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Trade and Economic Arrangements Between India and South East Asia in the Context of Regional Construction and Globalisation

Laurence HENRY

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LIST OF ACRONYMS

AB	(WTO) Appellate Body
ADB	Asian Development Bank
AFTA	ASEAN Free Trade Agreement
AIA	ASEAN Investment Zone
AMBDC	ASEAN Mekong Basin Development Cooperation
APEC	Asia-Pacific Economic Cooperation
ARF	ASEAN Regional Forum
ACT	ASEAN Consultation to Solve Trade and Investment Issues
AEM	ASEAN Economic Ministers
AIPs	ASEAN Industrial Projects Scheme
ASEAN	Association of South-East Asian Nations
ASEM	Asia-Europe Meeting
ASSOCHAM	(Indian) Association of Chambers of Commerce
BIMST-EC	Bay of Bengal Initiative for Multi-Sectoral Economic Cooperation
CCI	Chamber of Commerce and Industry
CECA	Comprehensive Economic Cooperation Agreement
CII	Confederation of Indian Industries
CMLV	Cambodia, Myanmar, Laos and Vietnam
CRTA	(WTO) Committee on Regional Trade Agreements
DSM	Dispute Settlement Mechanisms
EHP	Early Harvest Programme
ESCAP	Economic and Social Commission for Asia and the Pacific
EU	European Union
FDI	Foreign Direct Investment
FICCI	Federation of Indian Chambers of Commerce and Industries
FIEO	Federation of Indian Exporters Organisations
FOB	Freight on Board
FTA	Free Trade Agreement
FTZ	Free Trade Zone
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariff on Trade
GMS	Greater Mekong Sub-region

ICSID	International Centre for Settlement of Investment Dispute
LDC	Least Developed Countries
MFN	Most Favoured Nation
MM	Ministerial Meetings
NAFTA	North America Free Trade Area/Agreement
NAM	Non-Aligned Movement
PRC	People's Republic of China
ROO	Rules of Origin
RTA	Regional Trade Agreement
SAARC	South Asia Association on Regional Cooperation
SAFTA	South Asia Free Trade Agreement
SAPTA	South Asia Preferential Agreement
SDT	Special and Differential Treatment
SEOM	Senior Economic Officials Meeting
SOM	Senior Officials Meetings
SPS	Sanitary and Phytosanitary Measures
STEOM	Senior Trade/Economic Officials Meetings
TAC	Treaty of Amity and Cooperation
TBT	Technical Barriers to Trade
TNC	Trade Negotiating Committee
TRIPS	Intellectual Property
TSF	(BIMST-EC) Technical Support Facility
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organization
WTO DSU	WTO Dispute Settlement Understanding

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INTRODUCTION

The development of trade and economic arrangements between India and South-East Asia must be rooted within the larger processes of economic and diplomatic exchanges in Asia. The existence of regional organizations is not a new phenomenon but their success has been more or less conclusive. India's experiments at regional cooperation through SAARC (South Asian Association for Regional Cooperation)[1], have been rather disappointing because of conflicting political equations among members. On the other hand, ASEAN (Association of South-East Asian Nations) a successful model of regional cooperation started its revolutionary growth in the 1990's, thanks to the creation of AFTA (ASEAN Free Trade Agreement, 1992) and the 1997-1998 financial and economic crisis in the region. In East Asia, the regional process had first been driven by the private sector, but the crisis acted as a catalyst for more State-governed cooperation. Moreover, the drive towards regionalism[2] in Asia is a consequence of the reconfiguration of the world order, in terms of military and economic security. Nevertheless, earlier modes of regional cooperation, hangovers of pre-colonial times and ententes such as the Non-Aligned Movement still remain in place and are peculiar to Asian international relations. Presently, a new regional process that is evolving is the East Asia Summit.[3]

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[1] SAARC was established on 8 December 1985 by Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. In April 1993, they signed the South Asia Preferential Agreement (SAPTA) and later the South Asia Free Trade Agreement (SAFTA) on 6 January 2004.

[2] F. Nicolas, distinguishes regionalisation, regional process driven by the market and regionalism, which is supported by states: in "Les perspectives d'intégration économique en Asie de l'Est sous l'influence de la Chine", 2005, ‹www.reseau-asie.com›, p. 1.

[3] Kuala Lumpur Declaration on the First East Asia Summit, 14 December 2005, bringing together the Heads of State/Government of the Member Countries of the Association of South-East Asian Nations (ASEAN), Australia, People's Republic of China, Republic of India, Japan, Republic of Korea and New Zealand, available on ‹meaindia.nic.in›, visited on 03/03/2006.

This new grouping is attempting to put its own imprint on Asia without undue influence by Western powers, as was the case after the Second World War[4] and, on the contrary, has now the tools to influence international institutions, the actors and the law of the forthcoming world order. The formation of European construction has its roots in the Western constitutional model of State, based on the principle of the separation of powers and on the protection of public liberties values. It has been influenced by functional and federalist approaches of integration. The East Asian regionalism process is based on classical political and economic cooperation. This organization remains a celebration of State sovereignty, based on the lack of political transfers of competence to common authorities and respecting the principle of non-interference in the internal affairs of member-States. These State-based regional relations could well be challenged by international and transnational forces. Nevertheless, the Asian elites are rather well adapted to the challenges of technological modernity and globalisation.

Contrary to the founding of the European Community, the East Asian Community is about to be built on a much more insecure and shifting political, economic and social environment. For instance, the strength of the Franco-German leadership of the European Union has been an accepted fact, while it will be much more difficult to find an acceptable check and balance within the East Asian region. One of the major reasons for the evolution of the ASEAN-India entente is the perceived hegemony of China in Asia. South-East Asian States (as well as Japan, the United States or even Russia) are very interested in balancing Chinese power by India in the region. The People's Republic of China (PRC) is gradually taking a bigger place on the world scene, economically and military speaking. Since the Asian crisis and the Chinese entry to WTO (World Trade Organization), its capacity to trade and to attract FDI (Foreign Direct Investment) has indeed increased

[4] P. Isoart, "Le régionalisme en Asie du Sud-Est", *Régionalisme et universalisme dans le droit international contemporain*, Colloque SFDI de Bordeaux, 1977, Pedone, Paris, pp. 80-93.

considerably.[5] The development of the relations between India and South-East and East Asia is also now encouraged by Japan, which has long been a fierce opponent of regional construction. In this context, New Delhi has taken the opportunity to develop its trade and to adopt a more liberal trade and economic system, especially in collaboration with its South-Eastern neighbours. These days, South-East Asian countries and ASEAN consider being a hub between North-East Asian economies and India. Thus, integration in the region is at its first step, but it provides for the emerging structure of the creation of an East Asia trade block. To that respect, ASEAN will certainly go faster and deeper than its neighbours and it is the only Asian Organization that envisages creating a single market and production base by 2020. It is clear that if the WTO, Doha Agenda negotiations fail or are delayed, then the number of trade agreements within and with East Asian States will grow significantly. Thus, economic and legal integration is likely to be infinitely variable.

The association between India and South-East Asia, in particular ASEAN and its member-States reflects the overall tendencies of the emerging regional infrastructure of East Asia. It is based on an outburst of economic and trade agreements, which set-up economic cooperation and preferential and/or free trade zones. There are two parallel evolutions in this domain, a kind of pick and choose policy (also called forum shopping policy) with the development of similar arrangements and groupings, on one hand, and a lot of convergences between the bilateral, regional and world structures, on the other hand. After the presentation of the different arrangements and groupings involved between India and South-East Asia, the multi-faceted relations between them is asked in institutional terms, but also in normative terms of complementarities, competition and dialogue.

[5] FDI Tables: See Appendix 1: “ASEAN and Indian Foreign Direct Investments”.

Table 1: Comparative membership

	Mekong-Ganga Coopera-tion	**BIMST-EC**	**India-ASEAN special treatment**	**Economic/ Trade Bilateral agreement with India**	**WTO**
Brunei					X
Cambodia	X		X		X
Indonesia				Under negotiation	X
Laos	X		X		Accession procedure
Malaysia				Under negotiation	X
Myanmar	X	X	X		X
Philippines					X
Singapore				X 2005	X
Thailand	X	X		X 2003	X
Vietnam	X		X	In discussion	X
Others (South Asian States)		Bangladesh, Sri Lanka, Bhutan, Nepal		Bangladesh, Sri Lanka, Bhutan, Nepal	Bangladesh, Sri Lanka, Nepal. Bhutan under accession procedure

TRADE AND ECONOMIC ARRANGEMENTS AND GROUPINGS BETWEEN INDIA AND SOUTH-EAST ASIA: AN OVERALL PRESENTATION

South-East Asian States and ASEAN first developed their external policy with a view towards North-East Asia but has now turned towards India. After having studied the two main poles of this new relationship, that is ASEAN on one hand and India on the other, it is necessary to examine their trade and economic relationship and, finally take a look on the new regional groupings, especially in context of changes in the world market, firstly driven by GATT/ WTO. Even if the latter has been more oriented towards economic cooperation since the 1990s, the creation of WTO and trade liberalization is the core of international economic relations.

ASEAN's (Association of South East-Asian Nations) Evolution

Being the driving force of economic and trade liberalization and cooperation in the region, ASEAN's evolution is likely to be a model for the region. At its inception, ASEAN was a political and economic Organisation, but not very effective for the initial 10 years. The Association came into force with the Bangkok Declaration, 1967, adopted by the five original members Indonesia, Malaysia, Philippines, Singapore, Thailand, known as the "ASEAN-5". It only provided for general principles and aims related to social and economic stability, and also political independence for the nations, and laid down a basic institutional framework.[6] The first significant evolution came about in 1976 with the signature of the Treaty of Amity and Cooperation (TAC, 1976) and the adoption of the

[6] Bangkok Declaration, Bangkok, 8 August 1967, adopted by the Foreign Affairs Ministers of Indonesia, Malaysia, Philippines, Singapore and Thailand, ‹www.asean.sec.org›. In the forthcoming pages, all ASEAN references (itself or agreements and declarations with its partners) come from this website, if not mentioned otherwise.

Declaration of ASEAN Concord in Bali. The former is the first binding instrument adopted within the Association framework. Its principles and objectives are rather diverse but it provides for cooperation in the economic, social, technical, scientific and administrative fields. It nevertheless offers a kind of political code of conduct with member-States and between the Association and its Dialogue Partners which have all signed it.[7] The most important and innovative chapter relates to the mechanisms in place for peaceful settlement of disputes, which have, however, never been used so far. From an economic perspective, the Declaration of Concord further adds cooperation in the food and energy domains, industry, trade, and international economic environment. For the first time, a system for economic cooperation has also been provided, which is a set of recommendations, reviews of coordination and implementation of ASEAN programmes or projects, and exchanges of view.[8]

A preferential trade agreement was signed the following year, in 1977, on a product-by-product basis. Each member could propose which products it wanted to give preferential tariffs or to exclude through the use of the "sensitive products list". This agreement gave the illusion of real progress for the region, but it was actually a deception because of the lack of efficient implementation. For example, among the thousands of goods benefiting from a preferential tariff granted from Indonesia, only nine were really imported.[9] Nevertheless, on a typical neo-functionalist perspective, it was considered that such a scheme could have a spill-over effect on cooperation in other fields. Other instruments were also

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[7] ASEAN has a comprehensive dialogue on economic and security issues with its main international partners. ASEAN's Full Dialogue Partners are Australia, Canada, China, India, the European Union, Japan, Republic of Korea, New Zealand, the Russian Federation, the United States of America, and the United Nations Development Programme (UNDP) : See, S. Pushpanathan, Head of External Relations, ASEAN Secretariat, "ASEAN's Strategy towards its Dialogue Partners and ASEAN plus Three process", *ASEAN COCI Seminar on ASEAN new issues and challenges*, Hanoi, 3-4 November 2003, www.aseansec.org/15397.htm.

[8] Declaration of ASEAN Concord, Indonesia, 24 February 1976, Part B.

[9] S. Boissseau du Rocher, *L'ASEAN et la construction régionale en Asie du Sud-Est*, Paris, L'Harmattan, 1998, pp. 256-257.

considered by the 1977 Treaty, such as SWAPS agreements,[10] which is quite important from a financial cooperation point of view, and for the liberalization of non-tariff barriers.[11] Finally, private sector involvement started in 1972 with the creation of the ASEAN Chamber of Commerce, but the ASEAN Industrial Projects Scheme (AIPs) envisaged in 1976 generally failed because it was not adapted to the private sector's will.[12]

In 1992, ASEAN member-States signed the ASEAN Free Trade Area agreement (AFTA), based on a mechanism of progressive reduction of custom tariffs of goods and of agriculture products, which were added in 1993, according to the Common Effective Tariff Scheme. AFTA has been in force since 1st January 2002 (instead of 2008 as envisaged originally), but without significant trade generation due to it. Even though, new ways of protectionism have come up, member-States are more dependent on world trade in general and regularly use the sensitive products list to refuse trade liberalization on numerous items.[13] In 1998, the Hanoi Summit launched the ASEAN Investment Zone (AIA), based on the principle of granting national treatment[14] to ASEAN investors (2010) and even to foreign investors (2020). Nevertheless, once again, the scheme has too many exceptions to be really efficient.[15]

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[10] Agreements on Swaps of currencies and exchange rates. Swap is an exchange of financial assets or flows between two entities during a certain period of time.

[11] S. Boissseau du Rocher, *L'ASEAN et la construction régionale en Asie du Sud-Est*, *op. cit.*, pp. 258-259.

[12] Lay Hong Tan, "Will ASEAN Economic Integration Progress Beyond a Free Trade Area?", *ICLQ*, 2004, p. 936.

[13] E. Teo Chu Cheow, "L'ASEAN entre élargissement et marginalisation", *Politique Etrangère*, 2003, p. 141.

[14] The principle of giving others the same treatment as one's own nationals: It requires that imports be treated no less favourably than the same or similar domestically-produced goods once they have passed customs: www.wto.org.

[15] S. Boisseau du Rocher, "L'ASEAN pourra-t-elle sortir des turbulences?", available on <www.reseau-asie.com>, 2003, p. 7.

After the first expansion which brought Brunei on board on 8th January 1984 (Brunei and ASEAN founding members are sometimes called the 'ASEAN-6'), at the end of the 1990s, ASEAN took a historical decision by admitting Myanmar and the the so-called CMLV countries (Cambodia, Myanmar, Laos and Vietnam).[16] It was considered historical to reconcile the South-East Asian region as a whole, and bring the border closer to China and India, so as to say. However, this integration was not really prepared, neither politically, nor economically. ASEAN-6 could be considered an economic and strategic model for these transitional economies, but not much was concretely done to help them.[17] For the newcomers, ASEAN has been a major economic opportunity, but they joined the Association during the financial crisis that swept the region at the end of the 1990s.

Almost as if it was a premonition, the first ASEAN Finance Ministers' Meeting was held in March 1997, just before the crisis hit the region. Besides the deception generated in the absence of satisfactory help from the United States, IMF (International Monetary Fund) and APEC (Asia Pacific Economic Cooperation forum)[18], ASEAN itself was not well-equipped to handle the financial crisis. The 'ASEAN way' of non-interference in internal affairs and lack of appropriate institutions was seriously criticized. During the following Informal Summit in Kuala Lumpur in 1997, ASEAN members adopted the ASEAN Vision 2020 and the Hanoi Plan of Action, in order to "*implement initiatives to hasten economic recovery and address the social impact of the global economic and financial crisis. These measures reaffirm ASEAN commitments to closer regional integration and are directed at consolidating and strengthening the economic fundamental of the*

[16] Vietnam on 28 July 1995, Laos and Myanmar on 23 July 1997, and Cambodia on 30 April 1999.

[17] E. Teo Chu Cheow, "L'ASEAN entre élargissement et marginalisation", *op. cit.*, p. 135 and S. Boissseau du Rocher, *L'ASEAN et la construction régionale en Asie du Sud-Est*, *op. cit.*, pp. 295-296.

[18] A D. Ba, "China and Asean. Renavigating Relations for a 21st Century Asia", *Asian Survey*, 2003, 43:4, pp. 634-637.

Member Countries".[19] The Hanoi Plan is a set of recommendations to be adopted in the fields of macroeconomic and financial cooperation, economic integration enhancement, promotion of science and technology development and infrastructure, promotion of social development, protection of the environment and promotion of sustainable development. It was later completed by The Vientiane Action Programme (2004-2010), which aims to enhance "*competitiveness for economic growth and development through closer economic integration*".[20] However, concerning the consequences of the financial crisis itself, a solution was finally found within the 'ASEAN-Plus-Three' scheme, in cooperation with China, South Korea and Japan.[21] The leaders adopted a modest plan with the establishment of two new institutions to monitor the regional finances: the ASEAN Surveillance Coordinating Unit and ASEAN Surveillance Technical Support Unit, whose task is to watch the macroeconomic trends and to provide an early detection and warning system. It also sets up a peer review process among ASEAN leaders who exchange information and their point of view on the financial situation. Finally, the so-called Chiang Mai Initiative created a Fund of $950 billion and monetary cooperation.[22]

On 7th October 2003, the Declaration of Bali Concord II states the will to found an economic Community, together with a

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[19] § 4 Preamble of the Hanoi Plan of Action, ASEAN Heads of State/Government of the Informal Summit, Kuala Lumpur, 15 December 1997.

[20] Adopted by the Heads of State/Government of ASEAN in Vientiane, 29 November 2004 at the 10th ASEAN Summit.

[21] Started in an informal way in 1997, it has been institutionalised in 1999. The scheme provides for the cooperation between ASEAN on one hand and China (People's Republic of China, PRC), Japan and South Korea (Republic of Korea, ROK), in the other hand, in the fields of politic and security and, economy, trade and finance. It is currently 48 mechanisms coordinating 16 areas of ASEAN Plus Three cooperation, which include economic, monetary and finance, political and security, tourism, agriculture, environment, energy, and ICT, in "Overview ASEAN Plus Three Cooperation", <www.aseansec.org/16581.htm>

[22] Lay Hong Tan, "Will ASEAN Economic Integration Progress Beyond a Free Trade Area?", *op. cit.*, p. 953.

defence Community and a socio-cultural Community. The final aim is to establish by 2011 (instead of 2020 as planned previously) a common market and production base founded, on one hand, on the free flow of goods, services, skilled labour, investments and capital and, on the other hand, an export-based development strategy based on a further regional specialisation and economies of scale. Nevertheless, not much has been said how to achieve it,[23] except through the Recommendations of the High-Level Task Force (HLTF) on ASEAN Economic Integration.[24] The latter recommends not only economic cooperation initiatives relative to trade in goods, services, investment, intellectual property rights, capital mobility, but also institutional strengthening, private sector involvement and mechanisms for dispute settlement. It also proposes a fast-track integration in 11 priority sectors,[25] for which the implementation of Mutual Recognition Arrangements have to be accelerated, with the elimination of all barriers to trade, especially technical ones, through simplified custom procedures, the harmonisation of standards and technical regulations and schemes for the Rules of Origin.[26]

The development of ASEAN itself is often associated with external developments. Even if the 'ASEAN-Plus-Three' scheme remains its major external initiative, the Association has more and more a broad vision of its environment, as it has been reflected in the first East Asia Summit, which included the 'ASEAN-Plus-Three', but also India, Australia and New Zealand, or the first ASEAN-Russia Summit, held in December 2005, parallel to the Post-Ministerial Meeting.

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[23] S. Boisseau du Rocher, "L'ASEAN pourra-t-elle sortir des turbulences?", *op. cit*., p. 9.

[24] ‹aseansec.org/hltf.htm›.

[25] By 2007 for ASEAN-6 and 2012 for CMLV: electronics, e-ASEAN, health care, wood-based products, automotives, rubber-based products, textiles and apparels, agro-based products, fisheries, air travel and tourism.

[26] D. Hew, "South-East Asian Economies towards Recovery and Deeper Integration", in *Southeast Asia Affairs 2005*, Singapore, ISEAS publication, 2005, p. 53.

India's External Policy on Economy and Trade

In parallel to the development of ASEAN foreign policy, India has worked on its Look East Policy, launched in 1991 by then Indian Prime Minister, Narasimha Rao. The collapse of the Soviet Union and the first Gulf War pushed India towards adopting a multifaceted policy towards South-East Asian countries. They felt the necessity to build new alliances. One of the major impetuses of privatisation, deregulation and globalisation of its economy was the implementation of the International Monetary Fund Plan of Structural Adjustment decided in 1991. The latter was an indirect consequence fallout of the Gulf War, from an economic point of view, due to the rise of oil prices and to the end of the repatriation of money by the numerous Indian workers in Iraq, which had a disastrous impact on the Indian foreign currency reserve. At that time too, Japan had become India's first creditor. From a geopolitical point of view, India had no other solution than to look to the US for support since the USSR could no more support its traditional non-aligned policy[27]. Furthermore, since the 1980s, it has felt that its interventionist economic policy in the past left it out from the Asian economic miracle and, thus, India started to take interest in the Asia-Pacific region. New Delhi was also further isolated from the main regional integration processes in Europe, America and Asia-Pacific. New Delhi was also further isolated from the main regional integration processes in Europe, America and the Asia-Pacific. Also, after the India and Pakistan nuclear episode in 1998, India was cold-shouldered by Western powers. The United States and Japan decided sanctions against India. However, India showed its potential as a regional and world power with the tests and came closer to other Non-aligned and developing countries, such as China. The dramatic events on 11th September 2001 changed equations and turned out to be an occasion to reconsider ties between the South-East Asian countries, India and the United States. The rapprochement between New Delhi and

[27] G. Boquérat, "Une lecture de l'attitude de l'Inde pendant la crise du Golfe", *CSH Working Paper*, 98/4, pp. 1, 24 and 28.

Washington created a spill-over effect on Indian relations with ASEAN. [28]

Thus, the Look East Policy is a combination of bilateral, regional multilateral relations towards East Asian countries, especially ASEAN member-States. This policy has also been a revolution from a domestic point of view and, to open up its economy, India had to change mentalities and its old domestic political habit. For instance, the Ministry of Foreign Affairs had to deal with economic and trade issues and to coordinate its activities with the Ministries of Commerce and Finance, which was not so easy.[29]

India's economic opening strategy was firstly based on a bilateral basis, especially towards Malaysia and Singapore. Nevertheless, it has not always been successful, as shown by the India-Malaysia joint-ventures set-up in the 1970s. Nowadays, Singapore in particular wants to promote a "strategic alliance" with India and Indian firms, and benefits from its know-how and experience in multinationals and investment in developing countries. Contrary to the role of the Chinese Diaspora in the integration of East Asia economies, the Indian Diaspora in these two countries does not necessarily play a central role of impetus or catalyst for India-ASEAN investments, trade or economic relations.[30] India has also strategic relations with some of the ASEAN member-States, such as Vietnam, Malaysia or Myanmar, with regard to hydrocarbon and military supply.[31] Myanmar's accession to ASEAN has ensured a common border between India and the Association and this country participates in all projects involving India and the South-

[28] T. Chakraborti, "Disparate Priorities: Explaining the Penumbra of India's Look East Policy", in K. Raja Reddy, *India and ASEAN. Foreign Policy Dimensions for the 21th Century*, New Century Publications, New Delhi, 2005, p. 65.

[29] I. Saint-Mézard, *Eastward Bound: India's New Positioning in Asia*, Manohar, New Delhi, 2006, pp.122-123.

[30] I. Saint-Mézard, *ibid.* pp.103-105.

[31] Hu Shisheng, "India's Approach to ASEAN and its Regional Implications", in S. Swee-Hock, S. Lijun, C. Kin Wah (ed.), *ASEAN-China Relations. Realities and Prospects*, ISEAS publication, Singapore, 2005, pp. 129 and 146.

East Asian countries. Besides, like Singapore, Thailand has developed a web of bilateral Free Trade Agreements (FTA), notably with India, but also with countries from the Asia-Pacific region. The Economy economy is especially concerned by the relations between India and Thailand, which are both Members members of BIMST-EC (Bay of Bengal Initiative for Multi-Sectoral Economic Cooperation) and MGC (Mekong-Ganga Cooperation).

