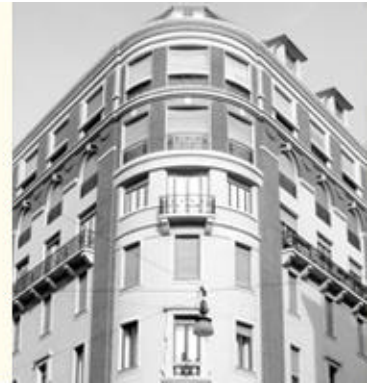




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ASSOCIAZIONE PROFESSIONALE



NOVEMBER 2006

**Licensing of industrial property
Keynotes on regional free trade areas**

Avv. Gianluca Pojaghi



European Union (EU)

Maastricht Treaty, 1993.

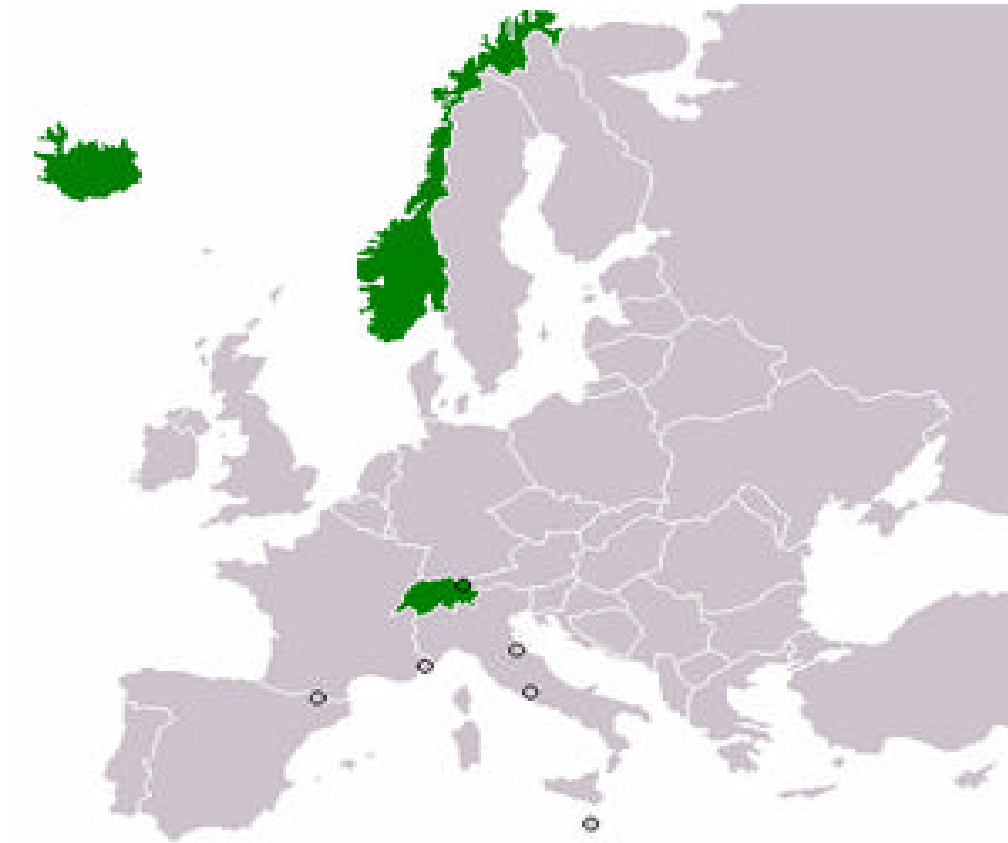
Free trade area, custom union, common market and economic and monetary union.

Initial provision of art. 28 of EU Treaty: “Quantitative restrictions on imports (art. 28 of EU Treaty) and exports (art. 29) and all measures having equivalent effect shall be prohibited between Member States.”, except (art. 30) when justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States”.

