

Article 34 of the TFEU were recognized by the European Court of Justice in the famous *Cassis de Dijon* case.[18] In addition, Article 36 of the TFEU provides explicit exceptions:

> The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

The exceptions under Article 36 of the TFEU and the inherent limits to Article 34 of the TFEU overlap. It is a matter of controversy whether discriminatory measures may also fall under the inherent limits or whether they can only be justified under Article 36 of the TFEU.

Any justifications of restrictions on the free movement of goods, by the inherent limitations to Article 34 of the TFEU or under Article 36 of the TFEU, are subject to a strict scrutiny of proportionality which also calls for a consistent approach to the public interest pursued.[19]

In a case similar to *Dominican Republic—Import and Sale of Cigarettes*,[20] the European Court of Justice had to rule on provisions for the import of ultra-high (p. 325) temperature milk into the United Kingdom which required a prior import licence and conditioning distribution in certain parts of the country on a second heating and repacking. This system, practically amounting to an import ban, did not pass the test of proportionality.[21]

Restrictive measures based on potential threats to human health require a risk assessment in the light of available scientific information.[22] This condition is quite similar to the standards for risk assessment under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).[23] In the absence of harmonization by the European Union, the treaty provisions on the free movement of goods establish the principle of mutual recognition, subject to the ‘inherent limits’ and the exceptions under Article 36 of the TFEU. Extensive secondary legislation of the European Union harmonizes standards for products, labelling, and marketing. To the extent that EU harmonization is exhaustive, it bars unilateral measures protecting specific interests.

(b) Free movement of services

The freedom of services (Articles 56ff of the TFEU) covers the freedom to provide and to receive services all over the European Union as well as cross-border movement of services. Thus, legislation which precludes the sale or use of foreign decoders providing access to satellite broadcasting services from other Member States in context with territorial licensing of transmission rights (eg as to sports events) interferes with the freedom of services, as the European Court of Justice held in the *Football Association Premier League* case.[24] When companies or natural persons (like a doctor or a lawyer) provide services in a Member State different from their home country, the freedom of establishment (Articles 49ff of the TFEU) may apply, if they have organized a basis in the country of destination. If, for example, an insurance company from Member State A provides services in Member State B through a local branch or subsidiary, such activity is covered by the freedom of establishment. If, however, the services are provided without any such basis in B by a subsidiary in B, this activity is subject to the freedom to provide services (Article 57 of the TFEU). The distinction between the freedom of establishment and the freedom to provide services depends on several criteria such as duration, regularity, and continuity of the provided services and the kind of infrastructure in the Member State where the service is provided.[25] Like the free movement of goods and the other ‘market freedoms’, the freedom to provide services operates both (p. 326) as a prohibition of discrimination and as a general prohibition of disproportionate restrictions.[26] Apart from ‘inherent limits’, there are also exceptions for public policy, public security, and public health (Articles 62, 52(1) of the

TFEU). A number of directives, including the Directive 2006/123/EC on services in the internal market,[27] harmonize applicable standards or otherwise facilitates the exercise of the freedom of services.

3. EFTA and the European Economic Area

The European Free Trade Association (EFTA), founded in 1960,[28] ranked among the most important free trade areas for a long time. The attraction of the European Communities (now the European Union), as a much more advanced form of integration, accounts for the accession of the former EFTA members Denmark, the United Kingdom, Portugal, Finland, Austria, and Sweden to the European Union. Iceland, Liechtenstein, Norway, and Switzerland are the only remaining members of the EFTA.

The Agreement on the European Economic Area (EEA) of 1992[29] opened the internal market of the European Union for the remaining EFTA members (except Switzerland). The EEA Agreement establishes an association with the European Union in terms of Article 217 of the TFEU. The EEA constitutes a large European free trade zone unfolding an enormous economic potential. The Member States of the EEA, with more than 500 million inhabitants, account for significantly more than 40 per cent of world trade. After the Swiss people rejected the EEA Agreement, Switzerland (which already had concluded a free trade agreement with the European Community) entered into a number of bilateral arrangements with the European Union (eg on free movement of persons, agriculture, civil aviation, elimination of border controls, and the taxation of savings). In certain areas of law, Swiss legislation unilaterally brings its domestic law in line with EU law without international obligation (‘autonomous implementation’). Swiss citizens, goods, and services now enjoy full access to the internal market of the European Union.

The EEA Agreement (in force since 1994) reflects the principles which govern the internal market of the European Union and EU competition law. The (p. 327) provisions on the free movement of goods, the free movement of workers, the right of establishment, the free movement of services and capital, as well as the supervision of competition are modelled after the EU system. The provisions of the EEA Agreement shall be construed in accordance with prior rulings of the European Court of Justice if their content is identical with the rules of EU law (Article 6 of the EEA Agreement).

The complexity of the institutional structure of the EEA Agreement reflects conflicting objectives. On the one hand, the European Union is interested in dynamically extending its own rules on the development of the internal market to the entire EEA. On the other hand, EFTA States reject being subject to ‘foreign’ regulatory powers. Finally, the EEA system must ensure uniform standards applicable to the entire EEA. The Agreement provides for the establishment of an EEA Council as the supreme political body (Articles 89ff). Its functions are set out in Article 89 of the Agreement:

Article 89

1. An EEA Council is hereby established. It shall, in particular, be responsible for giving the political impetus in the implementation of this Agreement and laying down the general guidelines for the EEA Joint Committee.

To this end, the EEA Council shall assess the overall functioning and the development of the Agreement. It shall take the political decisions leading to amendments of the Agreement.

2. The Contracting Parties, as to the Community and the EC Member States in their respective fields of competence, may, after having discussed it in the

> EEA Joint Committee, or directly in exceptionally urgent cases, raise in the EEA Council any issue giving rise to a difficulty.
>
> 3. […].

The EEA Council is composed of members of the Council of the European Union and the European Commission and one member from each EFTA State (Article 90.1). Crucial functions lie with the EEA Joint Committee (Articles 92ff). Article 93 of the EEA Agreement provides:

> 1. The EEA Joint Committee shall consist of representatives of the Contracting Parties.
>
> 2. The EEA Joint Committee shall take decisions by agreement between the Community, on the one hand, and the EFTA States speaking with one voice, on the other.

This mechanism pushes the EFTA States to reach consensus among them. Newly created EU law shall be adopted for purposes of the EEA on the basis of decisions of the EEA Joint Committee (Articles 98ff of the EEA Agreement). Details are set out in the Annexes to the EEA Agreement.

For the implementation of the treaty provisions and for monitoring mechanisms, the EEA Agreement establishes a two-pronged model. For the EFTA States, the EFTA Surveillance Authority monitors compliance with the EEA Agreement. Article 108.1 of the EEA Agreement states:

> The EFTA States shall establish an independent surveillance authority (EFTA Surveillance Authority) as well as procedures similar to those existing in the Community including (p. 328) procedures for ensuring the fulfilment of obligations under this Agreement and for control of the legality of acts of the EFTA Surveillance Authority regarding competition.