Even if India is a huge country with a market of one a billion people, it has always feared to be marginalizedation from by its most important economic partners. Furthermore, New Delhi was isolated from main important regional strategic deals since it was not accepted within APEC (Asia-Pacific Economic Community) nor ASEM (Asia-Europe Meeting, an informal process of dialogue and cooperation), until recently. For APEC, India was difficult to integrate because of the size and structural problems of its economy.[32] It also emphasises the fact that India is was also not a part of the 'ASEAN-Plus-Three', pillar of the cooperation with these two trans-regional groupings.[33] So far indeed, India has not been accepted as the fourth 'musketeer' partner of ASEAN, on an equal footing with the three major economies of the region. In place of it, the 'ASEAN-Plus-One' Summits have been held since 2002. Nevertheless, from an economic point of view, India cannot be compared with these three countries, which chain network and division of labour integration with South-East Asian States are not a new thing and still significantly driven by the private sector.[34] India has also suffered from its image of isolationalism and from the comparison with its big neighbour, China. While India does not recognise the latter to be a market economy yet, paradoxically,

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[32] I. Saint-Mézard, "La place émergente de l'Inde dans le processus d'intégration régionale asiatique", available on ‹www.reseau-asie.com›, 2005, p.1.

[33] R. Stubbs, "ASEAN + 3. Emerging East Asian Regionalism", *Asian Survey*, 42:3, 2002, p. 450.

[34] S. Boisseau du Rocher and B. Fort, *Paths to Regionalisation. Comparing Experiences in East Asia and Europe*, Marshall Cavendish Academic, Singapore, 2005, p. 4.

China is reputed to be more open to international business than India. Nevertheless, India has made efforts with the objectives of liberalization in terms of export duties (average of 30 per cent in 2002) and increasing efficiency and competition within its economy, even as reforms go on.[35] In recent years, India has made major efforts to open up its trade and investment regimes in order to increase exports a major engine of growth and has also improved its efficiency and international competitiveness.[36]

India is also a member of SAARC (South Asia Association for Regional Cooperation), which is a rather moribund South Asian regional Organisation because of the weak economies in the region which cannot complement each other effectively. India has the strongest economy within SAARC but, at the same time, it has political difficulties with almost all other members, especially Pakistan. India's objective is nonetheless to be the necessary link between South and South-East Asia.

The Look East Policy is more a multilateral than a regional strategy. Since the WTO Uruguay Round, a lot of developing countries have also adopted an export-led growth strategy which makes competition hardertougher. Furthermore, most Indian trade partners are members of multiple economic and trade blocks.[37] India needs to be closer and more integrated to ASEAN because of the latter's trade and export-oriented experience and because it is a hub to North-East Asia and to the world economy in general. In the process of globalisation, India has had to extend its domestic and regional market and its economic space. At the same time, it must show that it can be an attractive destination for goods, services, technology, and capital investment.[38] Relations with ASEAN will also boost economic

[35] WTO Secretariat, "Trade policies Review", WT/TPR/S/100, 2002, Introduction §§ 9 and 13.

[36] *Ibid*., Part II, §1, p. 15.

[37] D. Chakraborty And D. Sengupta, "IBSAC (India, Brazil, South Africa, China): A Potential Developing Country Coalition in WTO Negotiations", *CSH Occasional Paper*, No. 18/2006, December 2006, pp. 50 and 70.

liberalization and structural reform in India.[39] If India wants to become a regional power, it cannot depend on military force solely; economic strength is an important marker of regional power. India needs to further develop its regional relationships and make them more comprehensive and institutionalised, which has not been one of the strengths of New Delhi's traditional external policy.

Development of Trade and Economic Relations between India and ASEAN

The relations between India and ASEAN have been marked by four phases: First, it was a rather distant relationship, based on strategic links with individual countries.[40] At the beginning, India was not interested in ASEAN because it considered the latter as a pro-Western Organisation, even if the 1967 founding declaration of ASEAN is based on the principles of political independence and non-interference.[41]

The first meeting at the official level between ASEAN and India took place in 1980. It focussed on trade and economic cooperation in the industrial, scientific and technical fields.[42] Later, in the context of the development of its Look East Policy, India became a Sectoral Dialogue Partner in 1992, encouraged by the United States and Japan, who were interested in India's further liberalization process.[43] It provides for a more institutionalised

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[38] S. Narsimhan, "India's Look East Policy: Past, Present and Future", in K. Raja Reddy, *India and ASEAN. Foreign Policy Dimensions for the 21th Century*, New Century Publications, New Delhi, 2005, p. 32.

[39] I. Saint-Mézard, "The Look East Policy: An Economic Perspective" in F. Grare & A. Mattoo, *India and ASEAN. The economics of India's Look East Policy*, Manohar, New Delhi, 2002, pp. 25-27.

[40] G.V.C Naidu, "India and South-East Asia: Look East Policy", *Wold Focus*, September 2004, p. 8.

[41] Bangkok Declaration, 8 August 1967.

[42] Meeting at Official Level between ASEAN and India, "Joint Press Statement" Kuala Lumpur, 16 May 1980, <www.aseansec.org/5733/htm>.

relationship between the two partners. The economic and trade cooperation has been deepened and new cooperation fields were added, such as investment and tourism. New Delhi has also proposed to create a fund to develop programmes and projects in the fields of tourism, administration and management, trade and investments, computer and informatics, solar energy and environment protection.[44] India became a Full Dialogue Partner in 1996. With this, India could participate in the Post-Ministerial Meetings and is part of ARF (ASEAN Regional Forum), which is an ASEAN attempt to spread awareness of its concept of cooperative security and diplomacy on the international stage.[45] It also establishes cooperation in trade and investment, science and technology, tourism, infrastructure, human resource development and people-to-people interaction.[46]

Since 2002, with the first India-ASEAN Summit, a new phase of multifaceted policy has been launched: India was presented as one of the major partners of ASEAN. At the 2003 Summit, the Heads of State/Government agreed on a plan to create a regional trade and investment area as a long-term objective. India also expressed its support to the ASEAN initiative for regional economic integration and the grant of a preferential tariff treatment to new ASEAN members. Besides, the two parties reaffirmed their assistance to the different Mekong projects such as the Mekong-Ganga initiatives, to which India is a party, and to ASEAN Mekong Basin Development

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[43] I. Saint-Mézard, *Eastward-Bound: India's New Positioning in Asia*, *op. cit.*, p. 222 and pp. 286-287.

[44] Joint Press Release for the Meeting between ASEAN and India Senior Officials on the Establishment of the Sectoral Dialogue Relations between ASEAN and India, New Delhi, 16-17 March 1993; A. Matoo, "ASEAN in India's Foreign Policy", in F. Grare & A. Mattoo, *India and ASEAN. The politics of India's Look East Policy*, Manohar, New Delhi, 2001, p. 113.

[45] A. Gopinath, "Strategic relations of India-ASEAN in the 21st Century: an ASEAN Perspective", in K. Raja Reddy, *India and ASEAN. Foreign Policy Dimensions for the 21th Century*, New Century Publications, New Delhi, 2005, p. 139.

[46] First ASEAN-India Joint Cooperation Committee Meeting, New Delhi, 14-16 November 1996.

Cooperation (AMBDC)[47] and the Greater Mekong Sub-region (GMS),[48] to which India could participate in the future. Finally, once more emphasis was made on economic and technical cooperation, and people-to-people contacts.[49]

On 8 October 2003, India and the ASEAN States decided to sign the Framework Agreement on Comprehensive Economic Cooperation (hereafter ASEAN-India CECA) in order to strengthen their trade and economic cooperation, to create a Free Trade Zone (FTZ) in goods, to liberalise trade in services and to establish a free and transparent investment regime in the zone. More than the future constitution of an FTZ, the signature of the CECA has a broader strategic and political significance. During the 2003 Summit, India and ASEAN adopted a Joint Declaration for Cooperation to Combat Terrorism and India became a party to the Treaty of Amity and Cooperation in South-East Asia. From an economic point of view, there is a much possibility of working together. If the Indian market promises to be vast, the GDP per capita remains very different in the two zones with an average of $508 for India and $1266 for ASEAN countries. There are, however, huge differences within ASEAN, from the level of developed countries to the least developed ones.[50] On the other hand, ASEAN has the advantage as far as

[47] The Ministers and Representatives of Brunei, Cambodia, China, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam, as the core group, met in Kuala Lumpur on 17 June 1996, and agreed to the following Basic Framework of ASEAN-Mekong Basin Development Cooperation. Its objectives are to promote a sound and sustainable development of the Mekong region through economic partnership and projects, and to strengthen interconnection and economic linkages in the region, see ‹www.aseansec/6353.htm›.

[48] Created in 1992 with the Asian Development Bank's assistance, this subregional grouping comprises Cambodia, the People's Republic of China, Lao People's Democratic Republic, Myanmar, Thailand, and Vietnam. "The program has contributed to the development of infrastructure to enable the development and sharing of the resource base, and promote the freer flow of goods and people in the Subregion", ‹www.adb.org/GMS/default.asp›.

[49] Joint Statement of the First ASEAN-India Summit, 5 November 2002, Phnom Penh, Cambodia: ASEAN-India Cooperation in the 21st Century.

trade balance is concerned. Finally, imports and exports between the two tripled between 1991 and 2001,[51] and are now beginning to be significant.[52]

The trade liberalization process is considered on a flexible manner in favour of sensitive sectors and of new ASEAN members and two areas of economic cooperation ought to accompany it, trade facilitation measures and sectoral cooperation (in the fields of agriculture, fisheries and forestry, services mining and energy, science and technology, transport and infrastructure, manufacturing, human resource development). Trade in goods is first concerned here, especially through the reduction or elimination of custom tariffs. The system is based on the principle of negative list which nevertheless suffers numerous exceptions: All products not included in this list are subject to tariff reduction applied from the Most Favoured Nation (MFN)[53] rates, in accordance with specified schedules and rates to be decided later. A list of sensitive products subjected to a maximum ceiling must be mutually agreed by the parties. Finally, an Early Harvest Programme (EHP) has been convened in order to accelerate the implementation of trade liberalization for some listed goods (about a hundred) for which tariff elimination shall be completed by 31st October 2007 for ASEAN-6 and India and 31st October 2010 for the CMLV. Concerning trade in services, the aim is to go further than GATS

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[50] S. Karmakar, "India-ASEAN Cooperation in Services – an Overview", *ICRIER Working Paper*, No. 176, <www.icrier.org>, p. 4. See Appendix 2: "GDP per capita – international countries classification".

[51] R. Sen, M.G. Asher, R. S. Rajan, "ASEAN-India Economic Relations. Current Status and Future Prospect", *Economic and Political Weekly*, 17 July 2004, p. 3297.

[52] ASEAN now counts for 25 per cent of Indian trade, almost at equality with the EU and the US. As far as the main destinations of Indian exports are concerned, the respective shares are EU (23.54 per cent), East Asia, (20.7 per cent) and US (20.9 per cent) in J. Chaisse, "Ensuring the Conformity of Domestic Law with WTO Law. India as a Case Study", *CSH Occasional Paper*, No. 13, 2005, p. 5.

[53] MFN is a status accorded by one nation to another in international trade. It does not confer particular advantages on the receiving nation, but means that the receiving nation will be granted all trade advantages, such as low tariffs that any third nation also receives. In effect, having MFN status means that one's nation will not be treated worse than anyone else's nation.

(General Agreement on Trade of Services, part of the WTO agreements system), that is to liberalise this sector on a preferential basis with substantial sectoral coverage. The parties also will to adopt a liberal, transparent and protected investment regime. Nevertheless, the 2003 CECA provides for a short timeframe and need numerous additional measures to be fully implemented. It is complemented by the ASEAN-India Partnership for Peace, Progress and Shared Prosperity, adopted by the Heads of State/Government on 30th November 2004. Concerning the economic cooperation, objectives are refined while in broad terms, but new concerns about finance and small and medium enterprises have been added.

The Indian success in mobilising its administration in just ten months to negotiate the ambitious the 2003 Framework Agreement contrasts with the problems and the time taken generally to agree upon such implementation agreements. The ASEAN-India CECA was indeed supposed to come into force on 1 July 2004 for the countries that had already completed the procedure of ratification. Till today, the latter was completed on 24 February 2004 for the Philippines, followed by Laos on 13 September 2004 and Vietnam on 5 October 2004. Conclusions from the 3rd and the 4th India-ASEAN Summit also noted a certain disappointment in the implementation of the Plan of action of of their Partnership for Peace, Progress and Shared Prosperity and in the negotiation on the establishment of a Free Trade Area.[54] Furthermore, an agreement on trade in goods has been considered as a precondition for negotiations on services and investment, which are the main Indian interests. The implementation of the EHP was supposed to start on 1st November 2004, but the negotiations of the Rules of Origin dated back to 30th November 2004.[55] The issues raised during the Economic Ministers' Meetings in August 2006 reflect the discrepancy between ASEAN and Indian views. The negotiations

[54] § 6 of the Chairman's Statement of the 3rd ASEAN + India Summit Vientiane, 30 November 2004, "Deepening ASEAN-India Partnership" and §§ 3 and 6 of the Chairman's Statement of the 4th ASEAN-India Summit Kuala Lumpur, 13 December 2005.

[55] § 9 of the Chairman's Statement of the 3rd ASEAN-Plus-India Summit, Vientiane, 30 November 2004.

stay suspended since last year since the Indian proposition of a list of 1400 sensitive items was considered to be unacceptable by ASEAN. In August 2005, its proposals were "absolutely attractive", according to an Indian official, but the Malaysian international trade Minister informally said, during the ASEAN Economic Meeting hosted by Malaysia, that tariff concessions were not sufficient and the timetable for reducing tariff too slow. On the other hand, in December 2005, ASEAN decided to double its negative list, while India claimed a reduced list, similar to the one conceded to China.[56] The issue particularly concerns agricultural products, most of them being included in the sensitive list. For example, palm oil, one of the key exports of ASEAN products (with other agriculture products, such as pepper and coffee, ceramics and wooden furniture), especially for Malaysia and Indonesia, is meaningful. Edible oil is indeed the second largest Indian import, which actually attracts an average duty of 75 per cent.[57] India has offered to cut tariffs from 90 per cent to 60 per cent for refined oil and 80 per cent to 50 per cent for crude oil over sixteen years (*i.e.* till 2022). Alternatively, India has proposed a separate agreement on palm oil or a treaty based on ASEAN minus one (or more) member,[58] but none of those proposals have received an enthusiastic ASEAN answer.[59] Finally, the Indian sensitive list has been reduced from 1414 items last year to 852 (30 per cent of ASEAN export) at the beginning of the negotiations to 560 items, representing 5.4 per cent of ASEAN exports last August. Considering normal products, India has also proposed the elimination of tariff on 400 tariff lines (77 per cent of all tariff lines) and a phased reduction on other 600 tariff lines (12 per cent

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[56] "ASEAN doubles its negative list for FTA with India", *Financial Express* (India), 1/12/2005 and A. Sen, "Palm oil boil may delay FTA with ASEAN", *Times news Network*, 29/12/2005, available on <www.bilaterals.org>.

[57] "Edible oils made India-ASEAN FTA out of reach in 2006", *The Hindu*, 25/12/2006.

[58] This formula is based on the ASEAN-South Korea CECA model, which admits the fact that the agreement is not signed by all ASEAN members, but only with interested members.

[59] P. S. Suryanarayana "India, ASEAN to stay the dialogue course", *The Hindu*, 25/08/2006 and "India proposes separate deals on palm oil", *Business Times*, 26/08/2006.

of all tariff lines).[60] The latest Indian offer, in March 2007, concern 700 items in the normal track list, 490 in the sensitive list, while palm oil will be on standstill for five years.[61]

Table 2 : ASEAN's Exports and Imports to and from India[62] (In millions, US $)

	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
ASEAN Exports to India	1483	1989	2821	3722	4473	5217	5728	6555	6210	8418	8091
ASEAN Imports from India	1429	1547	1838	2843	4395	1750	2144	3213	3672	3696	4021
TOTAL	2912	3536	4659	6565	8868	6967	7872	9768	9882	12114	12,112
% Trade Growth		21.4	31.7	40.9	35.07	-21.4	12.9	24.08	1.1	22.5	-0.01

NOTE: Figures cover Brunei, Indonesia, Malaysia, Philippines, Singapore and Thailand (1993-1998); Figures cover only Brunei, Indonesia, Malaysia, Myanmar, Philippines, Singapore and Thailand (1999); Figures cover only Brunei, Cambodia, Indonesia, Malaysia, Myanmar, Philippines, Singapore and Thailand (2000)
Source: Export and Import Data Bank, Ministry of Commerce and Industry, Government of India, collected by the CII (Confederation of Indian Industry)

The implementation of negotiations tend to show that trade between India and South-East Asia is more a necessity for the former and emphasizes the fact that India is finally one ASEAN partner among others only, especially from a commercial point of view. The India-ASEAN Closer Partnership Framework Agreement, 2003 is

[60] "Indo-ASEAN FTA Talks Back on Track", <http://in.indiatimes.com>, 19/08/2006; "Indian Offer to Trim 'Sensitive List' Fails to Enthuse ASEAN", *ibid.*, 22/08/2006 and "ASEAN, India to Resume Stalled Free Trade Talks", *AFP*, 24/08/2006, available on ‹www.aseansec.org›.

[61] "India, ASEAN FTA to be signed by July", *India Infoline News Service*/Mumbai, 15 January 2007 and P. S. Suryanarayana, "India, ASEAN talks on FTA in Manila by March-end", *The Hindu*, 26 March 2007, available on <www.bilaterals.org>

[62] For more details, see Appendix 3: "India's Trade With ASEAN Countries".

certainly a reaction to the one signed between ASEAN and China a year before. Since the Asian crisis and the entry of the People's Republic of China (PRC) in the World Trade Organisation, China is seen as a major economic ally. The structure of the two agreements is very similar, but the one with China deals with agriculture, trade and economic cooperation, and facilitation. It prioritizes agriculture, human resource development, information and communication technology, investment and the Mekong basin development.[63] It is the first time that PRC signed such an economic and trade agreement at the regional level. Furthermore, the implementation of the ASEAN-PRC FTA is much more in place compared to the India-ASEAN one. The competition between India and China in the region is also evident when we look at the creation of new regional initiatives between India and certain ASEAN States, such as BIMST-EC and MGC.

New Regional Groupings between India and South-East Asian States: BIMST-EC (Bay of Bengal Initiative for Multi-Sectoral Economic Cooperation) and MGC (Mekong-Ganga Cooperation)

The entry of Myanmar into ASEAN has been important for India's Look East Policy. The Myanmar-India land boundary doubles up as a land boundary with South-East Asian countries. This holds a potential for trade. Two main kinds of cooperation were set up, more or less related to trade, the MGC, which derives from an India-ASEAN programme and the BIMST-EC. They are also a complement of the different initiatives of India towards the CMLV, within the India-ASEAN CECA. Finally, they may be seen as a means to be closer to China.[64]

The MGC is the only regional project studied here which does not directly involve a preferential trade agreement. Nevertheless it is an

[63] S. Srivastava & R.S. Rajan, "What does the Economic Rise of China Imply for ASEAN and India? Focus on Trade and Investment Flows", in H. Kehal (ed.), *Foreign Investment in Developing Countries*, London, Palgrave-McMillan Press, 2004, consulted <www.economics.adelaide.edu.au>, consulted on 14/12/2005, p. 197.

[64] F. Yahya, "India and Southeast Asia: revisited", *Contemporary Southeast Asia*, Vol. 25, No. 1, 2003, p. 80.

economic cooperation agreement between certain ASEAN member-States and India, with an aim to increase trade and investments in the region. Launched on 10th November 2000 by the Vientiane Declaration taken by the ASEAN Ministerial Meeting and Post-Ministerial Conference, the initiative concerns India, Myanmar and the Indochinese countries. Its first objectives are the promotion of tourism, transport, culture and education, which are important fields of cooperation for the promotion of people-to-people contact. The Hanoi Programme of Action was adopted in July 2001 by the Ministerial Meeting and constitutes the initial programme for implementation from 2001 to 2007. The Pnom-Penh Road Map, adopted by the Ministerial Meeting of MGC on 20th June 2003, provides for further specific actions in the four priority areas and envisages the exploration of new areas of cooperation, among others, in collaboration with ASEAN Integration Work Plan and Greater Mekong sub-region development programmes.

Table 3 : India's trade with MGC countries. (Value in Million US $)

	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006
Total Trade with Cambodia	12.41	20.45	18.88	18.38	24.97
Total Trade with Laos	3.20	1.73	0.56	2.70	5.58
Total Trade with Myanmar	435.32	411.12	498.66	519.11	636.66
Total Trade with Thailand	1,056.22	1,090.20	1,440.74	1,767.27	2,286.89
Total Trade with Vietnam	237.09	366.57	448.65	642.46	822.06
Total Trade with MGC Countries	*1744.25*	*1890.07*	*2407.49*	*2949.92*	*3776.16*

All data numbers are provided by the Government of India, Ministry of Commerce & Industry, Department of Commerce, <www.commerce.nic.in/eidb/default.asp>

The Bangladesh, India, Sri Lanka, Thailand Economic Cooperation (BIST-EC) was established by the Declaration of Bangkok in June 1997, soon followed by the accession of Myanmar in December 1997 becoming BIMST-EC. It is born of the desire to "*establish a firm foundation for common action to promote sub-regional cooperation in the areas of trade, investment, technological exchange*".[65] At the origin, it is based on the principle of open regionalism[66], until the adoption of the projects to establish a Free Trade Area, and highlights the importance of infrastructure linkages, especially in the transport and communication sectors.[67] In February 2004, this sub-regional grouping welcomed Bhutan and Nepal, although they are not Bay of Bengal's riparian States, strictly speaking. The membership of this group depends on territorial contiguity to or direct opening into, or primary dependence on the Bay of Bengal for trade and transport. BIMST-EC has identified six areas of focussed cooperation: Trade and investment, technology, transport and communication, energy, tourism, and fisheries. The 2004 Summit also agreed to explore new sectors of cooperation[68] and to emphasise the importance of the development of transport and communication infrastructure, hydropower and hydrocarbon projects. At that time, the Community took the name of Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation.

In 2000, the BIMST-EC Trade and Economic Ministers decided to study the feasibility of establishing a Free Trade Area among

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[65] Preamble of the Declaration on the Establishment of the BIST-EC, Bangkok, 6 June 1997, available on ‹www.bimstec.org›

[66] The "open regionalism" policy is based on market forces, common regional orientations and national policies: See below

[67] Joint Statement of the Special BIMST-EC Ministerial Meeting, Bangkok, 22 December 1997.

[68] Public health sector, education, rural community development, small and medium enterprises, construction, environment, information and communications, technology and biotechnology, weather and climate research, natural mitigation and management. New areas are also supposed to be discussed within the BIMST-EC: poverty alleviation and women's empowerment, biotechnology and intellectual property rights for traditional knowledge, and cultural cooperation.

members. The Framework Agreement (hereafter called the BIMST-EC FTA) was signed in Phuket on 8th February 2004 and includes trade in goods, and in services, investment and economic cooperation. Trade in goods is envisaged through the negative list system, *i.e*. all products, except those included in the negative list (limited to 20 per cent of the total trade), are subjected to tariff reduction or elimination on the basis of fast track (Early Harvest System-EHS, 10 per cent of the total trade)[69] or normal track. It must be complemented by agreements concerning the list inclusion, modalities, Rules of Origin, non-tariff measures, and so on. Trade in services and investments are to be liberalised through a positive list approach (sector by sector) and, concerning the first one, the objective is to go further than the GATS. Nevertheless, if the BIMST-EC FTA was supposed to enter into force on 30th June 2004, depending on constitutional internal procedures, its implementation should finally start on 1st July 2006 for the EHS, if the complementary measures are taken in the meantime, which is not yet the case, as far as I know. Finally, as a complement, cooperation is envisaged in the areas of trade facilitation, capacity building, technical assistance and support to Least Developing Countries.

Even if envisaged as a trans-regional bridge between ASEAN and SAARC, the BIMST-EC FTA signed in 2003, competes – or complements – not only with a similar project of FTA between India and Sri Lanka which came into effect in 2000, and with Thailand. As a regional initiative, BIMST-EC clearly wants to compete with SAFTA, the South Asia Free Trade Agreement, which has been in force since 1st January 2006, in order to leave out Pakistan from the bloc (with the Maldives, indeed, it is the only South Asian State which is not a member of BIMST-EC).

[69] "BIMST-EC finalizes dispute resolution rules", *Kathmandu Post*, 28/12/2006.

