GROPING TOWARDS UTOPIA (II): SPECULATIONS ON LAW, POLICY, AND HUMAN LIFE

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Table of Contents

I.	INTRODUCTION	1
II.	WHAT DOES IT MEAN TO BE – AND NOT TO BE – HUMAN IN AMERICAN LAW?	4
	A. The Race Question	4
	B. Legal Status of the Fetus	6
	C. Cloning and Stem Cells	8
III.	WHAT IS A HUMAN'S VALUE IN AMERICAN LAW*?*	10
	A. Wrongful Death	10
	B. Wrongful Birth	12
IV.	ANOTHER MODEST PROPOSAL	13
V.	CONCLUSION	17

I. INTRODUCTION

This essay takes as its starting point the proposition that we are too many.[1]

How many are too many? Despite the Green Revolution, which began in the early 1970s, an estimated 786 million people on this planet are still going hungry.[2] One might counter that the

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1. *See* Joel L. Swerdlow, *Population,* NATIONAL GEOGRAPHIC, Oct. 1998, at 3 ("Of all the issues we face as the new millennium nears, none is more important than population growth. The numbers speak for themselves. The Earth's population, which totaled 1.7 billion people in 1900, is now nearly 6 billion--and growing."); PAUL R. EHRLICH & ANNE H. EHRLICH, THE POPULATION EXPLOSION (1990).

> In 1968, *The Population Bomb* warned of impending disaster if the population explosion was not brought under control. Then the fuse was burning; now the population bomb has detonated. Since 1968, at least 200 million people--mostly children--have perished needlessly of hunger and hunger-related diseases, despite "crash programs to "stretch" the carrying capacity of Earth by increasing food production."

Id. at 9.

2. Peter Rosset et al., *Lessons from the Green Revolution,* TIKKUN MAGAZINE, Mar. 1, 2000, *available at* http://www.foodfirst.org/media.

problem is not insufficient productivity but, rather, poor distribution. But,

> [t]here is also growing evidence that Green Revolution-style farming is not ecologically sustainable, even for large farmers. In the 1990s, Green Revolution researchers themselves sounded the alarm about a disturbing trend that had only just come to light. After achieving dramatic increases in the early stages of the technological transformation, yields began falling in a number of Green Revolution areas. . . . The causes of this phenomenon have to do with forms of long-term soil degradation that are still poorly understood by scientists. . . . Where yields are not actually declining, the rate of growth is slowing . . . or leveling off, as has now been documented in China, North Korea, Indonesia, Myanmar, the Philippines, Thailand, Pakistan, and Sri Lanka.[3]

If the race between population growth and food supply cannot be won by the farmers and the chemical companies that supply their fertilizers, then we must either control, and presumably reverse, population growth of our species or leave it to the Four Horsemen of the Apocalypse — war, pestilence, famine and disease — to perform their age-old roles.

Even if sufficient food can somehow be produced to feed the ever-increasing numbers of human mouths, a second question immediately forces itself upon our attention: what prices in environmental degradation and loss of other species are we prepared to pay for the ability to feed today's six billion and the billions more our population projections anticipate for this new century? Put another way,

> [h]ow many cell phones is a gorilla worth? In the Democratic Republic of the Congo, eastern lowland gorillas are being killed for food by miners searching

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3. *Id. See also* T.R. Reid, *Feeding the Planet,* NATIONAL GEOGRAPHIC, Oct. 1998, at 65.

> Just three crops — wheat, rice, and corn — dominate grain production. This specialization has helped drive the agricultural boom of the past 30 years. . . . Relying so heavily on such a narrow genetic base is risky, however. One virulent disease could cause crop failure and famine. Even if crops stay healthy and cereal grain production continues to climb as projected . . . the global food supply may ultimately fall short.

Id.

> for coltan, a mineral in demand for making capacitors used in high-tech electronics. . . .
>
> The gorillas' forest habitat is not the only ecosystem taking a beating. With globalization, humans are increasingly mismanaging such ecosystems, from prairies to forests to oceans. This abuse harms not only wildlife but also our own economic interests.[4]

Some intellectuals have had the temerity to question the assumption that a just and "humane" society must value human life, without qualification, above all else on the planet. Most notable in this camp is Princeton philosopher Peter Singer. Singer stirs controversy wherever he speaks because he does not shrink from the tough questions, such as: "The rights we endow humans with, moral rights if you will, would not justify treating them as we do animals. . . . Why is it that all humans have this moral standing that protects them from being treated cruelly, but animals don't? Why are other species outside this sphere of equality?"[5]

The way Singer answers his own questions is what gets folks riled up.

> According to Singer, there are some humans, those with severe disabilities for example, who cannot really be called rational beings, and who are in fact less rational than non-human animals.
>
> Inferiority of animals can be taken for granted by philosophers because they are humans writing for other humans. . . . The fact that they are not the same species is no more reason to keep them from equality than is race or sex. . . .
>
> 'I couldn't say that the lives of humans who do not have self-awareness are more precious than a thinking, conscious animal,' said Singer.[6]

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4. *Valuing the Invaluable,* NATIONAL GEOGRAPHIC, Nov. 2001, at 10.
5. Laura Sass, *Peter Singer Imparts Philosophy at Rider*, THE RIDER NEWS, Apr. 12, 2002, at 1.
6. *Id. See also* Animal Freedom, *Factory farm animals and people from the third world are modern slaves, at* http://www.animalfreedom.org/english/opinion/slavery.html (last visited Sept. 9, 2002) ("In countries with factory farms animals are exploited as modern slaves, just as inhuman as the 'old' human slaves were treated and just as invisible.").

The fact is that at the dawn of this new century, we are confronted with two related, compelling questions which may be more fundamental than any others currently facing us:

- What does it mean to be "human"; and
- What is the value of a human life?

These questions are begged by the new technologies which will soon enable human cloning. They are begged by the bitter struggle between the right-to-life and the right-to-choose camps in the abortion debate. They are begged by the pharmaceutical industry and the medical profession, which together can cure many forms of cancer, eradicate small pox, and control HIV . . . but which cannot adequately serve the millions of Americans who have no health insurance, and which cannot help the tens of millions of HIV-positive Africans who cannot afford the expensive chemical cocktails.[7] And they are begged by the challenge posed to our carbon-based intelligent species by the silicon-based artificial intelligence of computing machines.[8]

Of course, while these questions may be far more compelling now, as we approach the shore of a Brave New World, they are questions with which the American law has always had to grapple. And so this discussion will commence with a look backward, before attempting to look ahead.

II. WHAT DOES IT MEAN TO BE--AND NOT TO BE--HUMAN IN AMERICAN LAW?

A. The Race Question

As Judge A. Leon Higginbotham has pointed out, the white American colonists did not immediately declare Africans to be sub-

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7. *See Africa Today,* NATIONAL GEOGRAPHIC, Sept. 2001, Map Section.

> As devastating as war, AIDS is tearing into the heart of African societies. It has killed more than 16 million people; 25 million more are infected with HIV. . . . Some 20 percent of adults are infected in South Africa, 36 percent in Botswana. The epidemic is fueled by taboos against discussing sex, lack of education about the transmission of HIV, women's second-class status, and the high cost of treatment.

Id.

8. *See* JIM JUBAK, IN THE IMAGE OF THE BRAIN: BREAKING THE BARRIER BETWEEN THE HUMAN MIND AND INTELLIGENT MACHINES ix (1992) ("Machines that incorporate some principles of the physical brain challenge our understanding of what a human being is all about."); ROBERT L. NADEAU, MIND, MACHINES, AND HUMAN CONSCIOUSNESS 43 (1991) ("The fundamental breakthrough that now seems required in order to accomplish this technological feat is a theoretical model that describes the global aspects of brain function in mathematical, or full scientific, detail.").

human. Taking the Commonwealth of Virginia as his case study, Judge Higginbotham discovered that "[w]hen the first Africans arrived at Virginia in August 1619, they were initially accorded an indentured servant status similar to that of most Virginia colonists."[9] But by 1669 Virginia common law and social attitudes had evolved to the point where the colony's lawmakers enacted "the first legislative pronouncement in Virginia that blacks were not fully human."[10]

Higginbotham continues, "[b]y 1705 the precept was even more deeply embedded in the minds and laws of white Virginians. The 1705 statute stated that if a master killed his slave, the law would treat the killing 'as if such accident had never happened.'"[11]

Once one has been educated about this early Virginian history, duplicated throughout the American south, the *Dred Scott* decision seems almost inevitable. In the key passage of the opinion Chief Justice Taney wrote of the Africans,

> They had for more than a century before [the Declaration of Independence and the Constitution] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.[12]

Much the same conclusions were drawn by the white colonizers with regard to the Native Americans. "The basic conquest myth postulates that America was virgin land, or wilderness, inhabited by nonpeople called savages; that these savages were creatures sometimes defined as demons, sometimes as beasts 'in the shape of men.'"[13]

Following the Civil War and the passage of the Thirteenth Amendment, no one could deny the legal status of African-Americans as fellow human beings, however second-class might be

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9. A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 18 (1996).

10. *Id.* at 51.

11. *Id.*

12. Dred Scott v. Sandford, 60 U.S. 393, 407 (1856).

13. FRANCIS JENNINGS, THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST 15 (1976).

the citizenship they were accorded. As for the Native Americans, prior to the Civil War, the largest enclave, known as the Five Tribes — Choctaws, Chickasaws, Cherokees, Creeks and Seminoles — which occupied most of modern Oklahoma, not only had their own governments, constitutions, court systems and schools; they even owned some 7,500 Black slaves.[14] "After the Civil War came the era of Christian reformers in Indian Affairs," and while surely viewed by whites as inferior humans — much like African-Americans — they were no longer considered to be "beasts in the shape of men."[15] In sum, while African Americans and Native Americans might remain second-class citizens and non-citizens, respectively, for many decades to come, their fundamental "humanness" was no longer denied by the American legal system.

Still, it is my argument that this nation's history of mistreatment of people of color established a line of thought in American law to the effect that some among us are not merely less equal, but are actually less than truly human. This might at first blush appear to be the antithesis of liberalism. Ironically, the view reemerged in the late twentieth century as the most radical and inflammatory of liberal views.

B. Legal Status of the Fetus

The legal category which I will label "non-human" did not disappear with the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments and the enactment of enabling legislation. The category remained in American law, as it does today. One notable occupant of this category is the human fetus. The non-human status of the fetus under Texas law comprised a significant part of the plaintiff's argument in *Roe v. Wade.*[16] This argument included the following legal propositions:[17]

- The killing of a fetus was not considered in Texas to be murder or any other form of homicide;

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14. TED MORGAN, A SHOVEL OF STARS: THE MAKING OF THE AMERICAN WEST 1800 TO THE PRESENT 404 (1995).

15. *Id.* at 369. ("The reformers assumed that progress depended on turning the Indians into farmers. Education and religion, they believed, would facilitate the transition. . . . Essentially, the peace policy--known at the time as 'piety or bullets'--aimed to move the Indians onto reservations under religious supervision. Congress wanted them to be self-sufficient. . . ."); JENNINGS, *supra* note 13, at 15.

16. 410 U.S. 113 (1973). *See also* SARAH WEDDINGTON, A QUESTION OF CHOICE 97-98 (1992).

17. WEDDINGTON, *supra* note 16.

- A pregnant woman engaging in conduct which was inadvertently fatal to the fetus was not guilty of negligent homicide;
- "No legal formalities [regarding] death were observed with respect to a fetus;"[18]
- Most property rights were contingent upon the fetus being born alive;
- Tort recovery was confined to babies who were born alive;
- No benefits, such as under workers' compensation statutes, were awarded to children unless they had been born.

This theme was pressed by plaintiff's counsel both in their initial briefs and in their supplemental briefs after the Court ordered re-argument of the case.[19] Furthermore, the plaintiffs contended that Texas law was typical of American law in the aggregate.

> [A] section of the brief stressed, yet again, the fact that Texas had never treated the fetus as having the rights and dignity of a person. We cited an 1889 decision which held that in order to obtain a murder conviction, the State must prove "that the child was born alive." We mentioned that under the rules of the Texas Welfare Department, a needy pregnant woman could not get welfare payments for her unborn child; that a federal court in Pennsylvania had held that the embryo or fetus is not a person or citizen within the meaning of the Fourteenth Amendment or the Civil Rights Act; and that a New York state court had concluded that the Constitution does not confer or require legal personality for the unborn.[20]

The second oral argument reflected the concern of at least some members of the Court about this issue of a fetus's humanness, or lack thereof.

> Justice Stewart asked, 'If it were established that the fetus were a life, you would have a difficult case, wouldn't you?' . . . .

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18. *Id.* at 97.

19. *Roe*, 410 U.S. at 113. Interestingly, in light of the topic of this essay, it has been said that no case "except the *Dred Scott* case has aroused as intense popular emotion." ARCHIBALD COX, THE COURT AND THE CONSTITUTION 322 (1987).

20. WEDDINGTON, *supra* note 16, at 135.

> Stewart then asked, 'Do you know of any case anywhere that [has] held that an unborn fetus is a person within the meaning of the Fourteenth Amendment?'
>
> 'No,' [counsel for the State of Texas] responded, 'we can only go back to what the framers of our Constitution had in mind.'[21]

Ultimately, the majority opinion embraced the principle that a fetus is a not a person for purposes of the Fourteenth Amendment.[22] As noted above, I see some irony here: while, no doubt, all my readers abhor slavery, it seems equally certain that many support a woman's right to an abortion; both *Dred Scott* and *Roe* arguably spring from a fundamental cultural or legal tradition that accepts the proposition that not all who share the genetic make-up of *homo sapiens* are truly "human."[23]

C. Cloning and Stem Cells

The debate, which has swirled around *Roe v. Wade* for some three decades, has spilled over into the bio-tech laboratories where stem cell research and cloning are science's concerns. President George W. Bush's bioethics panel recently favored a four-year moratorium on stem cell research, reasoning that

> [a] moratorium . . . would allow for a broader public debate about [stem cells'] moral status. Like human embryos, cloned cells have the potential to become a normal human baby. Scientists propose to destroy cloned cells to yield undifferentiated stem cells, which they hope to grow into replacement tissue for a variety of diseased and damaged organs.
>
> The report questions the ethics of creating cloned cells solely for medical experiments and therapies. 'There's an important moral boundary here, and we

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21. *Id.* at 139.
22. *Roe*, 410 U.S. at 158-59.
23. Obviously, I understand that the law recognizes that business entities, notably corporations, are "persons" under the Fourteenth Amendment, but this point does not affect the fundamental thrust of my argument, since it is only as incorporations of people that corporations enjoy this status. *See* COX, *supra* note 19, at 121.

> need time to discuss the costs of crossing it and not crossing it.'[24]

No less an academic light than Francis Fukuyama has weighed in, postulating a "Factor X."[25] According to Fukuyama, it is this human essence that, contrary to Peter Singer's view, accords us rights to which other species are not entitled. "You can cook, eat, torture, enslave, or render the carcass of any creature lacking Factor X, but if you do the same thing to a human being, you are guilty of a 'crime against humanity.'"[26] Fukuyama then acknowledges the point made above, namely that

> [t]he circle of beings to whom we attribute Factor X has been one of the most contested issues throughout human history. For many societies, including most democratic societies in earlier periods of history, Factor X belonged to a significant subset of the human race, excluding people of certain sexes, economic classes, races, and tribes and people with low intelligence, disabilities, birth defects, and the like.[27]

Arguing that Factor X is more than the sum of its parts--consciousness, intelligence, ability to make moral choices--Fukuyama concludes that

> [a]n embryo may be lacking in some of the basic human characteristics possessed by an infant, but it is also not just another group of cells or tissue, because it has the *potential* to become a full human being. . . . It is therefore reasonable . . . to question whether researchers should be free to create, clone, and destroy human embryos at will.[28]

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24. Jeffrey Brainard, *Presidential Bioethics Panel Recommends Moratorium on Research Cloning*, THE CHRONICLE OF HIGHER EDUCATION, July 12, 2002, *available at* chronicle.com/daily/2002/07/2002071201n.htm.

25. FRANCIS FUKUYAMA, OUR POSTHUMAN FUTURE 149 (2002) ("What the demand for equality of recognition implies is that when we strip all of a person's contingent and accidental characteristics away, there remains some essential human quality underneath that is worthy of a certain minimal level of respect — call it Factor X.").

26. *Id.* at 150.

27. *Id.*

28. *Id.* at 176.

Fukuyama fully appreciates the irony that the stem cell debate holds the potential to rip apart traditional political coalitions. In the United States, for example, the Right includes economic libertarians who prize business entrepreneurship and social conservatives who abhor abortion. The former should favor stem cell research, which holds the promise of new bio-technology industries, while the latter should condemn it, if they are to be consistent.[29] As for the American law, *Roe v. Wade* would seem to compel the conclusion that embryos, destroyed to produce stem cells, are not "persons" under the Fourteenth Amendment . . . in other words, not "human" because they lack Factor X.

But what then of clones; should we actually create such creatures some day soon? Will my clone be accorded the same rights that I enjoy under the United States Constitution? Or will the clone be my property, its status as a person or non-person, human or non-human, dictated by legal principles drawn from the ancient American legal tradition which culminated in the *Dred Scott* decision?

III. WHAT IS A HUMAN'S VALUE IN AMERICAN LAW?

A. Wrongful Death

Certainly the most famous and influential consideration of the value of human life in American tort law was undertaken in the 1970s by Richard A. Posner, now chief judge for the United States Court of Appeals for the Seventh Circuit and an author of considerable renown. In his groundbreaking study,[30] Posner posited the following proposition concerning the valuation of a human life:

> [s]ince the loss of vision or limbs reduces the amount of pleasure that can be purchased with a dollar, a very large amount of money will frequently be necessary to place the victim in the same position of relative satisfaction that he occupied before the accident. This factor is most pronounced in a death case. Most people would not exchange their life for anything less than an infinite sum of money, if the exchange were to take place immediately, since they would have so little time in which to enjoy the proceeds of the sale. Yet it cannot be correct that the proper award of damages in a death case is infinity.

29. *Id.* at 177.
30. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1972).

> This would imply that the optimum rate of fatal accidents was zero, or very close to it, and it is plain that people are unwilling individually or collectively to incur the costs necessary to reduce the rate of fatal accidents so drastically.[31]

The courts, Posner continues, solved this problem "by ignoring it."[32] In other words, the value of the life lost is equated to the pecuniary loss that will be endured by the survivors, plus pain and suffering endured by the decedent prior to death.[33] A particularly difficult problem is posed by the death of a child. The loss felt by the parents is incalculable. Yet from a purely pecuniary posture, the child's future earning capacity cannot be calculated; therefore, the only reliable measure is the investment made in the child to the date of death by the parents.[34]

These sorts of valuations might strike one as disturbingly similar to the values placed upon slaves in the antebellum American South.[35] The practice of slavery persists in parts of the world today, and where it is still practiced, continues to place a value on human — including children's — lives.[36] What seems to be the most significant distinction between tort valuations determined by juries and the price of slaves — either in the antebellum American South or in twenty-first century Africa — is the ability of the former to include an award for pain and suffering, at least in cases where the plaintiffs can bear their burden of proving that the decedent survived long enough to sustain such injuries. Otherwise, the parallel between valuing a life in a wrongful death action and valuing a slave in the antebellum southern marketplace would be as disturbing as is that between the de-humanizing of a fetus and the de-humanizing of a person of color at separate times under American law.

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31. *Id.* at 82-83.
32. *Id.* at 83.
33. *Id.*
34. *See id.* at 82-83.
35. The Constitution itself counted slaves as three-fifths of free citizens. Frederick Douglas is said to have purchased his freedom (his life, if you will) for $600. GEOFFREY C. WARD, THE CIVIL WAR 8, 16 (1990).
36. *See, e.g.,* Ricco Villanueva Siasoco, *Modern Slavery: Human bondage in Africa, Asia, and the Dominican Republic, at* http://www.infoplease.com/spot/slavery1.html (Apr. 18, 2001) ("According to 1993 U.S. State Department estimates, up to 90,000 blacks are owned by North African Arabs, and often sold as property in a thriving slave trade for as little as $15 per human being.").

B. Wrongful Birth

An interesting twist on the law's approach to wrongful death is its treatment of wrongful birth. A seminal case is *Fassoulas v. Ramey.*[37] Plaintiffs were married with two children, "both of whom had been born with severe congenital abnormalities."[38] Plaintiff John Fassoulas engaged the defendant, Dr. Ramey, to give him a vasectomy.[39] Despite John's operation, Edith Fassoulas became pregnant twice thereafter.[40] The first post-vasectomy child was, like her older siblings, deformed.[41] The second post-vasectomy child was only slightly deformed and the deformity was surgically corrected so that he grew to be a normal, healthy child.[42]

The plaintiffs sued Dr. Ramey and his clinic, claiming "wrongful births."[43] They sought damages, *inter alia,* the cost of raising the two children to adulthood.[44] The case was allowed to go to trial and a jury awarded the plaintiffs some $300,000, after making a deduction for the plaintiffs' comparative negligence in conceiving the second post-surgery child.[45]

The Florida Supreme Court reversed in part, reasoning that

> [t]he rule in Florida is that 'a parent cannot be said to have been damaged by the birth and rearing of a normal, healthy child.' . . . '[I]t has been imbedded in our law for centuries that the father and now both parents or legal guardians of a child have the sole obligation of providing the necessaries in raising the child, whether the child be wanted or unwanted.' 'The child is still the child of the parents, not the physician, and it is the parents' legal obligation, not the physician's, to support the child.' . . . For public policy reasons, we decline to allow rearing damages for the birth of a healthy child. . . .
>
> The same reasoning forcefully and correctly applies to the ordinary, everyday expenses associated with the care and upbringing of a physically or

37. 450 So.2d 822 (Fla. 1984).
38. *Id.* at 822.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 823.
43. *Id.*
44. *Id.*
45. *Id.*

> mentally deformed child. We likewise hold as a matter of law that ordinary rearing expenses for a defective child are not recoverable as damages in Florida.[46]

However, the court did allow the award of damages for "extraordinary" expenses associated with rearing the first post-vasectomy child, who was severely deformed.[47] It allowed no such damages for the second, healthy sibling.[48]

Clearly, under the holdings of cases such as this, a healthy human life is valuable. The law will not hear from the parents of such a human life that they have suffered a loss because the child was unwanted and visited upon them due to a doctor's negligence. With regard to a severely handicapped human, the court set a lower value upon that human life, the difference in value between her and her healthy sibling being the cost to be incurred by the parents in rearing her, over and above the cost of rearing her healthy brother.

By requiring the negligent defendant to compensate the parents for the extraordinary costs of rearing the deformed child, the court has in essence equated the deformed daughter's value to the parents with the inherent value of the healthy child. This willingness of American law to equalize the value of a disabled human being with that of a normal, healthy human might be carried over into American society at large.

IV. ANOTHER MODEST PROPOSAL

In his 1959 science fiction novel, *The Sirens of Titan,* Kurt Vonnegut early on observed of a main character,

> [b]ut, well-endowed as Mrs. Rumfoord was, she still did troubled things like chaining a dog's skeleton to the wall, like having the gates of the estate bricked up, like letting the famous formal gardens turn into New England jungle. The moral: Money, position, health, handsomeness, and talent aren't everything.[49]

But, of course, in determining the relative positions of people on the socio-political ladder of life they can be worth a lot. In other words, those who possess one or more of these attributes enjoys a

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46. *Id.* at 823-24 (citations omitted).
47. *Id.*
48. *Id.* at 824.
49. KURT VONNEGUT, THE SIRENS OF TITAN 12 (1959).

statistically-significant superior chance of success in our society over others who lack any or all of these advantages.

Later in the story, Vonnegut invents the Church of God the Utterly Indifferent.[50] Embraced by most of the human race, the new religion teaches that God is too great and too busy to worry about lowly *homo sapiens*, and therefore we must all learn to take care of ourselves. More to the point of this sequential essay[51] is one of the church's central tenets, namely that members purposely handicap themselves for the sake of creating equality.

> Everyone wore handicaps of some sort. Most handicaps were of an obvious sort — sashweights, bags of shot, old furnace grates — meant to hamper physical advantages. But there were . . . several true believers who had chosen handicaps of a subtler and more telling kind.
>
> There were women who had received by dint of dumb luck the terrific advantage of beauty. They had annihilated that unfair advantage with frumpish clothes, bad posture, chewing gum, and ghoulish use of cosmetics.
>
> One old man, whose only advantage was excellent eyesight, had spoiled that eyesight by wearing his wife's spectacles.
>
> A dark young man, whose lithe, predaceous sex appeal could not be spoiled by bad clothes and bad manners, had handicapped himself with a wife who was nauseated by sex.
>
> The dark young man's wife, who had reason to be vain about her Phi Beta Kappa key, had handicapped herself with a husband who read nothing but comic books.[52]

This is good satire. And like all good satire, it hits its mark. A more serious proposal aimed at the same mark asserts:

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50. *Id.* at 216.
51. *See* James Ottavio Castagnera, *Groping Toward Utopia: Capitalism, Public Policy, and Rawls' Theory of Justice*, 11 FLA. ST. J. TRANSNAT'L L. & POL'Y 297 (2002).
52. *See* VONNEGUT, *supra* note 49, at 224.

> Equal opportunity requires not only the elimination of legal and informal barriers of discrimination, but also efforts to eliminate the effects of bad luck in the social lottery on the opportunities of those with similar talents and abilities. (The 'social lottery' here refers to the ways in which one's initial social starting place — family, social class, etc. — affect one's opportunities. . . .)[53]

A question worth considering is whether John Rawls, whose theory of justice was a theme of the prequel to this article, would endorse this "bad luck" standard for measuring equal opportunity.

> It is worth noting that there are passages in Rawl's much-cited discussion in his book *A Theory of Justice* of how his Principle of Fair Equality of Opportunity and his Difference Principle fit together that might be interpreted as endorsing the [bad] luck view. . . . [However] Rawls may be merely saying that it would be impermissible to base a person's entitlement to a share of social goods on the mere fact that he happens to have been more fortunate in the genetic lottery. That view does not commit him to the [bad] luck thesis that all natural inequalities require redress or compensation as a matter of justice.[54]

If, indeed, Rawls is ambivalent about what I shall now call the "bad luck view" of justice, others of equal stature are up front in espousing the contrary opinion.

If I understand Dr. Singer's argument, then his thesis is the very opposite of the "bad luck view" of justice: he seems to say that those who have suffered bad luck may have forfeited their right to equal justice. The rights of a fully-conscious animal may trump those of a comatose human.[55]

Closely allied to the "bad luck view" is the "rescue principle." Lawyer-philosopher Ronald Dworkin writes,

> [f]or millennia doctors have paid lip service, at least, to an ideal of justice in medicine which I shall call the rescue principle. It has two connected parts. The first holds that life and health are, as Rene Descartes

53. ALLEN BUCHANAN ET AL., FROM CHANCE TO CHOICE: GENETICS AND JUSTICE 65 (2000).
54. *Id.* at 68.
55. *See* Sass, *supra* note 5 and accompanying text.

> put it, chief among all goods: everything else is of lesser importance and must be sacrificed for them. The second insists that health care must be distributed on grounds of equality: that even in a society in which wealth is very unequal and equality is otherwise scorned, no one must be denied the medical care he needs just because he is too poor to afford it.[56]

Thus is the issue joined. At one end of the spectrum of views are those, symbolized by the parishioners of Vonnegut's Church of God the Utterly Indifferent, who believe that even natural inequalities must be compensated, and at the other are those — e.g., most advantaged classes throughout all of human history — who accept, and perhaps even praise, political and economic inequalities as part of the natural order of things. Somewhere in the middle are those who would correct political and economic inequalities, by enacting anti-discrimination laws and affirmative action programs, but who are willing, like Plato, to accept natural inequalities as . . . well, natural, and therefore not offensive to our sense of justice.[57]

Let me suggest that implicitly fundamental to these views of equality and justice are differing notions of the value of individual human beings. Those who believe that even natural inequalities must be corrected or compensated must necessarily value all human lives equally. Those who favor class distinctions believe — implicitly, if not expressly — that some human beings are more valuable than others.[58]

The forces of history seem to favor this latter group. If the population pressures noted in Part I, above, increase, as I am predicting they will, the relative value of the *lumpen proletariat* will necessarily decline in the eyes of this group. Even those who favor affirmative action presumably will be content to provide those members of disadvantaged groups, who enjoy the requisite intelligence and talents, with a leg up over their majority-group competitors.[59]

Only under the "bad luck view" of justice and equality would fundamental physical disadvantages have to be remedied in order for a truly just society — a Utopia — to be achieved. The

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56. RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 309 (2000).

57. BUCHANAN, *supra* note 53, at 63.

58. *See, e.g.,* EDMUND MORRIS, THEODORE REX 450 (2001) (Concerning Theodore Roosevelt's wife, Edith, Morris observes, "Mediocrity bored her, as did class resentment. 'If they had our brains,' she was wont to say of servants, 'they'd have our place.'").

59. *See* COX, *supra* note 19, at 274-287.

impracticality of this approach is implicit in Vonnegut's satire: the bad luck of some in society is satirically overcome by the self-imposed, artificial disabilities of all the others. As Posner might be quick to point out, this is a highly inefficient way to achieve justice, albeit it could be accomplished tomorrow if suddenly somehow we all voluntarily embraced Vonnegut's concept.

V. CONCLUSION

What then might we do if we wish to grope toward this Utopia? In my prequel, I suggested that "improving the lot of the lowest common denominator of our sisters and brothers . . . will improve life for us all by replacing handouts with disposable income."[60]

Extending this notion a single step farther, let me now suggest that as we strive to achieve this material goal we concurrently must come to a consensus on what it means to be human and what is the value of a human life--even a severely damaged life in being. For my part, I favor a consensus which embraces Fukuyama's Factor X as the baseline for being human. The right to continued existence and to the resources that make such survival possible seem to me to be the minimum entitlements of all such "Factor X" lives in being. These are, in my view, "bottom line" requirements, the floors or foundations of a just society . . . as we continue to grope toward Utopia.

60. *See* Castagnera, *supra* note 51, at 307.

COOPERATION FOR NOMINAL DEVELOPMENT OR POLITICS FOR ACTUAL SURVIVAL? SOUTH ASIA IN THE MAKING OF INTERNATIONAL LAW

S.N. AL HABSY* & KISHOR UPRETY**

Table of Contents

I. BACKGROUND & INTRODUCTION 20
A. Geopolitics 20
B. History of International Law Making 23
C. Scope of the Study 25
II. THE INSTITUTION 26
A. Genesis of South Asian Regionalism 26
B. Juridical Character and Decision-making 28
C. Organizational and Operational Set-up 30
D. Financial Arrangements 34
III. INSTRUMENTS FOR INTERNATIONAL COOPERATION 35
A. Regulating Common Economic Interests 36
B. Regulating Common Social and Moral Interests 64
C. Regulating Specific Security Interests 71
IV. CONCLUSION 87
A. Widened Efforts 88
B. Limited Achievements 89
C. Optimism for Prospects 91

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I. BACKGROUND & INTRODUCTION

A. Geopolitics

In many senses, South Asia sits at a crossroads.[1] "It is a place where millions of people, from hundreds of language groups and ethnicities, have lived side by side for millennia. All of the world's great religions are represented in the region."[2] From a geographical standpoint, Southeast Asia holds both a strategically and commercially important place in the world. "Throughout history, the great trade routes between east and west have crossed the region, both on land and on sea, which still remains the case today."[3]

The population of South Asia (more than one-fifth of the world total) is growing rapidly. At the same time, and despite rapid economic growth during the 1990s, the region has among the lowest per capita incomes in the world. During 2000, the regional economic growth was also slow, but it was still ranked as the fastest growing developing country region.[4] India is by far the largest South Asian country in terms of population, gross domestic product ("GDP") and land area. It alone accounts for over three-fourths of the population and GDP of the South Asia region. After India, Pakistan and Bangladesh are the next largest South Asian countries in these categories, followed by Nepal, Sri Lanka, Bhutan and the Maldives.[5]

With more than one-sixth of the world's total population, India is the second most populous country in the world, after China. In area, it ranks as the seventh largest country in the world, covering 3,287,590 square kilometers,[6] which is slightly more than two percent of the earth's total land surface. India's frontier, bordered by six countries, is about 28,000 kilometers long, of which more

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1. Thomas R. Pickering, U.S. Policy in South Asia: The Road Ahead, Remarks at the Foreign Policy Institute, South Asia Program of the Paul H. Nitze School of Advanced International Studies of the Johns Hopkins University 2 (April 27, 2000), *at* http://www.nyu.edu/globalbeat/ southasia/Pickering042700.html (last visited Oct. 21, 2002).

2. *Id.*

3. *Id.* For a brief discussion, see generally GHULAM UMAR, SOUTH ASIAN ASSOCIATION FOR REGIONAL COOPERATION ("SAARC") ANALYTICAL SURVEY 14-47 (Pakistan Institute of International Affairs, 1988). W.H. Morris-Jones, *South Asia*, *in* STATES IN A CHANGING WORLD: A CONTEMPORARY ANALYSIS 157-76 (Robert H. Jackson & Alan James eds. 1993).

4. REGIONAL PERSPECTIVES, WORLD BANK ANNUAL REPORT (2001).

5. "The seven very unequal states constitute the most imperialized of all region—only Nepal and Bhutan are partial exceptions—and it was the first decolonized region in the modern period, its common experience of a single imperial domination was long and far from superficial." Morris-Jones, *supra* note 3, at 157.

6. THE WORLD FACTBOOK, CENTRAL INTELLIGENCE AGENCY 218 (1998).

than 10,000 kilometers is coastline.[7] Neighboring countries of particular concern to India are Pakistan to the northwest and China to the north, both of which have intractable border disputes with India and Bangladesh, which is surrounded on three sides by Indian territory. The other nations on India's frontier with perhaps a lesser concern are Nepal and Bhutan to the north, situated between India and China, which is also surrounded on three sides by India, and Myanmar (Burma) to the northeast.

The second largest country in the region is the Islamic Republic of Pakistan. Pakistan was brought into being at the time of the Partition of British India in 1947, in order to create a separate homeland for India's Muslims. Pakistan was a response to the demands of Islamic nationalists articulated by the All India Muslim League, under the leadership of Q. I. Azam Mohammed Ali Jinnah.[8] From independence in 1947 until 1971, Pakistan consisted of two regions: West Pakistan, in the Indus River basin, and East Pakistan, located more than 1,000 miles away in the Ganges River delta. In 1971, following serious internal political problems, an independent state of Bangladesh was proclaimed in East Pakistan.[9]

The People's Republic of Bangladesh is located in south-central Asia in the delta of the Ganges and Brahmaputra (called Jamuna) Rivers.[10] A riverine country, its land area of 143,998 square kilometers is bounded by the Indian states of West Bengal to the west and north, Assam to the north, Meghalaya to the north and northeast, Tripura and Mizoram to the east, Myanmar (Burma) to the southeast, and by the Bay of Bengal to the south.[11]

The kingdom of Nepal, which has historically distanced itself from the grip of all colonial powers, is situated between India in the East, West and South and by China in the North.[12] With 141,000 square km, it is a landlocked country with access to the sea only through India.[13] Thus, Nepal remains fragile in terms of its geopolitics. Equally fragile geopolitics is that of Bhutan, another landlocked and old kingdom, which, along with a total area of about 47,000 square kilometers, lies in the eastern Himalayas, between China to the north, the Indian territories of Assam and West Bengal to the south and east, and Sikkim to the west.[14]

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7. *Id.*
8. *See* 25 THE NEW ENCYCLOPEDIA BRITTANNICA 393 (15th ed.).
9. *See id.*
10. *See* 1 THE NEW ENCYCLOPEDIA BRITTANNICA 866-67 (15th ed.).
11. *Id.*
12. 8 THE NEW ENCYCLOPEDIA BRITTANNICA 599 (15th ed.).
13. *Id.*
14. 2 THE NEW ENCYCLOPEDIA BRITTANNICA 190 (15th ed.).