Followed by Court action and (among others) article 7. of Directive 89/104/CEE of December 21, 1988: Exhaustion of the rights conferred by a trade mark:

1. “The trade mark shall not entitle the proprietor to prohibit its use in relation to goods which have been put on the market in the Community under that trade mark by the proprietor or with his consent.
2. Paragraph 1 shall not apply where there exist legitimate reasons for the proprietor to oppose further commercialization of the goods, especially where the condition of the goods is changed or impaired after they have been put on the market”.

European Court of Justice: exhaustion compulsory, no choice.



European Free Trade Association (Efta)

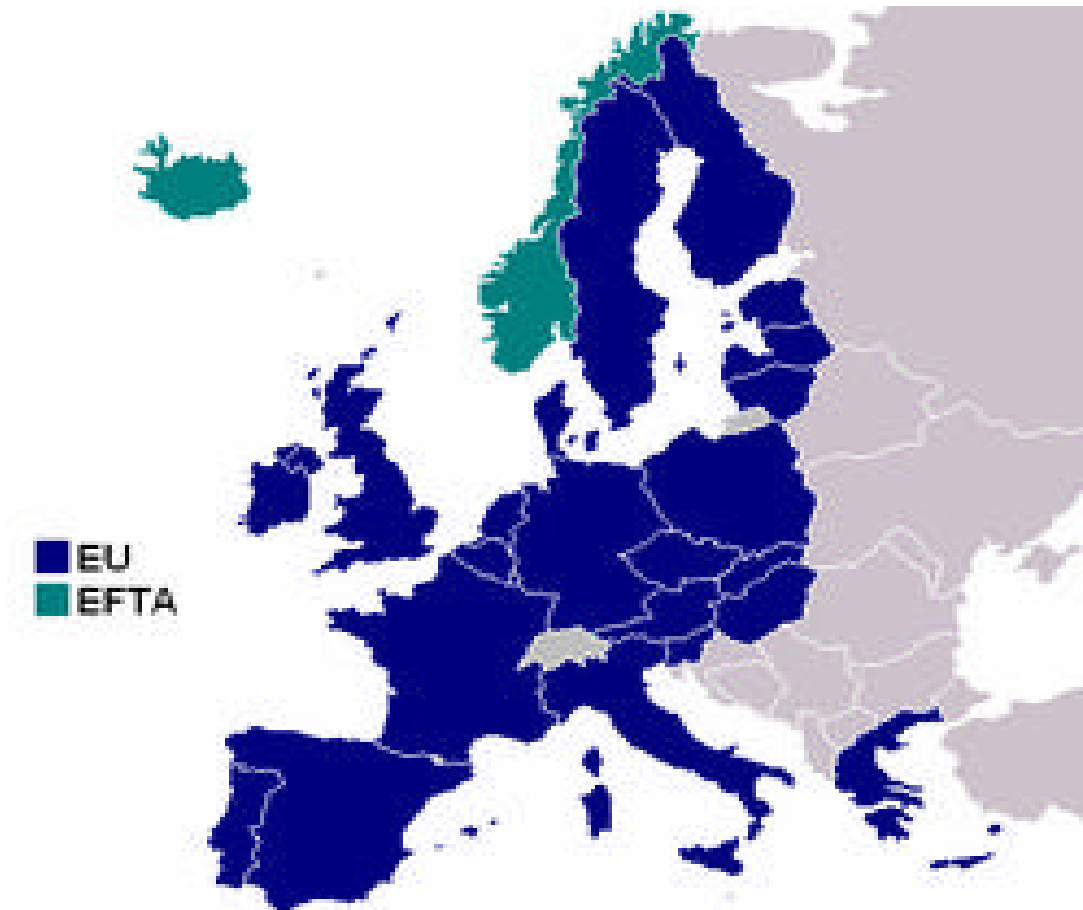
Stockholm Convention, 1960.

Iceland, Switzerland/Liechtenstein, Norway.

Free trade.

Originally alternative to European Community (UK, Denmark, Portugal, Austria, Sweden and Finland).

No specific competition or IP regulation.



European Economic Area (EEA)

Oporto Treaty, 1992.