Table 4 : India's trade with BIMST-EC countries. (Value in Million US $)

	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006
Total Trade with Myanmar	435.32	411.12	498.66	519.11	636.66
Total Trade with Thailand	1,056.22	1,090.20	1,440.74	1,767.27	2,286.89
Total Trade with Bangladesh	1,061.30	1,238.05	1,818.38	1,690.49	1,791.39
Total Trade with Bhutan	31.52	71.20	141.86	155.59	187.94
Total Trade with Nepal	570.40	632.12	955.40	1,088.97	1,239.82
Total Trade with Sri Lanka	698.27	1,011.81	1,513.94	1,791.58	2,602.37
Total Trade with BIMST-EC Countries	*3853.03*	*4454.5*	*6368.98*	*7013.01*	*8745.07*

All data numbers are provided by the Government of India, Ministry of Commerce & Industry, Department of Commerce, <www.commerce.nic.in/eidb/default.asp>

Bilateral Trade and Economic Relations

Generally speaking, India has built privileged connections with its older partners, such as Indonesia and Vietnam, allies since the decolonisation and the Cold War, or Singapore or Thailand, which are more recent partners and whose relation is more centred on economy and trade. It has signed numerous agreements on a

bilateral to avoid double taxation, to protect investment, to set-up joint ventures, but also on travel and visa facilitation, in order to facilitate the process of trade and economic relations among India and ASEAN members. These are too numerous to be enumerated here and I would rather like to focus on those that envisage the establishment of a free or preferential trade arrangement and related comprehensive economic cooperation. Consequently, bilateral relations experiment as well as complement regional cooperation. India and Thailand are close partners within MGC and BIMST-EC initiatives but, in 2003, they have decided to sign a Framework Agreement for Establishing a Free Trade Area by 2010 (hereafter India-Thailand FTA), through the liberalization of trade in goods and services and investments and economic cooperation in complement, such as trade facilitation or trade and investment promotion or specific sectors of cooperation. Once more, for the liberalization of trade, goods are listed in three different categories, Normal Track, Sensitive Track, and Early Harvest Scheme (EHS). It also appeals for the adoption of numerous complementary rules concerning the Rules of Origin, non-tariff barriers, safeguards measures *etc*…. On 30th August 2004, a Protocol adopted interim Rules of Origin for the products submitted to the EHS. It permitted the implementation of the Framework Agreement, which was supposed to begin on 1st March 2004. Finally, the development of trade in services and investment has to be negotiated in order to proceed further on existing agreements (GATS and Agreement for the Promotion and Protection of Investment, 10th July 2000 between India and Thailand).

Since the Asian financial crisis, Singapore has been eager to conclude bilateral trade agreements with the major world partners, such as India. Their economic and trade relations are facilitated by the complementarities of their economies and know-how and by the already established people-to-people connections through the Indian diaspora and immigrants (engineers for instance). In particular, since the beginning, Singapore has been impressed with the performance of India in infrastructure and information technology and numerous Indian engineers have been working

in the City-State. Thus, the signature of the Comprehensive Economic Cooperation Agreement on 29th June 2005 (hereafter India-Singapore CECA) reflects Singaporean trade strategy in general and towards India, in particular, to be a bridge or a hub towards South-East Asia.[70] Classically, it concerns trade in goods, services, investment and economic cooperation. Its particularity is that instead of being a mere framework agreement, it is very detailed and operational by itself, that is without any implementation or additional measures, since the date of its entry into force, on 1st August 2005. Concerning the trade in goods, the commitments are unbalanced since Singapore shall eliminate customs duties on all Indian goods, while Singaporean imports to India are listed in four different lists of products, Early Harvest Programme, for Phases Elimination in Duty, for Phases Reduction in Duty or Excluded from any Concession in Duty. So far, unfortunately, Singaporean companies complain that Indian customs authorities are not aware of the new lower duty structure under the India-Singapore CECA.[71] Nevertheless, a Supplementary Agreement on Goods is being negotiated offering a better market access to the City-State.[72] Moreover, national treatment is granted for investments listed in a positive list for India and in all sectors, except those included in a negative list for Singapore. For services inscribed in the schedule, each party shall accord the national treatment to services or services suppliers from the other party, *i.e.* a treatment not less favourable than it grants to its own services or suppliers. Those services and service suppliers are also subjected to the principle for the Most Favoured Nation commitments, *i.e.* if a party grants them more favourable conditions to a third-party, it must also grant it to the

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[70] I. Saint-Mézard, *Eastward-Bound: India's New Positioning in Asia*, *op. cit.*, p. 222 and p. 97. See also the preamble and article 1.2 (g) of the Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Singapore signed in New Delhi, 29 June 2005 (hereafter India-Singapore CECA 2005).

[71] "S'pore exporters faces problems at Indian ports", *Times News Networks*, 28/08/2006.

[72] P. S. Suryanarayana, "India, ASEAN talks on FTA in Manila by March-end", *The Hindu*, 26 March 2007, available on <www.bilaterals.org>.

other party. The general chapter on services is completed by two more on air services and movement of natural persons. Finally, cooperation is also considered in crucial sectors for the relations between India and Singapore, such as e-commerce, intellectual property rights, science and technology, education and media.

Numerous trade and economic agreements are still under negotiation for New Delhi. India and Vietnam plan to grant each other preferential trade tariffs, to encourage investment and consultancy in certain sectors, to cooperate in science and technology, human resource development, culture, tourism and foster people-to-people contacts. India also proposes to supply Vietnam with concessional credits and grants to import equipment, useful in facilitating trade and investments. All these commitments are recorded in the Joint Declaration on the Framework of Comprehensive Cooperation between India and Vietnam, called "As they enter the 21st century", adopted the 1st of May 2003, but the latter has not yet been translated in a formal and comprehensive agreement between the two parties.[73]

The ASEAN-India summits often give the opportunity to strengthen relations with certain members of the Association. India and Indonesia have adopted in November 2005 a Memorandum of Understanding for the Establishment of a Joint Study Group to examine the feasibility of Comprehensive Economic Cooperation Agreement. The MOU was signed to examine the feasibility of a Free Trade Agreement in goods, the expansion of trade in services with substantial sectoral coverage, to create a favourable investment regime and to foster economic and technical cooperation in finance services, science and technology, human resource development, infrastructure and tourism.[74] On 20th December 2005, India and

[73] Available on ‹www.meaindia.nic.in›, "bilateral documents".

[74] Memorandum of Understandings between the Government of Republic of India and Government of Republic of Indonesia on the Establishment of a Joint Study Group to examine the feasibility of Comprehensive Economic Cooperation Agreement (CECA), 23 November 2005, ‹www.meaindia.nic.in›

Malaysia had agreed to study the possibility of signing a similar agreement on trade in goods, services, investment and economic cooperation. In January 2006, they set up a Joint Study Group to work on the question. The latter proposes to give preferential market access for goods, with a fast-track approach for certain items, particularly in order to extend the range of products exchanged. Economic cooperation is envisaged in the areas of services (medicine, healthcare and diagnostic, advertising, audio-visual, financial, tourism and travel, transport and accounting and taxation services) and where it exists special synergies and complementarities between the two economies (particularly in manufacturing and construction, harmonisation of standards and mutual recognition of qualifications of professional service providers). The CECA could also cover the liberalization, promotion and facilitation of investments, through the adoption of the general principle of non-discrimination.[75]

All the treaties described here commonly deal with the same topics, trade in goods, services and investment and related economic cooperation. However, it is not only a regional concern, but also concern the World Trade Organisation and its set of agreements.

Regional Trade and Economic Arrangements and the World Trade System

The creation of the World Trade Organisation (WTO) has greatly improved the international trade system, since the GATT (General Agreement on Tariffs and Trade) was only a temporary executive agreement, which was used to apply according to existing legislation. Now, it is compulsory for all member-States to make their domestic legislation conform to their trade obligations. Furthermore, the GATT lacked an institutional frame, contrary

[75] P. S. Suryanarayana, "India, Malaysia Review Progress on Economic Pact", *The Hindu*, 24/10/2005; A. Sen, "Green Signal for CECA with Malaysia", *Financial Express*, 9/01/2006; "India-Malaysia Signs Liberal Economic Cooperation Contract", ‹www.bilaterals.org›, 11/06/2006.

to WTO which is a formal international Organisation, even if its structures are light. The new multilateral trade system is also much more inclusive, that is, it is not limited to the trade in goods and includes the trade in services for instance. The 1994 Marrakech Agreement is a single global undertaking, with no possibility of raising reserve, which permitted to stop the politic of "pick and choose", that is the policy of choosing the favourable clauses only. The body material structure is founded on GATT (trade in goods), GATS (trade in services), TRIPS (intellectual property) and the Memorandum of Understanding on the Dispute Settlement Mechanism. In addition, States can access freely different plurilateral agreements, *i.e.* Agreement on Trade in Civil Aircraft, Agreement on Government Procurement, International Dairy Agreement, International Bovine Meat Agreement, the latter two not being in force anymore.[76] In Asia, a big number of States/customs territories have not joined WTO yet, because of their economies in transition. China joined WTO in 2003, Cambodia in October 2004 and Vietnam in 2007. Laos has applied, but without acceptance so far. Finally, concerning BIMST-EC South Asian countries, Nepal was admitted within the WTO in April 2004, while Bhutan is going through the accession process.

Even if the ASEAN-India CECA, the ASEAN-China CECA, the BIMST-EC-FTA or bilateral economic and trade agreements are more intra-regional oriented, they are also initiatives towards the multilateral system. Indeed, the multiplication of Free Trade agreements is a reaction to regional trends, such as Chinese competitiveness in Asia, the declining access to the European Union and NAFTA (North American Free Trade Agreement) markets, but also the difficulties of the Doha Agenda talks.[77] All these conventions refer directly to the WTO system, not

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[76] D. Carreau, P. Julliard, *Droit international économique*, Paris, Dalloz, 2nd edition, 2005, pp. 54-56.

[77] S. Gaur, "Framework Agreement on comprehensive Economic Co-operation between India and ASEAN", *ASEAN Economic Bulletin*, Vol. 20, No. 3, 2003, p. 283.

only in terms of creating trade blocs but also in terms of compatibility or of explicit reference to WTO norms. The multilateral trade system is based on the most favoured treatment, to which regional trade treaties studied are exceptions, because they grant more favoured and preferential conditions to those regional partners. As the current system for RTA (Regional Trade Agreement) is not satisfactory enough, it is included on the Doha Agenda of negotiations. Furthermore, the multiplication of RTA also ask the questions of the real impact of the policy of building trade blocks in the basis of regional arrangements, since the parties to RTAs are also members of different WTO bargaining Groups.

Trade liberalization is the common aim of most international and regional economic organisations or arrangements, the latter generally try to work in a synergistic manner in order to respond to the challenges generated by globalisation. It can be a technical or financial assistance from ESCAP (United Nations Economic And Social Commission For Asia And The Pacific) or the Asian Development Bank. It can also be the promotion of cooperation with other regions such as Europe, with the Asia-Europe meeting (ASEM) or the Asia-Pacific Economic Cooperation (APEC). The latter promotes the principle of open regionalism which is a policy of liberalization of trade and investments based on non-binding and unilateral commitments rather than on mutual exchange of preferential tariffs.[78]

[78] Secrétariat CESAP, "Multilatéralisme et régionalisme dans une ère nouvelle: une interaction permanente – Zones de libre-échange dans le cadre du multilatéralisme en Asie et dans le Pacifique: progrès, difficulté et perspectives", 2004, E/ESCAP/SCITI/1, pp. 3-4.

Table 5 : Preferential or free trade agreements and economic cooperations

	MGC	BIMST-EC	India Asean	India Thailand FTA	India Singapore CECA
CECA			X		X
EHP		X	X	X	
FTA		Under negotiations		X	
Trade in goods		X	X	X	X
Trade in services		X	X	X	X
Investment		X	SDP	X	X
Transport & communication	X	X	X	X	
Construction				X	
Trade facilitations		X	SDP	X	X
Energy		X		X	
Fisheries		X	X	X	
Finance & banking		X		X	
Tourism	X	X	SDP	X	
Culture	X				
Education	X		X	X	X
Human resources development	X		X		
Science & Technology		X	SDP		X
Information & communication technology		X	X	X	X
Space technology				X	
Biotechnology			X	X	
Health Care				X	
Governement procurement			X	X	

SDP: Sectoral dialogue partner between India and ASEAN in 1992
EHP: Early Harvest Programme
CECA: Comprehensive Economic Cooperation Agreement
FTA: Free Trade Agreement

Table 6 : India's Trade Comparative Table. (In Million US $)

	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006
Total Trade with Singapore	2,276.40	2,856.39	4,210.22	6,652.01	8,779.06
Growth Trade with Singapore in %		25.48	47.40	58.00	31.98
Total Trade with CMLV	688.02	799.87	966.75	1182.65	1489.27
Growth Trade with CMLV in %		16.25	20.86	22.33	25.92
Total Trade with ASEAN-6	7156.21	8968.86	12288.15	16357.91	19805.71
Growth Trade with ASEAN-6 in %		25.32	37.00	33.11	21.07
Total Trade with ASEAN	7844.23	9768.73	13254.9	17540.56	21294.98
Growth Trade with ASEAN in %		24.53	35.68	32.33	21.40
% Share India-ASEAN Trade	8.23	8.55	9.33	8.99	8.44

	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006
Total Trade with MGC Countries	1744.25	1890.07	2407.49	2949.92	3776.16
% Share India-MGC Trade	1.83	1.65	1.69	1.51	1.49
Total Trade with BIMST-EC Countries	3853.03	4454.5	6368.98	7013.01	8745.07
% Share India-BIMST-EC Trade	4.04	3.90	4.48	3.59	3.46
Growth Trade with BIMST-EC in %		15.41	42.97	10.11	24.69
India's Total Trade	95,240.01	114,131.56	141,992.58	195,053.38	252,256.27
Growth India's total trade in %		19.84	24.41	37.37	29.33

Data provided by the Government of India, Ministry of Commerce & Industry, Department of Commerce, <www.commerce.nic.in/eidb/default.asp>

The number of trade and economic arrangements created between India and South-East Asian Sates give the impression of profusion, burst and redundancy, but one can call it flexibility and the possibility of several-tiered evolution. Lack of clarity also concerns the will to give, or not, a legal personality to the regional and trans-regional groupings, even if they provide for a similar basic organisation of labour, based on the classical theory of international Organisation.

Laurence Henry

THE INSTITUTIONAL FRAME FOR TRADE LIBERALIZATION AND ECONOMIC COOPERATION BETWEEN INDIA AND SOUTH-EAST ASIA

East Asian regionalism has long been influenced by the principles of peaceful coexistence, on one hand, and "open regionalism" and the "ASEAN way", on the other. All of them stress respect for sovereignty, national interest, consensus and the preference for ad hoc solutions, *i.e.* outside formal and institutional agreements. Even if the European model was clearly banished, one may nevertheless notice a new impulsion towards a more institutional mode of relations, even if a supranational frame is unlikely to be adopted.

The political process of regionalism in Asia is rooted in the principles of peaceful coexistence, Panchsheel, inherited from the Sino-Indian Treaty of 1954[79] and the Bandung Conference of 1955.[80] More or less broadly defined,[81] they can be summarized as follows: respect for sovereignty, non-interference in internal affairs, equality of rights, and peaceful resolution of conflicts. Of course, the meaning of those principles elaborated before the Cold War

[79] Mutual respect for each other's territorial integrity and sovereignty, mutual non-aggression, mutual non-interference in each other's internal affairs, equality and mutual benefit, and peaceful co-existence: Agreement between The Republic of India and The People's Republic of China on Trade and Intercourse between Tibet Region of China and India, Peking, 29 April 1954, ‹www.meaindia.nic.in›.

[80] Respect of fundamental rights, respect of sovereignty and of territorial integrity, non-intervention and non-interference in internal affairs, refusal to participate in collective defence arrangements in the particular interest of a Big Power, refusal to exert pressure on others, peaceful settlement of dispute in accordance with United Nations principles, respect of Justice and international obligations, encouragement to mutual interests and cooperation, available on ‹www.oup.co.uk/pdf/bt/cassese/cases/part3/ch18/1702.pdf#search='bandung%20conference%201955%20%20final%20communiqu%C3%A9'›, visited 19/06/2006.>

[81] L. Focsaneanu, "Les 'Cinq principes' de coexistence et le droit international", *AFDI*, 1956, pp. 150-180.

has evolved but their essence still remains and irradiates the regionalism process. A lot of declarations and treaties still refer to this common inheritance: it is the case, for instance, of the main texts adopted between India and ASEAN[82] and, at the bilateral level, between India and Vietnam and India and Indonesia[83]. Admittedly, those texts are not only concerned with economic and trade cooperation but also with political cooperation.[84]

APEC's open regionalism is based on the idea that trade and economic liberalization must be first driven by market forces and unilaterally by nations, in complement of the multilateral GATT and WTO system, institutional arrangements playing a minor role. The ASEAN system has long adopted this philosophy as well. Thus, the preferential trade agreements and economic cooperation were not so much trade creating by themselves and were rather shaped to give an impetus and a spill-over effect on trade. It takes example on the cooperation between North-East Asia and South-East Asia, based on State-voluntarism, economic networks, and informal contacts between political and business circles. [85] Governments have given direction to economic policy and priority sectors for national developments and have created a favourable environment for business.[86]

Generally speaking, the "ASEAN way" is totally transposed in the whole regional process. It is more a structural than an

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[82] such as the Joint Statement of the First ASEAN-India Summit, 5 November 2002, the Treaty of Amity and Cooperation in South-East Asia, to which India acceded in October 2003 and the ASEAN-India (as well as the ASEAN-China) Partnership for Peace, Progress and Shared Prosperity 2004.

[83] Joint Declaration between India and Vietnam in 2003 and India and Indonesia in 2005, ‹www.meaindia.nic.in›.

[84] See the preambles of the South Asia Free Trade Agreement (SAARC) and the Economic Cooperation Organisation Trade Agreement (ECO): "*in a spirit of mutual accommodation, with full respect for the principles of sovereign equality, independence and territorial integrity of all States*", available on ‹www.ecosecretariat.org› and ‹www.saarc-sec.org›.

[85]J.L. Domenach, "Asie orientale: le retour du politique", Badie B. & Smouts M.C. (dir.), "L'international sans territoire", *Cultures et Conflits*, Numéro spécial, No. 21/22, Printemps/été 1996, p. 228

[86] I. Saint-Mézard, *Eastward-Bound : India's New Positioning in Asia*, *op. cit.*, p. 436.

institutional process. It is considered that an administrative and procedural structure of decision could not fit with a spirit of mutual confidence and comprehension: "*The loose framework is positive because of its inherent potential to prevent confrontation and face-saving which is considered vital for ASEAN solidarity and cohesion*".[87] Furthermore, the decision-making process is mainly based on informality, consultation and consensus, and implementation remains largely decentralised and performs at the national level. Finally, settlement of disputes is often founded on ad hoc solutions. Even if India is satisfied with a system respecting State sovereignty and national interest, it must also deal with a new game of checks and balances. Contrary to SAARC where it is obviously the main power, it has to negotiate with a group which has its own habit and benefits from a relative economic strength and from its main position in Asia. India seems nevertheless to have adopted the ASEAN flexibility and its diplomacy has evolved towards more pragmatism.

Finally, the schemes adopted in the region are influenced by neofunctionalism theory, which gives more importance to common interest issues than to institutional integration and, thus, limit the idea of transfer of authority from sovereign States to international Organisations.[88] Except for bilateral agreements for which institutions remain based on collaboration between the involved national ministries, that eventually nominate expert working groups to assist them, the institutional organisation of the relation between India and ASEAN or within BIMST-EC or MGC are inspired by the ASEAN institutional light system, and are very similar. They are characterised by their basic structure and by the lack of supranational organs which could represent the interest of the community itself, at the benefit of the equal representation of States. Even the settlement of a common secretariat is difficult to adopt.

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[87] M. Alagappa, "Institutional Framework. Recommendations for Change" (1987), pp. 22-27, in S. Siddique and S. Kumar, (compilator), *The 2nd ASEAN Reader*, ISEAS, Singapore, 2003, p. 22.

[88] B. F. Alger, « Fonctionnalisme et intégration », *RISS*, Vol. XXIX, 1977, n°1, p. 77.

This web of agreements and sub-regional initiatives gives the image of regional integration and effective cooperation while the reality is more ambiguous and relative. Regional cooperation between India and ASEAN States is indeed based on a network of agreements, diplomatic conferences and regional international Organisations. One can nevertheless challenge if those regional initiatives or groupings are at the basis of the creation of international Organisations in the legal sense.[89] Different definitions of the latter have been given but, in this instance, a rather loose one must be adopted: "*Association of States, established by treaty among its Member States and endowed of a permanent apparatus of organs, in charge of pursuing the realisation of objectives of common interest thanks to cooperation among them*".[90] Even if ASEAN or BIMST-EC were not established by a constitutive charter, to my opinion, they can nevertheless be considered as an international Organisation, in the legal sense, since they are invested with a functional legal personality, that is a personality permitting them to act on the international society in order to realize their objectives.[91]

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[89] The issue was raised by S. Boisseau Du Rocher, *L'ASEAN et la construction régionale en Asie du Sud-Est*, L'Harmattan, Paris, 1998., p. 12.

[90] Definition translated by me from the one given by G. Abi-Saab, *Le concept d'Organisation internationale*, Paris, UNESCO, 1980, p. 52 ("*L'Organisation internationale est une association d'États, établie par accord entre ses membres et doté d'un appareil permanent d'organes chargé de poursuivre la réalisation d'objectifs d'intérêt commun par une coopération entre eux*").

[91] The quality of subject of international law can be deduced from the teleological approach: "*The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community* […] *The* [United Nations] *Charter has not been content to make the Organization created by it merely a centre 'for harmonizing the actions of nations in the attainment of these common ends' (article 1§ 4). It has equipped that centre with organs and has given it special task.* […] *In the opinion of the Court, the Organisation was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights, which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane.* […] *It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged*", ICJ Opinion, 11 April 1949, *Reparation for Injuries Suffered in the Service of the United Nations, ICJ Reports*, 1949, pp. 178-179.

The issue can be compared to the GATT (General Agreement on Tariffs and Trade) prior to the creation of the WTO in 1994. This Agreement used to have some of the characteristics of the international Organisation, such as its headquarters, organs and budget, legal activities (signature of contracts and treaties in the name of the State-parties), *i.e.* a normative and organisational structure, even if elementary.[92] In this instance, FTA and CECA can be at the origin of the creation of permanent common organs in charge of the management of the cooperation of the common objectives pursued, but all legal decisions are taken by State-parties and not by the common organs. This latter aspect is indeed crucial for most of the legal scholars because it is the characteristic which permits to say that the Organisation has a legal personality, autonomous from the one of its members. Finally, those FTA or CECA should declare their will to create an international Organisation to manage trade liberalization and economic cooperation, as the Convention of Stockholm did concerning the European Free Trade Association.[93]

There is indeed a growing debate on further institutionalisation of those groupings in the region. It is at least the case for ASEAN[94] and BIMST-EC[95], and it could be the sign of a change of mentality on this concern. The will to raise their international visibility in

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[92] E. Roucounas, "Engagements parallèles et contradictoires", *RCADI*, 1987, VI, p. 244.

[93] Convention Instituting EFTA, signed in Stockholm, 4 January 1960, *L'Association européenne de libre échange. Structure, règles et fonctionnement*, Publication du Secrétariat de l'AELE, Genève, 1976, p. 106.

[94] § 4 of the Chairman's Statement of the 11th ASEAN Summit "One Vision, One Identity, One Community", Kuala Lumpur, 12 December 2005. He expresses the will to "*… to enhance ASEAN's credibility, transparency and solidarity to protect and nurture the collective interest of ASEAN.*

We signed the Kuala Lumpur Declaration on the Establishment of the ASEAN Charter, which will be a landmark constitutional document embodying fundamental principles, goals, objectives and structure ASEAN cooperation capable of meeting needs of the ASEAN Community and beyond".

[95] For instance, the BIMST-EC Summit Declaration Bangkok, 31 July 2004 states "*that once a clear and focused programme of cooperation is in place, appropriate formal institutional mechanisms would be established, jointly and within each member country, for effective coordination and implementation*".

order to strengthen their bargaining power is certainly the main objective. This is also a way to better rationalize the decision-making process and implementation. There is indeed a growing demand for predictability and legal security. The main symbol, to that extent, is the creation of compulsory dispute settlement mechanism. Nevertheless, in the following years, the regional systems will certainly remain mainly based on inter-governmentality and consensus. The European Union model indeed plays negatively somehow, because East Asian regional Organisations are unlikely to create supranational bodies, such as the European Commission or the European Court of Justice which had largely driven European integration.

The Instuitional Frameworks at the Regional Level

More or less, the regional groupings studied here belong to the same model of institutional organisation, driven predominantly by nation-States and by inter-governmentality, while there is some space for the private sector, especially business representatives.

Institutions at the central level

In this instance, most institutional frameworks proceed from the diplomatic conference, which has been slowly invested with permanency and regularity and with a functional and rationalised institutional equipment.