In addition, the EFTA Surveillance Authority exercises control of restrictive practices and mergers of companies with respect to the impact on trade between the EFTA States (Articles 55ff). In cases affecting the trade between EU Member States, the European Commission will decide (Articles 56, 57.2). A submission to the jurisdiction of the European Court of Justice in Luxembourg to rule on the application of the EEA Agreement was not acceptable for the EFTA States. A small exception to this rule is contained in Article 111.3 first sentence of the Agreement:

> If a dispute concerns the interpretation of provisions of this Agreement, which are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties and if the dispute has not been settled within three months after it has been brought before the EEA Joint Committee, the Contracting Parties to the dispute may agree to request the Court of Justice of the European Communities to give a ruling on the interpretation of the relevant rules.

After the European Court of Justice had rejected the establishment of an EEA Court (with five judges of the European Court of Justice and three judges appointed by the EFTA States),[30] the EEA Agreement now follows a two-tiered system of judicial protection.

Alongside the European Court of Justice, an EFTA Court has been established with jurisdiction defined in Article 108.2 of the EEA Agreement:[31]

> The EFTA States shall establish a Court of Justice (EFTA Court).
>
> The EFTA Court shall, in accordance with a separate agreement between the EFTA States, with regard to the application of this Agreement be competent, in particular, for:
>
> (a) actions concerning the surveillance procedure regarding the EFTA States;
>
> (b) appeals concerning decisions in the field of competition taken by the EFTA Surveillance Authority;
>
> (c) the settlement of disputes between two or more EFTA States.

Disputes concerning the interpretation or application of the EEA Agreement can be brought before the EEA Joint Committee by the European Union or an EFTA State (Article 111). If the dispute concerns the interpretation of provisions, which are identical in substance to corresponding rules of EU treaties or secondary EU law, the parties may request the European Court of Justice to rule on the interpretation (Article 111.3). A court or tribunal of an EFTA State may request the European Court of Justice to decide on the interpretation of an EEA standard (Article 107 of the EEA Agreement, Protocol 34).

(p. 329) 4. The North American Free Trade Agreement (NAFTA)

The North American Free Trade Agreement (NAFTA) of 1992[32] emerged from the free trade agreement concluded between Canada and the United States in 1988.[33] Its parties are the United States, Canada, and Mexico. The NAFTA established a large free trade area with a population of about 475 million, constituting an important counterweight to the European Union, Japan, and China. The objectives of the NAFTA are defined in Article 102:

Objectives

> 1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:
>
> a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
>
> b) promote conditions of fair competition in the free trade area;
>
> c) increase substantially investment opportunities in the territories of the Parties;
>
> d) provide adequate and effective protection and enforcement of intellectual property rights in each Party’s territory;
>
> e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
>
> f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.

> 2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

Principles of NAFTA are national treatment as a basic principle and, in some areas, the most-favoured-nation treatment. For the trade in goods (Part II), the NAFTA provides for national treatment (Article 301), for the elimination or reduction of tariffs (Article 302), as well as for the elimination of restrictions on import and export (Article 309). Certain goods benefit from the most-favoured-nation treatment with respect to tariffs (Article 308). Only goods originating in the territory of one of the Parties to NAFTA qualify for the elimination or reduction of tariffs. Article 401 refers to the materials used as well as to the production process:

> Except as otherwise provided in this Chapter, a good shall originate in the territory of a Party where:
>
> a) the good is wholly obtained or produced entirely in the territory of one or more of the Parties, as defined in Article 415;
>
> b) each of the non-originating materials used in the production of the good undergoes an applicable change in tariff classification set out in Annex 401 as a result of production (p. 330) occurring entirely in the territory of one or more of the Parties, or the good otherwise satisfies the applicable requirements of that Annex where no change in tariff classification is required, and the good satisfies all other applicable requirements of this Chapter;
>
> c) the good is produced entirely in the territory of one or more of the Parties exclusively from originating materials; or
>
> d) except for a good provided for in Chapters 61 through 63 of the Harmonized System, the good is produced entirely in the territory of one or more of the Parties but one or more of the non-originating materials provided for as parts under the Harmonized System that are used in the production of the good does not undergo a change in tariff classification because
>
> (i) the good was imported into the territory of a Party in an unassembled or a disassembled form but was classified as an assembled good pursuant to General Rule of Interpretation 2(a) of the Harmonized System, or
>
> (ii) the heading for the good provides for and specifically describes both the good itself and its parts and is not further subdivided into subheadings, or the subheading for the good provides for and specifically describes both the good itself and its parts, provided that the regional value content of the good, determined in accordance with Article 402, is not less than 60 percent where the transaction value method is used, or is not less than 50 percent where the net cost method is used, and that the good satisfies all other applicable requirements of this Chapter.

Market access of agricultural products is subject to Part II, Chapter 7, Section A. NAFTA restrains technical barriers to trade (Part III). Part IV establishes rules for government procurement. In Part V, Chapter 11 on investment, inter alia, grants a minimum standard of treatment (Article 1105), compensation for expropriation (Article 1110), and provides for the settlement of disputes between private investors and a Party (Article 1122).[34] To trade

in services (Part V, Chapter 12), NAFTA grants national treatment (Article 1202) as well as most-favoured-nation treatment (Article 1203). Special rules apply to the telecommunication sector (Chapter 13) and to financial services (Chapter 14). Chapter 15 deals with competition, monopolies, and State-owned enterprises. Part VI, Chapter 17 is dedicated to intellectual property. NAFTA provides for a binational panel review of a final anti-dumping or countervailing duty determination by the competent authority of an importing Party (eg the US Department of Commerce). Upon request by an involved party, a binational panel of five experts shall replace judicial review and rule on the correct application of the laws of the importing country (Chapter 19, Article 1904). NAFTA establishes exceptions with regard to the matters covered by Article XX of the GATT (Article 2101), to national security (Article 2102), and to problems with the balance of payments (Article 2104). The institutional structure of NAFTA is rather lean. The Free Trade Commission (with members of cabinet rank), inter alia, reviews the implementation of the Agreement, oversees its further elaboration, and resolves disputes on interpretation or application of the Agreement (Article 2001.1). The Secretariat (Article 2002) comprises national sections.

