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Rules of Origin: The International Obligation of State Organs

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RULES OF ORIGIN : NAFTA'S HEART, BUT FTAA'S HEARTBURN

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INTRODUCTION

The North American Free Trade Agreement ("NAFTA") went into effect on January 1, 1994.[1] Yet, nine years after its passage, questions remain about its impact on the economies and environment of the United States ("U.S."), Canada and Mexico.[2] Although economists can make certain assumptions

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1. David M. Gilmore, *Free Trade Area of the Americas: Is It Desirable?*, 31 U. MIAMI INTER-AM. L. REV. 383, 386 (2000) (internal citations omitted).

2. Altieri explains that

> [m]easuring the total benefit from eight years of NAFTA is not easy. In the United States, the [United States Trade Representative, known as the] USTR suggests that NAFTA has increased household income by $1,300 to $2,000 annually, and that since NAFTA was signed, U.S. manufacturing has added over 400,000 jobs. Nonetheless, the USTR has failed to provide documentation pursuant to a Freedom of Information Act request for substantiation of the USTR figure. Public Citizen estimates NAFTA has caused the loss of 1.7 million U.S. manufacturing jobs and a surging $450 billion U.S. trade deficit. Global Exchange says more than 765,000 U.S. jobs have disappeared as a result of NAFTA. When these laid off workers find new jobs, they earn 23 percent less on average than at their previous employment. In Mexico, manufacturing wages fell 21 percent from 1995 to 1999, and have only started to recover. The percentage of Mexicans living in poverty has also grown since NAFTA went into effect.

Laura Altieri, *Between Empire and Community: The United States and Multilateralism 2001-2003: A Mid-Term Assessment: Trade and Economic Affairs: NAFTA and the FTAA: Regional Alternatives to Multilateralism*, 21 BERKELEY J. INT'L L. 847, 875–76 (2003) (internal citations and quotation marks omitted). Additionally, Michael C. McClintock notes that

> while U.S. companies have benefited from free trade, most workers feel left out in sharing those gains,…workers' wages for the past several years have remained stagnant and many…of the new jobs cre-

based on NAFTA's short-term results, it is not yet fully implemented in many respects.[3] Despite this fact, the thirty-four countries of the Western Hemisphere ("Partner Nations") continue to pursue a Free Trade Area of the Americas ("FTAA"), which would be a free trade area like NAFTA, but which would extend beyond Mexico to encompass all of Central and South America.[4] The decision to extend North America's blanket of free trade beyond Mexico's southern border solidified only eleven months after NAFTA's implementation.[5] Discussion of an FTAA began at the First Summit of the Americas held in

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> ated do not provide health care or retirement benefits. Average real wages for those participating in the New Economy have risen 11% since 1994, while real wages in the rest of the economy rose only 3%.

Michael C. McClintock, *Sunrise Mexico; Sunset NAFTA-Centric FTAA–What Next and Why?*, 7 SW. J.L. & TRADE AM. 1, 77 (2000) (internal citation and quotation marks omitted). Furthermore, Gilmore states that while

> [i]t is obvious from the increases in Mexican trade they have received a substantial benefit from NAFTA, it is difficult to quantify what benefits NAFTA has bestowed on the United States based on the statistics. While it is true that exports to Mexico have increased substantially, since they are now the third largest trading partner of the United States, they only account for a small share of total U.S. exports.

Gilmore, *supra* note 1, at 395. "NAFTA has created job gains and losses, but genuine disagreement exists as to whether NAFTA has created or lost more jobs." McClintock, *supra* note 2, at 24.

3. Transition periods for tariff reductions will continue to run until January 2008 for certain sensitive products. North American Free Trade Agreement, Dec. 8–17, 1992, Can.-Mex.-U.S., 107 Stat. 2057, 32 I.L.M. 289, Annex 302.2 [hereinafter NAFTA]. In addition, emergency relief in the form of suspension of tariff reductions called for by NAFTA may be invoked under Chapter 8 of NAFTA until that time. Finally, obstacles to trade in service industries such as trucking have not been fully implemented and have recently been hampered by at least one decision in the U.S. Federal Courts. *See* Public Citizen v. U.S. Dep't of Transp., 316 F.3d 1002 (9th Cir. 2003) (holding that the Department of Transportation's promulgation of three regulations without prior environmental analysis violated the Clean Air Act and state law but fulfilled the NAFTA obligations. The case was remanded to the Department for proper analysis.). *See also* The American Society of International Law, *Contemporary Practice of the United States Relating to International Law: U.S.-Mexico Dispute on Cross-border Trucking*, 97 AM. J. INT'L L. 179, 194 (Sean D. Murphy ed., 2003) (providing a brief overview of the NAFTA trucking dispute and the 9th Circuit opinion dealing with it).

4. JEFFREY J. SCHOTT, INSTITUTE FOR INTERNATIONAL ECONOMICS, PROSPECTS FOR FREE TRADE IN THE AMERICAS 1–2 (2001).

5. *Id.* at 1.

Miami in December 1994.[6] At this first meeting, the thirty-four democracies of the Western Hemisphere[7] agreed to pursue a free trade area that would encompass all of the Americas by December 2005.[8] Since 1994, the Partner Nations have negotiated intensely, and have resolved many potential problems. Still, significant problems remain.[9]

As with the negotiation and implementation of NAFTA, the ultimate success of any FTAA will hinge on developing workable rules of origin,[10] which play a critical role for any free trade area agreement.[11] The concept of a free trade area ("FTA") is

6. *See generally id.* at 1–4 (describing events that led to the Miami Summit).

7. Cuba, because of its Communist form of government, was the only country of the Western Hemisphere prohibited from participating in the Miami Summit. Christopher M. Bruner, *Hemispheric Integration and the Politics of Regionalism: The Free Trade Area of the Americas (FTAA)*, 33 U. MIAMI INTER-AM. L. REV. 1, 11 (2002) (describing the "democracy clause" contained in a declaration issued by the thirty-four participants at the Third Summit of the Americas, April 20-22, 2001).

8. Paul A. O'Hop, Jr., *Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-Based System*, 36 HARV. INT'L L.J. 127, 127 (1995).

9. *See* SCHOTT, *supra* note 4, at 13; Gilmore, *supra* note 1 (describing the work still needed to move FTAA negotiations forward).

10. SCHOTT, *supra* note 4, at 87 ("A key aspect of the market access negotiations will be the development of rules of origin (i.e., the criteria for determining eligibility for FTAA preferences).").

11. THIRD BUSINESS FORUM OF THE AMERICAS, NORTH-SOUTH CENTER, UNIVERSITY OF MIAMI, POSITION PAPER: CUSTOMS PROCEDURES AND RULES OF ORIGIN 2 (May 1997), *available at* http://www.sice.oas.org/ftaa/belo/forum/workshops/papers/wks3/uomcp_e.asp (last visited Oct. 30, 2003) [hereinafter CUSTOMS PROCEDURES AND RULES OF ORIGIN].

> Historically, governments have adopted rules of origin for a wide range of purposes, including qualification for duty-free treatment, charges against quotas, levying of dumping and countervailing duties, embargoes, and labeling and marking. As the hemisphere moves toward trade integration, the threshold question for all goods crossing borders will be, "Does this qualify as a product of a hemispheric country or countries?" Rules of origin are important to importers because they will dictate illegibility for Free Trade Area of the Americas (FTAA) treatment. They are also important to producers because they will dictate where businesses must produce and where they must source their materials and components in order to maximize the benefits of free trade.

very simple. An FTA begins when a group of neighboring nations decides that it would be more advantageous to trade among themselves than it would be to trade with nations in other parts of the world.[12] Aside from the economic advantages associated with restricting trade to individuals living in closer proximity, there exists the additional benefit of helping neighbors to grow their own economies — neighbors who likely will become consumers for one's own products.[13] To encourage trade and its accompanying economic benefits among members of the FTA, the member nations agree to grant each other special trading privileges or benefits that they deny to imports from non-member countries.[14] Chief among these benefits are lower or non-existent tariffs on goods imported from member nations.[15] However, for partner nations to implement such favorable trade benefits successfully, each must have a set of procedures which allow their customs agents to determine whether or not the products being imported originated in a partner nation. Without these procedures, known as the rules of origin, any FTA would fail because the partner nations would have no way to favor products from partner nations over those from non-partner nations. Thus, the rules of origin provide the critical link that makes any FTA viable.

Id. As discussed in Part III *infra*, the FTAA's success will also depend on its rules of origin being more understandable and more user-friendly than NAFTA's rules.

12. SCHOTT, *supra* note 4, at 5.

13. "[T]he FTAA would strengthen each country's interest in the economic health and political stability of the other members. This is important because problems in one country often spill over to neighbors and trading partners." SCHOTT, *supra* note 4, at 92. "NAFTA highlighted to US policymakers the great opportunities that can be created by closer trade ties with neighboring countries." *Id.* at 9.

14. *Id.* at 84–85.

15. *Id.* at 86.

NAFTA's rules of origin are the most complex ever devised,[16] but they have helped to police NAFTA's implementation and have contributed to Mexico and Canada becoming the U.S.' largest trading partners.[17] The thirty-four Western Hemisphere democracies have used NAFTA as their model in negotiating many provisions as they pursue an FTAA.[18] Although the com-

16. "Canada and Mexico had to accept the most detailed, complex and stringent market opening rules ever written which ideologically codified U.S. free trade policy in a 585 page primary document whose annexes and amended tariff schedules together total over 2,500 pages." McClintock, *supra* note 2, at 44. "[NAFTA's] rules of origin for this determination are notorious for their complexity." Catherine Curtiss & Kathryn Cameron Atkinson, *United States-Latin American Trade Laws*, 21 N.C.J. INT'L L. & COM. REG. 111, 141 (1995). "[T]he NAFTA rules of origin are much more complex and have a higher local content requirement than either MERCOSUR or the recent Chile-Canada Free Trade Agreement." Gilmore, *supra* note 1, at 411. "[T]he comprehensiveness of the NAFTA regime results in trade-inhibiting complexity." David A. Pawlak, *International Trade in the Americas: The Inter-American Lawyer's Guide to Origin Determinations*, 5 TUL. J. INT'L & COMP. L. 317, 343 (1997). "The MERCOSUR rules of origin requirements are far less complicated than those of the NAFTA….In sharp contrast to the very detailed and minute treatment given to determining the origin of products in the NAFTA context, MERCOSUR's rules of origin are relatively simple and comparatively liberal." Thomas Andrew O'Keefe, Commentary, *NAFTA and the Expansion of Free Trade: Current Issues and Future Prospects*, 14 ARIZ. J. INT'L & COMP. L. 305, 309 (1997). "The rules of origin are of particular concern because of the complexity of demonstrating compliance, particularly where regional value calculations are required." David A. Gantz, *The United States and the Expansion of Western Hemisphere Free Trade: Participant or Observer?*, 14 ARIZ. J. INT'L & COMP. L. 381, 401 (1997).

17. McClintock states that

> Canada is the largest U.S. trading partner exchanging goods and services worth $1 billion daily. In 1998, the U.S. bilateral trade with Mexico reached $174 billion, displacing Japan as the United States' second largest trading partner. 32% of the United States' overall exports go to, and 29% of its total imports come from, Canada and Mexico.

McClintock, *supra* note 2, at 75. *See also* U.S. DEPT. OF STATE, INTERNATIONAL INFORMATION PROGRAMS, BACKGROUNDER: FTAA OFFERS POTENTIAL FOR SIGNIFICANT INCREASE IN TRADE FLOWS, *at* http://usinfo.state.gov/regional/ar/summit/ftaa20.htm (last visited Feb. 11, 2004) (containing more U.S. trade statistics).

18. "[T]he NAFTA model is also widely viewed as the likely blueprint for the [rules of origin] of the Free Trade Area of the Americas (FTAA)." Antoni Estevadeordal & Kati Suominen, Paper, Rules of Origin: A World Map, (Preliminary draft presented at the seminar "Regional Trade Agreements in Comparative Perspective: Latin America and the Caribbean and Asia-Pacific")

plex rules of origin have served NAFTA well, they cannot serve as models for the rules of origin to be developed for the FTAA because the existing complexity would become exponentially greater, and thus, bring trade to a halt.[19] Using NAFTA-like rules of origin would doom the FTAA even before it leaves the negotiating table. Therefore, negotiators must either develop simpler rules or develop an alternative regional trade agreement model if they are ever to establish a Hemispheric–wide agreement.

Part I of this Article provides a brief overview of international trade, including the history, culture and diplomatic relationships among the three NAFTA partners, and provides the background and understanding (so important in international law) for interpreting and implementing NAFTA's provisions. This historical overview illustrates the complexities involved in negotiating trade agreements when only three nations are involved, and discusses the increasing complexity when that number grows by a factor of ten.

Part II focuses on the NAFTA rules of origin. It provides specific examples that demonstrate their importance to a free trade area, their operation and how special interests have helped fashion them. This Part also illustrates how the NAFTA rules of origin work, and sets the foundation for the argument that they cannot serve as the model for a future FTAA. Part III identifies the obstacles that FTAA negotiators will face if they try to construct their own rules of origin. The Article concludes that the success of any agreement ultimately will rest upon the ability of nations to put aside individual political interests and economic anomalies in favor of hemispheric interests and truly free trade.