After the two landlocked countries, come the two island nations, the Maldives and Sri Lanka. A group of atolls in the Indian Ocean, south-southwest of India, the Maldives, with a total area of 300 square kilometers,[15] were long a sultanate, first under Dutch and then under British protection. The Maldives became a republic in 1968, three years after independence.[16] On the other hand, the Democratic Socialist Republic of Sri Lanka (formerly Ceylon), by a process of peaceful constitutional evolution won its independence from the British Empire in 1948 and became a sovereign republic on May 22, 1972.[17] It is one of the largest islands in the Indian Ocean and lies to the southeast of the southernmost tip of India from which it is only separated by the narrow, twenty-mile long Palk Strait.[18]

Table[19]

Economic and Demographic Indicators For South Asian Countries			
	GDP Growth per capita (%) (2000)	GNP per capita (1999) in US Dollars	Population 1999 in Millions
Bangladesh	5.9	370	130.2
Bhutan	6.1	510	0.675
India	5.2	440	1002.1
Maldives	5.6	1200	0.269
Nepal	5.8	220	22.9
Pakistan	4.4	470	137.5
Sri Lanka	6.0	820	19.3

As is discernible from the table above, as a region, the countries in South Asia, present a very low growth rate and per capita income. Of the seven countries, four countries: Bangladesh,

15. 7 THE NEW ENCYCLOPEDIA BRITTANNICA 731 (15th ed.).
16. *Id.* at 732.
17. 28 THE NEW ENCYCLOPEDIA BRITTANNICA 179-80 (15th ed.).
18. *Id.* at 167.
19. Growth and Change in Asia and the Pacific, Key Indicators 2001 (Asian Development Bank, 2001).

Bhutan, Maldives and Nepal are also least developed countries ("LDCs").[20] Occupying regional slow growth "has evident implications for national political stability, and is a factor, which can in turn, further aggravate regional tensions."[21] Not surprisingly, economic growth has been in their development agenda for decades. Since the mid-twentieth century, all of these countries have "striven to achieve greater material prosperity and to spread it more widely among their people."[22] Success has been varied. If many instances of failure, which have been recorded, there have also been triumphs in many sectors. At the same time, the region had to confront several economic, social and political problems, including three wars between India and Pakistan, making this region particularly vulnerable in terms of comparative stability.[23]

B. History of International Law Making

Although some of the literature tends to ignore the participation of Asian and African states in the formulation of the norms of international law, "the origins and development of international law should, by no means, be dependent solely on or restricted to Western European nations."[24]

> The South Asian region . . . has long been significant in world affairs. For 5000 years, it has been one of the main centres of civilization, continually enriching societies beyond its borders and, in turn, being enriched from outside. Over the past 2000 years, there has flourished the high Sanskritic civilization of the classical Hindu age and the Persianate civilization of the Mughal Empire. Since the eighteenth century, the region has been the focus of the longest and deepest encounter between an Asian

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20. As designated by the United Nations. Presently, 49 countries in the world fall into the category of Least Developed Country ("LDC").

21. Praveen Bhalla, *Regional Groupings in Asia: Should SAARC Follow the ASEAN Model?*, 2 J. INT'L DEV. 285, 301 (July 1990).

22. Vijay Shukla, *Role of SAARC in the Context of Regional Cooperation in South Asia*, 13 ASIAN J. ECON. & S. STUDIES 313 (1994). Economic liberalization in the South Asian countries first started with the initiative of Sri Lanka followed by Pakistan and Bangladesh between 1975-77. Nepal started the process during 1980s and India in the early 1990s. BISHWAMBHER PYAKURYAL, IMPACT OF ECONOMIC LIBERALIZATION IN NEPAL 34 (Santosh K. Nair 1995).

23. *Id.*

24. YILMA MAKONNEN, INTERNATIONAL LAW AND THE NEW STATES OF AFRICA: A STUDY OF INTERNATIONAL LEGAL PROBLEMS OF STATE SUCCESSION IN THE NEWLY INDEPENDENT STATES OF EASTERN AFRICA 4 (Interprint Ltd. 1983).

> civilization and the West, which came to be entwined with the political struggle between South Asian nationalism and British imperialism.[25]

Influenced, and no less refined by the different exogenous, as well as endogenous elements overtime, including fine-tuning resulting from the Hindu, Buddhist, Islam and Christian religions, the history of international law-making in the South Asian region is sufficiently developed. There is enough evidence that prior to the Christian era, "there were in existence separate political units sufficiently independent of each other and each possessing an organ capable of conducting intercourse with others."[26] Illustrating the characteristics of universality, the region had sophisticated laws regarding warfare, diplomatic and consular relations. The region recognized the notion of immunity for diplomatic agents, and the subjects of inter-state law were political entities varying not only in their internal structure, but also with regard to the exercise of internal sovereignty.[27] The supremacy of law and sanctity of treaties[28] were fully recognized notions, and "concepts of inter-state law such as self-preservation, just war, independence, sovereignty, jurisdiction, legal equality and justifiable intervention" were highly respected.[29] Similarly, the concept of human rights, greatly cherished by modern international lawyers, was in a highly advanced stage in the ancient South Asia, albeit more so in substance, rather than in form.[30]

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25. Shukla, *Role of SAARC*, *supra* note 22, at 313.

26. Nagendra Singh, *History of the Law of Nations Regional Developments: South and South-East Asia*, in II ENCYCLOPEDIA OF PUB. INT'L LAW 824-825 (Rudolf Bernhardt, et al., 1995) (quoted in C.F. Amerasinghe, *South Asian Antecedents of International Law*, *in* INT'L LAW: THEORY AND PRACTICE. ESSAYS IN HONOR OF ERIC SUY 3 (Karel Wellens & Martinus Nijhoof ed. 1998)); *see generally* WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INT'L LAW 309-11 (Columbia Univ. Press 1964).

27. Amerasinghe, *supra* note 26, at 3-7.

28. Although treaties were valued, "the prime use made of treaties in interstate relations in ancient India was for the purpose of registering interstate transactions particularly connected with territorial disputes. Thus by the very nature of the purpose for which treaties were concluded, they were bilateral in character . . . [a] typical treaty . . . was an agreement between two kings for mutual surrender or exchange of territories, money and army (Arthasastra VIII) . . . [m]ultilateral conventions or treaties of the law-making type were unknown in ancient India." Singh, *supra* note 26, at 829. See FRIEDMANN, *supra* note 26, at 306-309, for a brief introduction on Islamic legal values and international law.

29. Amerasinghe, *supra* note 26, at 3-9.

30. See LAL DEOSA RAI, HUMAN RIGHTS IN THE HINDU-BUDDHIST TRADITION (Nirala 1995) for a detailed discussion. See also Surya P. Subedi, *Are the Principles of Human Rights "Western" Ideas? An Analysis of the Claim of the "Asian" Concept of Human Rights From the Perspective of Hinduism,* 30 CAL. W. INT'L L. J. 45-69 (1999), for a detailed analysis. *See also* Matthew A. Ritter, *Human Rights: The Universalist Controversy*, 30 CAL. W. INT'L L. J. 71 (1999) (a response to Dr. Surya P. Subedi, *Are the Principles of Human Rights "Western"*

If universality in ancient history has been predominant in modern history, the focus has been on regionalism.[31] Although each of the countries, as either a member of the United Nations and other intergovernmental agencies, or as an independent member of international movements such as the Non-aligned movement, has participated in international law-making, South Asian countries, as a group, have also started to show interest in the making of international law for the benefit of the region in proper.[32] In this context, it is noteworthy that several sporadic attempts in creating some forms of organization to derive political or economic advantages in the fifties and the sixties, failed due to lack of political consensus or economic and social justifications.[33] However, these countries continued effort, which led to the finalization of a mechanism for cooperation and development, at a regional level in the eighties. Focusing on a variety of social, economic and political issues, it transpired into the establishment of an organization termed South Asian Association for Regional Cooperation ("SAARC").[34]

C. Scope of the Study

This study, which has a modest objective, briefly explores the attempts made by the countries in South Asia to establish and institutionalize the SAARC framework, and the role of these countries in making international law, through the framework provided by SAARC. The study is divided into three main parts.

Ideas? An Analysis of the Claim of the "Asian" Concept of Human Rights from the Perspectives of Hinduism, 30 CAL. W. INT'L L. J. 45 (1999)).

31. *See generally* Singh, *supra* note 26, at 824, 829, 833, & 835.

32. *Id.*

33. Different attempts for regionalism in South Asia, in fact, were made as early as 1947, but mostly had failed. For a brief history, see Saman Kelegama*, South Asia and Other Regional Economic Groupings*, Paper Presented at the Conference on South Asia 2010: Challenges and Opportunities, Organized by Coalition for Action on South Asian Cooperation (CASAC) *at* http://cacaconline.com/South_asia_and_other_regional_ec.htm (last visited Mar. 23, 2001); *see also* Kishore C. Dash, *The Political Economy of Regional Cooperation in South Asia*, 69 PACIFIC AFFAIRS 1-2 (Summer 1996); Padmaja Murthy, *Relevance of SAARC*, Institute for Defense Studies and Analyses (New Delhi), *available at* http://www.idsa-india.org/an-jan00-9.html (last visited Nov. 10, 2002).

One relatively successful example is that of the Asian Clearing Union ("ACU") which had been in operation since November 1975. "[I]t was set up in September 1974 at the initiative of the ESCAP, [and] has its member central banks were predominantly drawn from SAARC member countries. The original signatories to the [ACU] Agreement were Bangladesh, India, Iran, Nepal, Pakistan and Sri Lanka. A seventh member Burma was admitted in 1977." I.N. Moocher, *Prospects and Possibilities of a Payments Union Covering SAARC-ASEAN Trade*, *in* SAARC ASEAN PROSPECTS AND PROBLEMS OF INTER-REGIONAL COOPERATION 239 (Bhabani Sen. Gupta ed.). See id. at 239-50 for detailed discussions on the ACU.

34. *Id.*

The first part provides a general introduction to the organizational structure of SAARC. In this context, after a brief review of the historical aspects of the organization, it deals with the decision-making organs, the different layers involved, the scope as well as the financing of the institution.

The second part, which is the central focus of this study, deals with the aspects of formalization of development and cooperation among countries in the region. It reviews the different instruments that have been developed and implemented in the region with the view of promoting cooperation, in economic as well as social areas. For purposes of simplicity, this part is divided into three sections based on the categories of instruments adopted by the organization to serve specific purposes. The overall division reflects the formalization of mechanisms to regulate common economic, social, moral, as well as, specific security interests. More precisely, the study reviews the instruments designed to provide food security in the region, and to enhance trade, to combating social evils such as flesh trade, to promoting child welfare, and to defending specific security concerns of these countries in a more effective fashion.

Finally the last part provides a brief conclusion along with an attempt to analyze the prospects for the future for the region.

II. THE INSTITUTION

A. Genesis Of South Asian Regionalism

"The most conspicuous development in international organizations, since the second world war has been the proliferation on all continents of regional groupings bearing long and often awkward names which the initiated commonly reduce to criptical initials."[35] Not surprisingly, during the Cold War era, "[r]egional economic groupings emerged primarily as a credible mechanism to support and sustain military alliances and to rebuild, coordinate and integrate markets and economies of the allies and dependable neighbors."[36] On the other hand, "in the post-Cold War era, although factors such as geographical proximity and socio-cultural links have played an important role, global economic forces have been the key factor in the formation of regional groupings."[37] Contemporary South Asian regionalism is also an example of a

35. INTERNATIONAL REGIONAL ORGANIZATIONS, CONSTITUTIONAL FOUNDATIONS v (Ruth C. Lawson ed. 1962).

36. Kelegama, *supra* note 33, at 1.

37. *Id.*

grouping formed to cope with the vagaries of global economic, and to a certain extent, political forces.[38]

The regional cooperation initiative, which this study attempts to discuss, was a consequence of three important aspects of change that occurred in global and regional contexts.[39] The first aspect "was the deteriorating international economic environment for South Asia resulting from the breakdown of the North-South negotiations and worsening prospects for the South Asian economies."[40] This naturally compelled the leaders of South Asia to think of ways to cope with these economic challenges.[41] The second aspect, occurred in the eighties, which was "the emergence of like-minded western-oriented regimes in South Asia" that "opened the prospects of greater regional interaction in various fields" in which South Asian leaders started to explore.[42] Finally, the third aspect was the strategic fall-out of developments like the "sour-revolution" in Afghanistan in 1978, which was followed by the Soviet military intervention in that country.[43] "This prompted the leaders of South Asian countries to unite to prevent Great Power intervention and rivalry [in their region], and [to] promote a regional forum to understand each other better and to have economic, social, cultural and scientific cooperation."[44] "Regional approaches can contribute constructively to international economic relations by allowing smaller groupings of economies to establish more significant levels of cooperation than is permitted by a broad multilateral agreement," and is also useful in enacting rules that respond to specific regional needs.[45]

The idea of regional cooperation for developing trade and investments in South Asia, through an intergovernmental organization, emerged in the early eighties.[46] After some initial and informal consultations, the Foreign Secretaries of the seven South Asian countries — Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka — met formally for the first time in

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38. *See generally id.* at 1.

39. Vijay Shukla, *New Frontiers of SAARC*, LII INDIA QUARTERLY J. INT'L AFFAIRS 87 (1996).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.; see generally* Padmaja Murthy, *Role of Smaller Members in the SAARC Forum*, Institute for Defense Studies and Analyses (New Delhi), *available at* http://idsa-india.org/an-nov8-5.html at 1-5; *see also* Bhalla, *supra* note 21, at 289-90.

45. John H. Jackson, *Perspectives on Regionalism in Trade Relations*, 27 LAW & POL'Y INT'L BUS. 873, 874 (1996).

46. Murthy, *Relevance of SAARC*, *supra* note 33, at 1.

Colombo in April 1981.[47] A few months later, a meeting of the Committee of the Whole identified five broad areas for regional cooperation. At their first meeting in New Delhi in August, 1983, the Foreign Ministers adopted a Declaration on South Asian Regional Cooperation ("SARC") and formally launched an Integrated Program of Action in five areas of cooperation: agriculture; rural development; telecommunications; meteorology; and health and population activities.[48] Later, the following were added to the program of action: transport; postal services; science and technology; sports; and arts and culture.[49] Finally, at the first SARC summit held in Dhaka on December 7-8, 1985, the Heads of State formally adopted a Charter establishing the South Asian Association for Regional Cooperation ("SAARC").[50] Thus, SAARC, which is compromised of seven countries of South Asia, is a manifestation of the determination of the governments and people of this region to work together towards finding solutions to common problems in a spirit of friendship, trust and understanding, as well as, towards creating an order based on mutual respect, equity and shared benefits.[51]

B. Juridical Character and Decision-Making

The SAARC operates with a set of objectives and general principles, which is identified in its Charter. Bestowed with the responsibility of accelerating the process of economic and social development through collective actions, it primarily aims at promoting the welfare of the people of South Asia, improving their quality of life, accelerating their economic growth, social progress and cultural development, and providing all individuals with the

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47. SAARC Profile, ch. 1 (Introduction) *at* http://www.saarc-sec.org/profile/ch1.htm (last visited Nov. 10, 2002). *See also* V. Kanesalingam, *General Overview of SAARC's Achievements*, 12 MARGA QUARTERLY J. 1 (Marga Inst. 1991).

48. SAARC Profile, *supra* note 47, at ch. 1.

49. *See* Arif A. Waquif, *Carrying The SAARC Flag: Moving Towards Regional Economic Co-operation*, at 1 (Consumer Unity and Trust Society, Briefing Paper No. 10, rev. 1998). See also Aabha Dixit, *SAARC: Toward Greater Cooperation*, Institute for Defense Studies and Analyses (New Delhi), *available at* http://www.idsa-india.org/an-jul-5.html at 1-3 (last visited Mar. 21, 2001), for a brief history of SAARC.

50. For the text of the Charter Establishing the South Asian Association for Regional Cooperation, *see* 26 INDIAN J. INT'L LAW 323-326, *available at* http://www.saarcnet.org/newsaarcnet/index.htm (last visited Nov. 10, 2002) [hereinafter "SAARC Charter"]. The SAARC Charter is also *available at* http://www.saarc-sec.org/charter.htm (last visited Nov. 10, 2002). For discussions see also Waquif, *Carrying The SAARC Flag*, *supra* note 49, at 1.

51. SAARC, para. 2 (Dhaka 1985), *available at* http://www.saarcnet.org/newsaarcnet/saarcdocuments/1ss-decl.htm (last visited Nov. 10, 2002). For the text of the Declaration, see 26 INDIAN J. INT'L LAW 321-322. See also Pramod Kumar Mishra, *Dhaka to New Delhi: One Decade of SAARC*, LII INDIA QUARTERLY J. OF INT'L AFFAIRS 73-86 (1996) for a general discussion on the evolution of SAARC.

opportunity to live in dignity and to realize their full potential.[52] It further aims at promoting and strengthening collective self-reliance, active collaboration and mutual assistance in the economic, social, cultural, technical and scientific fields, and in strengthening cooperation, on matters of common interest, with countries and international organizations.[53]

It has been noted that, by creating SAARC, "the seven countries, whose differences are more striking than their commonality seek to build on what they had in common."[54] Although linked by history and culture, these countries have different political systems, and the diversity in their economic and military power has been a major cause of mutual suspicion and distrust among them.[55] Hence, to remedy this heterogeneity-specific problem, they had to devise a common, risk-free approach to meet the objectives. In these attempts, SAARC Member States agreed to adhere to some basic principles.[56] First and foremost, "cooperation within the framework of SAARC is to be based on respect for the principles of sovereign equality, territorial integrity, political independence, and non-interference in the internal affairs of other States and mutual benefit."[57] Second, "such cooperation [is to complement and] shall not be a substitute, bilateral or multilateral cooperation, and is to be consistent with bilateral and multilateral obligations of member states."[58] Third, the decisions, at all levels, in SAARC are to be taken on the basis of unanimity.[59] Finally and most importantly, bilateral and contentious issues are to be excluded from its deliberations.[60] "SAARC has intentionally stressed the 'core issues' and avoided more divisive political issues, although political dialogue is often conducted on the margins of SAARC meetings."[61] In fact, SAARC has adopted the Nordic model of cooperation, wherein the political sovereignty of cooperating states is not disturbed in the process of integration.[62] It has sought to be a

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52. SAARC Charter, *supra* note 50, art. I.
53. *Id.*
54. Kanesalingam, *supra* note 47, at 1.
55. *Id.*
56. *Id.* art. II.
57. *Id.*
58. *Id.*
59. *Id.* art. X.
60. *Id.* art. X.
61. *See* Foreign relations of India, *available at* http://www.wikipedia.org/wiki/Foreign_relations_ of_India (last visited Nov. 11, 2002). See Kanesalingam, *supra* note 47, at 2 for a brief discussion.
62. Shrikant Paranjpe, *From State-centrism to Transnationalism: SAARC, SAPTA and SAFTA*, LII INDIA QUARTERLY J. OF INT'L AFFAIRS 95, 97 (1996).

platform for the establishment of cooperative relationship.[63] Given the political antagonisms in the region, it has adopted an incrementalist approach of keeping contentious politico-security issues outside its scope and focusing on economic, cultural, and social areas.[64]

C. Organizational & Operational Set-Up

Although some scholarly writings and discussions in the different fora have advocated the expansion of SAARC to include other countries in the region, the SAARC Charter, as yet, "provides for a close membership of the seven founding members."[65] From an organizational standpoint, the SAARC comprises a series of political decision-making, policy-making, and technical level groupings, and the Charter reflects that character of the organization.[66]

The highest authority of the SAARC rests with the Heads of State who meet annually at the Summit level.[67] At this level, all issues requiring high-level interventions may be sorted out, formally or informally.[68] Interestingly, the Heads of State, during the Ninth SAARC Summit, confirmed that a process of informal political consultations would prove useful in promoting peace,

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63. *Id.*

64. *Id.* Also, because the areas identified for cooperation are the least controversial and minimal, this approach has been termed as the "functional approach" by some. Murthy, *Relevance of SAARC*, *supra* note 33, at 2. Indeed, "the functionalist strategy urges the development of piecemeal non-political cooperative organization, which are established most effectively in the economic technical, scientific, social and cultural sectors" (referred to as functional sectors). The functionalism has been presented as an operative philosophy that gradually leads to a peaceful, unified and cooperative world. See THEODORE A. COULOUMBIS & JAMES H. WOLFE, INTRODUCTION TO INTERNATIONAL RELATIONS: POWER AND JUSTICE 292 (Prentice-Hall 2d ed. 1978) for a detailed explanation.

65. Shukla, *Role of SAARC*, *supra* note 22, at 318. The Organization in fact had to face a difficulty pertaining to this. During the fourth Summit in Islamabad, India came up with a proposal supporting Afghanistan's entry into SAARC (which then was ruled by a communist government). The proposal was resisted by Pakistan (which was involved in the resistance effort). A compromise then was effected, which was reflected in the summit declaration. Admission for another country into SAARC was to be governed by the principle of unanimity. This compromise has stalled SAARC's expansion since then. *See* Dixit, *supra* note 49, at 4; *see also* Summit Declaration, para. 4 (Islamabad, 1988). Recently, China has reportedly expressed a desire to join SAARC, with support from Bangladesh. *See* Anil Nauriya, *SAARC: Inside and Outside,* THE HINDU, Aug. 7, 2001.

66. *Id.*

67. SAARC Charter, *supra* note 50, art. III. To date, ten Meetings of the Heads of State or Government have been held in Dhaka (1985), Bangalore (1986), Kathmandu (1987), Islamabad (1988), Malé (1990), Colombo (1991), Dhaka (1993) New Delhi (1995), Malé (1997), and Colombo (1998), respectively. The Eleventh SAARC Summit which was to be held in Nepal (1999) was, due to political problems in the region, delayed and could only take place in January 2002. The twelfth Summit is to be held in 2003, in Pakistan.

68. SAARC 9th Summit, para. 8 (Male, 1997).

stability, amity and accelerated socio-economic cooperation in the region.[69]

Below the Summit level is the Council of Ministers. Comprised of the Foreign Ministers of Member States, the Council is responsible for formulating policies, reviewing progress, deciding on new areas of cooperation, establishing additional mechanisms as deemed necessary, and deciding on other matters of general interest to the organization.[70]

The Council meets a minimum of twice a year but, by agreement of Member States, can also meet in extraordinary sessions.[71] It has held twenty regular sessions until December 1998.[72] The Twenty-first Session of the Council was held in Colombo in March 1999.[73] In addition, a Commemorative Session of the Council, was held at New Delhi on December 18, 1995, to mark the First Decade of SAARC, during the Sixteenth Session of the Council of Ministers.[74]

Below the Council of Minister is the Standing Committee. Compromised of the Foreign Secretaries of Member States, the Standing Committee is entrusted with the task of the overall monitoring and coordinating of programs and modalities of financing, determining inter-sectoral priorities, mobilizing regional and external resources, and identifying new areas of cooperation.[75] It can meet as often, as deemed necessary, but in practice it meets twice a year and submits its reports to the Council of Ministers.[76] The Standing Committee is assisted by a Programming Committee, an *ad hoc* body comprised of senior officials from all Member States, which is responsible for scrutinizing the Secretariat's budget, finalizing the calendar of activities, considering the reports of the Technical Committees and the SAARC Regional Centers, and taking up any other matter assigned by the Standing Committee.[77] The Standing Committee can also set up Action Committees comprised of Member States concerned with implementation of projects involving more than two but not all Member States.[78] Presumably, in this context, the provision regarding action committees has been inserted in light of "the possibility that the

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69. *Id.*
70. SAARC Charter, *supra* note 50, art. IV.
71. *Id.*
72. *Id.*
73. *Id.* ch. 2.
74. *Id.*
75. *Id.* art. I (a-e).
76. *Id.* art. V(2). As of January 2001, the Committee had held twenty-seven regular sessions and two special sessions.
77. *Id.* ch. 2. Twenty-one sessions of the Programming Committee had been held through December 2001.
78. *Id.* art. VII.

SAARC might become relevant to surface or river water transport projects involving more than two states but not all [of the Member States]."[79] At the same time, by placing the power to set up Action Committees in the hands of the Standing Committee, the principle of unanimity has been extended to them.[80]

It is clear that "[w]ithin SAARC, cooperation is still to a considerable extent, 'controlled,' as it is conducted through the meetings of heads of State or governments and foreign ministers, and as all decisions still require their approval."[81] This reflects, according to some scholars, the continuing lack of trust and confidence between parties, which may impede cooperation in substantive areas.[82]

Next in the SAARC hierarchy are the Technical Committees, considered the backbone of the process of regional cooperation.[83] Compromised of representatives from all member countries,[84] these committees formulate programs and prepare projects in their respective areas of cooperation, which make up the Integrated Program of Action under SAARC.[85] They are responsible for coordinating and monitoring the implementation of such activities and submitting their periodic reports to the Standing Committee through the Programming Committee.[86] Along with relatively broad terms of reference, they are involved in the determination of the potential and the scope of regional cooperation in agreed areas, the formulation of programs and preparation of projects, the determination of financial implications of sectoral programs, the formulation of recommendations regarding apportionment of costs, the implementation and coordination of sectoral programs, as well as the monitoring of progress in implementation.[87]

The Technical Committees can also use other forms, methods or modalities for deliberation, if and when considered necessary, including meetings between heads of national technical agencies, meetings between experts in specific fields, or contact among recognized centers of excellence in the region.[88] It may be

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79. *See* Pran Chopra, *SAARC and ASEAN: Comparative Analysis of Structure And Aims, in* SAARC ASEAN PROSPECTS AND PROBLEMS OF INTER-REGIONAL COOPERATION 14 (Bhabani Sen Gupta ed. South Asian 1988).

80. *Id.*

81. Bhalla, *supra* note 21, at 297.

82. *See id.*

83. SAARC Charter, *supra* note 50, art. VI.

84. *Id.* The Chair of the Technical Committees normally rotates among Member States in alphabetical order every two years.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

appropriate to note that since the establishment of the SAARC, a number of ministerial level meetings have taken place in specific contexts, which have focused on areas of common concern and have become an integral part of the consultative structure.[89]

"Clearly, top structures as well as the operational structures at lower levels, have been firmly delineated in the SAARC Charter."[90] It provides for Summit Meetings to occur at least once a year.[91] It also provides for the Council of Ministers' meetings to occur at least once a year, which, in effect, means at least twice a year because the foreign ministers inevitably have to assemble at the time of the annual Summit.[92] The standing committee is required to meet at least once a year or as often as deemed necessary.[93] This, in effect, has meant at least three times a year, because they also have to meet at the time of the Summit, as well as the Council.[94]

Finally, in the SAARC hierarchy, in order to coordinate and monitor the implementation of activities, to service the meetings of the organization and to serve as the channel of communication with other international organizations, a Secretariat exists, which was established in Katmandu on 16 January 1987.[95] By being the

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89. Six Meetings of Planners have been held so far, starting from one in 1983, and five annually from 1987 to 1991. These meetings initiated cooperation in important areas such as Trade, Manufactures and Services, Basic Needs, Human Resource Development, Database on socio-economic indicators, Energy Modeling Techniques, Plan Modeling Techniques and Poverty Alleviation Strategies. Similarly, ministerial-level meetings have been regularly held to address different issues. For instance, the Islamabad meeting (1986) discussed the international economic issues, the New Delhi (1986), Colombo (1992) and Rawalpindi (1996) meetings discussed children's issues, the Shillong (1986), Islamabad (1990), Kathmandu (1993), and Dhaka (1995) meetings discussed Women's issues, the New Delhi meetings (1992 & 1997), and the Male (1997) and Colombo (1998) meetings discussed the Environment issues, the Islamabad (1993) meeting discussed the issues related to Disabled persons, the Male (1994) meeting discussed the issues related to Youth, the Dhaka (1994) and the New Delhi (1996) meetings discussed the issues related to poverty. Similarly, the Colombo (1996) meeting discussed the issues of Housing, and the Islamabad (1996) meeting discussed Agriculture. In the same vein, if Commerce was the focus of discussion in the meetings in New Delhi (1996), Islamabad (1998), and Dhaka (1999), and Tourism was the focus in Colombo (1997), the issues related to Information became prominent in the Dhaka (1998) meeting, and Communications became prominent in the Colombo (1998) meeting. *See* A Brief on SAARC, *available at* http://www.saarc-sec.org/brief.htm (last visited Oct. 22, 2002). It should also be noted that the Ninth SAARC Summit decided that the Environment Ministers Meeting will be held annually. *See* Ninth Summit Declaration, para. 40 (Male, 1997).

90. Chopra, *supra* note 79, at 12-13.

91. *Id.*

92. *Id.* at 12.

93. *Id.*

94. *Id.*

95. A Memorandum of Understanding on the establishment of the SAARC was signed by foreign ministers of the SAARC countries at the Bangalore Summit. Also a Bangladeshi diplomat, H.E. Abul Ahsan was chosen the first Secretary General. *See* Joint Press Release ¶¶ 2-3 (2d SAARC Summit, Bangladesh 1986).

headquarters of the organization, the Secretariat, has been increasingly utilized as the venue for various SAARC meetings.[96]

The Secretariat is comprised of a Secretary-General, seven Directors and a number of general services staff.[97] The Secretary-General is appointed by the Council of Ministers upon nomination by a Member State on the principle of rotation in alphabetical order.[98] Initially, the Secretary General held position for a period of two years, but the Ninth SAARC Summit (Male, May 1997) decided to change the tenure to three years.[99] Directors are appointed by the Secretary-General upon nomination by member countries for a period of three years, which, in special circumstances, may be extended for a period not exceeding an additional three years.[100] In this context, it may be worth noting that "[t]he creation of a permanent Secretariat in Kathmandu may have brought an element of continuity, but its ability to steer an independent course of action was severely hampered by the impact of the political state of affairs between Member States, as well as the relatively small size of the Secretariat."[101]

D. Financial Arrangements

The financial arrangements under the SAARC system are straightforward. Member states make provisions in their national budgets for financing activities and programs under the SAARC framework, which include contributions to the budgets of the Secretariat and to those of the regional institutions.[102] The financial provision, thus made is, announced annually, at the meeting of the Standing Committee.[103]

"The annual budget of the Secretariat, both for capital as well as recurrent expenditure, is shared by member states on the basis of an agreed formula."[104] A minimum of forty percent of the institutional cost of regional institutions is born by the respective host governments, and the balance is shared by all member states

96. *Id.*
97. *See* Ninth SAARC Summit Declaration, para. 5 (Male, 1997).
98. *Id.*
99. *Id.*
100. *Id.*
101. Dixit, *supra* note 49, at 3-4.
102. The SAARC Secretariat, *available at* http://www.saarc-sec.org/profile/ch13.htm (last visited Oct. 22, 2002).
103. *Id.*
104. *Id.* The initial cost of the main building of the Secretariat, together with all facilities and equipment, as well as that of the annex building completed in 1993 has been met by the Government of Nepal.

on the basis of an agreed formula.[105] Capital expenditures of regional institutions, which include physical infrastructures, furnishings, machines, equipment and, so forth, are normally born by the respective host governments.[106] Program expenditures of regional institutions are also shared by Member States, according to the agreed formula.[107] In the case of activities under the approved calendar, local expenses including hospitality are born by the host government, and the cost of travel is met by each sending government.[108]

The contribution of each Member State towards financing of the activities of SAARC is voluntary.[109] Each Technical Committee makes recommendations for the apportionment of the costs of implementing the programs proposed by it.[110] In case sufficient financial resources cannot be mobilized within the region for funding activities of the organization, external financing from appropriate sources may be mobilized with the approval of or by the Standing Committee.[111]

III. INSTRUMENTS FOR INTERNATIONAL COOPERATION

Since its establishment, SAARC has approached the issue of development-cooperation at essentially five fronts. The attempts have not focused so much on directly tackling the frequently thorny political issues, but they have been made towards establishing mechanisms for managing food insecurity, containing social evils perverting the society, promoting social welfare, protecting specific security interests, and invigorating trade amongst member countries. Several instruments for the implementation of the mechanisms of cooperation have been included in the form of international agreements or conventions, which includes the following: an agreement on food security, an agreement to establish a regime for preferential trading, two conventions to address the twin problems of children and women trafficking, as well as, to guarantee the promotion of child welfare, and two conventions to combat the evils of terrorism and drug trafficking and abuse.

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105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*; SAARC Charter, *supra* note 50, art. IX.
110. SAARC Charter, *supra* note 50, art. IX.
111. *Id.*

A. Regulating Common Economic Interests

Two main instruments are discussed in this sub-section. The first concerns the issue of food security and the efforts of the countries to create a mechanism to share food grains in emergency situations. This mechanism, despite the clamor of success in the beginning, has failed to derive expected benefits. Nevertheless, in understanding the evolutionary feature of SAARC, it is important to review this mechanism, albeit very succinctly.

The second instrument concerns a framework for the enhancement of trade. In this context, this subsection reviews the efforts of the countries to liberalize international trade and to stimulate competition. In so doing, it also attempts to provide the context in which efforts and measures were possible and to consider the significance and impact of the various decisions made by these countries as a single and united trading bloc. In addition to reviewing the mechanism for enhancing trade, this subsection also discusses a few practical problems encountered in the implementation of decisions, while in parallel, surveying the prospects for liberalized international trade in the South Asia region.

1. Guaranteeing Food Security

During the third SAARC Summit held in Katmandu in November 1987, an Agreement establishing a Food Security Reserve was entered into among SAARC nations.[112] This Agreement, signed by the foreign ministers of member countries, came into force on August 12, 1988.[113]

(a) Establishment and Maintenance of a Reserve

The main purpose of the Food Security Agreement is to establish a reserve of food grains for dealing with emergencies in member countries and to provide a much-needed cushion against food shortages and scarcity situations in the region.[114] In recognition of the importance of regional and sub-regional collective

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112. Agreement on Establishing the SAARC Food Security Reserve, Nov. 4, 1987 (Kathmandu) [hereinafter "Food Security Agreement"]. *See also* W.M. Karunadasa, *SAARC and Regional Conventions*, SUNDAY OBSERVER (Colombo) June 21, 1998, *available at* http://www.rediff.com/ news/2001/feb/14gp.htm (last visited Nov. 10, 2002).

113. Karunadasa, *supra* note 112. An interesting feature of the Food Security Agreement, *supra* note 112, is that it would enter into force on a date to be determined by the Council of Ministers provided that the member countries have collectively earmarked at least one hundred and twenty-five thousand metric tons of food grains on that date for the purpose of the Food Security Agreement. *See* Food Security Agreement, *supra* note 112, art. X.