(p. 331) 5. Regional Integration in South America

(a) The Latin American integration association

The States of Central and South America have concluded a number of agreements on economic integration. Under the Treaty of Montevideo of 1960, several South American countries established the Latin American Free Trade Association (ALALC).[35] In 1980, the Agreement on the Latin American Integration Association (Asociación Latinoamericana de Integración, ALADI)[36] replaced the original Montevideo Treaty. Its Member States are Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela. The organs of the ALADI are the Council of Ministers of Foreign Affairs, the Evaluation and Convergence Conference, the Committee of Representatives, and the General Secretariat (Articles 28, 29 of the Agreement). Under Article 30 of the Agreement,

> [t]he Council shall have the following powers:
>
> > To issue general rules aimed at a better compliance with the objectives of the Association, as well as at the harmonious development of the integration process;
> >
> > To examine the results of the tasks carried out by the Association;
> >
> > To adopt corrective measures of multilateral scope, following the recommendations adopted by the Conference as per terms of article 33, caption a) of the present Treaty;
> >
> > To establish the guide-lines to be followed by the other bodies of the Association in their tasks;
> >
> > To set the basic rules to govern the relations of the Association with other regional associations, international organizations or agencies;
> >
> > To review and update basic rules governing convergence and cooperation agreements with other developing countries and the respective areas of economic integration;
> >
> > To take cognizance of questions submitted by the other political bodies and decide upon them;

To delegate upon the other political bodies the power to decide on specific matters aimed at a better compliance with the Association objectives;

To accept accession of new Member countries;

To adopt amendments and additions to the Treaty as per precepts of article 61; To appoint the Secretary-General; and

To adopt its own Rules of Procedure.

(b) The Andean Community

Within the ALADI, several Andean countries moved to strengthen sub-regional integration by concluding the Cartagena Agreement on Subregional Integration (Andean Pact) in 1969.[37] Under the Agreement of Trujillo of 1996 modifying the (p. 332) Cartagena Agreement, the Andean Community of Nations (Communidad Andina de Naciones, CAN) emerged from the Andean Pact.[38] Current membership comprises Bolivia, Colombia, Ecuador, and Peru. Argentina, Brazil, Chile, Paraguay, and Uruguay are associate members. Inspired by the European model of integration, the Andean Community has a rather complex organizational structure. The main organs are the Andean Presidential Council, the Andean Council of Foreign Affairs, the Commission of the Andean Community, the General Secretariat, the Court of Justice, and the Andean Parliament. There are also several advisory bodies. The broader Andean Integration System (Article 16 of the Cartagena Agreement) also comprises a number of other institutions like the Andean Development Corporation, the Latin American Reserve Fund (FLAR), the Andean Health Organization, and the Consultative Council of the Indigenous People (Article 7 of the Cartagena Agreement). The Andean Presidential Council (Articles 11ff of the Cartagena Agreement) is composed of the leaders of the Member States and formulates guidelines. The Andean Council of Foreign Ministers (Articles 15ff of the Cartagena Agreement) formulates a common foreign policy as to sub-regional integration issues, concludes the international agreements of the Andean Community, and shares law-making functions with the Commission (Article 16 of the Cartagena Agreement). The Commission (Articles 21ff of the Cartagena Agreement), in which each Member is represented, defines the Andean Community policy in the areas of trade and investment and takes the necessary measures to implement the objectives of the Cartagena Agreement (Article 22 of the Cartagena Agreement). Decisions and resolutions of the Council of Foreign Ministers of the Commission and the General Secretariat shall be directly applicable (self-executing) in the Member States (Article 3.1 of the Treaty Creating the Court of Justice of the Cartagena Agreement, Articles 40f of the Cartagena Agreement), unless incorporation into national law is explicitly provided for (Article 3.2 of the Treaty Creating the Court of Justice of the Cartagena Agreement). The General Secretariat (Articles 29ff of the Cartagena Agreement), based in Lima, operates as the executive body of the Andean Community. The Court of Justice of the Andean Community,[39] with its seat in Quito, is modelled on the Court of Justice of the European Communities (now the European Union).

Its jurisdiction covers actions of annulment of secondary Andean law, actions for non-compliance, requests by national courts for binding preliminary interpretations and actions on omission as well as arbitral functions and labour disputes (Articles 17ff of the Treaty Creating the Court of Justice of the Cartagena Agreement). The direct applicability of decisions and resolutions of the Community Organs addressed to Member States as well as the binding effect of preliminary rulings of (p. 333) the Court of Justice support the supremacy of the Andean Community law and the inapplicability of domestic law in case of conflict.[40]

Under the Cartagena Agreement, internal tariffs were eliminated. As the progressive establishment and uniform implementation of a common external tariff (see Article 62.2(f) of the Cartagena Agreement) met with difficulties, the Andean Community is an imperfect customs union. The Andean Community has a common regime for foreign investment (Article 55 of the Cartagena Agreement, Decision 291) and for intellectual property rights (Article 55 of the Cartagena Agreement, Decision 486) as well as for Andean multinational enterprises (Article 56 of the Cartagena Agreement, Decision 292).

(c) MERCOSUR

The Common Market of South America (Mercado Común del Sur, MERCOSUR; in Portuguese: MERCOSUL)[41] was established in 1991 by the Treaty of Asunción,[42] as modified by the Protocol of Ouro Preto of 1994. Members are Argentina, Brazil, Paraguay, Uruguay, and Venezuela. Associate members currently are Chile, Colombia, Ecuador, Guyana, Peru, and Suriname. Subject to approval by all Member States, Bolivia is about to join the MERCOSUR as a full member. With a common external tariff still subject to many exceptions, a yet imperfect customs union has been established. A safeguard clause allows Member States to establish temporary import quotas on certain goods if a dramatic increase of imports threatens the national market and may cause significant damage to the economy.

In contrast to the European Union or the Andean Pact, the founders of MERCOSUR opted for a simple institutional system without complex institutional mechanisms of supranational decision-making. Instead, the Member States have attempted to reduce the economic asymmetries gradually by means of intergovernmental cooperation. The coordination of economic policies between Argentina and Brazil had to overcome significant obstacles especially in the monetary sector. The MERCOSUR has led to a significant revival of trade between its Member States and a significant increase in the gross national product of the four founding States. The growth of the MERCOSUR economies (also driven by the export of commodities) and the volume of trade within in the common market (especially between Argentina and Brazil) turned the MERCOSUR into one of the more successful projects of regional integration worldwide, despite often divergent economic policies of its members and occasional trade conflicts between Argentina and Brazil.

(p. 334) The current organizational structure of MERCOSUR rests on the Protocol of Ouro Preto of 1994.[43] This Protocol also established the legal personality of MERCOSUR in international law and under domestic law (Articles 34 and 35). The main organs of MERCOSUR are the Common Market Council, the Common Market Group, the Trade Commission, the Common Parliament Committee, the Socio-economic Advisory Forum, and the Administrative Office. The Common Market Council is the supreme decision-making body. It is composed of the foreign and economic ministers of the Member States. The Common Market Group is the executive organ of MERCOSUR. In this organ, each Member State is represented with four regular and four substitute members which constitute the National Section of the respective Member State. The Common Market Group is assisted by the MERCOSUR Trade Commission, which supervises the application of common trade policy instruments, monitors the development of the common market, and makes regulatory proposals.