(Apr. 2003), at 11 (internal citations omitted), *available at* http://www.iadb.org/intal/foros/LAestevadeordal_&_suominen_paper.pdf. "[D]espite the many drawbacks of the NAFTA regime, it likely will be adopted for use in the FTAA." Pawlak, *supra* note 16, at 343. "[T]he United States favored the creation of the FTAA through NAFTA expansion on a bilateral basis, which would give the United States substantial negotiating leverage over other nations in the hemisphere." Bruner, *supra* note 7, at 39.

19. Bruner, *supra* note 7, at 39.

I. HISTORY, CULTURE AND INTERNATIONAL RELATIONS AMONG NAFTA'S PARTNER NATIONS

Trade is as old as civilization itself. The need to trade is a natural outgrowth of a world whose natural resources are unevenly distributed around the globe.[20] Areas of the world blessed with certain natural wealth may at the same time suffer from the absence of other important resources.[21] Civilizations that have made certain technological advances may lack the requisite natural resources to take full advantage of that technology and vice versa.[22] The theory of absolute advantage helps to explain why it is economically efficient for nations to trade with each other.[23] The theory holds that a country possessing a natural advantage for producing a particular type of good would make the best use of its resources and time if it concentrates on producing that one product, and uses that product in trade to obtain those products for which its production processes are less efficient.[24] "[W]hat if a country has no absolute advantage over any of its potential trading partners with respect to any products or services?"[25] The Nineteenth Century economist David Ricardo answered this question in his 1817 book entitled "The Principles of Political Economy."[26] Ricardo developed the theory of comparative advantage, a revolutionary way of thinking about international trade, which holds that a country should focus its resources on producing and exporting those goods which it can produce most efficiently even if it does not have an absolute advantage over its trading partner,[27] be-

20. *See* MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 2–3 (2d ed. 1999).

21. *See id.*

22. *See id.*

23. *See id.* (describing Adam Smith's theory of absolute advantage).

24. *See id.*

25. *Id.* at 3.

26. *Id.*

27. As Trebilcock and Howse explain,

> [s]uppose a lawyer is not only more efficient in the provision of legal services than her secretary, but is also a more efficient secretary. It takes her secretary twice as long to type a document as the lawyer could type it herself. Suppose, more specifically, that it takes the lawyer's secretary two hours to type a document that the lawyer could type in one hour, and that the secretary's hourly wage is $20, and that the lawyer's hourly rate to clients is $200. It will pay the

cause international trade remains mutually advantageous even if one partner does not have an absolute advantage over another.[28] By a series of arithmetic examples, Ricardo demonstrated that nations are most efficient when they specialize in the production and export of goods in which they have the greatest comparative advantage, and import those goods for which they have the greatest comparative disadvantage.[29] Ricardo was the first in a line of theorists who held that "the underlying assumption of orthodox international trade theory is that factors of production, labor and capital, are relatively immobile."[30] As industrialists quickly learned, however, factors such as lower wages, lower transportation costs and fewer regulatory burdens could justify "direct foreign investment," a decision to build production facilities in a foreign country.[31] As a result, direct foreign investment became a viable alternative to trade alone.[32] Unlike the theory of foreign trade, the theory of direct foreign investment recognizes the mobility of the factors of production, and recognizes that manufacturers may transfer production facilities across international borders to take advantage of cost-saving circumstances not present in their home countries.[33] The three NAFTA countries experienced this natu-

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> lawyer to hire the secretary and pay her $40 to type the document in two hours while the lawyer is able to sell for $200 the hour of her time that would otherwise have been committed to typing the document. In other words, both the lawyer and the secretary gain from this exchange.

Id. at 4.

28. *Id.* at 3.

29. *Id.* at 4.

30. Cheryl W. Gray & William W. Jarosz, *Law and the Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe*, 33 COLUM. J. TRANSNAT'L L. 1, 8 (1995).

31. *Id.* at 10 (noting that these cost advantages have been defined as "location advantages").

32. *Id.*

33. McClintock explains that

> American transnationals have looked to the Western Hemisphere for investment opportunities. Their first choice has been Mexico where the cost of doing business is two-thirds less than in the United States…the reason increasing numbers of U.S. companies are choosing Mexico to enhance their competitiveness is because "NAFTA made it cost less."

ral evolution from trade to direct foreign investment in their developing relationship.[34]

From the time of their common origins in the British Empire, Canada and the United States have understood the importance of maintaining a close trading relationship with its geographic neighbors.[35] Territorial proximity and the need for peaceful relations were not the only catalysts for trade between the two North American neighbors. Their common heritage, language and culture also contributed to the growth in trade and a peace-

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McClintock, *supra* note 2, at 77–78. In examining the amount of direct foreign investment in another country, an investor must look at all potential costs. A country such as Mexico may enjoy lower costs among a certain group of resources, but those lower costs may not be reason enough to move a plant to Mexico because these cost savings may be off-set by higher costs in other areas, such as transportation or energy costs due to the lack of an efficient infrastructure. *Id.*

34. *See, e.g.,* Van R. Whiting, Jr., *Dynamic Integration, Foreign Investment, and Open Regionalism in the NAFTA and the Americas, in* NAFTA AS A MODEL OF DEVELOPMENT 46, 51–54 (Richard S. Belous & Jonathan Lemco eds. 1995) (describing the evolution of foreign investment in Latin America during the Twentieth Century); Alan M. Rugman & Michael Gestrin, *NAFTA's Treatment of Foreign Investment, in* FOREIGN INVESTMENT AND NAFTA 47–51 (Alan M. Rugman ed., 1994) (presenting data that demonstrates the degree to which North America has become a significant host for foreign direct investment); Hugh G. J. Aitken, *The Changing Structure of the Canadian Economy, in* HUGH G.J. AITKEN ET AL., THE AMERICAN ECONOMIC IMPACT ON CANADA 6–7 (Duke University Press 1959) (noting that Canada's economic development "during phases of rapid acceleration" was due in large part to the transfer "of capital, labor, technology, and entrepreneurship originating in other countries" including the United States); JOHN HERD THOMPSON & STEPHEN J. RANDALL, CANADA AND THE UNITED STATES: AMBIVALENT ALLIES 57 (3d ed. 2002) (noting that high tariffs in 1879 provided an early incentive for U.S. multinationals like the Singer sewing machine company to build plants in Canada and reporting that sixty-five such plants existed by 1887). *See generally* RALPH H. FOLSOM & W. DAVIS FOLSOM, UNDERSTANDING NAFTA AND ITS INTERNATIONAL BUSINESS IMPLICATIONS 71–77 (1997) (describing the business growth strategies of multinational corporations in North America).

35. *See generally* FOLSOM & FOLSOM, *supra* note 34, at 60–62 (describing trade between the two countries as an alternative to annexation of Canada following the American Revolution); ROBERT CRAIG BROWN, CANADA'S NATIONAL POLICY 1883-1900: A STUDY IN CANADIAN-AMERICAN RELATIONS 8–10 (1964) (noting that a "desire to establish a wide measure of reciprocal trade with the United States has been a persistent theme in Canadian history" supported by both liberals and conservatives with the only difference between them being "one of degree, not of kind").

ful coexistence.[36] Since at least the time of the American Revolution, politicians on either side of the border have worked to establish a solid foundation for trade — a foundation upon which the two sides could mutually benefit.[37] Some of the first trading treaties included the Elgin-Marcy Reciprocity Treaty, which focused on natural resources and tariffs, which were key sources of governmental revenue.[38] Eventually, Americans and

36. *See generally* FOLSOM & FOLSOM, *supra* note 34, at ch. 3 (describing international business relations prior to NAFTA); B.U. Ratchford, *Introductory Statement*, *in* THE AMERICAN ECONOMIC IMPACT ON CANADA vii (Duke University Press 1959) (explaining that the "long tradition of friendly relations and good will between the two countries" was due to "a common background and…political philosophy" as well as similarities between language, culture and economic institutions). *See also* Carol Wise, *NAFTA, Mexico, and the Western Hemisphere*, *in* THE POST-NAFTA POLITICAL ECONOMY: MEXICO AND THE WESTERN HEMISPHERE 8 (Carol Wise ed., 1998) (describing the Canadian Free Trade Agreement as "an evolutionary phenomenon" because of the "highly homogeneous nature of the two countries, including similar factor endowments and levels of development, and the dominant role that each country played in the other's trade and investment portfolio").

37. FOLSOM & FOLSOM, *supra* note 34, at 60. *See also* THOMPSON & RANDALL, *supra* note 34, at 16–17 (noting that "the border was wide open to commerce, and transborder travel" until the War of 1812). *See also id.* at 59 (describing the late Nineteenth Century "Commercial Union movement," which promoted "the establishment of a common market between the United States and Canada").

> The idea of a Commercial Union with the United States was not new. Making the North American continent an economic unit had been much more the direct concern of the Montreal merchants in 1849 than political unity. And, of course, economic cooperation between the two North American nations was and is a continuing feature of Canadian history. The real question was one of degree -- how far should cooperation go?

BROWN, *supra* note 35, at 127.

> From the winning of independence in 1783…American trade goals with respect to the Canadas and the other British colonies were clear and unchanging….American policymakers looked forward to the dismantling of the exclusive imperial trading system -- which would give American merchants access to Canada and the other British North American colonies.

GORDON T. STEWART, THE AMERICAN RESPONSE TO CANADA SINCE 1776 40 (1992).

38. Gerald K. McKim, Comment, *United States-Canadian Free Trade: Economic Repercussions of the CFTA and NAFTA on the United States, Canada and the Great Lakes Region*, 25 U. TOL. L. REV. 485, 487–88, (1994).

Canadians began to believe that a united Canada and United States would provide the most profitable relation for the two countries.[39] However, because Canadian politicians did not believe that annexation by the United States was in their best interest, they agreed, instead, to broad-based trade agreements.[40] These agreements suppressed talk of annexation, and, except for the War of 1812, Canada and the United States have been blessed with a peaceful co-existence.[41]

Relations between the United States and Mexico, on the other hand, were not only rocky but outright hostile for much of the Nineteenth Century.[42] The history of United States intervention in Mexico and other parts of Latin America made Mexico much more cautious about opening any doors to the United States.[43] This differing history of diplomatic relations has affected the way in which Canada and Mexico deal with the United States, and therefore also has affected the politics of

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> The evolution of a U.S.-Canada trade relationship can be traced back to 1854 with the signing of the Elgin-Marcy Reciprocity Treaty. The treaty, intended to foster limited free trade between the countries, proved highly beneficial for Canada but was abandoned by the United States due to economic and ideological conflicts. The dissolution of this agreement was a unifying force in Canada and led to the formation of the Confederation in 1867. Subsequent efforts to formulate similar agreements in 1869, 1871 and 1874 fell victim to protectionist U.S. trade policies which had been implemented during the interim period. Rebuffed in their efforts to open trade, the Canadians, led by Prime Minister John MacDonald, adopted the National Policy of 1879. The policy's purpose was twofold: (1) to protect Canadian manufacturing concerns through high tariffs and (2) to pressure the United States into negotiating another trade agreement. While the latter goal was never realized, the former was achieved all too well.

Id. (internal citations omitted).

39. FOLSOM & FOLSOM, *supra* note 34, at 60.

40. *Id.* at 59–62; STEWART, *supra* note 37, at 49 (describing how the Governor General of Canada, Lord Elgin, staved off calls for annexation by "negotiating access to the American market").

41. *See id.* at 30 (discussing the relationship between the U.S. and Canada).

42. "According to historian Stanley R. Ross, Mexicans perceive their relationship with the United States as one shaped by 'armed conflict, military invasion, and economic and cultural penetration.'" ROBERT T. MORAN & JEFFREY ABBOT, NAFTA: MANAGING THE CULTURAL DIFFERENCES 30 (1994) (internal citation omitted).

43. *Id.*

trade and trade relations.[44] As the United States pursues an FTAA, other Latin American countries exhibit the same level of distrust first voiced by Mexico.[45]

Distrust of U.S. foreign policy began almost immediately after Mexico gained its independence from Spain.[46] In 1822, President James Monroe recognized the existence of a Mexican empire, but thereafter failed to appoint an ambassador to pursue closer relations.[47] Monroe eventually appointed Joel Poinsett in 1825 as minister plenipotenciary, but Poinsett's meddling in Mexican domestic politics eventually led to his recall in 1829.[48] Poinsett returned to the United States having failed to establish a treaty of friendship and commerce with Mexico.[49] After Texas gained its independence from Mexico in 1836, it was only a matter of time before the United States annexed Texas (in 1845) and set its sites on California and other parts of the Southwest.[50] Skirmishes along the Rio Grande River, recognized by the United States as the international boundary, but disputed as such by Mexico, provided U.S. President Polk and Congress the excuse they needed to declare war on Mexico.[51] The Mexican-American War (or the "War of Northern Aggression" as Mexicans refer to it) finally ended in 1848 with the signing of the Treaty of Guadalupe Hidalgo.[52] However, during the intervening period, Mexico lost half of its North American territories.[53] The loss of such a large portion of its sovereign territory to the United States and the economic damage caused by years of war left the Mexican government with few resources in its treasury. It also planted a seed of suspicion within the

44. *See id.* at 30–31 (describing the history of diplomatic relations).