114. Food Security Agreement, *supra* note 112, art. X.

self-reliance, with respect to food security as a means of combating the adverse effects of natural and man-made calamities, the idea of establishment of the food security reserve by member countries received prominence.[115]

The Food Security Agreement generally deals with the formation of the food security reserve ("the Reserve"), the procedures for releasing food grains, and the administrative aspect of the Reserve.[116] The Reserve consists of wheat, rice or a combination of both (food grains), earmarked by member countries to withdraw in an emergency.[117] A schedule, included in the Food Security Agreement, prescribes the share that should be reserved to each country, which forms the Reserve.[118] The Reserve for the entire region is to be maintained at a minimum level of 200,000 tons, starting from as high as 153,000 tons share requirement for India to as low as 20 tons for the Maldives (see Table).[119] The member countries keep the Schedule under review and can amend it in light of operating experience.[120]

Table[121]

Countries	Share of the Reserve (in m/tons)
Bangladesh	21,100
Bhutan	180
Maldives	20
India	153,200
Nepal	3,600
Pakistan	19,100
Sri Lanka	2,800
TOTAL	200,000

Each member country undertakes to earmark its share of food grains allocated to it from the Reserve.[122] The food grains, which form part of the Reserve remains "the property of the member country that has earmarked them and shall be in addition to any

115. *Id.* pmbl.
116. *Id.*
117. *Id.* art. II, ¶ 1.
118. *Id.* art. II, ¶ 1.
119. *See id.* schedule to Food Security Agreement.
120. Food Security Agreement, *supra* note 112, art. II, ¶ 3.
121. Karunadasa, *supra* note 112, at 51.
122. Food Security Agreement, *supra* note 112, art. II, ¶ 4.

national reserve that may be maintained by that member country."[123] A member country can, at any time, voluntarily earmark additional food grains.[124] In such a case the member country concerned, may only withdraw, the amount in excess of its allocation by giving six months' advance written notice to the Food Security Board ("the Board").[125] Also, it should be noted that the quality of all food grains earmarked by the member countries should be at least of "fair average quality," or comply with any other quality standards set by the Board.[126]

The obligations of member countries do not end there. They are also required "to provide adequate storage facilities for the food grains that they have earmarked, to inspect the food grains periodically and to apply appropriate quality control measures, including turnover of the food grains, if necessary."[127] They must do so with a view to ensure that at all times the food grains satisfy the minimum required quality standards and replace any food grains that do not satisfy such standards.[128] In addition, they need to make every effort to comply with any guidelines on storage methods or quality control measures adopted by the Board.[129]

In accordance with the agreed procedures, each member country is entitled to draw on food grains, which form part of the Reserve in the event of an emergency.[130] For example, a member country can withdraw, if having suffered a severe and unexpected natural or man-made calamity, it is unable to cope by using its national reserve and is unable to procure the food grains it requires through normal trading transactions on account of balance of payments constraints.[131] Such withdrawal of food grains will come from the country's own share of the Reserve.[132] In doing so, a country must inform the member countries and the Board of such withdrawal.[133] It also has to replace any food grains as soon as practicable, and in any event, no later than two calendar years following the date on which the release of the food grains took place.[134] In addition, "a

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123. *Id.* art. II, ¶ 5.
124. *Id.* In this context, it is noteworthy that Pakistan was the first country to voluntarily increase its quota of contribution, almost doubling its quota. *See* BISHWA PRADHAN, SAARC AND ITS FUTURE 55 (1989).
125. Food Security Agreement, *supra* note 112, art. II, ¶ 4.
126. *Id.* art. II, ¶ 5.
127. *Id.* art. II, ¶ 6.
128. *Id.*
129. *Id.*
130. *Id.* art. III.
131. *Id.*
132. *Id.* art. VI, ¶ 1.
133. *Id.*
134. *Id.* art. V, ¶ 1.

member country shall notify the Board of the release, of the terms and conditions on which it was effected, and the date on which the food grains that had been released were replaced."[135]

In requesting the release from the reserve, "the member country in need shall directly notify the other member countries of the emergency it is facing and the amount of food grains required."[136] The other member countries then take immediate steps to make necessary arrangements to ensure the immediate and speedy release of the required food grains, subject to the availability of the combination requested.[137] The prices, terms and conditions of payment in kind, or otherwise with respect to the food grains released are directly negotiated between the member countries concerned.[138] However, the requesting member country also has a duty to inform the Board about its request.[139]

(b) Food Security Board

For purposes of coordination, the Food Security Agreement provides for a SAARC Food Security Reserve Board ("the Board") comprised of representatives from each member country.[140] The main functions of the Board are to undertake "a periodic review and assessment of the food situation and to assess the prospects in the region, including factors such as production, consumption, trade, prices, quality and stocks of food grains."[141] It can also examine "immediate, short term and long term policy actions as may be considered necessary to ensure adequate supplies of basic food commodities in the region."[142] Also, the Board can "submit on the basis of such examination, recommendations for appropriate action to the Council of Ministers."[143] Similarly, the Board is responsible for "reviewing the implementation of the provisions of the Food Security Agreement, call[ing] for such information from member countries as may be necessary for the effective administration of the Reserve and issu[ing] guidelines of technical matters such as maintenance of stocks, storage conditions and quality control."[144]

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135. *Id.* art. V, ¶ 2.
136. *Id.* art. IV, ¶ 1.
137. *Id.* art. II, ¶ 6.
138. *Id.* art. IV, ¶ 3.
139. *Id.* art. IV, ¶ 4.
140. *Id.* art. VII, ¶ 1.
141. *Id.* art. VIII, ¶ 1.
142. *Id.* art. VIII, ¶ 2.
143. *Id.*
144. *Id.* art. VIII, ¶ 3.

The periodic assessment reports are disseminated to all member countries.[145]

The decisions of the Board must be unanimous.[146] The Board elects a Chairman and Vice-Chairman based upon the principle of rotation among member countries for two year periods.[147] The Rules of Procedure for the meetings of the board are the same as for other SAARC meetings.[148] The Board meets at the same place and time as the Standing Committee, which precedes the annual Summit.[149] The SAARC Secretariat assists the Board in monitoring all matters relating to the release of food grains from the Reserve, and in convening and servicing meetings of the Board.[150]

(c) Implementation Problem

"South Asia is home to more food insecure people than any other region in the world. About 294 million people are classified by the Food and Agriculture Organisation as undernourished—more than one-third of the world's population."[151] Also, as noted by World Food Programme ("WFP"), "[a]lthough hunger simply means an absence of food, food security goes further, embracing multiple dimensions of availability, access and utilization on one hand and vulnerability on the other. These four dimensions of food security affect children, women and conflict affected people."[152] In this context, devising a mechanism for ensuring food security in the region is certainly welcome. Under the alarming situation of food shortage that South Asia is regularly confronted with, the SAARC Reserve was to help mitigate sufferings by member countries' populations.[153] However, as noted by a diplomat from India, Muchkend Dubey, the Reserve has some inherent defects.[154] It is too small to be of any efficient and practical use.[155] If it is to serve in an emergency situation, "the Reserve will have to be revamped. First, its size will have to be increased to 1.5 million tons against the present size of 200,000 tons. Second, the composition of the food grains kept in the Reserve

145. *Id.* art. VIII, ¶ 1.
146. *Id.* art. VII, ¶ 2.
147. *Id.* art. VII, ¶ 3.
148. *Id.*
149. *Id.* art. VII, ¶ 4.
150. *Id.* art. IX.
151. WFP's Sri Lanka Representative, Dr. Suresh Sharma, introducing the publication "Enabling Development: Food Assistance in South Asia, *available at* http://www.priu.gov.lk/News %20Update/current%20affairs/ca200105/20010502WFP_food_security_in_South_Asia.htm (last visited Nov. 9, 2002).
152. *Id.*
153. *See* PRADHAN, *supra* note 124, at 55.
154. *Id.*
155. *Id.*

would have to be changed to include a much larger proportion of rice."[156] And third, stocks would have to be maintained at most of the key points near deficient and disaster prone areas in member countries.[157]

In spite of the relatively straightforward legal framework, as well as, the nobility of the objectives, the facilities provided under the Reserve have never been utilized even though member countries have suffered from acute food shortages from time to time.[158] In addition, "proposed food security became only notional since there was no central granary to implement it."[159] Hence, it was decided to lessen the focus on it.[160]

2. Enhancing Trade Through Preferential Regime

Since its establishment in 1985, SAARC has taken significant steps to expand cooperation among member countries in core economic areas.[161] In 1991, it completed a Regional Study on Trade, Manufactures and Services ("TMS").[162] This study was the first important step, which paved the way for SAARC to move forward in strengthening cooperation in this field.[163] The TMS Study outlined a number of recommendations for promoting regional cooperation in core economic areas.[164] As a result, a high-level Committee on Economic Cooperation ("CEC") compromised of the Commerce Secretaries of all the Member States, was established in July 1991, to act as a forum to address economic and trade issues.[165] The CEC was also made responsible for generally monitoring the progress in the implementation of decisions relating to trade and economic cooperation within the SAARC framework.[166] In this

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156. *Ex-Indian Diplomat Applauds Leadership of Bangladesh*, PM DAILY STAR, Oct. 24, 1998.
157. *Id.*
158. M. Ismeth, *Experts Give Low Marks to SAARC: Eminent group hands over report to CBK*, THE SUNDAY TIMES, Aug. 2, 1998, at 3, *at* http://www.lacnet.org/suntimes/980802/frontm.html (last visited Nov. 4, 2002).
159. Interview, Nihal Rodrigo, Secretary General of SAARC, *SAARC Itself Caught Up In Rhetoric*, THE INDEPENDENT (Nepal), June 21-27, 2000, *at* http://www.nepalnews.com.np/contents/englishweek/independent/11-01/business.htm (last visited Sept. 16, 2002).
160. *Id.*
161. SAARC Charter, *supra* note 50, ch. 4.
162. *Id.*
163. *Id.*
164. *See* Arif A. Waquif, *SAPTA: A Step Toward Economic Regionalization In South Asia,* 35 ASIAN ECON. REV. 162 (1993). This study itself evolved from the recommendations of the expert group of planners of SAARC countries. It was based on seven country studies commissioned by the SAARC secretariat during 1989-90, following the recommendations of the SAARC leaders that exploratory studies in economic cooperation need to be undertaken.
165. SAARC Charter, *supra* note 50, ch. 4.
166. *Id.*

context, it was given the responsibility to review progress in the carrying out of decisions of meetings of SAARC Commerce Ministers, to coordinate the works of different expert groups on customs, investments, and standardization established under the aegis of SAARC, and most importantly, to consider the report of the Inter-Governmental Group on Trade Liberalization.[167]

The Inter-Governmental Group on Trade Liberalization, established during the Colombo Summit in December 1991, was mandated to "seek agreement on an institutional framework under which specific measures for trade liberalisation among SAARC member states could be furthered."[168] It prepared a draft agreement on SAARC Preferential Trading Arrangement ("SAPTA").[169] Upon the recommendation of CEC, the draft agreement was signed by the Council of Ministers in Dhaka on April 11, 1993, during the seventh SAARC Summit.[170] The New Delhi Summit held from May 2-4, 1995, formally approved the proposals for preferential trade.[171] Upon completion of all the procedural formalities by member countries, and subsequent to a notification issued by the Secretariat to this effect, the Agreement on SAPTA came into effect on December 7, 1995.[172]

The notably rapid accomplishment related to SAPTA clearly brings out two distinct conclusions. First, the SAARC countries have managed to enter into "the politico-economically sensitive area of trade liberalisation in a cautious and mutually acceptable manner."[173] While ensuring a "cautious and sensitive approach," they have still succeeded in commencing the implementation of SAPTA in December 1995, two years ahead of the time schedule envisioned initially.[174] Second, the SAARC countries did not approach "the liberalisation of intra-regional trade as an end in itself, but as a means toward improving the economic welfare of the

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167. *Id.*

168. Sixth SAARC Summit, Colombo Declaration ¶ 21 (Dec. 21, 1991). For discussions on a general trend of trade until the end of eighties, see Masroor Ahmad Beg, *Intra-SAARC Trade: A Dwindling Feature,* XLVI INDIA QUARTERLY J. INT'L AFFAIRS 47-89 (1990).

169. Sixth SAARC Summit, Colombo Declaration ¶ 21 [hereinafter "SAPTA"].

170. Seventh SAARC Summit, Dhaka Declaration.

171. Eighth SAARC Summit, New Delhi Declaration.

172. SAPTA provided for entry into force on the thirtieth day after the notification issued by the SAARC Secretariat regarding completion of the formalities by all Contracting States. SAPTA, *supra* note 169, art. 22. Interestingly, it did not permit signature to be accompanied by reservations. Similarly, reservations were also not admitted at the time of notification to the SAARC Secretariat of the completion of formalities. *Id.* art. 23.

173. Waquif, *Carrying The SAARC Flag*, *supra* note 49, at 2.

174. *Id.*

people of South Asia."[175] This approach comes distinctly from the declaratory provisions of SAPTA.[176]

The preamble of SAPTA broadly refers to the purpose of the arrangement, which is to establish and promote a regional preferential trade arrangement.[177] "[T]he expansion of trade could act as a powerful stimulus to the development of the[] national economies, by expanding investment and production, thus providing greater opportunities of employment and help securing higher living standards for their population[s]."[178] The creators, aware of the urgency to promote "the intraregional trade which presently constitutes a negligible share in the total volume of the South Asian trade."[179] In addition, to strengthen economic cooperation and development, they also agreed that the regional cooperation will be carried out in "a spirit of mutual accommodation, with full respect for the principles of sovereign equality, independence and territorial integrity of all States."[180]

The need for identifying specific areas for economic cooperation, including trade liberalization, was already acknowledged by the fourth SAARC Summit meeting held in Islamabad in December 1988.[181] Following that Summit, trade liberalization was included in the agenda of several successive summits. The preamble of SAPTA recalls several historic decisions made by the member countries on trade liberalization.[182] For instance, acknowledging the commitment made by the countries at the sixth SAARC Summit held in Colombo to the "liberalisation of trade in the region through a step by step approach in such a manner that countries in the region share the benefits of trade expansion equitably."[183] The preamble also stresses "the mandate given by the Colombo Summit to formulate and seek agreement on an institutional framework under which specific measures for trade liberalization . . . could be furthered."[184] In addition, it stresses the examination of a proposal by Sri Lanka in favor of the establishment of a preferential trading arrangement for the countries in South Asia.[185]

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175. *Id.*
176. *See* SAPTA, *supra* note 169, pmbl.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*

(a) Principles and Components

With this background, the SAARC Preferential Trading Arrangement ("SAPTA"), which emerged as an internal component of the SAARC mandate for developm ent through cooperation, was established to promote and sustain mutual trade and the economic cooperation among Contracting States," through the exchange of concessions.[186] The countries agreed to partially bring down tariffs toward each other's goods. It is important to remember that tariffs still continue to exist in trade among them, which was to give preference to the goods of member countries as compared to the rest of the world.[187] In parallel to preferential concessions, SAPTA also includes provisions favoring special treatment to the least developed countries ("LDCs") in the SAARC region.[188]

SAPTA is governed by a set of principles. The application of rights and obligations under it are to be based on "the principles of overall reciprocity and mutuality of advantages in such a way as to benefit all Contracting States" equitably.[189] All actions under the Agreement would need to take "into account their respective levels of economic and industrial development [in the countries], the pattern of their external trade, trade and tariff policies and systems."[190] The concessions should occur in "step by step" negotiations and should be "improved and extended in successive stages with periodic reviews."[191] All actions must recognize the special needs of the Least Developed Contracting States ("LDCSs") and agree upon concrete preferential measures in their favor.[192] The concessions can relate to manufactured products and commodities in their raw, semi-processed and processed forms.[193]

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186. *Id.* art. 2.

187. Scholars have made a distinction between two different types of preferential trade arrangements ("PTAs"). "First, there are PTAs among non-hegemonic countries (chiefly the developing countries), such as MERCOSUR, which contains Argentina, Brazil, Uruguay, and Paraguay, and the Association of Southeast Asian Nations ("ASEAN"). Second, there are PTAs that include hegemonic countries of the Triad, such as NAFTA and its proposed extensions, the proposed transformation of the Asia-Pacific Economic Cooperation ("APEC") into a PTA, the proposed Trans-Atlantic Free Trade Agreement ("TAFTA") (which would have a mix of hegemonic and non-hegemonic members), the EU, and the EU's association agreements with other countries." Jagdish Bhagwati, *Preferential Trade Agreements: The Wrong Road*, 27 LAW & POL'Y INT'L BUS. 866-868 (1996). *See also* Anne O. Krueger, *Are Preferential Trading Arrangements Trade-Liberalizing or Protectionist?* 13 J. ECON. PERSPECTIVES 110-111 (1999).

188. SAPTA, *supra* note 169, art. 10.

189. *Id.* art. 3.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

Governed by the above principles, SAPTA consists of four components:[194] arrangements relating to tariffs (customs duties included in the national tariff schedules of the Contracting States), paratariffs,[195] nontariff measures,[196] or direct trade measures.[197] The Contracting States are free to conduct their negotiations "for trade liberalisation in accordance with any [single] or combination of the following approaches and procedures."[198] The negotiations can be made on a product-by-product basis, [a]cross the board tariff reductions, sectoral basis, or can simply direct trade measures.[199] However, for an initial period, the Contracting States agreed to negotiate tariff preferences on a product-by-product basis.[200]

In the same vein, the Contracting States also agreed to consider "the adoption of trade facilitation and other measures to support and complement SAPTA . . . [for] mutual benefit."[201] In this context, special consideration is also given "to requests from Least Developed Contracting States for technical assistance . . . [in addition to] cooperation arrangements designed to assist them in expanding their trade with other Contracting States and in taking advantage of the potential benefits of SAPTA."[202] "The tariff,

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194. *Id.* art. 4.

195. *Id.* art. I(9).

> "Paratariffs" means border charges and fees other than "tariffs", on foreign trade transactions of a tarifflike effect which are levied solely on imports, but not those indirect taxes and charges, which are levied in the same manner on like domestic products. Import charges corresponding to specific services rendered are not considered as paratariff measures.

Id.

196. "'Nontariffs' means any measure, regulation, or practice, other than 'tariffs' and 'paratariffs,' the effect of which is to restrict imports, or to significantly distort trade." *Id.* art. I(10).

197. "'Direct trade measures' means measures conducive to promoting mutual trade of Contracting States such as long and mediumterm contracts containing import and supply commitments in respect of specific products, buyback arrangements, state trading operations, and government and public procurement." *Id.* art. I(7).

198. *Id.* art. 5.

199. *Id.* Negotiations on sectoral basis pertains to the removal or reduction of tariff, nontariff and paratariff barriers as well as other trade promotion or cooperative measures for specified products or groups of products closely related in end use or in production.

200. *Id.*

201. *Id.* art. 6.

202. *Id.* The possible areas for such technical assistance and cooperation are listed in Annex I to the SAPTA Agreement.

> The following are the additional measures in favor of least developed contracting states:
>
> (a) the identification, preparation and establishment of industrial and agricultural projects in the territories of Least Developed Contracting States which could provide the production base for the expansion of exports of Least Developed Contracting States to other Contracting States, possibly linked to cooperative financing and buyback arrangements;

paratariff, and nontariff concessions negotiated and exchanged amongst Contracting States shall be incorporated in the National Schedules of Concessions."[203] Such concessions, except those made exclusively to the LDCSs, are extended unconditionally to all Contracting States.[204] It may be useful to note that some initial concessions were also agreed to by the Contracting States at the time of the finalization of the international agreements.[205]

(b) Exceptions and Safeguards

> Liberalization always creates a risk of uncontrolled import growth, thus threatening domestic jobs. In cases where imported products could cause serious difficulties in certain industries the Agreement provides safeguard clauses. These clauses are based on existing GATT rules which envisage the possibility of introducing trade-limiting measures in

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> (b) the setting up of manufacturing and other facilities in Least Developed Contracting States to meet intra-regional demand under cooperative arrangements;
>
> (c) the formulation of export promotion policies and the establishment of training facilities in the field of trade to assist Least Developed Contracting States in expanding their exports and in maximizing their benefits from SAPTA;
>
> (d) the provision of support to export marketing of products of Least Developed Contracting States by enabling these countries to share existing facilities (for example, with respect to export credit insurance, access to market information) and by institutional and other positive measures to facilitate imports from Least Developed Contracting States into their own markets;
>
> (e) bringing together of enterprises in other Contracting States with project sponsors in the Least Developed Contracting States (both public and private) with a view to promoting joint ventures in projects designed to lead to the expansion of trade; and
>
> (f) the provision of special facilities and rates in respect to shipping.

Id. annex I.

203. *Id.* art. 7.

204. *Id.* art. 8. "SAPTA as it exists today does not rely on a clearly defined common external tariff. A proxy of such a tariff, however, originates in the bilateral treaties between SAPTA member states. Consequently it is quite possible to find existence of trade creation and/or diversion as effects of PTA among the SAARC countries." Harvard Univ., *Report: South Asian Preferential Trading Arrangement* 4, *available at* http://www2.cid.Harvard.edu/cidtrade/Issues/SAPTA.pd (last visited Nov. 9, 2002) [hereinafter "Harvard Report"]. "Also, most of the SAARC countries trade substantially with the developed countries of EU, NAFTA and APEC. Therefore, it is possible that with the formation of preferential trading arrangement some diversion of trade takes place from low cost supplier of non-member country to high cost supplier of member country for at least some products." *Id.* at 4-5.

205. SAPTA, *supra* note 169, annex II. *See also* Vijay Shukla, *New Frontiers of SAARC,* LII INDIA QUARTERLY J. OF INT'L AFFAIRS 92 (1996).

> justified cases. The aim of including these clauses into the Agreement has been to give both sides the possibility to reintroduce some import-limiting measures or even to introduce new barriers to trade, but only in carefully defined situations.[206]

With regard to the concessions granted under the SAPTA, there are also situations where exceptions can be found.[207] Four principal types of situations are foreseen by SAPTA for an exception to be triggered. For instance, the provisions of SAPTA are not applicable "in relation to preferences already granted or to be granted by any Contracting State to other Contracting States outside the framework of this Agreement, and to third countries through bilateral, plurilateral and multilateral trade agreements."[208] Similarly, the Contracting States are also not obligated "to grant preferences which impair the concession extended under those agreements."[209] Moreover, "any Contracting State facing serious economic problems including balance of payments difficulties may suspend provisionally the concessions as to the quantity and value of merchandise permitted that would be imported under the Agreement."[210] In the same manner, in any time of critical economic circumstances, i.e. when there is emergence of an exceptional situation where massive preferential imports cause or threaten to cause serious injury difficult to repair and which calls for immediate action, countries can suspend preferential treatments.[211]

When a decision to suspend takes place, the Contracting State, which initiates such action, is required to simultaneously notify the other Contracting States and the Committee of Participants.[212] In addition, any Contracting State that decides to call for such exceptions is required to afford adequate opportunities for consultations, upon request from any other Contracting State, which preserves the stability of the concessions negotiated under SAPTA.[213] If no satisfactory adjustment can be effected between the

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206. INSTITUTE FOR EAST WEST STUDIES, FROM ASSOCIATION TO ACCESSION: THE IMPACT OF THE ASSOCIATION AGREEMENTS ON CENTRAL EUROPE'S TRADE AND INTEGRATION WITH THE EUROPEAN UNION 21 (Kalan Mizsei & Andrzj Rudka eds. 1995). *See also Safeguards Against Trade Diversions via SAPTA*, BUSINESS LINE FINANCIAL DAILY (The Hindu Group), Nov. 21, 2000.

207. SAPTA, *supra* note 169, art. 11.

208. *Id.*

209. *Id.*

210. *Id.* art. 13, ¶ 1.

211. *Id.* art. 14.

212. *Id.*

213. *Id.*

concerned Contracting States within ninety days of such notification, the matter may then be referred to the Committee of Participants for review.[214]

The safeguard measures are dealt with in Article 14 of the Agreement.[215] If any manufactured products and commodities in their raw, semi-processed and processed forms, which are subject of concessions with respect to preference under SAPTA, "is imported into . . . a Contracting State in a manner or in such quantities as to cause or threaten to cause serious injury," such importing Contracting State, can suspend the concession accorded under the Agreement, except in critical circumstances.[216] However, such suspension should be provisional and without any discrimination.[217] "When such action has taken place, the Contracting State which initiates such action shall simultaneously notify the other [concerned] Contracting State(s)" and the Committee of Participants.[218] The Committee of Participants then enters into consultation with the concerned Contracting State in an attempt to reach mutual agreement for remedying the situation.[219] In the event of failure of the Contracting States to resolve the issue within ninety days of receipt of the original notification, then the Committee of Participants must meet within thirty days to review the situation and try to amicably settle the issue.[220] In case the consultation in the Committee of Participants fails to resolve the issue within sixty days, "the parties affected by such action reserve the right to withdraw equivalent concession(s) or other obligation(s), which the Committee of Participants does not

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214. *Id.*
215. *Id.*
216. *Id.*

> Serious injury means significant damage to domestic producers, of like or similar products resulting from a substantial increase of preferential imports in situations which cause substantial losses in terms of earnings, production or employment unsustainable in the short term. The examination of the impact on the domestic industry concerned also includes an evaluation of other relevant economic factors and indices having a bearing on the state of the domestic industry of that product. Threat of serious injury pertains to a situation in which a substantial increase of preferential imports is of a nature to cause "serious injury" to domestic producers, and that such injury, although not yet existing, is clearly imminent. A determination of threat of serious injury is based on facts and not on mere allegation, conjecture, or remote or hypothetical possibility.

Id.
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*

disapprove."[221] It is important to note that any of the concessions agreed upon under the SAPTA "shall not be diminished or nullified, by the application of any measures restricting trade by the Contracting States."[222] The products that are included in the National Schedules of Concessions remain eligible for preferential treatment so long as they satisfy the Rules of Origin, including special Rules of Origin with respect to the Least Developed Contracting States.[223]

At this juncture, it is appropriate to note that SAPTA calls for special treatment of the Least Developed Contracting States.[224] All Contracting States are required "to provide, wherever possible, special and more favourable treatment exclusively to the Least Developed Contracting States."[225] This type of treatment may include duty-free access, exclusive tariff preferences, or deeper tariff preferences for the export products, the removal of nontariff barriers, and where appropriate, of paratariff barriers.[226] Such favorable treatment may also include the negotiations of long-term contracts with a view to assisting Least Developed Contracting States in achieving reasonable levels of sustainable exports of their products, special consideration of exports from Least Developed Contracting States in the application of safeguard measures, greater flexibility in the introduction and continuance of quantitative or other restrictions provisionally and without discrimination in critical circumstances by the Least Developed Contracting States on imports from other Contracting States.[227] Similarly, the favorable treatment may also include measures to promote exports by expanding production bases by setting up joint ventures, buy-back arrangements, and other cooperative arrangements.[228]

The special and more favorable treatment provided exclusively for the LDCs is to assist them in deriving equitable benefits from the Agreement,[229] and particularly in saving them from being marginalized.[230] Interestingly in South Asia, due to four countries

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221. *Id.*
222. *Id.* art. 15.
223. *Id.* art. 16. The rules are set out in Annex III of the Agreement.
224. *Id.* art. 10.
225. *Id.*
226. *Id.* art. 10, ¶¶ a-c.
227. *Id.* art. 10, ¶ d-f.
228. *Id.* annex I.
229. Because of this, some authors have termed it as the "equity approach" of SAPTA. Waquif, *SAPTA*, *supra* note 164, at 162.
230. It is noteworthy that this notion of special treatment of LDC is *grosso modo* similar to the comprehensive and integrated plan of Action for LDCs adopted by the World Trade Organization ("WTO") in 1996. See for comparison *Comprehensive and Integrated WTO Plan*

out of seven being LDCs, more countries are eligible for special treatment than those that are not eligible.

(c) Enforcing Rules of Origin

When a product is the result of material and labor from two or more countries, the need for Rules of Origin arises.[231] "A Rule of Origin is a criterion that is used to determine the nationality of a product or a producer."[232] "Rules of origin are necessary in controlling imports on a discriminatory basis."[233] Provisions to ensure the application of the Rules of Origin, which have the substantive and procedural functions, are made in SAPTA.[234] The substantive function relates to the requirements that must be satisfied in order for a product to be considered as originating from a particular country.[235] The "procedural function relates to the formalities and certifications furnished to verify satisfaction of the substantive Rule of Origin."[236]

Products covered by preferential trading arrangements within SAPTA framework, which are imported into one Contracting State from another, are eligible for preferential concessions, if they conform to the origin requirement.[237] For that purpose, products are classified into two categories: those that are wholly produced or obtained in the exporting Contracting State, and those that are not wholly produced or obtained in the exporting Contracting State.[238]

Rule 2 of Annex III to the SAPTA attempts to define products that are wholly produced or obtained in the exporting Contracting

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of Action for the Least-Developed Countries Adopted on 13 Dec. 1996, *available at* http://www.wto.org/english/tratop_e/devel_e/action_plan.htm (last visited Nov. 9, 2002).

231. Aly K. Abu-Akeel, *Definition of Trade in Services under the GATS: Legal Implications*, 32 GEO.WASH. J. INT'L L. & ECON. 201 (1999).

232. *Id.*; Bernard M. Hoekman, TRADE LAWS & INSTITUTIONS 32, World Bank Discussion Paper, (World Bank, 1995).

233. *Id.* It may be appropriate to note that a "multilateral convention dealing with rules of origin . . . the International Convention on the Simplification and Harmonization of Customs Procedures (also known as the Kyoto Convention)" was negotiated in 1974, and is "administered by the Brussels-based Customs Cooperation Council." However, "despite the flexibility regarding the choice of origin system provided by the Convention," only few countries have signed it. *Id.* From amongst the SAPTA countries, only India, Pakistan and Sri Lanka are parties to the Convention. The Convention entered into force for India in 1977, for Pakistan in 1981, and for Sri Lanka in 1984. Kyoto Convention Annex A.1, *available at* http://www.unece.org/cefact/rec/kyoto/ky-01-e0.htm (last visited Nov. 9, 2002).

234. Abu-Akeel, *supra* note 231, at 201.

235. *Id.*

236. *Id.*

237. SAPTA, *supra* note 169, annex III, rule 1.

238. *Id.*

State.[239] Raw or mineral products, which are extracted from the soil, water or seabed of the Contracting State,[240] are included in defined products under Rule 2.[241] Also, agricultural products harvested in the Contracting State and animals born and raised the Contracting State in addition to products obtained from these animals, whether obtained through hunting or fishing.[242] Additionally, products of sea fishing and other marine products taken from the high seas by the vessels of the Contracting State,[243] and products exclusively processed onboard factory ships[244] of the Contracting State exclusively fall under Rule 2.[245] Furthermore, used articles, which are fit for recovery of raw materials, waste and scrap manufactured in the Contracting State or good produced exclusively from such materials in the Contracting State all fall into the first category.[246]

Products that are not wholly produced or obtained in the exporting state are also eligible for preferential concession so long as they fulfill certain conditions, which are dealt with in Rule 3.[247] Products worked on or processed, which result in a total value of less than sixty percent of materials, parts or produce originating from non-Contracting States (or of undetermined origin) and which the f.o.b. value of the products produced or obtained in the final manufactured process is performed within the territory of the exporting Contracting State, then it falls into this category.[248] By

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239. *Id.* annex III, rule 2.

240. *Id.* Including mineral fuels, lubricants and related materials as well as mineral of metal ores.

241. *Id.*

242. *Id.*

243. *Id.* annex III, rule 2, n.3.

> Vessels refer to fishing vessels engaged in commercial fishing, registered in a Contracting State's country and operated by a citizen or citizens and/or governments of Contracting States, or partnership, corporation or association, duly registered in such Contracting State's country, at cost 60 per cent of equity of which is owned by a citizen or citizens and/or government of such Contracting States, or 75 percent by citizens and/or governments of the Contracting States. However, the products from vessels engaged in commercial fishing under bilateral agreements, which provide for chartering or leasing of such vessels and/or sharing of catch between Contracting States are also eligible for preferential concessions.

Id. annex III, Rule 2(f), n.3.

244. In respect of vessels or factory ships operated by government agencies the requirement of flying the flag of a Contracting State does not apply. *Id.* annex III, rule 10(4).

245. *Id.* annex III, rule 2, n.3.

246. *Id.*

247. *Id.* annex III, rule 10(4).

248. *Id.* annex III, rule 3; Originally 50%, an amendment approved by the SAARC Council of Ministers at its Twenty-first Session held in Nuwara Eliya, Sri Lanka, on 18-19 March 1999, (the 1999 Amendment) changed it to 60%. *See generally* K.R. Srivats & Hema Ramakrishnan, *Government accepts origin norm change for goods under SAPTA pact*,

the same token, products that are subject to sectoral agreements also fall into this category.[249] In this context, the value of the non-originating materials, parts or produce is "the c.i.f. value at the time of importation of materials parts or produce where this can be proven or the earliest ascertainable price paid for the materials, parts or produce of undetermined origin in the territory of the Contracting State where the working or processing takes place."[250]

Rules of Origin are considered to be inherently arbitrary despite the extensive codification that accompanies them.[251] In order to properly enforce the rules, or at least to minimize the arbitrariness caused by the rules, clear provisions regarding the mechanism used to deal with products, which also contain inputs from countries other than the exporting countries, become necessary.[252] SAPTA also attempts to address the issue of such cumulative Rules of Origin.[253] Those products, "which comply with origin requirements . . . and which are used by a Contracting State as input for a finished product . . . eligible for preferential treatment by another Contracting State shall be considered as a product originating in the territory of the Contracting State where working or processing of the finished product has taken place provided that the aggregate content originating in the territory of the Contracting State is not less than 50 percent of its f.o.b. value."[254] Partial cumulation means that only products, which have acquired originating status in the territory of one Contracting State may be taken into account when used as inputs for a finished product eligible for preferential treatment in the territory of another Contracting State.[255]

Another clarification necessary for an unambiguous implementation of the Rule of Origin concerns the consignment of goods, which needs to be direct.[256] SAPTA attempts to address it.[257]

BUSINESS LINE FINANCIAL DAILY (The Hindu Group), Nov. 24, 2000, at 1.

249. SAPTA, *supra* note 169, annex III, n.6. "In respect of products traded within the framework of sectoral agreements negotiated under SAPTA, provisions may need to be made for special criteria to apply. Consideration may be given to these criteria as and when the sectoral agreements are negotiated."

250. *Id.* annex III, rule 3(c).

251. Bhagwati, *supra* note 187, at 866. Interestingly, however, "the nature of rules of origin is also considered to be an important determinant of the degree to which regional trading arrangement discriminate against non-member countries. The more restrictive such rules become, the more regional arrangements may be deemed to yield results that are inimical to multilateralism." Hoekman, *supra* note 232, at 54.

252. SAPTA, *supra* note 169, annex III, rule 4.

253. *Id.*

254. *Id.* Originally 60%, but the 1999 Amendment changed it to 50%.

255. *Id.*

256. *Id.* annex III, rule 5.

257. *Id.*

Goods are "considered as directly consigned from the exporting Contracting State to the importing Contracting State," if the products are transported without traversing over territory of any non-Contracting State; if the transportation of a product involves transit through one or more intermediate non-Contracting States regardless of transshipment or temporary storage in such countries, it will be considered as directly consigned in only the following three situations.[258] First, the transit entry should be justified for geographical reason or by considerations related exclusively to transport requirements.[259] Second, the products should not have entered into trade or consumption by the transit country.[260] Third, the products should not have undergone any operation in the transit country other than for the unloading and reloading or any other operation, which is required for maintaining them in good condition.[261] It is important to note that while packing may be treated separately if the national legislation so requires, it is still considered to be an important element of verifying the Rule of Origin of the product.[262] Furthermore, when determining the origin of products, "packing is considered as forming a whole with the product it contains."[263]

Finally, in order to pass the crucial tests pertaining to the Rule of Origin, products eligible for preferential concessions need to be supported by a Certificate of Origin[264] that an authority who is chosen by the government of the exporting Contracting State has issued and where the importing Contracting State has been notified in accordance with the Certification Procedures.[265] Otherwise, the

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258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.* annex III, rule 6.
263. *Id.*
264. *Id.* annex III, Certificate of Origin.

> I. General considerations to qualify for preference, products must (a) fall within a description of products eligible for preference in the schedule of concessions of SAPTA country of destination; (b) comply with SAPTA Rules of Origin. Each article in a consignment must qualify separately in its own right; and c) comply with the consignment conditions specified by the SAPTA Rules of Origin. In general, products must be consigned directly . . . from the country of exportation to the country of destination.
>
> II. Entries to be made in . . . [p]reference products must be wholly produced or obtained in the exporting Contracting State in accordance with Rule 2 of the SAPTA Rules of Origin, or where not wholly produced or obtained in the exporting Contracting States must be eligible under Rule 3 or Rule 4.

Id.