Legal sources of the MERCOSUR under the founding Agreement with its Protocols and Amendments are the international agreements concluded by the MERCOSUR as well as the decisions of the Common Market Council, the resolutions of the Common Market Group, and the guidelines of the Trade Commission. The Member States are bound to incorporate the acts of the MERCOSUR institutions into domestic law (Article 40 of the Protocol of Ouro

Preto). The Protocol of Brasilia of 1991[44] deals with the settlement of disputes within MERCOSUR.

The mechanisms of dispute settlement are now governed by the Olivos Protocol of 2002 (as modified in 2007).[45] If a dispute cannot be settled between the parties, they can jointly submit their controversy to the Common Market Group for consideration (Article 6.2). In the absence of a solution of the dispute, any party can initiate arbitral proceedings before an ad hoc tribunal (Articles 9ff of the Protocol). The Permanent Tribunal of Revision (Tribunal Permanente de Revisión, TPR) reviews arbitral awards (Articles 17ff). The parties can also directly submit a dispute to the Permanent Tribunal of Revision (Article 23). In their home State, private parties can lodge a complaint before the National Section of the Common Market Group (Articles 39ff). The Common Market Group may call for the opinion of an expert group after a preliminary examination of the complaint. Where the expert group unanimously concludes the complaint against a Member State well founded, any other Member State may require remedial measures or withdrawal of the disputed measures, and may, after the lapse of a short time, initiate arbitral proceedings (Article 44.1). The advanced level of integration in the MERCOSUR seems to call for an institutionally more developed system of dispute settlement.

The Declaration of Cuzco (2004) proclaimed the project of the South American Community of Nations (Comunidad Suramericana de Naciones, CSN) as a (p. 335) continental free trade zone which comprises the MERCOSUR and the Andean Community. By bilateral agreements, the Member States of the Andean Community have each agreed on a free trade zone with the Member States of MERCOSUR. Conversely, Argentina, Brazil, Paraguay, Uruguay, and Chile joined the Andean Community as associate members. These free trade agreements cover approximately 80 per cent of the trade between the two blocks. In 2007, the name of the CSN was changed into Union of South American Nations (Unión de Naciones Suramericanas, UNASUR). In May 2008, the constitutive treaty of UNASUR, which also operates as a political organization, was signed in Brasilia. UNASUR, with its 12 Member States, includes all member countries of the MERCOSUR and of the Andean Community.

(d) Pacific Alliance

In 2011 Chile, Colombia, Mexico, and Peru established the Pacific Alliance (Alianza del Pacífico), a promising framework for free trade agreements. The main objective is economic integration with free circulation of goods, services, capital, and persons. The Pacific Alliance also fosters close cooperation with the Asia-Pacific region.[46]

The Alliance is rather simply structured. Apart from meetings of the Presidents of the four countries as the supreme forum for decision-making (body on summits), there are only two other bodies: the Council of Ministers (integrated by the ministers of foreign trade and foreign affairs) and the High-Level Group (with the vice-ministers of foreign trade and foreign affairs).

A considerable number of States supporting the Alliance and its integration agenda have observer status, including Canada, China, France, Japan, Spain, South Korea, and the United States.

In South America, economic integration within the Pacific Alliance competes with MERCOSUR which also has a social dimension.

6. Regional Integration in Central America and the Caribbean

(a) Central American integration system

The Central American Integration System (Sistema de Integración Centroamericano, SICA) emerged from the Central American Common Market (MCCA) in 1993. Members are Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama. The bodies of this organization include the Presidents' Summit, the Council of Ministers of Foreign Affairs, the Central American Parliament, the (p. 336) Central American Court of Justice[47] (which also hears claims presented by private persons), the Secretariat, and the Executive and the Consultation Committee.

(b) Caribbean Community

Within the framework of the Caribbean Community (CARICOM),[48] the Revised Treaty of Chaguaramas on the Caribbean Community Including the CARICOM Single Market and Economy provides the basis for a common external tariff and a close coordination of trade policies. Members of CARICOM are Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Suriname, and Trinidad and Tobago. Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, and the Turks and Caicos Islands are Associates. Aruba, Colombia, Curaçao, the Dominican Republic, Mexico, Puerto Rico, Sint Maarten, and Venezuela have observer status. The international jurisdiction of the Caribbean Court of Justice[49] (which is also the highest court of appeal for those Commonwealth members which have shifted this function from the Privy Council to the Caribbean Court) extends to disputes between the CARICOM States, to preliminary rulings at the request of national courts, and to applications from private persons. In *Trinidad Cement Ltd v Caribbean Community*, the Court admitted a direct challenge by a private party against decisions of the organs of CARICOM, invoking the principle of 'legal accountability'.[50]

7. Regional Integration in Asia and the Pacific

(a) ASEAN

The Association of Southeast Asian Nations (ASEAN) was founded in 1967 and initially intended to contain the Communist expansion. It currently includes Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. On the basis of an agreement of 1977, the Member States of ASEAN have granted each other preferential tariffs. The Agreement of the ASEAN Free Trade Area (AFTA) provides for the gradual removal of barriers to trade. An important mechanism for economic integration within ASEAN is the 'Common Effective Preferential Tariff (CEPT) Scheme', adopted on the basis of an agreement of 2002 which aims at a substantial reduction of tariffs for a great (p. 337) number of products and the removal of non-tariff barriers to trade. The ASEAN Charter of 2007 vests ASEAN with legal personality.

(b) ACFTA and Other Free Trade Agreements of ASEAN States

On 1 January 2010, the free trade agreement between the ASEAN States and China (ASEAN-China Free Trade Agreement, ACFTA)[51] came into effect. ACFTA brings about the elimination of tariffs on about 90 per cent of the goods, first for only six ASEAN States (Brunei, Indonesia, Malaysia, Philippines, Singapore, and Thailand) and China. After a transitional period, the liberalization of trade now applies to all ASEAN States and China. With a population of almost 2 billion, the ACFTA is the largest free trade zone in the world in terms of population alone. In economic terms, ACFTA ranks third after the European Economic Area and NAFTA. Besides ACFTA, the ASEAN States concluded free trade agreements with Australia and New Zealand, India, Japan, and South Korea. An ASEAN-

initiated free trade agreement between these countries as well as China, the Regional Comprehensive Economic Partnership (RCEP),[52] is in the stadium of negotiations.

(c) SAFTA

The Agreement on the South Asian Free Trade Area (SAFTA)[53] between Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, Afghanistan, and Sri Lanka establishes the gradual elimination of most tariff and non-tariff barriers to trade and services. The SAFTA Agreement, in force since 2006, provides for the phased reduction of tariffs differentiating between the non-least developed Contracting States (India, Pakistan, and Sri Lanka) and the least developed Contracting States (Nepal, Bhutan, Bangladesh, Afghanistan, and the Maldives).