45. McClintock, *supra* note 2, at 10–11.

46. Josefina Zoraida Vazquez, *War and Peace with the United States, in* THE OXFORD HISTORY OF MEXICO 346 (Michael M. Brescia, trans., Michael C. Meyer & William H. Beezley eds., 2000).

47. *Id.* at 346.

48. *Id.*

49. *Id.* at 346–47.

50. *Id.* at 354–59.

51. MORAN & ABBOT, *supra* note 42, at 30.

52. Vasquez, *supra* note 46, at 356.

53. CARLOS FUENTES, A NEW TIME FOR MEXICO 179 (1996).

hearts of the Mexican people regarding the future intentions that the United States might have toward their territory.[54]

Throughout most of the Twentieth Century, it was primarily the U.S. economy and not the needs of Mexico that dictated trade relations between Mexico and the United States.[55] As a result, the United States relaxed its immigration laws during periods when it required cheap labor, but immediately tightened them when American economic policy called for it.[56] Such policies only increased Mexico's distrust of American economic policy and American industrial expansion into Mexico.[57] These nationalistic pressures in Mexico, in part, led to its expropriation of foreign-owned oil and gas industries in Mexico during the administration of Mexican President Lázaro Cárdenas in 1938.[58] The expropriations reduced foreign investment in Mexico, a trend that continued through the 1970s.[59] Oil exports funded Mexico's economy during this period, but the precipitous fall in oil prices during the late 1970s and early 1980s led to Mexico's economic decline.[60] Faced with a declining balance of trade, Mexico realized that it needed to relax its foreign trade investment laws, which had banned foreign investors and allowed inefficient industries to survive.[61] The liberalization of

54. Paul Vanderwood, *Betterment for Whom? The Reform Period: 1855-75*, *in* THE OXFORD HISTORY OF MEXICO 371 (Michael M. Brescia, trans., Michael C. Meyer & William H. Beezley eds., 2000).

55. *See, e.g.*, Victoria Lehrfeld, *Patterns of Migration: The Revolving Door from Western Mexico to California and Back Again*, 8 LA RAZA L.J. 209, 217–19 (1995) (discussing the effects of the economic climate of the U.S. in the Twentieth Century on the migration of Mexican nationals).

56. *Id.* at 209 (describing the pattern and attitudes of the U.S. regarding immigration from Mexico).

57. Mexico was not the only American neighbor to question such policies. Canada was also suspicious of initial overtures made by the U.S. calling for greater North American integration. "At the time, neither Canada nor Mexico responded with any enthusiasm, citing historical concerns about heavy U.S. influence over both countries, and a fear of being swallowed up by powerful U.S. competitors." Wise, *supra* note 36, at 7.

58. FUENTES, *supra* note 53, at 179.

59. *See* Gloria L. Sandrino, *The NAFTA Investment Chapter and Foreign Direct Investment in Mexico: A Third World Perspective*, 27 VAND. J. TRANSNAT'L L. 259, 297–99 (1994).

60. *Id.* at 299.

61. Wise explains that

Mexico's foreign investment laws reached its zenith in 1990 when Mexican President Carlos Salinas asked U.S. President George H. W. Bush to consider establishing a free trade agreement with Mexico similar to the 1989 trade agreement between Canada and the United States.[62] The United States was only too happy to oblige Mexico's request.[63]

Many viewed NAFTA as a response to a growing sense that the United States was losing its global trade preeminence.[64] By the mid-1980s the European Union ("EU") began to strengthen and the General Agreements on Tariffs and Trade ("GATT") stalled.[65] The United States was concerned that the EU would

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> as the competition to attract foreign capital became more fierce in the new post-Cold War context, President [Carlos] Salinas grew more willing to tread where his predecessor had feared to go: despite decades of diplomatic acrimony and mutual suspicion between Mexico and the United States, Salinas buried the hatchet and aggressively pursued an FTA with the Bush administration.

Wise, *supra* note 36, at 11.

62. *Id.* at 7–8.

63. *Id.* at 9 (discussing the U.S. policy of embracing deals such as the Canada-United States Free Trade Agreement, which "offered more immediate prospects for guaranteed market access").

64. This fear continues to drive the United States' pursuit of the FTAA:

> [T]he United States is a party to only two of the more than 130 free trade agreements in the world; the United States belongs to only one of the 30 free trade agreements in the Western Hemisphere. When multiplied across products and countries, the cost to America's strength…of falling behind on trade soars exponentially.

Robert Zoellick, *Countering Terror With Trade,* WASH. POST, Sept. 20, 2001, at A35.

> Another example of how the United States counters EU influence is the 2002 agreement with Chile. Although discussions with Chile about an agreement began in 1990 under the first Bush administration, it was not until Chile reached an agreement with the European Union in early 2002 that the United States finally signed a trade agreement.

Altieri, *supra* note 2, at 869.

65. The United States had long been involved in discussions to expand the General Agreement on Tariffs and Trade ("GATT") into a more comprehensive World Trade Organization. However, negotiations stalled, and the United States was eager to embark upon bilateral trade agreements in the hopes of igniting interest in the stagnating Uruguay Rounds of the GATT. THOMAS O. BAYARD & KIMBERLY ANN ELLIOTT, RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY 16–17 (1994); Eugenio Diaz-Bonilla et al., *Regional Agreements*

come to dominate the world economic market, and it was determined to create an equally strong economic force in the Americas in order to compete globally.[66] Although the United States was interested in maintaining its global trade status, it also wanted to create economic and political stability in its neighbor to the south.[67] Through much of the Twentieth Century, Mexico's economy was mixed, consisting of many state-owned corporations and possessing many characteristics of a

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and the World Trade Organization Negotiations, 85 AM. J. AGRIC. ECON. 3, 679 (2003). The planned trade agreements with Canada and Mexico had their desired effect, and the Uruguay rounds were underway by September 1986, only three months after the U.S. and Canada had begun negotiations to establish the Canadian Free Trade Agreement. *See* RALPH H. FOLSOM ET AL., NAFTA, A PROBLEM-ORIENTED COURSE BOOK 37 (2000). As a result, negotiations for both NAFTA and the WTO were conducted almost contemporaneously; and not coincidently, the two agreements share many commonalities. *Id.* at 38.

66. *See generally* Wise, *supra* note 36, at 9 (describing how "the declining competitiveness of U.S. goods in foreign markets" and the "slowness with which the GATT's Uruguay Round negotiations moved forward in the late 1980s" forced the U.S. to focus more upon bilateral trade agreements like NAFTA). Global competition continues, at least in part, to drive U.S. trade policy.

> The main objective for which Bush sought TPA [Trade Promotion Authority] was creation of an FTAA. As with NAFTA, one of the selling points of the FTAA is that it will help the United States preserve its access to neighboring countries' markets, while keeping the Europeans and Japanese out. It thus locked Canada and Mexico into America's net and out of the reach of the Europeans. In that way, NAFTA has served American interests by creating a regional block that, if united, could become powerful enough to take on competition, primarily from the EU.

Altieri, *supra* note 2, at 866 (internal citations omitted); McClintock, *supra* note 2, at 44 ("NAFTA was the response to the emergence of the EU and Japan as well as Asia as world trade rivals"). For a detailed explanation of Trade Promotion Authority see *infra* notes 79–89 and accompanying text.

67. "US officials argued that NAFTA could yield important benefits not only for economic growth but also for a range of political objectives, including promoting democracy in Mexico and contributing to a long-term solution to immigration problems." SCHOTT, *supra* note 4, at 9. U.S. trade policies continue to pursue goals beyond economic growth. "Free trade agreements can help establish the basic building blocks for sustainable development, including private property rights, competition [and] the rule of law.…Most importantly, free trade is about freedom and open societies. These values are at the heart of America's larger reform and development agenda." Zoellick, *supra* note 64, at 6.

state-planned economy.[68] The United States wanted to reshape the Mexican economy in its own image, and believed that NAFTA could transform Mexico's economy into a free-market economy.[69]

In order to transform economic relations between Mexico and the United States, NAFTA had to address a variety of issues which hampered trade, including high tariffs[70] and the web of restrictive investment laws that stifled foreign direct investment in Mexico.[71] These issues were appropriately addressed, and Congress passed NAFTA in 1993,[72] entering into force on January 1, 1994.[73] At least early on, Mexico gained the most from NAFTA, and within three years it had become the second largest export market for goods from the United States.[74] Between 1993 and 2001, the amount of trade generated among the three countries increased by 109% from $297 billion to $622 billion.[75] However, environmentalists and labor unions have highlighted some of the problems NAFTA created. For instance, environmentalists determined that increased industrialization along the U.S.-Mexican border will cause further environmental damage, air pollution, water pollution and hazardous waste problems.[76] As previously noted, however, it is difficult to

68. Michael Wallace Gordon, *Economic Integration in North America — An Agreement of Limited Dimensions But Unlimited Expectations*, *in* RALPH H. FOLSOM ET AL., NAFTA, A PROBLEM - ORIENTED COURSE BOOK 31 (2000).

69. Steven Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 L. & POL'Y INT'L BUS. 391, 395 (1993).

70. Gantz, *supra* note 16, at 387.

71. *See id.* at 391.

72. Stuart Rothenberg, *NAFTA's Strange Bedfellows*, WORLD&I, *at* http://www.worldandi.com/specialreport/1993/december/SA10285.htm (last visited Nov. 11, 2003).

73. *See generally* NAFTA, *supra* note 3, at 107 Stat. 2057, 32 I.LM. 289.

74. In so doing, it overtook Japan, which had previously held this second place position. Gilmore, *supra* note 1, at 394.

75. Dep't of Foreign Affairs and Int'l Trade of Can., *NAFTA at Eight: A Foundation for Economic Growth*, *at* http://www.dfait-maeci.gc.ca/nafta-alena/nafta8-section01-en.asp (last modified Apr. 16, 2003).

76. Michael Robins, *The North American Free Trade Agreement: The Integration of Free Trade and the Environment*, 7 TEMP. INT'L & COMP. L.J. 123, 125 (1993).

> The increased trade and industrial development created by NAFTA, however, will have serious detrimental ecological and environmental

predict whether NAFTA's eventual impact will be a net positive or negative.[77]

NAFTA's success has encouraged President George W. Bush to pursue aggressively expanded trade agreements with other nations around the world.[78] As did his father, the current President believes that fast track authority is vital to the success of future trade treaties.[79] Fast track authority authorizes the United States executive branch to submit fully negotiated treaties to Congress for approval without opportunity for congressional amendment.[80]

President Bush pursued fast track approval, which he called "Trade Promotion Authority,"[81] and which was passed in the House by a very thin margin in July of 2002 by a vote of 215-212, and in the Senate the following month by a vote of 64-34.[82] Bush wasted no time in using the new Trade Promotion Authority by signing a free trade agreement with Chile on December

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> effects. For example, along the 2000 mile border shared by the United States and Mexico, there is a history of ecological damage from past intensification of industrial operations. This gives environmentalists good reason to be concerned about NAFTA, for the agreement may also lead to an increase in industrial operations, thus causing further environmental damage. Intensified industrial operations could worsen air and water pollution and intensify the hazardous waste disposal problem. Opponents of NAFTA also fear that some American companies will use Mexico as a pollution haven**,** and that free trade will lead to challenges to United States health and environmental laws as unfair trade barriers.

Id.

77. For further analysis on this issue, see *supra* notes 1–2 and accompanying text.

78. RICHARD E. FEINBERG, INSTITUTE FOR INTERNATIONAL ECONOMICS, SUMMITRY IN THE AMERICAS: A PROGRESS REPORT 45 (1997).

79. AGENCE FRANCE PRESSE, *Bush to Push Congress to Grant Him Special WTO Negotiating Powers*, July 2, 2001, *available at* http://www.commondreams.org/headlines01/0702-01.htm.

80. *See* McClintock, *supra* note 2, at 11–20 (explaining the history and evolution of the fast-track procedure).

81. "Bush was recently granted Trade Promotion Authority ("TPA") or 'fast track.' With TPA, presidents can negotiate trade deals that Congress must then ratify or reject, but which they cannot amend. TPA makes enacting trade agreements much easier." Altieri, *supra* note 2, at 847.