EU + EFTA

Free trade area, free circulation of goods, persons, services and capitals, reduction of custom tariffs (art. 1/2).

Competition: Part IV (art. 53/57) of the Treaty, similar to articles 81 and following of the European Treaty

IP: Art. 65 “Protocol 28 and Annex XVII contain specific provisions and arrangements concerning intellectual, industrial and commercial property, which, unless otherwise specified, shall apply to all products and services”.

Annex XVII., art. 19: national treatment

“Members States shall accord to each other’s nationals treatment no less favorable than that they accord to their own nationals. Exemptions from this obligation must be in accordance with the substantive provision of Article 3 of the TRIPS Agreement”.

EFTA Court (Dec. 3, 1997-case no. E-2/97, Mag Instrument v. California Trading Company); EFTA Member States free to adopt exhaustion principle.



Asia Pacific Economic Cooperation (Apec)

First Apec Ministerial Meeting, 1989, Australia.

Free trade and investment area beginning in 2010 (for industrialized Countries) and 2020 (for developing Countries).

Sixth Apec Ministerial Meeting

6. "With respect to our objective of enhancing trade and investment in the Asia-Pacific, we agree to adopt the long-term goal of free and open trade and investment in the Asia-Pacific. This goal will be pursued promptly by further reducing barriers to trade and investment and by promoting the free flow of goods, services and capital among our economies. We will achieve this goal in a GATT-consistent manner and believe our actions will be a powerful impetus for further liberalization at the multilateral level to which we remain fully committed. We further agree to announce our commitment to complete the achievement of our goal of free and open trade and investment in the Asia-Pacific no later than the year 2020. The pace of implementation will take into account differing levels of economic development among APEC economies, with the industrialized economies achieving the goal of free and open trade and investment no later than the year 2010 and developing economies no later than the year 2020".

Competition: The Competition Policy and Deregulation Group (CPDG) enhances the region's competitive environment. The globalization of business has highlighted the importance of competition issues and the CPDG, under the guidance of the Committee on Trade and Investment, works to develop an understanding of regional competition laws and policies, examine the impact on trade and investment flows, as well as identify areas for technical cooperation among member economies.

IP: The Intellectual Property Rights Experts' Group (IPEG) is implementing a work program which aims to:

- deepen the dialogue on intellectual property policy;
- survey and exchange information on the current status of Intellectual Property Rights (IPR) protection and administrative systems;
- study measures for the effective enforcement of IPR;
- fully implement the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS);
- facilitate technical cooperation to implement TRIPS.



Association of South East Asian Nations (Asean)

Asean Declaration, 1967.

Bali Concord II, 2003.

- The Asean Declaration: the aims and purposes of the Association shall be “to accelerate the economic growth, social progress and cultural development in the region through joint endeavors in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South-East Asian Nations.

- ASEAN Vision: “to create a stable, prosperous and highly competitive ASEAN economic region in which there is a free flow of goods, services, investment and a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities in year 2020”.

2003: Cooperation agreement with China, which will lead to a market of 1.7 billion consumers.

Japan also signed agreement on reduction of tariff barriers.

Competition: no specific regulation.

IP: ASEAN Framework Agreement on Intellectual Property Cooperation,(1995).

1 “Member States shall strengthen their cooperation in the field of intellectual property through an open and outward looking attitude with a view to contributing to the promotion and growth of regional and global trade liberalization”.



Common Market for Eastern and Southern Africa (Comesa)

The Comesa Treaty, 1993.

Free trade area for goods and services produced within and removal of tariff (and non tariff) obstacles (as of October, 2000). Custom union with same external custom tariff (as of October, 2004). Free circulation of capitals and investments. Agreement on visas and establishing right to obtain free circulation of persons. Monetary union (as of 2025).

Competition: art. 55 of Treaty:

1. "The Member States agree that any practice which negates the objective of free and liberalized trade shall be prohibited. To this end, the Member States agree to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market.