(d) APEC

For the Pacific region, the Asia-Pacific Economic Cooperation (APEC) was founded in 1989 with its headquarters in Singapore. Its Member States include Australia, Brunei, Chile, China, Hong Kong, Indonesia, Japan, Canada, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Singapore, South Korea, Chinese Taipei (Taiwan), Thailand, the United States, and Vietnam. The 21 Member States of APEC have agreed on a comprehensive liberalization programme on their meeting in Vancouver in November 1997. As opposed to other (p. 338) economic areas, APEC is based on non-binding agreements and makes decisions by consensus.

(e) Trans-Pacific Trade Relations

The Agreement on Trans-Pacific Strategic Economic Partnership (TPSEP) provides a framework for the liberalization of trade in goods and services. Since 2006, the TPSEP Agreement has been in force between Brunei, Chile, New Zealand, and Singapore (P4).

The United States entered into negotiations with the P4 and other APEC countries on a new broader trade agreement in the Pacific Rim. In 2015, the United States, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam concluded the negotiations on the Trans-Pacific Partnership (TPP). The TPP agreement provides for trade liberalization and investment protection as well as for the protection of intellectual property and common labour standards.[54]

8. Regional Integration in Africa

The Economic Community of West African States (ECOWAS; Communauté Économique des États de l’Afrique de l’Ouest, CEDEAO),[55] established in 1975, is a customs union. Members are Benin, Burkina Faso, Ivory Coast, Gambia, Ghana, Guinea, Guinea-Bissau, Cape Verde, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

The Common Market for Eastern and Southern Africa (COMESA)[56] was formed in 1994 and comprises 20 Member States (Angola, Egypt, Ethiopia, Burundi, Djibouti, Eritrea, Kenya, Comoros, the Democratic Republic of Congo, Libya, Madagascar, Malawi, Mauritius, Rwanda, Zambia, the Seychelles, Sudan, Swaziland, Uganda, and Zimbabwe). In addition to the commonly agreed programme for the reduction or elimination of tariffs, a number of COMESA countries are negotiating on the elimination of non-tariff barriers to trade as well.

Burundi, Kenya, Rwanda, Tanzania, and Uganda established the Eastern African Community (EAC)[57] as a framework for a customs union. The institutional structure includes organs with representatives of the Member States, a secretariat, and the Court of Justice of the EAC.[58]

The Community of Sahel Saharan States (CEN-SAD) aims at free movement of persons, free establishment, and free trade of goods and services. Many of its 28 Member States are already party to other free trade arrangements.

(p. 339) South Africa and 14 other States form the Southern African Development Community (SADC), which was initially designed as a free trade zone and aims at the creation of a common market. Although not designed as a human rights court in the strict sense, the SADC Tribunal issued landmark rulings on the principles of rule of law and human rights. The Tribunal's ruling in the case of *Campbell et al v Republic of Zimbabwe*[59] met with massive opposition by the Government of Zimbabwe which refused to recognize the judgment. Consequently, the Member States of SADC de facto suspended the operation of the Tribunal.[60]

The ambitious project of the African Economic Community (AEC) under the Abuja Treaty of 1991[61] is inspired by the European Union. The AEC Treaty envisages implementation in several stages within 34 years. The existing regional economic communities in Africa are considered building blocks of the AEC (Article 88(1) of the AEC Treaty). The AEC pursues the ambitious aim of establishing a common currency and an African Central Bank.

The AEC stands in a complex relationship with the African Union.[62] The African Economic Community shall form an integral part of the African Union (Article 98(1) of the AEC Treaty). The African Court of Justice and Human Rights, which belongs to the institutional system of the African Union, has jurisdiction over disputes between the Members of the African Economic Community. The relations between the African Union and the regional economic communities of Africa are governed by a protocol of 2007.

9. Bilateral Trade Agreements of the European Union and of the United States

For the current trade policy of the European Union and of the United States, the establishment of free trade areas by bilateral trade agreements ranks as one of the strategic objectives. The United States concluded bilateral free trade agreements, inter alia, with Australia, Chile, the Central American States and the Dominican Republic (CAFTA-DR), Colombia, and Peru. In economic terms the Korea–United States Free Trade Agreement (KORUS FTA), in force since March 2012, has been the most important free trade agreement of the United States since NAFTA.[63] Central issues covered by US free trade agreements are tariff-exemptions for almost all goods, market access for financial and other services, and investment protection.

(p. 340) The European Union and its Member States concluded free trade agreements, inter alia, with Argentina, Chile, Colombia, Mexico, Peru, and South Africa.

After the extension of the European Union's external powers, especially in the areas of investment and intellectual property rights, by the Lisbon Treaty, the European Union seeks comprehensive economic agreements with its trade partners. The first treaty in force was the free trade agreement between the European Union and the Republic of Korea.[64] The Agreement provides for the progressive elimination of tariffs for industrial products and most agricultural goods as well as for the far-reaching liberalization of trade in services. Specific commitments address non-tariff barriers in the sectors of automobiles, pharmaceuticals, and electronics. The agreement also covers the topics investments, competition, government procurement, intellectual property rights, and transparency as well as sustainable development.

In 2014, the European Union and Canada concluded negotiations on the Comprehensive Economic and Trade Agreement (CETA).[65] A similar agreement with Singapore followed.[66]

Some East-Asian States like Japan, Malaysia, and Vietnam are engaged in more or less advanced negotiations with the European Union on the one hand and the United States on the other. In 2015, Vietnam and the European Union concluded the negotiations on a free trade agreement, which is the most ambitious and comprehensive free trade agreement between the European Union and a developing country so far.[67] Regional trade agreements, agreements between major economic powers, face fundamental as well as more technical criticism. A serious concern is the challenge to a multilateral approach. Certainly, reducing protectionism on a global scale may be more conducive to economic growth and prosperity than an even more massive elimination of barriers to free trade which is confined to a regional context. Still, bilateral or regional liberalization of trade may have an important 'spill over' effect in terms of weaning industries and domestic politics from protectionist measures and thus foster receptivity for equality of competitive conditions which is a paramount objective of the current world trade system.[68] Very often, the benefits of trade liberalization accrue essentially to big transnational corporations, whilst only rather modest 'trickle down effects' reach medium and small enterprises. However, it is difficult to make generalizing forecasts. The benefits for employment and for public budget, which in the end affect every citizen, must also be considered.(p. 341)

Preferential Trade Agreements of the European Union[69]