82. Carolyn Lochhead, *Senate Gives Bush Free-Trade Victory*, S.F. CHRON., Aug. 2, 2002, at A1.

11, 2002,[83] another with Singapore in January of 2003[84] and a third with four Central American nations in December of 2003.[85] Congress approved the first two of these trade pacts during the summer of 2003,[86] but the Central American Free Trade Agreement may not be voted on until after the November 2004 elections.[87] President Bush views these agreements as only the first of many bilateral trade agreements that his Administration will complete over the next several years.[88] More importantly, how-

83. Elizabeth Becker & Larry Rohter, *U.S. and Chile Reach Free Trade Accord*, N.Y. TIMES, Dec. 12, 2002, at C1.

84. ASSOC. PRESS, *U.S. Reports a Final Deal for Singapore Trade Pact*, N.Y. TIMES, Jan. 17, 2003, at C19.

85. Christopher Marquis, *Latin Allies of the U.S.: Docile and Reliable No Longer,* N.Y. TIMES, Jan. 9, 2004, at A8; Patrick Courreges, *Trade Vote Could be Delayed a Year: Sugar Lobbyist Unhappy with Bush Administration,* ADVOCATE (Baton Rouge, LA), Jan. 28, 2004, *available at* http://2theadvocate.com/stories/011204/new_sugar001.shtml (The U.S.'s Central American Free Trade Agreement ("CAFTA") partners include Costa Rica, Nicaragua, Honduras, El Salvador and Guatemala.). *Id.* Only four of the five Central American partners signed the December 2003 agreement. Costa Rica postponed further negotiations explaining it needed more time to evaluate CAFTA's impact on various markets including telecommunications, insurance, textile and agriculture. *Trade Scene: No Bore in 2004,* J. OF COM. ONLINE, Jan. 9, 2004. Isidro Lopez, *Analysis: Region Places Its Hopes in CAFTA,* UNITED PRESS INT'L, Jan. 9, 2004, *available at* http://www.countrywatch.com/@school/as_pf_wire.asp?vCOUNTRY=042&UID=973621.

86. Josette Sheeran Shiner, *Free Trade Rewards Workers*, WASH. POST, Aug. 13, 2003, at A27. The Chile and Singapore free-trade pacts join those already in place with Canada and Mexico (NAFTA), as well as two others with Israel and Jordan. The Bush administration is also currently negotiating additional free-trade agreements with Morocco, Australia, and the South African Customs Union; and it has announced plans for a similar agreement with Bahrain. DOREEN HEMLOCK INT'L, *Dominican Republic Gets in Line for Free-Trade Pact*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Aug. 18, 2003, at 10 [hereinafter *Dominican Republic Gets in Line for Free-Trade Pact*].

87. Courreges, *supra* note 85 (suggesting that the CAFTA may have a difficult time being approved because of lobbying by the sugar industry, which stands to lose economically as a result of lower sugar prices resulting from the tariff-free importation of Central American sugar).

88. *See Dominican Republic Gets in Line for Free-Trade Pact*, *supra* note 86, at 10. The Bush administration is currently negotiating or contemplating additional negotiations for free-trade agreements with the Dominican Republic, Australia, Morocco, Panama, Bahrain, Thailand, Colombia, Peru, Bolivia, Ecuador and the five Southern Africa Customs Union countries, which include Botswana, Lesotho, Namibia, South Africa and Swaziland. *Trade Scene: No Bore in 2004*, *supra* note 85.

ever, President Bush sees Trade Promotion Authority as an essential tool he will use to pass an FTAA.[89]

Politicians and citizens of the Americas alike fervently debate the relative benefits of an FTAA.[90] The Bush Administration not only believes that the U.S. economy would benefit from increased free trade, but also argues that the FTAA will provide a cure for ailing Latin American economies.[91] The political benefits of such an agreement have not been overlooked. As with NAFTA, many political analysts believe that the U.S.' greatest return from a successful FTAA would be the political stability achieved from the exportation of democracy and free market philosophy to Latin America.[92]

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89. *See* Lochhead, *supra* note 82, at A1.

90. "Domestic political support for deeper integration also remains uncertain. This is no less true for the United States than it is for other countries in the hemisphere." Stephan Haggard, *The Political Economy of Regionalism in the Western Hemisphere, in* THE POST-NAFTA POLITICAL ECONOMY: MEXICO AND THE WESTERN HEMISPHERE 302, 304–05 (Carol Wise ed., 1998).

91. "US officials argued that NAFTA could yield important benefits not only for economic growth but also for a range of political objectives, including promoting democracy in Mexico and contributing to a long-term solution to immigration problems." SCHOTT, *supra* note 4, at 9. U.S. trade policies continue to pursue goals beyond economic growth. "Free trade agreements can help establish the basic building blocks for sustainable development, including private property rights, competition [and] the rule of law. Most importantly, free trade is about freedom and open societies. These values are at the heart of America's larger reform and development agenda." Zoellick, *supra* note 64, at 6.

92. At least one Congressman has argued that stability and democracy has spread throughout Latin America because of liberalization of trade and integration of economies. "We can't take this for granted. We cannot assume it will always be this way. The trend towards open markets and democratic rule may not continue…economic stagnation breeds political instability, and instability breeds mass emigration, civil unrest, military conflict, and poverty." Rep. Jim Kolbe, *The NAFTA and the Expansion of Free Trade: Current Issues and Future Prospects "A View from Capitol Hill,"* 14 ARIZ. J. INT'L & COMP. L. 291, 293 (1997). President Clinton's U.S. Trade Representative, Ambassador Charlene Barshefsky, made a similar argument in 1999 while defending pursuit of a Free Trade Area of the Americas stating, "[t]rade integration has both benefited from and strengthened peace, freedom, democracy and the rule of law throughout the hemisphere. And the Free Trade Area of the Americas will improve, strengthen, and transcend all of this." Charlene Barshefsky, Keynote Address, 30 LAW & POL'Y INT'L BUS. 1, 5 (1999).

> There are a number of very important trade agreements that are being negotiated right now. The World Trade Organization has

More than a few Latin American leaders are unconvinced that the FTAA would provide them with the economic or political panacea that the Bush Administration continues to pursue.[93] Perhaps the most important single skeptic of the FTAA is Brazilian President Luiz Inácio Lula da Silva because Brazil, along with the United States and Canada, is co-Chair of the FTAA negotiations which are scheduled for completion by January 2005.[94] Also, as the largest of the Latin American countries, Brazil sees itself as the major U.S. competitor in the Western Hemisphere.[95] The Workers' Party of Brazil and Lula, its

> launched a new round. The Free Trade Area of the Americas is being negotiated. So the presidents made it clear that through trade, we can not only open up markets to our workers and our businesses all across America, but we also will be trading the values that we cherish: democracy and freedom. And so I'm up here encouraging the Senate, asking for the vote.

Sec. of Commerce Don Evans, Press Conference at the Capitol (Apr. 30, 2002).

93. "More and more Latin American countries are wary of [the NAFTA] approach." McClintock, *supra* note 2, at 11.

> [President] Bush [faces]...opposition [from] what amounts to a "new left" in South America, led by President Néstor Kirchner of Argentina and President Luiz Inácio Lula da Silva of Brazil. Those leaders…see the world…through their nations' own wrenching experiences with the free market. Brazil has urged other countries to refuse to ratify a…declaration [on] free trade unless Mr. Bush addresses the United States' $20 billion in annual farm subsidies.

Elisabeth Bumiller & Tim Weiner, *At Conference, Fox Backs Bush's Guest-Worker Plan,* N.Y. TIMES, Jan. 13, 2004, at A3.

> Governments, often lacking credibility among their people, are finding it easier to row with the tide. Argentina, a staunch U.S. ally in the 1990's, nowadays defends warmer relations with Cuban dictator Fidel Castro and Venezuela's populist leftist Hugo Chavez as a result of popular disillusionment with the IMF and Washington.

David Luhnow et al., *Latin America's Season of Discontent,* WALL ST. J., Oct. 16, 2003, at A21.

94. *"Clouds over Quito,"* ECONOMIST, Nov. 2–8, 2002, at 41 [hereinafter *Clouds over Quito*]. "Brazil, the largest country and economy in South America, has consistently rejected NAFTA." McClintock, *supra* note 2, at 10.

95. Bruner explains that

> Brazil itself feels that it has global competitive potential and finds the United States an "overbearing" presence in the hemisphere. Brazil genuinely "views itself and in many ways is the premier country of South America and a competitor of the United States," and as such believes in its own potential to achieve some measure of hegemony in South America.

leader, have both been skeptical of the FTAA for some time.[96] "The party manifesto says that the FTAA, as currently being discussed, is not a free-trade agreement but a process of 'economic annexation' of Latin America by the United States."[97] Similarly, Venezuelan President Hugo Chavez, distancing himself from some other Andean leaders, also criticized the proposed FTAA as a "hasty fix" for the impoverished Andean region.[98] Slow economic growth and civil unrest in the Andean region have slowed the progress of reforms that are essential to forming the foundation of any successful FTAA in the Western Hemisphere.[99] "Related to these problems, the revival of petty nationalism threatens to undercut the political comity required to maintain the cohesion of their integration initiatives and to work together to conclude the FTAA pact."[100] The seed of dis-

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Bruner, *supra* note 7, at 29 (internal citations omitted). Additionally, Schott explains that

> [T]he willingness of the trading powers of North and South America to engage in broad-based liberalization of their own trade barriers will determine the fate of the entire [FTAA] venture. Bridging the gap between the US and Brazilian positions thus will be key to the successful end game of the negotiations.

SCHOTT, *supra* note 4, at 114; "The United States, Brazil, and Mexico together account for more than 85 percent of Western Hemisphere GDP and two-thirds of its population." *Id.* at 2.

96. *Clouds over Quito*, *supra* note 94, at 41.

97. *Id.* at 41. *See also* Altieri, *supra* note 2, at 872 (describing da Silva's anti-FTAA stance).

98. Alexandra Olson, *Chavez Opens Andean Summit*, THE NEWS (Mexico City), June 24, 2001, at 10. Chavez continues to accuse the United States of unwanted intervention in Latin America.

> In a Sept. 7 radio monologue, the president charged the Bush administration with trying to interfere in Venezuela as previous U.S. administrations did against socialist governments in Chile in 1973 and in Nicaragua in the 1980s. "I say to the United States that the day must come when that interventionist obsession must end," Mr. Chavez said.

Marc Lifsher, *Venezuela's Chavez Ratchets Up Anti-U.S. Rhetoric*, WALL ST. J., Sept. 23, 2003, at A22. Chavez has gone on to refer to the FTAA as a form of "economic colonialism" that is meant to "hand our countries over to multinationals." BBC WORLDWIDE MONITORING, *Venezuela: Chavez Criticizes Central Bank, FTAA, Chile, in "Hello President,"* Dec. 31, 2003.

99. *See* SCHOTT, *supra* note 4, at 105.

100. *Id.*

trust planted by United States interventionist policies in Mexico and Latin America during the early Nineteenth Century has germinated and its roots continue to grow and expand throughout Latin America.[101] These obstacles of history, culture and

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> "If you talk to average people about the Free Trade Area of the Americas or even the gas export law, they really don't know much about them," said Eduardo Gamarra, a Bolivian scholar who is director of the Center for Latin American and Caribbean Studies at Florida International University in Miami. "But Evo Morales [leader of the Bolivian coca growers federation and 2002 Bolivian presidential candidate] and others have shrewdly used those ideas as a flag which plays on their deepest fears, the loss of identity and the giving away of what they consider to be their national patrimony."

Larry Rohter, *Bolivia's Poor Proclaim Abiding Distrust of Globalization,* N.Y. TIMES, Oct. 17, 2003, at A3. At a recent regional anti-globalization forum in Argentina, Mr. Morales maintained that the United States and multinational companies have "a plan to exterminate the Indian" in order to seize control of the riches of Bolivia and neighboring countries. *Id.*

101. Luhnow, de Córdoba and Marc Lifsher explain that

> [m]ayhem in the streets of several Latin American cities, including a virtual siege of Bolivia's pro-U.S. president by angry protesters, shows that the region's disaffected are increasingly making their voices heard. Like the so-called Arab street in the Middle East, public protest in this impoverished region is growing more violent and anti-American, and is starting to limit policy choices for regional leaders.

Luhnow, et al., *supra* note 93, at A21. "Brazil is fundamentally uncomfortable with U.S. hegemony in the Western Hemisphere. It has been argued that, because of the excessive focus on the relationship between the dominant bipolar system and regions as subordinated systems during the Cold War, the role of middle powers like Brazil has been under theorized." Bruner, *supra* note 7, at 28 (internal citations and quotation marks omitted). "The United States, which has often viewed most nations of Latin America as reliable and docile allies, is increasingly facing resentment over security and trade policies that some of them view as inimical to their interests." Marquis, *supra* note 85, at 8A (internal citations omitted).

> Across South America, labor unions, student and civic groups and a new wave of leaders — Hugo Chavez in Venezuela, Luiz Inacio Lula da Silva in Brazil, and Nestor Kirchner in Argentina — are expressing similar doubts about who actually benefits from a free flow of international trade and investment.
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> …
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> "Globalization is just another name for submission and domination," Nicanor Apaza, 46, an unemployed miner, said…"We've had to live

language are not unusual when it comes to international trade. However, the Partner Nations must recognize and address these obstacles before they can move on to develop a workable structure for an agreement that will form the FTAA.[102]

II. NAFTA AND ITS RULES OF ORIGIN

A. Legal Authority for NAFTA

NAFTA is often referred to as a treaty. However, it did not enter the U.S. legal lexicon through the Article II treaty-making power extended to the President and Congress under the Constitution, which requires senatorial "Advice and Consent."[103] Rather, it became a part of U.S. law as a result of a Congres-

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> with that here for 500 years, and now we want to be our own masters."
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> …
>
> He and many other protesters see an unbroken line from this region's often rapacious colonial history to the failed economic experiments of the late 20th century, in which Bolivia was one of the first Latin American countries to open itself to the modern global economy.

