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Regionalism as Trading Blocks: A Comparative analysis of the legal structure of the EC and NAFTA within the context of the WTO

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Abstract.

Geography has almost become obsolete. The world's goods and services can now be accessed instantaneously by electronic commerce. Small and medium sized countries have felt the cold winds of change blowing, and have adopted the "safety in numbers" philosophy. Regional organisations throughout the world have sprung up, with their original raison d'être the encouragement and development of regional trading blocks. Two of the most developed regional groupings are the EU/EC and NAFTA. These two organisations represent two quite different philosophies of regional trade groupings, with contrasting legal structures. The advent of Trade Globalisation, with the founding of the WTO has brought these two approaches into confrontation, as each side of the Atlantic Ocean tries to influence the development on the nascent WTO. This paper examines the two contrasting legal structures, and the conflict on an inter regional level that they are engendering.

Introduction:

The end of the WWII brought with it an end of empire, and the weakening of the states as a regulator of the affairs of man. With the rapid development in the technology of transport and communication a new age dawned, the age of internationalism. A parallel development with the break up of old empires and alliances was the multiplication of the numbers of independent states, many of them very small, who were now subject to the cold winds of internationalism. The larger states, such as the USA were not only better able to withstand global storms, but were often able to dictate terms to smaller and more vulnerable trade partners. Safety in numbers was seen as a tactic for survival, particularly in Western Europe, where the benefits of pooling of national sovereignty for the benefit of all was explored. One of the national leaders of Western Europe's transition phase, Sean F. Lemass, a former Taoiseach,¹ stated that "only in such a regional grouping" can small states "make the best of their resources and potential, preserve and develop their cultural heritage". He even went on to say that small states can "make a contribution to the progress of Europe and the World".²

The first wave of regionalism is best represented by the European Community, with formation in 1951 of the European Coal and Steel Community,³ with the Europe of the six eventually developing into what is now the complex and highly successful European Union. The success of European experiment has led to other regional organisations being founded around the world, such as NAFTA in 1992, with the increasing confidence of states operating within regional organisations leading to “the trend to formal regionalisation” being “accelerated markedly.⁴ The success of such regional agreements have resulted in “approaches and techniques which have subsequently found application in the multilateral trading system”,⁵ the larger and more ambitious World Trade Organisation in 1994.⁶

The EC and NAFTA.

In the world of global regionalism, two organisations take prominence, the EC and NAFTA, with the Australian New Zealand arrangement,⁷ coming in a close third. These regional blocks take a broader and more elaborate approach to regionalism than the other regional arrangements scattered throughout the globe.⁸ These two trading blocks do however take radically different approaches to regionalism, and while regional integration agreements, to date have had a positive contribution to make to multilateralism,⁹ the inherent differences in approach between the two may be the seeds of future conflicts on the world stage, and is possibly behind the first signs of friction currently being exhibited at the WTO level.

What is NAFTA?

The NAFTA is a free trade agreement entered into¹⁰ by its constituent parties¹¹ with a view to developing trade in goods and services. It predominantly addresses the issue of tariffs, and only exceptionally deals with non tariff barriers.¹² In that respect it is less comprehensive than the EC in its approach,¹³ but it is more comprehensive than the WTO, covering areas such as investment measures.¹⁴ The NAFTA is supplemented by the NAAEC¹⁵ and the NAALC,¹⁶ which merely "establishes for the parties a general obligation to maintain high labour standards".¹⁷ The objective of the NAFTA is merely to promote economic growth in its member countries,¹⁸ and not to achieve the

ultimate goal of political and social integration which is the stated aim of the European Community/Union.¹⁹ This limited aim is reflected in the nature and operation of its institutions, which are designed to "co-ordinate the activities of the Parties and not to make decisions on their behalf,"²⁰ with the primary institution, the Commission, having only the "power to consider, not to act".²¹

The Commission is supported by a Secretariat, which is an administrative institution, divided into national sections,²² thus evincing a lack of collegiality, which is very much in evidence in the EC/EU.²³ The Commission, amongst its other functions, has a role to play in the resolution of disputes under the agreement,²⁴ with disputes with the NAFTA are resolved in a number of different ways, but no permanent judicial organ such as the EC's European Court of Justice has been established.²⁵

NAFTA adopts a national treatment approach, complemented by compliance with host-state regulations,²⁶ to trade matters, thereby avoiding the highly contentious debates concerning the surrendering of national sovereignty to a supra national body that are currently bedeviling the EC. However it equally fails to address the problems of "barriers to trade or investment that result from differences in national policies".²⁷

What is the EC?