2. The Council may declare the provisions of paragraph 1 of this Article inapplicable in the case of:

(a) any agreement or category thereof between undertakings;

(b) any decision by association of undertakings;

(c) any concerted practice or category thereof; which improves production or distribution of goods or promotes technical or economic progress and has the effect of enabling consumers a fair share of the benefits;

Provided that the agreement, decision or practice does not impose on the undertaking restrictions inconsistent with the attainment of the objectives of this Treaty or has the effect of eliminating competition.

3. The Council shall make regulations to regulate competition within the Member States”.

IP: no specific regulation.



Southern African Customs Union (SACU)

The Sacu Treaty, 1969, renegotiated in 2002 (effective 2004).

Free trade area for goods and custom union. Abolition of internal tariffs and adoption of common external policy and tariff.

Article 2: Objectives: “The objectives of this Agreement are:

- (a) to facilitate the cross-border movement of goods between the territories of the Member States;
- (b) to create effective, transparent and democratic institutions which will ensure equitable trade benefits to Member States;
- (c) to promote conditions of fair competition in the Common Customs Area;
- (d) to substantially increase investment opportunities in the Common Customs Area;
- (e) to enhance the economic development, diversification, industrialization and competitiveness of Member States;
- (f) to promote the integration of Member States into the global economy through enhanced trade and investment;
- (g) to facilitate the equitable sharing of revenue arising from customs, excise and additional duties levied by Member States; and
- (h) to facilitate the development of common policies and strategies”

Competition: Article 40: Competition Policy

1. “Member States agree that there shall be competition policies in each Member State.

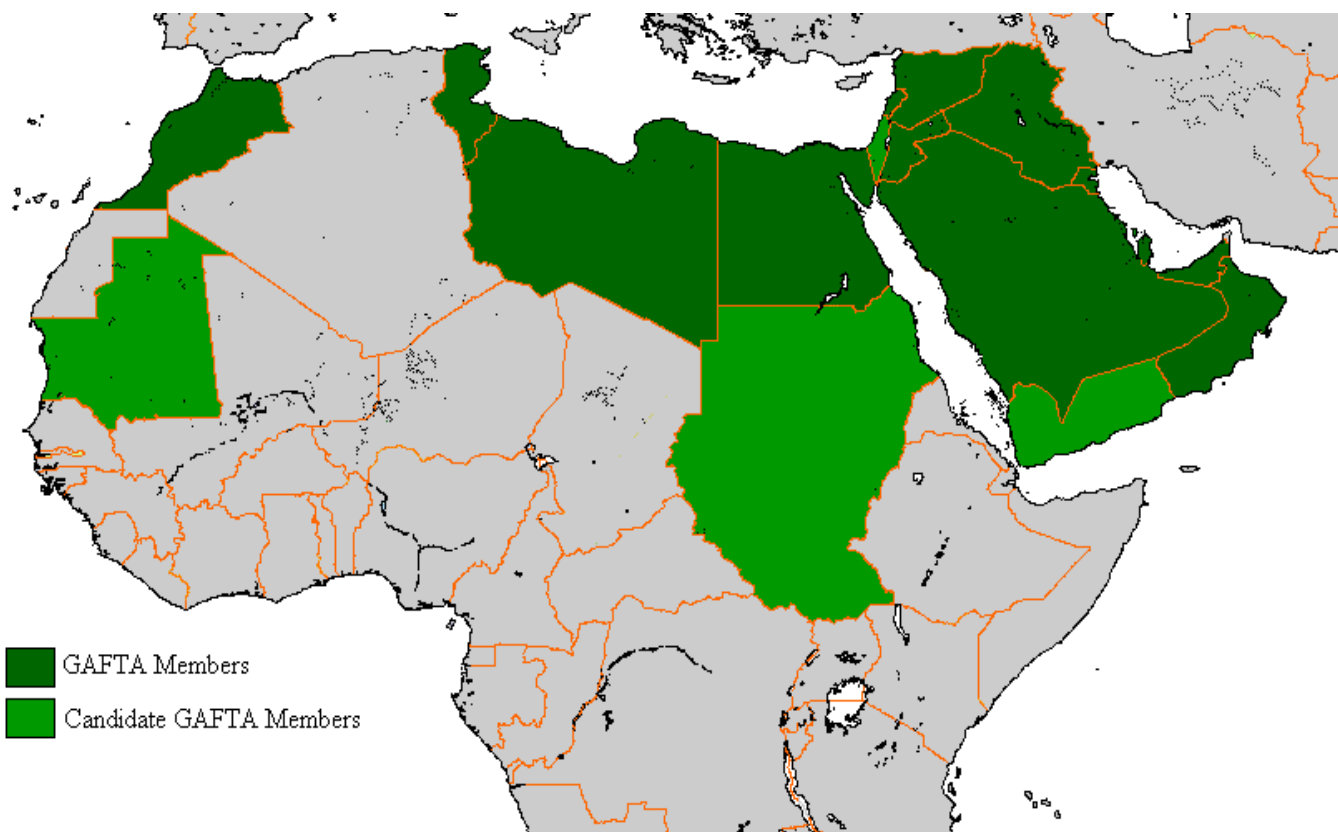
2. Member States shall co-operate with each other with respect to the enforcement of competition laws and regulations”.