265. *Id.* annex III, rule 7.

product may be declared ineligible.[266] In the same vein, a Contracting State can also "prohibit importation of products containing any input originating from States with which it does not have economic and commercial relations."[267]

It is clear from the above that the Rule of Origin has been treated as an important element by SAPTA, and Contracting States are in agreement that best efforts must be made towards cooperation where origin of inputs are specified in the Certificate of Origin.[268] In this context, it is worth noting that with regard to the LDCs, Rule 10 provides for a special criteria percentage.[269] According to Rule 10, "products originating in Least Developed Contracting States can be allowed a favourable ten percentage points applied to the percentage established" by the Agreement.[270] Thus, regarding products that are not wholly produced or obtained in the exporting State (Rule 3), the percentage would not exceed seventy percent, and regarding cumulative rule of origin (Rule 4), the percentage would not be less than forty percent.[271]

(d) Modification or Withdrawal of Concessions

The provisions regarding change of status of concessions made under SAPTA are relatively clear.[272] Two types of procedural formalities are relevant: change of status of concession vis-à-vis countries, which are still members of SAPTA, and change of status of concession vis-à-vis countries that have ceased to be members.[273]

"Any Contracting State may, after a period of three years from the day the concession was extended, notify the Committee of its intention to modify or withdraw any concession included in its appropriate schedule."[274] "The Contracting State intending to withdraw or modify a concession shall enter into consultation and/or negotiations," in an attempt to agree on any necessary and appropriate compensation with any Contracting States with whom the concession was initially negotiated and any Contracting State that has a substantial supplying interest.[275] In case agreement

266. *Id.*
267. *Id.* annex III, rule 8.
268. *Id.*
269. *Id.* annex III, rule 10.
270. *Id.*
271. *Id.* Originally 60% (for Rule 3) and 50% (for Rule 4), but the 1999 Amendment changed it to 70% and 40%.
272. *Id.* art. 17.
273. *Id.* art. 18.
274. *Id.* art. 17, ¶ 1.
275. *Id.* art. 17, ¶ 2. The Committee of Participants determines which Contracting States has a substantial supplying interest.

cannot be reached within six months of the receipt of notification between the Contracting States concerned, and where "the notifying Contracting State proceeds with its modification or withdrawal of such concessions, the affected Contracting States…may withdraw or modify equivalent concessions in their appropriate schedules."[276] Any such modification or withdrawal needs to be notified to the Committee.[277]

On the other hand, a Contracting State is always "free to withhold or to withdraw, in whole or in part any item in its schedule of concessions" with respect to that it determines "was initially negotiated with a State, which has ceased to be[come]" a member of SAPTA.[278] Yet, a country taking such action is first required to notify the Committee of Participants, and then upon request, to consult with the Contracting States that have a substantial interest in the product concerned.[279] It is obvious that consultations among countries have paramount importance under SAPTA Agreement.[280] Perhaps, under the Agreement,

> each Contracting State is required to accord sympathetic consideration by affording adequate opportunity for consultations regarding such representations as may be made by another Contracting State with respect to any matter affecting the operation of [this preferential trading arrangement]. The Committee of Participants can, at the request of a Contracting State, consult with any Contracting State in respect of any matter for which it has not been possible to find a satisfactory solution through such consultation.[281]

(e) General Oversight & Dispute Settlement

For the purpose of providing general oversight, reviewing the progress made in the implementation of the SAPTA, and ensuring that "benefits of trade expansion emanating from this agreement accrue to all Contracting States equitably," the SAPTA has provided for the establishment of a monitoring and coordinating body, known as the Committee of Participants.[282] This Committee, with

276. *Id.* ¶ 3.
277. *Id.*
278. *Id.* art. 18.
279. *Id.*
280. *Id.* art. 19.
281. *Id.*
282. *Id.* art. 9.

overarching responsibility, consists of representatives of all Contracting States.[283] It generally meets at least once a year.[284] In addition to these regular annual meetings, it also accords "adequate opportunities for consultation on representations made by any Contracting State with respect to any matter affecting the implementation of the Agreement."[285] To carry out its responsibilities for settling such representations, the Committee devises its own rules of procedures.[286]

The Committee is also vested with the responsibility of managing the process of withdrawal of a country from SAPTA.[287] "Any Contracting State may withdraw from [the SAPTA] Agreement" any time after its entry.[288] "Such withdrawal shall be effective six months from the day on which written notice" is given and is received by the SAARC Secretariat, who is the depositary of this Agreement.[289] The Contracting State is also required to simultaneously inform the Committee of the action it has taken.[290] "The rights and obligations of a Contracting State, which has withdrawn from this Agreement shall cease to apply as of [the] effective date."[291] "Following the withdrawal by any Contracting State, the Committee needs to meet within 30 days to consider action subsequent to withdrawal."[292]

Finally, the responsibility of the Committee also stretches to situations of disputes. Any disputes that arise among

> the Contracting States regarding the interpretation and application of the provisions of the [SAPTA] Agreement or any instrument adopted within its framework are to be amicably settled by agreement between the parties concerned. In the event of [a] failure to settle a dispute, it may be referred to the Committee by a party to the dispute . . . [The Committee reviews] the matter and makes [a] recommendation . . . thereon within 120 days from the date on which the dispute was submitted to it.[293]

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283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.* art. 21.
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.* ¶ 2.
292. *Id.* ¶ 3.
293. *Id.* art. 20.

With regard to dispute settlement, the provisions in SAPTA are too short, if not incomplete.[294] Detailed rules of procedures need to be devised, in order to clarify the mechanism for resolution of the disputes that are within the purview of the Committee. The spectrum of dispute resolution, whether they are direct negotiations or third party adjudications, is not clear. A third party approach, if intended, would also require clarifying the number, term and method of selecting arbitrators. Moreover, clarification regarding the available remedies appears to be needed. In short, one can note two distinct stages in dispute resolution.[295] First, there is the consultation stage.[296] Second, if consultation is unsuccessful, there is the stage in which the Committee makes findings of facts and/or legal determinations regarding the solution.[297]

(f) Trade Enhancement Problems and Prospects

The fact that, in a relatively short span of time, SAARC has taken remarkable strides favoring trade liberalization, most notably in institutionalizing SAPTA, is important.[298] But all that glitters is not gold. There are also a number of unsolved issues, problems, apprehensions and dissatisfactions.

(i) Political Versus Trade Problem

In spite of the achievements discussed earlier, and although there have been significant talk about trade, today, trade within South Asia stands at an abysmally low level.[299] Except in a few countries, the majority of trade is still outside of the South Asian region, although quite paradoxically, many of the items that are imported today are capable of being produced within the region itself.[300] Moreover, although SAPTA is "being talked about in

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294. *See, e.g., id.* art. 20.
295. *Id.* art. 20.
296. *Id.* art. 19.
297. *Id.* art. 20.
298. SAPTA has been hailed as the most significant achievements of the SAARC. Indra Nath Mukherji, *The South Asian Preferential Trading Arrangement. Identifying Products in India's Regional Trade*, 5 ASIA-PACIFIC DEVELOPMENT J. 37 (UNITED NATION ECONOMIC & SOCIAL COMMISSION FOR ASIA AND THE PACIFIC, June 1998).
299. Rajesh Nair, *Forget SAARC, Create a "South Asian Union,"* FIN. DAILY (THE HINDU), Jan. 11, 2001, at 13; Dixit, *supra* note 49, at 4-5; Harvard Report, *supra* note 204, at 35. "Clearly economic integration in the form of SAPTA has not led to increase intra-regional trade." *See also* Rajat Sharma, *SAPTA to SAFTA: Some Observations*, KATHMANDU POST, Oct. 2, 1999, at 2. This lack of increase in intra-regional trade is interesting and peculiar to South Asian region. Indeed, in other regions, as noted by a scholar, there is considerable evidence that preferential trade agreements have increased intra-regional trade among their members. Krueger, *supra* note 187, at 120.
300. Nair, *supra* note 299, at 13.

glowing terms [publicly], many of the countries in the region have been hesitant [about enhancing] the list of free-tradeables (sic) within the region."[301] No doubt, the general move, thus far, has been towards the direction of free trade, and on the balance, freer trade should benefit all South Asian economies in the long run.[302] Yet much remains to be done as freer trade implies greater competitiveness, and requires South Asian countries to adjust to new specialization in which they are willing to give up old lines of production that are inefficient.[303]

SAPTA, which was designed to provide a regional framework for expanding trade relations through preferential concessions, is currently in its fourth round of negotiations. The total number of commodities granted tariff concessions under the first two rounds of negotiations were 2,239.[304] The third round further expanded this list with the addition of another 1,000 commodities. Despite the relatively large coverage of products under SAPTA, there is no evidence of a positive impact on intra-SAARC trade except for Nepalese and Bhutanese trade with India where separate bilateral free-trade agreements are in place.[305] This is further complicated by the complete lack of any authoritative monitoring of items being traded under SAPTA, which is currently only carried out only by the SAARC Secretariat and relies heavily on inputs received by the member countries that are often sparse. The SAARC Secretariat monitoring shows (for SAPTA I and II during 1996-97): while India offered 1,017 commodities for tariff concessions under SAPTA, only 34 were actually being traded by India; out of 291 commodities being offered for SAPTA concessions by Nepal, only 7 were being actually traded; out of 25 commodities being offered by the Maldives, only 7 were being traded; out of 421 commodities being offered by Pakistan, only 13 were being traded; and out of 143 commodities being offered by Sri Lanka, only 79 were actually being

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301. *Id.*
302. *See id.*
303. *See id.*
304. Sadaf Abdullah, *SAARC Intra-Regional Trade: An Assessment* (on file with author). India was the first one to set the pace "by offering the highest number of items (106) for tariff concessions, followed by Pakistan (35), Sri Lanka (31), the Maldives (17), Nepal (14), Bangladesh (12) and Bhutan (11)." *SAPTA, The First Step*, BUSINESS LINE (THE HINDU) (Editorial) Dec. 14, 1995, at 1.
305. *Id.* Trade liberalization under SAPTA is a gradual and controlled process. Member countries negotiate initially tariff preferences on a product by product basis. Under this approach products, which are negotiated for preferential imports (that is those provided tariff concessions) are initially exchanged with all the members on the basis of requests and offer lists made by the members.

traded. Five years later, the situation has not improved significantly.[306]

Despite various approaches to trade liberalization allowed by SAPTA, such as product-by-product, across-the-board tariff reductions, sectoral approaches and direct trade measures, only the product-by-product approach has made any progress.[307] Even then, the tariff reduction has not been effective, as the trade volume of products falling in the concession items category has been very low.[308] In other words, member countries have provided product-by-product tariff concessions only on those items, which have negligible trade value.[309]

> One reason for this low volume could be the model of trade liberalization itself: the product-by-product approach. This approach is not effective in enhancing intra-regional trade [because] it has limitations both in terms of [the] weight of . . . scheduled products in the tradable and the depth of tariff cuts. The non-deployment of other agreed arrangements like paratariffs, nontariff measures and direct trade measures has made it more ineffective. Moreover, many of the products offered with concessions are not imported from within the region, and thus do not result in greater intra-regional trade creation. This issue is partly compounded by the fact that the countries in the region have offered each other concessions under other preferential arrangements and bilateral agreements.[310]

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306. *See generally* Harvard Report, *supra* note 204. For a brief discussion, see Dushni Weerakoon, *Does SAFTA Have a Future*?, 34 ECON & POLITICAL WEEKLY 3214-16 (India), Aug. 25-31, 2001.

307. Waquif, *Carrying The SAARC Flag*, *supra* note 49, at 3.

308. *See generally* Damakant Jayshi, *SAARC Ministers' Meet: Trade not making much headway*, Kathmandu, Aug. 16, 2002.

309. *From SAPTA to SAFTA*, Editorial, KATHMANDU POST, May 15, 1997 (on file with author).

310. Waquif, *Carrying The SAARC Flag*, *supra* note 49, at 3; Under the product-by-product approach, the products to be negotiated for preferential imports are initially exchanged bilaterally with all contracting states on the basis of request and offer lists. Once agreed upon, the list of products offered concessions are consolidated into a single national list of concessions and multilateralized. Mukherji, *supra* note 298, at 40; see *also* Minam Jafri, *SAPTA: Can They Evolve A Community Of Compromise,* XIII PAKISTAN & GULF ECON. 43 (May 28-June 3,1994);

> A product-by-product approach can be, however, an effective instrument for trade liberalization, if a trade-coverage rather than a product coverage approach is adopted in negotiations and provided that the non-tariff

Clearly, the SAPTA concessions have not made any significant difference so far to the volume and value of imports within SAARC.[311] Also, the inter-governmental negotiations under SAPTA have so far proved to be inadequate for mobilizing the private sector in South Asia to optimize gains from regional trade.[312]

> Trade within the South Asian region has also been limited by a host of economic and political factors. Although there is substantial informal trading, official trade amongst SAARC countries today accounts for less than four percent of their total trade volumes. The region's principal export destinations are the United States, the European Union, and Japan. On the political side, the main obstacle to greater trade integration has been the tension between India and Pakistan, India and Sri Lanka, or Bhutan and Nepal, and to a lesser degree, distrust of India by its smaller neighbors [the proverbial mistrust syndrome].[313]

Indeed, "the fear psychosis of dominance by the neighboring country [read big country] acts as a trade diversion force."[314]

> On the economic side, perhaps the main inhibiting factor has been a lack of complementarities in the countries' exports. The four major South Asian nations export a similar basket of commodities, and often compete directly in third markets especially for textiles. Furthermore, India's economic preponderance and comparative advantage in a

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> measures are reduced or eliminated along with reduction or elimination of customs tariffs. In practice, however, this approach generally turns out to be a protracted and time-consuming process.

Mukherji, supra note 298, at 46. As to inter-regional trade creation, see Shukla, *New Frontiers*, *supra* note 39, at 90.

311. "In 1997, the share of intra-regional trade in SAARC countries global trade was 3.7 percent. In the same year, Bangladesh had an intra-regional trade of 8.6 percent, India 2 percent, Maldives 16.4 percent, Nepal 8.3 percent, Pakistan 1.5 percent, and Sri Lanka 6.4 percent." Waquif, *Carrying The SAARC Flag*, *supra* note 49, at 2.

312. *Id.* at 3.

313. *Regional Trade Integration: Modest Progress*, 9 S. ASIA MONITOR, May 1, 1999, at 2; For a discussion of the effects of informal trade see Mukherji, *supra* note 298, at 55. It should be noted that although economic and other activities between Japan and South Asia have increased, the SAARC nations, compared to Japan's engagement with other parts of Asia, do not appear to hold the same attraction. Purendra C. Jain, *Japan's Relations with South Asia*, 37 ASIAN SURVEY 342-348 (1997).

314. Beg, *supra* note 168, at 88.

> range of products has resulted in asymmetric trade relations with her neighbors, hindering regional integration. Regional trade has also perhaps not taken off, because all the countries in the region had been pursuing, until the late eighties, import-substitution policies aimed at promoting and thus protecting domestic industries. Last, low growth and demand within the region itself, and historical trade links with the developed countries, have resulted in extra-regional patterns of trade.[315]

(ii) Whither Freer Trade

Following the ratification of SAPTA by all of the Member States, and its entering into force much earlier that envisioned, SAPTA Member Countries became more ambitious and determined. Comforted by their achievement in the institutionalization of preferential trade at the sixteenth Session of the Council of Ministers (New Delhi, December 1995), they agreed to strive further for the realization of a South Asian Free Trade Area ("SAFTA").[316] The CEC formed an Inter-Governmental Expert Group ("IGEG") during the transition to SAFTA comprised of experts from the Member Countries, which was an *ad hoc* body, focused on identifying the necessary steps towards moving into a free trade area.[317] The IGEG held a series of discussions and agreed on draft terms of reference for itself.[318] IGEG also drafted a broad framework of the Action Plan for achieving SAFTA.[319] In parallel, in order to give impetus to intra-SAARC trade under SAPTA and to promote economic cooperation in the region, the Commerce

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315. *Regional Trade Integration: Modest Progress*, 9 S. ASIA MONITOR, May 1, 1999, at 2. For a brief discussion on the reasons for the shrinkage of international trade see Beg, *supra* note 168, at 87-88; One should however note that

> [t]he emergence of SAARC in 1985 coincided with the winds of economic liberalization blowing over the Indian subcontinent. Sri Lanka had liberalized its economy in 1977, partial liberalization of the Indian economy began in 1985, and the late 1980s saw the initiation of economic liberalization both in Bangladesh (1987) and Pakistan (1988). With open economies in the four major countries in SAARC there was a need to explore the benefits of economic cooperation and thus in 1991 the first report on the benefits of economic cooperation was produced for consideration of South Asian nations.

Kelegama, *supra* note 33. For reasons prompting trade reforms in South Asia see also Arvind Panagariya, *Trade Policy in South Asia: Recent Liberalization and Future Agenda*, 22 WORLD ECON. 353 (May 1999); *see also generally* Weerakoon, *supra* note 306, at 3214-15.

316. Waquif, *Carrying the SAARC Flag*, *supra* note 49, at 2.

317. *See, e.g., id.* at 1-2.

318. *Id.*

319. *Id.*

Ministers of SAARC countries met in New Delhi in January 1996 and have since continued to meet annually.[320]

At the ninth SAARC Summit in Male, the Heads of State, recognized the need to achieve "a free trade area by the year 2001 A.D., and reiterated that steps towards trade liberalisation must take into account the special needs of the smaller Least Developed Countries and that benefits must accrue equitably."[321] Also during the Summit, a "Group of Eminent Persons" ("GEP") was constituted to review the functioning of SAARC.[322] This Group identified and recommended a substantive agenda for achieving economic integration in three phases: "(1) negotiation of a Treaty for South Asian Free Trade Area (SAFTA) by 1999, with implementation"[323] commencing in 2000 (achievement of SAFTA by 2008, stretching to 2010 for LDCs); (2) achievement of a "SAARC Custom Union with harmonisation of external tariffs by 2015; and (3) . . . [achievement of] a SAARC Economic Union with harmonisation of monetary and fiscal policies by 2020."[324]

One year later, the tenth SAARC Summit decided to set up a Committee of Experts with specific terms of reference to guide them in drafting a comprehensive treaty regime that creates a free trade area and emphasizes the importance of the finalization of the framework text by 2001.[325] While discussions are still ongoing, some delays have already started to occur, in light of several complexities.[326]

An important dimension contributing to the complexity in trade liberalization is related to the changed perception of free trade.

> [I]ndustry leaders today are moving beyond the narrow definition of trade in goods and commodities, to trade in specialized services, information technology, financial and capital instruments, energy and gas reserves, hydro-electricity, and building business partnerships for trade beyond the regional bloc. A South Asian Free-Trade Agreement . . . [originally] visualized for the year 2001—reflects a desire to build business linkages in these newer

320. *Supra* note 89, and accompanying text. It should be noted that SAARC also convenes meetings at ministerial level on specialized subject-specific themes.
321. Ninth SAARC Summit, Male, ¶ 14.
322. Male Declaration (1997), ¶ 4.
323. Shri Sahib Singh, *Perspective Plan for SAARC Countries*, *available at* http://www.meadev.nic.in/govt/parl-qa/loksabha/q6788.htm (last visited Nov. 9, 2002).
324. *Id.*
325. Tenth SAARC Summit, Colombo Declaration (1998).
326. *Id.* ¶ 23.

> areas where smaller countries like Bhutan and Nepal can provide hydro-electricity to the region, Bangladesh can provide natural gas to India, and India can import power and electricity from Pakistan where it is in surplus. India would be looking at exporting information technology and specialized services to its smaller neighbours, which will help to develop their economic performance and growth. By bringing positive economic gains to all members, a South Asian free trade area would be a good starting point towards the ambitious SAARC Economic Union and SAARC Monetary Union, by the year 2008.[327]

Nonetheless, in order to materialize all of the potential benefits, an atmosphere of trust among nations followed by liberal trade practices will be needed. Moreover, the transition to the SOUTH ASIAN FREE-TRADE AGREEMENT should equally be complemented by measures implemented to simultaneously correct and harmonize the existing South Asian regimes where trade legislation is highly discriminatory,[328] and where the inflows, particularly of foreign direct investment, continue to be bureaucratic, highly regulated, and are coupled with low labor market flexibility.[329]

In addition, economic production patterns in most countries in the region are outdated.[330] They need to respond to new opportunities and the withering away of industries, which are regionally and globally inefficient. Regional free trade could make a useful contribution towards South Asian economic advancement in the next few decades. This will only be achieved if such cooperation is attempted with a vision of a different South Asia, a dynamic, competitive and efficient group of nations. While regional trade liberalization could be a force towards the development of this dynamism, each South Asian nation must put its own house in order, build its economic and social infrastructure to enable such a development, and modernize its production patterns.

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327. Indeed, technological developments now make "it possible to use services to link and control the various stages of a geographically diversified production process." Bernard Hoekman & Pierre Sauve, LIBERALIZING TRADE IN SERVICES 73, World Bank Discussion Paper (World Bank, 1994); Poonam Barua, *CBM's and Non State Actors and Institutions. What Role for the Private Sector*, Stimson Center (July 1999).

328. Wolfgang-Peter Zingel, *On the Economics and Regional Cooperation in South Asia*, Paper Presented at the 15th European Conference on Modern South Asian Studies, Prague (Sept. 8-12, 1998).

329. *See* Shukla, *New Frontiers*, *supra* note 39, at 93.

330. *See* Panagariya, *supra* note 315 (describing barriers and issues in South Asian trade).

The idea of a "proposed trading bloc for the region, the South Asian Free Trade Area ("SAFTA")," has also been recently perceived as "an idealistic and perhaps an unrealistic goal."[331] To begin, the goals set for the creation of SAFTA were unrealistic as they were proposed at a time "when relations between India and Pakistan were excellent."[332] Currently, the situation is completely opposite due to tension between these two countries, which are the largest in the region.[333] Also, the time frame that was set out to be in place by 2001 was too optimistic, if not unrealistic.[334] It is now getting down to ground realities as the change in the political equation has resulted in postponement of decision-making and in holding up progress on SAFTA.[335] As a result, the eleventh Summit held in Kathmandu, again reiterated the importance of achieving a free-trade area and directed the Council of Ministers to "finalize the text of the draft treaty by the end of 2002."[336]

B. Regulating Common Social & Moral Interests

"The evil of trafficking in women and children for the purpose of prostitution is incompatible with the dignity and honor of human beings and is a violation of basic human rights."[337] South Asian countries, which have long suffered from this problem, have talked about the need for controlling the trafficking of women and children.[338] In parallel, in order to provide "assistance and protection [for children] to secure and fully enjoy their rights, and to develop their full potential and lead a responsible life in family

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331. JAIME DE MELO & ARVIND PANAGARIYA, THE NEW REGIONALISM IN TRADE POLICY: AN INTERPRETATIVE SUMMARY OF A CONFERENCE 5 (World Bank & Centre for Economic Policy Research, 1992). Whilst the "general agreement" is "that complete free trade is the most desirable goal" for all countries, to arrive at complete free trade from the different stages of trading regime, many possibilities exist for countries, one of which is forming a trading bloc. *Id.* Also, "whether trading blocs are good or bad is one of the most controversial issues." *Id.* For a brief discussion about trading blocs in contrast with full multilateralism, see id. According to Panagariya, "a fragmentation of the world into a handful of preferential trade blocs is a bad omen for the region." Panagariya, *supra* note 315, at 373. For discussions on economic analyses of regionalism, see generally Edward D. Mansfield & Helen V. Mulner, *The New Wave of Regionalism*, 53 INT'L ORG. 592-595 (1999).

332. Interview, Nihal Rodrigo, *supra* note 159.

333. *Id.*

334. *Id.*

335. *Id.*

336. Pact on Free Trade pledged at Summit, DAWN (Jan. 7, 2002). *See also* Eleventh SAARC Summit, Kathmandu Declaration, art. III, ¶ 7, (Kathmandu 2002) *at* http://www.saarcnet.org/newsaarcnet/saarcdocuments/saarc11summit.html (last visited Nov. 9, 2002) [hereinafter "Kathmandu Declaration"].

337. SAARC Convention On Preventing And Combating Trafficking In Women And Children For Prostitution, Jan. 5, 2002 [hereinafter "Human Trafficking Convention"].

338. *Id.*

and society," they have shown concern for the promotion of child welfare in the region.[339] Although the problems were extensively discussed since the inception of the SAARC, it took several years to finalize international instruments in these areas.

1. Preventing Flesh Trade

Concerned with "the increasing exploitation by traffickers of women and children" and the use of South Asian countries as the "sending, receiving and transit points," these countries were keen to ensure effective regional cooperation in the prevention of trafficking and prosecution "of those responsible for such trafficking."[340] On January 5, 2002, at the inauguration of the Eleventh Summit, a Convention was signed "to promote cooperation among Member States . . . [to] effectively deal with the various aspects of prevention, interdiction and suppression of trafficking women and children," as well as "the repatriation and rehabilitation of victims."[341]

Under the Human Trafficking Convention, Member States agree to "take effective measures to ensure that [under their respective criminal laws], trafficking, in any form," becomes "an offence punishable by appropriate penalties."[342] Such offences are considered "particularly grave" if the offender belongs to a national or international organised criminal group, or if the offender uses violence or arms.[343] Other factors considered in deciding the particular gravity of the offense include: whether the offender holds a public office and the offense is committed by misuse of that office, whether the offender commits an offense in an educational institution or social facility of whether the offense has been previously convicted.[344]

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339. SAARC Convention on Regional Arrangements For The Promotion Of Child Welfare In South Asia, Jan. 5, 2002 [hereinafter "Child Welfare Convention"]. "[T]rafficking in people, primarily women and children . . . has increased markedly throughout the 1990s. An estimated four million people throughout the world are trafficked each year." A. Yasmine Rassam, *Contemporary Forms Of Slavery And The Evolution Of The Prohibition Of Slavery And The Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 322, 323 (1999).

340. Human Trafficking Conventions, *supra* note 337, pmbl.

341. *Id.* art. II.

342. *Id.* art. III; Enforcement of laws is crucial. Indeed, in countries like India, Nepal, and Pakistan, "there are impressive sounding laws . . . on the books, but they are rarely enforced." Rassam, *supra* note 339, at 325.

343. Human Trafficking Convention, *supra* note 337, art. IV(a-c).

344. *Id.* art. IV(d-g).

(a) Judicial Proceedings & Mutual Legal Assistance

In trying offences under the Human Trafficking Convention, judicial authorities are obligated to maintain confidentiality of victims and to ensure "that they are provided appropriate counseling and legal assistance."[345] "Widest measure[s] of mutual legal assistance [with] respect [to] investigations, inquiries, trials or other proceedings" are prescribed.[346] Such assistance includes collecting evidence and obtaining statements of people, providing information, documents, criminal and judicial records about the "location of persons and objects including their identification," search and seizures, delivering property that include lending of exhibits, availing detained persons to give evidence, assisting in investigations, or servicing documents.[347] The requests for assistance should be "executed promptly in accordance with their national laws."[348] If the "Requested State is not able to comply . . . with a request . . . or decides to postpone its execution," the Requesting State has to be informed promptly.[349]

As such, the offences covered by the Human Trafficking Convention are extraditable under any extradition treaty between any Member States.[350] If a country, which "makes extradition conditional on the existence of a treaty, receives a request for extradition from another . . . [country] with which it has no extradition treaty," it can consider the Human Trafficking Convention "as the basis for extradition," which would be granted in accordance with its domestic laws.[351] In contrast, if a country "in whose territory the alleged offender is present" decides not to extradite, it has to submit, "without exception . . . the case to its competent authorities for prosecution."[352]

(b) Measures Against Trafficking & Treatment of Victims

To enable countries "to effectively conduct inquiries, investigations and prosecution of offences," the Human Trafficking Convention also envisions capacity building assistance to the member countries' governmental agencies.[353] It also strives to sensitize "their law enforcement agencies and the judiciary in

345. *Id.* art. V.
346. *Id.* art. VI.
347. *Id.* art. VI, ¶ 1.
348. *Id.* art. VI, ¶ 2.
349. *Id.*
350. *Id.* art. VII, ¶ 1.
351. *Id.* art. VII, ¶¶ 2-3.
352. *Id.* art. VII, ¶ 4.
353. *Id.* art. VIII, ¶ 1.

respect of offences . . . and other related factors that encourage trafficking in women and children" as a commitment made by member countries.[354] A Regional Task Force consisting of officials of the Member States is to be established in order "to facilitate the implementation" of the Human Trafficking Convention and "to undertake periodic reviews."[355] This does not preclude the ability of countries to establish, "by mutual agreement . . . [other] bilateral mechanisms to effectively implement the provisions of the Convention, including appropriate mechanisms for cooperation to interdict trafficking in women and children for prostitution."[356] In addition, regular exchange of information regarding agencies, institutions and individuals that are involved in trafficking in the region and the methods and routes used by traffickers, is encouraged.[357] The information furnished "shall include information of the offenders, their fingerprints, photographs, methods of operation, police records and records of conviction."[358]

The Human Trafficking Convention requires the "modalities for repatriation of the victims" of cross-border trafficking to the Country of Origin to be worked out as soon as possible.[359] Pending such arrangements, suitable provisions for the care and maintenance of victims, which include the provision of legal advice, health care, counseling, training, and establishment of protective homes or shelters for their rehabilitation should be made.[360]

In many of the countries in the region, trafficking in women and children are often carried out under the guise of recruitment through employment agencies.[361] In order to prevent this from happening, the Convention requires countries to appropriately supervise the employment agencies,[362] to focus on preventive as well as developmental efforts on areas that are known to be source areas for trafficking,[363] and to promote awareness about the problem of trafficking in person as well as its underlying causes.[364]

The countries will need to take several "legislative and other necessary measures to ensure the implementation of the [Human Trafficking] Convention,"[365] which is expected "to enter into force on

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354. *Id.* art. VIII, ¶ 2.
355. *Id.* art. VIII, ¶ 3.
356. *Id.* art. VIII, ¶ 4.
357. *Id.* art. VIII, ¶ 5.
358. *Id.*
359. *Id.* art. IX, ¶ 1.
360. *Id.* art. IX, ¶¶ 3-5.
361. *Id.* art. VIII, ¶ 6.
362. *Id.*
363. *Id.* art. VIII, ¶ 7.
364. *Id.* art. VIII, ¶ 8.
365. *Id.* art. X.

the fifteenth day following the day of the deposit of the seventh Instrument of Ratification with the Secretary General" of SAARC.[366]

2. Promoting Child Welfare

> A quarter of the world's children live in South Asia. . . . [P]arents or legal guardians . . . have the primary responsibility for the upbringing and development of the child. . . . [T]he family, as the fundamental unit of society and also as the ideal nurturing environment for the growth and well-being of children, should be afforded the necessary protection and assistance so it can fully assume and fulfill responsibility for its children and community. . . . [Thus], recognising the efforts of SAARC towards building a regional consensus on priorities, strategies and approaches to meet the changing needs of children, [a Convention has been concluded].[367]

(a) Guiding Principles

The main purpose of the Child Welfare Convention is "to facilitate and help in the development and protection of the full potential of the South Asian child," to promote "understanding [and awareness] of rights, duties and responsibilities," and to set up appropriate regional arrangements to assist the Member States in facilitating, fulfilling and protecting the rights of the Child, taking into account the changing needs."[368]

In that spirit, the Child Welfare Convention is governed by a number of guiding principles.[369] First, the "survival, protection, development and participatory rights of the child" are considered vital pre-requisites for "accelerating the process of their people's realization of human rights and fundamental freedoms, and achieving economic and social development in South Asia."[370] Second, the child should be able "to enjoy all rights and freedoms guaranteed by the national laws and regionally and internationally binding instruments."[371] In this context, commitment to implement the UN Convention on the Rights of the Child[372] and to "uphold 'the

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366. *Id.* art. XIII.
367. Child Welfare Convention, *supra* note 339, pmbl.
368. *Id.* art. II, ¶¶ 2-3.
369. *Id.* art. III.
370. *Id.* art. III, ¶ 1.
371. *Id.* art. III, ¶ 2.
372. *Id.* art. III, ¶ 3.

best interests of the child' as a principle of paramount importance" is made.[373] Third, "while recognizing that the primary responsibility . . . [for] the well-being of the child rests with the parents and family," the authority of States to ensure the protection of the best interests of the child also upheld.[374] Finally, "gender justice and equality [are considered] . . . key aspirations for children, the realization of which, collectively by the governments, would be conducive to the progress of South Asia."[375]

(b) Regional Priorities and Arrangements

"Without prejudice to the indivisibility of the rights enshrined in the UN Convention on the Rights of the Child and other international and national instruments," South Asian countries place special emphasis on bilateral and regional cooperation for child development.[376] "[B]asic services such as education [and] health care . . . [are recognized] as the cornerstone of child survival and development, [and each Member Country has agreed to] pursue a policy of development and a National Programme of Action that facilitate the development of the child. The policy shall focus on accelerating the progressive universalization of the child's access to the basic services and conditions." [377]

The Child Welfare Convention also guarantees "appropriate legal and administrative mechanisms and social safety nets . . . [to] protect the child from any form of discrimination, abuse, neglect, exploitation, torture or degrading treatment, trafficking and violence . . . [and to] discourage entry of children into hazardous labor."[378] In this context, "a multi-pronged strategy including opportunities at the primary level and supportive social safety nets for families that tend to provide child labourers," will be adopted.[379] Similarly, to

> [a]dminister juvenile justice in a manner consistent with the promotion of the child's sense of dignity and worth, and with the primary objective of promoting the child's reintegration in the family and society…

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373. *Id.* art. III, ¶ 4.
374. *Id.* art. III, ¶ 5.
375. *Id.* art. III, ¶ 7.
376. *Id.* art. IV, ¶ 1.
377. *Id.* art. IV, ¶ 2.
378. *Id.* art. IV, ¶ 3(a-b). In this context, it should be noted that the Ninth SAARC Summit called to eliminate the evil of child labor from the region by year 2010, and called for stringent measures to protect children from all forms of exploitation. Declaration of the Ninth Summit (Male 1997), ¶ 29.
379. Child Welfare Convention, *supra* note 339, art. IV, ¶ 3(b).

> [countries] shall provide special care and treatment to children in a country other than the country of domicile and expectant women and mothers . . . [and would promote alternative measures to institutional correction].[380]

In addition, they would provide children with opportunities to express views, provide access to information, in all matters affecting them, and "participate fully and without hindrance or discrimination in the school, family and community life."[381]

"To ensure consistent focus on and pursuance of the regional priorities," the Member States agree to "promote solidarity, co-operation and collective action."[382] Cooperation is viewed "as mutually reinforcing and capable of enhancing the quality and impact of their national efforts to create the enabling conditions and environment for full realisation of child rights and the attainment of the highest possible standard of child well being."[383] Member States agree to facilitate in the

> sharing of information, experience and expertise, [to] facilitate human resource development through planned . . . Training Programmes on Child Rights and Development, [to] make special arrangements for speedy completion and disposal . . . of any judicial or administrative inquiry or proceeding involving a child who is a national of [another Member Country], and for the transfer of children . . . accused of infringing the penal code, back to their country of legal residence for trial and treatment, provided that the alleged offence has not imperiled the national security of the country where it has been allegedly committed.[384]

Similarly, "strengthen[ing] the relevant SAARC bodies dealing with issues of child welfare to formulate and implement regional strategies and measures for prevention of inter-country abuse and exploitation of the child" remains a priority of the Convention.[385]

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380. *Id.* art. IV, ¶ 3(c).
381. *Id.* art. IV, ¶ 4(a-c).
382. *Id.* art. V.
383. *Id.*
384. *Id.* art. V(a-c).
385. *Id.* art. V(d).

(c) Transnational Cooperation

In order to meet the priorities under the Child Welfare Convention, bilateral and multilateral agreements and co-operation that would positively impact regional and national efforts in facilitating, fulfilling and protecting the rights and well-being of a child are encouraged.[386] Also encouraged are co-operation with the United Nations and other international agencies, and participation of non-governmental bodies.[387] In this vein, the countries agree to take, "in accordance with their respective Constitutions, the legislative and other measures necessary to ensure the implementation of the Convention," without disrupting any provision contained in existing national laws or international agreements, which are more favorable toward the realization of the rights of a South Asian child.[388] They also agree to take all political measures to fulfill the objectives of the Convention, which includes legislative and policy reform, "trained manpower, adequately equipped institutions and adequate allocation of human and financial resources."[389]

The Child Welfare Convention is set to become effective "on the fifteenth day following the date of deposit of the Seventh Instrument of Ratification with the Secretary General" of the SAARC.[390]

C. Regulating Specific Security Interests

International terrorism and the illicit trafficking of drugs have both been serious problems for most countries of the region, even prior to the establishment of SAARC. After its creation, the problem was given a regional dimension and put on the agenda of the SAARC meetings. Consequently, a few years later, Member States succeeded in finalizing legal instruments to that effect.

1. Preventing Terrorism

Terrorism is the cancer of the modern world. No state is immune to it. It is a dynamic organism, which attacks the healthy flesh of the surrounding society.[391]

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386. *Id.* art. II, ¶ 3.
387. *Id.* arts. VIII & IX.
388. *Id.* art. VII.
389. *Id.* art. X.
390. *Id.* art. XII.
391. Emanuel Gross, *Legal Aspects Of Tackling Terrorism: The Balance Between The Right Of A Democracy To Defend Itself And The Protection Of Human Rights,* 6 UCLA J. INT'L L. & FOR. AFF. 89 (2001) (citing P. Johnson, *The Cancer of Terrorism*, *in* TERRORISM: HOW THE

> Developed states have sought to reinforce traditional law holding states responsible for acts of terrorism originating in their territory; they have sought universal agreements of co-operation against aerial and related forms of terrorism. But, while all governments recognize their own vulnerability to terrorism, and almost all join in decrying it, international law to deal with it has been [relatively] slow in coming.[392]

At the first SAARC Summit held in Dhaka, terrorism was identified as a serious problem, which affected the security and stability of the entire South Asian region.[393] Also "[a]t the Bangalore Summit (1986) . . . the problem of terrorism was discussed in greater detail where the SAARC countries agreed that co-operation among SAARC States is vital in preventing and eliminating terrorism and its root causes."[394] As a result, during the Third Summit in November of 1987, a regional Convention was signed,[395] which came into force on August 22, 1988. Briefly stated, the Convention provides a regional focus to many of the well-established principles of international law with respect to preventing terrorism.[396] Under its provisions, Member States are committed to extradite or prosecute alleged terrorists thereby preventing them from enjoying safe havens.[397] Moreover, regional cooperation is envisioned in preventive action to combat terrorism through the "exchange of information, intelligence and expertise" identified as necessary for mutual cooperation.[398]

In the Final Declaration issued at the end of the Kathmandu Summit, the Heads of State, while expressing their satisfaction with the Terrorism Convention, recognized that the signing of this convention was "a historic step towards the prevention and

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WEST CAN WIN 31 (Benjamin Netanyahu ed. 1986)).