Larry Rohter, *Bolivia's Poor Proclaim Abiding Distrust of Globalization,* N.Y. TIMES, Oct. 17, 2003, at A3.

102. "Extending NAFTA throughout the hemisphere requires a change in perspective and approach. The sheer number and variety of states in the region make the traditional approach to harmonization less practical. Adding to the complexity of harmonization are the varying legal traditions that the states in the hemisphere have." O'Hop, *supra* note 8, at 163.

> Although all of the 30 [Latin American] reciprocal agreements…are linked to the objectives of the "new regionalism" approach, each country has pursued its own strategic trade objectives with its own tariff reduction scheme, rules of origin, and technical, procedural and even documental systems. This has given rise to what some observers have dubbed the 'spaghetti bowl' effect of trade agreements.

Antoni Estevadeordal, The Impact of Free Trade Agreements on the Pattern of Trade (Presentation given at Meeting of the Trade and Integration Network of the Inter-American Development Bank, Washington, D.C.) (May 29–30, 2003) (IPES-2003), at 3, *at* http://www.iadb.org/int/DRP/ing/Red1/documents/Estevadeordal-5-03eng.pdf.

103. U.S. CONST., art. II, § 2. "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." *Id.*

sional-Executive Agreement.[104] Since the founding of the nation, Presidents have made approximately sixteen hundred treaties under the Article II treaty-making power.[105] But Presidents also have made countless other foreign compacts without Senate approval.[106] Some of these more recent agreements were in the form of a Congressional-Executive Agreement in which Congress either grants the President advance authority to make agreements or ratifies the President's action by a joint resolution of Congress.[107]

> It is now widely accepted that the Congressional-Executive agreement is available for wide use, even general use, and is a complete alternative to a treaty: the President can seek approval of any agreement by joint resolution of both houses of Congress rather than by two-thirds of the Senate. Like a treaty, such an agreement is the law of the land.[108]

As previously discussed, Trade Promotion Authority grants the President power to negotiate trade treaties and present them to both houses of Congress for a simple majority vote.[109] By using this method of approval, the President avoids the requisite approval of two-thirds of the Senate dictated by Article II of the Constitution.[110] Although "[t]he Constitution does not expressly confer authority to make international agreements other than treaties,…such agreements, varying widely in formality and in importance, have been common from our early history."[111] For this reason, the U.S. Court of Appeals for the Eleventh Circuit refused to find NAFTA unconstitutional de-

104. *See* McClintock, *supra* note 2, at 11–13 (explaining the history of the congressional-executive agreement).

105. HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 215–18 (1996).

106. *Id.* at 215.

107. *Id.* at 215–18.

108. McClintock, *supra* note 2, at 33 (the author goes on to explain the Constitutional history of the Congressional-Executive agreement).

109. Becker & Rohter, *supra* note 83, at C1; Lochhead, *supra* note 82, at A1.

110. Becker & Rohter, *supra* note 83, at C1.

111. HENKIN, *supra* note 105, at 215–18 (internal citations omitted). *See also* Restatement (Third) of Foreign Relations of the United States, Section 303 (2) ("The President, with the authorization or approval of Congress, may make an international agreement dealing with any matter that falls within the powers of Congress and of the President under the Constitution.").

spite the fact that it had not been promulgated through the treaty-making Clause.[112]

NAFTA consists of twenty-two chapters that cover everything from Objectives in Chapter One[113] to Exceptions and Final Provisions in Chapters Twenty-One and Twenty-Two.[114] In addition, the agreement includes environmental and labor-side agreements as well as various annexes and rules of procedure.[115] However, Chapter Four, which lays out the rules of origin, is the heart of NAFTA.[116]

B. Rules of Origin – The Heart of NAFTA

Any study of a free trade agreement must begin with an understanding of the rules of origin and why they are so important to the heart of the Agreement.[117] A free trade agreement is an agreement whereby two or more nations agree to reduce tariffs and other barriers to trade so that goods may cross the international borders free of any barriers to trade, hence the name free trade.[118] In order for an FTA to operate effectively, the partner nations must devise a method by which customs inspectors at each border crossing can determine the origin of the goods being transported.[119] Unless customs agents are able to distinguish between goods entitled to receive free trade benefits (those goods originating within the free trade area) and goods not so entitled, there is a danger that a partner nation will accept imported goods from outside the trade area without being paid the appropriate tariff.[120] Any FTA would collapse if it failed to pro-

112. Made in the USA Found. v. U.S., 242 F.3d 1300 (11th Cir. 2001). *See also* McClintock, *supra* note 2, at 34–35 (outlining the arguments presented to the Eleventh Circuit).

113. NAFTA, *supra* note 3, 107 Stat. 2061–2122, 32 I.L.M. 289, 297–93 (containing chs. 1–9).

114. NAFTA, *supra* note 3, 107, Stat. 2061–2225, 32 I.L.M. 299–605 (containing chs. 1–22), Annex 2004 (1), (2), 32 I.L.M. 699.

115. *See* NAFTA, *supra* note 3, 107 Stat. 2163–65, 32 I.L.M. 605.

116. NAFTA, *supra* note 3, 107 Stat. 2069–86, 32 I.L.M. 349–58.

117. For the NAFTA Rules of Origin, see NAFTA, *supra* note 3, 107 Stat. 2069–86, 32 I.L.M. 349–58.

118. SCHOTT, *supra* note 4, at 84.

119. *See* Pawlak, *supra* note 16, at 326–27.

120. *See id.* This sort of situation is referred to as the creation of an "export platform." *See* Gantz, *supra* note 16, at 383 (describing fears that the NAFTA

vide for some kind of procedure, like the rules of origin, for identifying and preventing non-member goods from taking advantage of trade benefits meant solely for member nations.[121]

The rules of origin outlined in Chapter Four of NAFTA insure that only those goods originating within North America benefit from free trade.[122] Specifically, Article 401 defines when a good is "originating" and thereby entitled to the benefits conferred by NAFTA.[123] The definitions covered by Article 401 range from the very simple to the complex.[124] "In the simplest definition, originating materials are those that are wholly obtained in the territory of a party and include minerals extracted, goods harvested, and animals born and raised in a NAFTA country's territory."[125] Goods containing non-originating materials (parts or inputs that originate from outside the NAFTA member states), still may enjoy free trade benefits if "each of the non-originating materials used in the production of the good undergoes a change in tariff classification set out in Annex 401 as a result of production occurring entirely in the territory of one or more of the Parties."[126] A "change in tariff classification" occurs when a non-originating material is transformed by a North American manufacturing process into another product.[127] For instance, vanilla beans (non-originating material) imported from Madagascar might be transformed by U.S. labor and manufacturing resources into "pure vanilla extract."[128] This doctrine of substantial transformation "has deep roots in the jurisprudence of

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might transform Mexico into an export platform "from which Asian parts and components would…be exported to the U.S. duty free"). *Id.*

121. Edwin F. Einstein, *NAFTA Trade in Goods, in* NAFTA AND BEYOND 57, 61 (N. Kofele-Kale et al. eds., 1995).

122. *See, e.g.*, *id.* at 61–62.

123. NAFTA, *supra* note 3, ch. 4, art. 401(b), 107 Stat. 2069, 32 I.L.M. 349.

124. Einstein, *supra* note 121, at 61–62. *See* NAFTA, *supra* note 3, ch. 4, art. 415, 107 Stat. 2081–86, 32 I.L.M. 354.

125. Einstein, *supra* note 121, at 61–62 (citing to NAFTA, ch. 4, arts. 401(a), 32 I.L.M. 349 & 415(a)–(c), 32 I.L.M. 354).

126. NAFTA, *supra* note 3, ch. 4, art. 401(b), 107 Stat. 2069, 32 I.L.M. 349.

127. *Id.* ch. 4, art. 401 (b), 107 Stat. 2070, 32 I.L.M. 349. *See also* Einstein, *supra* note 121, at 62 ("[N]on-originating materials that…undergo a defined change in tariff classification…as a result of production occurring within the territory of one or more of the parties, are generally considered as originating.").

128. *See* NAFTA, *supra* note 3, Annex 401, 32 I.L.M. 397. *See also* Einstein, *supra* note 121, at 62.

the Supreme Court,"[129] and was adopted as a statutory rule of origin in the Trade Agreements Act of 1979.[130] The substantial transformation test proved to be inexact because its application relied on subjective evaluations, the outcomes of which depended on whether the final product of the U.S. manufacturing process had a new name, character or use.[131] NAFTA replaced the substantial transformation test with a more precise method of evaluating the degree of transformation by utilizing the Harmonized Tariff Schedule ("HTS") classification system.[132] The HTS numerically "identifies items along a progression from raw materials to finished products," providing customs officials with a tool to precisely measure degrees of transformation.[133] By employing the HTS numerical classification system, NAFTA can specify a precise transformation ("change in tariff classification") that must be achieved in order for a non-originating material to be transformed into an originating material or product. This, in turn, allows customs officials to apply appropriate trade preferences or restrictions.[134] The one hundred and sixty-nine-

129. RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS 292 (2d ed. 2001) (citing Anheuser-Busch Brewing Ass'n v. United States, 207 U.S. 556 (1908)).

130. *Id.*

131. Michael P. Maxwell, *Formulating Rules of Origin for Imported Merchandise: Transforming the Substantial Transformation Test*, 23 GEO. WASH. J. INT'L LAW & ECON. 669, 672–73 (1990).

132. RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS 291 (2d ed. 2001).

> For decades, most of the countries in the world, except the United States and Canada, classified imports according to the Brussels Tariff Nomenclature (BTN), which identifies items along a progression from raw materials to finished products. The United States had its own system of classification set out in the Tariff Schedule of the United States (TSUS). However, beginning in 1982, the United States initiated steps to convert the TSUS into a Harmonized Commodity, Description and Coding System (HS) of classification, in common with the classification system used by most other countries and developed by the Customs Cooperation Council in Brussels. The United States adopted the Harmonized System as the Harmonized Tariff Schedule (HTS) for classification of all imports by enactment of the Omnibus Trade and Competitiveness Act of 1988, with an effective date of Jan. 1, 1989. Many nations have adopted HS and use it for U.S. exports.

Id. at 291.

133. *Id.* at 290–91.

134. *See generally* NAFTA, *supra* note 3, Annex 401, 32 I.L.M. 397.

page "Annex 401" establishes the degree of transformation required for a non-originating material to convert into an originating material.[135] The transformation occurs when the non-originating material is transformed to such a degree that its HTS classification number shifts to a different classification level as outlined in Annex 401.[136] Goods that undergo this "tariff shift" receive free trade benefits under NAFTA because the additional North American labor and resources used to transform the non-originating material are deemed to have contributed sufficiently to the North American economy to grant the status of "originating good" upon the resulting product.[137] "In order to be considered as originating, goods containing non-originating materials that do not undergo a sufficient change of tariff classification, and even many that do but with a further qualification defined in Annex 401, must fulfill the regional value content requirement of Article 402 of NAFTA."[138]

Under Annex 401 as well as under Article 401(d), certain products may achieve originating status even if they do not meet a required tariff shift so long as the product contains a minimum percentage of labor, materials or overhead (known as "inputs") from North America.[139] The percentage of a product's North American input is referred to as a product's regional value content.[140] Granting originating status to a good with something less than 100% regional value content is justified because a good can make a substantial contribution to the North American economy even if 100% of the inputs do not originate in North America.[141] Annex 401 also may require that this "regional value content" be met in addition to a specified

135. *See id.* Annex 401, 32 I.L.M. 397.

136. *See* Einstein, *supra* note 121, at 62.

137. NAFTA, *supra* note 3, ch. 4, art. 401(b), 107 Stat. 2069, 32 I.L.M. 349. *See also* Einstein, *supra* note 121, at 62 ("Inputs from outside the NAFTA, called non-originating materials, that are incorporated into a good and undergo defined change of tariff classification, as described in Annex 401, as a result of production occurring within the territory of one or more of the parties, are generally considered as originating.").

138. Einstein, *supra* note 121, at 62–63.

139. *Id.* at 62.

140. *Id.* at 62–63 (citing NAFTA ch. 4, art. 402(3), 107 Stat. 2070, 32 I.L.M 349).