The European Community/Union of the other hand is a *sui juris*²⁸ entity. The European Union is an Umbrella structure deriving from the Maastricht Treaty,²⁹ which encompasses 3 pillars, pillar 1 the European Community, pillar 2, the Common Foreign and Security Policy, and Pillar 3, Justice and Home Affairs. It is only pillar 1, the EC, which concerns us in this context.

The European Community (found pursuant to the Treaty of Rome 1957) is a supra national entity which is given legal status by Article 281.³⁰ Member States' sovereignty has, to a large extent, been transferred to the institutions of the EC, with European law at all times prevailing over conflicting national law.³¹ Individuals have a right of recourse to their national courts in order to enforce European law against fellow citizens or their own governments.³²

The European Community policy areas are varied, to include trade³³ and competition policy,³⁴ but also issues such as the now developing public health policy,³⁵ Economic and Social Cohesion,³⁶ Social Policy³⁷ and the Environment.³⁸ Priority is not given to one policy area over the other, and any disputes arising are dealt with, either at a national level, by the national court structure, or at a community level, by the permanent European Court of Justice,³⁹ assisted at times by the Court of First Instance.⁴⁰

Trade, the subject matter of this paper, is not just an internal Common Commercial Policy, but also an external one,⁴¹ with close knit relations having been developed between trade and development policy with the EC's relations with the European Free Trade area countries,⁴² to develop the European Economic Area,⁴³ with the Central and Eastern European Countries,⁴⁴ with a view to eventual membership of the EC, with the Afro Caribbean Pacific countries,⁴⁵ which is mainly developmental in orientation, and the Euro-Mediterranean Partnership,⁴⁶ which is currently being designed, in conjunction with parts of pillar 2, with a view to increasing peace and prosperity in the region. Relations also exist with the NIS and Mongolia under Tacis.⁴⁷ None of these relationships could be construed as strictly trade arrangements. All comprise various blends of trade, development and other policy areas, forming a back drop to trade only relationships which currently exist with the NAFTA countries within the WTO context.

What is the WTO?

The Uruguay Round of Trade negotiations⁴⁸ led to GATT 1994, which is expressly provided to be "legally distinct" from the GATT 1947.⁴⁹ This particular round of the GATT negotiations was important, as it produced a new legal order for world trade, represented and protected by the WTO, which includes a complicated dispute resolution system. The approach of the WTO is to operate a multi-lateral trading system "based on a non-intrusive, non-discriminatory, national treatment approach".⁵⁰ National governments are free to maintain "divergent policies".⁵¹ In the event that national measures are seen to be adversely affecting trade, compensatory measures may be provided for under the GATT. The consequence of this non-intrusive approach of the GATT has resulted in a "lack of dynamism in the multilateral process",⁵² which is beginning to chafe at the nexus between the multi-lateral

and regional trading arrangements, and which could become more than a mild irritation if left un-addressed.

Such a lack is already being recognised with concepts such as "equivalent competitive opportunities" beginning to appear in multilateral negotiations,⁵³ with the recognition that significant barriers to trade result from differences in national treatment in matters such as the environment and labour standards. GATT is under pressure to move from the traditional "trade" policy to a more intrusive "integration" model currently utilised by the EC, resulting in a loss of sovereignty for its member states in which national policies are constantly open to challenge.⁵⁴ Should this developmental route be taken by the WTO then issues such as sovereignty will become prevalent, and the ambitious task of reconciling all the member states of the WTO to a definition of labour standards and environmental protection, which would satisfy both first world and developing countries will prove to be a formidable hurdle. The perceived need for environmental measures has still yet to produce viable regulations as a consensus on provisions "seems to be a long way off" at not only the WTO, but also the OECD and the UN.⁵⁵

In the event that no satisfactory resolution can be found to these issues at a multi-lateral level, then the populous of regional groupings,⁵⁶ particularly within the EC, who have surrendered so much national sovereignty, ostensibly in return for a higher quality of life, will begin to resent the free flow of goods and services from third countries with lower standards, and which undermine their own living standards and employment prospects.