392. LOUIS HENKIN, INTERNATIONAL LAW: POLITICS & VALUES 292 (Martinus Nijhoff 1995).

393. Karunadasa, *supra* note 112. The Dhaka Summit directed the Standing Committee to "set up a study group to examine the problem of terrorism . . . [and] directed the Council of Ministers to consider the report . . . and submit recommendations." PRADHAN, *supra* note 124, at 127.

394. Karunadasa, *supra* note 112. See also highlights of the recommendations of the SAARC Expert Group, in UMAR, *supra* note 3, at 102-103.

395. SAARC Regional Convention on Suppression of Terrorism, Nov. 4, 1987 [hereinafter "Terrorism Convention"]. For a brief introduction, and the climate during which the Convention was entered into see PRADHAN, *supra* note 124, at 53-55.

396. Terrorism Convention, *supra* note 395, art. I.

397. *Id.* art. III.

398. *Id.* art. VIII.

elimination of terrorism from the region."[399] In this regard, they further "reiterated their unequivocal condemnation of all acts, methods and practices (sic) of terrorism as criminal."[400]

(a) Objectives and Scope

In addition to the preamble, the Terrorism Convention includes eleven articles. The preamble, while making reference to the understandings reached at the Dhaka and Bangalore Summits, further recognizes "the importance of the principles laid down in UN Resolution 2625 (XXV) which among others require[s] that each state should refrain from organizing, instigating, assisting or participating in acts of civil strife."[401] The awareness of "the danger posed by the spread of terrorism and its harmful effect on peace, cooperation, friendship and good neighbourly relations" is identified as the main reason leading to the conclusion of the Convention.[402] Thus, the main objective of the Terrorism Convention is "to take effective measures to ensure that perpetrators of terrorist acts do not escape prosecution and punishment by providing for their extradition and prosecution."[403]

The Convention sets out a broad definition of terrorism, which was designed to bring SAARC nations into line with European and other international treaties governing the subject.[404] Under the Convention, terrorism can include any action that endangers life, involves serious violence against a person or serious damage to property, or creates a serious risk to the health or safety of the public.[405] The use or threat of such action becomes terrorism when it is designed to influence government, to intimidate the public or a section of the public and is made for the purpose of advancing a political, religious or ideological cause.[406] Action that involves the use of firearms or explosives is terrorism whether serious damage is actually caused or not.[407]

While defining conduct, which constitutes terrorism, the Convention draws from definitions provided by other relevant international conventions.[408] In this context, it brings within its

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399. Kathmandu Declaration, *supra* note 336, ¶ 18.
400. *Id.* ¶ 18.
401. Terrorism Convention, *supra* note 395, pmbl.
402. *Id.*
403. *Id.*
404. *Id.* art. I.
405. *Id.* art. I(e).
406. Gross, *supra* note 391, at 97-101 (detailing several approaches towards defining who or what is a terrorist).
407. Terrorism Convention, *supra* note 395, art. I(e).
408. For a detailed examination of what is terrorism and who is terrorist, see Gross, *supra*

purview all of the offenses that are within the scope of the following: the Convention for the Suppression of Unlawful Seizure of Aircraft, (the Hague, December 16, 1970), the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, (Montreal, September 23, 1971), the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, (New York, December 14, 1973), and any other "convention to which SAARC Member States concerned are parties and which obliges the parties to prosecute or grant extradition.[409]

In addition, "murder, manslaughter, assault causing bodily harm, kidnapping, hostage-taking and offences relating to firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or serious damage to property" are all offences condemnable under the Terrorism Convention.[410] Also condemnable are "an attempt or conspiracy to commit an offence,…aiding, abetting or counseling the commission of such an offence or participating as an accomplice in the offence."[411] Following the global trend first established by the European Convention on the Suppression of Terrorism (1977),[412] the SAARC Terrorism Convention makes it mandatory to treat certain actions as criminal, irrespective of political or other ideologies behind the action.[413]

The attempt of the Convention to have as broad a coverage as possible is obvious since "any two or more Contracting States" may, by agreement, decide to bring within its purview, "any other serious offence involving violence," which is not "regarded as a political offence, connected with a political offence, or an offence inspired by political motives."[414] The issue of foreign terrorists using the territory of a Contracting State as a safe haven is dealt with in the Convention by expressly stipulating that it takes on terrorist actions committed outside such territory directed against governments, persons or property situated outside such territory.[415]

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note 391, at 97-100.

409. Terrorism Convention, *supra* note 395, art. I.

410. *Id.* art. I(e).

411. *Id.* art. I(f).

412. European Council, European Convention on the Suppression of Terrorism, Europ. T.S. No. 90 (Jan. 27, 1977), *available at* http://conventions.coe.int (¶ 2 of Explanatory Report directly supports proposition) (last visited Nov. 10, 2002) [hereinafter "European Convention on Terrorism"].

413. *Id.* art. I.

414. *Id.* art. II.

415. *Id.* arts. IV-VI.

This extraterritorial effect of the Convention is important. The question remains whether there is a hierarchical approach toward giving extraterritorial effect to its rights, the extent of which is equally important.

(b) Duty to Extradite or Prosecute

The extradition provisions of the Terrorism Convention affects "[the] provisions of all extradition treaties and arrangements applicable between Contracting States . . . to the extent that they are incompatible" with it.[416] To the extent that any offence covered by the Terrorism Convention "is not listed as an extraditable offence in any extradition treaty," it is deemed to be included as such therein.[417] Consequently, if a Contracting State, which requires a treaty to extradite, "receives a request for extradition from another Contracting State with which it has no extradition treaty, the requested State may, at its own option . . . consider [the Terrorism Convention] as the basis for extradition."[418] On the other hand, a Contracting State, which does not require a treaty is obligated to "recognize the offences set forth" in the Terrorism Convention "as extraditable offences."[419]

If a suspect is found in the territory of a Contracting State, and such a State receives a request for extradition, it has two alternatives. First, it can decide to extradite that person, in which it takes all appropriate measures to extradite.[420] Second, instead of extraditing, it can submit the case to competent authorities to be handled under its domestic law.[421] In addition, the requested State can also refuse to extradite if the case is of trivial nature, if the request for the return of a fugitive offender "is not being made in good faith or in the interests of justice or for any other reason it is unjust or inexpedient to surrender or return the fugitive offender."[422] Therefore, one can argue that with this type of broadly crafted proviso or exception, "securing the extradition of terrorists, may be virtually ruled out impossible."[423]

Some other problems of substance may also be noted in the Convention. For instance, it is not clear how the states will protect

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416. *Id.* art. III, ¶ 1. For the discussions on the issue of extradition, PRADHAN, *supra* note 124, at 54.
417. Terrorism Convention, *supra* note 395, art. III, ¶ 2.
418. *Id.* art. III, ¶ 4.
419. *Id.* art. III, ¶ 5.
420. *Id.* art. VI.
421. *Id.* art. IV.
422. *Id.* art. VII.
423. Gopalaswami Parthasarathy, *Time to look beyond the subcontinent*, *at* http://www.rediff. com/news/2001/feb/14gp.htm (last visited Nov. 9, 2002).

the fundamental rights of defendants when an extradition takes place. "[T]hough terrorism might be an existential problem to a democratic state, human rights should be preserved, nonetheless."[424] It is also not clear whether the safeguards specific to the conditions of the requesting state will be adequately replaced by the extraterritorial effect of the Terrorism Convention when it comes to an issue such as the defendant's fundamental rights (including the right to a fair trial). Moreover, lack of common minimum standards in areas such as bail, detention, legal aid, treatment in detention, interviewing procedures, legal representation and interpretation services, may be cause for apprehension of countries.

The issue of dual criminality is another element in the Terrorism Convention which remains unclear. This issue becomes particularly crucial since the Terrorism Convention has to deal with some countries with less than satisfactory legal systems and where the laws are still littered with absurd offenses that hardly have any place in modern democracies. Moreover, the dual criminality policy may differ among states. Thus, it is important to deal with this issue, whether with a blanket removal of the dual criminality principle or some other techniques. The ambiguity should also be removed by tackling the issue of specialty at the same time. It may be noted that, as a rule of customary international law, specialty is one of the core protections for defendants. It is designed to ensure against breach of trust by the requesting state to the requested state and to avoid prosecutorial abuse against the defendant after the requesting state has obtained *in personam* jurisdiction over the defendant. The Terrorism Convention fails to prevent people from being extradited for one crime and then being tried for another, even for ones that they could not have been extradited. While the reliance on a political offense is increasingly rare in extradition proceedings, it nevertheless provides an important deterrent to countries who might seek extradition for the wrong reasons.[425]

(c) Regional Cooperation

The series of declarations, emanating from the several meetings, make it clear that the Member States are committed to "afford one another the greatest measure of mutual assistance in connection with proceedings brought in respect of the offences . . . [covered by

424. Gross, *supra* note 391, at 90.
425. Also noteworthy is that it remains a mandatory exception under the UN Model Treaty. Model Treaty on Extradition, UNGA45/116, A/Res/45/116, 68th Plenary Meeting, 14 Dec. 1990, art. 3.

the Terrorism Convention], including the supply of all evidence at their disposal necessary for proceedings."[426] The Agreement requires the Member States to "cooperate among themselves . . . through consultations between appropriate agencies, exchange of information, intelligence and expertise and such other cooperative measures as may be appropriate, with a view to[ward] prevention [of] terrorist activities through precautionary measures."[427]

In this context, it is noteworthy that a SAARC Terrorist Offenses Monitoring Desk ("STOMD") has been established in Colombo to collate, analyze and disseminate information on terrorist incidents.[428] Its special purpose is to "analyze, [sic] and disseminate information relating to incidence [sic], methods, tactics and strategies adopted by terrorists."[429] In terms of the Terrorism Convention, "co-operation among Liaison Officers (anti-Terrorist Law Enforcement Officers) is" also being promoted "through the holding of various international meetings, at regular intervals, with a view to monitoring, updating, evaluating and improving counter-terrorism tactics."[430]

Clearly, the initial purpose of the Terrorism Convention, as evidenced from its provisions, was to avoid miscarriages of justice. While the actual proscription of terrorist groups only remains an expression of government intention, the provisions of the Terrorism Convention are noteworthy as an example of the multifaceted approach, which is necessary in dealing with modern globalized terrorism. Indeed, "[t]errorism today is a complex and global problem—not necessarily only a localized domestic one. Thus, the challenge of fighting terrorism has slowly become global. . . . The growing mobility of terrorism illustrates the critical need for uniformity and for an integral approach to international cooperation."[431] However, optimism can only be limited since [e]very cause which different terrorist groups claim to represent . . . has evoked some governmental support or condonation. . . . Some governments [will] continue to resist outlawing those who terrorize under the banner of 'self-determination,' 'people's liberation,' or some other slogans of 'new political order.'"[432]

In any event, a Convention alone is not an end in itself. Perhaps because of this understanding, terrorism continued to be a constant concern of SAARC Summits held subsequent to the

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426. Terrorism Convention, *supra* note 395, art. VIII, ¶ 1.
427. *Id.* art. VIII, ¶ 2.
428. Karunadasa, *supra* note 112.
429. *Id.*
430. *Id.*
431. Gross, *supra* note 391, at 154.
432. HENKIN, *supra* note 392, at 292.

Kathmandu Summit (1987). For instance, the Eighth New Delhi Summit, held in May 1995, had "expressed serious concern on the spread of terrorism in and outside the region and [had] reiterated their unequivocal condemnation of all [types of terrorist] methods, acts and practices."[433] Further, it "emphasized that [the] highest priority should be accorded to the enactment of enabling legislation at the national level to give effect to the SAARC Regional Convention on Suppression of Terrorism."[434] Similarly, at the ninth SAARC Summit held in Male (1997) and also at the successive Colombo and Kathmandu Summits, terrorism appeared as an issue which posed serious threat to regional security and stability. The Summits reiterated their firm commitment toward combating terrorism.

Despite the legal framework and different declarations in its favor, according to a 1998 report prepared by the Group of Eminent Persons,[435] this Convention has not been able to create any real impact on controlling terrorism through regional cooperation.[436] Member States may need to continue to refine their approach in tackling the issue.

2. Curbing Drug Abuse

"The effects of drug trafficking on Member States are tantamount to an attack on the government itself. Drug crimes drain the economy, degrade governmental legitimacy and cause increased levels of corruption by government officials."[437]

"Drug trafficking had first been identified as a key issue at the Fourth SAARC Summit held in Islamabad in 1988."[438] "The Heads of States . . . in their Final Declaration expressed [their] grave

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433. Eighth SAARC Summit, New Delhi Declaration, ¶ 37.

434. Eighth SAARC Summit, New Delhi Declaration, ¶ 38. Even now, some countries are still to enacting the necessary domestic legislation to give effect to the Convention. Sri Lanka was the first country in South Asia to enact domestic legislation to give effect to the SAARC Convention by passing its own Suppression of Terrorism Act-No.70 of 1988. Except for Pakistan and Bangladesh, all other member countries have enacted domestic legislation. *India to Push through terror convention at SAARC summit*, HINDUSTAN TIMES, Dec. 26, 2001, at 1, *available at* http://www.nrilinks.com/nrinews/TI1838.htm (last visited Sept. 16, 2002).

435. An Experts' group constituted during the 1997 Male Summit, to review the functioning of SAARC. *See* 9th SAARC Summit, *supra* note 378, ¶ 4.

436. Ismeth, *supra* note 158.

437. CarrieLyn Donigan Guymon, *International Legal Mechanisms For Combating Transnational Organized Crime: The Need For A Multilateral Convention*, 18 BERKELEY J. INT'L L. 53, 64 (2000); "Illegal drugs are one of the world's largest trade sectors, with the global market estimated at $400-$500 billion a year, nearly 10% of total world trade and larger than the global automobile market." Kal Raustiala, *Law, Liberalization & International Narcotics Trafficking*, 32 N.Y.U. J. INT'L L. & POL. 89, 90 (1999).

438. Karunadasa, *supra* note 112, at 51. For highlights of the Meetings of Foreign Secretaries, held on November 13 1986, see UMAR, *supra* note 3, at 103.

concern over the growing magnitude and serious effects of drug abuse, particularly among" youth.[439] Accordingly, "they recognised the need for urgent and effective measures to eradicate this evil a[n]d decided to declare the year 1989 as the 'SAARC Year for Combating Drug Abuse and Drug Trafficking.'"[440] In parallel, "[t]hey agreed to launch a concerted campaign . . . to significantly augment SAARC efforts to eliminate drug abuse and drug trafficking," which includes the "closer cooperation in creating a greater awareness of the hazards of drug abuse, [the] exchange of expertise, [the] sharing of intelligence information, [the development of] stringent measures to stop trafficking in drugs and introduction of effective laws."[441] In addition, "[t]hey directed . . . that the Technical Committee concerned . . . [to] examine the possibility of a Regional Convention" for this purpose.[442]

As a consequence, in November 1990, the SAARC Convention on Narcotic Drugs and Psychotropic Substances was signed.[443] "It came into force on 15 September 1993 following ratification by all Member States."[444] This Convention, which was the third international instrument signed by SAARC countries after its formation,[445] seeks to reinforce and supplement the relevant international conventions and promote cooperation among member states in both law enforcement, and supply and demand reduction at the regional level.[446] Incorporating the generally accepted principles of extradition or prosecution, which are consistent with the respective national legislative regimes, the Narcotics Convention envisions the broadest measures for mutual legal assistance among Member States in investigation, prosecution and judicial proceedings with respect to drug offenses.[447] Thus, it is a

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439. Fourth SAARC Summit, Islamabad Declaration, ¶9. For a detailed account of the situation of illicit drug trafficking in some countries in the region, see generally Pascal Perez, ETAT DES DROGUES, DROGUES DES ETATS: OBSERVATOIRE GEOPOLITIQUE DES DROGUES [State of Drugs, Drugs of State: Geopolitical Observations of Drugs], Collection Pluriel (1994).

440. Declaration of the Fourth SAARC Summit, para. 9 (Islamabad 1988), *at* http://saarcnet.org.inewsaarcnet/saarcdocuments/4ss-decl.htm (last visited Sept. 14, 2002).

441. *Id.*

442. *Id.*

443. SAARC Convention on Narcotic Drugs and Psychotropic Substances, Nov. 23, 1990 [hereinafter "Narcotics Convention"].

444. Karunadasa, *supra* note 112, at 51.

445. *Id.* at 51.

446. *See* Narcotics Convention, *supra* note 443. The global drug regime comprises a series of major treaties and UN institutions, as well as bilateral efforts between consumer and producer states. The major UN Conventions are the 1961 Single Convention on Narcotics Drugs 1961, (the single convention), its 1972 Protocol, the 1971 Convention on Psychotropic substances, and the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. *See id.* at 1. For a brief introduction about the several conventions, see Raustiala, supra note 437, at 103-110.

447. *See* Narcotics Convention, *supra* note 443.

'step forward' in augmenting the efforts of South Asian countries to eliminate the root cause of drug abuse and the enormous profits deriving from illicit traffic.[448]

Briefly stated, the Narcotics Convention essentially purports to promote cooperation among Member States to "address more effectively the various aspects of prevention and control of drug abuse and the suppression of illicit traffic[king] in narcotic drugs and psychotropic substances."[449] Member States agree to take all of the necessary legislative, regulatory and administrative measures to carry out their obligations "in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States."[450] Thus, the eighteen articles in the SAARC Narcotics Convention deal at length with many aspects pertaining to drug offenses, sanctions, jurisdictions, prosecutions, extradition, and legal assistance.[451]

(a) Offences & Sanctions

The Convention brings within its purview a broad range of offences.[452] For instance, "the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic or psychotropic drug contrary to the provisions of the 1961 Convention . . . or the 1971 Convention" are prohibited.[453] Similarly,

> the cultivation of opium poppy, coca bush or cannabis plant for the production of narcotic drugs contrary to the provisions of the 1961 Convention . . . the possession or purchase of any [such] narcotic drug or psychotropic substance . . . [and] the manufacture, transport or distribution of equipment or materials, or of substances listed in [the] 1988 U.N. Convention [are prohibited].[454]

These substances are specifically prohibited when it is known that they are being used or are to be used for illicit cultivation,

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448. *Id.* pmbl.
449. *Id.* art. 2, ¶ 1.
450. *Id.* art. 2, ¶¶ 2-3.
451. *See id.*
452. *Id.* art. 3.
453. *Id.* art. 3(a).
454. *Id.* art. 3(b-d).

production or manufacture of any narcotic or psychotropic drugs.[455] Furthermore, the following activities are also prohibited, which include:

> the organisation, management or financing [of any drug offence]; the conversion or transfer of property, knowing that such property is derived from the proceeds from any [drug-related] offence . . . or from an act of participation in such offence . . . for the purpose of concealing or disguising the illicit origin of [t]he proper[t]y or of assisting any person who is involved in the commission of such an offence to evade the legal consequences of his actions [are also prohibited].[456]

Similarly, "the concealment . . . of the true nature, source, location, disposition, movement, rights with respect to ownership of property, knowing that such property is derive from an offence or from an act of participation in such an offence" is prohibited.[457] "[T]he acquisition, possession or use of property, knowing . . . that such property is derived from an offence, or from an act of participation in such offence" is also prohibited.[458] "[T]he possession of equipment or materials, or of substances . . . knowing that they are being or are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances" is prohibited.[459] Public incitement or inducement of others to commit any offense or to use narcotic or psychotropic substances drugs is prohibited.[460] Finally, "participation in . . . conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any such offence" are also prohibited.[461]

If the offences are captured in detail, so are the sanctions.[462] All Member States ensure to make the commission of the offenses punishable by appropriate penalties.[463] In minor cases, they may provide measures such as education, rehabilitation or social re-integration as alternatives to convictions or punishments.[464]

455. *Id.*
456. *Id.* art. 3(f).
457. *Id.* art. 3(g).
458. *Id.* art. 3(h).
459. *Id.* art. 3(i).
460. *Id.* art. 3(j).
461. *Id.* art. 3(k).
462. *Id.* art. 4.
463. *Id.* art. 4, ¶ 1.
464. *Id.* art. 4, ¶ 2.

When the offender is a drug abuser, then treatment and aftercare may be provided.[465] "The courts and other competent authorities [in these countries] can take into account factual circumstances" in deciding on the particularly serious nature of the offence.[466] Such circumstances may include the involvement in the offence of an organized criminal group[467] or the use of violence or arms by the offender.[468] Additional factors to take into account in the consideration of the severity of the offense or in the consideration of early release of parole of convicted persons include:

> the fact that the offender holds a public office . . .; the victimisation or use of minors; the fact [t]hat the offence is committed in a penal or an educational institution or social service facility . . . or in other places to which school children and students resort for educational, sports and social activities; [or] prior conviction . . . whether foreign or domestic.[469]

In parallel to courts, Member States agree to mandate their competent agencies to confiscate proceeds derived from the commission of the offense, the use of materials, equipment or other instrumentalities, or the identification, trace, or freezing of seized proceeds, property or instrumentalities.[470]

(b) Jurisdictional Cooperation

Under the Convention, each Member State has to establish jurisdiction over offences "committed in its territory, [or] on board a vessel flying its flag or an aircraft, which is registered under its laws, [or] when committed by one of its nationals or by a person who" resides in its territory.[471] Jurisdiction should also be established over acts of participation, association, or conspiracy to commit an offence, or over the act of aiding, abetting, facilitating and counseling the commission of any offense outside its territory, "with a view to commission, within its territory."[472] If a country does not want to extradite an offender who is present in its territory, provisions should also be made to submit the case to

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465. *Id.* art. 4, ¶ 3.
466. *Id.* art. 4, ¶ 4.
467. *Id.* art. 4, ¶ 4(a-c).
468. *Id.* art. 4, ¶ 4(d).
469. *Id.* art. 4, ¶ 4(e-h).
470. *Id.* art. 10.
471. *Id.* art. 5, ¶ 1(a-c).
472. *Id.* art. 5, ¶ 1(d).

competent authorities for prosecution through proceedings.[473] Such an offense "shall not be regarded as fiscal or political offences or as offences connected with a political offence or as offences inspired by political motives."[474]

(c) Attacking Supply-Demand

Generally, drug laws and policies are intended to address the problem with a combination of demand-side, supply-side and harm-reduction strategies.[475] The Narcotics Convention focuses on attacking supply and demand for drugs, with some provisions to help reduce the harmful effects of drugs.[476] Each Member State takes appropriate measures in preventing illicit cultivation in addition to eradicating plants containing narcotic or psychotropic substances, and adopting "appropriate measures aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances."[477] This is done with a view towards reducing and eliminating financial incentives for illicit traffic,[478] as well as, "measures for early destruction or lawful disposal of the narcotic drugs, psychotropic substances . . . which have been seized or confiscated."[479] Towards this end, each Member State also facilitates the exchange of scientific and technical information and research.[480]

Close cooperation among Member States, "consistent with their respective domestic legal and administrative systems, with a view to[ward] enhancing the effectiveness of law enforcement action to suppress [t]he commission of offences" is also another understanding reached under the Convention.[481] In this context, priority is given to "establish[ing] and maintain[ing] channels of communication between their competent agencies to facilitate the secure and rapid exchange of information concerning all aspects of such offences."[482] In addition, it allows for "the appropriate use or controlled delivery on the basis of bilateral agreements with a view to[wards] identifying persons involved in offences . . . and taking legal action against them."[483]

473. *Id.* art. 7.
474. *Id.* art. 9.
475. Raustiala, *supra* note 437, at 99.
476. Narcotics Convention, *supra* note 443, art. 12.
477. *Id.* art. 12, ¶¶ 1-3.
478. *Id.* art. 12, ¶ 3.
479. *Id.* art. 12, ¶ 4.
480. *Id.* art. 12, ¶ 2.
481. *Id.* art. 13, ¶ 1.
482. *Id.* art. 13, ¶ 1.
483. *Id.* art. 13, ¶ 2.

(d) Mutual Legal Assistance & Information Sharing

The Narcotics Convention envisions the broadest measures for "mutual legal assistance" between Member States in the investigation, prosecution, and judicial proceedings with respect to drug offenses.[484] Accordingly, Article 14 requires Member States to furnish information to each other and to the Secretary General of SAARC about the implementation of the Narcotics Convention in their territories and in the texts of legislations promulgated to give effect to it.[485] The exchange of information includes particulars of cases involving illicit trafficking within their jurisdiction in which they consider, "the quantities involved, the sources from which the substances are obtained or the method employed by persons so engaged."[486]

Measures of legal assistance include:

> taking evidence or statements from persons; effective service of judicial documents, executing searches and seizures; examining objects a[n]d sites, providing information and evidentiary items; providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records; identifying or tracing proceeds, property, instrumentalities or other items for evidentiary purposes.[487]

In this context, the Convention is clear: mutual legal assistance cannot be declined on the ground of bank secrecy.[488]

(i) Execution of the Request

An authority, to be responsible for executing requests for mutual legal assistance, is designated by each country.[489] All other countries and the Secretary General of SAARC are notified of the designation.[490] "Transmission or requests for mutual legal assistance and any communication related" are to be effected through such designated authorities.[491] However, this requirement is "without prejudice to the right of a State to require that such

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484. *Id.* art. 11, ¶ 1.
485. *Id.* art. 14(a).
486. *Id.* art. 1(b).
487. *Id.* art. 11, ¶ 2(a-g).
488. *Id.* art. 11, ¶ 5.
489. *Id.* art. 11, ¶ 7.
490. *Id.*
491. *Id.*

requests and communications be addressed to it through diplomatic channels and, in urgent circumstances . . . through the International Criminal Police Organization."[492]

A request is executed in accordance with the domestic law of the requested State.[493] The requesting State has an obligation to neither transmit, "nor use information . . . or evidence furnished by the requested State for investigations, prosecutions or proceedings" for purposes other than those stated in the request.[494] Normally, requests for mutual legal assistance are made in writing, except in urgent circumstances where oral requests may be permitted, but need to be later confirmed in writing.[495] Such requests should include:

> [t]he identity of the authority making the request; [t]he subject matter and nature of the investigation, prosecution or proceeding to which the request relates and the name and the function of the authority conducting such investigation, prosecution or proceeding; a summary of the relevant facts except in respect of requests for the purpose of service of judicial documents; [and a] description of the assistance sought and details of any particular procedure the requesting State wishes to [b]e followed; [w]here possible, the identity, location and nationality of the person concerned, [and] the purpose for which the evidence, information or action are sought [should also be included in the request].[496]

Also, there are situations where legal assistance can be refused or postponed. For instance, legal assistance may be refused if the request is not made in conformity with the Narcotics Convention, "if the requested State considers that execution of the request is likely to prejudice its sovereignty, security, public order (*ordre public*), or other essential interest," or if it would be contrary to domestic law.[497] However, the state refusing to comply with the request, has to provide reasons for refusal.[498]

Along the same lines, legal assistance can be postponed "on the ground that it interferes with an ongoing investigation, prosecution

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492. *Id.*
493. Narcotics Convention, *supra* note 443, art. 11, ¶ 11.
494. *Id.* art. 11, ¶ 12.
495. *Id.* art. 11, ¶ 8.
496. *Id.* art. 11, ¶ 8(a-f).
497. *Id.* art. 11, ¶ 14(a-c).
498. *Id.* art. 11, ¶ 15.

or proceeding."[499] In these cases, both the requested and the requesting States should consult with each other to determine a course of action defining the terms and conditions needed to still respond to the request.[500]

The ordinary costs of executing a request are to be borne by the requested State.[501] "If expenses of a substantial or extraordinary nature are . . . required to fulfill the request, the States shall consult [with one another] to determine the terms and conditions under which the request will be executed as well as the manner in which the costs will be borne."[502]

(ii) Immunity

> A witness, expert or other person who consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State, shall not be prosecuted, detained, punished or subjected to any other restriction of his personal liberty in that territory in respect of acts, omissions or convictions prior to his departure from the territory of the requested State. [However,] [s]uch safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days, or…for any period agreed upon by the States, from the date on which he has been officially informed that his presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory or, having left it, has returned of his own free will.[503]

(iii) Information Exchange

For the purpose of ensuring mutual legal assistance, information becomes important, within the context of the Narcotics Convention in either of two forms. It may either be related to a specific case or may be made for general cooperation purposes.

If a Member State has reason to believe that an alleged offender has fled from its territory after committing an offence, it has to "communicate to all other concerned States all the pertinent facts

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499. *Id.* art. 11, ¶ 16.
500. *Id.*
501. Narcotics Convention, *supra* note 443, art. 11, ¶ 18.
502. *Id.*
503. Narcotics Convention, *supra* note 443, art. 11, ¶ 17.

regarding the offence committed and all available information regarding the identity of the alleged offender."[504] If the circumstances "so warrant, the Member State in whose territory the alleged offender is present shall take appropriate measures under its domestic law so as to ensure the offender's presence for the purpose of prosecution or extradition."[505] The State where the offense was committed and the State, in which the alleged offender is a national or in whose territory the offender permanently resides, needs to be notified of such actions.[506]

"The effectiveness of the international legal regime for drug control is generally considered low in relation to the scope of the problem."[507] It is therefore important to provide extra-care in the enforcement as well as other relevant aspects of the regime to optimize effectiveness. In this context, it is noteworthy that a SAARC Drug Offences Monitoring Desk ("SDOMD") has been established in Colombo to collate, analyze and disseminate information on drug related offences in member countries.[508] The implementation of the Narcotics Convention is monitored by the Technical Committee on the Prevention of Drug Trafficking and Drug Abuse, during its annual meetings.

IV. CONCLUSION

SAARC is only seventeen years old. To expect the "adolescent" to keep up with more mature organizations such as the European Union, which has been around for much longer, is quite unrealistic. Nevertheless, an objective conclusion should be attempted.

In 1985, when SAARC was set up to promote the welfare of the peoples of South Asia, its leaders pledged to expand economic, scientific, social, cultural and technical co-operation, and to work together in international fora on issues of common interest.[509] Today after a decade and a half, and after eleven summits of SAARC leaders and scores of other lower level meetings, little has been achieved in promoting economic co-operation, and in jointly implementing agreements on issues ranging from combating terrorism and drugs, tackling food insecurity, to expanding trade, investment and industrial ties. Nonetheless, the achievement is still praiseworthy in light of the fact that South Asia has always been a geographic region, which is strangely full of discrepancies

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504. *Id.* art. 6, ¶ 1.
505. *Id.* art. 6, ¶ 2.
506. *Id.* art. 6, ¶ 2(a-b).
507. Raustiala, *supra* note 437, at 113.
508. Parthasarathy, *supra* note 423, at 41.
509. Mishra, *supra* note 51, at 74.

between the eagerness for regional cooperation on the one hand and open hostilities on the other hand.

A. Widened Efforts

Institutional dynamism seemed omnipresent in the beginning. SAARC focused primarily on technical cooperation with the aim of creating a common ground. The eleven technical committees[510] drew "up an Annual Calendar of activities for [the] exchange of information, [the] formulation of programmes and [the] preparation of projects in their respective fields," which are not the exclusive areas of cooperation.[511]

> SAARC activities and meetings [also] take place on specific subjects of common interest . . . when required. Four . . . Regional Centres have also been set up on Agricultural Information (Dhaka [1988]), Tuberculosis Prevention (Kathmandu [1992]), Meteorological Research (Dhaka [1995]), and on Documentation of SAARC interest [India, 1994]. A fifth Regional Centre on Human Resource Development is proposed to be established in Islamabad, Pakistan.[512]

Around 1990, "the second stage of cooperation within SAARC" started with an emphasis on social agenda.[513] Major initiatives were taken on "social issues such as [the] eradication of poverty, [the] promotion of literacy, and [the] development of women and children. [Also,] [i]t was decided that the decade [of] 2001-2010 would be designated as the 'SAARC Decade of the Rights of the Child.'"[514] The persistent problem of poverty in the region was also emphasized when the Heads of State of the Member States "committed themselves to the eradication of poverty in South Asia by the year 2002."[515] A three-tier institutional structure to evolve cooperation within this field, compromised of "the group of Secretaries to Governments dealing with poverty eradication and

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510. Partharsarthy, *supra* note 423, at 39. Agriculture; Communications; Education; Culture & Sports; Environment & Meteorology; Health & Population Activities; Prevention of Drug Trafficking & Abuse; Rural Development; Science & Technology; Tourism; Transport; and Women's Development.
511. *Id.*
512. *Id.*
513. *Id.*
514. *Id.*
515. *Id.*

social development, the group of Finance/Planning Secretaries . . . and Finance/Planning Ministers," was set up.[516] "This mechanism acts as a forum for [the] exchange of information on poverty eradication . . . strategies and technologies [programs]."[517]

B. Limited Achievements

Indeed, wide-ranging activities have been initiated and carried out and agreements have been concluded, "but taken together, [with few minor exceptions, they have] . . . not helped to build a more cohesive economic grouping of South Asian countries or [to] instill enough confidence among its leaders and people at large, to fully realise the benefits of cooperation."[518] Particularly frustrating is the proliferation of conventions and treaties, which have not had much to do with economic development *per se*. "The long-term goal of building a single South Asian market and developing complementarities [with]in, and creating synergies of, their respective economies was not attempted under the SAARC auspices."[519]

Attempts are definitely genuine, but the areas covered are not of much use. Arguably, many conventions were simply entered into for aesthetic purposes, which at most, would help introduce the institution beyond the borders. For instance, the Food Security Agreement has almost become theoretical. Terrorism, as well as, the Narcotics conventions, have not succeeded in significantly reducing terrorist activities or drug abuse. The Conventions addressing the issues of trafficking in persons or promoting the welfare of children are too recent to be evaluated but many years may still lapse before either become effective. Nevertheless, all the conventions and agreements have created a relatively satisfactory framework for the exchange of intelligence information and other data, and have created a mechanism for cross-border legal assistance based on mutuality and reciprocity. Moreover, these international instruments have attempted to lay the foundation for the minimization of violence and the maximization of social and economic welfare, and the maximization of participation of all Member States in the decision-making process has been realized.

On the other hand, on the trade front, moderate success can be noted. Attempts have been made at the regional level to liberalize international trade.[520] Countries have taken steps by removing the

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516. *Id.*
517. *Id.*
518. Dixit, *supra* note 49, at 3.
519. *Id.* at 1.
520. *See generally* Panagariya, *supra* note 315, at 353.

many visible and the less visible barriers to international trade. However, achievement still remains less than glorious. Based on the experience dominated by behavioral and attitudinal heterogeneity of the countries in the region, it is safe to conclude that more political understandings will be needed before one can assess the trade arrangements the South Asian region has devised for itself as a highly satisfactory one.

Political stability within, and good relations among, Member States always plays an important role in expediting economic cooperation. Although bilateral relations are not discussed within the SAARC framework, it is important for member countries to solve their internal and bilateral problems.[521] At the 18th SAARC Ministerial Council meeting agreement was reached to use preferential trade agreements between member states as a vehicle for attaining the goals of free trade in South Asia. The unanimity between foreign ministers that free trade is of greater relevance than preferential trading arrangements is a milestone in the progress towards boundary-less trading in the region. However, before the South Asian Free-Trade Agreement materializes, several issues need to be clarified. Among them are, *inter alia*, issues pertaining to special relations, like those between India and Bhutan, India and Nepal or the free trade ties between India and Sri Lanka. It is important to find ways to integrate them into the South Asian Free-Trade Agreement. It is also important to look "at issues where broader cooperation is possible, for instance, energy, where the hydropower of Nepal and Bhutan can be tied up with gas from Bangladesh and technology from India and the U.S."[522] Indeed, "taking one step at a time [and] insulating these issues from . . . political factor[s]" become a major difficulty, but remains crucial for long-term success.[523]

The most contentious aspect of the South Asian Free-Trade Agreement is the issue of Rules of Origin.[524] Tension over the

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521. It should be noted that the revision of SAARC Charter to permit discussions of contentious political issues has come out in the past and has gained momentum, but due to lack of consensus amongst top leadership, is not yet reality. For more details see Mishra, *supra* note 51, at 86.