141. *Id.* at 63 (citing NAFTA, ch. 4, arts. 401(c), 107 Stat. 2069, 32 I.L.M. 349 & 402(4), 107 Stat. 2070, 32 I.L.M. 350).

tariff shift for certain goods.[142] Article 402 provides for two methods of calculating the regional value content: the "transaction value method" and the "net cost method."[143]

The first step in calculating the regional value content is determining either the product's transaction value[144] or its net cost,[145] depending on the method to be used.[146] Once the transaction value or the net cost is determined, the formula for determining the regional value content is a simple matter of arithmetic.[147] The regional value content ("RVC") of a good using the transaction value method is calculated by applying the following formula: RVC = ((TV-VNM)/TV) x 100, where TV is the transaction value of the good and VNM is the value of the non-originating material used in the production of the good.[148] The result from this formula reflects the percentage of the transaction value of the good that contains originating material.[149] If originating material accounts for 60% or more of the transaction value, then the good is deemed originating.[150]

The regional value content of a good using the net cost method is calculated by using a similar formula: RVC = ((NC-

142. *Id.* at 62–63.

143. *Id. See also* TREBILCOCK & HOWSE, *supra* note 20, at 126.

144. The transaction value is "the price actually paid or payable for a good or material." NAFTA, *supra* note 3, at ch. 4, art. 415, 107 Stat. 2081, 32 I.L.M. 354–57.

145. The net cost is defined as the "total cost minus sales promotion, marketing and after-sales service costs, royalties, shipping and packing costs, and non-allowable interest costs that are included in the total cost." NAFTA, *supra* note 3, ch. 4, art. 415, 107 Stat. 2081, 32 I.L.M. 354–57.

146. Einstein, *supra* note 121, at 63.

147. *See* NAFTA, *supra* note 3, ch. 4, art. 402(2), 107 Stat. 2070, 32 I.L.M. 349.

148. NAFTA, *supra* note 3, ch. 4, art. 402(2), 107 Stat. 2070, 32 I.L.M. 349.

149. *See id.* Since VNM (value of non-originating material) is subtracted from TV, only originating material is left as a percentage of TV. *Id.*

150. NAFTA, *supra* note 3, ch. 4, art. 401(d)(ii), 107 Stat. 2069, 32 I.L.M. 349.

> A good shall originate in the territory of a Party…provided that the regional value content of the good, determined in accordance with Article 402, is not less than 60 percent where the transaction value method is used, or is not less than 50 percent where the net cost method is used, and that the good satisfies all other applicable requirements of this Chapter.

Id.

VNM)/NC) x 100, where NC is the net cost of the good and VNM is the value of non-originating materials used in the production of the good.[151] The result of this formula reflects the percentage of the net cost of the good that contains originating material.[152] If originating material accounts for 50% or more of the net cost, then the good will qualify for the benefits granted to originating goods.[153]

The general rule provides that the exporter or producer of a good may choose either the transaction value method or the net cost method to determine the regional value content.[154] Generally, the transaction value is easier to calculate than the net cost method[155] because the latter method requires a cost accounting of every resource and component (whether originating or not) that goes into manufacturing a particular product.[156] In certain cases, the producer or manufacturer is prohibited from using the more facile transaction value method in determining regional value content.[157] Article 402(5) lists those situations that demand use of the net cost method.[158] Among others, these situations include: certain cases where the good is sold by a producer to a related person,[159] where the good is a motor vehi-

151. NAFTA, *supra* note 3, ch. 4, art. 402(3), 107 Stat. 2069, 32 I.L.M. 349.

152. *Id.* Since VNM (value of non-originating material) is subtracted from NC, only originating material is left as a percentage of NC. *See id.*

153. NAFTA, *supra* note 3, ch. 4, art. 401(d), 107 Stat. 2069, 32 I.L.M. 349.

154. NAFTA, *supra* note 3, ch. 4, art. 402(1), 107 Stat. 2070, 32 I.L.M. 349.

155. As noted in *supra* note 144, the transaction value is defined as "the price actually paid or payable for a good or material." NAFTA, *supra* note 3, ch. 4, art. 415, 107 Stat. 2081, 32 I.L.M. 354–57.

156. NAFTA, *supra* note 3, ch. 4, art. 402(3), 107 Stat. 2070, 32 I.L.M. 349 (providing the net cost method equation as RVC = [(NC-VNM) / NC] x 100, with NC representing the net cost of the goods).

157. NAFTA, *supra* note 3, ch. 4, art. 402(5), 107 Stat. 2071, 32 I.L.M. 350.

158. *Id.*

159. "Related person" is defined in Ch. 4, art. 415 as

> a person related to another person on the basis that: a) they are officers or directors of one another's businesses; b) they are legally recognized partners in business; c) they are employer and employee; d) any person directly or indirectly owns, controls or holds 25 percent or more of the outstanding voting stock or shares of each of them; e) one of them directly or indirectly controls the other; f) both of them are directly or indirectly controlled by a third person; or g) they are members of the same family (members of the same family are natural

cle and where "the exporter or producer wishes to accumulate the regional value content of the good in accordance with Article 404."[160]

NAFTA prohibits use of the transaction value when related persons are involved "…and the volume…exceeds eighty-five percent of the producer's total sales" during a given period[161] to prevent producers from manipulating intra-company prices to generate a false transaction value, which could lead to granting a particular product originating status when it might not otherwise be so entitled. In this sense, NAFTA's prohibition of the transaction value method is no different than the common practice of many countries that monitor and regulate transfer pricing between subsidiaries of a multinational corporation.[162] Transfer pricing, the act of selling to a related person for a higher or lower amount than one would sell in an arms-length transaction for the purpose of manipulating profits and, therefore, tax consequences in a particular jurisdiction, also can be used to make a product appear to be originating even though it would not be so designated in a normal arms-length transaction.[163]

NAFTA's rules of origin also include specific exceptions or protections for important industries and products.[164] For example, its rules require that automobile manufacturers use the more onerous net cost method rather than the simpler transaction value method in establishing the origination of manufactured vehicles.[165] The importance of the American automobile industry to the North American economy and the ever-present

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or adoptive children, brothers, sisters, parents, grandparents, or spouses).

Id. ch. 4, art. 415, 107 Stat. 2081, 32 I.L.M. 354–57.

160. NAFTA, *supra* note 3, ch. 4, art. 402(5)(e), 107 Stat. 2071, 32 I.L.M. 350. For a detailed explanation of "accumulation" under Article 404, see *infra* notes 169–73 and accompanying text.

161. *Id.* ch. 4, art. 402(5), 107 Stat. 2071, 32 I.L.M. 350.

162. For a general discussion of why various nations monitor and regulate transfer pricing, see Stephen Linde, Note, *Regulation of Transfer Pricing in Multinational Corporations: An International Perspective*, 10 N.Y.U. J. INT'L L. & POL. 67 (1977).

163. *Id.* at 72–76.

164. McKim, *supra* note 38, at 341.

165. NAFTA, *supra* note 3, ch. 4, art. 402(5)(d), 107 Stat. 2071, 32 I.L.M. 350.

threat of international competition were responsible for this and other burdens placed on trade in automobiles.[166] Not only must the automobile industry trace the origination of every material that goes into their production, but NAFTA raised the percentage of originating materials required for access to trade preferences from 50% to 62.5%.[167] The two requirements not only provide an additional layer of protection for the American automobile industry, but also provide an incentive for automobile parts manufacturers, formally located in Asia, to build North American plants, because automobile manufacturers now will be looking for American-made parts to incorporate into their vehicles in order to qualify for NAFTA benefits.[168]

Finally, NAFTA requires producers to use the net cost method when accumulating the value of originating resources used in the production of non-originating components sold to them for ultimate incorporation into their own products.[169] Manufacturers can use the accumulation method of valuing products when it purchases a component ("part A") for incorporation into its newly manufactured product ("product AB"), where part A does not qualify as originating under regional value content rules even though it does contain some originating resources.[170] If product AB also fails to meet the regional value content test, the manufacturer may recalculate the regional value content by breaking the cost of part A into the various components that went into part A's production.[171] Thus, rather than including the entire cost of part A as non-originating in calculating the regional value content of product AB, the manufacturer can determine how much of part A was originating. After determining this breakdown, the manufacturer of product AB can then accumulate the originating portion of part A into its own formula for determining the regional value content of its product AB.[172] The accumulation method,

166. Pawlak, *supra* note 16, at 501.
167. NAFTA, *supra* note 3, ch. 4, art. 403(5)(a), 107 Stat. 2074, 32 I.L.M. 351.
168. Einstein, *supra* note 121, at 73.
169. NAFTA, *supra* note 3, ch. 4, art. 402(5)(e), 107 Stat. 2071, 32 I.L.M. 350.
170. *Id.* ch. 4, art. 404(1), 107 Stat. 2076, 32 I.L.M. 352.
171. *Id.*
172. *Id.*

therefore, allows the manufacturer of product AB to take credit for any portion of part A classified as originating rather than having to count the entire cost of part A as non-originating. The additional "credit" that the manufacturer of product AB may achieve through this method may be sufficient to reach the 50% regional value content that would qualify product AB as originating, and therefore, eligible for the trade benefits provided by NAFTA.[173]

The rules of origin also provide a *de minimis* rule,[174] exempting goods from the rules of origin if they contain non-originating materials when the non-originating materials do not exceed 7% of the transaction value or of the total cost of the good.[175] Without the *de minimis* exception, the Annex 401 rules requiring non-originating materials to undergo a change in tariff classification would weigh harshly on those goods with a very small percentage of non-originating materials that do not make the required tariff shift.

As one can see, the NAFTA rules of origin create a complex web of restrictions, requirements and exceptions that are difficult to understand and apply. These intricacies only compound the complexity of a process already made difficult by differences in language, culture, and history. Transferring NAFTA's rules of origin to the FTAA will only make the "dance" among the Partner Nations increasingly difficult to perform. Whatever form the FTAA eventually takes, it must account for and adapt to the unique economies, cultures, histories and diplomatic rela-

173. For a more detailed example of the accumulation method, see generally NAFTA: A Guide to Customs Procedures, U.S. Customs Service, *at* http://www.customs.ustreas.gov/nafta/docs/us/guidproc.html#2%20RULES%20OF (last visited Jan. 30, 2004). Recall that Article 402(5)(e) requires use of the net cost method of regional valuation when accumulation is used, and Article 401(d) tells us that the net cost method must reach at least a fifty percent threshold to be classified as originating.

174. NAFTA, *supra* note 3, ch. 4, art. 405, 107 Stat. 2076–77, 32 I.L.M. 352–53.

175. The *de minimis* rule provides a certain list of goods that may not benefit from this exception. *Id.* ch. 4, art. 405(3), 107 Stat. 2077–78, 32 I.L.M. 352–53. It also provides that the *de minimus* rule for fabrics is based upon weight rather than cost, i.e., fabrics containing non-originating fibers or yarns will be exempt from the rules of origin if the non-originating components do not exceed 7% of the total weight of the finished good. *Id*. at ch. 4, art. 405(6), 107 Stat. 2077, 32 I.L.M. 353.

tionships of each additional party. Rules of origin form the heart of any free trade area, and as such, it is the rules of origin that are most critical to the success of any FTAA.

III. RULES OF ORIGIN – HEARTBURN FOR THE FTAA

Even though the NAFTA rules of origin serve the three NAFTA partners well, the rules are not without their detractors. Chief among the complaints is that the rules are far too complex, and that paradoxically, the rules actually form a barrier to trade more than they dismantle trade barriers.[176] The complexity of the rules and the cost of resources needed to identify, understand, track and comply with these rules are especially costly for developing nations and their industries.[177] In fact, NAFTA's rules of origin are so complex that they are accompanied by a two hundred page Annex that explains many of the intricate technical details an exporter must examine to determine the origination of a particular product.[178] Studies that have evaluated administrative costs associated with rules of origin compliance reveal that companies spend anywhere from 1.4% to 5.7% of the value of the goods exported.[179] Applying

176. "NAFTA presents one example of how onerous customs procedures can be an impediment to trade even after countries have agreed to eliminate border charges." CUSTOMS PROCEDURES AND RULES OF ORIGIN, *supra* note 11, at 2–3. Flatters and Kirk state:

> [R]ules of origin are an essential element of regional trading arrangements. But their use as protectionist devices, whether in North-South or South-South agreements, can also undermine and subvert the benefits of the trade liberalization they are meant to support. This is one of the great dangers of regionalism as a strategy for global integration.

Frank Flatters & Robert Kirk, *Rules of Origin as Tools of Development*, at 1 (2003) (presented at a conference entitled The Origin of Goods: A Conceptual and Empirical Assessment of Rules of Origin in PTAs, sponsored by Institut National de la Recherche Agronomique), *at* http://www.inra.fr/Internet/Departements/ESR/UR/lea/actualites/ROO2003/articles/flatters.pdf.

177. Eugenio Diaz-Bonilla et al., *supra* note 65, at 5–6.

178. DANIELLE GOLDFARB, C.D. HOWE INSTITUTE, COMMENTARY NO. 184, THE ROAD TO A CANADA-U.S. CUSTOMS UNION: STEP-BY-STEP OR IN A SINGLE BOUND?, 4 (2003), *available at* http://www.cdhowe.org [hereinafter HOWE INSTITUTE COMMENTARY].