Decision-making institutions

Summits at the level of the Heads of State/Government are the top regional institutions, even if they have more significance from a political point of view than on the decision-making process. They generally give a comprehensive view of the direction for future cooperation in different fields, thanks to declarations which are not legally binding. The periodicity of meetings is a pledge of will for efficient cooperation.[96]

[96] The First ASEAN-India Summit was held in 2002 only and the first BIMST-EC Summit was held in 2004. The first East Asia Summit has been launched to be then the first stone in community building in the region.

Ministerial Meetings (MM) have also an important political meaning but they are above all the central institution in the decision-making process. Following the ASEAN institutional scheme, priority is given to the Foreign Affairs Minister's Meetings. The ASEAN foreign affairs ministers conference has indeed in charge the negotiation of economic and trade agreements through the means of a "country of contact", which is more particularly in charge of negotiation.[97] The Ministers of Economy and Trade Ministerial Meetings are also a key institution for the management of trade and economic agreements, but the share of powers shows the political meaning of economic issues in the region.

The success of such meetings often depends on the upstream work of the Senior Officials Meetings (SOM), whose recommendations may simply be endorsed by the MM. Finally, one may emphasize the importance of informal Ministerial Meetings for the good understanding of cooperation. Concerning the ASEAN-India relationship, the institution of SOM started in 1993 after India became a sectoral dialogue partner of ASEAN, even if they had existed informally before.[98] The members of SOM are high ranking officials, who belong to the national Ministries or to ASEAN member-States delegations involved, or officers from the concerned agencies approved by their respective countries. Generally speaking, they belong to foreign affairs in the case of SOM, or to the trade/economic ministries in the case of the Senior Trade/Economic Officials Meetings (STEOM).[99]

Secretariat: decentralised on a rotation basis or centralised

The way administrative functions are fulfilled and by which kind of organ are very instructive on the nature of the cooperation,

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[97] S. Boissseau du Rocher, *L'ASEAN et la construction régionale en Asie du Sud-Est*, *op. cit.*, p. 122.

[98] Meeting at Official Level between ASEAN and India, "Joint Press Statement", Kuala Lumpur, 16 May 1980, <www.aseansec.org/5733.htm>.

[99] Terms of Reference for the STEOM of BIMST-EC. This document is very informative concerning the objectives, composition, frequency of meetings, chairmanship and coordination role of SOM.

integrated or diplomatic, centralised or decentralised. At the image of the ASEAN Secretariat created in 1976 only, the administrative functions remain mainly functional and by no way political. It just has a role of coordination and no decisional power.[100] Moreover, Secretariat functions are more often assumed at the diplomacy level rather than by international civil servants, selected on their own professional values which, once more, shows the political meaning of trade and economic regional cooperation.

The Joint Cooperation Committee (JCC), like its predecessor the ASEAN-India Joint Sectoral Cooperation Committee,[101] acts as the Secretariat for the cooperation between India and ASEAN. It is an intergovernmental consultative body that facilitates and coordinates the relations in the different areas of cooperation. "*The JCC is a key institutional mechanism providing substantive content and implementing programmes of cooperation*".[102] It is composed of representatives of Indian States and of the ASEAN. Its comprehensive and coordinating role is central and is an important tool for rapprochement and understandings between administrations. It is also the institution which may give impulsion for change in the India-ASEAN relations. The JCC is also assisted by the ASEAN New Delhi Committee, composed of the heads of diplomatic missions of ASEAN member countries in New Delhi who shall facilitate the dialogue thanks to monthly meetings.

The BIMST-EC and the MGC have operated with a secretariat assumed by the hosting country of the Ministerial Meetings and SOM. It means that it is not permanent but sets-up by rotation and assumes by government officials instead of international civil

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[100] S. Boissseau du Rocher, *L'ASEAN et la construction régionale en Asie du Sud-Est*, *op. cit.*, p. 135.

[101] Meeting between ASEAN and senior Indian officials on the Establishment of the Sectoral Dialogue Relations, New Delhi 16-17 March 1993 and First Meeting of the ASEAN-India Joint Sectoral Cooperation Committee, Bali, Indonesia, 7-8 January 1994, "Press Release".

[102] The First ASEAN-India Joint Cooperation Committee Meeting, New Delhi, 14-16 November 1996, "Joint Press Release".

servants.[103] In 2001, the BIMST-EC Ministerial Meeting nevertheless decided to explore the creation of a permanent secretariat. Thailand prepared a concept paper on the subject which has not yet been adopted, even if it proposes a very light secretariat.[104] In the meantime, a working group composed of BIMST-EC member-State ambassadors has been set-up in Bangkok to endorse the secretariat responsibilities (the so-called Bangkok Working Group). A certain number of variant have been imagined such as the setting-up of a Technical Support Facility (TSF) to assist the Bangkok Working Group, or that the latter work in close coordination and relationship with the SOM or the enhancement of the co-ordination role or the BIMST-EC Chair.[105] Finally, the sixth BIMST-EC Ministerial Meeting, held in 2004 adopted the TSF option for a trial period of two years. Its function is to serve the Bangkok Working Group and to coordinate BIMST-EC activities, including those of the BIMST-EC Chamber of Commerce. TSF has no diplomatic status, as it was proposed by the study prepared by an ESCAP (United Nations Economic and Social Commission for Asia and the Pacific) consultant.[106] Finally, the eighth BIMST-EC Ministerial Meeting acknowledged the need for a small permanent secretariat because of the expansion of memberships, institutions and agenda.[107]

Secondary institutions

Concerning the negotiation and the management of trade and economic trade agreements, the central role is again devoted to

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[103] Second MGC Ministerial Meeting, Hanoi Programme of Action for MGC, 28 July 2001, § 6.

[104] Fourth BIMST-EC Ministerial Meeting, Yangoon, 21 December 2001, Joint Statement § 14 and Draft Concept Paper on BIMST-EC Secretariat, Prepared by Department of Economic affairs, Ministry of Foreign Affairs, Thailand, 13 September 2002.

[105] Report of the Fifth BIMST-EC Senior Officials Meeting, Colombo, 18-19 December 2002, "Agenda Item 6: Future Direction of BIMST-EC".

[106] 6th BIMST-EC Ministerial Meeting, 8 February 2004, Phuket, "Joint Statement" and Report of the Chairman of Bangkok Working Group to the 7th BIMST-EC Senior Official Meeting, Phuket, 6 February 2004.

[107] The 8th BIMST-EC Ministerial Meeting, Dhaka, 18-19 December 2005, "Joint Statement".

SOM and ministerial level.[108] Formally, the work is generally prepared by a Trade Negotiating Committee (TNC) if there is a real will to conclude a trade and economic agreement or, by a Joint Study Group whose task is only to examine the feasibility of such an agreement.[109] In this instance, most treaties studied here are only "mother agreements", i.e. framework agreements that need to be backed up by further implementation agreements and thus more negotiations. Consequently, most of the time, TNC's are not demobilized yet.[110] Generally speaking, there is no creation of neither specific nor common institutions for the implementation of trade and economic cooperation agreements, which are assumed directly by the national bureaucracies and not by regional institutions. At the very outset, regional institutions can informally review how parties enforce them. The AFTA nevertheless constitutes an exception because a Ministerial Council was established to oversee and coordinate the implementation of the treaty and to conduct mediation between the parties. Its results are nevertheless not very conclusive, in particular because of national and lobbyist pressures from economic and political circles.[111]

All central institutions can set up working groups to help them at the technical level. Generally speaking, they include experts in the different areas of cooperation, but they can be constituted by ambassadors, as is the case for the BIMST-EC Bangkok Working

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[108] For instance the BIMST-EC FTA 2004 provides in its article 10 on Institutional Arrangements: "*The Trade Negotiating Committee shall regularly report to the BIMST-EC Trade/Economic Ministries through the Senior Trade and Economic Officials on the progress and outcome of its negotiations*" or Article 12 § 3 "Institutional Arrangements for the Negotiations", ASEAN-India CECA 2003 "*The ASEAN-India Trade Negotiating Committee shall regularly report to the Ministers of Commerce and Industry if India and the ASEAN Economic Ministers (AEM -India Consultations), through the meetings of the ASEAN Senior Economic Officials and India 'SEOM-India Consultations, on the progress and outcome of its negotiations*".

[109] See for instance, the precisions made by the Memorandum of Understanding between India and Indonesia on The Establishment of a Joint Study Group to Examine the Feasibility of Comprehensive Economic Cooperation Agreement, 23 November 2005.

[110] See article 10 BIMST-EC FTA 2004 and article 12 ASEAN-India CECA 2003.

[111] S. Boisseau du Rocher, "L'ASEAN pourra-t-elle sortir des turbulences ?", *op. cit.*, 2003, p. 6.

Group.[112] They can be called experts groups, or sub-committees. Their interest is that they are more focussed on key areas and are more resulted-oriented.[113] They can be set up permanently or on an ad hoc basis. The problem is often that the experts are often called to sit in different commissions or working groups and do not have time to complete their job properly.[114]

Implication of the economic private sector in the Regional Decision-Making Process

The regional process in East Asia has first been driven by the business sector, at the origin of the regionalisation of markets and factors of production. Moreover, the first cooperation projects did not fit with their will and were rather a failure. The 1997 financial crisis demonstrated that non-State actors could further threaten the political and economic foundations of States and that intergovernmental action was not sufficient to absorb it. A balance must be found between the interests of entrepreneurs and the preservation of national and regional general interests. Economic cooperation should be driven by the private sector, notably because its intervention is free from administrative and political barriers and blockages.[115]

The Private sector is associated with the decision-making and implementation processes, more or less directly and with the founding of projects.[116] Thus, the ASEAN-India Framework

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[112] See above.

[113] H. Namhong, "ASEAN-India Summit Partnership: Challenges and Prospects", in *India-ASEAN Partnership in an Era of Globalization. Reflections by Eminent Persons*, RIS Publication, New Delhi, 2002, pp. 142-143.

[114] Interview with Rajat Nag, January 2006, RIS New Delhi; Draft Concept Paper on BIMST-EC Secretariat, § 3, *op. cit.*

[115] P.V. Rao, "Sub-Regional Strategies of Cooperation in ASEAN: the Indian Approach", in K. Raja Reddy, *India and ASEAN. Foreign Policy Dimensions for the 21st Century*, New Century Publications, New Delhi, 2005, p. 156.

[116] Cf. "track III diplomacy": A. Alatas, "International Relations in the Era of Globalization: Challenges and Opportunities for India-ASEAN Cooperation", *India-ASEAN Partnership in an Era of Globalization. Reflections by Eminent Persons*, RIS Publication, New Delhi, 2002, p. 124.

Agreement on Comprehensive Economic Cooperation in 2003 states in its preamble: "*Recognising the important role and contribution of the business sector in enhancing trade and investment between the Parties and the need to further promote and facilitate their cooperation and utilisation of greater business opportunities provided by the ASEAN-India Regional Trade and Investment Area*". Similarly, the article 2.1.2 of the Plan of Action to Implement the ASEAN-India Partnership for Peace, Progress and Shared Prosperity: "*Encourage*[s] *participation of trade and representatives in the Business Summits and trade fairs held in India and ASEAN countries…*". However, later, this text emphasises the role of facilitator undertaken by the Indian and ASEAN governments. Their responsibility is to "*promote and facilitate*", to "*establish linkages involving business and industries*", to "*maximise the synergies*". Following ASEAN's partnership with "civil society associations"[117], or the United Nations Global Compact, the concept of civil society must be taken broadly here. It means, first that professional and business associations are overrepresented.[118] Furthermore, beyond the traditional partnership between the State and the big enterprises, ASEAN seems to be more open to the involvement of civil society, especially NGOs,[119] while it is unlikely to be the case of India, since the latter generally prefers to stick to the intergovernmental system.[120] The academic sector can be also involved in the

[117] See, "Guidelines on ASEAN's Relations with Civil Society Organisations (previously called Non Governmental Organisations)".

[118] For a discussion of the concept and the historic inclusion of business society within it, see J. C. Lagrée, "Société civile internationale, un concept à réévaluer", *Esprit Critique*, 2004, Vol. 6, No. 2, available on <http://vcampus.univ.perp.fr/esptitcritique/>

[119] E. Teo Chu Cheow, "L'ASEAN entre élargissement et marginalisation", *op.cit.*, p. 141.

[120] For the Indian position on NGO and WTO, see J. Chaisse & D. Chakraborty, "Dispute Resolution in the WTO: the Experience of India", in D. Sengupta, D. Chakraborty, P. Banerjee, *Beyond the transition phase of WTO. An India Perspective on Emerging Issues*, Academic Foundation & CSH, New Delhi, 2005, p. 531.

decision-making process, among other by its expertise and international networks.[121]

Since the beginning, the ASEAN-India relations acknowledge the importance of the involvement of private sector in their cooperation, even if at the beginning it was directed towards the creation of joint ventures. From 1980, a Joint Business Council of the Apex Chambers of Commerce of India and the ASEAN Chambers of Commerce and Industry (CCI) was established. The latter, now called ASEAN-India Business Council (AIBC)[122], has an effective role to play since India became a Sectoral Dialogue Partner. It is a private organisation, but established by an intergovernmental decision. Its main role is to allow business communities to network and encourage information exchanges, notably through the organisation of forums, seminars, or trade shows. Furthermore, the AIBC meets separately but, above all, it participates in the ASEAN-India Joint Cooperation Committee.[123] Nevertheless, the Indian private sector still seems to be little involved and interested in the formal institutional cooperation process with ASEAN.[124]

Concerning MGC, the areas of cooperation decided should involve the private sector, but there is no mention of it in the official texts,

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[121] F. Hagner includes them in the civil society: "Le Global Compact. Une tentative d'implication d'une multiplicité d'acteurs ds la mise en oeuvre du droit international", in *in* L. Boisson de Chazournes et Rostane Mehdi, *Une société internationale en mutation : quels acteurs pour une nouvelle gouvernance*, Bruylant, Collection Les Travaux du CERIC, Bruxelles, 2005, p. 48.

[122] On the ASEAN side, it is composed by the ASEAN Chamber of Commerce and Industry (CCI), which brought together national CCI, even if the Federation of Singapore CCI and the Singapore-Indian CCI have a special role to play and remain at the heart of the mechanism of cooperation between ASEAN and India. The Indian side is represented by the four major trade and industrial chambers, FICCI (Federation of Indian Chambers of Commerce and Industries), ASSOCHAM (Association of Chambers of Commerce), FIEO (Federation of Indian Exporters Organisations) and CII (Confederation of Indian Industries).

[123] § 8 of the Meeting at Official Level Between ASEAN and India, Kuala Lumpur, 16 May 1980, *op. cit.* and § 10 First Meeting of the ASEAN-India Joint Sectoral Cooperation Committee, Bali, Indonesia, 7-8 January 1994, *op. cit.*

[124] I. Saint-Mézard, *Eastward-Bound: India's New Positioning in Asia*, *op. cit.*, pp. 123-124.

it is the reason why one can suppose that it is more implicit than formal. On the contrary, since its origin the BIMST-EC has truly associated the private sector, on the recommendations of ESCAP. A business forum was even easier to establish than the BIMST-EC economic forum. The former, created in March 1998, is formed by representatives of the private sector. Its role is to create an innovative form of partnership between governments and private sector as well as to forge links within the businesses themselves. The idea is to create a community, beyond formal governmental cooperation, involving business, civic and professional organisations and to include exchange of ideas, culture, business practices, technology and people.[125] For instance, the BIMST-EC Youth Football Tournament is often quoted as a positive example of people-to-people contacts by Ministerial Meetings and even by the First BIMST-EC Summit Declaration adopted on 31st July 2004. The recommendations made by the private sector can also be very practical, such as the issue of travel/business visas, for example. The discussions between governments and the private sector can also be crucial for the negotiations of the list of products to include in the different lists of a Free Trade Agreement, or to provide a definition for Rules of Origin.[126] It is now assisted by the BIMST-EC Chamber of Commerce and Industry, created in 2003. The Business Economic Forum, whose establishment was unsuccessfully hoped by the Ministerial Meetings until 1999, is formed by public and private sector representatives and is a forum for exchange of views between policymakers and the business community. It is a necessary means to identify market potential, to permit cooperation of BIMST-EC small and medium enterprises and to assist the implementation of cooperative projects in the fields of trade, investment and infrastructure.[127] According to the

[125] Report of the Ad Hoc Expert Group Meeting on BIMST-EC: Promoting Government-Private sector Partnership, Bangkok, 2 and 3 March 1998.

[126] See, FICCI Press Release, "India's Approach to BIMST-EC FTA to be Finalised Soon: Commerce Ministry Official at FICCI Meeting", 5 May 2005, ‹www.ficci.com›.

[127] Special BIMST-EC Ministerial Meeting, Bangkok, 22 December 1997 and 3rd BIMST-EC Trade/Economic Ministerial Meeting, "Agreed Conclusions", 15 February 2001, Yangon, Myanmar.

experience of the Business Forum and Economic Forum to work back-to-back, their meetings are now held in conjunction with BIMST-EC SOM and Foreign Ministers Meetings.[128]

Finally, it is interesting to note that the Joint Study Group, set up to examine the feasibility of a FTA between India and Indonesia, is formed by government officials and by representatives from the private sector and academia.[129]

More than the establishment of common organs, the existence of a normative power devoted to the community institutions is a symbol for the creation of an international subject, able to act independently in the international society. Otherwise, the normative and financial remain of the capacity of States only.

Legal and Financial Instruments

By the fact of the so-called principle of speciality, international Organisations have the necessary competence to realise the object and aims for which they were created. Those functions are generally enshrined in their constitutional charter or deduced from the necessity to exercise its functions.[130] Those functions are exclusive to the Organisation or can be shared with its member-States. Then, the action is undertaken by the Organisation only when it is the best way to achieve it, otherwise the State competency remains (so-called principle of subsidiarity). Generally speaking, the objective of regional cooperation between India and South-East Asia is rather to move closer to national policies than to develop common policies defined and managed by the Organisation itself.

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[128] §11, 5th BIMST-EC Ministerial Meeting, Colombo, 20 December 2002.

[129] Memorandum of Understanding between India and Indonesia on the Establishment of a Joint Study Group to Examine the Feasibility of Comprehensive Economic Cooperation Agreement, 23 November 2005, available on ‹http://meaindia.nic.in›.

[130] Theory of implied powers: "*Under international law, the Organisation must be deemed to have those powers which, though nor expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of duties*", ICJ Opinion, 11 April 1949, *Reparation…*, *op. cit.*, p. 182.

In this instance, the normative competences of the organs are not precisely defined, but they correspond to the classical powers of an international Organisation. Most legal and financial decisions are taken at the intergovernmental level. Finally, the regional initiatives have no financial independence, because they do not possess their own budget.

Decision-making process and regional normative instruments

In the absence of constitutional charter and by will of flexibility and respect of sovereignty, there is no clear share of powers. First, the ambiguity concerning the attribution of a legal international personality to the regional groupings or Organisations, discussed below, has some consequences here, because it permits to say if the actions are endorsed by the Organisation on its own name, or by its member-States, or both. Second, another issue is primarily the use of non-compulsory instruments and ad hoc solutions, which fits well with the a-legal tradition of East Asia. For Western observers, accustomed to the legal positivism point of view, the main difficulty remains that non compulsory texts (soft law) can be more effective than binding instruments (hard law).

The decision-making law generally belongs to the highest central organs, that is the Ministerial Meetings and the Summits of Heads of State. In the East Asian region, there is a tradition of regular use of recommendations, which are non-compulsory acts, irrespective of their name declarations, joint statements or road maps. In addition, the most common instrument for cooperation at the regional and bilateral levels is the use of treaties. In principle, regional Organisations, as any other international body, can also sign treaties on their own right. It is a consequence of their legal status under international statutes. For instance, ASEAN or even BIMST-EC could sign an agreement with another Organisation, such as the Asian Development Bank or the International Monetary Fund and it would have legal standing. Nevertheless, once more, the ambiguity remains in this field, because it is difficult to attribute those conventions, and corresponding responsibility to implement them, to the Organisation and its members-States or to State-parties

alone, that is to the Organisation itself as a collective personality, or to the States individually. For instance, the preamble of the ASEAN-India CECA quotes each ASEAN Member State, acting "collectively" or "individually", on one hand, and India, on the other. The Framework Agreement on the BIMST-EC Free Trade Area quotes the seven governments involved as member-States of BIMST-EC, but at the same time "*hereinafter referred to collectively as 'the Parties' and individually as 'a Party'*". It is based on what is called "mixed treaties" in European Community law when, because of the share of competences, an agreement must be signed by both member-States and the Community itself. In my opinion, nevertheless, the Framework Agreements do not correspond to this legal definition of mixed treaties because neither ASEAN, nor BIMST-EC are quoted as "*Parties*", and no representative have sign it in the name of the Organisation.

For important agreements, a procedure of ratification subjected to national constitutional rules is expected before the treaty can enter into force. For example, at the date of its formal entry into force, on 1st July 2004, the ASEAN-India CECA was ratified on the ASEAN side, by Philippines, to be followed by the Lao PDR and Vietnam.[131] Besides the entry into force from a strictly legal point of view, those treaties generally require implementation agreements to be effectively and currently applicable (except for the India-Singapore CECA) and often accept too many exceptions. Because of this, the ASEAN-India Early Harvest Programme implementation was already postponed several times instead of having started on 1st November 2004, because of the failure of negotiations on the Rules of Origin.[132] In the same manner, the signature of Trade in Goods, including Rules of Origin, Sensitive Lists and Dispute Settlement Mechanism, will allow the actual implementation of Article 3 of the BIMST-EC FTA 2004.[133] This

[131] Table of ASEAN Treaties/Agreements and Ratification, as of December 2006.

[132] § 9, Chairman's Statement of the 3rd ASEAN-Plus-India Summit, Vientiane, 30 November 2004 and § 6, Chairman's Statement of the 3rd ASEAN-Plus-India Summit, Kuala Lumpur, 13 December 2005.

[133] Point A.1, 8th BIMST-EC Ministerial Meeting, Dhaka, 18-19 December 2005.

recalls the nicknames given to AFTA: "*Agree First Talk After*"[134] or "*Another Futile Trade Agreement*"[135]. On the other hand, the advantage is that every economic and trade cooperation is negotiated step by step and implemented pragmatically according to the needs. Another issue is the lack of financial support to the functioning of the cooperation and to the implementation of projects.

In accordance with the "ASEAN way", the use of consensus is the rule of the day. Together with the informal institutional scheme, this characteristic certainly explains why the decisions use rather vague terms and generally have rather broad objectives, which allows a larger scope for implementation. Another consequence is the gap between the objectives and the reality of the field, with a lot of non-enforcement or implementation à la carte. The interest of these procedures is that consensus does not allow a State to be in minority and thus to lose face and respect the Asian value of harmony and the practice of Indonesian origin of *musyawarah* (consultation) and *mufakat* (consensus).[136] It means that it is necessary to negotiate until the adoption of a decision without fundamental objection and without vote. Consensus must also be distinguished from unanimity, the latter allowing the exercise of veto. It is indeed generally a way to keep the dialogue between the minority and the majority and to respect the equality and sovereignty of States even for the smallest member-States or parties. In fact, it gives a lot of responsibilities and powers to the presidency of the meeting which must persuade and find the lowest common denominator.[137]

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[134] H. Soesastro, "Accelerating ASEAN Economic Integration: Moving beyond AFTA", *Economic Working Paper Series*, <www.csis.or.id/papers/wpe091>, March 2005, p. 1.

[135] M. Ariff, "AFTA = Another Futile Trade Area" (1994), in S. Siddique and S. Kumar, (compilator*), The 2nd ASEAN Reade*r, ISEAS, 2003, p. 226.

[136] S. Boisseau du Rocher, *L'ASEAN et la construction régionale en Asie du Sud-Est*, *op. cit.*, p. 140.

[137] E. Suy, "Rôle et signification du consensus dans l'élaboration du droit international" (1986), *Annuaire de l'Institut de Droit Internationa*l, vol. 67-I, 1997, pp. 16-36.

Besides consensus, other procedures can nevertheless be used for more efficient deliberations of certain organs, but it is not easy to come to know these procedural requirements. Thus, in 1996 an ASEAN-India Working Group has been set up to rationalise the procedure for approving and implementing common projects.[138] If consensus cannot be reached, the BIMST-EC Bangkok Working Group and Ministerial Meeting has proposed an alternative procedure: "*We recommend to leaders the adoption of the principle of requiring at least 3 member countries* [up to five] *for projects implementation, and at least 4 member countries for the convening of an Expert Group, while consensus is needed for policy decision, including on new membership*."[139]

Generally speaking, regional initiatives, such as ASEAN-India cooperation, BIMST-EC or MGC fit well with East Asian and ASEAN customs, which induces flexibility and respect of sovereignty, even if it does not necessarily fit with the Indian legal tradition. New Delhi has nevertheless some advantages in following this path. First, the system allows some flexibility and the implementation process is staggered over a period of time. This may be useful for India which sometimes have internal political problems to reform its trade and economy. It is a consequence of the normative effect of the legal instruments used, but also it is sometimes expressly stipulated such in the ASEAN-India CECA.[140] Second, it permits negotiation and implementation à la carte. For instance, when dealing with ASEAN, the latter is not necessarily

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[138] See First Meeting of the ASEAN-India Joint Sectoral Cooperation Committee, Bali, Indonesia, 7-8 January 1994 and I. Saint-Mézard, "The Look-East Policy: An Economic Perspective", *op. cit.*, p. 33, note 11.