522. Interview, Nihal Rodrigo, *supra* note 159, at 1.

523. *Id.*

524. Indeed, although

> SAPTA was broadly aimed at providing tariff concessions among all member states, [it] was also formed to enable for the smaller SAARC members to enter the vast Indian markets. But a clause in rules of origin insisting that only products having 50 per cent manufacturing base in their respective countries were eligible for tariff concessions became an irritant as most of these countries do not have much of production facilities. These countries thus want origin of production clause to be

domestic content requirements under the Rules of Origin has been present throughout, and several countries want this tension substantially reduced.[525] This is followed by issues concerning "the status of Least Developed Countries ("LDCs") in SAFTA, [where] the new equation will come into effect once the special relationships change, the loss of revenue for countries when tariff barriers are lowered and a time frame for the entire exercise."[526] Sri Lankan issues, which "Sri Lanka would like to be considered in a separate category as a small economy" will surface, since Sri Lanka is "not a[n] LDC and has a strong economy" but is limited to growth is due to its small size.[527] "Similarly, the loss of revenue through the lowering of tariff barriers is important for Sri Lanka, since it has already lower rates than, [for instance], India."[528]

By securing consensus on many unresolved issues and providing that smaller problems are solved in time, the South Asian Free-Trade Agreement could lead the region into robust growth within the next thirty years, and in this sense, although not completely immune from criticisms, the South Asian Free-Trade Agreement appears very promising.[529] However, free trade, from a practical standpoint, has to first become a reality,[530] and all the countries of the region have to make their political will as ostensive as possible, so as to facilitate further enhancement of the applicable legal framework.

C. Optimism for Prospects

In view of the relatively slow pace of achievements, as well as the continual tension among some countries, there are also scholars who propose the expansion of SAARC.[531] Such ideas for broadening SAARC, which have been around for a few years, suggest that countries look beyond the narrow confines of the subcontinent, shed some earlier inhibitions on projects of sub-regional cooperation, and

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reduced to 25 per cent.

K.J.M. Varma, *SAARC Members Sore Over Poor SAPTA Progress,* INDIAN EXPRESS NEWSPAPERS (Bombay), July 27, 1998, at 1-2.

525. *Id.* at 1.

526. Interview, Nihal Rodrigo, *supra* note 159, at 1-2

527. *Id.* at 2.

528. *Id.*

529. However, the South Asian Free-Trade Agreement , according to some economists, is almost certain to be a largely "trade diverting" and hence efficiency-reducing union. *See* Panagariya, *supra* note 520, at 373.

530. *See Regional Trade Integration: Modest Progress*, SOUTH ASIA MONITOR, May 1, 1999, *at* 2, *available at* http://www.csis.org/saprog/sam9.html (particularly discussions on why the regional trade is low and the implication for SAPTA) (last visited Nov. 9, 2002).

531. *See supra* text accompanying note 65. *See also* Nitish Sengupta & Arindam Banik, *Regional Trade & Investment: Case of SAARC*, ECON & POL. WEEKLY 2930-31 (Nov. 15, 1997).

develop new links and strands of cooperation bilaterally, sub-regionally and regionally across the entire Indian Ocean region.[532] Indeed, the proposal has some merit. However, SAARC "cannot be exclusively driven by a defensive response to the pressures of globalization but must rediscover for itself the compelling logic underlining a process of constructive regionalism."[533] If SAARC has not been successful in systematically changing the behavior of Member States on all issues, it has, on some issues, no doubt, been a vehicle for implementing instruments of national policies. Again, one should bear in mind, as suggested by a commentator, that "SAARC is a marriage of convenience rather than love."[534] Indeed, SAARC provides an alternative, if not an accompanying structure, within which relations can be conducted among Member States, and provides a significant, alternative structure in which smaller states may get a sense of equality and a distinct identity with regard to larger countries on issues concerning the region. In this sense, SAARC has become significant for the political survival of states as distinct and sovereign entities.

In addition, purely from an international law standpoint, the regular declarations, in the course of the one and a half-decade of SAARC's existence, have frequently adopted hortatory statements of principle, covering many issues and reaffirming the goal of economic growth, as well as social and behavioral changes. This, no doubt, remains a prominent normative activity of SAARC - its role in the making of international law, which cannot and should not be ignored, *in toto*.

Therefore, providing a final conclusion about SAARC is a challenging task, particularly in view of its less than noteworthy achievements. However, there is no reason to take a cynical view and emphasize dramatic rhetoric about SAARC's seeming inability to deal with vital problems of the region. Also, there is no reason to be idealistic and envisage, through SAARC, global solutions to all the major problems facing South Asia, without recognition of the constraints imposed by state sovereignty, and the disparate needs, choices, priorities and agendas of Member States. No doubt, the approach should be a cautious one, one of the middle-road, neither of total rejection nor of total acceptance in entirety; an approach which will lead all Member States, large and small, to a situation where tension will be contained, sovereignty will be respected, and

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532. *See* Parthasarathy, *supra* note 423; *see, e.g.,* K.K. Katyal, *Free trade still a long way off*, THE HINDU, Jan. 10, 2002, *available at* http://www.hinduonnet.com/thehindu/2002/01/10/stories/ 2002011001521200.htm (last visited Nov. 9, 2002).

533. Ismeth, *supra* note 158, at 2.

534. Zingel, *supra* note 328, at 1.

positive developmental actions will continue to thrive. In this sense, the future is more important than the present.

THE CARIBBEAN BASIN INITIATIVE: AN EXAMINATION OF STRUCTURAL DEPENDENCY, GOOD NEIGHBOR RELATIONS, AND AMERICAN INVESTMENT

MICHAEL CORNELL DYPSKI[1]

Table of Contents

I. INTRODUCTION 96
II. HISTORICAL BACKGROUND 97
III. THE CARIBBEAN BASIN INITIATIVE 101
A. Phase Two: The Caribbean Basin Economic Recovery Act of 1983 101
B. Phase Two: The Caribbean Basin Economic Recovery Expansion Act of 1990 109
C. Phase Three: The Carribean Basin Trade Partnership Act of 2000 112
IV. THE UNITED STATES, THE CARIBBEAN, AND FOREIGN DIRECT INVESTMENT: ANALYSIS AND CASE STUDIES 115
A. The Bahamas 118
B. Barbados 118
C. Belize 119
D. Costa Rica 120
E. Dominican Republic 121
F. El Salvador 123
G. Guatemala 123
H. Guyana 124
I. Honduras 125
J. Jamaica 126
K. Nicaragua 127
L. Panama 128
M. Trinidad and Tobago 130
V. NAFTA, THE WTO, AND THE CBI 131
VI. CONCLUSION: THE FUTURE OF THE CBI AND THE AMERICAN INVESTOR 133

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I. INTRODUCTION

On May 18, 2000, President William Clinton signed into law the Trade and Development Act of 2000.[2] The goal of the Act is to "authorize a new trade and investment policy for sub-Saharan Africa, expand trade benefits to the countries in the Caribbean Basin, renew the generalized system of preferences, and reauthorize the trade adjustment assistance programs."[3]

The focus of this paper is to examine Title II of this Act, the United States-Caribbean Basin Trade Partnership Act ("CBTPA")[4] and its predecessors. The CBTPA is actually the third in a series of legislation for a "comprehensive program 'to promote economic revitalization and facilitate expansion of economic opportunity in the Caribbean Basin region.'"[5] The Caribbean Basin Economic Recovery Act of 1983 ("CBERA") and the Caribbean Basin Economic Recovery Expansion Act of 1990 laid the foundation for the current American trade framework in the region outlined in the CBTPA. Collectively, these three acts are known as the Caribbean Basin Initiative ("CBI").

Part II of this paper will provide the basic historical dynamic and background of the United States' role in Latin America and the Caribbean, which gave birth to the CBI. This background will lead to a discussion of these three pieces of international law, with obvious emphasis on the current legislation.

Part III will discuss and analyze the Caribbean Basin Economic Recovery Act of 1983, the Caribbean Basin Economic Recovery Expansion Act of 1990, and the Caribbean Basin Trade Partnership Act of 2000.

Part IV will include the role of American companies and their input of foreign direct investment ("FDI") in the region, as well as the political, economic, and social climates of several of the beneficiary CBI states and their attitudes toward the United States' FDI.

This paper will conclude with discussion of the future viability of the CBI in an expanding free trade environment dominated by the North American Free Trade Agreement and the World Trade Organization, and whether the CBI provides real opportunity for the American investor in the region.

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2. Pub. L. No. 106-200, 114 Stat. 251 (2000) (codified in scattered sections of 19 U.S.C.).
3. *Id.*
4. *Id.* §201.
5. THE CARIBBEAN BASIN: ECONOMIC AND SECURITY ISSUES, S. PRINT NO. 102-110, at 332 (1993) (quoting President Ronald Reagan in a February 1982 speech before the Organization of American States).

II. HISTORICAL BACKGROUND

The success of the Cuban Revolution of 1959 brought about an amalgamation of Marxism-socialism, reformist concepts of economic dependency in the Caribbean and Latin America, and blatant anti-imperialism to the backyard of the United States.[6] Due to weak adherence of the United States to its "good neighbor policy"[7] and the growing popularity of the structural dependency theory[8] as a viable explanation for the economic, political, and social woes of the Third World, pro-Soviet and anti-capitalist sentiments were fomented in the struggling Latin American and Caribbean region. The "good neighbor policy" of United States-Latin American relations was an attempt, at times vain, to diminish the American shadow in the region and lessen its role as the "colossus of the north."[9]

In an effort to remedy some of the vast inequalities in the Caribbean and Latin America and perhaps to quash growing communist sentiments, the United States under President John Kennedy, with the support of several Latin American countries, proclaimed the Alliance for Progress in 1961.[10] Under the plan, the United States was to provide a substantial portion of the $20 billion in funding deemed necessary for the alliance, including more than

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6. EDWIN WILLIAMSON, THE PENGUIN HISTORY OF LATIN AMERICA 354 (1992).

7. ROBERT H. FERRELL, AMERICAN DIPLOMACY 765-793 (3d ed. 1975). Succinctly, the "good neighbor policy," usually attributed to President Franklin Roosevelt, is a policy of non-intervention. *Id.* Roosevelt, in his 1933 inaugural address, set forth "a new spirit of cooperation rather than intimidation" in the United States' relationships with other nations in the world. MICHAEL J. KRYZANEK, U.S.-LATIN AMERICAN RELATIONS 52 (2d ed. 1990). Roosevelt stated:

> In the field of world policy, I would dedicate this nation to the policy of the good neighbor — the neighbor who resolutely respects himself and, because he does so, respects the rights of others — the neighbor who respects his obligations and respects the sanctity of his agreements in and with a world of neighbors.

Id. at 53.

The "good neighbor policy" marked a significant change in the American approach to other states in the Western Hemisphere. Prior to the 1930s, the United States continued to adhere to the Monroe Doctrine, promulgated by the fifth President in 1823. Basically, this policy asserted the sovereignty of the United States in all hemispheric matters and acted as a warning to the European powers to refrain from interfering in the affairs of the United States and the newly independent nations of Latin America. *See id.* at 24-27.

8. *See* G. POPE ATKINS, LATIN AMERICA IN THE INTERNATIONAL POLITICAL SYSTEM 348-49 (3d ed. 1995).

9. FERRELL, *supra* note 7, at 765. The overthrow of the Arbenz government in Guatemala (1954), the Central Intelligence Agency debacle at the Bay of Pigs, Cuba (1961), the Marine invasion of the Dominican Republic (1965), and the U.S. assisted toppling of the Allende government in Chile (1972) are stark examples of the fragility of striking balance between perceived American national security interests and good neighbor relations with Latin America and the Caribbean. See WILLIAMSON, *supra* note 6, at chs. 9, 12 & 14, for concise histories of these episodes of intervention.

10. *See* FERRELL, *supra* note 7, at 789.

$1 billion the first year.[11] Unfortunately, the Alliance for Progress failed. Under the plan, most of the development in the region was to come from private investment. However, due to the overall social, economic, and political turbulence in the region, some new, some ancient, private investors ignored Kennedy's call.[12]

Shortly after the creation of the United Nations in 1945, one of its agencies, the Economic Commission for Latin America and the Caribbean ("ECLA"), published a thorough and radical analysis of economic development in the region.[13] Inspired and promulgated by the Argentine economist Raúl Prebisch, the structural dependency theory "visualizes the world economy in terms of a 'center-periphery' structure", with capitalist-industrialized nations forming the center and the developing-underdeveloped world at the periphery.[14] Under the structural dependency theory, the states of Latin America and the Caribbean remain under a "form of colonialism."[15] Prebisch stressed the necessity for economic reform in the states of the region. He urged for a widening and deepening of economic integration, an expansion of local markets, and mass industrialization as the means for sustained growth and development.[16] Prebisch advocated foreign intervention in the economies of the developing-underdeveloped world through "public economic assistance, private investment, and trade preferences", but stressed the ultimate goal of domestic fiscal independence.[17] By the

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11. *Id.*

12. *Id.* Professor Ferrell states that:

> Problems . . . arise out of the extremely unequal distribution of wealth and position in Latin America. The United States as a true democracy has become a sort of showcase to all Latin America, and many of the Latins with the increased advantages of education are going to ask questions about the medieval social structures in some of their nations. Getting these structures adjusted to modern . . . realities may bring considerable political . . . perhaps international trouble.

Id.

Professor Ferrell's description of the situation of the region is starkly accurate, albeit perhaps coarse. He continues with:

> [the nations of Latin American and the Caribbean] "did not have the pool of skilled manpower such as Europe possessed on the eve of the Marshall Plan. After several years, the Alliance for Progress petered out, going the way of so many other projects and dreams for the betterment of the Western Hemisphere . . . [In the region] the United States has seemed constantly to be coming up against dead ends, but no better policy has appeared . . . than that of the good neighbor.

Id.

13. ATKINS, *supra* note 8, at 348.

14. *Id.* at 348-49.

15. *Id. at 349.*

16. *Id.*

17. *Id.* As quoted in ATKINS, Mr. Prebisch said that "[e]xternal cooperation is important, but only as a means of supplementing and stimulating internal action, not as a substitute for

late 1980s and into the early 1990s, Latin America and the Caribbean generally abandoned the structural dependency approach, as greater democratization efforts and economic liberalization (i.e., laissez faire, market-driven forces) gained favor.[18]

Structuralism, burgeoning adherence to Cuban-style Marxist ideology, and strengthening anti-American sentiments would forge an environment in Latin America and the Caribbean, which by the late 1970s and early 1980s, would reach such a magnitude to force Washington to pay greater attention to its southern neighbors.

The United States, stymied and suffering from the so-called "Vietnam syndrome," was either unwilling or unable to confront the "revolutionary change" threatening its foreign policy and national security interests.[19] What follows are some examples reflecting this sea of change in American foreign policy from that of activism to delayed intervention. These events would forge the United States' ambition to gain positive influence in Latin America and the Caribbean and promote democracy and free trade.

- In 1979, the Sandinista front overthrew the Somoza dictatorship in Nicaragua, establishing the first successful Marxist revolution in the Western Hemisphere since the Cuban Revolution.[20]

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it." *Id.*

18. *Id.* As will be set forth below, President Clinton advocated a greater expansion of the CBI, emerging as the CBTPA of 2000. The author of this article believes that the CBI, while a needed tool for Caribbean economic development and political stability, is the continuation of a long-standing structural dependent relationship between the United States and her southern neighbors. Interestingly, in 1994, Clinton called for greater domestic state intervention to promote self-sufficiency in the Caribbean and Latin America. *See* DUNCAN GREEN, SILENT REVOLUTION: THE RISE OF MARKET ECONOMICS IN LATIN AMERICA 178 (1995). American policy-makers favored increased research and development, more government spending on infrastructure, and greater governmental intervention in industrial planning. *Id.* Clinton's Under-Secretary for International Affairs at the U.S. Treasury, Lawrence Summers, in a speech to the InterAmerican Development Bank stated that "markets alone, without government action, cannot bring the shared prosperity that we crave . . . [This idea] should be top of any agenda for Latin America and the Caribbean today." *Id.*

However, the United States has been slow to practice what it has preached. It has been pointed out that while the United States

> advocates 'managed trade' in its own dealings with countries like Japan, it is unwilling to countenance such activities from the South, for which it continues to prescribe large doses of free trade and deregulation. The flow of ideas from the North has nourished the debate, but the political pressures from Washington have continued to close it down.

Id.

19. KRYZANEK, *supra* note 7, at 221.

20. *See* THOMAS C. WRIGHT, LATIN AMERICA IN THE ERA OF THE CUBAN REVOLUTION 175-76 (1991).

- A year later, the Nicaraguan Revolution inspired the FMLN-led revolutionary movement in El Salvador in an attempt to emulate their Marxist comrades in Managua.[21]
- Throughout the 1970s, Jamaica, Grenada, and Guyana were "openly pro-Cuba"[22] and quite adept at playing the "Cuban card."[23] The leaders of the Caribbean had remarkable "political *savoir faire* . . . most of them of Fabian socialist persuasion. They understood the limits of Washington's interests beyond geopolitics and were also wary of the stirrings on their left."[24] Many leaders in the Caribbean, most notably Michael Manley and Edward Seaga of Jamaica and Maurice Bishop of Grenada, "began to exploit" the United States-Cuban tension to suit their own political and personal objectives.[25]

This economic, political, and ideological maelstrom at America's "third border"[26] caused Washington to counter with a tool of containment known as the Caribbean Basin Initiative. "Designed as a means of responding to communist-inspired revolution through a comprehensive trade and aid policy," the Caribbean Basin Initiative united the Caribbean and Central America into a single strategic area "that would benefit from more liberal access to [America's] markets, greater economic assistance, and more incentives for capital investment."[27] Ravaged by revolution and overall state instability, the CBI was viewed as a means to

21. *Id.* at 95-96. The FMLN (Frente Farabundo Martí de Liberación Nacional) movement in El Salvador, having never gained complete control of the country and weakened by the collapse of the Sandinista government in Nicaragua, eventually failed by the beginning of the 1990s.

22. ANTHONY P. MAINGOT, THE UNITED STATES AND THE CARIBBEAN 120 (1994).

23. *Id.* at 114-39.

24. *Id.* at 119.

25. *Id.* at 114-39. *See also* Steven G. Fishbach, *"The Quiet Revolution": Trade and Investment Liberalization in Chile and Jamaica*, 48 ADMIN. L. REV. 527, 535 (1996) (recognizing that "[d]uring his first year as prime minister, Seaga successfully courted foreign investment and aid by skillfully 'maneuvering the geopolitical Cold War setting to extract the most from . . . the United States.").

26. President Ronald Reagan called Central America and the Caribbean the United States' "third border." *See* KRYZANEK, *supra* note 7, at 80.

27. *Id. See also* Mark Baker, *Privatization in the Developing World: Panacea for the economic ills of the Third World or prescription overused?*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 233, 247 (1999).

> Bilateral trade agreements like the Caribbean Basin Initiative, which served to spur foreign assembly plants in the Caribbean to take advantage of low labor costs, gave the development of export-assembly industries some momentum. The Caribbean nations in turn were permitted increased access to U.S. markets. This type of industrialization which sought the input of foreign investors was termed "industrialization by invitation."

Id.

resuscitate the struggling region. The program made starkly evident the importance and vitality of the Caribbean region to the interests of the United States as the Soviet-Cuban menace loomed.[28] The CBI began as a "Marshall Plan" tailored for the Caribbean.[29] This paper will examine the utility of the regime today and whether the United States' government, as well as its investment concerns, have aided in the reconstruction and development of the CBI beneficiary members.

III. THE CARIBBEAN BASIN INITIATIVE

A. Phase Two: The Caribbean Basin Economic Recovery Act of 1983

On August 5, 1983, President Ronald Reagan signed into law The Caribbean Basin Economic Recovery Act,[30] the "cornerstone of [the] CBI."[31] For exporters in the Caribbean, "the intended hallmarks of CBI were simplicity and ease of use."[32] Most Caribbean exports are eligible for preferential treatment under the CBI or the United States Generalized System of Preferences ("GSP").[33] However, the GSP has a complicated duty structure considered by some to "disadvantage small, relatively inexperienced" exporters and producers in the Caribbean.[34] The CBERA is a means to quickly and efficiently promote a modernization in the Caribbean economic base from a few, "low value 'traditional'" and agricultural goods, like sugar, bananas, and coffee, to more diverse, manufactured products.[35] What follows is a

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28. Keiron E. Hylton, *International Trade: Elimination of Tariffs on Caribbean Products*, 25 HARV. INT'L L.J. 245, 249 (1984).

29. *Id.*

30. Pub. L. No. 98-67 (1983) (codified at 19 U.S.C. §§ 2701-2706, & 7652 (Supp. 1983)). Pub. L. No. 98-67 consists of two titles. Title I is entitled "Interest and Dividend Tax Compliance." This title is of no relevance for purposes of this paper. Title II is entitled the "Caribbean Basin Initiative." Title II consists of three subtitles: Subtitle A (codified at 19 U.S.C. §§ 2701-2706), deals with duty-free treatment; Subtitle B (codified at 26 U.S.C. § 7652) sets forth various tax provisions, particularly in regards to rums from Puerto Rico and the United States Virgin Islands; and Subtitle C (§ 231) in response to Congressional concerns over communism in the region, section 231 simply states: "It is the sense of the Congress that sugar from any Communist country in the Caribbean Basin or in Central America should not be imported into the United States."

31. Rachel Shub, *Recent U.S. Trade and Investment Initiatives in Latin America and the Caribbean*, 789 PLI/Corp. 585, 597 (1992).

32. James E. Stamps, *Caribbean Basin Initiative: Ten Years of Trade Preference*, 3 FLA. ST. J. TRANSNAT'L L. & POL'Y 149, 150 (1994).

33. *Id.*

34. *Id.* at 151.

35. *Id.* at 150.

summary of the major provisions of the CBERA considered relevant for purposes of this paper.

Section 211 gives the President authority to "proclaim duty-free treatment or other preferential treatment for all eligible articles from any beneficiary country."[36] Under Section 212(a) of the Act, the President may designate a country as a beneficiary of the CBI under proclamation, after notifying both the House of Representatives and the Senate.[37] Conversely, the President may terminate a beneficiary's CBI designation by proclamation after notification to Congress and sixty days notice to the beneficiary at issue.[38] Reasons for the withdrawal of CBI privileges must be provided to that country.[39]

At the creation of the CBERA, twenty-seven nations and territories were designated as "beneficiary countries."[40] These included Anguilla, Antigua and Barbuda, The Bahamas, Barbados, Belize, British Virgin Islands, Cayman Islands, Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Montserrat, Netherlands Antilles, Nicaragua, Panama, Saint Christopher-Nevis [now known as Saint Kitts and Nevis], Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, and the Turks and Caicos Islands.[41] For these states to acquire "beneficiary country" status, they have to satisfy seven conditions, some of which could be waived.

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36. 19 U.S.C. § 2701 (2000). This authority differs from the Presidential authority to proclaim duty-free treatment under the Generalized System of Preferences ("GSP"). *Id.* § 2463(a). Under the GSP, advice from the International Trade Commission ("ITC") is a precondition to a granting of duty-free treatment. Under the CBI, advice from the ITC is not necessary. *See* Francis W. Foote, *The Caribbean Basin Initiative: Development, Implementation, and Application of the Rules of Origin and Related Aspects of Duty-Free Treatment*, 19 GEO. WASH. J. INT'L L. & ECON. 245, 267 n.101 (1985).

37. 19 U.S.C. § 2702(a)(1)(A).

38. *Id.* § 2702(a)(2).

39. *Id.*

40. *Id.* § 2702(b).

41. *Id.* On January 1, 1984, twenty of these "beneficiary countries" were eligible for CBI status: Antigua and Barbuda, Barbados, Belize, the British Virgin Islands, Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Montserrat, Netherlands Antilles, Panama, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago. The Bahamas was designated in March 1985. Upon becoming independent from the Netherlands Antilles in April 1986, Aruba joined the CBI. Guyana was designated in November 1988. Nicaragua was designated in November 1990. Panama's CBI status was suspended in April 1988, but restored in March 1990. Anguilla, the Cayman Islands, Suriname, and the Turks and Caicos Islands have not requested beneficiary status. *See* USTR, *Third Report to the Congress on the Operation of the Caribbean Basin Economic Recovery Act* 9 (1999), *at* http://www.ustr.gov/regions/whemisphere/ camerica/3rdreport.pdf (last visited May 15, 2002).

Under Section 212(b), the President is proscribed from designating any of the preceding twenty-seven states as beneficiary countries if their government:

> (1) is Communist or appears to be "controlled by international communism (i.e., by the Soviet Union);"[42]
> (2) "has nationalized, expropriated, or otherwise seized ownership or control of property owned by a United States citizen or by a corporation, partnership, or association which was owned 50% or more by United States citizens."[43] This includes actions "to repudiate or nullify any existing contract or agreement with any patent, [44] trademark, or other intellectual property"[45] of imposing taxes, exactions, or maintenance and operational restrictions so as to effectively seize, nationalize, and expropriate American property or business concerns.[46] This condition could be mollified if the President determines that the offending state has made or is putting forth a good faith effort to provide prompt, adequate, and effective compensation for its taking actions;[47]
> (3) fails to recognize binding arbitral awards in favor of the United States;[48]
> (4) gives preferential treatment to other developed nations, besides the United States, which has or could have a significant detrimental effect on American commerce;[49]
> (5) violates intellectual property laws by broadcasting materials of American copyright owners without their consent;[50] and
> (6) does not have signatory status to a treaty, convention, or protocol regarding the extradition of citizens of the United States.[51]

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42. Foote, *supra* note 36, at 269.
43. 19 U.S.C. § 2702(b)(2)(A).
44. *Id.* § 2702(b)(2)(B)(i).
45. *Id.* § 2702(b)(2)(B)(ii).
46. *Id.* § 2702(b)(2)(C).
47. *Id.*
48. *Id.* § 2702(b)(3).
49. *Id.* § 2702(b)(4).
50. *Id.* § 2702(b)(5).
51. *Id.* § 2702(b)(6), *repealed by* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, tit. IX,

While the preceding conditions are mandatory, those under paragraphs (1), (2), (3), and (5) could be waived only if the President determines, and reports to Congress, that the designation of the beneficiary country is in the national economic and security interests of the United States.[52]

Section 212(c) lists several additional, and wholly discretionary, criteria the President must take into account in an executive determination of bestowing beneficiary status to an eligible state.[53] These conditions were intended to ensure that each designated country is engaging in market-oriented policies and programs that will allow the CBI to properly function as a tool of economic development.[54] The Executive must consider:

> (1) an expression by a beneficiary country of its desire to join CBI;[55]
> (2) the economic conditions, living standards, and other relevant economic factors of the country;[56]
> (3) the country's willingness to provide equitable and reasonable access to the markets and commodity resources of the country;[57]
> (4) the country's acceptance and adherence to rules of international trade in accordance with the General Agreement on Tariffs and Trade and section 2(a) of the 1979 Trade Agreements Act;[58]
> (5) the degree to which a country uses trade distortion maneuvers, such as export subsidies, export performance requirement, or local content requirements;[59]
> (6) the degree to which a country employs trade policies which contribute to the overall revitalization of the Caribbean Basin region;[60]

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§ 9002(b), 100 Stat. 3207-166 (1986).

52. *Id.* § 2702(b)(7).
53. *Id.* § 2702(c).
54. Foote, *supra* note 36, at 276 n.160.
55. 19 U.S.C. § 2702(c)(1).
56. *Id.* § 2702(c)(2).
57. *Id.* § 2702(c)(3).
58. *Id.* § 2702(c)(4).
59. *Id.* § 2702(c)(5).
60. *Id.* § 2702(c)(6).

> (7) the degree to which a country is engaging in self-help practices and measures to promote and ensure its own economic development;[61]
> (8) the degree to which a country has in place policies promoting worker's rights and permitting rights of organization and collective bargaining;[62]
> (9) the countries' protections of the intellectual property rights of foreign nationals, including patents, trademarks, copyrights, and broadcast materials;[63] and
> (10) the countries' willingness to cooperate with the United States in the overall, general administration of the CBI.[64]

Section 213, entitled "Eligible Articles," deals with duty-free treatment of certain goods under the CBERA.[65] Under the Act's rules of origin, duty-free treatment is afforded to any article which is the "growth, product, or manufacture of a beneficiary country" and enters the United States directly from a beneficiary country.[66] Furthermore, the article must have an added value of at least 35 percent reflecting the cost of the materials produced plus the direct costs of processing operations.[67]

Section 213(b) lays out articles specifically excluded from preferential CBI treatment.[68] These article include:

> (1) textiles and apparel subject to textile agreements;[69]

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61. *Id.* § 2702(c)(7).
62. *Id.* § 2702(c)(8).
63. *Id.* § 2702(c)(9)-(10).
64. *Id.* § 2702(c)(11).
65. *Id.* § 2703.
66. *Id.* § 2703(a)(1).
67. *Id.* § 2703(a)(1)(B). Under § 2703(a)(3), "direct costs of processing operations" includes all actual labor costs involved in production, assembly, and manufacture, as well as dies, molds, tooling, and depreciation attributable to the production of an eligible article.
68. *Id.* § 2703(b). See also Foote*, supra* note 36, at 282-289 for brief histories of Congress' considerations and rationale for the exclusion of these articles.
69. *Id. § 2703(b)(1)(A).* Under the CBERA, textiles are ineligible for duty-free treatment. However, in June 1986, the Special Access Program, known as Super 807 (HTS 9802.00.80.10, formerly 807.0010), was implemented to apply to "imports of textile apparel assembled in a CBI beneficiary from fabric formed as well as cut in the United States." S. PRINT NO. 102-110, *supra* note 5, at 339. "The U.S. components can be made of either U.S. or foreign fabric as long as the fabric is cut to shape in the United States and exported ready for assembly." CARIBBEAN BASIN ECONOMIC RECOVERY ACT: IMPACT ON THE UNITED STATES: 13TH REPORT, USITC PUB. 3132, 13 (1998). This ultra-CBERA provision gave reduced duty treatment and permitted bilateral negotiations to increase any applicable quotas in regards to apparel and textiles. *Id.* These "guaranteed access levels" agreements are in effect with several Caribbean

> (2) footwear, handbags, luggage, flat goods, work gloves, and leather apparel;[70]
> (3) tuna, prepared or preserved in any manner, in airtight containers;[71]
> (4) petroleum and products derived from petroleum;[72] and
> (5) watches and watch-related parts and accessories.[73]

Indicative of Congressional concern for the people of the developing states of the Caribbean region, section 213(c) sets forth a unique aspect of the CBERA. While the remainder of the Act focuses on the political and economic aspects of duty-free treatment of Caribbean goods, this section shows a willingness of the United States to protect the dietary needs of the people of the Caribbean and thwart greedy and unscrupulous producers of sugar and beef. The President is given wide discretion "to determine what constitutes an adequate plan in consideration of the fact that the agricultural capabilities of many Caribbean countries are limited by climatic, geographic and other factors."[74]

Within ninety days of designation, a beneficiary country must provide to the President a "stable food production plan" outlining the measures and proposals necessary to ensure that the nutritional levels of the region's population will not be adversely affected by an increase in sugar and beef production.[75] If the President either does not receive an acceptable plan or determines that a beneficiary country is not putting forth a good faith effort to institute a reasonable plan, he must suspend, after consultation with the offending country, the duty-free treatment.[76] The President shall remove the suspension upon satisfactory production, in the determination of the Executive, of a viable nutrition maintenance plan by the beneficiary country.[77]

The sugar industry has maintained "a crucial place in the economic and social lives" of the Caribbean people.[78] To this, the

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states, including Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Jamaica. *Id.*

70. 19 U.S.C. § 2703(b)(1)(B).
71. *Id.* § 2703(b)(1)(C).
72. *Id.* § 2703(b)(1)(D).
73. *Id.* § 2703(b)(1)(E).
74. Foote, *supra* note 36, at 294.
75. 19 U.S.C. § 2703(c).
76. *Id.* §§ 2703(c)(2)-(3).
77. *Id.* § 2703(c)(5).
78. REPORT OF THE WEST INDIAN COMMISSION: TIME FOR ACTION 173 (2d ed. 1993).

CBERA sets forth special rules in regards to sugars, syrups, and molasses in section 213(d).[79] This subsection is "intended to balance the need to prevent interference with the domestic price support program against the need to assure Caribbean Basin countries preferential access to U.S. sugar markets."[80] It also gives the President tremendous control over sugar imports into the United States. The President, in consultation with the Secretary of Agriculture, may suspend or adjust upward quantitative limitations on sugar, syrups, and molasses depending upon a determination of the exports' effect on the American price support program in place for sugar beets and sugar cane.[81]

Under subsection (e), the President may invoke protective measures, or safeguards, to respond to negative impacts of CBI duty-free treatment on American domestic industries.[82] By Executive proclamation, duty-free treatment may be suspended if founded upon either Section 203 of the Trade Act of 1974 or Section 232 of the Trade Expansion Act of 1962.[83] An Executive suspension of duty-free treatment shall be deemed an increase in duty under subsections (a) and (c) of section 203 of the Trade Act of 1974.[84] Following the proclamation, the ITC is to provide a report stating the possible, if any, negative impact of the article on domestic industries.[85] However, a discovery by the ITC of a negative impact alone, excluding a national security concern under Section 232 of the Trade Expansion Act of 1962, is insufficient for the Presidential

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79. 19 U.S.C. § 2703(d) (Supp. 1983).

80. Foote, *supra* note 36, at 294.

81. 19 U.S.C. § 2703(e). *See also* Robert A. Pastor & Richard D. Fletcher, *Twenty-first Century Challenges for the Caribbean and the United States: Toward a New Horizon*, *in* DEMOCRACY IN THE CARIBBEAN: POLITICAL, ECONOMIC, AND SOCIAL PERSPECTIVES 264-265 (Jorge I. Domínguez et al. eds., 1993). The authors point out that Congress approved a new sugar quota system in 1981. Through this, imported sugar received a higher price, but the quota reductions caused severe overproduction. From 1975-1981, the United States imported 1.7 million tons of Caribbean sugar. This amount plummeted to only 442,000 tons in 1989. The potential revenue loss to the region from 1982 to 1989 was about $1.8 billion. Throughout the region during this period, close to 400,000 jobs were lost in the sugar industry. Five sugar mills closed in the Dominican Republic alone from 1982 to 1992. As the authors dramatically state: "The effect of U.S. sugar policy on the region has been comparable to that of the most ferocious natural or political disasters." Pastor & Fletcher, *supra* note 81, at 264.

82. 19 U.S.C. § 2703(e).

83. *Id.* § 2703(e)(1). Section 203(a)(1)(A) of the Trade Act of 1974 states, in part, "the President shall take all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefit than costs." 19 U.S.C. § 2253(a)(1)(A) (Supp. 1983). Section 232 of the Trade Expansion Act of 1962 deals with the impact of imports on American national security. Following a negative recommendation of the Secretary of Commerce, the President must take necessary action to alleviate threats to national security from imports. 19 U.S.C. § 1862(b)(1)(A) (Supp. 1983).

84. 19 U.S.C. § 2703(e)(3).