IP: Import or exports limitations foreseen: Article 18:

1. “Goods grown, produced or manufactured in the Common Customs Area, on importation from the area of one Member State tot the area of another Member State, shall be free of customs duties and quantitative restrictions, except as provided elsewhere in this Agreement.

2. Notwithstanding the provisions of paragraph 1 above, Member States shall have the right to impose restrictions on imports or exports in accordance with national laws and regulations for the protection of:

- (a) health of humans, animals or plants;
- (b) the environment;
- (c) treasures of artistic, historic or archeological value;
- (d) public morals;
- (e) intellectual property rights;
- (f) national security; and
- (g) exhaustible natural resources”.



Great Arab Free Trade Area (GAFTA)

Foreseen first in 1997 by the Economic and Social Council of the Arab League.

Goals:

- to decrease the customs on local production, and to make an Arab Free Zone for Exports and Imports within members;
- to boost the economies of the member countries in several ways;
- to attract more foreign direct investments (regional, European and international);
- to increase trade between the member countries;
- to reduce the flow of smuggled goods which are not taxed and often hurt local productions as well as the balance of payments;
- to strengthen the member countries' negotiating power when dealing with powerful economic blocs such as the EU or in international arenas such as WTO meetings (so far, 6 Arab countries are members of WTO: Morocco, Tunisia, Egypt, Jordan, Oman and Kuwait);
- to increase economic interdependence between Arab countries and thus hopefully, increasing the region's stability and security.

No specific competition or IP regulation.



FIGURE 2.8
The Countries of the
North American Free
Trade Association
(NAFTA).

North American Free Trade Agreement (Nafta)

The Nafta Agreement, 1994, modeled on the free commerce agreement between the US and Canada (1989), to include Mexico.

Goals: barrier elimination to facilitate exchange of goods and services (no persons)

Article 102: Objectives:

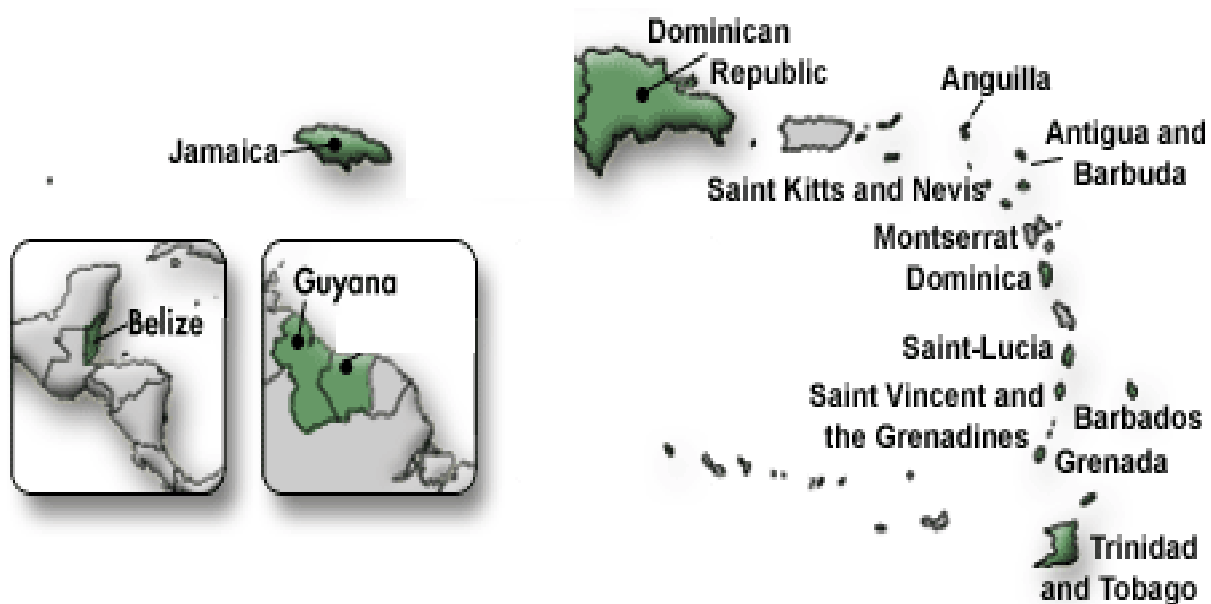
1. "The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:
 - a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the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

Competition: Article 1501: Competition Law:

1. Each Party shall adopt or maintain measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto, recognizing that such measures will enhance the fulfillment of the objectives of this Agreement. To this end the Parties shall consult from time to time about the effectiveness of measures undertaken by each Party.
2. Each Party recognizes the importance of cooperation and coordination among their authorities to further effective competition law enforcement in the free trade area. The Parties shall cooperate on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area.
3. No Party may have recourse to dispute settlement under this Agreement for any matter arising under this Article.

IP: Article 1703: National Treatment:

1. "Each Party shall accord to nationals of another Party treatment no less favorable than that it accords to its own nationals with regard to the protection and enforcement of all intellectual property rights. In respect of sound recordings, each Party shall provide such treatment to producers and performers of another Party, except that a Party may limit rights of performers of another Party in respect of secondary uses of sound recordings to those rights its nationals are accorded in the territory of such other Party.



Caribbean Community(Caricom)

Treaty of Chaguaramas, 1973.

Free area of circulation of persons, capitals and goods.

Goals: institution of a common market by harmonizing external tariffs fiscal incentives and foreign policies.

Competition: Protocol VIII: Competition Policy, Consumer Protection, Dumping and Subsidies , 2000, to:

- indicate anticompetitive business conducts;
- establish a controlling commission.

IP: no specific regulation.



Central American Common Market (CACM)

General Treaty On Central American Economic Integration, 1960.

Goals (Tegucigalpa Protocol, 1991):

- to establish an economic union;
- to strengthen the Centro American financial centre;
- to strengthen the region and insert it successfully as an economic block in the international economy;
- to promote economic, social, cultural and political development.

Goals (Managua Accord, 1993):

- to perfect a free trade area (aiming at economic union);
- to study needs for removal of tariff and non tariff barriers;
- to develop and harmonize the legal frame for IP protection.

No specific competition or IP regulation.



Asociación Latino-americana de Integración (Aladi)

Montevideo Treaty, 1980.

Preceded by the Association Latino Americana del Libre Comercio (ALALC), Treaty of Montevideo, 1960.

Chapter I: Objectives, duties and principles

Article 1: "By the present Treaty the Contracting Parties pursue the integration process leading to promote the harmonious and balanced socio-economic development of the region, and to that effect they hereby institute the Latin American Integration Association (hereafter referred to as the "Association"), with headquarters in the city of Montevideo, Eastern Republic of Uruguay.