Preferential Trade Agreements of the European Union in place

Albania, Algeria, Antigua, Bahamas, Barbados, Barbuda, Belize, Bosnia-Herzegovina, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Egypt, El Salvador, Former Yugoslav Republic of Macedonia, Grenada, Guatemala, Guyana, Haiti, Honduras, Israel, Jamaica, Jordan, Lebanon, Madagascar, Mauritius, Mexico, Montenegro, Nicaragua, Occupied Palestinian Territory, Panama, Papua New Guinea, Peru, Republic of Korea (South Korea), Serbia, Seychelles, Singapore, South Africa, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Suriname, Switzerland, Syria, Trinidad and Tobago, Ukraine, Zimbabwe

Countries with which the United States has a bilateral free trade agreement in place[70]

Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Republic of Korea (South Korea), Mexico, Morocco, Nicaragua, Oman, Panama, Peru, Singapore

10. Mega-regional Trade Agreements: CETA, TPP, TTIP, and beyond

A recent and salient feature of sub-global trade liberalization are the so-called 'mega-regionals', that is, trade agreements which span regions far apart from each other and often have an intercontinental reach. These agreements tend to pursue a broader agenda of economic integration than traditional free trade agreements. Mega-regionals, beyond trade liberalization, cover important issues such as investment protection. They govern gigantic trade and capital flows. An important aspect of mega-regionals is regulatory cooperation (eg under CETA and TTIP). Regulatory cooperation bodies are an institutional mechanism for the exchange of information, for consultation, and for the consideration of respective regulations of the parties as well as for the development of common standards. TTIP has the potential to bring about a realignment of global economic governance. Together with the Trans-Pacific Partnership (TTP), TTIP would become one of the pillars of a bipolar order, which rests on trans-pacific cooperation and transatlantic cooperation in trade and investment. TTIP and the TTP stand in a synergetic as well as competitive relationship. In the long run, the dynamics of regulatory cooperation between the European Union and the United States may be the crucial factor in global standard setting for products and services

and the removal of non-tariff barriers to trade. In addition, cooperation between the European Union and the United States in competition law may give transatlantic cooperation an edge over its transpacific counterpart. CETA, the comprehensive economic agreement between Canada and the European Union, pursues an agenda similar to TTIP. The opening of the negotiations (p. 342) on the settlement of investment disputes under CETA, with the objective to put pressure on the US Government in the TTIP negotiations, bears witness to the strategic interplay between parallel treaty regimes governing transatlantic relations.

(a) The Comprehensive Economic and Trade Agreement (CETA)

In 2014, Canada and the European Union finished negotiations on the Comprehensive Economic and Trade Agreement (CETA).[71] The preamble of CETA emphasizes the parties' commitment to sustainable development, labour and environmental protection, as well as their attachment to international security, human rights, democracy, and the rule of law. These objectives demonstrate that trade liberalization and investment protection are embedded in a broader political context and that the parties of CETA undertook many regulatory approaches.

Apart from covering the core issues of trade liberalization including tariff elimination, CETA, inter alia, contains chapters on trade remedies (anti-dumping and countervailing duties, safeguards), technical barriers to trade, sanitary and phytosanitary measures, investment, cross-border trade in services, financial and telecommunications services, recognition of professional qualifications, electronic commerce, competition policy, state enterprises and monopolies, government procurement, intellectual property, and regulatory cooperation. It also addresses labour standards (with reference to ILO Declaration on Fundamental Principles and Rights at Work and its Follow up as adopted in 1998), and environmental protection. CETA establishes a dispute settlement system with arbitral panels of independent experts.

(b) The Agreement on the Trans-Pacific Partnership (TPP)

In February 2016, twelve countries of the Pacific Rim signed the Agreement on the Trans-Pacific Partnership (TPP).[72] Parties are Australia, Canada, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. It is remarkable that China stays outside the TPP. The United States were the major driving force behind the TPP which reflects the American 'Pivot to Asia' strategy. Like CETA, the TPP Agreement covers the protection of investments (chapter 9). Its impact on the global political and economic order may even overshadow the Transatlantic Trade and Investment Partnership the negotiation of which aroused a most lively interest on both sides of the Atlantic and generated an unprecedented public controversy within the European Union.

In many respects, the TPP Agreement pursues a similar agenda as CETA. But for many of its parties, the TPP standards will have a far more significant impact on national legislation and on regulatory practice. This holds true for financial services (chapter 11), telecommunications services (chapter 13), state-owned enterprises, and designated monopolies (chapter 17), and intellectual property rights (chapter 18, with refined standards as to effective market protection of pharmaceutical products or as to copyright infringements in the online environment). In (p. 343) some sensitive areas, the TPP Agreement defers to regulatory philosophies of parties, for example with respect to products of modern biotechnology (Article 2.29). The Agreement dedicates a special chapter to labour standards (chapter 19). The chapter on the environment (chapter 20) makes particular reference to trade and biodiversity (Article 20.13) and the transition to a

low emission economy (Article 20.15). Other chapters cover development (chapter 23) as well as transparency and anti-corruption (chapter 26).

On an inter-governmental level, the Agreement is administered by the TPP Commission (chapter 27). The dispute settlement (chapter 28) is modelled after the WTO system. It includes an arbitral panel consisting of independent experts which shall make an objective assessment (Article 28.11). In compliance with the panel's findings, parties shall eliminate nonconformity of national measures 'whenever possible' (Article 28.18.2). In case of non-implementation, remedies are compensation and suspension of benefits (Article 28.19).

Its complex and detailed texture within often very strict standards for restrictive trade measures or regulatory frameworks as to competition law, intellectual property, or other trade-related areas, the TPP Agreement sets an ambitious model for other mega-regionals with heterogeneous parties.

(c) The Transatlantic Trade and Investment Partnership Agreement (TTIP)

The relevance of liberalization of transatlantic trade can hardly be overestimated. Trade between the European Union and the United States accounts for about a third of the entire world trade. The European Union and the United States concluded several agreements on mutual recognition, for example as to product-related standards. In 2007, the EU–US summit adopted the Framework Agreement on the Advancement of Transatlantic Economic Integration. Since 2013, the European Union and the United States have been engaged in negotiations on the TTIP. TTIP shall considerably reduce existing tariffs, and average custom duties are already relatively low (about 2 per cent).[73] However, it is important to differentiate between the custom duties for individual goods. Whilst more than half of EU–US trade is not subject to any custom duties at all, tariffs for the remaining trade are marked by a notable spread and occasionally reach prohibitive dimensions (1 per cent on many raw materials, 30 per cent for clothes, 53 per cent US custom duties on raw tobacco). Sometimes the European Union and the United States charge different duties for the same product (eg cars). TTIP will also eliminate or reduce non-tariff barriers to trade. Many industrial sectors suffer from different technical requirements (eg components of cars) or standards for the production process (hygienic standards for food production). Regular cooperation under TTIP shall facilitate recognition of equivalent standards or contribute to a harmonized approach. This regulatory cooperation has the potential to establish common standards which may operate as a global benchmark in international trade. The negotiation mandate of (p. 344) the European Commission laid down by the Council of the European Union[74] contains an important reservation in favour of 'cultural and linguistic diversity' and policies in support of the cultural sector. The directive aims at preserving the quality of public utilities and excludes services in the exercise of governmental authority. The European Commission shall aim at the elimination or lowering of non-tariff barriers to trade such as technical standards for automobile components. According to rather optimistic expectations, TTIP will increase the transatlantic trade volume both for the European Union and the United States by about EUR 100 billion within a decade.