179. *Id.* at 8 ("Estimates of rules of origin administrative costs under the European Free Trade Association-European Community FTA range from 1.4

these same percentages to the combined trade between the United States and Canada reveals that the total administrative costs of NAFTA's rules of origin could amount to anywhere from $8 billion to $31 billion a year.[180] There is some evidence that importers and exporters are opting to forgo NAFTA's free trade benefits simply because the costs of compliance with the rules of origin are too high.[181] Both critics and supporters of the FTAA continue to raise concerns that the rules of origin themselves may form obstacles to trade.[182] The number of concerns and difficulties identified with regard to the NAFTA rules of origin would not disappear if similar rules were incorporated into the FTAA, but likely would be magnified because of the greater number of partners involved and because of the larger number of developing countries with fewer technical resources to aid in compliance.[183] Adopting rules of origin like NAFTA's would defeat the FTAA's purpose either by bringing trade to a halt or forcing most producers and developing countries to forgo free trade benefits due to the exorbitant compliance cost.

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percent-to-5.7 percent of the value of export transactions, using company-level data.").

180. *Id.* at 8.

181. Tim Tatsuji Shimazaki, *Proof of Origin as a Trade Barrier, 1998*, *reprinted in* RALPH H. FOLSOM, MICHAEL WALLACE GORDON & DAVID LOPEZ, NAFTA 65–66 (2000).

> In one example, Linda Stepp, a chief financial officer of Televideo, a video design and sales company in San Diego, expressed her concerns over the amount of documentation necessary in addition to the Certificate of Origin. She estimated her cost of complying with NAFTA to be about $50 per document after factoring in notarization fee and getting things stamped….In another example, at Honeywell Microswitch in Westmont, Illinois, it took six employees nearly six months just to ensure that the company's products — switches and sensors — qualified for the NAFTA's preferential treatment.

Id.

182. "Origin rules are designed to ensure that benefits from liberalization accrue to producers in FTAA countries by preventing free riding by producers in non-participating countries. Often, however, their inherent complexity results in the rules becoming obstacles to trade flows under FTAA." CUSTOMS PROCEDURES AND RULES OF ORIGIN, *supra* note 11, at 2; *see also* Mariana C. Silveira, *Rules of Origin in International Trade Treaties: Towards the FTAA*, 14 ARIZ. J. INT'L & COMP. L. 411, 439 (1997) (noting that an FTAA working group had identified rules of origin as a potential restriction on free trade).

183. *See* Silveira, *supra* note 182, at 460–62.

Regardless of the type of rules of origin ultimately adopted by the FTAA, the Partner Nations would have to harmonize their customs procedures to a certain extent if they are to implement the rules successfully. Customs authorities in the various nations cannot consistently apply a set of rules if each applies different sets of procedures that fail to result in a predictable and efficient application process.[184] Additionally, many Latin American countries lack access to high level technological resources available to the developed countries of Europe and North America.[185] Such resources aid in updating regulations to reflect changing patterns of trade and are essential to policing compliance.[186] The World Trade Organization has found that failure to modernize and reform customs procedures can produce a bureaucratic barrier to trade that is even more insurmountable than high import duties.[187] In December 1995, the Chairman and CEO of Federal Express in an address to the Air Cargo Americas Conference in Miami stated that "[i]t makes little sense to have a network like ours that moves goods across continents in twenty-four to forty-eight hours when those goods become entrapped in archaic customs bureaucracies for days."[188] In order to prevent these kinds of delays, the Partner Nations must provide resources for adequate training of customs personnel who ultimately must apply rules of origin. In addition, the Partner Nations must provide adequate technological resources for administering the rules, particularly to less developed countries that lack such resources or possess antiquated or

184. "It is essential for the continued economic expansion of the United States that markets in our hemisphere become increasingly open to U.S. goods and services and there be clear, predictable and nondiscriminatory rules governing trade throughout the Americas." McClintock, *supra* note 2, at 74.

185. CUSTOMS PROCEDURES AND RULES OF ORIGIN, *supra* note 11, at 3.

186. *See* Silveira, *supra* note 182, at 460.

187. Neil King, Jr. & Scott Miller, *Cancún: Victory for Whom? Poor Nations' Revolt Could Freeze Them Out of Big Trade Deals*, WALL ST. J., Sept. 16, 2003, at A4 [hereinafter *Cancún: Victory for Whom?*]. As an example of the costs involved with such inefficiencies, some experts "have estimated that new customs procedures could add nearly 1% to economies of countries across Asia." *Id.*

188. CUSTOMS PROCEDURES AND RULES OF ORIGIN, *supra* note 11, at 3 (quoting the Chairman and CEO of Federal Express in an address to the Air Cargo Americas Conference in Miami in December 1995).

incompatible technology.[189] Even now, the lack of a modern technological and communications infrastructure in some of the region's developing countries prevent traders in those areas from determining and implementing developments or improvements that have emerged in either domestic or international trade law.[190] The simplest of the rules of origin cannot bring about free trade in the Americas unless all countries develop consistent customs procedures across the Western Hemisphere. In addition, they all require access to the resources necessary for the efficient, fair and predictable application of the rules of origin finally adopted.

Agreeing on a common set of rules of origin for the FTAA will also be difficult both because Latin American nations already have adopted rules of origin under various free trade agreements which they have formed over the past two decades and because these rules are closely tied to the interests of domestic political groups.[191] Like NAFTA's special automobile industry provisions, these other trade agreements may contain special

189. *Id.* at 5. *See also* Pawlak, *supra* note 16, at 347 (discussing the burdens placed upon shippers and producers that force them to forgo preferential treatment as well as the economic strain that would be placed upon poorer nations to administer and enforce complicated rules of origin).

190. O'Hop, *supra* note 8, at 164 ("Tools for legal research and reporting, which are taken for granted in the developed world, are still the exception in the developing world.").

191. "[T]he United States belongs to only one of the 30 free trade agreements in the Western Hemisphere." Robert Zoellick, *supra* note 64, at A35.

> [T]here are over a dozen customs unions and free trade areas involving Mexico and Latin America….As a practical matter, the overlap of these agreements with each other, the GATT/WTO agreements and the numerous bilateral agreements that intersperse these multilateral efforts can create a seeming maze of customs, trade and investment rules.

Curtiss & Atkinson, *supra* note 16, at 139–40;

> One of the problems with the approach that is being taken with the FTAA negotiations is that the agreement will overlay the 23 trade pacts or agreements in the region. This is further complicating the current overlap of many regional and subregional agreements with yet another layer of rules and regulations governing trade transactions, creating more confusion.

Gilmore, *supra* note 1, at 412; "There is much more variation across [rule of origin] regimes in the Americas." Estevadeordal & Suominen, *supra* note 18, at 11.

protective measures woven into them as a result of lobbying from critical industries pressuring their governments to protect their economic interests.[192] These special interest measures

192. Silveira, *supra* note 182, at 461. This "capturing" of domestic trade policies by special interest groups has been explored extensively by other authors. *See, e.g.*, Jeffery Atik, *Global Trade Issues in the New Millennium: Democratizing the WTO*, 33 GEO. WASH. INT'L L. REV. 451, 459 (2001) ("The traditional view of capture of domestic trade policy is that local producers engage the national political apparatus to erect protectionist barriers. The more recent view is that multinationals…have become dominant in national trade policy-making."); Jeri Jensen-Moran, *Trade Battles as Investment Wars: The Coming Rules of Origin Debate,* 19 WASH. Q. 239 (1996) ("NAFTA clearly demonstrated how rules of origin can become a 'viper's nest for special interests,' in the context of regional agreements."); G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 836 (1995) (describing one model of WTO trade law as a regime in which private actors seek to influence national trade policy only for the benefit of their own personal interests); Linda C. Reif, *Multidisciplinary Perspectives on the Improvement of International Environmental Law and Institutions*, 15 MICH. J. INT'L L. 723, 738 (1994) (discussing Anne-Marie Slaughter Burley's articulation of liberal internationalism, which "holds that private actors are the essential players in international society who, in seeking to promote their own interests, influence the national policies of States"); Chantell Taylor, *NAFTA, GATT, and the Current Free Trade System: A Dangerous Double Standard for Workers' Rights*, 28 DENV. J. INT'L L. & POL'Y. 401, 401 (2000) (arguing that "[t]he single, clearest, most direct result of economic globalization to date is a massive global transfer of economic and political power away from national governments and into the hands of global corporations and the trade bureaucracies they helped create"); Richard Bernal, *Regional Trade Arrangements in the Western Hemisphere*, 8 AM. U.J. INT'L L. & POL'Y 683, 697 (1993) (noting the past "propensity [of the United States] to 'manage' trade by resorting to protectionism for selected endangered industries"); Jared L. Landaw, Note, *Textile and Apparel Trade Liberalization: The Need for a Strategic Change in Free Trade Arguments,* 1989 COLUM. BUS. L. REV. 205, 217 (describing the role of textile and apparel industry lobbying in trade policies that provided them with protection from imports and concluding that "[t]rade policy is formulated in the legislative arena, where politicians are influenced by interest group lobbying."); Joseph A. LaNasa III, *Rules of Origin Under the North American Free Trade Agreement: A Substantial Transformation into Objectively Transparent Protectionism,* 34 HARV. INT'L L.J. 381, 400 (1993) (describing the U.S. automobile industry's influence in the drafting of NAFTA's unique rules of origin for automobiles, which seek to protect the U.S. industry); Marion Crain & Ken Matheny, *Labor's Identity Crisis,* 89 CALIF. L. REV. 1767, 1780 (2001) (noting that protectionist strategies influenced the AFL-CIO's policy positions on the NAFTA); Michael P. Leidy & Bernard M. Hoekman, *Spurious Injury as Indirect Rent Seeking: Free Trade Under the Prospect of Protection,* 3 ECON. & POL. 111, 112 & 116–17 (1991) (describing how labor and industry lobbies affect state policies on free trade

make later harmonization very difficult if not impossible because industries may have changed their entire mode of doing business as a result of these anomalies.[193] Even slight deviations could seriously injure the particular economic sector.[194] In addition, the economic health of the participating nations may be closely tied to the particular industry, further complicating any attempt at harmonization. Any change to rules of origin developed under such circumstances seems unlikely.[195] In fact, the U.S. automobile industry will seek to include within any subsequent FTAA a level of origination even higher than the 62.5% set by NAFTA.[196] The U.S. automobile industry seeks such protection from the large and competitive market for

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particularly when it comes to providing protection from foreign competitors). Most recently, Bush Administration efforts to achieve rapid progress on free trade agreements with Central America and Australia have encountered resistance from "[t]he sugar industry -- which accounts for less than 1% of all U.S. farm sales but 17% of agriculture's political contributions since 1990." Michael Schroeder, *Sugar Growers Hold Up Push for Free Trade,* WALL ST. J., Feb. 3, 2004, at A13. U.S. manufacturers that stand to benefit most from these two pacts "have lined up on the other side" with one manufacturer's lobbyist expressing concern that such agreements might "be hijacked by a few protectionist interests, which frankly are unwilling to compete." *Id.* (quoting William Lane, a Washington lobbyist for Caterpillar Inc., the Peoria, Ill. maker of construction and mining equipment).

193. Silveira, *supra* note 182, at 461.

194. CUSTOMS PROCEDURES AND RULES OF ORIGIN, *supra* note 11, at 4.

195. *See* Silveira, *supra* note 182, at 458 (noting that trade agreements tend to "reflect the position of the most powerful industries" giving rise to "an endless series of debates, and uneasiness in the negotiations"). *See also id.* at 435 (noting that international trade agreements sometimes establish special rules for particularly sensitive products); O'Hop, *supra* note 8, at 154 (explaining that existing subregional trade agreements in the Western Hemisphere were "designed to achieve specific economic objectives and to address almost exclusively the particular needs of its subregional constituency" and that a regional agreement like the FTAA would have to bring harmony to conflicting institutional and legal obstacles created by such self-serving agreements).

> NAFTA certainly is not going to relinquish its "rules of origin" on which receiving internal tariff preferences absolutely depends. On the other hand, acceptance of NAFTA's regime would detrimentally affect the MERCOSUR countries which might find themselves forced to switch their input sourcing from cheaper and higher quality sources in Europe and Asia, for example, in favor of North America in order to comply with the new rule-of-origin requirements.

McClintock, *supra* note 2, at 47–48 (internal citations omitted).

196. Silveira, *supra* note 182, at 458.

automobile parts in Brazil.[197] Many similar special interest requests are likely to emerge from each of the remaining thirty-three Partner Nations. Such a state of affairs can only lead to endless debate and a negotiation process filled with great frustration and little progress.[198]

The special interest arguments expected to arise could be resolved more easily if any of the existing regional trade agreements within the Western Hemisphere had a supranational institutional structure like that found within the EU. Among other things, the fifteen-member EU trading bloc has created a common political structure that helps to identify and serve EU

197. *Id.* at 458. *See also* Jeri Jensen-Moran, *supra* note 192, at 239 ("the automobile industry has already hinted it will want a rule even higher than 62.5 percent when negotiations begin with Mercosur, because the Brazilian market is much bigger and…a competitive supplier of automobile parts").