The long-term objective of such process shall be the gradual and progressive establishment of a Latin American common market.

Article 2: The rules and mechanisms of the present Treaty, as well as those which may be established within its framework by member countries, shall have as their purpose the performance of the following basic duties of the Association: promotion and regulation of reciprocal trade, economic complementation, and development of economic cooperation actions encouraging market expansion.

Article 3: In the implementation of the present Treaty and the evolution towards its final objective, member countries shall bear in mind the following principles:

- Pluralism, sustained by the will of member countries to integrate themselves, over and above the diversity which might exist in political and economic matters in the region;
- Convergence, meaning progressive multilateralization of partial scope agreements by means of periodical negotiations between member countries, with a view to establish the Latin American common market;
- Flexibility, characterized by the capacity to allow the conclusion of partial scope agreements, ruled in a form consistent with the progressive attainment of their convergence and the strengthening of integration ties;
- Differential treatments, as determined in each case, both in regional and partial scope mechanisms, on the basis of three categories of countries, which will be set up taking into account their economic-structural characteristics. Such treatments shall be applied in a determined scale to intermediate developed countries, and in a more favorable manner to countries at a relatively less advanced stage of economic development; and
- Multiple, to make possible various forms of agreements between member countries, following the objectives and duties of the integration process, using all instruments capable of activating and expanding markets at regional level”.

Competition: no specific regulation.

IP: several bilateral or multilateral agreements, some affirming the principle of national treatment:

- Bolivia-Mexico

Artículo 16-04:Trato nacional

1. “Cada Parte otorgará a los nacionales de la otra Parte, trato no menos favorable del que conceda a sus nacionales en materia de protección y defensa de todos los derechos de propiedad intelectual, a reserva de las excepciones ya previstas en la Convención de Roma, el Convenio de Berna y el Convenio de París”.

-Chile-Mexico

Artículo 15-04:Trato nacional

1. “Cada Parte otorgará a los nacionales de la otra Parte un trato no menos favorable que el que otorgue a sus nacionales con respecto a la protección y defensa de los derechos de propiedad intelectual referidos en este capítulo, a reserva de las excepciones ya previstas en, respectivamente, el Convenio de París, el Convenio de Berna, la Convención de Roma y el Convenio de Ginebra”.



Andean Community

Cartagena Agreement, 1969.

Venezuela no longer a member Country of the Agreement

Free exchange area for goods, capitals and workers. Common external tariff. Will to create a common Latin American Market.

Article 1. “The objectives of this Agreement are to promote the balanced and harmonious development of the Member Countries under equitable conditions, through integration and economic and social cooperation; to accelerate their growth and the rate of creation of employment; and to facilitate their participation in the regional integration process, looking ahead toward the gradual formation of a Latin American Common Market”.

Competition:

Decision 283: Rules for preventing or correcting distortions in competition caused by dumping or subsidy practices;

Decision 284 Rules and regulations for preventing or correcting distortions in competition caused by restrictions on exports;

Decision 285 Rules and regulations for preventing or correcting distortions in competition caused by practices that restrict free competition (see also art. 82 and 82 of the EU Treaty): “Practices restricting free competition are understood to mean agreements, parallel behaviors or collusion between

enterprises that restrict, impede or distort competition or that could do so. For purposes of this Decision, the abusive exploitation by one or several enterprises of their dominant position in the market, is also considered a practice that restricts free competition.

IP: Decision 486 Common Intellectual Property Regime

Article 1. On National Treatment: "Each Member Country shall accord the nationals of other members of the Andean Community, the World Trade Organization, and the Paris Convention for the Protection of Industrial Property, treatment no less favorable than it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in articles 3 and 5 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and in article 2 of the Paris Convention for the Protection of Industrial Property".



Mercado Común do Sul (Mercosur)

Asunción Treaty, 1991.

Países integrantes and Países Asociados.