The NAFTA / WTO relationship

Despite the fact that the NAFTA does not expressly enjoy international personality,⁵⁷ unlike the EC, and the NAFTA institutions do not have authority to enter into treaties in their own names,⁵⁸ there is still scope for conflicts between the "NAFTA norm systems and the WTO norm systems",⁵⁹ particularly in light of the fact that in Article 103(2) of the NAFTA, while recognising GATT obligations, provide that "in the event of any inconsistency between this Agreement and other such agreements [including the GATT], this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement".⁶⁰ While it would appear that the NAFTA prevails over the GATT, in the context of Article 103, this

conclusion is "not a certain one".⁶¹ This, together with the fact that under Article 2005(1) NAFTA, disputes between the parties which may be resolved between the parties⁶² under either the NAFTA or WTO regime, leaves to the complaining party the choice of law applicable.⁶³ It can thus be seen that the political tenor of the NAFTA prioritises "more direct regional concerns over more diffuse global concerns."⁶⁴

The approach to dispute resolution between the two organisations evince a difference of emphasis, with the NAFTA arbitral panels⁶⁵ relying on consent to their findings, as there is no legal enforcement mechanism. However, recent changes in GATT 1994, whereby dispute resolution rules of panels have been strengthened, are likely to increase the chances of conflict. NAFTA Parties will be unable to "block the adoption of WTO panel reports, and thereby prevent conflicts from reaching full fruition".⁶⁶

The environment, in particular, is likely to create a conflict between NAFTA and the WTO, as the NAFTA environmental agreements provide⁶⁷ that disputes are to be resolved pursuant to NAFTA, if so requested by the respondent.⁶⁸ If a WTO decision under Chapter 4⁶⁹ requires lower environmental protection to be granted to third party goods, the NAFTA provision requiring its members to give each other MFN treatment would result in a lowering of environmental standards within the NAFTA area, which would lead to serious political repercussions.⁷⁰

The possibilities for conflict between the NAFTA and the WTO increase, as circumstances give rise to different answers to the same questions, under the different agreements.⁷¹ General rules of international law will not be adequate to resolve these problems,⁷² particularly in light of the intense political fall out that will accompany any such conflict.⁷³ This prioritisation of the NAFTA over the WTO is in recognition of the higher standards being demanded in the regional organisation in the sensitive policy area of the environment, which perhaps needs to be formally echoed by the European Court of Justice on behalf of the EC.

The lack of a co-ordinated external commercial policy⁷⁴ of the NAFTA countries will also pose some interesting conundrums in the future,⁷⁵ particularly in light of the fact that many of the WTO disputes pits the first world, represented by the USA and Canada, against the developing world, with many of whom Mexico would have an empathy.⁷⁶

The EC / WTO relationship

The EC is unusual in that it is the only RIA currently recognised as a member of the WTO, with its constituent member states holding a parallel membership in their own rights.⁷⁷ The EC holds as many votes as it has members.⁷⁸ None of the other regional groupings⁷⁹ have direct relationships with the WTO, and must be "regulated vicariously through their constituent Member States".⁸⁰ Despite this recognition of the EC in the WTO forum, a full elaboration of the relationship remains outstanding.⁸¹ In Opinion 1/94⁸² the ECJ held that the Common Commercial Policy of the EC currently enshrined in Article 133 EC⁸³ entitled the Commission to develop an external Common Commercial Policy.⁸⁴ Matters such as the GATS⁸⁵ and TRIPs⁸⁶ were held to be outwith the delegated powers of the EC, and remained in the exclusive competence of the EC member states.