85. *Id.* § 2703(e)(2).

proclamation to stand. The CBERA states that no proclamation which provides solely for a suspension of duty-free treatment of any article shall be made unless the United States International Trade Commission, "in addition to making an affirmative determination . . . determines in the course of its investigation . . . that the serious injury (or threat thereof) substantially caused by imports to the domestic industry producing a like or directly competitive article results from the duty-free treatment provided by this title."[86]

Sections 215 and 216 of the CBERA requires that the International Trade Commission and the Secretary of Labor, respectively, draft reports to Congress, reviewing and analyzing the overall impact of CBI on the United States and its production, labor force, investment, and related matters.[87]

Section 218 contains the sunset provision of the Act. It states that the duty-treatment under the CBERA shall begin on the date of its enactment[88] and shall terminate on August 5, 1990.[89]

For purposes of this paper, the relevant portions of the CBERA have been covered. Next, this paper will discuss the changes and further development of the CBI under the Caribbean Basin Economic Recovery Expansion Act of 1990 ("Expansion Act"). This Act provides greater coverage of Caribbean articles eligible for duty-free treatment[90] and places more pressures upon the CBI states to ensure worker's rights and provides tax incentives for foreign direct investment from the United States into the region. After seven years, the Expansion Act was perceived as a remedy for the continued anemic economic malaise and stagnation in the Caribbean region. Although the United States International Trade Commission asserted, despite weak data, that the

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86. *Id.* § 2703(e)(4).
87. 19 U.S.C. §§ 2704-2705 (Supp. 1983).
88. *Id.* § 2706(a) (Supp. 1983).
89. *Id.* § 2706(b).
90. For the CBI to be a worthwhile endeavor for all parties involved, the United States had to provide broader duty-free treatment for Caribbean goods. From 1983 to 1990, the growth of imports under the CBERA eligible goods, in absolute terms, had been smaller than that of CBERA non-eligible goods, the former increasing by $1.339 billion and the latter by $1.648 billion. S. PRINT NO. 102-110, *supra* note 5, at 338. This "suggesting that the effectiveness of the CBERA might need some improving. The same need is suggested by Congressional concerns that resulted in the Caribbean Basin Recovery Expansion Act of 1990." *Id.* Also, note that during the first four years after the inception of the CBI program, the major beneficiaries were the "larger and more economically diversified" states of The Dominican Republic, Jamaica, Costa Rica, Guatemala, and Honduras. Gregory K. Schoepfle & Jorge F. Perez-Lopez, *Employment Implications of Export Assembly Operations in Mexico and the Caribbean Basin*, *in* MIGRATION IMPACTS OF TRADE AND FOREIGN INVESTMENT 22 (Sergio Díaz-Briquets & Sidney Weintraub eds., 1991).

> 'CBERA has proven to be a success in many regards' and significant increases have been registered in some new or nontraditional U.S. imports under the preference e.g., frozen GSP-eligible orange juice, and ethanol; GSP-eligible jewelry, and medical instruments from selected countries, the CBERA and other related provisions have as yet not brought about substantial improvements in the overall export position of CBERA countries vis-à-vis the United States and, indirectly, in the diversification, restructuring, and/or expansion of the Caribbean economies as a whole. Nor does it appear that CBERA imports have grown faster than other imports from CBERA countries.[91]

B. Phase Two: The Caribbean Basin Economic Recovery Expansion Act of 1990

On August 20, 1990, the Customs and Trade Act of 1990 was signed into law.[92] Title II of the Act is entitled the "Caribbean Basin Economic Recovery Expansion Act of 1990".[93] Through this Act," Congress stressed that the "commitment of the United States to the successful development of the [Caribbean] region, as evidenced by the enactment of the Caribbean Basin Economic Recovery Act, should be reaffirmed, and further strengthened, by amending that Act to improve its operation."[94]

Perhaps the most notable portion of the Act is Section 211. This repealed Section 218 of the CBERA,[95] thereby extending CBI benefits indefinitely.

Under Section 213(b)(2) of the CBERA, footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel were not eligible for duty-free treatment.[96] Section 212 of the Expansion Act reduces tariffs on these goods, with the exclusion of footwear, by 20 percent over a five-year period, with a 2.5 percentage point limit.[97]

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91. S. PRINT NO. 102-100, *supra* note 5, at 338.
92. Pub. L. No. 101-382, 104 Stat. 629 (1990) (codified in scattered sections of 19 U.S.C.).
93. 19 U.S.C. § 2701 (Supp. 1990) (Congressional findings note 3).
94. *Id.*
95. 19 U.S.C. § 2706 (Supp. 1990).
96. *Id.* § 2703(b)(2) (Supp. 1983).
97. *Id.* § 2703(a)(Supp. 1990). This section was to go into effect on or after January 1, 1992. Also, the 20 percent duty reduction does not apply to articles with a tariff rate of more than 12.5 percent. *See id.*

Section 213 of the Expansion Act amends Section 212 of the CBERA to include another statement of the United States' concerns for labor by consideration of whether the beneficiary countries afford their citizens "internationally recognized worker rights."[98]

Section 215 of the Expansion Act enlarges the scope of eligible goods to those which are the "growth, product, or manufacture" of Puerto Rico.[99] These goods are duty-free as long as they are imported directly from a beneficiary country into the United States, have been further processed, "advanced," or "improved" in a beneficiary country, and, if any materials are added to the article in the beneficiary country, that material is a product of the beneficiary country or the United States.[100]

Under Section 222 of the Expansion Act, products, exclusive of textiles and petroleum products, are eligible for duty-free treatment if they are processed or assembled from components or ingredients wholly made in the United States.[101]

Fears of countervailing duties and causes of action from dumping are allayed in light of Section 224.[102] This law states that CBI imports will not be calculated in a cumulative manner, except in relationship to other beneficiary countries.[103] This provision "aims to make it less likely that imports from a CBI country will be found to be a cause of injury to U.S. industries."[104]

Finally, under Section 936 of the Internal Revenue Code, American corporations receive a tax credit for doing business in Puerto Rico and securing the monies in Puerto Rican financial institutions.[105] This in turn benefits CBI beneficiary countries because under the provisions of the tax law, Puerto Rican banks allow investors to borrow these funds at below-market interest rates (typically 1 to 2 percentage points below the London Interbank Offer Rate) to finance projects in the Caribbean.[106] These provisions are

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98. *Id.* § 2702(b)(7).

99. *Id.* § 2703(a). These benefits were to apply to articles entered or withdrawn from warehouse to consumption on or after August 5, 1990. *Id.* § 2703(b)(1).

100. *Id.* § 2703(a).

101. *Id.* § 2703.

102. *Id.* §1677.

103. *Id.*

104. Stamps, *supra* note 32, at 159.

105. 26 U.S.C. § 936 (2000).

106. *Id.* *See also* Stamps, *supra* note 32, at 160 n.67. For a CBI country to benefit from these investment and project financing monies, a country must have

> concluded with the United States a 'tax information exchange agreement' (TIEA) providing for 'the exchange of such information [with respect to any person] . . . as may be necessary or appropriate to carry out and enforce the tax laws of the United States and the beneficiary country (whether criminal or civil proceedings), including information which may otherwise be subject to nondisclosure provisions of the local law of the

formalized under Section 227 of the Expansion Act.[107] Oddly, however, the Section 936 program was repealed as part of the Small Business Job Protection Act in 1996.[108] "Accordingly, this source of investment income for qualifying countries no longer is available."[109]

Despite the progress and increased trade liberalization under the Expansion Act, the states of the Caribbean continued to express "disappointment . . . that the U.S. had not yet enacted legislation to grant NAFTA parity to products of Caribbean origin and that stated U.S. commitments of support for satisfactory market arrangements for the Caribbean in their traditional markets had also not yet been translated into appropriate action."[110] The primary fear of Caribbean leaders is that the comprehensive textile and apparel provisions of NAFTA will cause a detrimental production shift from the CBI beneficiaries to Mexico.[111] As was noted in the early 1990s before the inception this trilateral regime, "NAFTA would eliminate advantages of the CBI."[112] If Mexican investment and industry is "successful in swamping the North American market, Caribbean countries have just cause for concern."[113]

To abate these concerns and instill confidence in the Caribbean leadership of the dedication of the United States to freer trade and

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beneficiary country.'

S. PRINT NO. 102-110, *supra* note 5, at 341, *quoting* 25.U.S.C. § 2674(6)(C)(i) (2000).

Many beneficiary countries are reluctant to subject themselves to these TIEAs for "fear that as a result they might be forced to change their tax laws or disclose sensitive income information." *Id.*

107. 104 Stat. 661 (amending 26 U.S.C. §936). Section 227 further states that the government of Puerto Rico shall ensure that at least $100 million is available for Caribbean investments each year.

108. USTR, *Third Report*, *supra* note 41, at 13. *See also* The Small Business Job Protection Act, Pub. L. No. 104-188, § 1601, 110 Stat. 1827 (1996).

109. USTR, *Third Report*, *supra* note 41, at 13.

110. ANNUAL REPORT OF THE SECRETARY GENERAL OF THE CARIBBEAN COMMUNITY 49 (1998). The members of The Caribbean Community (CARICOM) are Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago. CARICOM Observers include Aruba, Bermuda, the Cayman Islands, Colombia, the Dominican Republic, Mexico, Netherlands Antilles, Puerto Rico, and Venezuela. Anguilla, the British Virgin Islands, and the Turks and Caicos Islands are CARICOM Associate Members. *See* The Caribbean Community Secretariat, *at* http:www.caricom.org (last visited Sept. 13, 2002).

111. J.T. O'Neal, *A Handshake Not a Hand-Out: Extending NAFTA Parity to Textile Imports from the Caribbean Basin Countries*, 9 FLA. J. INT'L L. 497, 501 (1994). In 1993, the United States, Canada, and Mexico entered into the North American Free Trade Agreement ("NAFTA"). 32 I.L.M. 289. The NAFTA is a comprehensive trade program requiring the three signatories to gradually eliminate tariffs. O'Neal, *supra* note 111, at 498.

112. JENNIFER HOSTEN-CRAIG, THE EFFECT OF A NORTH AMERICAN FREE TRADE AGREEMENT ON THE COMMONWEALTH CARIBBEAN 109 (1992).

113. *Id.* at 110.

greater investment in the CBI members, the Caribbean Basin Trade Partnership Act ("CBTPA") became effective in October 2000.[114]

In a speech only a few weeks before the passage of the CBTPA, Ambassador Charlene Barshefsky, the United States Trade Representative, said that the United States and Caribbean states "have no more critical a set of relationships than those with our closest neighbors."[115] Ambassador Barshefsky went on to discuss the "new additions to the current set of eligible goods . . . which will be eligible for treatment equivalent to that offered to Mexican goods under the North American Free Trade Agreement".[116] These new provisions are seen as but one step towards a greater Free Trade Area of the Americas. She concluded her speech by stating that the:

> CBI enhancement will [be] especially valuable, by providing early incentives for investment in the region, and encouraging domestic reform and liberalization policies that build the capacity for smaller economies to compete . . . Over time, all of us will benefit from a generally stronger hemispheric economy that will increase opportunities for trade, investment, and tourism throughout the region; and this is particularly evident for the Caribbean region as the natural bridge between the Americas.[117]

The major relevant provisions of the CBTPA will now be discussed.

C. Phase Three: The Caribbean Basin Trade Partnership Act of 2000

Under Section 202(b)(1), the United States clarifies its intent and dedication to include the states of the Caribbean into NAFTA or a NAFTA-like arrangement of free trade and tariff treatment.[118]

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114. Trade and Development Act of 2000, *supra* note 3.

115. Ambassador Charlene Barshefsky, *The Turning Point: The Caribbean Basin Initiative and the Free Trade Area of the Americas in 2000*, a speech given at the Inter-American Development Bank, p. 1 (Sept. 11, 2000), *at* http://www.ustr.gov/speech-test/barshefsky/barshefsky_98.html (last visited May 15, 2002).

116. *Id.* at 4.

117. *Id.* at 5.

118. Trade and Development Act of 2000, *supra* note 3, §202(b)(1). This section states that "[i]t is the policy of the United States to offer Caribbean Basin beneficiary countries willing to prepare to become a party the FTAA or another free trade agreement, tariff treatment essentially equivalent to that accorded to products of NAFTA countries for certain products not currently eligible for duty-free treatment under the CBERA." *Id.*

Perhaps the most dramatic portion of the CBTPA deals with the extension of duty-free and quota-free treatment to once ineligible goods produced in the Caribbean. Section 211, which amends, or more appropriately radically alters, Section 213(b) of the CBERA, provides greater access to the American market, most notably for textiles and apparel. During the transition period of October 1, 2000 to the earlier of either September 30, 2008 or the date on which the Free Trade Area of the Americas or a similar integration regime enters into force,[119] the Caribbean beneficiary countries are to enjoy preferential treatment.[120] This means that certain once-excluded products "shall enter the United States free of duty and free of any quantitative restrictions, limitations, or consultation levels."[121] Some of these include:

> (1) apparel items assembled in one or more beneficiary countries from fabrics wholly formed or cut in the United States;[122]
> (2) apparel items cut and assembled in one or more beneficiary countries from fabric wholly formed in the United States;[123]
> (3) apparel items, excluding socks, knit to shape from American fabrics and knit apparel articles, other than T-shirts, cut and wholly assembled in one or more CBI countries from fabric formed wholly in either the Caribbean or the United States;[124]
> (4) apparel items cut, sewn, or knit to shape in a beneficiary country or countries from fabrics not readily available in either the United States or in a beneficiary country;[125]
> (5) Caribbean government-certified hand-loomed, handmade, or folklore items;[126] and
> (6) textile luggage manufactured from fabrics wholly formed in the United States.[127]

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119. *Id.* §211(a), creating section 213(b) of the CBERA.
120. *Id.* §211(a), creating section 213(b)(2)(B) of the CBERA.
121. *Id.*
122. *Id.* §211(a), creating section 213(b)(2)(A)(i) of the CBERA.
123. *Id.* §211, creating section 213(b)(2)(A)(ii) of the CBERA.
124. *Id.* §211, creating section 213(b)(2)(A)(iii) of the CBERA. T-shirts are eligible, but subject to certain quantitative limitations. *See* amended CBERA section 213(b)(2)(A)(iii)(III).
125. *Id.* §211, creating section 213(b)(2)(A)(v) of the CBERA.
126. *Id.* §211, creating section 213(b)(2)(A)(vi)of the CBERA.
127. *Id.* §211, creating Section 213(b)(2)(A)(viii) of the CBERA. Also, under section 212 of the CBTPA, liquors and spirituous beverages produced in Canada and containing at least 90 percent rum by volume receive duty-free treatment if the rum is a product of a CBI country or the United States Virgin Islands. *Id.* §212, amending Section 213(a) of the CBERA. The

The CBTPA provides for severe penalties for those who engage in the practice of transshipment.[128] If the President makes a determination upon sufficient evidence that transshipment has occurred, all CBI benefits will be rescinded from the offending exporter for two years.[129] If a beneficiary country is unwilling to prevent transshipment, an Executive finding of such will result in a quantity reduction of textiles and apparel eligible for import into the United States, under a formula of the quantity of the transshipped articles multiplied by three.[130]

The rules regarding CBI eligibility in relations to apparel and textiles are quite strict. The preceding duty-free and quota-free provisions heavily favor the use of fabrics produced either in the United States or the Caribbean. Apparel and textiles manufactured in the Caribbean, but outside the scope of the CBTPA and the revised CBERA, fall within the provisions set out in the Harmonized Tariff System and the World Trade Organization Agreement on Textiles and Clothing.[131] To reaffirm the United States' reluctance to allow import of apparel and textiles not conforming to the preceding rules, as well as attempting to satisfy the Caribbean's yearning for NAFTA-like treatment, the CBTPA states that the tariff treatment during the transition period afforded to footwear, canned tuna, petroleum, watches and certain watch parts, handbags, luggage, flat goods, work gloves, and leather wearing apparel "shall be identical to the tariff treatment" of a Mexican product under NAFTA.[132]

Canadian alcoholic product must be imported directly from Canada into the United States to receive this treatment. *Id.*

128. *Id.* §211, creating Section 213(b)(2)(D)(iii) of the CBERA. Transshipment

> has occurred when preferential treatment . . . has been claimed for a textile or apparel article on the basis of material false information concerning the country of origin, manufacture, processing, or assembly of the article or any of its components. For purposes of this clause, false information is material if disclosure of the true information would mean or would have meant that the article is or was ineligible for preferential treatment.

Id.

129. *Id.* § 211, creating section 213(b)(2)(D)(i) of the CBERA.

130. *Id.* § 211, creating section 213(b)(2)(D)(ii) of the CBERA.

131. 65 Fed. Reg. 59650, 59654 (Oct. 5, 2000).

132. Trade and Development Act of 2000, *supra* note 3, § 211, creating section 213(b)(3)(A)(i) of the CBERA. Under this section, textiles and apparel are tacitly excluded from the NAFTA treatment afforded the remaining quintet of products/product groups in section 211(b)(1)(A)-(F) of the CBTPA. *See also* 65 Fed. Reg., *supra* note 131, at 59652, which states: Under Section 213(b)(3)(A)(i), "imports of footwear, canned tuna, petroleum and petroleum products, watches and watch parts, handbags, luggage, flat goods, work gloves, and leather wearing apparel would be eligible for a reduction in duty equal to the preference Mexican products enjoy in accordance with the staged duty-rate reductions set forth in . . . NAFTA." *Id.*

Finally, the CBTPA further subjects the CBI beneficiary countries to not only the original CBERA eligibility requirements,[133] but also criteria indicating commitment to multiple principles of the World Trade Organization: negotiations in hemispheric economic integration plans, improved worker's and children's rights, and combating narco-trafficking and corruption.[134]

With the legal foundation of the United States' current approach to trade, investment, and development in the Caribbean region established, the next part of this paper will discuss and analyze the role of the CBI host countries and foreign direct investment from the United States ("USFDI"). This section will, first, provide a broad overview of USFDI in the Caribbean in recent years. Second, this section will discuss USFDI within the CBI framework and how it has been received by, and integrated into, some of the United States' major Caribbean trading partners.

IV. THE UNITED STATES, THE CARIBBEAN, AND FOREIGN DIRECT INVESTMENT: ANALYSIS AND CASE STUDIES

In general, foreign direct investment has "the advantage of not adding to a country's debt overhang by incurring new debt-servicing liabilities, while possibly generating significant resource flows to the country and improving its exports, employment and income situations."[135]

For purposes of this paper, foreign investment is "clearly necessary for the overall economic development of the Caribbean Basin countries and particularly for achieving the stated purposes of the CBI."[136] However, the program, which has rested on the basis of trade barrier elimination and investment promotion,[137] "contains no direct incentives for stimulating U.S. private investment in the Basin."[138] While the aforementioned Section 936 provisions promoted an indirect and limited incentive for investment,[139] it has now been eliminated. Under the current regime, American investment in the Caribbean, at least in relation to the CBI, rests solely upon the tariff and quota system in place. As was noted

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133. 19 U.S.C. §2702(b)-(c) (2000).
134. Trade and Development Act of 2000, *supra* note 3, §211, creating section 213(b)(5)(B)(i)-(vii) of the CBERA.
135. Swinburne Lestrade, *State Policy and the Role of Direct Foreign Investment in a world of increased capital mobility--New directions, in* CARIBBEAN ECONOMIC POLICY AND SOUTH-SOUTH CO-OPERATION 249 (Ramesh F. Ramsaran ed., 1993).
136. S. PRINT NO. 102-110, *supra* note 5, at 340.
137. LATIN AMERICA IN A NEW WORLD 70 (Abraham F. Lowenthal & Gregory F. Treverton eds., 1994).
138. S. PRINT NO. 102-110, *supra* note 5, at 340.
139. *Id.* at 341.

shortly after the implementation of the Expansion Act of 1990, "the lack of specific, broad based investment incentives in the CBI has left any CBI-connected stimulation of U.S. investment in the Caribbean Basin countries primarily up to the indirect effects of export stimulation brought about by the CBERA trade preference."[140]

To take advantage of the CBI preferences, American corporations began to invest in "low wage export processing area[s]."[141] In many states of the Caribbean, this has equated with an expansion in textile and apparel manufacturing. For example, in recent years, the clothing industry in the Dominican Republic has accounted for almost 50% of all national exports to the United States, in contrast to about 10% in 1980.[142] In Costa Rica, clothing accounted for 36% of all exports to the United States in 1995, up from 9% in 1980.[143]

Other leading Caribbean exports from 1998-2000, and their primary countries of origin are:

- The Bahamas: expandable polystyrene;
- Costa Rica: pineapples, cantaloupes, orange juice, and hair dryers;
- Dominican Republic: cigars, raw sugar, circuit parts, electric transformers, and beer made from malt;
- Honduras: non-woven hospital and lab apparel; and
- Nicaragua: beef cuts.[144]

These numbers, of course, do not indicate the flow of FDI by the United States into the region. This is the case due to a dearth of statistical data. While net inflows of foreign direct investment are readily available,[145] through sources like the United States Department of Commerce and the United Nations, record keeping in many Caribbean states, in regards to CBI specific activities, is inadequate. As the USITC concedes, "although official foreign direct investment statistics show that FDI in the region is growing

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140. *Id.* at 342.

141. FOREIGN DIRECT INVESTMENT IN LATIN AMERICA: PERSPECTIVES OF THE MAJOR INVESTORS 74 (The Inter-American Development Bank & The Institute for European-Latin American Relations, 1998).

142. *Id.*

143. *Id.*

144. THE IMPACT OF THE CARIBBEAN BASIN ECONOMIC RECOVERY ACT: 15TH REPORT, USITC PUB. 3447, 30 (2001).

145. *See id.* at 60. *See also Foreign Investment in Latin America and the Caribbean 2000*, U.N. Economic Commission for Latin America and the Caribbean 52 (2001); *Caribbean Trade and Investment Report 2000*, *at* http://www.caricom.org/archives/ctirexcerpts.htm (last visited May 15, 2002).

gradually, it is difficult to isolate trends in investment in CBERA-eligible products alone."[146] In 1997, only the American embassy in Trinidad and Tobago responded to a USITC request for information on "new or expansion investment" in CBI-eligible products.[147] By 2000, Trinidad and Tobago was joined by Barbados, El Salvador, Guatemala, Guyana, Honduras, Nicaragua, and Saint Kitts and Nevis in providing data pertaining directly to CBERA-related investments.[148] Much of this data, however, comprises aggregate FDI data in CBERA-related investment. The USITC states that "it is difficult to distinguish trends in investment in CBERA-eligible products alone."[149]

From a broad viewpoint, the Caribbean constitutes an area of "vital importance in the strategies that U.S. companies have adopted in the face of the new challenges of globalization."[150] Despite their small size, the states of Central America and the Caribbean collectively received a "considerable amount of FDI," as they saw an input of US$5.35 billion in 1999.[151] In fact, except for Antigua and Barbuda, Belize, and Guyana, all of the countries of the Caribbean region experienced an increase in FDI in the second half of the 1990s.[152] However, this investment growth is tempered by the fact that almost 90% of Caribbean FDI from 1995 to 1999 was directed to only nine countries: Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Jamaica, Nicaragua, Panama, and Trinidad and Tobago.[153]

What follows are brief surveys of the investment climate for several of the larger beneficiary states receiving CBI treatment.[154]

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146. IMPACT ON THE U.S. OF THE CARIBBEAN BASIN RECOVERY ACT: 13TH REPORT, *supra* note 69, at 56.

147. *Id.* The information provided revealed a 108% increase in USFDI from 1996 to 1997. "These significant investment figures (in terms of a per capita basis) make Trinidad and Tobago the second most important U.S. investment partner in the Western Hemisphere (after Canada, and excluding countries with extensive offshore banking services)." *Id.* However, petrochemical and oil/gas exploration accounted for over 80% of this American investment. At that time, these activities were not eligible for preferences under CBI. *Id.*

148. IMPACT ON THE U.S. OF THE CARIBBEAN BASIN RECOVERY ACT: 15TH REPORT, *supra* note 144, at 91. Even when CBERA-related investment data is provided by a country, it is sometimes woefully inadequate. For example, in the 2000 report, El Salvador and Honduras reported solely on investments in the garment maquila sector. *Id.*

149. *Id.*

150. FOREIGN DIRECT INVESTMENT IN LATIN AMERICA: PERSPECTIVES OF THE MAJOR INVESTORS, *supra* note 141, at 79.

151. *Foreign Investment in Latin America and the Caribbean 2000*, *supra* note 145, at 51.

152. *Id.*

153. *Id.*

154. The Caribbean microstates receiving CBI treatment (i.e., Antigua and Barbuda, Aruba, the British Virgin Islands, Dominica, Grenada, Montserrat, Netherlands Antilles, Saint Kitts and Nevis, Saint Lucia, and Saint Vincent and the Grenadines) are excluded because these countries have small economies relying primarily on tourism. Also, the United States Trade

These are based upon recent data from the federal government and numerous Central Banks and serve useful both as a tool for comparative study as well as risk analysis for prospective American investors in the region.

A. The Bahamas

With a stable, democratic government,[155] lack of corporate and personal income taxes,[156] proximity to the United States,[157] easy profit repatriation,[158] and no real history of political violence,[159] or expropriation,[160] The Bahamas has experienced a significant increase in FDI in recent years.[161]

However, the Bahamian economy is predominantly import-based and is not actively engaged in exporting under the CBI, except for some chemicals, plastics,[162] and polystyrene.[163] Heavy reliance on tourism, relatively high wages, along with small agricultural and manufacturing sectors, "have hindered the Bahamas' ability to exploit" the benefits of the program.[164] While Bahamian legislation, such as the Industries Encouragement Act, which exempts some duties from imported machinery, tools, equipment and raw materials[165] might entice investment, it should be noted that "import substitution appears to be the primary focus of investment promotion efforts; attracting investment that generates exports is secondary."[166] Hence, for the American investor wishing to utilize CBI treatment, the Bahamas may not provide an optimal opportunity.

Representative concedes that in there is "very little information about the trade policies of these smaller CBERA beneficiaries." *See* USTR, *Third Report*, *supra* note 41, at 55.

155. U.S. Dept. of State, *FY 2001 Country Commercial Guide: Bahamas* 1, *at* http://www.state.gov (last visited May 15, 2002).

156. *Id.* at 23.

157. *Id.* at. 21.

158. *Id.* at 22.

159. *Id.* at 27.

160. *Id.* at 22.

161. *Id.* at 29. In 1998, in flows of FDI in The Bahamas measured $793.8 million; in 1999, FDI measured at $512.8 million. "While no exact breakdown of this figure is available," most investment in the Bahamas is centered on hotel construction and development. *Id.*

162. USTR, *Third Report*, *supra* note 41, at 25.

163. USITC PUB. 3447, *supra* note 144, at 49. In 2000, expandable polystyrene accounted for around 90 percent of Bahamian imports under the CBERA. *Id.*

164. U.S. Dept. of State, *FY 2001 Country Commercial Guide: Bahamas*, *supra* note 155, at 27-28.

165. *Id.* at 23.

166. USITC PUB. 3132, *supra* note 69, at 87.

B. Barbados

The Government of Barbados openly encourages FDI on the island, as all foreign investors receive the benefit of national treatment.[167] Programs, such as the Fiscal Incentives Act[168] and Section 14A of the Income Tax Act,[169] provide generous benefits to foreign exporting companies. Also, the country has experienced relatively stable FDI over the past ten years hovering around $15 million per annum.[170] The Barbadian government compiles no official data on the breakdown of foreign direct investment.[171]

In sum, Barbados, with a highly stable government,[172] ease of repatriation upon registration with the Central Bank,[173] investor-friendly legislation, and standard expropriation rights, which rarely if ever have been exercised,[174] make Barbados an attractive host for investment. However, with the absence of reliable government statistics of FDI, the conservative investor may well be wary of investment on the island until clearer indicators are available.

C. Belize

Despite one of the most stable political environments in the Caribbean,[175] a commitment to easy repatriation of profits,[176] and a stated openness to FDI,[177] several investment activities may not be engaged in by non-Belizeans.[178] For purposes of the CBI, these prohibited economic sectors include merchandising, fishing within the nation's barrier reef area, sugar cane cultivation, and apiary

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167. U.S. Dept. of State, *FY 2001 Country Commercial Guide: Barbados* 22, *at* http://www.state.gov (last visited May 15, 2002).

168. *Id*. at 23. The Fiscal Incentives Act, which provides equal treatment to both nationals and foreigners, permits any manufacturer a maximum ten-year tax holiday by satisfying either a value-added criterion or exports 100% of its output to markets outside of the Caribbean Community. *Id.*

169. *Id.* at 24. Under this tax law, any manufacturer may receive a tax reduction determined by the percentage of its profits derived from foreign exports.

170. *Foreign Investment in Latin America and the Caribbean 2000*, *supra* note 145, at 52.

171. U.S. Dept. of State, *FY 2001 Country Commercial Guide: Barbados*, *supra* note 167, at 34.

172. *Id.* at 3.

173. *Id.* at 23.

174. *Id.* at 26.

175. U.S. Dept. of State, *FY 2001 Country Commercial Guide: Belize* 12, *at* http://www.state.gov (last visited May 15, 2002).

176. *Id.* at 33.

177. *Id.* at 23. The Belize Trade and Investment Development Service has identified the following as priority investment sectors: agriculture, agro-businesses, food processing, livestock, aquaculture, horticulture, light-manufacturing, offshore assembly plants, deep-sea fishing and processing, and forestry. *Id.*

178. *Id.* at 23-24.

activities.[179] Combined with these restrictions is a history of appropriation,[180] bureaucratic red-tape, and the sentiment of many foreign investors that Belize's "investment promotion tools are rarely as open and effective as they are portrayed."[181]

The inefficiency and friction of the state bureaucracy has been coupled with the government's desire for FDI in areas which could be well-suited for utilization of the CBI (with the exception of the prohibited sectors of sugar and reef fishing). When the CBI was established, several industries, such as citrus and exotic fruits and farmed shrimp enjoyed the program's benefits.[182] Overall, however, Belize appears to provide mixed opportunity to the American investor.

D. Costa Rica

Costa Rica, with a net inflow of FDI in 1999 of US$669 million,[183] is one of the Caribbean's most promising and rapidly developing countries. A dedication to attracting high quality FDI,[184] an active investment promotion program (The Costa Rican Coalition for Development Initiatives),[185] a highly-educated workforce,[186] and economic/political stability[187] make Costa Rica one of the most attractive beneficiaries of CBI treatment.[188] In regards to CBI, industrial investments are progressing healthily. As a whole, "the CBERA program grants Costa Rica duty-free treatment for some 4,000 products and has played a significant role in helping

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179. Other sectors prohibited by law to non-Belizeans include internal transportation, restaurants and bars, souvenir manufacturing for local market, sightseeing tours, accounting, legal services, and beauty salons. *Id.*

180. *Id.* at 25. The State Department points out that while there have been no instances of expropriation or nationalization of a foreign company, there have been several contentious cases where the government, under its right of eminent domain, has appropriated property belonging to foreign investors. *Id.*

181. *Id.* at 23. Investment schemes, such as the Fiscal Incentives Act, International Business and Public Companies Act, Export Processing Zone Act, and Commercial Free Zone Act are cited as torpid legislation. *Id.*

182. USITC PUB. 3447, *supra* note 144, at 76.

183. *Foreign Investment in Latin America and the Caribbean 2000*, *supra* note 145, at 52.

184. U.S. Dept. of State, *FY 2000 Country Commercial Guide: Costa Rica* 61, *at* http://www.state.gov (last visited May 15, 2002).

185. *Id.* at 62.

186. *Id.*

187. *Id.*

188. *Id.* at 114. For example, in 1998, net FDI into Costa Rica reached US$531 million. Seventy-eight percent of that came from U.S. investors. Also, Costa Rica enacted a new expropriation law in 1995 (Law No. 7495). *See* USTR, *2000 National Trade Estimate Report on Foreign Trade Barriers* 68 (2000). Under this law expropriations, while rare, are to occur only after full advance payment is made. *Id.*

Costa Rica diversify its exports and increase bilateral trade with the U.S."[189]

Industries that are relatively labor intensive and require moderately to highly skilled workers are expected to prosper.[190] While entrenched U.S. investors such as Dole and Chiquita remain in Costa Rica,[191] newer investments taking advantage of CBI have included "manufacturing or assembly of electronic components, telecommunications equipment, machinery, consumer goods, electrical appliances, up-scale apparel products, toys, sporting goods, selected leather products . . . and health and natural, resource-based products, including food processing and agro-industrial products."[192]

Overall, with the exception of state-controlled monopolies in telecommunications, electricity, insurance, and petroleum refining, "no significant barriers exist" in regards to foreign investment in Costa Rica.[193] These proscriptions probably have minimal effect on CBI related investments.

E. Dominican Republic

In 1999, the Dominican Republic received a total of US$1.338 billion in FDI, more than 25% of the Caribbean region's total.[194] According to 1998 statistics, the stock of United States FDI in the country reached $535 million.[195] These numbers reflect a spectacular surge in investment on the island-nation. The annual average FDI inflow into the Dominican Republic from 1995 to 1999 was three and a half times higher than inflows during the period from 1990 to 1994.[196]

For the U.S. investor, foreign direct investment has been concentrated in the manufacturing and financial sectors.[197] "Much

189. U.S. Dept. of State, *FY 2000 Country Commercial Guide: Costa Rica*, *supra* note184, at 62.

190. *Id.*

191. *Id.* at 96.

192. *Id.* at 62. *See also* USITC PUB. 3447, *supra* note 144, at 77. In 1997, Intel invested approximately $200 million and employs around 2,000 processionals and technicians. Intel exports in 1999 were over $2 billion.

193. U.S. Department of State, *FY 2000 Country Commercial Guide: Costa Rica*, *supra* note 184, at 193.

194. *Foreign Investment in Latin America and the Caribbean 2000*, *supra* note 145, at 52. It must be noted that while the CBI has had a significant impact in FDI in the D.R., foreign-funded electricity privatization accounted for a large portion of the cited 1999 FDI increase. *Id.* at 53.

195. USTR, *2000 National Trade Estimate Report on Foreign Trade Barriers*, *supra* note 188, at 69.

196. *Foreign Investment in Latin America and the Caribbean 2000*, *supra* note 145, at 52.

197. USTR, *2000 National Trade Estimate Report on Foreign Trade Barriers*, *supra* note 188, at 69.

of the U.S. investment in the manufacturing sectors is located in export processing zones where footwear, apparel, and to a lesser extent, electronic products and medical goods, are assembled from U.S. components and materials and then exported back to the United States."[198]

While the Dominican Republic has experienced remarkable growth in the past decade and permits liberal infusion of FDI,[199] several obstacles remain which should be made apparent to the U.S. investor. Besides a history of tyrannical dictatorship, mentioned in the first section of this paper, the current government faces pandemic corruption,[200] labor and social unrest,[201] a history of expropriation and insufficient compensation,[202] and weak adherence to dispute settlement mechanisms.[203]

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198. *Id. See also* USITC PUB. 3447, *supra* note 144, at 78. These export processing zones, or free trade zones ("FTZs") offer 100 percent exemption on all taxes, duties, and fees relating to production/export activities. Within the FTZs, the U.S. has been the largest investor, with a recent share of 47 percent, 228 firms. *Id.* at 78-79.

199. The Dominican government has efficiently promoted a transition "in terms of sectoral structure, the traditionally natural-resource-based export structure underwent considerable diversification in the 1990s, thanks to heavy foreign investments in relatively simple manufacturing activities in textiles or assembly of imported components for the electronic industry." *Foreign Investment in Latin America and the Caribbean 2000*, *supra* note 145, at 53. These efforts are linked to the government's bid to encourage investments in more sophisticated manufacturing activities. *Id.*

Under Dominican law, there are no limited on foreign control or screening of foreign investment and foreign investment is permitted in all sectors of the economy except for: disposal and storage of toxic, hazardous, or radioactive waste not produced in the country; activities affecting public health and the ecological equilibrium of the country; and the production of materials and equipment directly linked to national security. *See* U.S. Dept. of State, *FY 2001 Country Commercial Guide: Dominican Republic* 44, *at* http://www.state.gov (last visited May 15, 2002).

200. *Id.* at 48.

201. *Id.* The State Department reports an incident in 1999, where two small bombs were placed near facilities belonging to an American-owned electricity distribution company. One bomb caused minor damage. *Id.*

202. *Id.* at 45. As the State Department reports:

> Dominican expropriation standards have historically been at variance with international norms. A number of U.S. investors have outstanding disputes with the Dominican Government concerning expropriated property. In some cases these claims have existed for many years. Investors and lenders often have not received prompt or adequate payment. Even when compensation has been ordered by a Dominican court, or when the Government has recognized the claim, actual payment has been extremely difficult to obtain.

Id.