[139] Point 8 of the Joint statement, 6th BIMST-EC Ministerial Meeting, 8 February 2004, Phuket, Thailand.

[140] Article 13 § 4: "Any ASEAN Member State may defer its participation in the implementation of this Agreement provided that a notification is given to the other parties within twelve (12) months from the date of signing of this Agreement. Any extension of the negotiated concessions to such ASEAN Member State shall be voluntary on the part of the parties participating in such implementation. The ASEAN Member State concerned shall participate in the implementation of this Agreement at a later date on the same terms and conditions, including any further commitments that may have been undertaken by the other parties by the time of such participation".

considered a united block, especially when the entry into force would concern only States which have ratified the treaty concerned. Thus, its relative strength, as a regional power, is more likely to be taken into account, while preserving the image of a regional initiative as a whole. The pick and choose policy allows to instigate a lot of recommended or desirable initiatives which can be activated when they are possible or necessary. This emphasizes the fact that these trade and economic projects are as much economic as political policies and are more voluntarist than effective. The example of BIMST-EC is pertinent in this context. It has potentiality which needs to be effectively harnessed and pushed forth. This also explains why the regional initiatives are often overtaken by bilateral ones, especially between India and Singapore, which are nevertheless the heart of ASEAN-India cooperation, and between India and Thailand, heart of the BIMST-EC cooperation. Finally, even if this system shows a positive image of the regionalism processes, it lacks the legitimacy that comes from legal sanction. The demand in this regard is growing. It fits with Indian Rule of law traditions but also with the economic actors' will of a more stable and predictable environment.

Financial instruments

The ASEAN-India cooperation has at its disposal a fund that was created when they became sectoral partners in 1993. "*This Fund would be placed at the disposal of the ASEAN secretariat and administered by a Joint Management Committee which will be established for this purpose*".[141] The fund is supposed to be used to finance events which facilitate people to people contacts and interactions such as seminars and fairs. Trade promotion and cooperation is generally funded directly by the countries themselves. The ASEAN-India Partnership for Peace, Progress and Shared Prosperity points out the necessity of the strengthening of existing funding mechanisms, including the ASEAN-India

[141] Meeting between ASEAN and Indian Senior Officials on the Establishment of the Sectoral Dialogue Relations between ASEAN and India, New Delhi, 16-17 March 1993, *op. cit.*, § 14.

Cooperation Fund. Nevertheless, the difficulty remains in mobilising financial support and especially on an equitable basis: "*ASEAN and India are committed to providing requisite resources and in accordance with their respective capacities, including mutually exploring effective and innovative external resources mobilisation efforts…*".[142] The necessity to call for external finance is quite common, while there is a need for these initiatives to keep their autonomy, as stated by the eighth BIMST-EC Ministerial Meeting: "[P]*rojects should be clearly conceptualized, adequately funded… and based, as far as possible, on internal financing from within the BIMST-EC member States. We also agreed to consider resources from outside, on a case by case basis*".[143] MGC works on a similar basis, with a fund supplied by member-States, donor agencies and countries, and international Organisations.[144] External financial and technical support generally come from the Asian Development Bank, the Washington Agencies, International Monetary Fund and World Bank, United Nations Development Programme and ESCAP. The MGC measures to seek financial resources are very broad and imaginative: Beyond the classical formula, it also imagines the possibility of the 2+1 cooperation formula "*whereby two MGC countries will join hands together with donor country or Organisation*." As a transregional initiative, MGC plans to work with the Greater Mekong-Subregion development programmes and with the projects of ASEAN Integration Work Plan, to which India is not a party. MGC also envisages the financial support of the private sector, directly or indirectly.[145] Investors are indeed the key element for the functioning of economic cooperation between India and South-East Asia. For BIMST-EC, it is more realistic to implement two projects per year only and to be able to finance them. Finally, each government pays for their national representatives and for the

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[142] "Institutional and Funding Arrangements for implementation", ASEAN-India Partnership for Peace, Progress and Shared Prosperity, 30 November 2004.

[143] Point C, 8th BIMST-EC Ministerial Meeting, Dhaka, 18-19 December 2005, *op. cit.*.

[144] Article 5.1, Hanoi Programme of Action for MGC, 28 July 2001.

[145] Article 6, Phnom Penh Road Map, 20 June 2003.

implementation of common policies and trade-related measures on their territory. The functioning of the organs is taken in charge by member-States and meetings' expenditure are generally shared by the host country and participating countries.[146]

Another important feature of the realisation of a regional project is the capacity to adopt common and sometimes compulsory dispute settlement mechanism.

Regional Disputes Settlement Mechanisms

The issue of an efficient dispute settlement system is very classical in international law, but in this instance it also hits the national judiciary since regional regimes studied here can directly concern private persons as well. Between States, there can be different kinds of dispute settlement mechanisms (DSM), political or judicial, by the parties directly, or through the intervention or facilitation of a third party. From a theoretical point of view, a legal instrument does not necessarily need the existence of legal remedy and judicial review to be enforced since it is compulsory. Nevertheless, the existence of an efficient dispute settlement mechanism is good warranty for effective enforcement and legal security.

Dispute settlements in the Asian context

The adoption and acceptance of compulsory systems has been a difficult proposition in Asia. After attaining independence, most Asian countries started using judicial mechanisms, such as the submission of cases before the International Court of Justice and Arbitral Tribunals, mainly to resolve territorial disputes and States' succession issues. It was specially the case of India.[147] Then, during the end of the 1960's till the 1990's, newly independent States were reluctant to use such formal procedures for the settlement of their disputes, preferring political proceedings, which were

[146] See for instance, article 2 Summary Record, 1st Task Force Meeting on Matrix of BIMST-EC Projects Proposals, 11 November 2002, Ministry of Foreign Affairs.

[147] L. Henry, *Mutations territoriales en Asie central et orientale*, Thèse pour le Doctorat en Droit, Faculté d'Aix-en-Provence, Université P. Cézanne, 21 juin 2005, pp. 298-340.

considered as more respectful of their sovereignty. Generally speaking, those States considered the submission of a case to a court of law as an inimical act, which may conduct to loose face and not conform to the a-legal Asian tradition. The ordinary law was therefore the settlement of dispute by direct negotiations or consultations, without intervention of a third party.[148] To that respect, in South-East Asia, the first evolution arose with the signature of the TAC in 1976. For the purpose of pacific settlement of disputes between ASEAN States, the parties involved had agreed upon to submit their case before the High Council comprising of a representative at the ministerial level of each contracting party, which may recommend means of settlement or offer its services, such as good offices, mediation, inquiry or conciliation.[149] This system has nevertheless never been used so far. More recently, Malaysia, in particular, has started intense activity before international tribunals.[150] Generally speaking, it is well known that the creation of an international Organisation, especially at the regional level, is often linked with the development of third party and judicial dispute settlement mechanisms. Finally, judicial or quasi-judicial dispute settlement mechanisms are more akin to respect the equality of the parties and to provide an equitable solution.

Trade and economic issues are nevertheless often considered as less politically sensitive, and an evolution of mentalities towards the benefit of all for a more secure and predictable system of law have permitted an evolution in this domain, at the world and regional levels. It is also a way to test the level of integration within a community. The Asian financial crisis, for instance, demonstrated that there was a need for a better enforcement of law, i.e. a need for efficient dispute mechanisms and harmonisation of economic law. The legal system of trade and economic cooperation needs

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[148] L. Henry, *ibid.*, pp. 299-303 et pp. 364-366.

[149]. Ch. 4, "Pacific Settlement of Dispute", Treaty of Amity and Cooperation in South-East Asia, Indonesia, 24 February 1976.

[150] L. Henry, *Mutations territoriales en Asie centrale et orientale*, *op. cit.*, pp. 384-421.

credibility to gain the confidence of investors.[151] It has changed the mentality of Asian States which have been reputed to have an a-legal tradition or, at least, a preference for social understandings and solutions rather than the strict enforcement of law. Finally, even if India has a legal tradition based on the Rule of law, from an internal point of view, regarding its international relations, it has been quite resistant to the use of compulsory and permanent dispute settlement mechanisms as well.

Even if there is an evolution towards judicial disputes resolution mechanisms, diplomatic means stay quite important. The ASEAN-India CECA and the BIMST-EC FTA both provide for negotiations for the establishment of an appropriate formal dispute-settlement procedure and disputes, for the purpose of implementation or application of those agreements. Meanwhile, very classically, "*any dispute arising between the parties regarding the interpretation, application or implementation of this agreement shall be settled amicably through mutual consultations*".[152] Finally, the Framework Agreement for Establishing FTA between India and Thailand (article 10) also provides for a very classical amicable settlement through negotiations. Nevertheless, according to the media, the BIMST-EC Trade Negotiation Committee has finalized a mechanism to settle trade-related dispute by a high-level party mediation committee.[153] By definition, mediation is the intervention of a third party which proposes the premises of a solution but cannot impose it on the parties in dispute. The intervention of a third organ presents the advantage of facilitating the negotiations and to guarantee the respect of the solution, while respecting State's sovereignty as well.

Trade dispute settlement mechanisms generally reflect the special nature of international economic law that necessitates reciprocity, continuity of economic relations and quick litigation, and not only

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[151] R Arumugam, "Revisiting the Law and Development Paradigm in ASEAN", in R. Hiang-Khng, D. Hew Wei-Yen (ed.), *Regional Outlook: South-East Asia 2004-2005*, 2003, p. 59.

[152] Article 9 § 2 BIMST-EC FTA 2004 and article 11 ASEAN-India CECA 2003.

a traditional international responsibility regime. This well explains the main place taken by experts and the mixing of diplomatic and judicial elements Furthermore, the distinction between compulsory and non-compulsory solutions is rather relative because, in case of non-compliance, reprisals are much more insidious. As for the WTO DSM, the quasi-judicial mechanisms provided here are characterised by the persistence of negotiations at each stage of the procedure, beforehand, and during the process as an alternative, and even afterwards. In the latter case, indeed, the parties to the dispute can negotiate the modalities and the time-frame of implementation of the so-called "recommendations", even if bringing it into conformity is preferred. Furthermore, if the defendant cannot be brought into compliance with the recommendations within a reasonable period of time, they, if so requested, could enter into negotiations with the plaintiff with a view to reaching a mutually satisfactory agreement on any necessary compensatory adjustment. This is true for both so-called "arbitration" and panel and appellate body mechanism existing for the settlement of trade and economic disputes in East Asia. It is actually the main difference with a judicial mechanism, whose decision is always final and binding. One may note that even if numerous bilateral trade agreements in East Asia, in particular the CECA between India and Singapore,[154] use the term 'arbitral tribunal', it cannot be called as such for the reasons mentioned above. Nevertheless, these tribunals have several other characteristics of arbitration, in particular, concerning the administration of the arbitral procedure. Indeed, the parties appoint the arbitrators, decide the procedure, pay the expenses and the decision is not submitted to an appeal. On the contrary, in the case of a dispute settlement mechanism established within an

[153] "BIMST-EC finalizes dispute resolution rules", *Kathmandu Post***,** 28/12/2006.

[154] It is also the case for the Agreement on Dispute Settlement Mechanism Under the Framework Agreement on Comprehensive Economic Cooperation Among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea, signed in Kuala Lumpur, on 13 December 2005 and for the Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-Operation Between the Association of Southeast Asian Nations and the People's Republic of China, signed in Vientiane, on 29 November 2002.

international Organisation, such as WTO or ASEAN, the administration of the whole award, such as the appointment of the panel members, the detailed procedures, implementation of the recommendations and expenses, is taken in charge by the Organisation itself, not by the parties to the dispute. Furthermore, it can be appealed from the panel's decision. However, even if the will of the parties is respected at each stage of the process, such a solution is possible only in an integrated system.

I present here the ASEAN and the India-Singapore Dispute Settlement Mechanism (DSM) because they are the only institutionalized DSM at the regional level. Furthermore, they appear to me as a "cultural revolution" as well as stands as a model for the future schemes of settlement of disputes in East Asia, concerning inter-governmental, private or private/public disputes.

ASEAN dispute settlement mechanism[155]

By willing a system lacking legal commitments, ASEAN States have faced the issue of the construction of a common and effective legal system, warranty of a better integration process, for which a credible dispute settlement mechanism is a pillar. They have moved towards a more efficient system with the adoption of the Protocol on Dispute Settlement Mechanism in November 1996, in charge of reviewing the Framework Agreement on Enhancing ASEAN Economic Cooperation, adopted on 18th January 1992, as amended by the 1995 Protocol and all related agreements listed (47 treaties in 1996 and 46 treaties in 2004). The basic characteristics of the mechanism are that it is not compulsory, even if, the final decision, if it intervenes, is binding and compulsory. Furthermore, it involves political and legal elements, as well as inter-governmental and judicial proceedings. All disputes must first be conducted through consultations in order to be settled amicably. Moreover, at any time, before or during the procedure, the parties may agree to submit their case to good

[155] Protocol on Dispute Settlement Mechanism, 20 November 1996 and ASEAN Protocol on Enhanced Dispute Settlement Mechanism, 29 November 2004.

offices, conciliation or mediation. If consultations fail, the key element is the possibility for the Senior Economic Officials Meeting (SEOM) to appoint a panel, composed of professionals with required qualification in the area of international trade law or policy, appointed by the SEOM with the help of the Secretariat of ASEAN and acting independently from their governments.

The panel's task is to make a statement on the facts and legal findings and to draft a report without the presence of the parties to the dispute. The decision whether to adopt the panel's report is taken by the SEOM with a simple majority even if the parties to the dispute have no right to vote. An appeal before the ASEAN Economic Ministers (AEM) is possible and its decision is then final and binding on all parties to the dispute. All the procedure is confidential and enshrined in a strict time-frame (a maximum of 290 days). If the State concerned fails to comply with the SEOM's ruling or the AEM's decision, this party can ask to enter into negotiation with a view to adopting mutually agreed compensations. If the parties cannot agree on such compensations, any party having invoked the dispute settlement procedure can ask the AEM to suspend the application to the member-State concerned of concessions or other obligations under the Agreement or any covered agreement.

This protocol, although signed by all ASEAN member-States (it entered into force on 26th May 2006, after the ratification or acceptance of all signatories – *i.e.* Brunei, Indonesia, Malaysia, Philippines, Singapore, Thailand, Vietnam), was replaced by a new one, adopted on 29 November 2004, by all member-States and in force upon signing[156]. The new mechanism adopted is very balanced, between the will to give more independence to the quasi-judicial bodies and the preservation of State sovereignty, especially for third-parties and at the stage of the adoption of implementation measures, compensations or suspension of

[156] ARTICLE 21 Final Provisions § 2. "This Protocol shall replace the 1996 Protocol on DSM and shall not apply to any dispute which has arisen before its entry into force. Such dispute shall continue to be governed by the 1996 Protocol on DSM".

concessions. It is less politicised because the AEM does not intervene anymore and more professional because of the intervention of trade specialists at the appeal level. Globally, the system nevertheless remains the same even if the procedure is much more detailed. As in the WTO DSM, the adoption of the report is based on the negative consensus rule *i.e* that the SEOM shall adopt the report unless the latter decides by consensus not to adopt it. Appeal can be lodged before the Appellate Body (AB), composed by professionals, appointed on a permanent basis of four years by the AEM. It has only a role of cassation, *i.e*., the appeal is "*limited to issues of law covered in the panel report and legal interpretations developed by the panel*".[157] The report is then adopted by the SEOM, also by negative consensus. In case of approval, the parties must accept unconditionally the AB report, but every member-State may express its view on it. Concerning the panel or AB's report enforcement, more flexibility is given to the party which must comply. For instance, the period of compliance can be longer because of special circumstances of the case of the complexity to the actions to be taken, in particular in case of the necessity to pass a national legislation. Compensations are also more controlled at the benefit of the party which must comply, that is why it is stipulated that they are temporary and voluntary. The system of compensation is similar to the former one, even if an authorisation is requested before the SEOM, instead of the AEM, and it is more strictly framed by principles and procedures. The costs are now taken in charge by a special fund administered by the ASEAN Secretariat and not by the parties directly, which respects more the equality between the parties and the difference of wealth and development.

India-Singapore DSM

In the India-Singapore CECA, a special chapter is dedicated to dispute settlement (Chapter 15). If consultations fail and unless another procedure of good offices, conciliation or mediation is set-up, it provides for an arbitral procedure. The basic

[157] Article 12 § 6 ASEAN DSM 2004.

composition of the Tribunal is of three members chosen for their expertise or experience in international trade law, reliability and independence. The arbitral tribunal shall judge in facts and law and shall, in case of breach of the agreement, recommend to the party in default to bring the measure into conformity. Otherwise, the payment of monetary compensation is excluded, but in case of non-compliance with the award, the party which failed to bring the measure into conformity shall request to enter into negotiations in order to reach acceptable compensation. On the contrary, only the other party can ask for temporary suspension of benefits. The proceedings are very detailed by the agreement and confidentiality must be respected. All along the procedure, the Tribunal must seek that the dispute may be settled amicably by the parties or in conformity with the parties' will. As noticed previously, a clever balance is indeed made between the requirements of an independent award and the respect of the parties' sovereignty, which generally speaking, conforms to the spirit of arbitration, for instance, "*The report of the arbitral tribunal shall be drafted without the presence of the Parties in the light of the information provided and the statements made. The arbitral tribunal shall accord adequate opportunity to the Parties to review the entirety of its draft report prior to its finalisation and shall include a discussion of any comments by the Parties in its final report*".[158]

Remedies for private dispute related to economic and trade agreements

An effective system of compliance towards private sector must also be envisaged to ensure the efficiency of these agreements. Investments are the typical area for disputes which may concern States and/or the private sectors. ASEAN has created the ASEAN Consultation to Solve Trade and Investment Issues (ACT), which is a network of government agencies that the private sector could refer to. The ACT would then direct the problem to the appropriate

[158] Article 15.8.10 India-Singapore CECA, 2005. See also article 15.9.

national agency and ensure that a speedy and appropriate solution is found.[159] In addition, the agreement among certain ASEAN members (Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand) for the Promotion and Protection of Investments in Manila, 15 December 1987, provides for an arbitral procedure for disputes between a State and a private person.[160] In 2003, the first arbitration procedure nevertheless decided that it has no jurisdiction on technical ground.[161] Between member-States, the 1998 Framework Agreement on the ASEAN Investment Area provides for the use of the procedure before the ASEAN DSM.[162]

The India-Singapore DSM also lays out procedure dedicated to private disputes related to the India-Singapore CECA. The arbitral proceedings is inter-governmental and, therefore, cannot be used with regard to the refusal to grant temporary entry (with very few exceptions) or for investments disputes, for which a special procedure is envisaged. First, Chapter 6, on investment, states the necessity for a good access to national courts of law, especially in

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[159] "*ACT is an internet-based problem-solving network for use by business operators and other agencies as a non-legal and non-binding mechanism capable of expeditiously resolving operational problems encountered by the regional business community on cross-border issues related to the implementation of ASEAN agreements. It has its own website for professional use only*": <http://act.aseansec.org>.

[160] Article 10: 1. "*Any legal dispute arising directly out of an investment between any Contracting Party and a national or company of any of the other Contracting Parties shall, as far as possible, be settled amicably between the parties to the dispute*".

2. "*If such a dispute cannot thus be settled within six months of its being raised, then either party can elect to submit the dispute for conciliation or arbitration and such election shall be binding on the other party. The dispute may be brought before the International Centre for Settlement of Investment Disputes (IGSID), the United Nations Commission on International Trade Law (UNCITRAL), the Regional Centre for Arbitration at Kuala Lumpur or any other regional centre for arbitration in ASEAN, whichever body the parties to the dispute mutually agree to appoint for the purposes of Conducting the arbitration*".

[161] Lay Hong Tan, "Will ASEAN Economic Integration Progress Beyond a Free Trade Area?", *op. cit.*, pp. 949-951.

[162] Article 17, Agreement signed in Makati, Philippines, 7 October 1998.

case of expropriation.[163] Second, if a dispute arises between a State and an investor, after consultations and negotiations, the latter can, within a certain time-limit, submit the case before the court or administrative tribunal, the International Centre for Settlement of Investment Dispute (ICSID) for conciliation or arbitration (if in force between the parties), or to the arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL). As far as possible, the State-parties must let the investor seek interim measures of protection and preservation of its rights and interests before local courts, prior to the submission of the case before one of the above forums. Finally, neither party shall bring an international claim or give formal diplomatic protection to one of its investors, unless the other party does not comply with award rendered in the dispute.[164]

Even if institutional evolutions tends to show a real start of regional construction, the evolution of the trade and economic relations is finally largely influenced by the world trade system and India and a majority of South-East Asian nations still give priority to multilateralism, rather than to regional construction.

Trade management at the International Level: The World Trade Organisation system

The institutional WTO frame

The World Trade Organisation (WTO) is a product of GATT, and provides for a collective structure to manage international trade and related economic measures. It is a classical international Organisation of cooperation, based on the principle of equality of States, which nevertheless allows membership of autonomous custom territories (such as Hong Kong, Taipei or the European Union for instance). Accession to WTO is conditional and based

[163] Article 6.18 India-Singapore CECA, 2005: "*Each Party shall within its territory accord to investors of the other Party treatment no less favourable than the treatment, which it accords in like circumstances to its own investors, with respect to access to its courts of justice and administrative tribunals and agencies in all degrees of jurisdiction both in pursuit and in defence of such investors' rights*". On expropriation, see also article 6.5.4.

[164] Article 6.21 « Investment Disputes » India-Singapore CECA, 2005.

on the member-States' consensus, while withdrawal does not need permission. Its institutional central structure is also classical, with three main organs: first, the Ministerial Conference, which is not permanent but meets twice a year. Composed by the Ministers of commerce of all member-States, it is the organ which is invested with the power of decision. Secondly, the General Council, also made up by the delegations of all member-States, is the permanent organ which exercises the functions of the conference during the inter-sessions periods. It has specific functions, such as the budget or the relations with other international Organisations and NGO's. Third, the Secretariat, headed by the General Director, is in charge of administrative questions.

Subsidiary organs have in charge the management of the different multilateral agreements, Councils on trade in goods (GATT), in services (GATS) and in intellectual rights (TRIPS) and they are answerable to the General Council. They can create committees and working groups specialised on a specific issue, such as the working group on accession or the Committee on Trade and Environment for instance.

The WTO is the permanent institution for multilateral trade negotiations. The decision-making process is normally based on majority, but in practice there is a constant search for reaching consensus. Concerning the sources of WTO, primary sources, that is WTO agreements, must be distinguished from interpretative sources. Furthermore, even if the agreement establishing the WTO is placed at the bottom of the multilateral structure, the overall system is based on the general principle of *lex specialis*, that is in case of contradiction between this agreement and any other WTO multilateral agreements, the latter prevails. Finally, if the WTO organs cannot take general and impersonal decisions, they nevertheless have the missions of implementation, administration and functioning of the whole WTO system (so-called interpretative sources). Decisions and declarations from the Ministers of Commerce and by the Trade Negotiating Committee are included in the Final Act and are legally binding by themselves even if they are

not formally included in the WTO agreements. The WTO General Council interprets the general agreements and allows waivers. Among its missions of administration, one concerns the regular examination of trade policies and practices of member-States, in order to appreciate their transparency and conformity to the WTO system. At the end of the examination process, the Ministerial Council can take recommendations to the member-States under scrutiny, which is a powerful political means of pressure.[165] Nevertheless, the central pillar for a more secure, predictable and rule-based system is ensured by the dispute settlement system, which provides for a quasi-jurisdictional mechanism. This system is all the more important since the efficiency and effectiveness of WTO is not provided by the principle of direct effect, which means that it cannot be directly evoked by private persons before national courts.