As neither the World Trade Organisation nor GATT is expressly referred to in the EC treaty,⁸⁷ the relationship between the two organisations, in the context of EC jurisprudence, has been developed by way of case law of the ECJ.

Article 302 EC⁸⁸ empowers the European Commission, to "maintain such relations as are appropriate with all international organisations. European Law requires the EC to adhere to all of its international law commitments, with "the provisions of such an agreement" being deemed to form an integral part of the community system",⁸⁹ with an obligation being placed on the ECJ to ensure the "uniform application" of the terms of such agreements throughout the Community,⁹⁰ in order to ensure that they are not used to create barriers to trade.

ECJ jurisprudence recognises that the EC was substituted for the Member States with regard to commitments under the GATT as far back as on the 1st July 1968, when the EC introduced its Common Customs Tariff.⁹¹ The ECJ has taken upon itself the role of interpreter of the GATT by way of preliminary ruling under Article 234 EC,⁹² with regard to issues arising as and from that date, (1968).⁹³

In 1972 the ECJ recognised that the provisions of GATT 1947 was binding on the Community,⁹⁴ however the same case went on to say that the issue of whether or not an EC provision is illegal because it is in breach of a public international law obligation, it is necessary to establish; 1. The public international obligation is binding on the Community, and 2, where the proceedings are before a national court, that the rule is self-executing.⁹⁵ Regard must also be had to the "spirit, the structure and the terms of the convention".⁹⁶ In 1972 it was found that, because there was great flexibility in the earlier GATT, it was considered that the particular part of GATT in question at the time, was not self-executing. Such an argument would not be as persuasive with regard to the GATT 1994. The ECJ has yet to overturn a provision of EC law on the basis that it is incompatible with GATT rules,⁹⁷ however some day it may be required to re-enact the judgement of Solomon.

The effect of NAFTA and the EC in the WTO

While differences exist, the NAFTA and GATT are broadly similar in structure and intent, with the EC having a significantly different legal structure and political intent.⁹⁸ This difference in legal structure, together with the articulation of the two RIA's to the WTO are likely to give rise to many legal problems.

A situation could easily arise where conflicting judgements arise from adjudications on the same situation from both the WTO DSB pursuant to WTO rules, and the RIA dispute settlement, or in the case of the EC, a judgement of the ECJ, utilising regional rules.⁹⁹ There is no clear mechanism for prioritising a conflict of laws situation, with some indication, as referred to earlier, that the North American countries will prefer the NAFTA rules in some circumstances, and the EC stating that WTO rules take priority if certain conditions are met, but the balance of priority between EC policy areas, and the consequent political fall out, if trade issues override other more electorally sensitive issues, is likely to considerably muddy the waters.

If rules are to be developed at the WTO level to address these difficulties, the articulation of different regional legal obligations to the WTO may require different mechanisms, in order to satisfactorily address the issues arising from the radically different legal construct of the RIA's.¹⁰⁰

From the internal jurisprudential standpoint of the RIA's, particularly in the case of the EC, further clarification of the exact nature of the legal relationship with the WTO is required. The continuing ambiguities, fudged in 1994 by the signing of the GATT by both the EC and each of its constituent member states, can not be left in abeyance in perpetuity.

Equally the legal status of the NAFTA, and its legal articulation to the jurisdictions of its member states also requires attention, together with NAFTA's relationship with the WTO, in order to achieve a clear picture of the hierarchy on norms in the global context. Care will have to be taken in these discussions on both sides of the Atlantic, and in the context of other RIA's with a problematic relationship with the WTO, in order to ensure that WTO agreements have an equality of force of persuasiveness within all of its member states, in order to ensure that the nature of the relationship of the national jurisdiction with the WTO does not of itself create unequal distortions in global trade flows. It is the *effect* of the legal structures that requires examination, rather than the legal phrasing of the articulation documentation, as a legal document only means what its implementing court says it means, and not what some other third party thinks it means. The same phrase in the English language has often been interpreted differently in common law courts of different English speaking jurisdictions. The complications that can arise when different languages are used, and different legal systems interpret the same agreement can give rise to a reincarnation of the tower of Babel. It is for this reason that the EC instituted the ECJ, one court, using one language, French, and a blend of jurisprudential techniques to give a final interpretation of EC law, enforceable in an equal manner in every member state.