203. *Id.* The Dominican Republic adheres to the "Calvo Doctrine," under which commercial disputes must be settled by judicial processes of the country in which the dispute occurs. *Id. See also* ROBERT BLEDSOE & BOLESLAW BOCZEK, THE INTERNATIONAL LAW DICTIONARY 123 (1987). In this text, the authors appear to equate what the State Department labels the "Calvo Doctrine" with their use of the "Calvo Clause." According to Bledsoe and Boczek, the Calvo Clause is a public contractual clause with "aliens requiring that disputes arising from a contract be settled solely by local remedies." *Id.* at 122. In contrast, the "Calvo Doctrine"

F. El Salvador

After twelve years of civil conflict,[204] El Salvador has experienced impressive liberalization and development of its foreign investment structure. In 1999, the stock of USFDI was approximately $600 million, an increase of $380 million from 1998.[205]

The keystone of the Salvadoran investment structure is the Investment Law of 1999, which the USTR touts as "world class."[206] Other complementary legislation includes the 1990 Export Activation Law and the 1998 Free Trade Zone Law.[207]

These laws, along with a Bilateral Investment Treaty with the United States in March 1999,[208] provide a stable foundation for U.S. investment in El Salvador. While a recent shift in FDI from textiles and apparel to privatization and acquisitions in telecommunications and electricity companies has occurred,[209] the Salvadoran labor force, over half of which is skilled in the agricultural and

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is the "[p]roposition that a state cannot be responsible for acts of insurrectionists against aliens or, more broadly, for any damages resulting from domestic uprisings, mob violence or revolutions, irrespective of whether or not the state took all reasonable measures to protect the aliens." *Id.* at 123. This is an interesting, yet academic discrepancy.

Normally, there are no provisions for private sector--government dispute settlement. *FY 2001 Country Commercial Guide: Dominican Republic*, *supra* note 199, at 184. While recently becoming a member of the International Center for the Settlement of Investment Disputes ("ICSID"), the D.R., has not historically recognized the right of investors to submit disputes to binding international arbitration. Also, Santo Domingo does not enter into binding arbitration with foreign private citizens. *Id.* at 46.

204. U.S. Dept. of State, *FY 2001 Country Commercial Guide: El Salvador* 8, *at* http://www.state.gov (last visited May 15, 2002).

205. USTR, *2000 National Trade Estimate Report on Foreign Trade Barriers*, *supra* note 188, at 84 (2000).

206. USTR, *Third Report*, *supra* note 41, at 36. The Investment Law of 1999 is a "[c]omprehensive, clearer, and modern piece of legislation" that encourages foreign investors, both natural and legal persons, to freely establish businesses in El Salvador, with the exception of small business activities, defined as having less than $25,000 start up capital, and fishing within twelve miles of the state's territorial sea. Other relevant sections of this law afford comprehensive intellectual property protection, optional registration of investment with the Ministry of the Economy, and clear procedures for dispute resolution between foreign investors, the government, and Salvadoran partners. *Id.* S*ee also* U.S. Dept. of State*, FY 2001 Country Commercial Guide: El Salvador*, *supra* note 204, at 25.

207. U.S. Dept. of State, *FY 2001 Country Commercial Guide: El* Salvador, *supra* note 204, at 24. Both the Free Trade Zone Law of 1998 and the Export Reactivation Law of 1990 provide incentives for firms maintaining maquilas. These maquilas will be discussed further in the next section of this paper. Over ninety percent of the production in the maquila system is textile based. Other incentives include twenty-year tax exemptions, duty free importation of machinery, equipment, and manufacturing tools, and duty-free importation of raw materials and partially completed products. *Id.* at 26.

208. *Id.* at 28. This BIT complements a 1960 investment guarantee treaty, protecting U.S. investors against losses from currency inconvertibility and expropriation. The last case of expropriation was in 1986, involving a private electric distribution company. *Id.*

209. *Foreign Investment in Latin America and the Caribbean 2000*, *supra* note 145, at 54.

manufacturing sectors,[210] should provide the necessary base for investment in CBI-related areas.

G. Guatemala

Guatemala, a country with a USFDI stock of $429 million in 1998,[211] is like its neighbor, Belize, difficult to gauge as an opportunity for the conservative investor. One on hand, as the State Department reports, Guatemala, which enjoys CBI treatment has "[e]njoyed very healthy growth over the last decade" in exports to the United States such as textiles, flowers, and seasonal fruits and vegetables.[212] On the other hand, while Guatemala does afford national treatment to foreign investors, its laws are complex, confusing, and discouraging.[213] Passage of the Investment Law of 1998 was an attempt to streamline the administrative processes of investment registration and promote overall investment in the country. However, bureaucratic hurdles exist and the scene in Guatemala City has impeded fluidity of the investment system.[214]

H. Guyana

Beleaguered by severe drought in 1998, a 57-day strike by civil service workers in 1999, a ban on shrimp exports by the United States for environmental law violations,[215] coupled with a long history of social unrest and political and economic mismanagement,[216] Guyana should be a nation of great concern for the American investor. Yearning for new investment,[217] the

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210. U.S. Dept. of State, *FY 2001 Country Commercial Guide: El Salvador*, *supra* note 204, at 30.

211. USTR, *2000 National Trade Estimate Report on Foreign Trade Barriers*, *supra* note 188, at 128.

212. U.S. Dept. of State, *FY 2000 Country Commercial Guide: Guatemala* 53, *at* http://www.state.gov (last visited May 15, 2002). *See also* USITC PUB. 3447, *supra* note 144, at 82. Since passage of the CBTPA of 2000, 41 new companies have opened apparel/textile operations in Guatemala, creating 12,500 new jobs.

213. USTR, *2000 National Trade Estimate Report on Foreign Trade Barriers*, *supra* note 188, at 129.

214. U.S. Dept. of State, *FY 2000 Country Commercial Guide: Guatemala*, *supra* note 212, at 53. This source states that "[t]hough Guatemala in 1998 passed a new foreign investment law to streamline and facilitate foreign investment, time-consuming administrative procedures and occasional arbitrary impediments are still a reality." *Id.* at 52. Also, enforcement of dispute settlement, while similar in procedure to the United States, is, in practice, "[l]ess transparent, more cumbersome and poorly implemented." *Id.* at 54.

215. U.S. Dept. of State, *FY 2001 Country Commercial Guide: Guyana* 1, *at* http://www.state.gov (last visited May 15, 2002).

216. For a detailed history of modern Guyana, see Ralph R. Premdas, *Race, Politics, and Succession in Trinidad and Guyana*, *in* MODERN CARIBBEAN POLITICS 113-124 (Anthony Payne & Paul Sutton eds., 1993).

217. U.S. Dept. of State, *FY 2001 Country Commercial Guide: Guyana*, *supra* note 215, at

Guyanese legislative, administrative, and judicial system remains inchoate and fragile.[218] While Guyana experienced a surge in FDI about ten years ago, "in recent years there have been some smaller scale investments but none of the desperately needed larger foreign investments have developed. The relative absence of new foreign investors may be due to a lack of clarity in Guyana's investment policy and the need for an investment code."[219] These well-entrenched problems should provide sufficient bases for circumspection in the realm of FDI. Interestingly, despite this tenuous stability, the State Department still views "Guyana as a potentially profitable site for American investors, particularly in the areas of primary materials, agriculture, and some consumer products."[220] It must be noted, that while "the amount of CBI investment in 2000 was $325,000 . . . [n]o U.S. company has invested in CBERA-related industries in Guyana."[221]

I. Honduras

The State Department has assessed Honduras as "an excellent location to penetrate the Central American market."[222] This is indicated by an increase in new FDI in 1999 of US$230 million from $US 99 million in 1998.[223] The Honduran Central Bank reported new FDI in 1999 by sector as US$56 million in manufacturing, US$42 million in agriculture, and $US42 million in mining.[224] Specifically, the overall stock of American FDI was $186 million in 1998,[225] with new U.S. investment reaching US$90 in 1999.[226]

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218. *Id.* at 22.

219. *Id.* at 29.

220. *Id.* at 2. The State Department points out that Guyana has a vast array of exotic and gourmet foods products which have a high demand in the Caribbean and North America. Products, such as jams, jellies, fruit puree blends, rice, sauces, and spices have shown "great potential for increased production and export." *Id.* However, American "investors should proceed with caution and patience . . . and realize that Guyana's infrastructure and legal frameworks are still developing." *Id.*

221. USITC PUB. 3447, *supra* note 144, at 84.

222. U.S. Dept. of State, *FY 2001 Country Commercial Guide: Honduras* 2, *at* http://www.state.gov (last visited May 15, 2002). Positive factors of Honduran investment are ratification of the 1992 Investment Law, free trade zones, low labor costs, proximity to the American market, the "best Caribbean port" in Central America, economic and political stability, and reduced tariff levels. *Id.* at 46. Some major provisions of The 1992 Investment Law include a guarantee of national treatment to foreign investors, mandatory registration of new FDI, guaranteed freedom to export and import goods (with some phytosanitary and zoosanitary exceptions), and an unlimited right to own property. *Id.* at 46-47.

223. *Id.* at 46.

224. *Id.*

225. USTR, *2000 National Trade Estimate Report on Foreign Trade Barriers*, *supra* note 188, at 144.

226. U.S. Dept. of State, *FY 2001 Country Commercial Guide: Honduras*, *supra* note 222,

In regards to CBI-related investments, the Honduran export economy is focused upon textiles and apparel. To this, other industries have suffered. While in 1998, the Honduran Congress passed a series of laws "designed to promote investment in renewable energy, tourism, agro-industry, and mining . . . [t]he Government has been slow to implement these laws."[227]

In contrast, the Honduran textiles and apparel industry continues to expand.[228] Honduras "ranks second in the world in apparel export production, first among CBI countries, and first in Central America."[229] Prolonged growth in this sector is anticipated. As a result of the Caribbean Basin Trade Partnership Act, "employment in the maquila sector is expected to double in the next five years."[230] This fertile environment should promote a significant increase in the number of U.S. apparel manufacturers operating in Honduras, now numbering around eighty-two in 2000.[231]

In sum, despite some considerable problems,[232] many endemic to most of Central America and the Caribbean, Honduras appears to represent an ideal investment opportunity, particularly in the well-established textile and apparel sectors. This seems even more so in light of the CBTPA and the expected growth surrounding that legislation.

J. Jamaica

Jamaica, praised during the Reagan administration as the "cornerstone of the CBI,"[233] remains a sizeable component of the preference system plan. In 1999, the island received US $524 million in new FDI, almost 10 percent of the Caribbean total, and an increase of over 40 percent from the 1998 figure.[234] As Jamaica's

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at 46.

227. *Id.* at 48.

228. *Id.* at 51. According to the Honduran Apparel Manufacturing Association, total foreign and domestic investment in the apparel industry amounted to US$1.08 billion in 1999. Of this, US$565 million was in foreign investment. Total U.S. investment in this sector reached US$322 million by the end of 1999. *Id.*

229. *Id.*

230. *Id.* at 48.

231. *Id.* at 51.

232. *Id.* at 2. The State Department cites judicial insecurity, a poorly educated labor force, outdated labor codes, corruption, administrative red tape, inadequate financial supervision, perceived inconsistent treatment for foreign investors, increasing crime, and an inadequately developed infrastructure as issues that "need to be addressed in order to improve the country's investment and business climate and attract even greater foreign investment." *Id.*

233. JAMES A. NATHAN & JAMES K. OLIVER, UNITED STATES FOREIGN POLICY AND WORLD ORDER 445 (4th ed. 1989).

234. *Foreign Investment in Latin America and the Caribbean 2000*, *supra* note 145, at 53. Like much of the Caribbean sub-region, FDI to Jamaica in the 1990s was aimed at the light, simple manufacturing in the export-processing zones. *Id.*

primary recipient of its exports, the United States has played a vital role for investment.[235] From 1996 to 1999, the value of American FDI in Jamaica surged from US$199 million to US$1.1 billion.[236] However, in 1999, USFDI dropped to US$849 million.[237] This contraction was due, in large part, to increased global competition in apparel production, Jamaica's largest non-traditional export industry.[238] For the U.S. investor wishing to exploit the benefits of CBI treatment, Jamaica also has significant agricultural and mining production possibilities.[239]

Overall, due to a well-developed investment law framework[240] and general economic stability, the environment in Jamaica is conducive to foreign investment. However, one need only look to the events of this past July in Kingston[241] to realize the fragility of a nation mired in poverty and significant economic and social disparity.[242]

K. Nicaragua

Ravaged by years of civil war at the hands of the Somoza family, the Sandinista front, and the America-supported Contras,[243] Nicaragua emerged in 1990 to forge democratic reforms and a "government oriented toward marketplace policies."[244] These changes were marked by significant increases in the amounts of FDI input to Nicaragua. From 1990 to 1994, Nicaragua received an annual average of US$19 million in FDI.[245] By 1999, this number

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235. U.S. Dept. of State, *FY 2001 Country Commercial Guide: Jamaica* 2, *at* http://www.state.gov (last visited May 15, 2002).

236. *Id.* at 38.

237. *Id.*

238. USTR, *Third Report*, *supra* note 41, at 46. At one time, the garment industry provided employment for thousands of Jamaican workers. Since 1994, this industry has declined due to firm closures. Now, the sector employs 50% the number of workers it did in 1994. *See* USITC PUB. 3447, *supra* note 144, at 86.

239. U.S. Dept. of State, *FY 2001 Country Commercial Guide: Jamaica*, *supra* note 235, at 4-5. Some of these products include sugar, spices, bananas, coffee, limestone, and alumina/bauxite. *Id.*

240. *Id.* at 30-32. This includes a bilateral investment treaty with the U.S., which came into force in 1997. *Id.* at 34. Legislation to attract foreign investment includes the Export Industry Encouragement Act (10-year tax exemptions, duty-free imports for raw materials used in production), the Industry Modernization Program, and the Factory Construction Law (tax relief for companies constructing and leasing factories). *Id.* at 30-32.

241. Matthew J. Rosenberg, *Jamaica Uses Army Against Opposition Protesters*, WASH. POST, JULY 11, 2001, at A16.

242. *See* U.S. Dept. of State, *FY 2001 Country Commercial Guide: Jamaica*, *supra* note 235, at 34, which states that "Crime [rooted in poverty, unemployment, and drug trafficking] poses a greater threat to damage foreign investment than do politically motivated activities." *Id.*

243. WILLIAMSON, *supra* note 6, at 357.

244. WRIGHT, *supra* note 20, at 196.

245. *Foreign Investment in Latin America and the Caribbean 2000*, *supra* note 145, at 52.

reached US $300 million.[246] Unfortunately, data from the Nicaraguan Central Bank goes little beyond this basic information.[247] Like many states in the Caribbean sub-region, most FDI flows in Nicaragua have been in construction, services, mining, energy, tourism, and aquaculture.[248] Also, like many other CBI beneficiaries, the apparel production sector has been the most successful. In 1999, apparel exports to the United States increased by 17 percent, to US$277 million.[249] With the CBTPA, Nicaragua hopes to take advantage of the enhanced tariff preferences in utilizing U.S. and Caribbean fabrics.[250]

Overall, Nicaragua appears to provide ample opportunity to the American investor. Certainly, problems similar to that of its Central American neighbors are present in Nicaragua. However, with the passage of Law Number 344, the Foreign Investment Law of 2000,[251] greater administrative, bureaucratic, and judicial streamlining, investment liberalization, thereby producing real opportunity will emerge. Since the electoral defeat of the Sandinistas under revolutionary leader Daniel Ortega in 1990,[252] Nicaragua has made "significant progress" in promoting foreign investment.[253] This enhanced liberalization has been the impetus for a recent average growth of 5 percent and further "visible signs of investment and economic progress."[254]

L. Panama

In 1998, Panama maintained a stock of USFDI of about US $27 billion.[255] However, in that same year, overall foreign direct investment in CBI-related activities accounted for only around 11% of Panamanian FDI.[256] The State Department has assessed that the

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246. *Id.*
247. U.S. Dept. of State, *FY 2001 Country Commercial Guide: Nicaragua* 29, *at* http://www.state.gov (last visited May 15, 2002).
248. *Id.*
249. *Id.* at 15.
250. *Id.* at 16. Nicaragua has a substantial maquila sector, taking advantage of the country's lower labor costs. *Id.* at 15-16.
251. *Id.* at 22. The Foreign Investment Law of 2000 assures national treatment for both domestic and foreign investors, abolishes the foreign investment committee, recognizes property rights, including the right to proper indemnification, and eliminates the former necessity of investment contracts. *Id.*
252. KRYZANEK, *supra* note 7, at 241.
253. U.S. Dept. of State, *FY 2001 Country Commercial Guide: Nicaragua*, *supra* note 247, at 22.
254. *Id.*
255. USTR, *2000 National Trade Estimate Report on Foreign Trade Barriers*, *supra* note 188, at 319.
256. U.S. Dept. of State, *FY 2001 Country Commercial Guide: Panama* 60, *at http:*//www.state.gov (last visited May 15, 2002). The breakdown by sector is as follows:

sectors with the greatest potential for expansion are ports, maritime services, telecommunications, tourism, energy, and mining.[257] Obviously, with its strategic location as a mid-point in the hemisphere and as homeland of the Panama Canal, the country has been able to link its transport and maritime service with the manufacturing and warehousing sectors. The Colon Free Trade Zone is the largest of its kind in the Western Hemisphere, second in the world to Hong Kong.[258] Typically tax advantages, import duty exemptions, and other incentives characterize the CFTZ,[259] as well as most other free trade zones. According to recent statistics, Panamanian exports have been slumping.[260] Perhaps this is due to burdensome labor costs. In Panama, the minimum wage was increased to US$253 monthly.[261] While in a global context this is not much, it is fairly high for Central America.[262]

Overall, just as the Panamanian government has taken a "wait and see" attitude[263] towards the economy, perhaps those interested in foreign direct investment should be as conservative. While Panama has initiated vast privatization efforts, maintains a stable infrastructural and political system, permits easy repatriation of profits as the American dollar is the legal national currency,[264] and holds interesting opportunities in regards to petroleum production,[265] the country has never been able, or has refused,[266] to fully exploit CBI benefits. In light of weak U.S. demand, at least relative to other CBI countries, Panama may not be of profitable interest to the CBI-oriented investor.[267]

Transport/storage - 33%; Services/communication - 31%; Manufacturing - 11%; Finance/Real Estate - 11%; Others - 14%. *Id.* Manufacturing, which includes the production of processed foods, clothing, and chemicals, along with construction constitutes only 12% of Panamanian GDP. *Id.* at 7-8. Agriculture, forestry, and fishing make up 7% of GDP. *Id.* at 8. Panama's principal primary products include, for example, bananas, sugar, shrimp, coffee, and tropical fruits. *Id.*

257. *Id.* at 8.

258. *Id.* at 10.

259. *Id.* at 37.

260. *Id.* at 10. During 1999, the CFTZ was significantly affected by a slowdown in Latin American consumption, the zone's largest export market. Exports dropped to US$4.9 billion in 1999, a drop from US$6 billion or 17% from 1998. *Id.*

261. *Id.* at 5.

262. *Id.*

263. *Id.* at 6.

264. *Id.* at 27.

265. *Id.* at 39.

266. Eighty percent of the Panamanian GDP is not in goods, but services (e.g., port activities, banking, insurance). *Id.* at 7. Note also that Panama's beneficiary status under CBI was suspended in April 1988, making it the first country to lose its CBI status. It was restored in March 1990. USTR, *Third Report*, *supra* note 41, at 8.

267. *Id.* at 40. As the State Department points out: "Since Panama is not an important textile exporter, the new legislation [the CBTPA of 2000] will be of limited value to Panama."

M. Trinidad and Tobago

As the largest foreign investor in the country,[268] Trinidad and Tobago attracted US$1.095 billion in United States FDI.[269] This number jumped to $1.2 billion last year.[270] In fact, these large inputs of FDI make Trinidad and Tobago the second largest recipient of American investment in the Western Hemisphere.[271]

While quite sizeable, much of this investment is directly connected to the county's considerable hydrocarbon/petroleum resources.[272] In 1999, 82 percent of FDI by American investors was in petrochemicals, oil, and gas.[273] Under the pre-2000 CBI regime, this environment would not be conducive to those interested in utilizing that particular trade framework. However, under the CBTPA, new opportunities have certainly become manifest. Under the CBERA of 1983 and the Expansion Act of 1990, petroleum and petroleum-derived products were expressly ineligible for duty-free treatment.[274] However, under the CBTPA, these once-ineligible products, now receive similar treatment as that of Mexican petroleum under NAFTA.[275] This development certainly makes Trinidad and Tobago a more enticing center for CBI-based investment.

Before the inception of the CBTPA, Trinidad and Tobago's attraction in regards to the CBI was limited. Overall, while oil and gas production are vital to the Trinidadian economy, greater diversification in non-petrochemical industries must occur in order to more fully reap the benefits of the program's duty and quota reductions.[276]

Id. With the new liberalization of petroleum export entry under the CBTPA, it is yet to be seen what kind of benefit Panama could receive. The author feels that, most likely, the greatest beneficiary of these petro-provisions will be Trinidad and Tobago.

268. U.S. Dept. of State, *FY 2001 Country Commercial Guide: Trinidad and Tobago* 34, *at* http://www.state.gov (last visited May 15, 2002).

269. *Id.* at 40.

270. *Id.*

271. *Id.* at 34. This statistic is second to Canada and excludes countries of under one million inhabitants or those with significant offshore banking investment activities. *Id.*

272. *Foreign Investment in Latin America and the Caribbean 2000*, *supra* note 145, at 53. During the 1990s, production of natural gas in Trinidad and Tobago increased by 500%. *Id.*

273. U.S. Dept. of State, *FY 2001 Country Commercial Guide: Trinidad and Tobago*, *supra* note 268, at 34.

274. 19 U.S.C. §2703(b)(4) (Supp. 1983 & Supp. 1990).

275. Trade and Development Act of 2000, §211, creating section 213(b)(3)(A)(i) of the CBERA.

276. The State Department notes that Trinidadian agricultural production is experiencing negative growth. U.S. Dept. of State, *FY 2001 Country Commercial Guide: Trinidad and Tobago*, *supra* note 268, at 3. However, industries like pleasure-boat construction, *id.* at 19, and, especially, methanol, sugar, and some iron, steel, and copper-zinc products (e.g., bars, rods) have had considerable impact on U.S. imports. *See* USITC PUB. 3132, *supra* note 69, at

This concludes the brief investment environment summaries of most of the CBI beneficiary states. The author hopes this section will provide the reader a decent overview of the national political, economic, and business climates of the Caribbean sub-region and their influence on investment decision-making.

V. NAFTA, THE WTO, AND THE CBI

Prior to the advent of the CBTPA in 2000, there had been great anxiety among the CBI countries regarding the deleterious effect of NAFTA on investment and trade in the region.[277] As has been noted, "prior to NAFTA, the growth rates of both Mexican and Caribbean textile exports had remained constant. This current change has caused much alarm in many CBERA countries whose economies have been growing primarily from the increase in their textile industries."[278]

With the CBTPA, these concerns should be allayed.[279] While nominally, the CBI beneficiaries are not members of NAFTA, they have received NAFTA-like parity, without the burden of the tariff and quota reciprocity prescribed by the Mexican-Canadian-U.S. counterpart. Until the termination of the CBTPA transition period on September 30, 2008, beneficiary countries receive duty-free and quota-free treatment of Caribbean goods into the United States.[280]

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32. In fact, although production is falling, iron and steel bars and rods have in recent years been Trinidad's largest CBI exports to the United States. *See* USTR, *Third Report*, *supra* note 41, at 18. Some sector diversification has been observed in light manufacturing related to products such as pasta, beer, cereals, canned foods, electric bulbs, and furniture. *See* USITC PUB. 3447, *supra* note 144, at 89.

277. USTR, *Third Report*, *supra* note 41, at 55. One article states: At the creation of NAFTA, "it was estimated by the World Bank that "the total Caribbean losses due to NAFTA-induced export displacement [were to] range from $35 million to $53 million a year." Paul Esquiel, *Beyond NAFTA: The Caribbean*, 1 NAFTA: LAW & BUSINESS REVIEW OF THE AMERICAS 137, 141 (1995). The World Bank went on to assert that "another potential harm the Caribbean might face as a result of NAFTA would be the diversion of direct investment away from the Caribbean and towards Mexico." *Id.* Later, in September 1993, President Clinton and U.S. Trade Representative Mickey Kantor promised that the Caribbean's economic and investment interests would be protected through "the reshaping" of the CBI. *Id.* After seven years of "reshaping," the CBTPA was born.

278. O'Neal, *supra* note 111, at 502. *See also* Hilbourne A. Watson, *Introduction: The Caribbean and the Techno-Paradigm Shift in Global Capitalism*, *in* THE CARIBBEAN IN THE GLOBAL POLITICAL ECONOMY 7 (Hilbourne A. Watson ed., 1994). In this text, the author states: The "implementation of the North American Free Trade Agreement (NAFTA) . . . could intensify the erosion of any advantages the [Caribbean] region has in low-wage assembly production." *See also* Brian D. Patterson, *Environmental Issues in the Evolving United States-Caribbean Trade Relationship*, 7 GEO. INT'L ENVTL. L. REV. 515, 532 (1995): "Tens of thousands of jobs in the region depend on the textile and apparel industry and these nations have invested heavily in infrastructure to support apparel manufacturing for export."

279. *See supra* Part III.B-C.

280. Trade and Development Act of 2000, §211(a), creating section 213(b)(2)(B) of the CBERA.

For once ineligible items, the CBTPA now affords these products NAFTA-like treatment.[281]

Therefore, the NAFTA menace has been abated to a large extent. What remains, however, is the World Trade Organization ("WTO"), its establishment of the liberalizing Agreement on Textiles and Clothing, and the erosion and elimination of the Multi-Fibre Arrangement ("MFA") under the General Agreement on Tariffs and Trade ("GATT").

Under Article XI of the GATT, which was created in 1947[282] and amended in 1994,[283] quantitative restrictions on imports, with some exceptions, are to be eliminated.[284] Within this framework, developing countries in the post-World War II era, began mobilizing attempts at rapid industrialization.[285]

Countries, like Japan, which were experiencing rapid economic development and industrialization were viewed as a threat and became a source of great apprehension to the developed world.[286] Throughout the 1950s and 1960s, many Western countries, mainly the United States and Great Britain, "began to oppose the general post-war trend of trade liberalization in the area of textiles."[287]

To this, nations of the developed world, under the auspices of the GATT, promulgated the Multi-Fibre Arrangement of 1974, which, "in direct conflict with the edicts of GATT," allows for quantitative restrictions in regards to textiles.[288] This regime, which has been altered and extended three times, provides for the negotiation of bilateral trade agreements and greater import control of textiles

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281. *Id.* §211, creating section 213(b)(3)(A)(i) of the CBERA. *See also supra* note 130.

282. GENERAL AGREEMENT ON TARIFFS AND TRADE (1947), art. XXVI(1) (amended 1994). *See* JOHN H. JACKSON, ET AL., 1995 DOCUMENTS SUPPLEMENT TO LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 51 (3d ed. 1995).

283. *See* JACKSON, *supra* note 282, at 15.

284. GATT art. XI states, in part:

> No prohibitions or restrictions . . . whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on exportation or sale for export of any product destined for the territory of any other contracting party.

Id. at 28.

285. *See* Alice Wohn, *Towards GATT Integration: Circumventing Quantitative Restrictions on Textiles and Apparel Trade Under the Multi-Fiber Arrangement*, 22 U. PA. J. INT'L ECON. L. 375, 388-390 (2001). Like in Europe and the United States, the development and expansion of the "textile industry [in the developing world] marked the beginning of industrialization." *Id.* at 388. This growth is seen as a "'primary stepping stone' to industrial development." *Id.* at 389.

286. *Id.* at 389.

287. *Id.*

288. Carl Dyer, et al., *U.S. Trade Policy in Retrospect: A Synopsis from the Continental Congress to Current Costs*, *in* INTERNATIONAL TRADE AND THE NEW ECONOMIC ORDER 163 (Raul Moncarz ed., 1995).

deemed to prevent "market disruption."[289] With the conclusion of the

Uruguay Round in 1994, which created the WTO,[290] it was determined that the MFA had run its course. The Agreement on Textiles and Clothing ("ATC") invokes the true spirit of the GATT, near complete global trade liberalization. The ATC sets forth a series of rules promoting the gradual and progressive removal of quantitative restrictions. The primary means to achieve this goal are stated succinctly in Article 9: "This Agreement and all restrictions there under shall stand terminated on the first day of the 121st month that the WTO Agreement is in effect, on which date the textiles and clothing sector shall be fully integrated into GATT 1994. There shall be no extension of this Agreement."[291] Hence, by 2005, quantitative restrictions and tariffs now in place under the MFA are to be eliminated.[292]

In effect, this will subvert the entire purpose of the CBI. With the removal of trade barriers and preferential treatment, the beneficiaries of the CBI will be placed on equal footing with all other exporters to the United States. For the United States, as a nation, the effect will probably be minimal. Since 1986, the total share of U.S. imports from CBI countries has been less than 2 percent.[293] For the American investor, however, the demise of the MFA could suffocate opportunity in CBI-related production in the region. The final section of this paper will analyze the prospects of the CBI for the American investor in the near future, both before and after the removal of the MFA.

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289. *Id.* The MFA was extended 1977-1981 ("MFA II"), 1982-1986 ("MFA III"), and 1986-1991 ("MFA IV"). *Id.* The MFA was to expire in July 1991. However, as the Uruguay Round stalled, one-year MFA extensions continued until 1993. *See* Wohn, *supra* note 285, at 404. "Market disruption" may be defined "in terms of damage to domestic industry with special reference to sales, market share, profits, employment, and production." Hilbourne A. Watson, *Global Restructuring and the Prospects for Caribbean Competitiveness: With a Case Study from Jamaica*, *in* THE CARIBBEAN IN THE GLOBAL POLITICAL ECONOMY 79-80 (Hilbourne A. Watson ed., 1994).

290. All CBI beneficiaries are members of the WTO, except for The Bahamas, *at* http://www.wto.org (last visited May 15, 2002).

291. The Agreement on Textiles and Clothing, in Annex 1A of the WTO Agreement, art. 9, *reprinted in* JACKSON, *supra* note 282, at 148.

292. Regardless of the 2005 termination of the MFA, the CBTPA is to expire on September 30, 2008. To comply with its WTO obligations during the 3 year period, the United States should request a waiver of GATT Article I with respect to equal treatment and most favored nation status. *See* JACKSON, *supra* note 282, at 8, 17.

293. For example, in 1999, the total share of U.S imports from CBI countries was 1.9 percent. Last year, that number fell to 1.8 percent, a value of $22.16 billion. *See* USITC PUB. 3447, *supra* note 144, at 15.

VI. CONCLUSION: THE FUTURE OF THE CBI AND THE AMERICAN INVESTOR

It is certainly true as one author asserts: [T]he MFA epitomizes protectionism . . . in the industrialized economies and violates the spirit of trade liberalization."[294] However, in regards to the states of the Caribbean region, the MFA, coupled with the CBI, has acted as a shield against an onslaught of exports from other areas of the developing world. The tariff and quota provisions under the CBI have afforded the program's beneficiaries a guaranteed market, thereby ensuring development and employment to a historically beleaguered region.

The negative effects to the Caribbean nations "by dismantling the MFA could be significant."[295] The garment production industry comprises "an important part of the Caribbean Basin economic system, and may not be able to survive without the assistance of distortive (sic) trade measures such as the MFA."[296] With the removal of the MFA, the textile-dependant countries of the Caribbean then must contend with added pressures from nations, such as India, Pakistan, and China, which "are much more efficient producers of textiles and apparel than are CBI countries."[297] A slew of unfettered manufacturing powerhouses, like China, would sacrifice the burgeoning textile and apparel maquilas of the Caribbean. In turn, American and Caribbean manufacturers will be "the first eliminated from the market because their prices will remain the highest."[298] With this sector diminished and relegated to near dissolution, U.S. investment in the Caribbean's textile plants will wither.

The American investor must keep in mind that the ATC/MFA applies only to textiles and apparel. The CBTPA was introduced last year to assist the Caribbean in preparation for the possible aftershock from the elimination of the MFA. While data indicates that prior to October 2000, the effects of the CBI were minimal on the U.S. economy, "the impact of the introduction of new preferences granted under the CBTPA amendment may not be insignificant."[299] This should come as welcome news to both U.S. investors and the

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294. Watson, *supra* note 289, at 80.

295. Renee T. Legierski, *Out in the Cold: The Combined Effects of NAFTA and the MFA on the Caribbean Basin Textile Industry*, 2 MINN. J. GLOBAL TRADE 305, 318 (1993).

296. *Id.*

297. *Id.*

298. *Id.* at 319.

299. USITC PUB. 3447, *supra* note 144, at 91. It should be noted that while President Clinton signed the CBTPA in May 2000, the law's "transition period" did not begin until October 1, 2000. *See supra* text accompanying note 119.

Caribbean governments. In recent years, "U.S. imports from CBERA countries have been dominated . . . by assembly of apparel from U.S.-made fabric."[300] For many CBI countries, textile-based production is the foundation of exportation.[301] With the enhanced liberalization promoted by the CBTPA, USFDI flows into the Caribbean should increase. Proximity to the United States, skilled labor, stability, sufficient legal institutions, and now further quota-free and duty-free treatment, provides a somewhat healthy climate for investment in the region. Successful diversification efforts have been made in several countries, as it has become obvious that economies once founded on sugar and bananas cannot now be transformed into economies based on the maquila. These progressive measures will improve the Caribbean's standing as an investment center.

However, for the Caribbean, the race is on. The MFA phaseout, which will be completed in three years, looms over the Caribbean maquila system. One author has asserted that the "conclusion of NAFTA and the phasing out of the Multi-Fiber Agreement quotas under the Uruguay Round of the GATT have severely impaired the value of CBI benefits as investment incentives in beneficiary countries."[302] This is not necessarily so. However, this portent could become reality because, without further diversification, these economies will no doubt suffer by being overwhelmed by more efficient and cheaper Mexican and Asian counterparts.

For American FDI to enjoy CBI benefits in the future, investment can be aimed at either non-textile based industries or in the garment maquila system. The latter should be preferred for both the investor and the overall well-being of the Caribbean economies. Since this industry is so entrenched and has grown to

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300. INTERNATIONAL ECONOMIC REVIEW, USITC PUB. 3298, 15 (Apr./May 2000). This explains this section's concentration on the garment sector.

301. *See* Alejandro Ferraté, *Foreign Direct Investment in Costa Rica after the "Death" of CBI*, 2 J. INT'L LEGAL STUD. 119 (1996).

> The impact of the CBI on Central American [and the Caribbean] countries cannot be understated. CBI spurred foreign direct investment in the area, mostly in the form of export manufactures or maquiladoras. The most ubiquitous legacy of CBI is a large textile and apparel assembly industry in [the Caribbean and Central America]. The textile and apparel assembly maquiladoras were established in the 1980s and early 1990s to benefit from increased access to the U.S. market under CBI, lower production costs relative to some Asian producers, and stringent quotas on textile producers from Asian producers under the Multi-Fiber Agreements (MFA).

Id. at 119-120.

302. Matias F. Travieso-Diaz & Aledandro Ferraté, *Recommended Features of a Foreign Investment Code for Cuba's Free Market Transition*, 21 N.C. J. INT'L & COM. REG. 511, 527 (1996).

become the fulcrum of CBI investment and production in the region, its collapse will undoubtedly produce a ripple effect. This could undermine the entire economic system in the Caribbean and produce tremendous losses in money, labor, and stability. Further incentives from the beneficiary countries are necessary to entice overall CBI investment. In this area, celerity is demanded even more so in regards to textile-based industries as the MFA deadline approaches.

In conclusion, the relationship between the United States and the Caribbean is both symbiotic and symbolic. Their histories are elegantly intertwined. Without the one, the other's path would be dramatically different. The United States has acted as bully, hegemon, and patriarch. The states of the Caribbean have been dependent, once under their colonial yoke, and now as sovereign nations. Intrusive meddling from the North, inept leaders, who at times have acted as spoiled children, and environmental limitations are but a few of the factors for the Caribbean's developmental stalling and its pervasive, perhaps inevitable, dependency. For purposes of CBI investment, this union is more evident than ever. Continued input of investment into the keystone of the CBI economy, textiles, coupled with host country improvements through structural reformation via greater capital incentives (e.g., tax deferments), administrative transparency, and fair and speedy judicial remedies are necessary to diversify the manufacturing sectors. By bolstering the textile rampart, the overall economies of the Caribbean will be protected from the imminent storm called for in 2005. By not doing so, attempts at balancing and diversification will deteriorate and aggregate CBI investment will fall in the aftermath of rapid capital flight, unemployment, and instability.