WTO Dispute Settlement Mechanism (WTO DSM)[166]

The WTO DSM is an inter-governmental mechanism, for which States have a free choice of the modes of dispute settlement, political (good offices, conciliation, mediation)[167] or judicial (arbitration)[168], even if the heart of the mechanism remains the use of the Dispute Settlement Body (DSB consists of all WTO Members; when the WTO General Council meets to settle trade disputes). It is competent for the disputes between member-States relative to the multilateral treaties coming from the Marrakech Agreements, that is the Agreement Establishing the WTO (also called the WTO Agreement), which serves as an umbrella agreement and the annexed agreements on goods, services and intellectual property (GATT, GATS and TRIPS), dispute settlement, to plurilateral trade agreements

[165] D. Carreau, P. Julliard, *Droit international économique, op. cit.*, pp. 56-64 and D. Luff, *Le droit de l'Organisation Mondiale du Commerce*, Bruylant, LGDJ, Bruxelles et Paris, 2004, pp. 21-31.

[166] Annex 2 of the Agreement Establishing the WTO, Understanding on Rules and Procedure Governing the Settlement of Disputes (hereafter WTO DSU).

[167] Articles 5 and 24 § 2 WTO DSU.

[168] Arbitration relating to implementation of DSB ruling-: articles 21 § c), 22 §§ 6 and 7, and article 26 § 1 c) WTO DSU. Arbitration as an alternative means of dispute settlement: article 25 WTO DSM.

(dependent on members' acceptance), and to special proceedings concerning special clauses enclosed in certain agreements. The system is based on the principle of gradual formalism, with three phases, one between States (consultations), one before the panel, and eventually before the Appellate Body (AB).[169] Only one third of trade disputes are actually submitted to a panel, the rest finding a friendly solution through consultations. Furthermore, at any stage, consultation and mediation are still always possible. The understanding provides for a very detailed procedure and a strict timetable to follow (a maximum of one year and three months, even less in case of urgency, if the dispute involves perishable goods). The procedure remains confidential but the reports are published, which is important to establish a coherent and predicable system of law. The DSB has the authority to establish panels and AB and to accept their findings and results. It must then monitor the implementation of the rulings and recommendations and authorizes suspension of concessions or other obligations under the covered agreements. Generally speaking, it takes its decision by consensus.

Panels consist of three experts (or possibly five) from different WTO member-States, acting in their individual capacities. The latter are chosen by the DSB in consultation with the parties to the dispute on a list established by the WTO Secretariat. Panels and AB do not issue decision but present reports, which contains observations, recommendation, or suggestions:

"*The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the*

[169] D. Carreau, P. Julliard, *Droit international économique*, *op. cit.*, pp. 73-75.

parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution".[170]

Only parties to the dispute may appeal a panel report before a standing Appellate Body, composed of seven persons of recognized authority, with demonstrated expertise in law and international trade. The appeal is limited to the issues of law and to the legal interpretations developed by the panel (cassation). Panel and AB reports have legal effect when adopted by the DSB, which can reject it, but by negative consensus only. Even if the WTO members can express their view on the case, the parties to the procedure shall accept unconditionally the AB report adopted by the DSB. The current sanction must be to promptly bring the incriminated measure into conformity with the covered agreements. If the member cannot comply, it must enter into negotiation with a view to developing mutually acceptable compensations. If no satisfactory compensation is agreed upon, any party having invoked the dispute settlement can ask the DSB the suspension of concessions, which are generally called "counter measures" or "economic reprisals". If the concerned party considers that the level of the suspension of concessions or other obligations authorized by the DSB are not equivalent to the level of nullification or impairment, it can referred to arbitration, carried out by the original panel or by an arbitrator appointed by the Director-General. This decision is final and binding.[171]

Finally, the issue of the possibility for a dispute settlement panel to review Regional Trade Agreements was asked since a procedure of compulsory examination of such agreements by Committee on Regional Trade Agreements (CRTA) exists. Under the GATT of 1947, it was generally seen as a political question under the responsibility of the contracting parties.[172] In 1999, a panel report

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[170] Article 11 of the WTO DSU: "Function of Panels".

[171] Article 22 §§ 6 and 7 WTO DSU.

[172] Sungjoon Cho, "Breaking the Barrier between Regionalism and Multilateralism: a New Perspective on Trade Regionalism", *Harvard International Law Journal*, 2001, n°42, pp. 438-439.

answered that the two examination procedures were not exclusive because their aim and object are slightly different. The task of the CRTA is to examine the overall RTA's compatibility with the WTO system, from an economic, political and legal point of view. The possibility for a judicial review can be inferred from the paragraph 12 of the Understanding on the Interpretation of Article XXIV of the GATT 1994, as well as the appropriate clauses of the DSU and article XXIV GATT 1994. Thus, the panel must examine the "*compatibility of any matters arising from such regional trade arrangements. For us, the term "any matters" clearly includes specific measures adopted on the occasion of the formation of a customs union or in the ambit of a customs union*".[173]

Trade and economic agreements between India and South-East Asia as a commercial and negotiation tool to influence world trade law

The multiplication of trade and economic arrangements, altogether with economic growth in the East Asian region, proves the dynamism of this region, economically and commercially, and therefore other States or regional Organisations could well have to negotiate with East Asian countries, collectively or individually, in order to stay in the running.[174] For instance, Europeans fear the growing competitive capacity in trade of Asian economies if the system is more open. On the other hand, if the multilateral negotiations fail, they could directly discuss bilateral agreements with ASEAN or India and thus avoid liberalization of agriculture, while obtaining a more open system for the trade in services, for instance.

The positions of India and its South-East Asian partners are not necessarily the same and even a single nation can be part of different groups of negotiation which have sometimes contradictory

[173] WT/DS34/R, 31 May 1999, *Turkey – Restrictions on Imports of Textile and Clothing Products*, §§ 9.49 to 9.53; quotation § 9.50 *in fine*. Custom Unions are quoted here but the reasoning can concern, *mutatis mutandis*, any FTA as well.

[174] « Bruxelles est tenté par des accords bilatéraux », ‹www.lemonde.fr›, 14/06/2006; "US and ASEAN sign trade and investment agreement", ‹www.channelnewsasia.org›, 25/06/2006.

requirements. It implies different level of negotiation within the WTO, one as individual State, one as a member of regional agreements, one as part of bargaining blocks. However, Asian States have common interests and values to protect, first of all their sovereignty, facing the pressure of developed countries which still are their first trade partners. Some coalitions are a heritage of the Non-Aligned Movement (NAM) and it is amazing to see that, for instance, the 2005 Declaration between India and Indonesia continue to refer to it.[175] This movement which had some signification at the time of the Cold War, failed to impose the "New Economic Order" in the 1970s' and is now less pertinent on the world stage. NAM is nevertheless at the origin of G-15 and trade and economic agreements in the region can be seen as a concretisation of the will to promote South-South cooperation. Created in 1989 at the Non-Aligned Summit in Belgrade, the group was expected to render a collective voice to developing countries in the North-South negotiations. It gave an opportunity to India, Indonesia and Malaysia to work closely. However, India was left alone with its position by the South-East Asian Nations and the G-15 achieved nothing in the WTO negotiations of the Uruguay Round.[176] Another attempt of grouping was the creation of the G-10, whose aim was to make the problems of developing countries a priority. Led by India during the negotiations of the Uruguay Round, it was especially concerned with the sensitive issues concerning the (non)-inclusion of intellectual property rights and investments in the WTO agreements.[177]

More recently, the Doha Agenda for development has lead to the hope that the interests of developing countries could be better and fairly taken into account. Cooperation in that direction is mentioned in the preamble of the ASEAN-India Partnership for Peace,

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[175] Joint Declaration between the Republic of India and the Republic of Indonesia, 23 November 2005.

[176] I. Saint-Mézard, *Eastward Bound: India's New Positioning in Asia, op. cit.*, pp. 45-46 and "G-15", available on ‹http//meaindia.nic.in/onmouse.G-15.pdf›, visited 10/06/2006.

[177] I. Saint-Mézard, *Eastward Bound: India's New Positioning in Asia, op. cit.,* p. 350.

Progress and shared Prosperity 2004. One of the most important groups of negotiation of developing countries within the WTO is the G-20 which includes *inter alia* India, Indonesia, Philippines and Thailand, but also China. Created in the final stage of the Cancun Ministerial Meeting, it was first concerned with agriculture, but now comprises issues such as non-agricultural market access, services and trade facilitation. G-20 position concerning agricultural products is that developed countries should eliminate trade-distorting subsidies and reduce considerably their custom tariff, while allowing developing countries to maintain appropriate custom tariffs for their production. It is rather a negative alliance against the EU and the USA, where the future position of China will be crucial for bargaining.[178] Nevertheless, a lot of contradictions remain among its members. Further, some of them, *i.e*. Indonesia, Philippines and Thailand, are also part of the Cairns Group, which advocates general tariff reductions, especially concerning the higher tariffs (in accordance with the so-called Swiss formula), especially in the agriculture area.[179] These positions are also challenged by the proposals taken by the G-33 on special products and special safeguard mechanism in agriculture for developing countries.[180] Finally, India, followed again by Indonesia, is also the leader of one of the last-created group of developing countries, the G-8. Their position concern industrial tariffs that should be subjected to the principle "less than full reciprocity", which means that developing countries should have proportionately lower reduction commitments than developed States. It would be a way to compensate for the fact that market access is not only an

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[178] D. Chakraborty And D. Sengupta, "IBSAC (India, Brazil, South Africa, China): A Potential Developing Country Coalition in WTO Negotiations", *op. cit.*, p. 88.

[179] P. Ranjan, "How Long Can the G20 Hold Itself Together? A Power Analysis", *CENTAD (Centre for Trade and Development) Working Paper*, New Delhi, 2005, 15 pp. ‹www.centad.org›, pp. 1, 3, 6, 12. See also G-20 Ministerial Declaration, New Delhi, 19 March 2005, ‹http://commerce.nic.in›, visited 11/02/2006.

[180] G-33 comprises 42 States, mainly developing countries (including not only India, Indonesia, Philippines, but also China, and Sri Lanka), concerned with food security, livelihood security and rural development, Third World Network Info Service and Trade Issues, "Group of 33 Submits Proposals on Special Products and Special Safeguard Mechanism in Agriculture", 14 June 2005, ‹www.twnside.org.sg> (Third World Network), visited 10/02/2006.

issue concerning tariffs alone. It is easier for developed countries to diminish custom tariffs and, at the same time, to protect their market by the means of non-tariff and anti-dumping law, which are more sophisticated measures, more difficult for a developing country to set up.[181]

Before the WTO Hong Kong Meeting in December 2005, ASEAN took a relatively clear position on what would have to be discussed there.[182] ASEAN and China has also expressed in 2004 a common opinion on that issue, very similar to the one of ASEAN alone. The aim is resolutely to ensure that developed countries can truly take advantage from the WTO system.[183] Nevertheless, none of

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[181] The G-8 is composed of South Africa, Argentina, Brazil, India, Indonesia, Namibia, Venezuela and Egypt "India forms coalition of eight nations on NAMA", *The Hindu*, 14/12/2005. The principle "less than full reciprocity" is also mentioned in the Point 4.4 "Cooperation within the WTO", Plan of Action to Implement the Joint Declaration on ASEAN-China Strategic Partnership for Peace and Prosperity, 29 November 2004.

[182] §§ 50-52, Chairman's Statement of the 11th ASEAN Summit "One Vision, One Identity, One Community", Kuala Lumpur, 12 December 2005: "*An ambitious and overall balanced outcome at the end of the Round must include, among others; a comprehensive package in agriculture to ensure substantial reductions in trade distorting domestic support, substantial improvements in market access for all products by significantly lowering tariffs and reducing quantitative restrictions, and the elimination of all forms of export subsidies of developed Members by 2010; an agreement on non-agricultural market access through a Swiss formula with ambitious coefficients and sectoral agreements on a voluntary basis that will ensure real market access improvements for all WTO members; an agreement in services that will create commercially meaningful and real market access opportunities in all WTO members; clarification and improvement of the WTO rules for securing and enhancing benefits in market access that will ensure clearer and more predictable trade disciplines; and clearer and improved WTO rules for trade facilitation that will contribute to further expediting the movement, release and clearance of goods*".

[183] Article 4.4. "Cooperation within the World Trade Organisation (WTO)" of the Plan of Action to Implement the Joint Declaration on ASEAN-China Strategic Partnership for Peace and Prosperity: § 1: " *Make efforts to push for the completion of the negotiations on the Doha Development Agenda (DDA) with a view to achieving a well balanced and equitable outcome as stipulated in the July 2004 package";* §2 "*Make the existing Special and Differential Treatment (S&D) as well as Less-than-Full-Reciprocity principle more precise, effective and operational to provide opportunity for developing members to participate more actively and enable them to derive benefit from trade liberalization*"; *§ 3 "Support and work towards expanding technical assistance and help on capacity-building for developing countries"; § 4 "Strengthen cooperation in the multilateral trading system, especially the WTO, to make it more responsive to the priorities of the developing countries*"; § 5 "*Effectively address particular concerns of developing and less developed members through specific flexibility provision*"; and " *Support the accession of Laos and Vietnam to the WTO at the earliest possible time*".

the declarations made in Kuala Lumpur in November 2005, neither concerning ASEAN-Plus-Three, nor ASEAN-Plus-India, nor the First East Asia Summit, quotes forthcoming WTO negotiations in Hong Kong. Finally, while most of these groups agree on the principle of further reduction of custom tariffs, they are generally speaking concerned with the agriculture issue and flexibility and more protection for developing countries.

Table 7 : Composition of negotiation groups within the WTO Doha Agenda

	Non WTO Member	G 10	G 15	Group of 33	Group of 20	Group of 8	Cairns Group
Cambodia	X						
Myanmar							
Lao	X						
Vietnam							
Brunei							
Indonesia			X	X	X	X	X
Malaysia			X	X			
Philippines				X	X	X	X
Singapore							
Thailand				X	X		X
India		X	X	X	X	X	
Others East or South Asian parties to RTAs studied here				Sri Lanka PRC	PRC		

The creation and multiplication of groupings has a double-edged effect: On one hand, it reinforces the power of negotiation, by giving the impression of ubiquity of India and major South-East Asian Nations. On the other hand, it also emphasises the feeling

of fragmentation and lack of cohesion. Is the construction of East Asian regionalism able to create a regional model and a trade and economic block for world trade negotiations? Nevertheless, the number of agreements between India and South-East Asian States is compensated by the adoption of a similar division of labour between the institutions created. When considering their goals and objects, the same mitigated impression appears. On one hand, they provide for a similar cooperation and integration but, that changes with the wind, which gives the impression of redundancy and competition among them. On the other hand, nevertheless, the interweaving of the different regional and world systems provide for a quite coherent and flexible scheme, influenced by the same philosophy of development and liberalization of trade at all levels.

ARRANGEMENTS BETWEEN INDIA AND SOUTH–EAST ASIA: CREATION OF A REGIONAL LEGAL SYSTEM ON ITS OWN OR DECENTRALISATION OF THE MULTILATERAL TRADE AND ECONOMIC LAW?

At first sight, the web of agreements between India and South-East Asia at the regional and world levels matches well with the characteristics of networks described by A. Colonomos: low specialisation of functions; multiplicity of relations, redundancy of the links, non-rigid frontiers, non-coordination of action and lack of hierarchy between the actors.[184] Nevertheless, by comparing those treaties more properly, the systems created are influenced by the same organisation and the same goals and recall the theory of regimes, defined as sets of governing arrangements that include networks of rules, norms and procedures, around which actor expectations converge in a given issue area, and that regularize behaviour and control its effects. The purpose of the regime is to facilitate agreements. Because of growing interdependence, the norms of behaviour are assuming more and more legitimacy and become infused with normative significance.[185]

World and regional systems concern similar topics but they both organise their cross-recognition and their coexistence. The political and economic strength of Asia, especially East Asia is now recognized on the world scene, but it does not necessarily mean that it is sufficient to weigh on the orientation of the world trade negotiations, especially if the States of the region do not offer an alternative and defend their interests in a disorganised manner.

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[184] A. Colonomos, «Sociologie et science politique: les réseaux, théories et objets d'études», *RFSP*, vol. 42; No. 1, fév. 1995, p. 175.

[185] S.D. Krasner, "Structural Causes and Regime Consequences: Regimes as intervening variables", *IO*, 36:2, 1982, pp. 185-187 and p. 202.

Laurence Henry

The Compatibility of Regional Trade Agreements (RTA) with the WTO Regime

The multilateral and regional trade regimes arise from the same liberal philosophy and are deemed to be complementary for the realisation of the objectives of liberalising trade and integrating economies, as quoted in many regional and other international trade agreements.[186] The compatibility of the RTA with the WTO system is nevertheless submitted to certain conditions.

The WTO-RTA system

Articles XXIV GATT, V GATS or article 2 c) of the Enabling Clause (1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries) give a right to make an exception to the Most Favoured Nation principle, pillar of the world trade system, in order to create Regional Trade Agreements, but at certain conditions only. The WTO Agreements provide for procedural and substantial commitments to be followed but, in practice, the legal obligations are finally rather light in order to create an RTA, especially for developing countries.[187] The Regional Trade Agreement must be notified before its entry into force to the appropriate Council (Council for Trade in Goods, Council for Trade in Services or the Committee on Trade and Development). Then, the latter establishes a report, based on information given by the parties to the RTA, notably through answers to questions asked by other WTO member-States and by the Committee. Notification is in principle

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[186] "*Recognising that regional trade arrangements can contribute towards accelerating regional and global liberalization and as building blocks in the framework of the multilateral trading system*", in the preambles of both the ASEAN-India CECA 2003, *op. cit*. and of the India-Thailand FTA 2003; "*Recognizing the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements*", in the Understanding on the Interpretation of article XXIV of the GATT 1994, *op. cit*.; "*We reaffirm the primacy of the multilateral trading system, which includes a framework for the development of regional trade agreements, and we renew our commitment to ensure that regional trade agreements are complementary to it and consistent with its rules*", § 7 of the Singapore Ministerial Declaration, 13 December 1996, ‹www.wto.org›.

[187] J-A. Crawford & R.V. Fiorentino, « The Changing Landscape of RTAs », *WTO Discussion Paper*, n°8, 2005, p. 19.

compulsory, but examination of the RTA is not necessarily requested. If the regional agreement seems to be inconsistent with the reference WTO Agreement, then the Committee can make compulsory recommendations: "*The parties shall not maintain or put into force, as the case may be, such an agreement if they are not prepared to modify it in accordance with these recommendations*".[188] Theoretically, the CRTA must also make a periodical examination of the implementation of the regional trade agreements, which however does not exist in practice.

Materially, the main objective of RTA must be to facilitate substantially all trade among its members and not to raise barriers to trade for other parties.[189] Firstly, concerning the regional internal trade, duties and regulations must not be more restrictive than prior to the entry into force of the agreement and they shall be eliminated on "*substantially all the trade*".[190] This latter expression has never been defined and thus allows some flexibility for its interpretation and application. By comparison, article V GATS provides for the expression "*substantial sectoral coverage*", which is reputed to be a weaker obligation compared to article XXIV, and the Enabling Clause which also allows more flexibility on that point.[191] The DS 34 (1999) Panel Report has indeed recognised a certain equivalence between the expression employed by the clauses of references and, therefore, the interpretation of the article XXIV § 5 a) given by the Understanding of article XXIV GATT can be to apply *mutatis mutandis* the following sub-section b) and the other clauses quoted above.[192] The RTA must also satisfy a second commitment, which

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[188] Article XXIV § 7 *ii*) *in fine* GATT.

[189] Article XXIV § 4 GATT *in fine* "*They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories*". See also WT/DS34/R, 31 May 1999, *Turkey – Restrictions on Imports of Textile and Clothing Products*, § 9.105 and WT/DS34/AB/R, 22 October 1999, § 57.

[190] Article XXIV § 8 b) GATT 1994.

[191] A. Shingal & J. Chaisse, "A Burden or an Incentive: Developing World Trade and the Role of RTAs", *op. cit.*, p. 484.

[192] WT/DS34/R, 31 May 1999, *op. cit.*, §§ 9.125 and 9. 163.

is "*not to raise barriers to trade of other contracting parties*"[193], which means that it "*should to the greatest possible extent avoid creating adverse effects on the trade of other Members*".[194] In addition, if these two conditions are fulfilled, then the RTA may provide for measures which would not be WTO compatible otherwise. This aspect was controversial until the DS 34 AB ruling. In the first instance, the Panel report decided that WTO rules took precedence over RTA and do not justify regional provisions in contradiction with it. On the contrary, the Appellate Body considered that article XXIV authorizes such incompatible measures and may be invoked as a "defence" enabling exceptions to the WTO system if they are very necessary to the establishment of the regional trade area.[195]

In this instance

Generally, RTA between India and South-East Asian States go beyond the simple preferential liberalization of trade and also includes economic cooperation, especially concerning trade-related issues. WTO law differentiates FTAs from Custom Unions (CU), but in this instance only the former ones are concerned. Custom Unions indeed imply, by definition, the determination of a common external custom tariff, which is often the fruit of hard negotiations and is of political concern. FTA has indeed the advantage to be faster to conclude and

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[193] Article XXIV §§ 4 and 5 GATT.

[194] Preamble of the Understanding on the Interpretation of Article XXIV of the GATT 1994.

[195] The AB developed its reasoning on custom unions but the latter can be transposed to FTA: "*Accordingly, on the basis of this analysis of the text and the context of the chapeau of paragraph 5 of Article XXIV, we are of the view that Article XXIV may justify a measure which is inconsistent with certain other GATT provisions. However, in a case involving the formation of a customs union, this "defence" is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not allowed to introduce the measure at issue. Again, both these conditions must be met to have the benefit of the defence under Article XXIV*", WT/DS34/AB/R, 22 October 1999, *op. cit*. § 58

maintain the right for each party to maintain its external trade policy vis-à-vis third parties. This latter aspect is primordial in East Asia since, generally speaking, States of the region have an outward-oriented trade policy and are reluctant to take this kind of supranational decision in common.[196] Article XXIV § 8 b) GATT defines a FTA as "*a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories*".

For the purpose of WTO, regionalism does not mean geographic regionalism and the States parties to FTA are not necessarily neighbours. For instance, India and Singapore, even belonging to the same continent, have no common borders. The eventual FTA between ASEAN and the European Union[197] will also be treated as such, even if an ASEAN member-State, Laos, is not yet member of WTO. Being party to a FTA is a way to prepare them to be part of the multilateral trade system. On the other hand, the adoption of a RTA with non-WTO Members members raises very specific and difficult legal issues.[198] Moreover, economic cooperation is often outside the scope of WTO policy and, generally speaking, its objective is a better coordination of national economic policies. RTA are consequently seen to be a laboratory for trade creation. Finally, because India and most of its South-East Asia partners are developing countries, RTA studied

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[196] Lay Hong Tan, "Will ASEAN Economic Integration Progress Beyond a Free Trade Area?", *op. cit.*, p. 942.

[197] "l'Union Européenne veut placer l'Asie au coeur de sa politique commerciale", ‹www.lemonde.fr›, 11/09.2006.

[198] See Won-Mog Choi, "Legal Problems of Making Regional Trade Agreements with Non-WTO Member States", *Journal of International Economic Law*, December 2005, pp. 825-860.

are likely to be based on the Enabling clause.[199] Nevertheless the India-Singapore CECA and the India-Thailand FTA do specifically refer to article XXIV § 8 b) GATT and article V § 1 b) GATS only. [200]

The time when the RTA must be notified is indeed not specified but, in principle, the parties should do it before its entry into force.[201] So far, none of the agreements studied here has been notified to the WTO Committee yet. It is nevertheless often the case of RTA involving developing countries. The Doha Agenda has thus decided that the negotiations should also provide for a decision for the clarification and the improvement of disciplines and procedures applying to RTA, taking into account developmental aspect of such agreements as well as the situation of developing countries.[202] Recently, the WTO General Council has adopted a draft decision on that issue: The timing for notification and examination by the Committee is framed and, on request, the Secretariat will be allow to provide technical assistance with respect of information to be given by developing countries.[203] By contrast, AFTA (ASEAN Free Trade Agreement 1992) and SAPTA (South Asia Preferential Agreement 1995) were notified to the WTO,[204] by reference of the Enabling Clause, but no examination was requested. In fact,

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[199] Article 2 c) Decision of 28 November 1979 (L/4903), Differential and more Favourable Treatment Reciprocity and Fuller Participation of Developing Countries, "*Regional or global arrangements entered into amongst less-developed contracting parties for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the CONTRACTING PARTIES, for the mutual reduction or elimination of non-tariff measures, on products imported from one another*". Block letters in the original.

[200] Articles 3 § 1 and 4 India-Thailand FTA, 2003 *op. cit.*; Articles 1.2 b) and c) India-Singapore CECA, 2005.

[201] WTO Secretariat, "Compendium of Issues Related to Regional Trade Agreements", TN/RL/W8/Rev.1, 1 August 2002, p. 5.