Critics fear an erosion of the multilateral approach to progressive trade liberalization under the WTO. Voices warn against lower standards of health and environmental protection under TTIP's trade and investment rules. Many challenges to TTIP ignore already existing commitments, especially under WTO law. The European Commission pursues an ambitious negotiation agenda as to high labour and environmental standards.

(d) Implications for the World Trading System

From a global perspective, mega-regionals have an ambivalent impact on trade liberalization, competitiveness, and balance of negotiation power. On the one hand, critics consider mega-regional agreements as a particular challenge to the WTO as the global forum for trade liberalization and are concerned about the risk for non-parties to be marginalized. Even more than other free trade agreements, mega-regionals erode the principle of most-favoured-nation treatment within the WTO. Dispute settlement may compete with the WTO Dispute Settlement Body in the interpretation of rules which incorporate obligations under the WTO treaties or establish similar standards. This might severely impair the guiding function of the WTO panel and Appellate Body reports.

On the other hand, mega-regionals operate as fore runners in the sense that they put pressure on WTO members to agree to further trade liberalization which may pave the way for bridging differences within the WTO and reaching consensus on a global level. This holds particularly true for agreements which include economically and politically powerful States with different regulatory philosophies or conflicting industrial or agricultural interests such as the TPP. For example, the TPP Agreement commits parties to cooperate within the WTO towards elimination of export subsidies for agricultural products (Article 2.23). Mega-regionals also give a voice to smaller countries in a sub-global framework.

Moreover, mega-regionals bring up important objectives which transcend economic development. Thus, the preamble of CETA affirms the commitment of both sides as parties to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions and recognizes that(p. 345)

> States have the right to preserve, develop and implement their cultural policies, and to support their cultural industries for the purpose of strengthening the diversity of cultural expressions, and preserving their cultural identity, including through the use of regulatory measures and financial support.[75]

Furthermore, mega-regionals are committed to the standards of proportionality and transparency and, in the context of investment protection, to fairness and access to justice. These standards are important elements of ‘good governance’ on the domestic and international plane. The dispute settlement mechanism will contribute to consistency and accountability of legislative and executive action, which in terms of a spillover effect will benefit citizens also in a purely domestic context.

Finally, mega-regionals respond to concerns which are voiced also under the WTO system. Both CETA and the TPP Agreement respond to political complaints about excessive limitations of regulatory freedom by trade liberalization. Thus, in the preamble of the TPP Agreement, the parties

> [r]ecognize their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals.[76]

The TPP Agreement expresses a commitment to ‘promote transparency, good governance and rule of law’ in its preamble.

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1 See S Inama, *Rules of Origin in International Trade* (CUP 2009); for 'rules of origin' in the WTO context, see H Imagawa and E Vermulst, 'The Agreement on Rules of Origin' in PFJ Macrory, AE Appleton, and MG Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis* (Springer 2005) vol I, 601.

2 See eg Article 4(1) of the EFTA Treaty; Decision No 293 of the Commission of the Andean Pact (1993) 32 ILM 172.

3 R Dragneva and J De Kort, 'The Legal Regime for Free Trade in the Commonwealth of Independent States' (2007) 56 ICLQ 233.

4 For the broader perspective, see L Bartels and F Ortino (eds), *Regional Trade Agreements and the WTO Legal System* (OUP 2006).

5 See Ch XIV.2(b)(i).

6 For a more economic analysis, see JJ Hallaert, 'Proliferation of Preferential Trade Agreements: Quantifying its Welfare Impact and Preference Erosion' (2008) 42 JWT 813.

7 European Commission, 'Global Europe: Competing in the World—A Contribution to the EU's Growth and Jobs Strategy' (Staff Working Document) COM(2006) 567 final.

8 ECJ Case C-8/74 *SA ÉTS. Fourcroy v Dassonville* [1974] ECR 837 (852).

9 See on the German 'purity standard' for beer ECJ Case C-178/84 *Commission v Germany* [1987] ECR 1227.

10 ECJ Case C-302/86 *Commission v Denmark* [1988] ECR 4607.

11 ECJ Case C-322/01 *Deutscher Apothekerverband eV v DocMorris* ECJ [2003] ECR I-12887.

12 ECJ Case C-249/81 *Commission v Ireland* [1982] ECR 4005.

[13] ECJ Case C-142/05 *Åklagaren v Mickelsson and Roos* [2009] ECR I-4273.

[14] ECJ Joined Cases C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097 para 17: '[T]he application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder trade between Member States, within the meaning of that definition, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products. Such rules therefore fall outside of Article 30 [now Article 34] of the Treaty.'

[15] ECJ Joined Cases C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097 Summary.

[16] Article 34 of the TFEU for example does also not apply to sales restrictions on Sundays, ECJ Joined Cases C-69/93 and C-258/93 *Punto Casa* [1994] ECR I-2355; see also ECJ Case C-317/91 *Quattro v Quadra* [1993] ECR I-6227.

[17] See N Reich, 'The "November Revolution" of the European Court of Justice: Keck, Meng and AUDIRevisited' (1994) 31 CML Rev 459.

[18] ECJ Case 120/78 *Rewe-Zentral v Federal Monopoly Administration for Spirits* [1979] ECR 649 (662), usually referred to as the 'Cassis de Dijon' case. 'In the absence of common rules relating to the production and marketing of alcohol […] it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory. Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.'

[19] ECJ Case 120/78 *Rewe-Zentral v Federal Monopoly Administration for Spirits* [1979] ECR 649; ECJ Case C-178/84 *Commission v Germany* [1987] ECR 1227.

[20] WTO, *Dominican Republic: Measures Affecting the Importation and Internal Sale of Cigarettes—Report of the Appellate Body* (2000) WT/DS302/AB/R; see Ch XIV.3(c) and 5(f).

[21] ECJ Case C-124/81 *Commission v United Kingdom* [1983] ECR 203.

[22] ECJ Case C-192/01 *Commission v Denmark* [2003] ECR I-9693 paras 45ff; the case was about vitamin additives in food.

[23] See Ch XV.

[24] ECJ Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others* [2011] ECR I-9083.

[25] ECJ Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 para 27; ECJ Case C-215/01 *Bruno Schnitzer* [2003] ECR I-14 847 para 32.

[26] ECJ Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 para 37.

27 Directive of the European Parliament and of the Council (EC) 2006/123 on services in the internal market [2006] OJ L 376/36.