Another important distinction between the regional and multilateral approaches is that the regional agreements have, to a greater or lesser degree, and in built dynamism. The articulation problems of the WTO and its RIA's must also recognise that the RIA's, particularly the EC, is a highly dynamic organisation, which is constantly evolving. The articulation must be developed in such a manner to facilitate growth and expansion, in whatever direction the EC may take in the future. The dynamism of the RIA's highlights the lack of same at the WTO level, despite the fact the WTO is still a young organisation. The RIA's will require the WTO to develop in ways in which it is not currently empowered so to do, to cover, for example, new trade, environmental and labour issues *as and when they surface* during disputes.

Failure timeously to resolve issues *as they surface* will lead to increasing global tensions,¹⁰¹ and a disengagement by peoples and states form the WTO concept.¹⁰²

As stated before, EC citizens have surrendered significant amounts of national sovereignty in return for higher living standards, which they will be most reluctant to forgo in order to comply with WTO or other international obligations. The EC and NAFTA must therefore, in the debates concerning regionalism and globalism, be differently classified. It must be always remembered that the powers of governments to act on the international stage is always delimited by what is deemed politically acceptable by their electorate. This has been recognised by the OECD.¹⁰³

The differing approaches of the EC, with its comprehensive coverage of policy areas, and laws enforceable by a supra national entity, and the trade dominated policies of the NAFTA, which relies on national enforcement mechanisms, is in effect a conflict of cultures, which, despite the best will in the world, will lead to conflict. These conflicts have been signalled for a very long time, with the Banana dispute and the Beef Hormone dispute already hitting the national headlines, with GM crops likely to follow suit. Many more disputes, whereby the American trade dominated policy comes into conflict with the fine balance being maintained in the EC between the policies of trade, development, health etc. are foreseeable.

Conclusion.

The concept of subsidiarity,¹⁰⁴ has entered into Eurospeak, whereby the increasing complexity of concurrent competence of different levels of governance¹⁰⁵ within the EC, is now being exacerbated by issues of globalisation, and the unresolved relationships between the global and regional trade organisations. Whenever the issues referred to above dealing with the articulation between the WTO and the RIA's has been resolved, the issue of subsidiarity at this level will also need to be addressed.¹⁰⁶

The complexity of the relationship between regional agreements and the WTO cannot merely be addressed in economic terms, as acknowledged by the OECD,¹⁰⁷ who have stated that regional agreements "always need to be considered in terms of their political and strategic importance as well as in

terms of their impact on the multilateral trading system".¹⁰⁸ Equally the needs and fears of national electorates, whether justified or otherwise, must always be taken into account. The future of the relationship between the two will be a complicated and evolving relationship.

A thought occurs that globalisation is in effect an agreement between states, in an era when the powers of states is perceived to be in decline. The EC, in light of its greater integration, has begun to discover the restrictions that states can have on free trade, and in the area of European Corporate law, has begun to develop legal entities which do not need to have their roots in a particular Member States jurisdiction. Experiments along the lines of the European Economic Interest Groupings, EEIGs,¹⁰⁹ and the proposed European Company, Societas Europea,¹¹⁰ together with legal academics current inquiry into the possibility to move an existing company across and national border,¹¹¹ while not yet achieving the objective of a stateless legal entity, indicated the direction of thinking, which if ever it comes to fruition, may have repercussions, not only at a regional level, but also at a global level. Can the WTO, in its current manifestation, ever conceivable develop to deal with stateless global legal entities?

¹ Irish equivalent of Prime Minister.

² Noble Symposium 17: Small States in International Relations. EDS. August Shou and Arne Olav Bruntland, Wiley 1971. Sean F. Lemass.