[202] § 29, WTO Doha Ministerial Declaration, 14 November 2001.

[203] WTO Negotiating Group on Rules, "Transparency Mechanism for Regional Trade Agreements. Draft Decision", 29 June 2006, JOB(06)/59/Rev.5.

[204] Notification of SAPTA, 25 April 1997, WT/COMTD/10 and notification of AFTA, 30 October 1992, L/4581. it must be noted that the SAFTA, signed on 6 January 2004, has been notified yet.

it is difficult to say if these two agreements have actually achieved much for regional and multilateral trade liberalization.[205] Another comparison can be made with the ASEAN-China FTA, which has been notified to the Trade and Development Committee on 21 December 2004, after the Agreement on Trade in Goods was adopted and before being in force the 1st January 2005.[206] The European Union, the United States and Japan have exercised their right to ask questions to the Trade and development Committee. The first one, in particular, does not agree upon the legal basis of the FTA Agreement, that is the Enabling Clause, and considers that the treaties go beyond preferential tariff treatment and also aim investments, services, non-tariff barriers, and custom cooperation. Consequently, the two conventions should be notified on the article XXIV GATT basis. Otherwise, the questions asked refer above all to issues related to the lack of transparency and to the need for clarification on some details of certain provisions.[207]

In this instance, the main problem of compatibility between the RTA studied and the WTO concerns the elimination of custom duties on "*substantially all the trade*" (article XXIV § 8 GATT). So far, indeed, most of the FTA and CECA are actually preferential trade agreements because they provide rather for reduction than elimination of custom tariffs. As details are not negotiated yet, it is nevertheless difficult to speculate if the substantial coverage criterion will be finally respected. For instance, in the India-Singapore CECA, Singapore is the only one which offers free duty on Indian goods, while India grants progressive reduction or elimination of custom tariffs on Singaporean exported goods. The India-Thailand FTA is even more ambiguous because the articles

[205] R. Chand, "Preferential Trading Agreements and Regional Trade: Implications for Asia", *IEG Working Paper*, Institute of Economic Growth, New Delhi, January 2004, pp. 3 and 4.

[206] WT/COMTD/N/20 and WT/COMTD/N/20Add./

[207] Questions asked by the European Union, 8 February 2006, WT/COMTD/51/Add.2; Questions asked by the United States, WT/COMTD/51/Add.3, 17 February 2006; Questions asked by Japan, 10 March 2006, WT/COMTD/51/Add.4

2 and 3 predict to respect the requirements of article XXIV § 8 GATT, but its preamble envisages the establishment of a Free Trade Area "*eventually*" only. The ASEAN-India CECA is not explicit on the question and, so far, elimination of duties is envisaged for the Early Harvest Programme items only. The only agreement to provide for a clear policy on progressive elimination of custom tariffs is the BIMST-EC FTA. In addition, even if the will to respect the "*substantially all the trade*" criterion is real it is generally considered as a middle or long-term objective. Consequently, the issue is whether the RTA fits with Article XXIV § 7 a) GATT: "*The Contracting Parties find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one*". The Understanding on article XXIV specifies that the length of time cannot exceed 10 years, except in exceptional cases. This is indeed the maximum period for implementation adopted by the trade agreement signed by India with South-East nations.[208]

If the WTO system has adopted its own rules and procedure on its compatibility with RTA, the question is larger. The different regional arrangements do not provide for such regulation among them and the issue is often very technical and the practice can reveal eventual divergence or incompatibility.

An Infinitely Variable Trade and Economic Law: Overlapping or Complementary Agreements between India and South-East Asia

If the GATT was by definition mainly concerned with the trade in goods, the WTO goes beyond and relates not only to trade in services and investment, but also to trade complementary measures. Regional agreements deal with economic cooperation

[208] The ASEAN-India CECA provides for a period of implementation from 2006 to 2016 and the BIMST-EC FTA from 2006 to 2015 at the latest, while the India-Thailand FTA and the India-Singapore CECA provide for shortest period of implementation (until 2010 and 2009 respectively).

as well, which are important for the development and the complementarities of the economies and trade structures of the region. Multilateral, regional and bilateral trade agreements are generally seen to be complementary. Generally speaking, the higher the number of negotiators, the more difficult and lengthy are the negotiations. This is the reason why regional or bilateral agreements generally go further in the liberalization of trade and economic cooperation. They nevertheless treat the same issues, but the implementation can be deeper or faster in one domain or another.

From a material law point of view

On one hand, the trader or the investor may have some difficulty to efficiently benefit from the different agreements between India and its South-East Asian partners. On the other hand, it may take advantage of the existence of overlapping agreements and benefit from their comparative advantage.

The rules of origin

The issue of the adoption of Rules of Origin (ROO)[209] is crucial when a State confers custom duty preference to different countries. As there is no common external custom tariffs in an FTA, an importer could use the cheapest port of entry and the country from which it could take advantage from a more generous quota for example, in order to benefit from the free circulation of goods and re-export its products in another contracting party, which practice higher tariff or stricter quotas. The WTO Agreement on Rules of Origin aims at the harmonisation of ROO, except those relating to the grating of tariff preferences. Thus, it does not directly concern ROO negotiated within RTA schemes. Nevertheless, pursuant to

[209] ROO can be defined as "*Laws, regulations and administrative procedures which determine a product's country of origin. A decision by a customs authority on origin can determine whether a shipment falls within a quota limitation qualifies for a tariff preference or is affected by an anti-dumping duty. These rules can vary from country to country*". Glossary on ‹www.wto.org›.

respect article XXIV § 5 b) GATT,[210] the ROO must not be stricter than prior to the creation of the FTA, even if in practice it seems to be often the case.[211]

In 2004, India and ASEAN agreed to interim ROO for products under the Early Harvest Programme. The latter are based on the principle of 40 per cent of value added[212] but the details of these rules have not been agreed upon yet and even they are the very reason of delays for the implementation of the ASEAN-India CECA and its EHP. By comparison, the Singapore-India CECA provides for a whole chapter on this issue and have adopted the general rule of 60 per cent of the FOB value[213] and it also provides for additional rules[214]. Finally, the India-Thailand CECA provides for a combination of the two above criterion for products not fully produced or obtained

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[210] Article XXIV § 5 b) GATT "*With respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free-trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be*".

[211] A. Shingal & J. Chaisse, "A Burden or an Incentive: Developing World Trade and the Role of RTA", *op. cit.*, p. 486.

[212] Chairman's Statement of the 3rd ASEAN-Plus-India Summit, Vientiane, 30 November 2004, § 9: "*The Interim Rules of Origin will be based on a general rule of 40% of value added with the ASEAN-proposed list of minimal processes, subject to reasonably short list of products…*"

[213] It implies that distribution services like transport and handling performed on goods up to the customs frontier (of the economy from which the goods are classed as merchandise.) are included in the price.

[214] Article 3. 4 § 1 India-Singapore CECA: "*Within the meaning of paragraph (b) of Article 3.2 and subject to the provisions of Articles 3.6, 3.9 and that the final process of manufacturing is performed within the territory of the exporting Party, products would be considered as originating if: a) ii) the total value of the materials, parts or produce originating from countries other than the Parties or of undetermined origin used in the manufacture of the product does not exceed 60% of the FOB value of the product so produced or obtained*". The FOB price or value "*refers to the price actually paid or payable to the exporter for the good when the good is loaded onto the carrier at the named port of exportation. The value includes the cost of the good and all costs necessary to bring the good onto the carrier*" (article 3.1 India-Singapore CECA).

within one of the contracting party.[215] Concerning the products aimed by the different agreements, the overlapping is far from being the rule. Nevertheless, one can find products commonly listed by them. It is the case for instance of items under the Harmonised System 160 413,[216] which is quoted in the list of common products on which India and ASEAN countries have agreed to exchange tariff concessions, the list of products eligible for preferential tariff for the Early Harvest Scheme between Thailand and India, and in the list of Indian tariff concessions to Singapore concerning products for phased elimination of duty.

Thailand and Singapore's policy to be part to numerous FTA combined with low custom tariffs permit them to become a hub for intermediate transformation and re-exportation of products. The fear of distortion may explain why India and ASEAN have difficulties to negotiate ROO because the Indian side is not ready to adopt the simple and liberal ASEAN (and China) regime, while the latter does not want to compromise on an issue which is at the origin of its economic success.[217] Finally, Negotiations under BIMST-EC also fails on the percentage of value addition for ROO, for both general rule and product special rule, LDC being in favour of 30 per cent while developing countries pushing for 30 per cent value addition criteria.[218]

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[215] Interim Rules of Origin for Products Eligible for Preferential Tariff for the Early Harvest Scheme Under the Framework Agreement for Establishing Free Trade Area between the Republic of India and the Kingdom of Thailand, 30 August 2004 Rule 6, "*Criteria shall be applied in determining the origin of not-wholly produced or obtained products provided that the final process of the manufacture is performed within the territory of the exporting Party and subject to Rule 8: i) local value added content of 40% meaning thereby that the total value of materials originating from the countries other than the Parties or of undetermined origin (that is non-originating materials) used does not exceed 60% of the FOB value of the product so produced or obtained*".

[216] Referred to sardines, sardenella and brisling or sprats, whole or in pieces but not minced, prepared or preserved.

[217] S. Srivastava & R.S. Rajan, "What does the Economic Rise of China Imply for ASEAN and India? Focus on Trade and Investment Flows", *op. cit.* , pp. 3-4 and H. Soesastro, "The Evolution of ASEAN + X FTAs: Implications for Canada", *CSIS Economic Working Paper Series, n°89, 2005*, ‹www.csis.or.id/papers/wpe089›, pp. 11-12.

[218] "BIMST-EC finalizes dispute resolution rules", *op. cit*.

The taking into account of the situation of developing and Least Developed Countries (LDC)

Within the GATT/WTO system, developing countries beneficiate from a Special and Differential Treatment (SDT), that is they can take advantage of compensating measures in order to balance economic and trade structural asymmetries. This principle of differential and more favourable treatment was introduced by the Tokyo Round in 1969. These rules can be the legal basis for a RTA between developing countries, since the Enabling Clause provides them for the possibility for better and non-reciprocal market access for developing countries, and a preferential trade regime and more favourable treatment in respect to Non-Tariff Barriers.[219] A country may declare oneself developing country and then benefit from the 145 measures include in the SDT; least developing countries[220] can also enjoy the use of 22 additional measures specific to their group.[221]

As in the AFTA system, both the ASEAN-India CECA and the BIMST-EC FTA, should be founded on the Enabling Clause since they provide for a "special" treatment in favour of the Least Developed Countries of the region, that is the so-called CMLV (Cambodia, Myanmar, Laos, Vietnam) for ASEAN[222] and Myanmar, Bangladesh, and now Nepal and Bhutan as well,

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[219] A.K. Koul, "Developing Countries in the GATT/WTO – Their Obligations and the Law", *Indian Journal of International Law*, 2004, No. 3-4, pp. 457-48.

[220] LDC is a category of States that are deemed highly disadvantaged in their development process (many of them for geographical reasons), and facing more than other countries the risk of failing to come out of poverty. Since 1971, the United Nations make a list of LDC based on three criteria: low income (less than 750 $ per capita and per year), weak human assets, economic vulnerability measured through a composite index. For ASEAN countries, are included Cambodia, and Laos, and for BIMST-EC Bangladesh, Bhutan and Nepal, *i.e.* no south-East Asian countries.

[221] Synthèse politique des travaux de la Conférence IFRI-AFD, 28 octobre 2005, Paris, "L'avenir du traitement spécial et différencié (TSD). Les défis jumeaux de l'érosion des préférences et de différenciation des pays en développement", 8 pp., ‹www.ifri.org›, pp. 1-3.

[222] "*Recognising the different stages of economic development among ASEAN Member States and the need for flexibility, including the need to facilitate the increasing participation of Cambodia, Lao PDR, Myanmar and Vietnam (the New ASEAN Member States) in the India-ASEAN economic co-operation and the expansion of their exports*, inter alia, *through the strengthening of their domestic capacity, efficiency and competitiveness*", Preamble of the ASEAN-India CECA, 2003. See also articles 7 § 1, 3 ii).

concerning the BIMST-EC.[223] These two treaties also copy the WTO exceptions concerning the grant of special and differential treatment. Generally speaking, it concerns the extension of the period for implementation and technical and financial assistance.

Concerning the relations between India and the ASEAN's new member-States, some Indian concessions and assistance concern trade while others concern economic cooperation. First, new ASEAN member-States have a longer period for implementation of the Early Harvest Programme (2010 instead of 2007 for India and ASEAN-6). India accords them concessions on 111 supplementary items, in accordance with the WTO Council Decision of 15th June 1999.[224] Negotiations of trade in services and investments must take into account special and differential treatment and flexibility for them, in accordance with their level of development.[225] Secondly, in order to expand their trade and investment structure with India, they will get capacity building programmes and technical assistance, especially in the domains of customs, standards and conformance, capital market, information and communication technology, human resource development.[226]

Least Developed Countries of BIMST-EC enjoy a longer period to implement the reduction of tariffs scheme and they can have the use of derogations concerning products included in the Negative List (*i.e.* products which do not beneficiate for normal tariff

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[223] Preamble: "*Recognising that the least developed countries in the region need to be accorded special and differential treatment commensurate with their development needs*" and Article 2 d): "*provision for special and differential treatment and flexibility to the least developed countries in the region*", BIMST-EC FTA 2004.

[224] Articles 7 § 1, 3 ii) ASEAN-India CECA and WTO General Council, Preferential Tariff Treatment for Least-Developing Countries, Decision on grant of Waivers, 15 June 1999 (in accordance with article IX §3 GATT), "… *allow developing country Members to provide preferential tariff treatment to products of least-developed countries, designated as such by the United Nations, without being required to extend the same tariff rates to like products of any other Member*".

[225] Article 8 § 3 ASEAN-India CECA 2003 and Article 2 § 1.2.5 ASEAN-India Partnership for Peace, Progress and Shared Prosperity, 2004, *op. cit*.

[226] Article 2 § 1.2, § 2.2.3, § 2.3.5, § 2.4.7, § 2.7.1.2, §§ 2.8.2 and § 2.8.5 ASEAN-India Partnership for Peace, Progress and Shared Prosperity, 2004.

reduction and subject to a maximum ceiling).[227] Concerning economic cooperation, LDC may particularly take the advantage of capacity building programmes and technical assistance, in particular in trade-related fields such as SPS (Sanitary and Phytosanitary Measures), TBT (Technical Barriers to Trade) requirements.[228] This aspect of the cooperation is particularly important since developing countries in general, and LDC in particular, the lack of financial and institutional resources to put into effect these highly complex agreements. Furthermore, in order to support the integration process among ASEAN, "*India shall continue to accord Most-Favoured Nation (MFN) Treatment consistent with WTO rules and disciplines to all the non-WTO ASEAN Member-States upon the date of signature of this Agreement*",[229] which is a way to help Cambodia and Vietnam, and now Laos, to enter the WTO.

Finally, bilateral Free Trade Agreements concluded by India with Thailand and Singapore are based on article XXIV § 8 b) GATT and article V § 1 b) GATS, and thus not on the enabling clause for developing countries, even if in the case of the second one, India benefits from a longer period of implementation for tariff elimination, while Singapore shall eliminate customs duties on all originating goods of India as from the date of entry into force of this agreement.[230]

Trade complementary measures

Trade and investment facilitations in the technical and standard fields were one of ASEAN-India areas of concern before the signature of the 2003 CECA. The latter also states the necessity to develop facilitation measures such as simplification of customs procedures, mutual recognition agreements, business visa and travel

[227] Articles 3 § 2 and 7 BIMST-EC FTA.

[228] Articles 6 § 3 and 4 BIMST-EC FTA.

[229] Article 9 ASEAN-India CECA, 2003.

[230] Articles 3 § 1 and 4 India-Thailand FTA, 2003; Articles 1.2, 2.3 § 1 and Annex 2 A and 2B India-Singapore CECA, 2005.

facilitation. The ASEAN-India Partnership for Peace, Progress and Prosperity proposes more concrete measures on that issue, especially assistance to CMLV countries for conformation. The BIMST-EC and the India-Thailand FTA also quotes the necessity of cooperation in the sector of trade complementary measures, without much precision. This kind of facilitations may also be taken at the national level. For instance, India has simplified customs procedures to further reduce cross-border transaction costs.[231] Removing trade obstacles across borders is also a WTO concern and the revision of related articles, as well as the adoption measures on technical assistance, capacity building in this area ad effective cooperation between customs authorities are comprised in the negotiations agenda.[232] Some facilitation can be taken at the regional level, while others are of bilateral concerns, such as visa for instance, which is a sovereign issue but a business concern as well.

Finally, cross-border facilitation measures must be combined with physical infrastructures to increase trade and economic exchange.

Cooperation in the field of transport and communication technologies: A common regional policy

One of the major cooperation programmes between India and ASEAN States is the improvement of transport linkages and communication infrastructure, by land, air and sea. All regional initiatives have this component, sometimes autonomously, sometimes in relation with other areas, such as trade, and services, energy, tourism, and people-to-people relations. It is very important for India since it needs further links with the Asia-Pacific Rim and with South China, through the Mekong region. ASEAN has taken into account the potential of this region,

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[231] R.S. Rajan and R. Sen, "The New Wave of FTAs in Asia: With Particular Reference to ASEAN, China and India", *op. cit.*, p. 185.

[232] The so-called "July Package", adopted in July 2004, provides negotiations in order to clarify and improve GATT Article V (Freedom of Transit), Article VIII (Fees and Formalities connected with Importation and Exportation), and Article X (Publication and Administration of Trade Regulations): in "Trade Facilitations", ‹www.wto.org›

particularly with the perspective of accession of Indochinese countries. In December 1995, the ASEAN Summit announced the launch of the ASEAN-coordinated Mekong Basin Development Cooperation (AMBDC) initiative, including two plans, the East-West Corridor in the Mekong Basin and the Trans-Asian railways.[233] The region is also an opportunity for cooperation and competition between India and China. Since 1992, transports are an important and integral part of the Greater Mekong Subregion (GMS) Programme on economic cooperation, which includes the six Mekong riparian States, Laos, PRC, Cambodia, Vietnam, Thailand and Myanmar. These projects are largely supported by the Asian Development Bank, to which India is a shareholder. The involvement of India in AMBDC and GMS has been mentioned by the declaration of the first ASEAN-India Summit in 2002.[234] GMS is also the result of public-private partnerships, as shown by the organisation of the Asian Development Bank's forum to boost Mekong-India cooperation, in collaboration with the Confederation of India Industry (CII) in New Delhi in November 2005.[235] In 1999, the two countries launched the Kunming Initiative for a Growth Quadrangle with Myanmar and Bangladesh in order to strengthen regional economic cooperation and cultural exchanges. Six months before the creation of MGC, China signed, in April 2000, the Mekong Sub-regional agreement on Commercial Navigation on Lancang-Mekong River with Laos, Myanmar and Thailand, which is particularly interested in energy, transport and communication sectors.[236] The Mekong River Basin Development is one of the key areas of economic cooperation mentioned by the ASEAN-China 2002 CECA (article 7e)). Furthermore, China and ASEAN

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[233] K. Chongkittavorn, "The GSM Co-Operation within the ASEAN Context", pp. 126-128 (2000), in S Siddique and S. Kumar, (compilator), *The 2nd ASEAN Reader*, ISEAS, Singapore, 2003, p. 126.

[234] § 11, Joint Statement of the First ASEAN-India Summit, 5 November 2002.

[235] CII and ADB, *Mekong Development Forum. Promoting India-Mekong Cooperation*, New Delhi, India, 9-10 November 2005.

[236] P.V. Rao, "Sub-Regional Strategies of Cooperation in ASEAN: The Indian Approach", *op. cit.* pp. 162-164 and pp. 167-168.

have developed a close cooperation in the domain of transport through the ASEAN-China Transport Ministers Meeting mechanism established in 2001 and the signature of the Memorandum of Understanding between the ASEAN Secretariat in the name of its member-States and PRC on transport cooperation in November 2004.[237]

Transport infrastructure and information and communications technology are few of the sectors of cooperation stated by the 2003 ASEAN-India CECA. The 2004 ASEAN-India Partnership for Peace, Progress and Shared Prosperity develops this idea by mentioning the development of the trilateral highway between India, Myanmar and Thailand to Laos and Cambodia. It also provides for the will to create an ASEAN-India maritime association and enhancement of maritime cooperation, the involvement of private sector in infrastructure project and the liberalization of air services. India started its open sky policy with ASEAN first.[238] The collaboration in the information and communication technology (ICT) is seen not only through the institutional cooperation in infrastructure connectivity, but also the promotion of human resource cooperation and the enhancement of people-to-people links, especially in the areas of rural development. [239]

At the continental level, transport and communication ought to be developed through the MGC, because it is one the four sector of cooperation developed by it. The objectives are clearly affirmed, that is facilitating the movement of people and goods, and socio-

[237] Memorandum of Understanding between the Governments of the Member Countries of the Association of Southeast Asian Nations and the Government of the People's Republic of China on Transport Cooperation Vientiane, 27 November 2004. See also article 2 § 6 Transport Cooperation of the Plan of Action to Implement the Joint Declaration on ASEAN-China Strategic Partnership for Peace and Prosperity, Vientiane, 27 November 2004.

[238] "Open Sky policy to all airlines proposed", *The Hindu*, 18/10/2003.

[239] Article 2.5 "Transport and infrastructure" and article 2.7.1 "Information and Communication technology", ASEAN-India Partnership for Peace, Progress and Shared Prosperity, 30 November 2005.

economic development. The Programme of Action on Transport and Communication identifies four main domains of action: development of road and railways networks, multimodal transport, maritime and inland water transport, air transport and communication, and networking. Finally, the Phnom Penh Road Map 2003 does not actually add substantive innovations in this sector, except the study on the feasibility of rail linkage from New Delhi to Hanoi (trans-Asian Railway project) and the holding of a meeting of Expert Group on Transport and Communication.[240]

Being an association of Bay of Bengal riparian States when it started out, BIMST-EC could have been interested in maritime transport only. On the contrary, however, it is finally more concerned by the development of the Southern Corridor of the Trans-Asia Railways and Asian Highway projects.[241] The philosophy of the cooperation in this domain is the enhancement of commercial, industrial cultural and social interaction, trade and investment, even if there is no mention of such cooperation in the 2004 BIMST-EC FTA, and tourism as well as the arising out of the Bay of Bengal rim identity of BIMST-EC. The latter also acknowledges the necessity to work together with the private sector and to look at other regional project underway in a comprehensive manner.[242]

Finally, at the bilateral level, the India-Thailand FTA only mentions ICT and infrastructure development as areas of cooperation, while the India-Singapore CECA only provides for a special chapter on air services, which only reiterates existing agreement between the

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[240] Part IV of the Vientiane Declaration of Mekong-Ganga Cooperation, 10 November 2000; Article 4 and Annex II "Programme of Action on Transport and Communications", Hanoi Programme of Action for MGC, Hanoi, 28 July 2001; Article 4 Phnom Penh Road Map, Phnom Penh 20 June 2003.

[241] § 6, BIMST-EC Economic Ministerial Retreat, « Agreed Conclusions", 7 August 1998, Bangkok, Thailand.

[242] Joint Statement of the BIMST-EC Ministerial Meeting, Bangkok, 22 December 1997; §11, 2nd BIMST-EC Ministerial Meeting, Dhaka, 19 December 1998; BIMST-EC Summit Declaration, Bangkok, 31 July 2004; Article 4, Joint statement, 8th BIMST-EC Ministerial Meeting, Dhaka, 18-19 December 2005.

parties such as the GATS and the 1968 bilateral Air Services Agreement. The 2005 Declaration between India and Indonesia also mentions the "*necessity to improve connectivity and people to people contacts between their countries through enhanced tourism, civil aviation and shipping links*".[243]

So far, the trilateral highway from India to Thailand seems to have been one of the major realisations concerning the development of transport infrastructure and will open up North-East India and Myanmar. Perhaps it is a consequence of the fact that it is a common policy of MGC and BIMST-EC and an important means to realise the link between South and South-East Asia, out of maritime roads. It is also the result of private-public partnership, with the creation of a consortium to raise funds.[244]

The Ongoing Creation of a Multilateral and Regional System of Law

International law is not a hierarchical but a decentralised system of law and provides for principles to solve the issues linked to the contradictions between different international commitments. However, the reality is more complex but also more flexible, and calls for normative coexistence, cross-references, inter-normativity and institutional dialogue. The relations between India and South-East Asia have not created a system, but rather the coexistence of different legal systems, bilateral, regional, sub-regional, transregional and multilateral.