198. The impact of interest group politics in multilateral trade negotiations can be seen in the breakdown of the WTO Doha Round of talks held in Cancún, Mexico in September, 2003. A major reason for the failure of these talks was the reluctance of developed nations like the United States and members of the European Union to agree to steep reductions in farm subsidies, which developing countries blame for depressing world-wide prices and in turn locking their farmers out of the global market place. Neil King, Jr. & Scott Miller, *Trade Talks Fail Amid Big Divide Over Farm Issues, Developing Countries Object to U.S., EU Goals; Cotton as a Rallying Cry*, WALL ST. J., Sept 15, 2003, at A1.

> Before the talks broke off, American farmer groups attending the conference here said they were pleased [Robert B. Zoellick, the United States Trade Representative] was able to protect most of the farm bill passed in 2002, which raised subsidies by $40 billion…The farm states voted heavily in favor of Mr. Bush in the 2000 election, and were the backbone of the states that gave him the bulk of his electoral votes. Agribusiness, which profits from the low cost of corn, soybeans and other crops subsidized by American taxpayers, has shifted its allegiance to the Republican Party. Political contributions from agribusiness jumped to $53 million in 2002 from $37 million in 1992, with the Republicans' share rising to 72 percent from 56 percent, according to figures compiled by the Center for Responsive Politics.

Elizabeth Becker, *Coming U.S. Vote Figures in Walkout at Trade Talks*, N.Y. TIMES, Sept. 16, 2003, at A6. "All the lobbying pressures — business and social — are sowing a new skepticism toward international agreements among developing nations…all these extraneous nontrade issues are being brought in by newer and newer business lobbies, [and] people in developing countries are beginning to feel crowded." William Greider, *The Real Cancún, WTO Heads Nowhere*, NATION, Sept. 22, 2003, at 11, 13.

interests over those of each individual member.[199] Unfortunately, none of the existing trade agreements in the Western Hemisphere has such an institutional structure that can resolve the disputes that will certainly arise as the Partner Nations seek to find common ground upon which to build an FTAA.[200]

Even if the Partner Nations can develop workable rules of origin, implementing these rules would pose yet another problem due to the diverse legal systems that exist throughout the Western Hemisphere. The legal systems of the majority of nations in the Western Hemisphere are based on civil law[201] which resolves legal problems based on philosophical foundations quite different from common law nations like the United States and Canada.[202] These different approaches to the law can lead to very different interpretations or applications of the same rule of origin.[203] This was not a difficult obstacle for NAFTA negotiators to overcome, but the problems easily could multiply as the FTAA adds thirty-one additional partners to the mix. At the very least, it is a problem that must be anticipated and for which solutions should be explored.

Finally, and most importantly, there exists a simple problem of incompatibility between existing regional trade agreements. The two largest regional trade agreements in the Western Hemisphere are NAFTA and MERCOSUR.[204] While NAFTA is a

199. LEE E. PRESTON & DUANE WINDSOR, THE RULES OF THE GAME IN THE GLOBAL ECONOMY 97–98 (2d ed. 1997).

200. *See* O'Hop, *supra* note 8, at 159–61.

201. JOHN HENRY MERRYMAN, ET AL., THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEM OF WESTERN EUROPE AND LATIN AMERICA 5 (1994).

202. Harry W. Jones, *Our Uncommon Common Law,* 42 TENN. L. REV. 443, 448 (1975).

203. *See generally* MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 16 (2d ed. 1994) (suggesting that interpretation and application of the law can lead to different outcomes based upon more than just legal history, but upon other factors such as the culture that creates the law, the language that expresses it and the approach from which it is addressed). O'Hop, *supra* note 8, at 163–64 ("Even among the civil law states, there is considerable diversity in the origin and content of their respective civil codes. This diversity is further reflected in the manner in which the harmonization of laws agreed to pursuant to international conventions becomes effective under domestic law.").

204. Bruner, *supra* note 7, at 28. MERCOSUR is the common market for the Southern Cone established between Argentina, Brazil, Paraguay and

free trade agreement, which allows each of its members to establish their own unique tariffs for imported goods, MERCOSUR is a customs union, the defining characteristic of which is an agreement by all members to charge identical tariffs for each imported good.[205] Of the two forms of regional trade agreement, the customs union is much more difficult to achieve because of the political and special interest obstacles the member nations must overcome to coordinate a single common external tariff on all products entering the territory encompassed by the customs union.[206] NAFTA and MERCOSUR cannot be merged without changing the essential characteristics that make each agreement unique — characteristics that were presumably quite important in the negotiation process that produced each agreement. NAFTA could seek to become a customs union like MERCOSUR and establish a common external tariff,[207] but GATT rules would require Mexico and Canada to lower their import duties to the lower amount already in place in the United States.[208] Canada and Mexico might, of course, be reluctant to do so, but the greater problem is that the same GATT rule would oblige all members of any union between NAFTA and MERCOSUR similarly to lower external tariff rates to the 3.5% established by the United States.[209] Except for computers and telecommunications equipment, MERCOSUR has estab-

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Uruguay. The common market provides for the free movement of goods, services and factors of production between the member nations. Additionally, a common external tariff is adopted and macroeconomic policies are coordinated. *See generally* Treaty of Asuncion, Southern Common Market Agreement ("MERCOSUR"), Mar. 26, 1991, *available at* http://www.sice.oas.org/trade/mrcsr/mrcsrtoc.asp.

205. Bruner, *supra* note 7, at 28; Gantz, *supra* note 16, at 402.

206. *See* Gantz, *supra* note 16, at 402 (internal citations omitted).

207. A customs union like MERCOSUR would still make use of rules of origin although to a much more limited extent than a free trade area, so a merger between NAFTA and MERCOSUR would still not resolve the problem inherent in agreeing upon a common set of rules. Silveira, *supra* note 182, at 421–22, 430, 453.

208. General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXIV(2)(b), 61 Stat. A-3, 55 U.N.T.S. 187. GATT Article XXIV(5)(b), provides that whenever a regional trade agreement like a customs union is formed, the "duties and other regulations of commerce maintained in each of the constituent territories…shall not be higher or more restrictive" than those existing prior to formation of the customs union. *Id.*

209. McClintock, *supra* note 2, at 47 (internal citations omitted).

lished a common external tariff of 20% for all foreign imports.[210] Due to its economic impact, it is highly doubtful that members of MERCOSUR would agree to lower their existing common external tariff by 16.5%.

Given the incredible number of problems involved in negotiating an FTAA, it is not surprising that the Bush Administration, upon receiving Trade Promotion Authority, embarked on a race to negotiate as many free trade agreements as possible within a short period of time.[211] The haste with which the Bush Administration has initiated negotiating additional free trade pacts is, perhaps, an indication of the lack of confidence that it has with the FTAA process. It is also an indication that the Administration has not abandoned the "hub-and-spoke" strategy of establishing NAFTA–like rules as the hub of any free trade pact it negotiates.[212] Establishing as many trade agreements as possible with smaller segments of Latin America seems to be the only viable alternative for the United States both because the NAFTA rules of origin pose too great an obstacle to forging a viable FTAA, and because achieving a customs union encompassing the entire Western Hemisphere would be politically impossible.[213]

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210. *Id.* at 46–47.

211. As mentioned earlier, the Administration signed agreements with Chile, Singapore and Central America soon after having received authority, and it is currently negotiating or contemplating additional negotiations for similar free-trade agreements with the Dominican Republic, Morocco, Australia, Morocco, Panama, Bahrain, Thailand, Colombia, Peru, Bolivia, Ecuador and five Southern African Customs Union countries, which include Botswana, Lesotho, Namibia, South Africa and Swaziland. *Trade Scene: No Bore in 2004*, *supra* note 85. These, of course, are in addition to existing free trade agreements with Canada and Mexico (NAFTA), and Israel and Jordon. "The U.S. is now trying to hammer out free-trade deals with 14 countries….And as the [September, 2003 WTO Doha Round of talks in Cancún] broke down here, U.S. officials said that still more countries stepped forward to ask for bilateral trade deals." *Cancún: Victory for Whom?*, *supra* note 187, at A4.

212. FEINBERG, *supra* note 78, at 45 (1997). Some observers have referred to this strategy as "a virtual FTAA." Kristi Ellis, *Ambitious Agenda for FTAA*, WOMEN'S WEAR DAILY, Feb. 11, 2003 (quoting Professor Peter Morici at the University of Maryland School of Business for the proposition that the U.S. will continue to negotiate small trade agreements until they "finally get a virtual FTAA").

213. The failure of the WTO Doha Round of talks held in Cancún, Mexico in September 2003, foreshadows the difficulties that will be faced by FTAA supporters, and perhaps the ultimate fate of the FTAA itself will be abandonment

CONCLUSION

Negotiating and implementing rules and procedures for tracking the importation and exportation of products throughout the entire Western Hemisphere will not be an easy task. If the FTAA is ever to have a chance to succeed, not only must the nations of the Western Hemisphere overcome the obstacles of history, language and culture, but they also must dismantle and reconstruct institutional bureaucracies at the domestic level that, in part, have cemented existing rules and procedures. This latter challenge may very well be the greater of the two for the Partner Nations. Existing rules of origin, whether they are part of the NAFTA regime or belong to the more than two dozen other trade agreements already at work in the Americas, are not rules to be dismissed easily. These rules have been worked and reworked to achieve certain political and economic goals at both the domestic and international level. Surely, each of the hundreds, if not thousands, of provisions found within each of these agreements that may strike us as idiosyncratic or irrelevant has been forged by a very deliberate negotiation process involving great compromise and exhaustive political wrangling both at home and abroad. Any attempt at revising this complex set of relationships in order to integrate them into a larger and more complex hemispheric trade agreement will require greater political skill and greater compromise than the American nations have ever shared with one another.

Since the implementation of NAFTA in 1994, U.S. administrations have continued to pursue a hub-and-spoke strategy to spread NAFTA–like rules throughout the Hemisphere. How-

in favor of less complicated bilateral and regional trade agreements. The breakdown of talks in Cancún has even caused the Europeans, quintessential multilateralists, to reconsider their focus and ask whether pursuit of bilateral trade accords might now be in their best interest. Although the European Union is a party to several bilateral and regional trade pacts, it has not negotiated any such agreements since 1999, preferring to pursue a multilateral strategy through the WTO. Scott Miller, *Bilateral Deals on Trade Draw Opposition in EU*, WALL ST. J., Sept. 25, 2003, at A14. *See also Victory for Whom?*, *supra* note 187, at A4 ("The EU held off on new bilateral trade deals until the Doha round was completed, putting all its trade chips in the WTO process."). Not to be left out, China and Japan also continue to pursue trade agreements with smaller blocs of neighbors, adding to the evidence of a worldwide crisis of confidence in the ability of a large number of states to hammer out multilateral trade agreements. *Id.*

ever, the eight-year absence of fast track authority, now referred to as Trade Promotion Authority, made extending NAFTA via hub-and-spoke difficult, if not impossible, because during the eight year hiatus, Latin American countries established an ever more complex set of trading relationships among themselves and among other nations and trading blocs around the world.[214] Although the nations of the Western Hemisphere still desire access to the rich markets of the United States, the United States may no longer possess the leverage to dictate the terms of such access. The United States is realizing this as it proceeds with the FTAA negotiation process. Its reaction has been to pursue a parallel process of negotiating agreements with individual Latin American countries[215] to achieve through bilateral negotiations what it ultimately may not be able to achieve through multilateral negotiations.

The United States cannot have it both ways. It cannot seek hemispheric unity on the one hand, and on the other hand, a series of separate trade deals that only continue the balkanization of trade relationships within the region. It may be able to convince smaller segments of the Western Hemisphere to deal with it on it's NAFTA–like terms, but in the end it would only establish another layer of complexity over the already intricate set of trading relationships that exist throughout the Western Hemisphere.

214. For a brief discussion on the various trade pacts among Latin American states, see Curtiss & Atkinson, *supra* note 16, at 148.

215. *See, e.g.*, *Cancun: Victory for Whom?, supra* note 187 (stating the "U.S. is now trying to hammer out free-trade deals with 14 countries"). *See also* Elizabeth Becker & Larry Rohter, *supra* note 83 (discussing the trade pact between the U.S. and Chile); Patrick Courreges, *supra* note 85 (discussing CAFTA whose partners include Costa Rica, Nicaragua, Honduras, El Salvador and Guatemala). *Trade Scene: No Bore in 2004*, *supra* note 85 (noting that the Bush Administration is currently negotiating or contemplating free-trade agreements with the Dominican Republic, Australia, Morocco, Panama, Bahrain, Thailand, Colombia, Peru, Bolivia, Ecuador and the five Southern Africa Customs Union countries, which include Botswana, Lesotho, Namibia, South Africa and Swaziland).

The nations of the Western Hemisphere, including the United States, will achieve truly free trade only when they compromise their established concepts of trade, and this may include abandoning ties to specific provisions found within existing rules of origin. The thirty-four democracies of the Americas must agree to negotiate creatively and openly with each other if they are to make each other stronger. One can only hope that the nations eventually will reach this level of cooperation and trust as the FTAA negotiations proceed.