³ Treaty Establishing the European Coal and Steel Community, Paris, April 18, 1951.

⁴ Regional Integration and the Multilateral Trading System: Synergy and Divergence, OECD 1995. Executive Summary page 13.

⁵ *ibid.* at page 14.

⁶ pursuant the Uruguay Round of GATT.

⁷ ANZCERTA

⁸ *Op cit.* Footnote no. 4, at page 43.

⁹ *Op cit.* Footnote no. 4, at page 14.

¹⁰ On the 1st January 1994, pursuant to the Canada-Mexico-United States: North American Free Trade Agreement [done Dec. 8-17, 1992], 32 I.L.M. 289 & 605.

¹¹ The USA, Canada and Mexico.

¹² Such as technical barriers to trade, subsidies, government procurement and quantitative restrictions (QR's).

¹³ *Op cit.* Footnote no. 4.

¹⁴ Frederick M. Abbott, "Law and Policy of Regional Integration- The NAFTA and Western Hemispheric Integration in the World Trade Organization System", Kluwer 1995, at page 25.

¹⁵ North American Agreement on Environmental Co-operation, Canada- Mexico- United States: North American Agreement on Environmental Cooperation [done Sept. 8-14, 1993], 32 I.L.M. 1480 (1993).

¹⁶ North American Agreement on Labor Co-operation, Canada- Mexico-United States : North American Agreement on Labor Cooperation [done Sept 8-14, 1993], 32 I.L.M. 1499 (1993), each entered into force Jan 1, 1994.

¹⁷ *Op cit.* Footnote no. 14, at page 113.

¹⁸ *Op cit.* Footnote no. 14, at page 23.

¹⁹ "Determined to lay the foundations of an ever closer union among the peoples of Europe", Preamble to the Treaty of Rome, 1957.

²⁰ *Op cit.* Footnote no. 14, at page 23.

²¹ *Ibid.*

²² Ibid.

²³ These two institutions are supplemented by the Border Environment Commission and the North American Development Bank (NADBANK).

²⁴ Op cit. Footnote no. 14, at page 28.

²⁵ Op cit. Footnote no. 14.

²⁶ Op cit. Footnote no. 4, at page 14.

²⁷ Op cit. Footnote no. 4, at page 48.

²⁸ One of a kind.

²⁹ Treaty on European Union 1992.

³⁰ Article 210 EC, pre Amsterdam.

³¹ See the line of ECJ case law commencing with Case 6/64, *Costa v. ENEL*, [1964] ECR 405, [1966] CMLR 111, where the principle was recognised, and subsequently developed in Case 11/70, *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125 (national constitutional law), to include the protection of recognised rights under EC law, and also potential rights not yet ruled upon by the ECJ; Case C-213/89, *R v. Secretary of State for Transport, ex parte Factortame Ltd and others* [1990] ECR I-2433.

³² All national courts and tribunals are obliged to apply European Community law; Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal* [1978] ECR 629.

³³ Article 113 EC.

³⁴ Article 81 and 82 EC, (Article 85 and 86 EC pre Amsterdam).

³⁵ Article 152 EC, (Article 129 EC pre Amsterdam).

³⁶ Articles 158 to 162 EC, (Articles 130a to 130d EC pre Amsterdam).

³⁷ Articles 136 to 145 EC, (Articles 117 to 122 EC pre Amsterdam).

³⁸ Articles 174 to 176 EC, (Articles 130r to Article 130t EC pre Amsterdam).

³⁹ Articles 220 to 245 EC, (Articles 164 to Articles 188 EC pre Amsterdam).

⁴⁰ See Article 237 EC, (Article 180 EC pre Amsterdam), for the limits of jurisdiction of the Court of First Instance.

⁴¹ Opinion 1/94 [1994] ECR 5254.

⁴² Currently Norway, Iceland, Liechtenstein and Switzerland.

⁴³ As of the 1st January 1994, but not including Switzerland.

⁴⁴ Under the Europe Agreements.

⁴⁵ Initially under the Yaunde Convention (July 1963) but currently under the Lome convention of the 28th of February 1997, which is due to expire on the 29.2.2000, and which is currently being renegotiated.

⁴⁶ Pursuant to the Barcelona Declaration, adopted at the Euro-Mediterranean Conference, 27th and 28th November 1995, with currently intends, together with the EC/EU, to encompass within the proposed Euro Mediterranean Economic Area, the countries of Tunisia, Morocco, Algeria, Egypt, Lebanon, Israel, Jordan, Turkey, Cyprus, Malta Syria, and the Palestinian Authority.

⁴⁷ Council Regulation (Euratom, EC) No 1279/96, which covers the NIS (Former USSR less the Baltic States) plus Mongolia.

⁴⁸ which commenced with the Punta del Este declaration in September 1986, and culminated in the signing of the final texts in Marrakech, Morocco, April 1994, which duly entered into force on the 1st January 1995.

⁴⁹ Op cit. Footnote no. 14, at page 104.

⁵⁰ Op cit. Footnote no. 4, at page 46.

⁵¹ Ibid.

⁵² Op cit. Footnote no. 4.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Op cit. Footnote no. 4, at page 43.

⁵⁶ which are permitted under the GATT under Article XXIV of GATT 1994 and Article V of GATS.

⁵⁷ Op cit. Footnote no. 14, at page 30.

⁵⁸ Op cit. Footnote no. 14, at page 30.

⁵⁹ Op cit. Footnote no. 14, at page 116.

⁶⁰ Op cit. Footnote no. 14, at page 56.

⁶¹ Op cit. Footnote no. 14, at page 106.

⁶² The USA, Canada and Mexico.

⁶³ "Article 2005(1) NAFTA expressly refers to disputes under the GATT, agreements negotiated under the GATT, or GATT successor agreements, and thus avoids the ambiguity inherent in NAFTA Article 103 regarding NAFTA-GATT-WTO priority". Op cit. Footnote no. 14, at page 100.

⁶⁴ Op cit. Footnote no. 14, at page 25.

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- ⁶⁵ Established under Art 2008(2).
- ⁶⁶ Op cit. Footnote no. 14, at page 102.
- ⁶⁷ Art 2005(3)
- ⁶⁸ Op cit. Footnote no. 14, at page 100.
- ⁶⁹ This deals with sanitary and phytosanitary measures and technical standards.
- ⁷⁰ Op cit. Footnote no. 14, at page 102.
- ⁷¹ Op cit. Footnote no. 14, at page 106.
- ⁷² Op cit. Footnote no. 14, at page 108.
- ⁷³ Op cit. Footnote no. 14, at page 108.
- ⁷⁴ Which is prevented from developing, at least in part, by the constitutional restrictions on the executive of the United States in the area of international commerce, Op cit. Footnote no. 14, at page 32.
- ⁷⁵ Op cit. Footnote no. 14, at page 30.
- ⁷⁶ Op cit. Footnote no. 14, at page 32.
- ⁷⁷ Whether it is the EC, or its constituent member states which vote at WTO meetings is an internal matter for the EC.
- ⁷⁸ An interesting fact given that the EC has plans to rapidly expand its membership into central and eastern Europe, and given that the USA, which has a comparable population base, has only one vote at the WTO.
- ⁷⁹ The lack of legal personality for NAFTA, together with the lack of "an express mechanism for the formulation and implementation of a common external policy" has prevented NAFTA from having a direct voice in the affairs of the WTO, and has hampered the development of a direct NAFTA/WTO/EC relationship. Op Cit. Footnote no. 14 at page 31.
- ⁸⁰ Op cit. Footnote no. 14, at page 42.
- ⁸¹ Op cit. Footnote no. 14, at page 32.
- ⁸² Opinion 1/94 of 15.11.1994 Opinion pursuant to Article 228(6) of the EC Treaty. ECJ [1994] 5267
- ⁸³ Article 113 EC, pre Amsterdam.
- ⁸⁴ Introducing the concept of Implied Parallel Powers into EC jurisprudence. See Constitutional Aspects of Opinion 1/94 of the ECJ concerning the WTO, *International and Comparative Law Quarterly*, Volume 45 April 1996, page 440, Andrea Appella.
- ⁸⁵ While the cross-border direct supply of services was analogous to the trade in goods and therefore part of the Common Commercial Policy, the rest of the modes of the supply of services regulated by GATS i.e. consumption abroad, commercial presence and the presence of natural persons, exceeded the limits of Article 113 EC and the Common Commercial Policy: "The International Practice of the European Communities Current Survey, A Survey of the Principal Decisions of the European Court of Justice pertaining to International Law in 1994", Christopher Vedder and Hans-Peter Folz, page 131.
- ⁸⁶ Article 113 only covered the provisions of TRIPs dealing with the fight against the release of counterfeit goods into free circulation, since these related to measures taken by customs authorities at the external frontiers of the Community. Intellectual Property rights did not relate specifically to international trade: "The International Practice of the European Communities Current Survey, A Survey of the Principal Decisions of the European Court of Justice pertaining to International Law in 1994", Christopher Vedder and Hans-Peter Folz, page 131.
- ⁸⁷ Although reference is made to international reciprocal agreements under Article 310 EC, (Article 238 EC, pre Amsterdam).
- ⁸⁸ Article 229 EC, pre Amsterdam.
- ⁸⁹ *Hauptzollamt Manz v. C.A. Kupferberg & Cie. K.G. a.A.* (reference for a preliminary ruling from the Bundesfinanzhof) Case 104/51 [1982] ECR 3641.
- ⁹⁰ *Ibid.*
- ⁹¹ *Anministrazione delle Finanze dello State v. Societa Petrolifera Italiana SpA (SPI) and SpA Michelen Italiana (SAMI)* (reference for a preliminary ruling from the Corte Suprema di Cassazione). Joined Cases 267 - 269/81. [1982] ECR 801.
- ⁹² Article 177 EC, pre Amsterdam.
- ⁹³ Op cit. Footnote no 91.
- ⁹⁴ *International Fruit Company N.V. and others v. Productschap Voor Groenten en fruit (No 3) case 21 - 24 /72).*
- ⁹⁵ *Ibid.*
- ⁹⁶ *Ibid.*
- ⁹⁷ Op cit. Footnote no. 14, at page 56.
- ⁹⁸ Op cit. Footnote no. 4, at page 52.
- ⁹⁹ Op cit. Footnote no. 14, at page 59.
- ¹⁰⁰ Op cit. Footnote no. 14, at page 60.
- ¹⁰¹ Op cit. Footnote no. 4, at page 14.

¹⁰² Op cit. Footnote no. 4, at page 15.

¹⁰³ "Widely based political acceptability is becoming part and parcel of any trade agreement, not simply a desirable addition. In the new environment, therefore, much more potential exists for conflict between global and regional levels, as well as between national and other levels." Op cit. Footnote no. 4, at page 21.

¹⁰⁴ Subsidiarity, as a legal term, is an EC concept introduced by the Maastricht treaty, 1992. It deals with the allocation of competence in a situation of concurrent competence between 2 or more levels of governance. Article 5 EC (Article 3b pre Amsterdam) states that: "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

¹⁰⁵ In the context of the EC, these are the Supranational bodies of the EC, the National Governments, and the sub national regional governments, which it is EC policy to develop and strengthen, with a view to bringing government closer to the people.

¹⁰⁶ Op cit. Footnote no. 4.

¹⁰⁷ Op cit. Footnote no. 4, at page 35.

¹⁰⁸ Op cit. Footnote no. 4, at page 36.

¹⁰⁹ Council Regulation (EEC) 2137/85, OJ L 199, 31/7/85, page 1.

¹¹⁰ Proposal for a Council Regulation on the Statute of a European Company, OJ C 263 16.10.89, page 41.

¹¹¹ Pursuant to the British case of R. v. HM Treasury ex parte Daily Mail & General Trust plc. [1989] All ER 328.