General rules of international law, cross references and dialogue

As I said earlier, most of the regional treaties studied here are only framework agreements which often call for further implementation conventions to be enforceable, thus it is sometimes difficult, at

[243] Joint Declaration signed between India and Indonesia, New Delhi, 23 November 2005.

[244] C.S. Kuppuswamy, "India's Policy: Looking Eastward- Update No 2" *South Asia Analysis Group*, Note No. 151, 29 April 2002, ‹\www.saag.org/notes2/note151.html›, visited 04/11/2005.

this stage, to talk about their compatibility. If it is not fully satisfactory from a legal security point of view, it also permits a flexible, step-by-step approach, which respects States' sovereignty. As a matter of fact, each FTA or CECA or grouping has created its own community of interests and its own hierarchy of norms and can pretend to be autonomous. Nevertheless, it has to deal with its international environment as well.

To resolve conflicts between international obligations, international law provides for two capital principles, *lex posteriori derogate priori* and *lex specialis derogat generali*: In simple terms, it means that, when identical States are party to two or more conventions, the most recent norm prevails and, secondly, the most particular overlaps the most general one. The 1969 Vienna Convention, codifying the law of treaties envisages the issue of conflict of law in terms of time, in its article 30 "Application of Successive Treaties Relating to the same Subject Matter", *i.e*. in terms of succession of obligations, the most recent prevailing. In the second hypothesis, it implies that, in principle, the bilateral treaty ought to overrule the regional or the multilateral treaty. Finally, international law is also relative, that is a State cannot invoke the incompatibility within its obligations to avoid its commitments vis-à-vis a third party, which it is also engaged with.

These principles apply to the compatibility between regional trade and cooperation agreements studied here, while the compatibility between RTA and WTO offers a different solution based on the principle of cross-references[245]: On one hand, article XXIV GATT or V GATS provide for the possibility of creation of RTA at certain condition and the latter are presumed to be compatible with the WTO, but can also provide for exceptions.[246] On the other hand, the RTA between India and South-East Asia also

[245] This kind of solution is conform to article 30 § 2.2 of the 1969 Vienna Convention on Law of Treaties: "*When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail*".

[246] See above.

expressly quote the issue of compatibility with WTO and other agreements in such a way that they must conform to the latter. Most of these CECA or FTA uses the traditional formula in their preamble: "*Reaffirming the rights, obligations and undertakings of the respective parties under the World Trade Organisation (WTO), and other multilateral, regional and bilateral agreements and arrangements*".[247] Secondly, the references to WTO law and GATT in particular are numerous within the text of these agreements. As I have already quoted, they generally make reference to article XXIV GATT and V GATS, especially concerning the implementation of the EHP, as their legal basis.[248] The formula of the "General exceptions", always the same, recalls the one of article XX GATT, even if in a more restricted way.[249] Finally, instead of creating new rules, which could be inconsistent, the agreements simply refer to certain WTO agreements on anti-duping, safeguard balance or payments, or TRIPS.[250].

By adopting the rule of superiority of WTO law, RTA consider themselves as a decentralised scheme of the multilateral trade system and the solution they adopt is that general law prevails on

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[247] ASEAN-India CECA, 8 October 2003; BIMST-EC FTA 30 June 2004; India-Thailand FTA 9 October 2003; and article 16.5.1. India-Singapore CECA, 29 June 2005.

[248] Articles 3 § 1 and 6, ASEAN-India CECA; Articles 3, 4 and 7 BIMST-EC FTA; Articles 3 and 4 India-Thailand FTA; Article 1.2. b) and c) India-Singapore CECA.

[249] Article 10 India-ASEAN CECA, article 8 BIMST-EC FTA, article 9 India-Thailand FTA "*Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between or among the Parties where the same conditions prevail, or a disguised restriction on trade within the India-ASEAN FTA* [or the BIMST-EC FTA or the India-Thailand FTA], *nothing in this Agreement shall prevent any Party from taking action and adopting measures for the protection of its national security or the protection of articles of artistic, historic and archaeological value, or such other measures which it deems necessary for the protection of public morals, or for the protection of human, animal or plant life, health and conservation of exhaustible natural resources"*.

[250] See Chapter 2 India-Singapore CECA (Trade in Goods), articles 2.6, 2.7, 2.8, 2.10, and article 7.10; Article 3 § 6 iv), vii), viii) and article 7 on EHP v) "*The WTO provisions governing modification of commitments, safeguard actions and other trade remedies, including anti-dumping and subsidies and countervailing measures, shall, in the interim, be applicable to the products covered under the Early Harvest Scheme and shall be superseded and replaced by the relevant disciplines negotiated and agreed to by the Parties under Article 3(6) of this Agreement*". (Emphasis added)

the special law. In practice, nevertheless, the solution must not be found in a strict coherent and pyramidal system, but rather in dialogue, between actors, State, institutions and judicial bodies. To that effect, the terms employed by the BIMST-EC FTA or the India-Singapore CECA are significant and could have been used by the other RTA. The first one indeed says in its preamble "*Recognising the need to harmonize with the changing global economic environment*…", while the article 16.5.2 India-Singapore CECA declares "*In the event of any inconsistency between this Agreement and any other agreement to which both Parties are parties, the Parties shall immediately consult with each other with a view to finding a mutually satisfactory solution*". This solution, application of successive treaties theory and necessity of renegotiation in case of non-conformity was the one adopted earlier by the European Union, through the article 307 Treaty on the European Union, as confirmed by the *International Fruit Company* ECJ Case in 1972, concerning the GATT.[251]

These quotations refer to a typical phenomenon in contemporary international law of the coexistence of different systems of law, as well as cross-diffusion of values, principles and norms. Its means that, even if theoretical solutions exist, WTO is also influenced in its creation and interpretation by existing RTA, and reciprocally.[252] Since its first report indeed, the AB has recognised that WTO law, as international law, must be interpreted in the light of the 1969 Vienna Convention on the law of treaties, reflecting general customary law on the question, and that "*the General Agreement is not to be read in clinical isolation from public*

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[251] Previously article 235 European Community Treaty. § 10 and 11 of the ECJ case, *International Fruit Company*, 12 December 1972: "*It is clear at the time when they concluded the Treaty establishing the European Economic Community the Member States were bound by the obligations of the General Agreement.*

By concluding a treaty between them they could not withdraw from their obligations to third countries", Joined Cases 21 to 24/72, *ECJ Reports*, p. 1226.

[252] F. Snyder, "Les sites de gouvernance", *in* L. Boisson de Chazournes et Rostane Mehdi, *Une société internationale en mutation : quels acteurs pour une nouvelle* gouvernance, Bruylant, Collection Les Travaux du CERIC, Bruxelles, 2005, pp. 319-320

international law".[253] Article 31 of the Vienna Convention provides for the general rules of interpretation: priority must be given to the ordinary meaning of the terms of the treaty in the light of its context, object and objective. To that effect, it must be taken into account agreements or instruments agreed upon in connection to the treaty, as well as subsequent conventions and practices adopted by the parties and relevant rules of international law.[254]

Interpretation is therefore the main tool for a coherent and harmonised system of international law, especially if the obligations can apparently be contradictory. Concerning the issue of the compatibility of WTO and RTA, the Dispute Settlement Body has adopted a solution based on the principle that there is no fundamental primacy of the WTO multilateral law over a more developed regional system, in contradiction with the one of the panels underlying the prevalence of WTO over the regional

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[253] WT/DS2/AB/R, 1996-1, *United States - Standards for Reformulated and Conventional Gasoline*, 29 April 1996, p. 15.

[254] Article 31. 1. "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*

2.The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3.There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended".

system.[255] One had found in this ruling the expression of "constitutionalism pluralism". This expression expresses the true dialogue existing between the regional (and bilateral) and the multilateral level, which allows a parallel evolution of the systems and the check and balance between them.[256] There is a progressive harmonisation by the adoption of a set of minimal common rules, *i.e.* a certain standardisation of material trade law, with reciprocal influence between the regional and world levels. Nevertheless, this harmonisation is bound to be progressive since the different normative orders created at the regional level can produce different answers and solution on the same legal issue. The global trade law is little by little more stable and predictable because of the progressive integration of normative and institutional rules realised thanks to communication, negotiations and management of conflicts.

[255] WT/DS34/R, 31 May 1999, *Turkey – Restrictions on Imports of Textile and Clothing Products*, *op. cit.*. See above.

[256] T. N'Gunu, "Regionalism and the WTO: Mutual Accomodation at the Global Trading System", *International Trade Law and Regulation*, No.11-14, 2005, pp. 126-145.

CONCLUSION

The trade and economic relationship recently elaborated between India and South-East Asia gives a feeling of profusion and redundancy. A close scrutiny of the arrangements nevertheless tempers this first impression because the organic structure and substantive law finally provide for a certain coherence among them. They are quite similar from a material and structural point of view, influenced by the same liberal philosophy, and by the Asian conception of State sovereignty. So far, these developments have given a positive and dynamic face to the region, even if there is in fact a true problem of effective enforcement of the cooperation and liberalization programmes. In addition, the institutional and material framework reflects the state of advancement of the regional process, while giving a lot a flexibility and potentiality to the latter. Hopefully, trade and economic liberalization is supported by economic and trade constant growth within the region. However, it seems to me useful to improve the transparency of institutional and substantive law, especially through the clarification and improvement of relations between the different arrangements and groupings and a progressive harmonisation of normative and operational projects.

East Asia and India are nevertheless at the crossroads. ASEAN have to keep the balance between the two main poles of its external Asian policy, that is North-East Asia and India. The latter has to prove its capacity to go-on with the liberalization process and to become a regional power, pulling its own weight on the world scene. However, one of the most difficult challenges is to agree on the direction regionalism must take in the near future. There is indeed a big discrepancy between the multiplicity of trade and economic liberalization programmes and the reality of enforcement and implementation of the agreements. Blockages and divergences at the regional and world levels, put in question the real will of liberalization. The major issue of agriculture is a topic example in this domain. Furthermore, except for few economic cooperative

projects, the creation of a Free Trade Area seems to be the only common mission of the regional construction. Reduction of elimination of custom duties could nevertheless be very well realised in other forums, such as WTO. Furthermore, the divergence between the rhetoric of unity and the difficulty to adopt an integrated institutional system is equally problematic, especially if a major difficulty arises, as it was the case during the financial and economic Asian crisis. Even if there is some progress towards enforcement of law through the development of dispute settlements mechanisms, most projects also suffered from being the fruit of non-binding texts. For a major growth of trade and investments in the region, legal security must be ensured.

India and South-East Asia have different interests and economic and political culture and the post-independence unity lasted a moment only. However, growing interdependence, ideological rapprochement and informal connection would create a habit of cooperation between States, governments and civil society which could go further historical and political divergences: This could be the application of the famous spill-over effect theory. Even if trade is increasing in volume within the region, the dependence vis-à-vis the rest of the world is still important, but could be a factor of unity in the region. From this point of view, nevertheless, India is not part of APEC and has just been accepted within ASEM, and it must stay mobilised to be in the run. Perhaps, it is one of its most important challenges to ensure its credibility in the world scene. The Look East Policy is a formidable occasion to go on with economic reforms and further trade liberalization. It is a necessary condition for India to be better incorporated in the new Asia, instead of staying at its periphery, as it was more or less the case so far. Economic growth is finally its better ally.

In South-East Asia, the regionalism challenge is mainly withstood by ASEAN. The latter has indeed decided to move towards the creation of an Economic Community by 2015 (instead of 2020 originally), in addition to a Socio-Cultural Community and Security Community and to adopt a constitutional Charter "*embodying*

fundamental principles, goals, objectives and structures of ASEAN cooperation capable of meeting the needs of the ASEAN Community and beyond".[257] ASEAN is now attracted by a "European Style" ASEAN, with the creation of single market, to stay attractive for FDI and competitive in front of China and India.[258] Since 1997, the term "integration" is employed in place of cooperation, which is indicative of the new and deeper objectives of the Association.[259]

Today, the regional process in the Asian region is rather a system binding different arrangements and forums, firstly concerned by the liberalization and development of trade within the region and with the rest of the world. Beyond the discrepancy between the rhetoric and the reality, constitution of preferential and free trade arrangements is only the first step of economic integration. The issue is whether East Asia can influence the world trade law and/or can create its own system of law, founded from the web of trade and economic agreements already existing?

Which Future for the Ongoing East Asian Community? Is ASEAN-India Partnership a Premise for a more Integrated East-Asia Community?

So far, the construction of the regional trade system manoeuvres towards different directions from "minilateralism"[260] and bilateralism to regionalism and multilateralism. Moreover, the regional process has evolved from the concept of open regionalism driven by APEC to a more institutionalised pattern since the financial crisis. The development of trade and economic treaties in the region, driven by a common liberal economy philosophy

[257] Chairman's Statement of the 11th ASEAN Summit "One Vision, One Identity, One Community", Kuala Lumpur, 12 December 2005.

[258] "ASEAN for single market by '15 to block FDI loss to China, India", <http://in.indiatimes.com>, 23/08/2006.

[259] Heads of State/Government of ASEAN, ASEAN Vision 2020, Kuala Lumpur, 15 December 1997.

[260] The expression belongs to F. Nicolas, "Les perspectives d'intégration économique en Asie de l'est sous l'influence de la Chine", 2005, *op. cit.*, p. 7.

led to think of the opportunity to create a Free Trade Zone in East Asia, instead of keeping non-coordinated and redundant network of agreements. Nevertheless, the structure and concerns of the web of trade and economic agreements between India and South-East Asia are very similar but they are not necessarily compatible with the dilution in a larger community. Furthermore, if a big Free Trade Agreement is signed in the region, the possibility of numerous blockages is likely to exist for political reasons, or because it will allow too many exceptions to be trade creating. If the world liberalization process goes on, the project of East Asian Community must go further it to be credible and, thus, must be accompanied by a political project.

The first East-Asia regional summit in 2005 put together very different sub-regional groupings: ASEAN, North-East Asia, with three major economies, China, South Korea and Japan, the so-called "white Asia", *i.e.* Australia and New Zealand and, finally, India. For the moment India supports Japan's proposal to create an East Asia FTZ,[261] but ASEAN leaders seem to be more interested to conclude trade agreements with each of its dialogue partners. Concerning East Asia, ASEAN wants to remain the centre, the hub, thanks to the signature of economic and trade agreements with all its regional partners, but it will have more and more to deal with the competition with China for the leadership. Relations between India and South-East Asia have suffered from the competition with ASEAN-Plus-Three,[262] but also from the difficulty for India to open-up its trade and economy. Hopefully, India has created original economic links with South-East Asia, through MGC, BIMST-EC and bilateral agreements with Thailand and Singapore.

[261] "India supports Japan's proposal on Pan-Asia FTA", <http://in.indiatimes.com>, 24/08/2006.

[262] ASEAN-Plus-One is only seen as a complement of ASEAN-Plus Three: ". *We will continue to encourage and support cooperation under the ASEAN Plus One processes to further contribute to the overall cooperation within the ASEAN Plus Three framework, which will form an integral part of the overall regional architecture in a complementary manner with other regional fora and processes*", § 3 Kuala Lumpur Declaration on the ASEAN-Plus-Three Summit Kuala Lumpur, 12 December 2005.

The creation of a Free Trade Zone is likely to be the first step of an East Asia Community, associated with some economic cooperation, such as transport or technology, based the web of existing trade and economic agreements. The issue is whether this FTZ will move forward a more integrated community, in economic and/or legal terms and how to rule it. For the Europeans, integration indeed means the existence of supranational institutions and also the creation of own legal order, affecting individuals and not only States. If the first proposition is unlikely to exist soon, because of the sensitivity of the sovereignty issue and the difficulty to envisage the idea of transfer of authority to an international Organisation, the second is possible, at least concerning special objectives in the economic and trade domains. [263] Finally, the parallel evolution of WTO will certainly accelerate or impede the modalities of trade liberalization towards an Asian application of world trade law or the constitution of a specific regional trade block, with its own objectives and values.

[263] See on functionalist theory and integration: B. F. Alger, « Fonctionnalisme et intégration », *op. cit.*, p. 77.

APPENDIXES

Appendix 1: ASEAN and Indian Foreign Direct Invesments

Comparative Foreign Direct Investments in ASEAN by source country/region. (Value in million $ US)

Source Country/ Region	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**	**2002**	**2003**	**2004**
ASEAN	4271.8	5235.7	2730.8	1789.3	763.1	2495.4	3634.4	2301.8	2432.7
Asian New industrialised Economies (Honk Kong, South Korea, Taiwan)	242.0	3520.6	1930.4	1629.0	1459.8	1828.0	567.6	1558.9	2427.9
China PRC	117.9	62.1	291.3	62.5	133.4	147.3	80.9	188.7	225.9
India	**68.8**	**90.2**	**92.6**	**41.7**	**79.5**	**32.3**	**96.0**	**81.2**	**46.3**
Indian FDI growth		**31.1**	**2.6**	**- 54.9**	**90.6**	**- 59.3**	**197.2**	**- 15.4**	**- 42.98**
Total Share in %	**0.22**	**0.26**	**0.01**	**0.14**	**0.40**	**0.17**	**0.69**	**0.44**	**0.18**
Japan	5283.3	5229.5	3937.6	1688.2	455.0	1606.3	3366.2	2317.7	2538.2
EU	9483.1	8326.5	6861.1	12048.0	13840.1	6053.6	5087.5	6674.7	637.7
USA	5177.2	4950.1	3222.3	9931.7	7311.6	4569.4	357.6	1395.3	5051.9
Total FDI % Growth	**30208.6**	**34098.6 12.87**	**22406.3 - 34.29**	**27852.8 19.55**	**22646.7 - 18.69**	**18457.1 - 18.49**	**13824.7 - 25.09**	**18447.0 33.43**	**25654.2 39.06**

Source: Calculated from ASEAN Secretariat - ASEAN FDI Database (compiled from data submission and/or websites of ASEAN Member Countries' national statistics offices, central banks and other relevant government agencies). As for 31 December 2005.

Indian FDI : Comparative statement on country-wise fdi inflows. (From August 1991 to October 2006, Amount in Million $US)

Rank	Country	Amount of FDI Inflows	% With Total Inflows
7	**Singapore**	**1554.98**	**4.12**
20	**Malaysia**	**142.2**	**0.37**
27	**Thailand**	**77.57**	**0.18**
29	**Phillipines**	**52.41**	**0.12**
36	**Indonesia**	**30.68**	**0.09**
88	**Myanmar**	**0.23**	**0.00**
96	**Vietnam**	**0.10**	**0.00**
4	*Japan*	*2172.42*	*5.60*
9	*South Korea*	*789.29*	*1.89*
59	*China Prc*	*3.91*	*0.01*
55	Sri Lanka	5.09	0.01
83	Bhutan	0.61	0.00
91	Nepal	0.22	0.00
2	USA	5497.56	13.94
1	Mauritius	15442.35	41.09
1 BIS	Top 10 EU Countries (Netherlands, UK, Germany, France, Italy, Sweden, Belgium, Luxembourg, Spain, Austria)	6158.43	19.0
	TOTAL FDI	**32,382.82**	

Source: Calculated from "Fact shit on Foreign Direct Investment", from August 1991 to September 2005, available on <www.commerce.nic.in>.

Appendix 2 : Comparative GDP Per Capita

Income level Per capita and per year. In US$	**ASEAN countries**	**East Asian Countries**	**South Asian Countries**
Low income ‹ 765	Cambodia, Myanmar, Laos, VN		India, Afghanistan, Bangladesh, Bhutan, Nepal, Pakistan
Lower middle income 762 - 3035	Indonesia, Philippines, Thailand	China (PRC)	Sri Lanka
Upper Middle income 3036 - 9385	Malaysia		
High income › 9386	Brunei, Singapore	Hong Kong, Macao, China-Taipei, Republic of Korea, Japan	

Source: J. M. Paugam & A. S. Novel, « Why and How Differentiate Developing Countries in the WTO? Theoretical Options and Negotiating Solutions", Conférence IFRI-AFD, 2005, available on <www.ifri.org>.

Appendix 3: India's Trade with ASEAN Countries

Source: Calculated from the Government of India, Ministry of Commerce & Industry, Department of Commerce, http://www.commerce.nic.in/eidb/default.asp

India's Trade with CMLV ASEAN countries. (Values in US$ Million)

	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006
India's Export to Cambodia	11.29	19.84	18.60	18.13	24.19
Import	1.12	0.61	0.28	0.24	0.78
Total Trade with Cambodia	12.41	20.45	18.88	18.38	24.97
% Growth		64.76	-7.68	-2.65	35.87
India's Import to Myanmar	374.43	336.04	409.01	405.91	525.96
Export	60.89	75.07	89.64	113.19	110.70
Total Trade with Myanmar	435.32	411.12	498.66	519.11	636.66
%Growth		-5.56	21.29	4.10	22.65
India's Import to Laos	0.04	0.15	0.13	0.05	0.10
Export	3.16	1.58	0.43	2.65	5.47
Total Trade with Laos	3.20	1.73	0.56	2.70	5.58
%Growth		-46.09	-67.47	381.17	106.47
India's Import to Vietnam	18.91	29.18	38.21	86.50	131.39
India's Export from Vietnam	218.17	337.39	410.44	555.96	690.68
Total Trade with Vietnam	237.09	366.57	448.65	642.46	822.06
%Growth		54.62	22.39	43.20	27.96
Total Trade with CMLV	*688.02*	*799.87*	*966.75*	*1182.65*	*1489.27*

India's Trade with ASEAN-6. (Values in Million US $)

	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006
Export to Brunei	2.86	4.45	4.59	5.06	42.94
Import from Brunei	0.36	0.32	0.34	0.54	0.88
Total Trade with Brunei	3.21	4.78	4.93	5.60	43.82
%Growth of Trade with Brunei		48.58	3.18	13.71	681.98
Export to Indonesia	533.71	826.06	1,127.21	1,332.60	1,380.20
Import from Indonesia	1,036.81	1,380.87	2,122.08	2,617.74	3,008.11
Total Trade with Indonesia	1,570.52	2,206.93	3,249.29	3,950.34	4,388.31
%Growth Trade with Indonesia		40.52	47.23	21.58	11.09
Export to Malaysia	773.69	749.37	892.77	1,084.06	1,161.86
Import from Malaysia	1,133.54	1,465.42	2,046.56	2,299.01	2,415.61
Total Trade with Malaysia	1,907.23	2,214.79	2,939.33	3,383.07	3,577.47
%Growth Trade with Malaysia		16.13	32.71	15.10	5.75
Export to Philippines	247.79	472.00	321.53	412.23	494.66
Import from Philippines	94.84	123.77	122.11	187.39	235.49
Total Trade with Philippines	342.63	595.77	443.64	599.62	730.16

	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006
%Growth Trade between India and the Philippines		73.88	-25.53	35.16	21.77
Export to Singapore	972.31	1,421.58	2,124.84	4,000.61	5,425.29
Import from Singapore	1,304.09	1,434.81	2,085.38	2,651.40	3,353.77
Total Trade with Singapore	2,276.40	2,856.39	4,210.22	6,652.01	8,779.06
%Growth Trade between India and Singapore		25.48	47.40	58.00	31.98
Export to Thailand	633.13	711.20	831.69	901.39	1,075.31
Import from Thailand	423.09	379.00	609.06	865.88	1,211.58
Total Trade with Thailand	1,056.22	1,090.20	1,440.74	1,767.27	2,286.89
%Growth Trade with Thailand		3.22	32.15	22.66	29.40
Total Trade with ASEAN-6	*7156.21*	*8968.86*	*12288.15*	*12411.52*	*19805.71*
Total Trade with ASEAN	*7844.23*	*9768.73*	*13254.9*	*13594.17*	*21294.98*

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Trade and Economic Arrangements Between India and South East Asia in the Context of Regional Construction and Globalisation

Summary

The economic and trade relations between India, on one hand, and South-East Asia, on the other hand, are shaped by numerous agreements and groupings, which may become formal international Organisations in the future. They are indeed based not only on comprehensive economic agreements or free trade agreements between India and ASEAN or at the bilateral level with Thailand and Singapore in particular, but also on the BIMST-EC and the MGC groupings. After having been mainly based on informality and ad hoc arrangements, they are today more institutionalised and founded on a more formal corpus of law. This paper first presents those regional initiatives, and how they are governed and managed. Then, it makes the statement that they are overlapping but, at the same time, they are also influenced by the same philosophy of trade and economic liberalization and influenced by the WTO system, in terms of law, institutions and dispute settlement. They are also the result of a tension between the multilateral, regional and bilateral levels and they aim to protect different interests at different levels. The paper finally discusses the possible influence of these arrangements between India and South-East Asia on the future organisation of the regional economic and trade integration in East-Asia.

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