Very ambitious program, aiming at:

- Free circulation of goods, services and productive factors
- abolition of internal custom tariffs
- establishment of common external tariff
- common commercial policy
- coordination of macroeconomic policies
- adoption of targeted agreements
- creation of a permanent mechanism of consultation and information between member states

h) a remarkable intergovernmental institutional network:

- Common Market Council (Consejo del Mercado Comum),
- Common Market Group (Grupo Mercado Comum),
- Market Commission (Comissao de Comércio do Mercosul),
- Joint Parliamentary Committee (Commisto Parlamentar Consunta),
- Consulting Economic and Social Forum (Centro Mercosul de Promocao do Estrado de direito),
- Consulting Secretariat (Secretaria do Mercosul).

CAPÍTULO I

Propósito, Principios e Instrumentos

ARTIGO 1: “Os Estados Partes decidem constituir um Mercado Comum, que deverá estar estabelecido a 31 de dezembro de 1994, e que se denominará Mercado Comum do Sul (MERCOSUL).

Este Mercado Comum implica:

A livre circulação de bens serviços e fatores produtivos entre os países, através, entre outros, da eliminação dos direitos alfandegários e restrições não-tarifárias á circulação de mercadorias e de qualquer outra medida de efeito equivalente;

O estabelecimento de uma tarifa externa comum e a adoção de uma política comercial comum em relação a terceiros Estados ou agrupamentos de Estados e a coordenação de posições em foros econômico-comerciais regionais e internacionais;

A coordenação de políticas macroeconômicas e setoriais entre os Estados Partes - de comércio exterior, agrícola, industrial, fiscal, monetária, cambial e de capitais, de serviços, alfandegária, de transportes e comunicações e outras que se acordem, a fim de assegurar condições adequadas de concorrência entre os Estados Partes; e

O compromisso dos Estados Partes de harmonizar suas legislações, nas áreas pertinentes, para lograr o fortalecimento do processo de integração”.

Competition: art. 4 Tratado de Asuncion, obliging member states to inhibit imports at prices influenced by subsidies, dumping or anticompetitive business conducts.

Competition defense Protocol (1996):

Art. 4. “Constituem infração as normas do presente Protocolo, independentemente de culpa, os atos, individuais ou concertados, sob qualquer forma manifestados, que tenham por objeto ou efeito limitar, restringir, falsear ou distorcer a concorrência ou o acesso ao mercado ou que constituam abuso de posição dominante no mercado relevante de bens ou serviços no âmbito do MERCOSUL e que afetem o comércio entre os Estados Partes”.

Art 7. “Os Estados Partes adotarão, para fins de incorporação a normativa do MERCOSUL e dentro do prazo de 2 anos, normas comuns para o controle dos atos e contratos, sob qualquer forma manifestados, que possam limitar ou de qualquer forma prejudicar a livre concorrência ou resultar na dominação de mercado regional relevante de bens e serviços, inclusive aqueles que resultem em concentração econômica, com vistas a prevenir os seus possíveis efeitos anti competitivos no âmbito do Mercosul”.

IP: “Harmonizacao de normas sobre propriedade intelectual no mercosul, em materia de marcas, indicacoes de procedencia e denominacoes de origem”, 1995: Art. 3 Trattamento Nacional: “Cada Estrado Parte concederá aos nacionais dos demais Estados Partes um tratamento nao menos favorável ao que concede a seus próprios nacionais quanto à protecao e exercicio dos direitos de propriedade intelectual em materai de marcas, indicacoes de procedencia e denominacoes de origem”.

Finally, in 2004, Mercosur ad Andean Community Member States have signed the Declaration of Cusco, establishing the **Comunidad Sudamericana de Naciones (CSN)**, the objectives of which are:

- a) the creation of a free market area;
- b) the abolition of all internal custom tariffs by 2014;
- c) the abolition of all internal custom tariffs for dangerous goods (arms, explosives) by 2019;

- d) the establishment of common Parliament, currency and passport by 2019;
- e) the coordination of policies in agricultural, diplomatic, energetic, scientific, cultural and social fields.