28 EFTA Convention 370 UNTS 5.

29 Decision of the Council and the Commission (EC) 1994/1 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States, and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden, and the Swiss Confederation [1994] OJ L1/3; the EEA Agreement was concluded between the European Community, the (meanwhile extinct) European Coal and Steel Community and their Member States on the one side and the EFTA States on the other side.

30 ECJ Opinion of the Court 1/91 *Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty—Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* [1991] I-6079.

31 See C Baudenbacher, P Tresselt, and T Örlygsson (eds), *The EFTA Court: Ten Years On* (Hart Publishing 2005).

32 See (1993) 32 ILM 289ff, 605ff.

33 See (1988) 27 ILM 281; see FM Abbott, 'North American Free Trade Agreement' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2012) vol VII, 776; FP Cantin and AF Lowenfeld, 'Rules of Origin, The Canada-U.S. FTA, and the Honda Case' (1993) 87 AJIL 375.

34 See GN Horlick and AL Marti, 'NAFTA Chapter 11 B—A Private Right of Action to Enforce Market Access through Investments' (1997) 14 J Int'l Arbit 43.

35 See S Montt, 'Latin American Integration Association' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2012) vol VI, 699.

36 (1981) 20 ILM 672.

37 (1989) 28 ILM 1165; see FV García Amador, *El ordenamiento jurídico andino, Un nuevo derecho Comunitario* (Edicionas De Palma 1977).

38 RA Porrata-Doria Jr, 'Andean Community of Nations (CAN)' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2012) vol I, 381.

39 CE Daly Gimón, *Tribunal de Justicia e Institutionalidad en la Comunidad Andina de Naciones* (Editorial Adadémia Espanola 2011); RA Porrata-Doria Jr, 'Andean Community of Nations, Court of Justice' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2012) vol I, 385.

40 See L Sáchica, *Introducción al derecho comunitario andino* (Témis 1990); E Tremolado Alvarez, *El derecho andino en Colombia* (Universidad Externado de Colombia 2007).

41 PB Cassella, 'Legal Features and Institutional Perspectives for the MERCOSUR' (1998) 31 VRÜ 523; MT Franca Filho, L Lixinski, and MB Olmos Giupponi (eds), *The Law of Mercosur* (Hart Publishing 2010); JP Schmidt, 'MERCOSUR' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2012) vol VII, 110.

42 (1991) 30 ILM 1041.

43 (1995) 34 ILM 1244.

44 (1997) 36 ILM 691.

[45] See M Klumpp, ‘Mercosur, Permanent Appeals Court’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2012) vol VII, 117.

[46] See <https://alianzapacifico.net/en/what-is-the-pacific-alliance/#strategic-value> (accessed 22 February 2016).

[47] See R Virzo, ‘Central American Court of Justice’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2012) vol II, 33.

[48] D Byron and C Malcolm, ‘Caribbean Community (CARICOM)’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2012) vol I, 1125.

[49] D Byron and C Malcolm, ‘Caribbean Court of Justice (CCJ)’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2012) vol I, 1130.

[50] Caribbean Court of Justice, *Trinidad Cement Ltd v The Caribbean Community* CCJ App no AR 3 of 2008 (Judgment of 5 February 2009) CCJ 2 (OJ) para 32.

[51] For the development of ACFTA, see S Inama, ‘The Association of South East Asian Nations—People’s Republic of China Free Trade Area: Negotiating Beyond Eternity With Little Trade Liberalization?’ (2005) 39 JWT 559.

[52] Yoshifumi Fukunaga, ‘ASEAN’s Leadership in the Regional Comprehensive Economic Partnership’ (2014) 2 Asia & the Pacific Policy Studies 103–115.

[53] See R Islam, ‘An Appraisal of the South Asian Free Trade Agreement and Its Consistency with the WTO Rules on Preferential Trade Agreements’ (2010) 44 JWT 1187.

[54] See in Section 10(b) in this Chapter The Agreement on the Trans-Pacific Partnership (TPP).

[55] See JE Okolo, ‘ECOWAS Regional Cooperation Regime’ (1989) 32 GYIL 111.

[56] R Akombe Kwamboka, *Regional Integration and the Challenge of Economic Development: The Case of the Common Market for Eastern and Southern Africa (COMESA)* (Rutgers University 2005).

[57] A Ajulu, *The Making of a Region: The Revival of the East African Community* (Institute for Global Dialogue 2005).

[58] See AP van der Mei, ‘Regional Integration: The Contribution of the Court of Justice of the ECA’ (2009) 69 ZaöRV 403.

[59] SADC Tribunal, *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* Case No 2/2007 (Decision of 28 November 2008) (2009) 48 ILM 530.

[60] E de Wet, ‘The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa’ (2013) 28 ICSID Rev 45–63.

[61] Treaty Establishing the African Economic Community of 1991 (Abuja Treaty) (1991) 30 ILM 1241.

[62] RF Oppong, ‘The African Union, African Economic Community and Africa’s Regional Economic Communities: Untangling a Complex Web’ (2010) 18 African Journal of International and Comparative Law 92.

[63] See YS Lee, ‘The Beginning of Economic Integration Between East Asia and North America?—Forming the Third Largest Free Trade Area Between the United States and the Republic of Korea’ (2007) 41 JWT 1091.

[64] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127/6.

65 See Section 10(a) in this Chapter.

66 See for the text of the EU-Singapore Free Trade Agreement at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> (accessed 23 June 2016).

67 EU and Vietnam reach agreement on free trade deal European Commission Press release IP/15/5467 (4 August 2015) <http://europa.eu/rapid/press-release_IP-15-5467_en.htm> (accessed 23 June 2016).

68 See Article III:1 of the GATT: 'The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production'.

69 <http://trade.ec.europa.eu/doclib/docs/2012/november/tradoc_150129.pdf> (accessed 23 June 2016).

70 <http://www.ustr.gov/trade-agreements/free-trade-agreements> (accessed 9 February 2016).

71 The text is available at <trade.ec.europa.eu/doclib/html/152806.htm> (accessed 9 February 2016).

72 The Agreement is available at <https://ustr.gov/tpp/> (accessed 9 February 2016).

73 European Commission, *Fact Sheet on Trade in Goods and Customs Duties in TTIP* <http://trade.ec.europa.eu/doclib/html/152998.htm> (accessed 23 June 2016).

74 Council of the European Union Directives for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America [17 June 2013] Doc 11103/13 DCL 1 (declassified 9 October 2014).

75 In a less emphatic manner, the preamble of the TPP Agreement also recognizes the importance of cultural identity and diversity:

> the provisions of this Agreement preserve the right to regulate within their territories and resolving to preserve their flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity.

76 In similar terms, the preamble of CETA states the understanding of the parties that

> the provisions of this Agreement preserve the right to regulate within their territories and resolving to preserve their flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity.