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THE 2004 INTERNATIONAL LAW REVIEW SYMPOSIUM ON THE FREE TRADE AREA OF THE AMERICAS: IMPLICATIONS OF A HEMISPHERIC MARKETPLACE

INTRODUCTORY REMARKS

Thomas M. Haney†

I want to welcome you all to this opening session of the symposium on the "Free Trade Area of the Americas: The Implications of a Hemispheric Marketplace."

This is the second in a series of annual symposia sponsored by our International Law Review, the purpose of which is to provide an academic forum for scholars, public officials and others to discuss a major issue in the international arena. The students once again have assembled a remarkable group of speakers and other participants who will spend tonight and tomorrow engaging in what I hope and expect will be a spirited discussion of this year's topic, the proposed Free Trade Area of the Americas.

The New World, the Western Hemisphere, has a unique history, and the United States has played a variety of roles over the centuries in that history. From the earliest days of our country, the United States has expressed interest in its hemispheric neighbors - although that interest has not been consistently sustained, nor has it always been benevolent.

I remember the promise of the Latin America Free Trade Association that was launched in 1960, and the excitement generated by President John F. Kennedy's proclamation of an Alliance for Progress - the Alianza para el Progreso. On officially announcing the Alliance in 1961, President Kennedy said, "Our unfulfilled task is to demonstrate to the entire world that man's unsatisfied aspiration for economic progress and social justice can best be achieved by free men working within a framework of democratic institutions." Those words may still have some relevance to the project under discussion tonight.

I also remember how, not long after President Kennedy's death, the optimism of those days faded. The Latin American Free Trade Association never fulfilled its promise of economically tying the countries of the region together. The establishment of the Castro government in Cuba and the military interventions throughout Latin America in the 1970's and '80's dampened the enthusiasm of

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the United States for hemispheric projects, and the Cold War turned our interests elsewhere.

The restoration of democracy throughout the region by the 1990's and the introduction of free market economics within the hemisphere rekindled ideas of and hopes for cooperation among the nations of the Americas. The United States underwent its first experiment with economic integration with the emergence of NAFTA, the North American Free Trade Agreement, in 1993 - an experiment that remains controversial to this day, as we recently saw as we celebrated - or lamented - its 10th anniversary.

From the first Summit of the Americas in 1994 in Miami, the United States has enthusiastically proclaimed the concept of free trade from the Arctic Circle to Tierra del Fuego - although its commitment to real free trade remains somewhat doubtful. Nonetheless, the United States continues to pursue free trade opportunities within the hemisphere.

Our School of Law established ties with a law faculty in Santiago, Chile, and last year some of the faculty accompanied a number of our law students on a study tour to Chile. While there, they were treated to a continual stream of information, mostly but not entirely favorable, about the United States - Chile Free Trade Agreement which had just been negotiated and which was ratified by our Senate and signed by our President later that year.

Newspapers have given decent coverage - for a story on economics - to the recently-concluded free trade agreement between the United States and the principal nations of Central America. And it seems clear that the United States remains intent on pursuing other opportunities for free trade in the Americas.

By far the most ambitious of these projects is the proposal for a Free Trade Area of the Americas. For the past decade, this plan has been moving, mostly forward, on a variety of planes. But, as the recent Special Summit of the Americas in Monterrey, Mexico has demonstrated, the path toward concluding the Free Trade Area of the Americas is by no means certain or smooth. Critics of United States policies and plans - both in this country and elsewhere in Latin America, notably Brazil - have called into question whether this ambitious project can be brought to completion.

I expect that our speakers tonight and tomorrow will provide us all with many different perspectives and conclusions on that issue.

I would now like to introduce Professor Margaret Moses, who will proceed with the program. Thanks again for being with us for this exciting symposium.

Thomas M. Haney
February 5, 2004

THE FTAA NEGOTIATIONS: A MELODRAMA IN FIVE ACTS

Keynote Address by Kevin C. Kennedy†

On December 31, 2003, the North American Free Trade Agreement ("NAFTA") marked its tenth anniversary. Another tenth anniversary in free trade also took place at the end of 2003, but this was an anniversary that went largely unnoticed, namely, the tenth anniversary of formal talks on a Free Trade Area of the Americas ("FTAA"). The FTAA was officially launched in Miami in 1994 at the first of four Summits of the Americas, and ten years later a renewed, albeit watered-down, commitment to completing those negotiations took place at the eighth and latest FTAA Ministerial Meeting in November 2003, again in Miami. Whether what occurred at the Miami Ministerial Meeting is cause for celebration or cause for frustration depends, of course, upon one's views about economic integration and globalization. For reasons that will be explained here, there is nothing to cheer about what took place at the Miami Ministerial.

Background on the FTAA (and the Dramatis Personae)

A proposal to integrate the economies of the countries in the Western Hemisphere was launched in 1990 by President George H.W. Bush in his Enterprise for the Americas Initiative. This piece of unfinished business was championed by the Clinton administration and restyled as the Free Trade Area of the Americas.[1] The goal of the FTAA, as articulated at the First Summit of the Americas held in Miami in December 1994, and renewed at the third FTAA Ministerial Meeting at Belo Horizonte, Brazil in May 1997, was a free trade area

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[1] *See generally* Richard L. Bernal, *Regional Trade Arrangements and the Establishment of a Free Trade Area of the Americas,* 27 LAW. & POL'Y INT'L BUS. 945 (1996); Frank J. Garcia, *"Americas Agreements"—An Interim Stage in Building the Free Trade Area of the Americas,* 35 COLUM. J. TRANSNAT'L L. 63 (1997); Paul A. O'Hop, *Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-Based System,* 36 HARV. INT'L L.J. 127 (1995); Carol Stump, *Free Trade Area of the Americas (FTAA),* 4 J. INT'L L. & PRAC. 153 (1995); Ruperto Patino Manffer, *The Future of Free Trade in the Americas,* 10 CONN. J. INT'L L. 639 (1995); Kenneth W. Abbott & Gregory W. Bowman, *Economic Integration in the Americas: "A Work in Progress,"* 14 NW. J. INT'L L. & BUS. 493 (1994); David A. Pawlak, *Learning from Computers: The Future of The Free Trade Area of the Americas*, 27 U. MIAMI INTER-AM. L. REV. 107 (1995); Frank J. Garcia, *NAFTA and the Creation of the FTAA: A Critique of Piecemeal Accession,* 35 VA. J. INT'L L. 539 (1995); Charles M. Gastle, *Policy Alternatives for Reform of the Free Trade Agreement of the Americas: Dispute Settlement Mechanisms,* 26 LAW. & POL'Y INT'L BUS. 735 (1995); *The Evolution of Free Trade in the Americas: NAFTA Case Studies*, 11 AM. U.J. INT'L L. & POL'Y 687 (1996)(conference papers). The FTAA maintains a website at http://www.alca-ftaa.org. Other FTAA websites are at http://www.itaiep.doc.gov and http://americas.fiu.edu.

stretching from Alaska to Tierra del Fuego by 2005.[2] That far-sighted vision turned myopic at the eighth Ministerial Meeting held in Miami in November 2003.

The 34 heads of the democratic nations in the Western Hemisphere (all countries in the hemisphere with the exception of Cuba) launched FTAA negotiations at the 1994 Summit of the Americas in Miami, calling for the completion of a FTAA by 2005.[3] The leaders committed themselves to integrate the patchwork quilt of bilateral and regional trade agreements (at least seven regional trade arrangements and more than twenty-five bilateral trade agreements) that exist in the Western Hemisphere.[4] Upon its completion, the

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[2] *See* Summit of the Americas, Declaration of the Principles and Plan of Action, Dec. 11, 1994, *reprinted in* 34 INT'L LEGAL MATERIALS 808 (1995); Free Trade Area of the Americas, Third Ministerial Trade Meeting, Belo Horizonte, Minas Gerais, Brazil, May 16, 1997, Joint Declaration, para. 2.

To date, there have been four Summits of the Americas. The first was held in Miami in 1994; the second in Santiago, Chile in 1998; the third in Quebec, Canada in 2001; and the fourth—a Special Summit—in Monterrey, México in 2004. Summit Declarations and Plans of Action are available at http://www.alca-ftaa.org/Summits_e.asp (last visited Jan. 24, 2004). To date, there have been eight Ministerial Meetings held in the following cities: Denver, United States of America(June1995); Cartegena, Colombia (March 1996); Belo Horizonte, Brazil (May 1997); San Jose, Costa Rica (March 1998); Toronto, Canada (November 1999); Buenos Aires, Argentina (April 2001); Quito, Ecuador (November 2002); and Miami (November 2003). Ministerial Declarations are available at http://www.alca-ftaa.org/Minis_e.asp (last visited Jan. 25, 2004).

[3] *See* Summit of the Americas, Declaration of Principles (Dec. 1994), *at* http://www.ftaa-alca.org/ministerials/miami_e.asp (last visited Apr. 1, 2003)("We, therefore, resolve to begin immediately to construct the 'Free Trade Area of the Americas' (FTAA), in which barriers to trade and investment will be progressively eliminated. We further resolve to conclude the negotiation of the 'Free Trade Area of the Americas' no later than 2005, and agree that concrete progress toward the attainment of this objective will be made by the end of this century").

[4] *See* RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW: THE GATT-WTO SYSTEM, REGIONAL ARRANGEMENTS, AND U.S. LAW 250-51 (1998). The most economically important of the hemispheric regional trade agreements is, of course, the North American Free Trade Agreement (NAFTA). For an overview of NAFTA's legal obligations, operation, and impact, *see generally* NORTH AMERICAN FREE TRADE AGREEMENT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 159, 103d Cong., 1st Sess. (1993). The most recently concluded regional free trade agreement in the Hemisphere is the US-Central America Free Trade Agreement (CAFTA). The CAFTA countries are El Salvador, Guatemala, Honduras, and Nicaragua. *See* Office of the U.S. Trade Representative, Trade Facts, Free Trade with Central America, Summary of the US-Central America Free Trade Agreement (Dec. 17, 2003), *available at* http://www.ustr.gov/new/fta/Cafta/2003-12-17-factsheet.pdf (last visited Jan. 24, 2004). Within Latin America, five major regional trade agreements have been formed:

- The Central American Common Market ("CACM"), created in 1961, whose members include Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama. *See* General Treaty of Central American Economic Integration, Dec. 13, 1960, El Salvador-Guatemala-Honduras-Nicaragua, 455 U.N.T.S. 3, *entered into force* June 4, 1961.
- The Andean Pact ("ANCOM"), formed in 1969, a subgroup of the Latin American Integration Association, whose members include Bolivia, Colombia, Ecuador, Peru, and Venezuela. *See* Agreement on Andean Subregional Integration, May 26, 1969, Bolivia-Colombia-Chile-Ecuador-Peru, *reprinted in* 8 INT'L LEGAL MATERIALS 910. Venezuela eventually acceded to the Agreement, but Chile later denounced it, effective October 30, 1976. *See* Thomas Andrew O'Keefe, *How the Andean Pact Transformed Itself into a Friend of Foreign Enterprise*, 30 INT'L LAW. 811 (1996).

FTAA will integrate a population of over 850 million people into a 13 trillion dollar market.[5]

- The Caribbean Community ("CARICOM"), formed in 1973, whose members consist of the 13 English-speaking island nations in the Caribbean and Belize. *See* Treaty Establishing the Caribbean Community, July 4, 1973, 947 U.N.T.S. 17, *reprinted in* 12 INT'L LEGAL MATERIALS 1033 (1973).
- The Latin American Integration Association ("LAIA" or "ALADI"), formed in 1981, a multilateral preferential trade association comprising Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, México, Paraguay, Peru, Uruguay, and Venezuela. *See* Treaty of Montevideo (1980) Establishing the Latin American Integration Association (LAIA), Aug. 12, 1980, *entered into force* Mar. 18, 1981, *reprinted in* GENERAL SECRETARIAT OF THE ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN TREATIES AND CONVENTIONS 353. LAFTA was restructured in 1980 and renamed ALADI.
- The Southern Common Market ("MERCOSUR"), formed in 1991, another subgroup within the ALADI, whose members include Argentina, Brazil, Uruguay, and Paraguay, and whose associate members include Chile and Bolivia. *See* Treaty of Asuncion, March 26, 1991, *reprinted in* 30 INT'L LEGAL MATERIALS 1044 (1991).

In terms of its economic impact on Latin America, MERCOSUR is clearly the most ambitious and dynamic of the five Latin American RTAs.

[5] *See* BHALA & KENNEDY, *supra* note 4, at 251. The NAFTA parties wasted no time in pursuing the objectives identified in the Declaration of Principles. Immediately following the Summit, the leaders of the NAFTA parties formally announced that preliminary discussions on Chile's accession to NAFTA would begin in January 1995, with formal negotiations beginning in June 1995. These plans were derailed, however, following the intense, and at times acrimonious, political battles in the United States over passage of NAFTA in 1993 and the Uruguay Round Agreements in 1994. Congress and the Administration both suffered from free-trade fatigue. President Clinton was unsuccessful in securing fast-track authority from Congress to negotiate Chile's NAFTA accession. *See* Stewart A. Baker, *After the NAFTA*, 27 INT'L LAW. 765 (1993). Indeed, the stage had been set in part for Chile's accession to NAFTA prior to the conclusion of NAFTA when Chile and México concluded a free trade agreement ("FTA") that entered into force January 1, 1992. Trade in most goods became duty free on January 1, 1998. However, Chile seemingly lost patience with Congress and President Clinton in their interminable quarrel over renewal of fast-track negotiating authority—now called "trade promotion authority"—and, instead, found new hemispheric trading partners. *See* U.S. INT'L TRADE COMM'N, THE YEAR IN TRADE 1995, OPERATION OF THE TRADE AGREEMENTS PROGRAM 35 (USITC Pub. 2971 1996); *Latin America Awaits a Call by Clinton*, CHRISTIAN SCI. MONITOR, Nov. 20, 1996, at 6. First, Chile joined MERCOSUR as an associate member on October 1, 1996. Second, Canada and Chile concluded a bilateral FTA on November 18, 1996, that covers tariffs, non-tariff measures, investment, services (excepting financial services), rules of origin, customs procedures, emergency safeguards action, dispute settlement, AD and CVD actions, competition policy, labor, and environment. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, FUTURE FREE TRADE AREA NEGOTIATIONS: REPORT ON SIGNIFICANT MARKET OPENINGS 4-5 (1997); Tom Jennings, *Canada-Chile Free Trade Agreement*, INT'L ECON. REV. 9 (USITC Pub. 3043 May/June 1997); *Canada To Use Free-Trade Agreement With Chile To Press U.S. On NAFTA Accession, Chretien Says*, 13 Int'l Trade Rep. (BNA) 1782 (1996).

The Clinton Administration could be criticized for squandering an opportunity to expand NAFTA by failing to add Chile as NAFTA's fourth member. The Bush Administration, on the other hand, successfully concluded, and the Senate approved, a Chile-US FTA on July 31, 2003. *See* Office of the US Trade Representative, *Statement of U.S. Trade Representative Robert B. Zoellick Following Senate Approval of Chile and Singapore Free Trade Agreements*, Press Release (July 31, 2003), *available at* www.ustr.gov/releases/2003/07. Although Chile was not formally admitted to the NAFTA trilateral relationship, with its web of FTAs among the three NAFTA parties, Chile is de facto, if not de jure, a NAFTA party in all but name. Chile's eventual accession to NAFTA arguably was an essential step toward hemispheric integration. *See Free Trade Area for the Americas: Chile Is the Linchpin*, INT'L ECON. REV. 11 (USITC Pub. 2934 Nov. 1995).

Act I: The 1994 Miami Summit of the Americas

The 1994 Miami Summit Action Plan called on the Trade Ministers of the 34 FTAA participants to meet in 1995 to draft a more complete plan for FTAA negotiations and to meet again in 1996 to develop a timetable for future work.[6] To that end, Trade Ministers met in Denver in June 1995, and issued a Joint Declaration and Work Plan. The Ministers agreed to set up nine FTAA working groups—subsequently renamed "negotiating groups" at the 1998 San José Ministerial Meeting—on investment; agriculture; subsidies, antidumping and countervailing duties; market access; services; competition policy; government procurement; intellectual property; and dispute settlement. It is noteworthy that negotiating groups have not been established for labor and the environment, notwithstanding a call in the Miami Summit Action Plan to "further secure the observance and promotion of worker rights" and to make trade liberalization and environmental policies "mutually supportive." Several Latin American representatives, as well as private groups, voiced concerns over a US proposal to include the Labor and Environment Ministers in the FTAA process. Opposition to the US proposal was mounted on the ground that neither issue merits inclusion in the immediate action plan required to advance the FTAA process. Moreover, some participants argued that the proposed US language on labor and the environment departed from the more vaguely worded language on labor and the environment in the Miami Summit Action plan. Sources monitoring the pre-Denver consultations reported that the United States agreed to soften its proposed language in order to achieve consensus at the June Ministerial.

The June 1995 Ministerial Meeting in Denver failed to resolve two key points of disagreement about the future direction of FTAA negotiations: (1) the scope of the FTAA negotiations, and (2) the approach to be used to achieve the FTAA. Former US Trade Representative Mickey Kantor and former Canadian Trade Minister Roy MacLaren both viewed the FTAA as a two-track integration process—the newly established FTAA negotiating groups as one track, and the deepening and strengthening of existing sub-regional trade agreements as the other track. Under this view, the negotiating group discussions and the existing sub-regional agreements would be mutually reinforcing and would ultimately converge. A middle approach envisioned FTAA negotiations modeled after the Uruguay Round "single undertaking" approach. This scenario envisioned a multilateral forum open to all 34 countries in which they would simultaneously negotiate all aspects of the FTAA and in which all participants would accede to all of the agreements negotiated rather than adopt an "à la carte" approach as had been done in the Tokyo Round.

At the opposite end of the spectrum, former Brazilian Foreign Minister Luiz Felipe Lampreia advocated an approach that would have widened and deepened existing sub-regional agreements. The sub-regional accords would become

[6] *See Free Trade Area for the Americas: Chile Is the Linchpin, supra* note 5.

"building blocks" for broader hemispheric economic integration along a path that ultimately would lead to bloc-to-bloc negotiations. But is this a "building block" or a "bloc building" approach? A constant concern about regionalism is that regional trade agreements ("RTAs") that create trade blocs may end up being trade diverting rather than trade creating because they close market access to more efficient producers from outside the bloc in favor of less efficient producers within the bloc. Advocates of the building block approach maintained that, by capturing the gains and building on the progress already made in the sub-regional trade blocs, FTAA objectives would be realized more quickly than under the Uruguay Round's single-undertaking model. However, critics of the "building block" approach argued that much time could be lost in efforts to harmonize a diverse group of sub-regional arrangements ranging from free-trade areas, such as NAFTA, to common markets, such as MERCOSUR.[7]

At the March 1996 Ministerial Meeting in Cartagena, Columbia, the Trade Ministers agreed on "the importance of further observance and promotion of worker rights and the need to consider appropriate processes in this area, through our respective governments."[8] The lack of significant movement forward at this juncture can be explained in part by the incessant Brazilian-American sparring. While the United States would have preferred that an FTAA be a World Trade Organization ("WTO") "plus" agreement that would broaden the legal commitments made in the Uruguay Round, the early Brazilian model envisioned an FTAA that would first deepen existing sub-regional trade agreements before broadening them into an FTAA. The Brazilian vision would carry the day at the Cartegena Ministerial Meeting.[9] As events would unfold, the Brazilians would ultimately win the argument over the future of FTAA negotiations.

Act II, Scene 1: The 1997 Belo Horizonte Ministerial Meeting

The glacial pace of FTAA negotiations was accelerated slightly at the 1997 Belo Horizonte Ministerial Meeting in Brazil. In their Joint Declaration,[10] the Trade Ministers reiterated:

- the FTAA negotiations will be completed no later than 2005;
- the FTAA will be consistent with General Agreement on Tariffs and Trade

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[7] *See id.* at 12.

[8] Free Trade Area of the Americas, Second Ministerial Meeting, Joint Declaration Adopted March 21, 1996, *available at* http://www.ftaa-alca.org/ministerials/carta_e.asp (last visited Jan. 25, 2004). The trade ministers also agreed to establish a Negotiating Group on Dispute Settlement, but postponed the establishment of a Negotiating Group on the environment. No such negotiating group was ever established.

[9] Brazil also objected to the negotiating groups using NAFTA language as FTAA draft language. *See Brazil Gets Its Way*, THE ECONOMIST, March 30, 1996, at 45-46. As two commentators have observed, this was a discouraging state of affairs. *See* Abbott & Bowman, *supra* note 1, at 517.

[10] Free Trade Area of the Americas, Third Ministerial Meeting, Belo Horizonte, Minas Gerais, Brazil, May 16, 1997, Joint Declaration, *available at* http://www.alca-ftaa.org (last visited Jan. 25, 2004) [hereinafter Joint Declaration].

("GATT") Article XXIV and the General Agreement on Trade in Services ("GATS") Article V on regional trade agreements; and
- the FTAA will be trade creating, not trade diverting.[11]

The 34 Trade Ministers also agreed on the following points: (1) decision-making is to be by consensus, (2) an FTAA must be a comprehensive undertaking, (3) countries may accede individually or as members of an RTA, and (4) a Secretariat is to be established to support the negotiations.[12] As is explained below, the comprehensive undertaking goal of FTAA negotiations ultimately would be rejected at the November 2003 Ministerial Meeting in Miami.

Act II, Scene 2: The San José Ministerial Meeting

The participants in the FTAA negotiations held their fourth Ministerial Meeting in San José, Costa Rica, in March 1998.[13] The 34 Ministers of Trade issued a joint declaration recommending to their respective heads of state that they formally launch negotiations on the FTAA at their Second Summit in Santiago, Chile.[14] The Ministers outlined the structure and organization of the negotiations into nine negotiating groups: market access; investment; services; government procurement; dispute settlement; agriculture; intellectual property rights; subsidies, antidumping, and countervailing duties; and competition policy.[15] The Trade Ministers also reaffirmed their commitment "to make concrete progress by the year 2000. We direct the negotiating groups to achieve considerable progress by that year."[16] Of course, 2000 came and went with no concrete progress having been made. Significantly, non-governmental organizations ("NGOs") representing labor, environmental, and academic groups were invited to submit contributions to the FTAA Ministerial Meeting to be held in Canada in October 1999. A Committee of Government Representatives on the Participation of Civil Society is responsible for receiving and distributing

[11] Joint Declaration, *supra* note 10, paras. 1-2.

[12] *Id.* para. 5. The Ministers formally established a Negotiating Group on Dispute Settlement whose terms of reference are to compile an inventory of dispute settlement procedures in the region, identify areas of commonality and divergence, and make recommendations on an FTAA dispute settlement mechanism. *Id.* Annex II.

[13] *See* US Int'l Trade Comm'n, *Free Trade Area of the Americas*, INT'L ECON. REV., at 1-5 (March/April/May 1998).

[14] *See* Free Trade Area of the Americas, San José Ministerial Declaration, March 19, 1998, para. 8, *available at* http://www.alca-ftaa.org/EnglishVersion/costa_e.htm (last visited Jan. 25, 2004).

[15] *See id.* para. 11. The nine negotiating groups meet at the following three rotating venues according to the following timetable:
- Miami, Florida, from May 1, 1998 to February 28, 2001;
- Panama City, Panama, from March 1, 2001 to February 28, 2003;
- México City, México, from March 1, 2003 to December 31, 2004 (or until the conclusion of the negotiations).

[16] *See id.* para. 18.

submissions from civil society in the FTAA process.[17] The participation of civil society has been ongoing, but whether or not it will have any impact remains to be seen.

Act II, Scene 3: The Santiago Summit

At the Second Summit of the Americas held in Santiago, Chile, in April 1998, the 34 heads of state accepted the recommendations made by their trade ministers in San José and officially launched negotiations on a Free Trade Area of the Americas.[18] The Santiago Declaration reiterates the negotiators' commitment to complete FTAA negotiations by 2005. The Declaration also states that the FTAA will be balanced, comprehensive, WTO-consistent, and will constitute a single undertaking (i.e., will be an all-or-nothing package deal). The FTAA negotiations have been chaired on a rotating basis according to the following timetable:

- Canada (vice-chair Argentina), from May 1, 1998 to October 31, 1999;
- Argentina (vice-chair Ecuador), from November 1, 1999 to April 30, 2001;
- Ecuador (vice-chair Chile), from May 1, 2001 to October 31, 2002;
- Brazil and the United States (co-chairs), from November 1, 2002 to December 31, 2004

The Intermission: Intervening Ministerial Meetings Before the 2001 Quebec City Summit

Every play has an intermission, but the melodrama that is the FTAA negotiations was especially long. Fast-track negotiating authority had expired in 1993. In the absence of a renewal of fast-track negotiating authority, the United States' ability to negotiate effectively was completely hamstrung. As a result, the three intervening Ministerial Meetings between the 1998 Santiago Summit and the 2001 Quebec City Summit were largely exercises in reaffirming the principles announced in the Santiago Summit Declaration: the FTAA would be balanced, comprehensive, WTO-consistent, and a single undertaking, i.e., an all-or-nothing, package deal.[19] As will be explained shortly, the 2003 Ministerial

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[17] The contributions made by civil society in the FTAA process are available at http://www.alca-ftaa.org/SPCOMM/COMMCS_E.ASP (last visited Jan. 25, 2004).

[18] *See* Second Summit of the Americas, Santiago Declaration, April 19, 1998, *available at* http://www.sice.oas.org/ftaa/santiago/sadop_e.htm (last visited Jan. 25, 2004). The heads of state also issued a Plan of Action, a body of concrete initiatives intended to promote the overall development of FTAA countries. *See* Second Summit of the Americas, Plan of Action, April 19, 1998, *available at* http://www.sice.oas.org/ftaa/santiago/sapoa_e1.stm (last visited Jan. 25, 2004).

[19] *See, e.g.*, Free Trade Area of the Americas, Fifth Trade Ministerial Meeting, Declaration of Ministers, Toronto, Canada, November 1999, para. 2 ("We reaffirm the principles and objectives that have guided our work since Miami, including *inter alia* that the agreement will be balanced, comprehensive, WTO-consistent, and will constitute a single undertaking. We agree that we are on our way to completing our work by 2005."), *available at* http://www.alca-ftaa.org/ministerials/minis_e.asp (last visited Jan. 25, 2004); Free Trade Area of the Americas, Sixth Meeting of Ministers of Trade of the Hemisphere, Ministerial Declaration, Buenos Aires, Argentina, April 7, 2001, para. 2 ("We affirm the principles and objectives that have guided our work since the First

Meeting was to depart dramatically from these consistently stated goals of the FTAA negotiations.

Act III, Scene 1: A Draft Text Emerges (The Plot Thickens)

In an effort to improve transparency, and at the same time to quell rumors and correct misinformation about what was being negotiated, it was agreed at the Third Summit of the Americas held in Quebec City in April 2001 that a draft FTAA text would be made public.[20] A preliminary first draft was published on July 3, 2001.[21] Slightly revised versions were published in 2002 and again in November 2003.[22]

Practically every line in the draft text is bracketed. Although I have not actually counted, I have heard that there are over 7,000 brackets in the draft text. There clearly is much work to be done and many differences to be bridged. A quick review of the text—if such a thing is possible considering that the text is several hundred pages long—raises many intriguing questions. The following is a small sample:

• Chapter V calls for special and differential ("S&D") treatment of countries in the hemisphere "that takes into account levels of development and size of the economies of the Parties . . . ."[23] But will S&D treatment mean extended

Summit of the Americas, in particular, the basic principle of consensus in decision making within the FTAA process and the achievement of a balanced, comprehensive agreement that is consistent with the rules and disciplines of the World Trade Organization. We reaffirm that the result of the FTAA negotiations shall constitute a comprehensive single undertaking, that incorporates the rights and obligations that are mutually agreed for all member countries."), *available at* http://www.alca-ftaa.org/ministerials/BAmin_e.asp *(last visited Jan. 25, 2004);* Free Trade Area of the Americas, Seventh Meeting of Ministers of Trade, Ministerial Declaration, Ecuador, 1 November 2002, para. 5 ("We reaffirm the principles and objectives that have guided our work since the First Summit of the Americas, in particular, the basic principle of consensus in decision making within the FTAA process and the achievement of a balanced and comprehensive agreement that is also consistent with the rules and disciplines of the World Trade Organization (WTO). We reaffirm that the result of the FTAA negotiations shall constitute a comprehensive single undertaking that incorporates the rights and obligations that are mutually agreed for all member countries."), *available at* http://www.alca-ftaa.org/ministerials/quito/ minist_e.asp (last visited Jan. 25, 2004).

[20] *See* Third Summit of the Americas, Declaration of Quebec City, April 20-22, 2001, *available at* http://www.alca-ftaa.org/ministerials/Quebec/declara_e.asp *(last visited Jan. 25, 2004)*("The decision to make public the preliminary draft of the FTAA Agreement is a clear demonstration of our collective commitment to transparency and to increasing and sustained communication with civil society.").

[21] *See USTR Zoellick Says Publication of Free Trade Area of the Americas (FTAA) Text Will Help Explain Trade Benefits*, Office of the US Trade Representative, Press Release, Jul. 3, 2001, *available at* http://www.ustr.gov/regions/whemisphere/ftaa.shtml (last visited Jan. 25, 2004).

[22] Free Trade Area of the Americas, Second Draft Agreement, *available at* http://www.ustr.gov/regions/whemisphere/ftaa2002/secondtext.htm (last visited Jan. 25, 2004); Free Trade Area of the Americas, Draft Agreement, FTAA.TNC/w/133/Rev.3 (Nov. 21, 2003), *available at* http://www.ftaa-alca.org/FTAADraft03/Index_e.asp (last visited Jan. 25, 2004) [hereinafter Third Draft Agreement].

[23] Third Draft Agreement, *supra* note 22, ch. V, art. 1.1.

transition periods for implementing obligations, as was the case in most of the Uruguay Round agreements, or will there be a substantive dimension as well? For example, under the WTO Agreement on Agriculture developed countries were obligated to reduce their export and domestic agricultural subsidies by percentages greater than those required of developing countries.[24]

• Chapters VI and VII on the environment and labor, respectively, are completely bracketed, even their titles, meaning that provisions on environment and labor might not be included in any final agreement. An introductory sentence in both Chapters states that environmental and labor commitments "shall not be utilized as conditionalities or subject to disciplines, the non-compliance of which can be subject to trade restrictions or sanctions."[25] In other words, no trade penalties may be imposed for a country's failure to enforce domestic labor and environmental standards.

• Chapters X and XI on rules of origin and certificates of origin are disturbingly reminiscent of NAFTA's labyrinthine rules of origin, including the nightmarish regional value methodologies of transaction value and net cost.[26] These methodologies are truly the trade lawyers' revenge on the tax lawyers. I am hard pressed to cite a more efficient non-tariff barrier to trade adopted in the name of free trade. Will small and medium-size enterprises, both here and in the rest of the hemisphere, have the resources to comply with the record keeping that will be necessary to complete and substantiate a certificate of origin to the satisfaction of the US Customs Service? We shall see, but I am skeptical.

• Chapter XVII on investment mirrors much of NAFTA Chapter 11 on investment, but with important clarifications, including a provision that—except in rare circumstances—government regulation for purposes of public health, safety, and environmental concerns does not amount to an indirect expropriation.[27]

• Chapter XXIII on dispute settlement is a hybrid of NAFTA Chapter 20 on government-to-government dispute settlement and the WTO Dispute Settlement Understanding (DSU). Like NAFTA Chapter 20, Chapter XXIII permits the complaining party to choose either the FTAA dispute settlement mechanism or the WTO DSU in cases where the responding country's measures violate both FTAA and WTO obligations.[28] Dispute settlement panelists may not be citizens of any of the disputing parties, reflecting Article 8.3 of the DSU.[29] Chapter XXIII would also create a seven-member, standing appellate body, again

[24] *See* WTO Agreement on Agriculture, art. 15.2.

[25] *See* Third Draft Agreement, *supra* note 22, ch. VI, second sentence; ch. VII, second sentence.

[26] *See id.* ch. X, art. 4.

[27] *See id.* ch. XVII, annex XX.

[28] *See id.* ch. XXIII, art. 8. *Compare* NAFTA art. 2005.1.

[29] *See id.* ch. XXIII, art. 13.2(c).

mirroring the WTO DSU.[30]

Act III, Scene 2: The Cancún Meeting of the WTO Ministerial Conference and the Fallout

On September 14, 2003, the fifth meeting of the WTO Ministerial Conference was held in Cancún, Mexico. As everyone knows, that meeting collapsed when developed and developing countries could not strike a compromise on the so-called Singapore issues, i.e., trade facilitation, investment, competition policy, and transparency in government procurement.[31] A subtext was the inability of the European Union and the United States to achieve any breakthroughs on agricultural subsidies or market access for agricultural goods. No consensus emerged in the immediate aftermath of the Cancún failure as to what the impact, if any, would be on the FTAA negotiations. At least one US negotiator offered the opinion, in Solomon-like fashion, that the failed Cancún Ministerial Conference "could cut either way" as far as its impact on the FTAA negotiations,[32] while Deputy US Trade Representative Peter Allgeier stated that the 2005 deadline for concluding the FTAA was still achievable.[33] One activist predicted that the Cancún failure would have a negative impact on the FTAA negotiations.[34] Apprehensive over the negative impact that the Cancún collapse might have on the FTAA, the US business community urged US negotiators not to retreat from a comprehensive agreement in the FTAA negotiations.[35] Participants in the FTAA negotiations, including key players Argentina and Brazil, warned—perhaps presciently, perhaps in a self-fulfilling prophecy—that disagreement over agricultural subsidies and market access for agricultural products (the same issues that have divided the WTO members not only at Cancún but also in the entire Doha Development Round) could also derail the FTAA negotiations.[36]

In the weeks leading up to the FTAA Miami Ministerial Meeting in November 2003, Brazil made rumblings that the FTAA's goal of reaching a

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[30] *See id.* ch. XXIII, art. 25. *Compare* WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 17.

[31] *See* Daniel Pruzin & Gary G. Yerkey, *WTO Talks Crash as Developing Nations Balk at 'Singapore Issues,'* 20 Int'l Trade Rep. (BNA) 1533 (Sept. 18, 2003).

[32] *See, e.g.*, Rossella Brevetti, *USTR Official Says WTO Failure Could 'Cut Either Way' for FTAA Talks*, 20 Int'l Trade Rep. (BNA) 1555 (Sept. 18, 2003).

[33] *See* Rossella Brevetti, *Allgeier Says FTAA 2005 Target Date Is 'Achievable' Despite Cancun Failure*, 20 Int'l Trade Rep. (BNA) 1625 (Oct. 2, 2003).

[34] *See* Gary G. Yerkey, *Failure of WTO Talks in Cancun Likely to Negatively Impact FTAA Negotiations*, 20 Int'l Trade Rep. (BNA) 1583 (Sept. 25, 2003).

[35] *See* Rossella Brevetti & Michelle Amber, *Businesses Urge Administration to Seek High-Level FTAA in Light of Cancun*, 20 Int'l Trade Rep. (BNA) 1627 (Oct. 2, 2003).

[36] *See* David Haskel, *Mercosur Says Same Farm Trade Issues Causing Failure at Cancun Threaten FTAA*, 20 Int'l Trade Rep. (BNA) 1666 (Oct. 9, 2003).

comprehensive agreement would have to be cut back.[37] Brazil argued that if the US position is accepted, and agricultural subsidies and antidumping rules are to be negotiated exclusively in the WTO as part of the Doha Round, then so too would investment, competition policy, and government procurement. Brazil's vision, at least as I understand it, is an FTAA agreement basically limited to trade in goods, i.e., issues related to tariffs, customs procedures, market access, rules of origin, and dispute settlement, with other issues—investment, intellectual property, government procurement, competition policy, and agricultural subsidies—being moved either to bilateral negotiations or to the WTO in the Doha Round.[38] Matters came to a head in the running Brazil-US battle for the hearts and minds of the FTAA participants less than a month before the Miami Ministerial Meeting when Brazil accused the United States of "systematic arrogance" for allegedly trying to isolate Brazil in the FTAA negotiations. This was a truly melodramatic moment.[39] The stage was now set for abandoning the comprehensive, single-undertaking package deal consistently sought by the United States in the FTAA negotiations.[40]

Act IV, Scene 1: The 2003 Miami Ministerial Meeting (The Dénouement)

At the November 2003 Ministerial Meeting in Miami, the FTAA Trade Ministers apparently bowed to the inevitable, namely, a scaled-back FTAA.[41] In a sharp departure from its earlier trajectory, the FTAA negotiations will no longer be a comprehensive, single undertaking as had been announced and reiterated over the previous nine years. Dubbed "FTAA-lite" by its critics, the US business community put the best face on the situation, observing that the outcome of the Miami Ministerial was better than a total collapse of the negotiations.[42]

The Miami Ministerial Declaration left a few observers scratching their heads.[43] For example, the Declaration at one point states, "The Ministers

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[37] *See* Gary G. Yerkey, *USTR's Allgeier Heading to South America To Inject New Life into FTAA Negotiations*, 20 Int'l Trade Rep. (BNA) 1709 (Oct. 16, 2003).

[38] *See id.* at 1710; Ed Taylor, *Brazil's Chief FTAA Negotiator Accuses U.S. Officials of 'Systematic Arrogance,'* 20 Int'l Trade Rep. (BNA) 1798 (Oct. 30, 2003).

[39] *See Brazil's Chief FTAA Negotiator Accuses U.S. Officials of 'Systematic Arrogance,' supra* note 38, at 1798; Ed Taylor & David Haskel, *U.S., Brazil Harden Postions [sic] Over Scope Of FTAA, With Allgeier, Lula Standing Firm*, 20 Int'l Trade Rep. (BNA) 1799 (Oct. 30, 2003).

[40] *See* Rossella Brevetti, *Allgeier Sees Question of Scope as Immediate Challenge in FTAA Talks*, 20 Int'l Trade Rep. (BNA) 1844 (Nov. 6, 2003).

[41] *See* Rossella Brevetti, *FTAA Trade Ministers Agree to Scale Back Framework for FTAA at Shortened Ministerial*, 20 Int'l Trade Rep. (BNA) 1960 (Nov. 27, 2003).

[42] *See* Rossella Brevetti, *U.S. Chamber of Commerce Welcomes Miami FTAA Ministerial Declaration*, 20 Int'l Trade Rep. (BNA) 1962 (Nov. 27, 2003).

[43] *See* Rossella Brevetti, *Mexican Official Says FTAA Declaration Raises More Questions for Negotiations*, 20 Int'l Trade Rep. (BNA) 2001 (Dec. 4, 2003).

reaffirm their commitment to a comprehensive and balanced FTAA . . ."[44] in all nine negotiating groups. Two paragraphs later, however, that same Declaration states, "Ministers recognize that countries may assume different levels of commitments. . . . One possible course of action would be for these countries to conduct plurilateral negotiations within the FTAA . . . ."[45] The scope of the FTAA negotiations have thus shifted from a single-undertaking approach to a two-tiered—or perhaps a multi-tiered—approach. The one prior commitment that was reaffirmed was to conclude the negotiations by January 1, 2005, with a new and earlier deadline of September 30, 2004 set for concluding the market access negotiations.[46]

The details of the negotiations have yet to be worked out, but that process was scheduled to begin at a meeting of deputy trade ministers in Puebla, México in early February, 2004 (after reaching an impasse, the Puebla meeting was recessed until March 2004).[47] Exactly what the direction of the FTAA negotiations will be in the aftermath of the Miami Ministerial Meeting is anyone's guess. Does it mean a FTAA on trade in goods and services without any linkages to the other negotiating groups, such as investment or government procurement, which seems to be Brazil's position? Does it mean a FTAA with baseline commitments in all nine negotiating groups, but with trade benefits on goods being reduced if a country does not make significant commitments in all areas addressed by negotiating groups, i.e., a "you get what you pay for" approach, which seems to be the US position?[48] Does it mean a FTAA with significant commitments in all nine negotiating groups, with obligations being phased in over time depending on a country's level of development but with all participants eventually assuming the same level of obligations, which seems to be the Canadian and Chilean position?[49] As one Mexican official warned, the FTAA negotiators could find themselves "negotiating a process instead of a deal."[50]

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[44] Free Trade Area of the Americas, Eighth Ministerial Meeting, Miami, USA, Ministerial Declaration, para. 5 (Nov. 20, 2003), *available at* http://www.alca-ftaa.org/Ministerials/Miami/declaration_e.asp (last visited Jan. 25, 2004).

[45] *Id.* para. 7.

[46] *See id.* paras. 5, 13.

[47] *See Joint Communique of the Co-Chairs of FTAA TNC in Puebla*, Feb. 6, 2004 (co-chairs agree to recess the Trade Negotiations Committee meeting held in Puebla until March 2004), *available at* http://www.insidetrade.com/secure/pdf5/wto2004_rh28b.pdf; *FTAA Faces Uphill Struggle to Meet Miami Declaration Targets*, 22 Inside U.S. Trade No. 5 (Jan. 30, 2004).

[48] *See id.*

[49] *See id.*

[50] *Mexican Official Says FTAA Declaration Raises More Questions for Negotiations*, *supra* note 43, at 2001.

Act IV, Scene 2: The "Special" Summit of the Americas (FTAA Negotiations Derailed?)

Perhaps realizing that the FTAA negotiations were close to being put on life support, a "special"[51] Summit of the Americas was held in Monterrey, México, on January 13, 2004. The heads of state of the 34 participating countries engaged in a rather dull and hollow one-day meeting. In the words of Hugo Chavez, President of Venezuela, "We arrive, we greet each other, make speeches, sign a declaration, take some photos, smile, eat and go."[52] Those are hardly the words of someone truly committed to the FTAA process. Despite President Chavez's apparent disenchantment, the Monterrey Declaration does make a commitment to the FTAA, but puts an unbelievable spin on the outcome of the Miami Ministerial Meeting—a meeting that may very well have dealt a mortal blow to the FTAA process. The Monterrey participants issued a rambling and essentially vacuous declaration that had the following to say regarding the FTAA negotiations:

> We welcome the progress achieved to date toward the establishment of a Free Trade Area of the Americas (FTAA) and take note with satisfaction of the balanced results of the VIII Ministerial Meeting of the FTAA held in Miami in November 2003. We support the agreement of ministers on the framework and calendar adopted for concluding the negotiations for the FTAA in the established timetable, which will most effectively foster economic growth, the reduction of poverty, development, and integration through trade liberalization, contributing to the achievement of the broad Summit objectives.[53]

My questions are these: Exactly what "progress has been achieved to date" after five years of negotiations? What "balanced results" are they referring to? What "framework for concluding the negotiations" was adopted in Miami? Is it significant that the Declaration fails to make an explicit reference to the January 2005 deadline for concluding negotiations? Some observers think it is. Reportedly, there was a fight at the Monterey Summit over this very question.[54] The Monterrey Declaration also dropped this ominous footnote:

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[51] "Special" in this case means "previously unscheduled." The next Summit of the Americas was scheduled to be held in Argentina, most likely sometime in late 2004 or early 2005. *See* Third Summit of the Americas, Declaration of Quebec City, April 20-22, 2001 ("We . . . have accepted the offer of the Government of the Republic of Argentina to host the Fourth Summit of the Americas."), *available at* http://www.ftaa-alca.org/ministerials/Quebec/declara_e.asp (last visited Jan. 25, 2004).

[52] *Loveless brothers,* THE ECONOMIST, Jan. 17, 2004, at 30.

[53] Special Summit of the Americas, Declaration of Nuevo León, Monterrey, México, January 13, 2004, *available at* http://www.ftaa-alca.org/Ministerials/NLeon_e.asp (last visited Jan. 25, 2004).

[54] *See FTAA Faces Uphill Struggle to Meet Miami Declaration Targets*, 22 Inside U.S. Trade No. 5 (Jan. 30, 2004).

> Venezuela enters a reservation with respect to the paragraph on the Free Trade Area of the Americas (FTAA) because of questions of principle and profound differences regarding the concept and philosophy of the proposed model and because of the manner in which specific aspects and established timeframes are addressed. We ratify our commitment to the consolidation of a regional fair trade bloc as a basis for strengthening levels of integration. This process must consider each country's particular cultural, social, and political characteristics; sovereignty and constitutionality; and the level and size of its economy, in order to guarantee fair treatment.[55]

One is forced to wonder whether or not this statement portends disaster, but trouble is definitely brewing. Within a week after the "special" Monterrey Summit, the February 2004 Puebla meeting of deputy trade ministers was threatened with cancellation after Brazil learned that Chile had organized a pre-Puebla preparatory meeting to which only a hand-picked group of countries was invited – the United States, Canada, Mexico, and Costa Rica, all of which had supported a broad FTAA Agreement.[56]

The Unwritten Final Act: Brazil Has "Won," But Is It A Pyrrhic Victory?

In the aftermath of the Miami Ministerial Declaration and the nearly-aborted February deputy ministers' meeting in Puebla, it is impossible to predict just what the outcome of the FTAA negotiations will be. It should seem fairly obvious to even the casual observer that the current negotiating climate is not particularly hospitable to a successful conclusion of negotiations. I will go out on limb and predict that the September 30, 2004 deadline for completing the market access negotiations will not be met, nor will the January 1, 2005 deadline for completing negotiations on other issues be met. Let me suggest a few scenarios.

• *If "[t]he course of true love never did run smooth,"*[57] *then what are the chances of Brazil and the United States patching up their differences?* Frankly, not very good. In this scenario the United States or Brazil or both walk out, resulting in a complete collapse of the FTAA negotiations. This scenario is possible for several reasons, either standing alone or in combination. First, US frustration with Brazil may reach the breaking point, driving the United States to isolate Brazil in the FTAA negotiations. In response, Brazil's MERCOSUR partners circle the wagons; other countries, in particular Venezuela, that feel an allegiance to MERCOSUR or Brazil are torn; and the result is an FTAA

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[55] *See id.*

[56] *See* Ed Taylor, *Free Trade Area Meeting Set for February Cancelled Due to Dispute Over Invitation List*, 21 Int'l Trade Rep. (BNA) 60 (Jan. 8, 2004).

[57] WILLIAM SHAKESPEARE, A MIDSUMMER NIGHT'S DREAM, act 1, scene 1.

collapse. Second, with the bilateral and/or plurilateral two-tiered course that apparently has now been set for the FTAA negotiations, the United States could conclude that there is little advantage in pursuing negotiations under FTAA auspices and instead opt for comprehensive, package-deal agreements with countries in the Western Hemisphere, either bilaterally (as in the case of the Chile-US Free Trade Agreement) or plurilaterally (as in the case of the CAFTA, the US-Central America Free Trade Agreement with El Salvador, Honduras, Guatemala, and Nicaragua).[58] In late January, the United States concluded a free trade agreement with Costa Rica (which will join the CAFTA[59]); it has just initiated free trade negotiations with the Dominican Republic;[60] and it has stated its intention to pursue free trade agreements with Panama, Ecuador, Colombia, Peru, and Bolivia in 2004.[61] Counting its two NAFTA partners, that will mean free trade agreements with more than one-third of the nations in the Hemisphere.

• *The US Trade Representative ("USTR") stays the course, but Congress balks at an FTAA Agreement that is less than comprehensive.* Mindful of the admonition, "Do not let the best be the enemy of the good," in this scenario the USTR swallows hard, holds its nose, and delivers a FTAA Agreement, but one that is limited to trade in goods and perhaps trade in a few services sectors. However, Congress reacts with displeasure because a "FTAA-lite" that covers only trade in goods and perhaps includes some modest openings in the services area would definitely fall short of Congressional objectives. The principle trade negotiating objectives established by Congress in the Bipartisan Trade Promotion Authority Act of 2002 (the "Trade Act of 2002")[62] include improved market access not just for US goods, but for services and capital as well; stronger protection of intellectual property rights; transparency in government procurement; and trade-related environmental and labor standards.[63] Congress could send a strong signal that any FTAA Agreement that fails to meet the objectives laid out in the Trade Act of 2002 is dead on arrival, or it could actually disapprove a less-than-comprehensive FTAA trade agreement.[64] The

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[58] *See U.S. & Central American Countries Conclude Historic Free Trade Agreement*, Office of the U.S. Trade Representative, Press Release (Dec. 17, 2003), *available at* http://www.ustr.gov/releases/2003/12/03-82.pdf (last visited Jan. 25, 2004).

[59] *See U.S. and Costa Rica Reach Agreement on Free Trade, Costa Rica Will Join Recently Concluded Central American Trade Pact*, Office of the US Trade Representative, Press Release 04-03 (Jan. 25, 2004), *available at* http://www.ustr.gov/releases/2004/01/04-04.pdf (last visited Feb. 4, 2004).

[60] *See Zoellick to Visit the Dominican Republic January 14 as Free Trade Negotiations Begin,* Office of the US Trade Representative, Press Release 2004-02 (Jan. 13, 2004), *available at* http://www.ustr.gov/releases/2004/01/04-02.pdf (last visited Jan. 25, 2004).

[61] *See Zoellick Announces FTA Negotiations With Four Andean Countries, Panama*, 20 Int'l Trade Rep. (BNA) 1935 (Nov. 20, 2003).

[62] Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107-210, 116 Stat. 993 (2002), *codified at* 19 U.S.C. §§ 3801-3812.

[63] 19 U.S.C. § 3802(b)(1)-(6), (11).

[64] *See U.S. Chamber of Commerce Welcomes Miami FTAA Ministerial Declaration, supra* note

latter would be a first, however.

• *The USTR stays the course, a 34-nation FTAA Agreement covering only trade in goods is successfully negotiated, and Congress blesses it. A patchwork quilt of bilateral and plurilateral agreements emerges on services trade, investment, and enhanced intellectual property protection.* The international trade regime has been analogized to riding a bicycle: in order not to fall over, you have to keep pedaling. In this scenario, the bicycle theory of international trade triumphs. Considering that the FTAA consists of two developed nations and 32 developing countries, it seems probable that bilateral or plurilateral agreements on investment will be concluded in tandem with agreements on trade in services between the United States and several of its labor-rich, capital-poor neighbors to the south. The sticking points will occur in exempted sectors, e.g., state-owned public utilities and natural resources, and with regard to whether services trade negotiations should proceed on a negative list basis (i.e., all service sectors are presumptively open unless expressly exempted, which is the approach taken in NAFTA) or a positive list approach (i.e., all service sectors are presumptively closed unless specifically listed in a schedule of commitments, which is essentially the approach taken in the General Agreements on Trade in Services ("GATS")).[65] Once again, Brazil and the United States are divided over this question, with Brazil preferring the GATS positive list approach and the United States preferring the NAFTA negative list approach. A related problem with such agreements could be their WTO-consistency. If whole sectors, such as agriculture, are excluded in the trade in goods negotiations, or entire service sectors are not part of a trade in services agreement, e.g., financial and telecommunications services,[66] such agreements face serious problems of inconsistency with GATT Article XXIV and GATS Article V.[67]

• *On a variation of the previous scenario, FTAA negotiations are successfully concluded on trade in goods by the September 30, 2004 deadline, but other unresolved issues become the subject of follow-on FTAA negotiations à la the Uruguay Round "built-in" agenda on agricultural and services trade.* This concept, floated by Brazil in 2003, envisions a FTAA on trade in goods being concluded by September 30, 2004, with more nettlesome issues being the subject of future negotiations after 2005.[68] However, if the Doha Round moves forward

37, at 1962-63 (Senator Baucus warns that any FTAA Agreement that does not address environment and labor standards will violate the Trade Act of 2002 and will be unacceptable to Congress).

[65] *See Brazil's Chief FTAA Negotiator Accuses U.S. Officials of 'Systematic Arrogance,' supra* note 38, at 1798.

[66] Brazil has stated that it does intend to make financial and telecommunication services part of any FTAA services negotiations. *See Brazil's Chief FTAA Negotiator Accuses U.S. Officials of 'Systematic Arrogance,' supra* note 38, at 1798.

[67] For a discussion of GATT Article XXIV and GATS Article V on regional trade arrangements, *see* BHALA & KENNEDY, *supra* note 4, at 163-70.

[68] *See U.S. and Brazil to Hold High-Level Talks Ahead of FTAA Mini-Ministerial Nov. 8-9*, 20 Int'l Trade Rep. (BNA) 1843 (Nov. 6, 2003).

to a successful conclusion, then most of the issues that would be part of these FTAA follow-on negotiations—investment, expanded commitments in services trade, competition policy, transparency in government procurement—would be absorbed in Doha Round agreements in any event.

Conclusion

Just as NAFTA was viewed as a telltale for the ultimate success or failure of the parallel Uruguay Round negotiations, arguably the FTAA negotiations are a barometer of the ultimate fate of the parallel Doha Development Round. In the case of NAFTA, the feeling at the time was that if two developed nations, Canada and the United States, could not reach agreement on integrating their economies with a single developing country, México, then the chances of success for the Uruguay Round as a whole were slim, given that several developed countries were attempting to do the same with nearly 100 developing countries. Similarly, in the case of the FTAA, if two developed countries, again, Canada and the United States, cannot reach agreement with 32 developing countries on a range of issues that are also on the Doha Round agenda, then what chance of success does the Doha Round have with its 146 participants, 80 percent of which are developing countries? In short, the success or failure of the FTAA negotiations is a fair predictor of the success or failure of the Doha Round, so perhaps the FTAA negotiations cannot be allowed to collapse.

Just as the Canada-US Free Trade Agreement was the foundation for NAFTA, NAFTA could have been a major step toward eventual hemispheric economic integration. Although no blueprint yet exists for achieving this ambitious plan for hemispheric economic integration by 2005,[69] NAFTA itself contains an accession clause permitting accession by other countries regardless of location "subject to such terms and conditions as may be agreed between such country or countries and the [NAFTA] Commission and following approval in accordance with the applicable legal procedures of each country."[70]

Some useful lessons for the FTAA negotiators can be drawn from recent experiences with economic integration in Asia and the Pacific Basin. There are many parallels between the two regions. First, the rapidly growing nations of the Pacific Rim are experimenting with new forms of integration while continuing to support the multilateral system. At the same time, they are forced to make accommodations among nations of vastly different size, structure, and level of development, as well as a growing number of sub-regional groupings, such as the Association of Southeast Asian Nations Free Trade Area.

Second, countries in the Asia-Pacific region, like their Western Hemisphere counterparts, hope to use economic integration to achieve important political

[69] *See* Craig L. Jackson, *The Free Trade Agreement of the Americas and Legal Harmonization*, Am. Soc. Int'l L. Newsletter (June-Aug. 1996).

[70] NAFTA art. 2204.1.

goals. The Asian experience suggests that, in an era of economic transition like the one the Western Hemisphere is experiencing, a more flexible, yet progressive, program of creating regional legal and economic institutions may prove to be the best path to integration.[71]

In the absence of fast-track negotiating authority (or trade promotion authority as it is now called), FTAA negotiations were a futility.[72] Now that trade promotion authority has been renewed,[73] it is obvious that trade promotion authority has always been a necessary, but never a sufficient, condition for the success of the FTAA negotiations. In short, the FTAA negotiations may still be a futility. Regardless of whether a FTAA Agreement is negotiated, and regardless of whether Congress eventually approves such an agreement as truncated, as it will likely be, the existing regional trade arrangements—NAFTA, CAFTA, MERCOSUR, the Andean Community, CARICOM, ALADI, and the Central American Common Market—still offer the prospect of accelerating the pace of economic integration within the Western Hemisphere even in the absence of an agreement on a FTAA.

[71] *See* Abbott & Bowman, *supra* note 1, at 519-23 (an FTAA modeled more closely after APEC than NAFTA is preferable).

[72] *See The road from Santiago*, THE ECONOMIST, at 25-26, April 11, 1998. *But see Free Trade Area of the Americas Off to Strong Start from Miami Talks*, Office of the USTR, Press Release 98-94 (Oct. 22, 1998).

[73] *See* 19 U.S.C. § 3803.

EXPECTED IMPACT OF FTAA ON LATIN AMERICAN COUNTRIES

By Robert Grosse and Roy C. Nelson†

The Free Trade Area of the Americas ("FTAA") is proposed to become effective in January 2005. The viability of this major regional economic integration project has been widely debated over the past decade since the idea was first presented at the Miami Summit of the Americas in December 1994. The idea was developed through subsequent Summits in Santiago, Chile in 1999 and Quebec, Canada in 2001, as well as through several Ministerial Meetings that took place in between these Summits. By the end of 2003 the question of gaining approval of a free trade area by the region's national governments had advanced to the point of questions arising regarding the detailed contents of the agreement and debating possible exceptions to the free trade rule, rather than whether or not an agreement would be reached. It is expected that an agreement will be achieved; therefore, this article explores some of the implications of such an agreement.

The broad intent of the FTAA is to create a regional economy rivaling the European Union, and one that unites the industrial leaders—the United States ("US") and Canada—with emerging markets from Mexico to Argentina. This intent indicates the expected scope and significance of the impact of the FTAA. Far from focusing only on the traditional elements of a free trade area—creation and diversion of trade based on tariff reductions—the FTAA is to bring with it additional elements including: the elimination or reduction of non-tariff barriers to trade; similar elimination or reduction of barriers to trade in services; expansion of foreign direct investment; and generation of increased confidence in the economies of Latin America and the Caribbean.

This article examines the expected FTAA and its potential impact on Latin American and Caribbean countries that are eligible to join the FTAA. The expected impact on the US has been studied elsewhere,[1] and is not included in

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[1] *See, e.g.*, Council of the Americas. *FTAA: Blueprint for Prosperity*. Washington, D.C.: Council of the Americas, 2001.

this analysis; however, reference is made to Brazil throughout this article. It should be recognized at the outset that the FTAA cannot parallel the European Community model too closely, since the nature of the countries involved is significantly different. Namely, with regard to the FTAA, the United States constitutes approximately 85% of the regional income, and provides the market for more than half of the exports everywhere in the Western Hemisphere, other than the Southern Cone countries (For Brazil and Argentina, the US absorbs only about 20-25% of their exports, while the European Union takes in slightly more).[2] Thus, the bargaining situations of the countries are different between countries in the Western Hemisphere and Europe, since Europe has had more balanced dealings at least among the larger countries (i.e., France, Germany, and Britain). And the level of economic development is quite different between the US and Canada on one hand, where gross domestic product (GDP) per capita was more than US $30,000 per person in 2002, and Latin America and the Caribbean countries where GDP per capita was less than US $7,000 in 2002.[3]

Conceptual View of the FTAA's Overall Impact on Latin America

The negotiations for a Free Trade Area of the Americas cover far more than tariff barriers. The additional items on the agenda include standards and technical barriers, rules of origin and customs procedures, intellectual property protection, and regulation of trade in services.[4] The negotiations also relate to other activities of international firms, such as foreign direct investment. An analysis of the expected impact of the FTAA must include consideration of the added policy issues that will appear in the Agreement (or as side agreements[5]). A full evaluation of the expected impact includes the following items:

EXPECTED AREAS OF IMPACT OF FTAA ON LATIN AMERICAN COUNTRIES

Elements of the Agreement	Countries & Products
Generalized reduction/elimination of tariffs with a timetable	All FTAA countries and most products
Separate reduction or non-reduction of tariffs on some specific items	Brazilian auto parts, perhaps in exchange for US steel; Brazilian information technology products, possibly in exchange for US orange juice
Specific reduction of existing quota barriers	US quotas on textiles and sugar

[2] International Monetary Fund, *Direction of Trade Statistics*. Updated monthly and available on CD-ROM *at* http://www.imf.org/external/pubs/cat/longres.cfm?sk=16063.0.

[3] International Monetary Fund, *International Financial Statistics*. Updated monthly and available on CD-ROM *at* http://ifs.apdi.net/imf/about.asp.

[4] *See, e.g.*, the FTAA draft agreement *at* http://www.ftaa-alca.org/FTAADraft03/Index_e.asp [hereinafter FTAA draft agreement].

[5] That is how NAFTA was negotiated among the US, Canada, and Mexico. A number of issues, including labor rights and environmental protection, were treated in separate 'side agreements' attached to the main free trade agreement among those three countries in 1993. Intellectual property protection was treated in a separate chapter of the actual agreement.

on certain products	
Specific reduction of subsidies on existing products (especially agricultural)	US subsidies on many agricultural products
National treatment of Multinational Enterprises (MNEs) in the region	All Latin American countries where this principle is not already achieved
Rules on some service sectors	Greater opening of financial markets in Latin America
Other harmonized rules on business	Foreign direct investment in all sectors and countries

The elimination of tariff barriers is likely to be agreed upon relatively easily in the FTAA discussions, because tariffs on non-critical products tend to be low, and therefore a point of negotiation that is not particularly contentious. In contrast, tariffs on certain agricultural products can be difficult to negotiate, and, therefore, may never be eliminated by the FTAA. Given the approximate average tariff of 10-20% ad valorem across Latin America,[6] it seems reasonable to assume that eliminating such "barriers" will not be too difficult, since the existing protection is fairly limited. This is also true regarding the US, where the average tariff is less than three percent ad valorem.[7] These kinds of restrictions tend to be the easiest to reduce or eliminate in regional and global free trade talks, since their impact is so visible and small.

A second part of the FTAA will, necessarily, be negotiation toward the reduction or elimination of tariffs on specific, highly-restricted goods, such as agricultural products. This area, as well as textiles and clothing, are the greatest sources of conflict in the FTAA negotiations. The United States, in particular, imposes tariffs on several key Latin American and Caribbean export products, particularly sugar, orange juice, and tobacco. If the United States does not agree to eliminate or reduce the levels of these tariff barriers, then a major source of gains from free trade will be lost.

A third part of the FTAA will be the attempted elimination of quotas and other non-tariff barriers, such as quotas on textiles and clothing imposed by the United States. These barriers are generally placed on the most important exports from Latin American and Caribbean countries, and thus, cause tremendous trade diversion away from the efficient producers. The US lobbies for these sectors are powerful and may be capable of stopping any progress on dismantling these barriers. Nevertheless, the quotas in clothing and textiles are scheduled to be eliminated through the global Multifibre Arrangement by the end of 2004,[8] so

[6] *See, e.g.*, Interamerican Development Bank, *Integration and Trade in the Americas*. Washington, D.C.: IDB, at 11 (Jan. 2004).

[7] *See, e.g.*, World Trade Organization, *Trade Policy Review – United States*, WT/TPR/G/126 at 7 (Dec. 17, 2003) [hereinafter *Trade Policy Review – United States*]. This document points out that the average US tariff on a simple basis was 3.6%, but that including other preference schemes, the trade weighted average tariff was about 1.6%.

[8] The Multifibre Arrangement was formally replaced by the WTO "Agreement in Textiles and Clothing" ("ATC") in 1994, with a ten-year term during which the textile and clothing quotas would be eliminated progressively. The ATC ends at the end of 2004. *See* http://www.wto.org/

this issue probably will not be negotiated within FTAA, but still should be resolved simultaneous with FTAA.

A fourth part of the FTAA will be the elimination of subsidies (that disallow or harm imports), such as those on agricultural products in the United States. This issue does not appear likely to be resolved within the FTAA discussions, since the US has taken the position that agricultural subsidies will need to be considered at the World Trade Organization ("WTO") instead.[9]

A fifth part of the FTAA will cover the treatment of foreign multinational companies. The most common way of treating such companies under regional free trade agreements is to handle them in accordance with each country's treatment of non-national firms. This issue may be resolved because it has not been a source of major conflict in FTAA negotiations and, actually, may have an important role in economic benefits being generated from the FTAA. If US firms are treated by the Argentine government the same as Argentine firms, and Argentine firms are treated like US firms by the US government,[10] then a major step will have been taken to stimulate business investment throughout the region.

Expected Impact on Foreign Direct Investment by the FTAA

The empirical analysis of expected impacts covered by this article begins with a look at foreign direct investment ("FDI"), which differs from the usual discussions of regional economic integration in general and free trade areas. FDI is investment in controlling ownership of companies by foreign companies, whether the investment is by establishing a new plant or other facility, or by the acquisition of an existing company. Foreign direct investment into Latin America in 2002 was approximately US $56 billion, relative to regional GDP of approximately US $1,673 billion.[11] Thus, FDI was about 4% of regional GDP.

This example emphasizes that, no matter what tariff reductions are established as part of the FTAA, there will be a significant impact on FDI if an overall agreement is reached among the countries of the region. Even if negotiations to reduce barriers to imports into the US (especially on agricultural and textile products) in exchange for barrier reductions on imports into Latin American countries do not achieve much progress, a FTAA that does include provisions for national treatment of non-national companies, and for transparent regulation of companies, will be likely to have a major impact on FDI.

This impact can be seen in the context of Mexico joining the US and Canada in NAFTA in 1994. By formally agreeing to follow rules on business (e.g., incorporation rules, ownership rules, intellectual property rules)—and by pursuing other policies of economic openness—Mexico attracted very large inflows of FDI after entering NAFTA. The average annual value of FDI flows

english/docs_e/legal_e/16-tex.wpf.

[9] *See* the FTAA draft agreement, *supra* note 4.

[10] Foreign firms already receive national treatment in the US, and this principle is affirmed in the multilateral OECD agreements among industrial-country members of that organization.

[11] UNCTAD, World Investment Report 2002. Geneva: UNCTAD, 2003.

into Mexico during 1990-1993 was US $4 billion, while the average annual inflow of FDI during 1995-98 was US $11.5 billion.[12] Although a crude indicator, this would mean that, because FDI into the rest of Latin America (without Mexico) averaged US $69 billion during 1999-2002, the average FDI for Latin American countries would leap to US $198 billion per year during 2006-2009 *ceteris paribus* with an FTAA in place. These numbers are excessively simplistic since they do not account for other events such as the Argentine crisis of 2002, the dot com crisis of 2000-2002, and other phenomena that affect FDI activity. Even so, this example points up the very significant impact that may be anticipated in FDI if the FTAA is similarly able to generate investor[13] confidence in the rest of Latin America, as NAFTA did with Mexico.

Expected Impact of FTAA on Trade in Goods

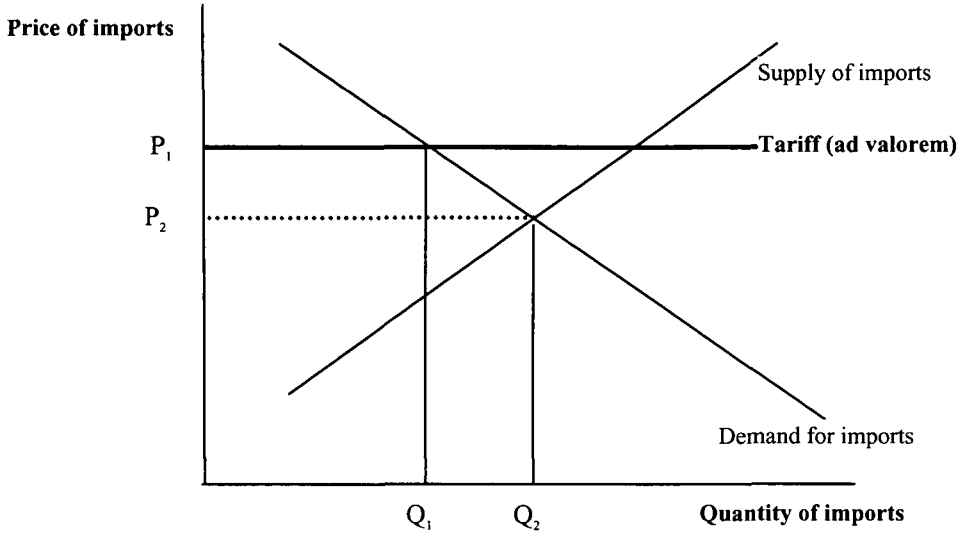
In addition to FDI, the Free Trade Area of the Americas will impact the economies of Latin American and Caribbean countries in several different ways. The main focus of analysis of gains and losses from regional economic integration is traditionally trade in goods. When tariffs are reduced on exports within the region, the resultant lower cost of delivering goods from one country to another will stimulate added trade at the margin. For example, if tariffs are decreased from 10% ad valorem to zero, export and import activity between member countries will be stimulated by a certain percentage based on the elasticity of price, hence demand, for imports in each country, as well as the amount of imports to each country. This idea is sketched graphically in Figure 1.

[12] These data are available from the US Department of Commerce *at* http://www.bea.gov/bea/di/usdiacap.htm.

[13] This applies to portfolio investment as well as direct investment. Greatly increased investment into stocks, bonds, real estate, and bank deposits should be expected from a successful negotiation of FTAA, just as what occurred in Mexico under NAFTA.

Figure 1

GAINS FROM TRADE BY REDUCING INTRA-REGIONAL TARIFFS



The gains from eliminating a tariff barrier are shown as the shift in the total quantity of the exported product (from Q_1 to Q_2), and a reduction in the price paid by consumers of the product from P_1 to P_2. The government of the importing country loses tariff revenue as a result of this policy change, but overall welfare rises because the "dead weight loss" from overpricing the product is eliminated.

This picture fails to account for the problem of trade diversion, which is the reduction in imports from non-member countries whose exporters lose out because the tariff reduction is not applied to their products. Thus, more efficient producers in non-member countries will lose the opportunity to supply the most efficiently produced products into the free trade area if the tariff cost made the difference in cost competitiveness. In principle, trade diversion exists to prohibit the export of products from non-member countries (e.g., from the European Union or from other emerging markets) into FTAA member countries.[14]

How high the original tariff barriers were and how price elastic the demand was for traded products is a crucial consideration to determine actual trade creation produced by the implementation of the FTAA. As shown in Figure 1,

[14] Trade diversion occurs initially if tariff barriers preclude the third-country imports. Thereafter, if within-region tariff reductions make regional trade cost-competitive, such tariff reductions continue to exclude third-party exports. Thus, trade diversion exists *a priori* due to the tariffs on imports into individual countries (i.e., local producers take the market due to protection). Then, with regional barrier reductions, regional producers come to dominate the market based on cost competitiveness.

the demand is somewhat price-elastic near the intersection with the supply curve, with some gain in total revenue from price reduction due to tariff elimination. If the demand curve were very steep, then tariff reduction would have relatively little impact on the amount of importing. Similarly, a very steep supply curve would produce relatively little impact on imports. Conversely, a price-elastic demand for the product would produce a very large increase in imports if tariffs were eliminated.

Tariff Barriers in Latin America, 2003

Tariffs in Latin American countries varied greatly in 2003. A brief list of products that have been highly protected is given in Table 1 below.

Table 1

SELECTED TARIFF RATES IN THE AMERICAS, 2002

Country/ product	Product #1	Product #2	Average tariff, 2001
Argentina	Leather Goods 21.5%	Carpets 21.5%	9.2%
Brazil	Automotive vehicles and parts 23.5%	Shoes & Footwear 23.5%	11%
Chile	Live Animals 7%	Meats 7%	8%
Colombia	Meats 20%	Prepared Foods 20%	11%
El Salvador	Arms and Ammunition 30%	Meat and Fish Preparations 27.3%	6.4%
Mexico	Sugar and Confectionary 92.7%	Meats 82.1%	15.4%
Trinidad & Tobago	Edible Fruits and Nuts 33.4%	Fish and Shellfish 29.2%	4.6%
United States	Tobacco 90.7%	Shoes and Footwear 14.1%	1.8%
Venezuela	Meats 20%	Prepared Foods 20%	13.5%

Tariff protection varies widely across countries and among products. Tariffs in Latin American countries currently average from ten to twenty percent, whereas the average tariff in the United States is less than three percent.[15] Tariffs on agricultural and food products tend to be highest everywhere, especially on tobacco, fish, and meats. This is true in the United States as well as in Latin American and Caribbean countries.

Non-Tariff Barriers in Latin America, 2003

Latin American countries are relatively open to trade as far as non-tariff barriers are concerned. Nevertheless, there are important sectors, such as media and energy, where local businesses are favored. Additionally, foreign products in some sectors are limited by quotas and health restrictions, just as in the United

[15] *Trade Policy Review – United States, supra* note 7.

States. Table 2 lists selected non-tariff barriers in Latin America in the early 2000s.

Table 2

SELECTED NON-TARIFF BARRIERS IN THE AMERICAS, 2002

Country	Product #1	Product #2	Comment
Argentina	Autos	Paper and Pulp; Footwear	Permanent and temporary quotas and import licensing
Brazil	Agricultural Chemicals	Aircraft	Import licensing requirements; local content requirements
Chile	Pharmaceuticals	Weapons	Import licensing required
Colombia	Fresh and Frozen Poultry & Parts	Powdered Milk	Import licensing required
El Salvador	Seditious Books and Other Printed Matter	Coffee Trees and Coffee Seeds	Prohibited
Mexico	Basic Agricultural Products	Petroleum	Import licensing required
Trinidad & Tobago	Poultry	Sugar	Import licensing and surcharges
United States	Sugar	Clothing	Quotas; subsidies
Venezuela	Pork	Cigarette Paper	Prohibited

Note that this list does not differ too much from the list of tariff restrictions. The main types of products that are restricted through quotas, subsidies, and import licensing requirements are food and clothing items.

The FTAA's Expected Impact on One Country—Brazil

Reduction of Trade Barriers in the United States

Brazil would benefit significantly from a reduction of tariffs in the United States in key sectors. Of Brazil's US $60 billion in annual exports, about 25% go to the United States.[16] Brazil is an important producer of orange juice, tobacco, sugar, steel, and soybeans, and the US currently has significant restrictions on trade in all of these sectors. With the advent of the FTAA, the US may agree to eliminate or significantly reduce its barriers to trade in at least some of these areas. One estimate is that if the US were simply to eliminate barriers to trade on just four products—orange juice, steel, meat and soy products—Brazil's annual exports would increase by US $2 billion.[17]

[16] Economist Intelligence Unit, *Country Forecast: Brazil*, ECONOMIST, Aug. 2003.

[17] Roger Burback, "Incoming Brazil President Adept at Checkmating Bush," ALAI, *America Latina en Movimento*, December 13, 2002, *available at* http://www.redress.btinternet.co.uk/rburbach16.htm.

An analysis of two representative sectors, orange juice and sugar, shows how a reduction of US trade restrictions would increase exports and employment in those sectors in Brazil. Increased direct employment would have significant related effects, such as indirectly generating jobs in other areas, therefore, the overall impact would be greater than the estimates provided here. However, in this analysis, only potential increases in direct employment are considered.

Orange Juice

Brazil is the world's foremost producer and exporter of orange juice by which it generates US $1.5 billion in revenues annually.[18] In 1992, 90% of orange juice imported into the US came from Brazil.[19] By 2001, however, Brazil supplied only 46% of the orange juice imported to the US, having lost market share to Mexico and Costa Rica, which had preferential trade arrangements with the US.[20] Another reason for the decline in Brazilian exports of orange juice to the US is that the US has imposed significant restrictions on orange juice imports in the form of tariffs and subsidies.

The current US tariff on Brazilian orange juice is 29.7 cents per gallon.[21] The Brazilian embassy reported in 2002 that the tariff was 7.85 cents per liter of reconstituted orange juice, which it estimated was equivalent to a 60% value added tariff. In addition to this tariff, the US imposes an "equalization tax" of 2.7 cents per gallon.[22]

The orange juice sector currently employs 400,000 people in Brazil.[23] Because approximately seven percent of the sector's exports, and therefore seven percent of the jobs employing 28,000 people, are currently dedicated to the US, a doubling of these exports could result in a proportional increase in jobs—from 400,000 to 428,000.[24]

Sugar

As with orange juice, Brazil is a major producer of sugar but confronts barriers to the US market in the form of quotas, subsidies, and tariffs. In 1981, the US imposed a strict quota on sugar imports, which eliminated 90% of Brazil's sugar exports to the United States. The US imposes a 244% tariff on any

[18] U.S. BARRIERS TO BRAZILIAN GOODS, SERVICES AND INVESTMENT, 33-34, *available at* http://www.brasilemb.org/trade_investment/Barr2002_english.pdf (Brazilian Embassy, Washington, D.C., Oct. 2002) [hereinafter U.S. BARRIERS TO BRAZILIAN GOODS, SERVICES AND INVESTMENT].

[19] *Id.*

[20] *Id.*

[21] Laura Layden, *To Florida Citrus Growers, Keeping Tariff on Brazilian Orange Juice is Priority at WTO Talks*, NAPLES NEWS, *available at* http://www.ussugar.com/sugarnews/trade/keeping_tariff.html (Sept. 10, 2003).

[22] U.S. BARRIERS TO BRAZILIAN GOODS, SERVICES AND INVESTMENT *supra* note 18.

[23] Abecitrus, The Brazilian Association of Citrus Exporters, at http://www.abecitrus.com.br (last visited .Mar. 8, 2004). Also *available at* http://www.arabbrazil.com/orange.htm.

[24] *Id.*

imports above the quota. As a result of this restriction, Brazil exported only 150,000 tons of its total worldwide sugar exports of 13 million tons to the US in 2002.[25] At a price of US $617 per ton, this means that Brazil exported US $92.6 million worth of sugar to the US—just 1.2% of its total exports—while selling a total of over US $8 billion on the global sugar market.

With a reduction in trade barriers Brazil could easily double its annual sugar sales to the US, from 150,000 to 300,000 tons. This would have a significant impact on jobs in Brazil. One source estimates that for every 500,000 tons of sugar grown in Brazil, 30,000 jobs are created.[26] Nine thousand jobs could be created in Brazil, assuming an increase in sales to the US of 150,000 tons as a result of a reduction in sugar tariffs. This assumption greatly underestimates the potential impact of a FTAA Agreement that would eliminate US trade restrictions on sugar imports altogether.

Reduction of Trade Barriers in Brazil

Brazil also has a number of trade barriers which may be reduced with the advent of the FTAA. Key sectors that Brazil has sought to develop by means of such barriers include the capital goods, information technology, automobile, and telecommunications industries. Only capital goods and information technology are considered here.

Machine Tools/Capital Goods

For segments of the capital goods industry that have no local production in Brazil, tariffs were already reduced to four percent in 2000. However, the average tariff is 14% in segments of this industry in which there is local production.[27] In 2000, the total market for machine tools in Brazil was US $809 million. Brazil imported US $52.3 million of this total from the US, giving the US a relatively small 6.5% share of the Brazilian market.[28]

Assuming a doubling of imports from the US with the elimination of tariffs, the US share of the market would increase to 13%. In the unlikely event that the entire increase would come at the expense of local producers, Brazil could potentially lose a proportional number of jobs in that sector. This would result in a 6.5% decline in employment in this sector. However, this is not a realistic assumption because some, if not all, of this increase in market share would come at the expense of other countries that export to Brazil, rather than from local

[25] Jon Jeter, *Brazilians Soured by U.S. Sugar Tariffs*, THE WASHINGTON POST, Sept. 10, 2003, atA12, *available at* http://www.washingtonpost.com/ac2/wp-dyn/world/americas/southamerica/post?start=60&per=20 (Sept. 10, 2003).

[26] *Id.*

[27] Patrick Levy, United States and Foreign Commercial Service Market Research Reports, Industry Sector Analysis, *Capital Goods Industry Grows*, Apr. 9, 2001, *available at* www.stat-usa.gov.

[28] INTERNATIONAL BUSINESS STRATEGIES, *Machine Tool Industry in Brazil*, Aug. 2001, 5, *available at* http://www.internationalbusinessstrategies.com/page/IBS/PROD/BRAZIL/1945 (last visited Mar. 8, 2004).

production alone.

Information Technology Sector

Brazil has maintained significant barriers to trade in this industry since at least the mid-1980s when the Brazilian government established an "Informatics Law,"[29] implementing the "market reserve" policy. This law codified an existing policy reserving the Brazilian personal computer and software market for local producers.

In 1991, the Brazilian government liberalized its policies and modified this law, allowing imports, albeit at tariff rates in the 30% range, as well as foreign investment in the sector. However, the government continued to promote local production by providing a number of subsidies in the form of tax incentives to companies that produced in Brazil, and met other prescribed conditions. The main benefits the government provided to such companies were exemption from Brazil's industrialized products tax ("IPI") [a 15% tax on the final cost of production of industrial goods], and preference in government procurement for Brazilian-made IT goods, provided that their prices were competitive with imported equivalents.[30] In order for companies to get these benefits, they had to invest at least five percent of their revenues from IT hardware products on research and development within Brazil. Companies also had to manufacture some portion of the end product in Brazil. For example, personal computer manufacturers built the motherboards in Brazil in order to qualify for the tax breaks.

In January 2001 another modification of the Informatics Law went into effect. The most important change in the new law was that it enacted a gradual elimination of the IPI exemption for local manufacturers to a 95% exemption in 2001, 90% in 2002, 85% in 2003, 80% in 2004, 75% in 2005, and 70% from 2006 to 2009, when it will be eliminated altogether.[31] Changes in tariff rates have also occurred. In 2003 the government reduced the import tariff on personal computers from 26% to 16%, a rate that is supposed to remain in place until 2006. The current tariff on imported software is 15%.[32]

Currently, the most rapidly growing part of the information technology industry in Brazil is the computer software sector.[33] An analysis of the effects of the elimination of tariffs in this sector indicates that the impact on Brazil could be significant. Currently, the total Brazilian market for software is US $5.5

[29] ROY C. NELSON, INDUSTRIALIZATION AND POLITICAL AFFINITY: INDUSTRIAL POLICY IN BRAZIL 20-23 (New York and London: Routledge Press) (1995).

[30] Genard Burity, *Software Market: Brazil*, U.S. & FOREIGN COMMERCIAL SERVICE MARKET RESEARCH REPORTS, INDUSTRY SECTOR ANALYSIS (Feb. 2, 2003), *at* www.stat-usa.gov [hereinafter U.S. & FOREIGN COMMERCIAL].

[31] *Id.*

[32] *Id.*

[33] *Id.*

billion per year.[34] Of this amount US $2.5 billion, or approximately 46%, is imported.[35] The US alone provides US $2 billion—80%—of Brazil's total software imports.[36] If Brazilian tariffs on imports of software from the US were eliminated, US software imports could double in value to US $4 billion. In this event—if we assume that foreign competitors would be shut out of the market altogether—Brazilian production of software would shrink to only US $1.5 billion.[37]

This amount is only half of the current Brazilian production in this sector of US $3 billion. Assuming that jobs would be lost proportionally to the decline in sales, the current 116,800 employees in this sector in Brazil would be reduced by half, to only 58,400. This is an unlikely outcome, given that protection of the Brazilian software sector is presently obtained by a tariff of 15%, which probably restricts a fairly small percentage of potential imports. The impact here would probably be small, unless the elimination of software tariffs signaled to the world market that Brazil was committed to open competition in this sector, thus leading to greater imports as a result.

In any event, a decline in local software production would have a significant impact on Brazil in terms of the related negative effects of so many jobs being lost in a key sector that provides its employees with relatively high wages. At the same time, however, the numerous sectors that make use of software in their business activities would now be unimpeded by import restrictions on software from the US. Therefore, Brazilian businesses would be able to make more efficient use of their resources by purchasing the most relevant and efficient software for their specific needs, regardless of its national origin. Thus, the net effect of reducing barriers to the importing of software to Brazil would not, necessarily, be to reduce Brazilian employment.

Another factor is that these overall numbers do not indicate how a reduction in tariffs would affect specific segments of the Brazilian software industry. Any jobs lost as a result would be in the weakest segments of the industry, rather than in areas such as banking automation software, in which Brazilian firms have special strengths and have developed their own niche. In such areas, the FTAA would very likely result in an increase in exports from Brazil and, therefore, an increase in jobs.

The "market reserve" policy in place in the informatics sector throughout the 1980s and early 1990s is now widely viewed as a mistake. For over a decade it hindered the development of numerous other sectors that relied on information technology. Continuing restrictions in this manner would only prolong this earlier mistake. Although some jobs in some segments of the software industry might be lost in the short run if the remaining trade restrictions are lifted, jobs

[34] *Id.*

[35] Author's calculations.

[36] U.S. & FOREIGN COMMERCIAL. *Supra* note 30.

[37] *Id.*

elsewhere would be created from more efficient use of this technology, and the Brazilian economy would grow overall. This, in turn, would generate more jobs in other areas.

Obstacles to the Agreement: Points of Contention Between the United States and Brazil

Clearly, Brazil has much to gain from the FTAA. Nevertheless, the Brazilian government has expressed a number of concerns about the US stance toward the agreement. Brazil's main concerns are that the US does not want to discuss its agricultural subsidies and antidumping laws in the context of the FTAA negotiations.[38] The US position is that these issues should be discussed in the WTO.[39] Additionally, Brazil is concerned about the US insistence that the FTAA should go beyond reductions in tariffs to include implementation of harmonized rules throughout the hemisphere on intellectual property rights, government procurement, and investment.[40] Brazil believes that these issues should be addressed in the WTO rather than in the FTAA.[41] In this section, we analyze both countries' positions on these issues, and highlight some sectors in both countries that would benefit most from a FTAA Agreement that did address these issues.

U.S. Agricultural Subsidies and Antidumping Laws

Agricultural Subsidies

Many developing countries are frustrated by agricultural subsidies in developed nations such as the US, the EU, and Japan, which severely limit the ability of developing countries to export to these developed countries. The current Doha round of the WTO is intended, in part, to reduce such subsidies in developed countries. As a major exporter of agricultural products, Brazil is strongly opposed to such subsidies and, as a result, led a group of 22 developing nations (the G22) at the 2003 ministerial meeting of the WTO in Cancún to oppose them.[42] The Brazilian government's position is that negotiations on other issues should not continue until the developed countries make concessions on agricultural subsidies.[43] Since substantive concessions were not forthcoming in Cancún, the talks there broke down.

This reluctance on the part of the US to reduce its agricultural subsidies

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[38] Paul Blustein, *Trade Talks End in Vague Accord; Framework for Americas Less Than Had Been Envisioned*," WASH. POST, November 21, pat. E01.

[39] *Id.*

[40] Brink Lindsey, *"The Miami Fizzle: What Else But Cancun Redux?"*, WALL ST. J., November 29, 2003, pat. A9.

[41] *Id.*

[42] *Between Rivalry and Cooperation: Latin America and the United States*, THE ECONOMIST, Nov. 29, 2003, at 67 [hereinafter *Between Rivalry and Cooperation: Latin America and the United States*].

[43] *Id.*

explains why Brazil is so determined now to make sure that this is part of the FTAA. It is likely that the Brazilian government does not want to make concessions if the US will not make concessions of its own. The US, however, does not want to reduce its agricultural subsidies in the FTAA, because that will not require any similar reduction on the part of the EU or Japan, which is why the US wants to continue to negotiate such reductions in the context of the WTO.

Antidumping Laws and Section 201

The US has domestic laws that allow it to retaliate against "dumping" (selling in foreign markets at prices below the cost of production in the home market). Brazil's concern is that the US definition of what constitutes "dumping" is too broad, and that this legislation is frequently used purely for protectionist purposes.[44] Section 201 of the 1974 Trade Act is also of concern to Brazil. This law allows the US to impose tariffs against all countries if it determines that a domestic industry is being damaged by a large volume of imports.[45] While Section 201 is consistent with the WTO's "safeguards" provisions, Brazil's concern is that the US may be too willing to impose such safeguards purely for protectionist purposes, as many believed to be the case when the Bush Administration used Section 201 to impose steel tariffs in 2001.[46]

Brazilian Policies on Investment, Government Procurement, and Intellectual Property Rights

Investment Liberalization

Brazil has yet to fully dismantle its barriers to investment in service industries, specifically the insurance industry. This is an important area of US concern. Nevertheless, liberalization of this sector would be consistent with Brazil's overall trend toward market-oriented reforms, which Brazilian President Luiz Inacio Lula da Silva has maintained.[47] While a concession from the Brazilian government would seem likely, Lula is likely to use this issue as a bargaining chip to win further concessions from the US.

Government Procurement

A competitive bidding process for government contracts is consistent with the current administration's emphasis on transparency as well as its overall emphasis on market-oriented policies consistent with WTO principles.[48] Although the Brazilian government may well be inclined to adopt the changes the US seeks, this area, too, serves as a useful bargaining chip.

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[44] *Id.*

[45] Susan Rosegrant, *Standing up for Steel: The U.S. Government Response to Steel Industry and Union Efforts to Win Protection from Imports (1998-2001)*, Kennedy School of Government, 2002.

[46] *Between Rivalry and Cooperation: Latin America and the United States*, *supra* note 42.

[47] Economist Intelligence Unit, *Country Forecast: Brazil*, ECONOMIST, Mar. 2003.

[48] *Id.*

Intellectual Property Rights

Brazil's legislation is now consistent with WTO (and US) standards.[49] The issue is enforcement. The difficulty here is not ideological opposition to the policy but the difficulty of enforcing existing legislation.

Conclusion with respect to Brazil

The US is already Brazil's principal export market, accounting for 25.1% of Brazil's US $60.3 billion worth of exports in 2002, followed closely by the EU at 24.9% (China was the destination of only 4.2% of Brazil's exports, followed by Argentina, Mexico, and Japan, which each received 3.9% of the total).[50] On the other hand, the EU is Brazil's principal source of imported goods, supplying 27.6% of Brazil's US $47.2 billion worth of imports, while the US supplied 26%. Argentina, Brazil's neighbor, supplied only ten percent, followed by Japan at five percent, and China at 3.3%.[51]

With the FTAA, trade between Brazil and the US, which is already sizeable, will become even more significant. Nevertheless, the US will continue to hold the dominant position when it comes to winning on issues of contention between the two countries. For this reason, Brazil's chief concerns are unlikely to be substantively addressed before the 2004 US presidential campaign, during which domestic issues will take precedence. Because the current administration in Brazil seems unlikely to make concessions without getting something in return, Brazil—if only for pragmatic bargaining reasons—is also unlikely to make concessions in the short term. As will be explained in the conclusion to this article, it is likely that the FTAA will be negotiated successfully in some form by the December 2004 deadline. Final resolution of some of the more complex and controversial issues currently in dispute, however, may take considerably longer.

Lessons from a Study of Free Trade with Colombia

Based on a series of studies examining the potential impacts of free trade between Colombia and the United States,[52] a number of useful insights can be made into the goal of understanding broader, regional free trade. The most striking findings of estimates of the impact of eliminating trade barriers between Colombia and the US were that: (1) with free trade, agricultural exports from Latin America would boom and would produce lower prices and greater availability of sugar, soybeans, orange juice, and other farm products in the US;[53] (2) competition from China and potentially other Asian countries would

[49] *Id.*

[50] BACKGROUND NOTE: BRAZIL, *available at* http://www.state.gov/r/pa/ei/bgn/1972.htm (U.S. Department of State, Jun. 2003).

[51] *Id.*

[52] Evan Tanner & Robert Grosse (eds.), *North American Journal of Economics and Finance* Special Issue on "Free Trade Between Colombia and the United States" (Spring 1994); Ochoa, Hector (ed.), *Estudio para la Negociacion de la Zona de Libre Comercio entre Colombia y Estados Unidos*. Cali, Colombia: ICESI, 1994.

[53] *Id.*

continue to pose a huge competitive challenge to Latin American exporters of clothing, shoes, and other manufactured goods into the United States, despite free trade in the Americas;[54] and (3) barriers to the import of foreign goods, services, and companies have been declining since the late 1980s, and there is no reason to expect a change in the direction of deregulation—with or without free trade agreements.[55]

The study of the sugar industry was one example of possible gains from free trade that have been disallowed by quotas and tariffs in the United States. The trade barriers with regard to sugar have resulted in sugar prices in the US that are about three times higher than in Latin America, and in trade diversion.[56] This example, though less visible publicly than US barriers to steel and auto imports, is one that could be addressed in FTAA negotiations and could produce important benefits to US consumers. In the study of Colombia, the impact would be to create several thousand jobs in Colombia in the areas of sugar cane growing, sugar milling, and distributing of sugar.

In the early 1990s free trade in sugar would have generated gains to US consumers of approximately US $680 million resulting from lower cost, greater availability of sugar, and a reduction in producer losses of about US $450 million from output lost to imports from Colombia.[57] The new Colombian sugar exports would come from sugar previously exported elsewhere in the world, sugar previously sold in Colombia, and new production spurred by the market growth. Under the FTAA, this same kind of impact would take place in other major sugar growing countries in the region, including Brazil, Mexico, Argentina and Guatemala.

A different kind of impact would result in the Columbian clothing and textile industry. While the broad picture was similar, with US quotas on Colombian exports of clothing and textiles, the impact of elimination of these barriers was much less due to competition from Chinese producers.[58] While Colombian producers would be positively impacted by eliminating quota limits, Chinese products would continue to enter at much lower prices, despite tariffs and quotas on such products, thus posing a continuing challenge to Colombian exporters.[59] Since the global Multifibre Arrangement governs the system of quotas on clothing and textiles into industrial countries of Europe, Japan and the US from emerging markets, bilateral free trade with Colombia in these products was seen as unlikely to remain bilateral. And once China obtains open access to the US market, the Colombian producers would have to search for market niches, such as high quality and/or high fashion clothing to compete.

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[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*

Some Conclusions on FTAA and its Potential Impact on Latin America and the Caribbean

The successful conclusion of a Free Trade Area of the Americas among the 34 countries of the region would clearly bring overall economic benefits to the members of the group. Conceptually, dropping "artificial" barriers to international trade will allow for gains from specialization where producers in each member exporting country are more efficient than their competitors in the importing country. The overall gains from trade will benefit all participating countries, under reasonable assumptions about production costs, demand patterns, and institutional factors. However, no one expects the FTAA to achieve free trade across all products, so the real questions are: how large will the gains be in products that are deregulated and how will those gains be distributed?

Another major consideration that has not been raised, and that will be a key outcome of achieving a free trade agreement, is the credibility that will be attached to a country's linking itself to the United States. Regardless of the specifics of the agreement, the fact that a country such as Mexico has linked itself legally to the United States in NAFTA has largely increased investors' confidence in Mexico. That is, investors now believe that the rules of the game in Mexico are more credible and less subject to arbitrary changes than in previous times. Because Mexico has trade rules—and other rules on, for example, labor, environmental protection, and intellectual property protection—established in a formal agreement with the United States, investors perceive greater likelihood that those rules will be followed and not changed arbitrarily. This expectation of legal stability has contributed very profoundly to the large increase in US and other industrial country FDI into Mexico since 1994.[60]

A similar impact can be expected in other Latin American countries that join in a free-trade agreement with the United States whether through the FTAA or bilaterally. The impact may be numerically smaller since no other Latin American or Caribbean country with the exception of Brazil, approaches the economic size of Mexico. Chile may be a good example of this impact because it recently entered into a free trade pact with the US and is expected to enjoy the kind of impact asserted here. The impact should appear not only in foreign direct investment, but also in portfolio investment [i.e., purchase of local financial instruments] from the US, EU, and Japan. The effect of these investments may ultimately dominate the overall impact of the FTAA, just as they do in the case of Mexico with NAFTA.

[60] A recent study of NAFTA by the World Bank stated: "The report's main conclusion regarding NAFTA is that the treaty has helped Mexico get closer to the levels of development of its NAFTA partners. The research suggests, for example, that Mexico's global exports would have been about 25% lower without NAFTA, and foreign direct investment (FDI) would have been about 40% less without NAFTA." *See* Daniel Lederman, et. al, *Lessons from NAFTA for Latin American and Caribbean (LAC) Countries: A Summary of Research Findings.* THE WORLD BANK,. *available at* http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20146331~menuPK:34479~pagePK:34370~piPK:34424~theSitePK:4607,00.html (Dec. 2003).

Overall, it is expected that the FTAA will be successfully negotiated by the countries of the hemisphere, and probably on the timetable agreed—namely by the end of 2004.[61] The actual content of the agreement will probably fail to satisfy many people, especially those who want to see major tariff and non-tariff barrier reductions. Some industrial sectors will certainly remain protected. Even so, the very important benefits of having a more credible policy regime in countries of the region, due to joining with the United States, should be considerable, primarily from new direct and portfolio investment into Latin America and the Caribbean.

[61] This was the date originally agreed at the Miami Summit of the Americas in 1994, and subsequently reaffirmed throughout the negotiations of FTAA. *See, e.g.*, the FTAA website *at* http://www.ftaa-alca.org/alca_e.asp.

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FREE TRADE DOES NOT EQUAL FREEDOM FROM RED TAPE: PRACTITIONER THOUGHTS ON FTAA RULES OF ORIGIN

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Introduction

That "free trade" is at the core of the Free Trade Area of the Americas ("FTAA") is obvious. But the simple phrase "free trade" is deceptive. It conceals such nitty-gritty issues as the meaning of "free" (zero percent duty rates or reduced but not eliminated duties) for a product that "originates" (is considered "made") in one of the FTAA countries. With respect to the latter issue, is a product accorded preferential treatment simply when it is shipped from one FTAA country to another? Or must the product also meet some test for being made in one of the FTAA countries? If there is such a test, how does it work? What does it mean to be *made* somewhere?

This essay considers these questions as it analyzes the proposed FTAA rules of origin—the rules that determine the conditions under which a product[1] is eligible for preferential ("free" trade) treatment.[2] At the time this essay is being written, the third draft text of the international agreement that would establish the FTAA (hereinafter the "FTAA Agreement") is being circulated. In the draft FTAA Agreement, Chapter X concerns the "Origin Regime," and Chapter XI concerns "[Customs] Procedures Related to Rules of Origin." The specific origin rules for actual products, which will appear in an annex to the agreement, have not been publicly released and are the subject of ongoing negotiations. Nevertheless, Chapters X and XI give a clear sense of how the product-specific rules will work. They are being modeled on the origin rules used by the United States, Canada, and Mexico in the North American Free Trade Agreement ("NAFTA"). The NAFTA utilizes a combination of "tariff-shift" and "regional value content" ("RVC") tests to determine when a product is sufficiently "made" in a NAFTA country to be eligible for preferential NAFTA treatment when it is

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[1] The focus is on free trade in products, not services, although the latter are increasingly important in international trade agreements.

[2] A product technically is eligible for preferential treatment if it is an "originating good" pursuant to Article 3 of Chapter X of the draft FTAA Agreement.

traded among the three NAFTA countries.

Part I introduces the basic principles of reciprocity and non-discrimination/discrimination in free-trade agreements. Part II considers, as seen in regional free-trade agreements, rules of origin and, more specifically, the intricacies of tariff-shift and RVC tests. Part III discusses the "red-tape" burdens of origin rules in regional free-trade agreements. The essay concludes with some thoughts on the FTAA Agreement's likely origin rules.

Free Trade, Reciprocity, and Regional Free-Trade Areas

If a country wanted to lower its duty rates for imports from all countries, it would lower its generally applicable duty rates (i.e., the default, baseline rates that apply to products regardless of origin). A true adherent to free trading principles would unilaterally, and without any need for reciprocity by its trading partners, lower or eliminate the duty rates applicable to imports no matter their country of origin.[3] Countries, however, do demand reciprocity from trading partners, and this reciprocity dynamic is at the core, for example, of trade negotiations and agreements of the World Trade Organization ("WTO").[4] The basic notion is a group agreement to lower or eliminate the duty rate for a product by all members of the group.[5] While a true free trader would prefer her country to lower its duty rates even in the absence of reciprocity, most free traders today accept the condition of reciprocity as a necessary evil to produce actual results in free-trade negotiations.[6] Furthermore, reciprocity in the WTO context is also accepted because a country that lowers its duty rate on a product that is "made" in another WTO member country is in effect lowering the duty rate on the product no matter the country of origin because most of the world's countries are now WTO members.

The situation in regional free-trade areas is quite different.[7] A regional free-

[3] *See* Jagdish Bhagwati, Free Trade Today 98 (2002).

[4] The WTO, an international institution established in 1995, was created by a sweeping revision in 1994 of the General Agreement on Tariffs and Trade ("GATT"). The GATT, an international trade treaty, dates to 1947, and over time its administration developed into a quasi-international institution. The so-called Uruguay Round of GATT negotiations concluded in 1994, yielding (among other things) an essentially altogether new GATT—referenced as GATT-1994—and the WTO, a new international institution for the administration of GATT-1994.

[5] The principle of nondiscrimination is at the heart of WTO rules. It requires a WTO Member to accord equal treatment to all other WTO Members (so-called most-favored nation treatment) and to treat equally products that are imported and those that are domestically made (so-called national treatment).

[6] *See* Bhagwati, *supra* note 3, at 102-104.

[7] The "regional" nature of regional free-trade areas includes the obvious situation of countries located contiguously (e.g., in NAFTA) or in a region (e.g., in the FTAA), but it also includes linkages between far-flung countries, such as in the U.S.-Singapore Free Trade Agreement or the E.U.-Mexico Free Trade Agreement. Also, the trade in regional free-trade areas is not always completely "free" of customs duties, because product coverage can be limited and/or duty rates may be reduced but not eliminated. Some commentators thus prefer to utilize the term

trade agreement, such as the NAFTA or the FTAA Agreement, by its nature discriminates against products from outside the region covered by the agreement.[8] There are similarities between free trade in the WTO context and free trade in the context of a regional free-trade agreement: reciprocity is demanded, and agreed-upon duty-rate reductions are accorded to products made in any member of the group. The key difference is that, in the regional free-trade agreement context, the group is relatively small and it necessarily denies preferential treatment to products made outside the regional area.[9] In regional free-trade agreements, therefore, the actual requirements that determine when a product is "made" in one of the regional countries are critically important.[10]

Rules of Origin

Origin determinations concern the complicated matter of what it means to be *made* somewhere. There is a relevant international convention, known as the Kyoto Convention,[11] administered by the World Customs Organization ("WCO"), located in Brussels. The convention includes the concept of goods being "wholly produced or obtained" in a country, but this is essentially restricted to natural-resourced-based products. Most goods are, of course, manufactured goods, and they often contain inputs that are sourced from other

"preferential," and not "free," when referring to regional trade areas or agreements.

[8] Regional free-trade agreements are justified, with respect to trade in products, as being WTO-legal by Article XXIV of GATT and the GATT-1994 Understanding on the Interpretation of Article XXIV, which allow, in certain circumstances, for custom unions and free-trade areas. However, a fairly recent WTO decision, *Turkey-Textiles*, has called into question the legality of many regional free-trade agreements because of their discriminatory nature. *See* WTO Appellate Body Report on Turkey—Restrictions on Imports of Textile and Clothing Products (*Turkey-Textiles*), WT/DS34/AB/R, adopted November 19, 1999 (considering appeal of WTO Panel Report WT/DS34/R, adopted May 31, 1999). *See also* Gabrielle Marceau & Cornelis Reiman, When and How Is a Regional Trade Agreement Compatible with the WTO, LEGAL ISSUES OF ECONOMIC INTEGRATION 28(3) (2001) (suggesting that the *Turkey-Textiles* decision may have created a rebuttable presumption that regional free-trade agreements are GATT-illegal).

[9] A regional free-trade agreement is but one ideal type of regional economic integration. Lesser integration is associated with a preferential-trade agreement, *supra* note 7, whereas increasingly greater integration is associated with customs unions, common markets, economic unions, and finally economic and monetary unions. *See* BERNARD HOEKMAN & MICHEL KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM 213 (1995).

[10] Rules of origin are also employed for other purposes, such as when determining the origin of an imported product that must be labeled with a "country-of-origin marking." *See, e.g.*, 19 U.S.C. § 1304 and 19 C.F.R. Part 134 (setting forth the general requirements concerning a country-of-origin marking for articles imported into the United States). *See also* David Palmeter, *Rules of Origin in Customs Unions and Free Trade Areas*, in REGIONAL INTEGRATION AND THE GLOBAL TRADING SYSTEM 327 (Kym Anderson & Richard Blackhurst eds., 1993) (noting as well the use of origin rules in the administration of country-specific import quotas).

[11] The Kyoto Convention is formally known as the International Convention on the Simplification and Harmonization of Customs Procedures (in force September 25, 1974). *See generally*, David A. Pawlak, *Learning from Computers: The Future of the Free Trade Area of the Americas*, 27 U. MIAMI INTER-AM. L. REV. 107, 134 (1995) (hereinafter Pawlak, Computers); Marianna C. Silveira, *Rules of Origin in International Trade Treaties: Towards the FTAA*, 14 ARIZ. J. INT'L & COMP. L. 411, 420 (1997). A revised, updated Kyoto Convention has been negotiated but has yet to enter into force.

countries. Therefore, origin is attributable to the last country where significant manufacturing or processing operations create a good. The test looks for the place where the last "substantial transformation" occurs, with "substantial" meaning sufficient to give a final good its "essential character."

Substantial transformation is a slippery concept and is hard to apply in practice.[12] The Kyoto Convention simply mentions permissible criteria for determining substantial transformation: changes in tariff classification; specific, listed operations which do or do not result in substantial transformation; the relative value of materials, by their origin, in a final good; or the value added in the exporting country.[13]

In a regional free-trade agreement, the simplest way to confer origin is to base it upon the country from which a product is imported. Under this approach, if a product is shipped from, say, Mexico to the United States, it is "Mexican." This approach, of course, undermines discrimination against extra-regional products because such a product can become eligible for preferential treatment by simple trans-shipment through a regional country.[14] At the other extreme, another approach would require, for a product to be "made" in the region, that all of a product's components be ultimately derived from the natural resources of the region and that all manufacturing operations that produce the components and the final product be in the region. Given pervasive international sourcing of

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[12] *See* Palmeter, *supra* note 10, at 328-29 (noting criticism of the "substantial transformation system" as being "inherently imprecise and subjective").

[13] *See generally*, Hoekman & Kostecki, *supra* note 9, at 102; Palmeter, *supra* note 10, at 335. GATT-1994 includes an Agreement on Rules of Origin, but this does not apply to rules of origin in regional free-trade agreements. *See* Hoekman & Kostecki at 102-104. *See generally*, Pawlak, Computers, *supra* note 11, at 137-39; Silveira, *supra* note 11, at 436-39. At least one commentator suggests that the WTO origin rules being developed pursuant to the Agreement on Rules of Origin, which apply to origin determinations related to *non-preferential* concerns, will likely be the basis for future WTO origin rules that concern preferential free-trade areas. *See* Silveira, *supra* note 11, at 438. This assumes that the WTO can even develop specific origin rules for non-preferential purposes pursuant to the Agreement on Rules of Origin, and progress in this area has bogged down. *See* Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CAL. L. REV. 401, 474 (2002) ("Current efforts by a WTO committee to harmonize rules of origin in the Agreement on Rules of Origin remain unresolved because of disagreements about which types of activities qualify as origin conferring.").

[14] *See* David A. Pawlak, *International Trade in the Americas: The Inter-American Lawyer's Guide to Origin Determinations*, 5 TUL. J. INT'L & COMP. L. 317, 327 (1997) (hereinafter Pawlak, Lawyer's Guide) ("This practice is termed trade deflection or transshipment. Rules of origin make it difficult for traders to use transshipment to cloak their nonoriginating goods with bogus originating status in a surreptitious attempt to gain FTA preferential tariff treatment."). This approach is rarely utilized. However, it is the approach taken, with respect to a limited number of products, in the "Integrated Sourcing Initiative" of the United States-Singapore Free Trade Agreement. *See* U.S.-Singapore FTA, Article 3.2 and Annex 3B. This has been controversial because, among other reasons, it effectively allows for free trade with a third country without certain commitments concerning labor and environmental protection that could be required as part of a free-trade agreement with that third country. *See* Sandra Polaski, Serious Flaw in U.S.-Singapore Trade Agreement Must Be Addressed, Issue Brief, Trade, Equity, and Development Project, Carnegie Endowment for International Peace (April 2003) (criticizing the U.S.-Singapore FTA approach as a loophole for free trade in Indonesian products without any commitment by Indonesia for minimum standards for and enforcement of labor and environmental protections).

components for manufactured goods, this approach is overly restrictive. In a regional trade agreement, therefore, the compromise is an allowance for extra-regional inputs so long as the manufacturing operations that do occur in the region, in the creation of a product, are substantial. It currently appears that the test for substantiality that will be utilized in the FTAA Agreement is based on the NAFTA model, which requires a "tariff shift" by the extra-regional components and/or a minimum regional value content ("RVC") with respect to the final product.

To understand a tariff-shift requirement demands an understanding of the basics of tariff classification.[15] A country's tariff schedule is a system of classifying products into groupings. The groupings start broadly and narrow, with subsets and subsets of subsets, until one arrives at the classification. Through work centered at the WCO in Brussels, many countries have adopted the same standard nomenclature and taxonomy, to a certain level of depth, in their tariff schedules, and this harmonization (among other things) facilitates the use of tariff shifts in origin tests.

When classifying a product in a tariff schedule, one starts with the broadest groupings, called headings, decides which one is correct (only one can be correct), and then works down within that chosen heading to determine the appropriate subheading and the ultimate full classification (sometimes called the "item number," "item code," or "tariff item").

The employment of a hypothetical example is useful. Let us consider a hardbound book that consists simply of a hard cover, made of cardboard; paper; and printing ink. In our hypothetical tariff schedule a book is fully classified in a provision that identifies "hardbound books" by name. This classification is within a subheading of products termed "books and other printed matter," which itself is a subset of a heading that covers "miscellaneous articles." For the hardbound book to "originate" (be made) in Country X for the purposes of a regional free-trade agreement, let us require that its components either be from Country X or, *with respect to foreign-made components*, that they undergo a shift in tariff classification, as a result of the creation of the hardbound book in Country X, such that their classification shifts from outside to inside the heading of "miscellaneous articles" (where the hardbound book is classified).

Application of this test requires a determination of the classification of the foreign-made components. Assume that the paper is classified in a provision that covers "paper for books" that is within a heading of "paper and articles of paper," and let us say that the printing ink is classified in a provision covering "printing ink" that is itself within a heading for "dyes, pigments, paints, and inks." When these components are transformed from individual pieces of paper and printing ink into the hardbound book, they successfully shift in tariff

[15] The tariff classification of a product, along with its country of origin, is used to determine the applicable duty rate.

classification from outside to inside the heading "miscellaneous articles," which covers the hardbound book. Therefore, it does not matter if the paper and printing ink are themselves from outside Country X, because their processing (into a hardbound book) in Country X transforms them, according to the tariff-shift test, into a product of Country X.

The remaining component is the hard cover. If the cover itself is classified in the tariff schedule somewhere within the heading "miscellaneous articles," the hardbound book will fail the tariff-shift test because the cover's classification will then begin and end in the same heading, "miscellaneous articles." In this situation, for the hardbound book to originate within the regional free-trade area, the cover would need to be made in the region. On the other hand, if the cover is classified elsewhere in another heading—within, maybe, "articles of cardboard"—the hardbound book will fully satisfy the tariff-shift test.

There are numerous problems with a tariff-shift test. First, one can easily come across situations where there is hardly any real change in components in the creation of a final product but the test is satisfied simply because of the peculiarities of how the final product and its components are grouped in the tariff schedule. Second, while many countries now share, to a substantial but incomplete degree, a common tariff schedule, the actual classification of the same item may differ between countries. Two countries, sharing a harmonized tariff schedule, may come to inconsistent conclusions regarding the proper classification of the same item, especially when there are multiple classifications, which arguably include the item. The devil, so to speak, is in the application of the otherwise harmonized nomenclature and taxonomy. The uncertainty and inconsistency that characterizes tariff classification can lead to difficulties associated with a product's eligibility for preferential treatment under a regional free-trade agreement. If countries in a regional free-trade agreement have different opinions on the tariff classification of components of a finished product, they may very well have different conclusions for whether the finished product meets an origin rule if it is based on a tariff-shift test.

The shortcomings of tariff-shift tests appear likely to force the FTAA countries into substitution or supplementation with RVC tests. The basic notion behind an RVC requirement is that eligibility should be conferred only if a certain minimum amount of the final product's value is attributable to the region. The main RVC test, at least the main formulation used in the NAFTA, employs the "transaction value" method.[16] This requires that a minimum of 60 percent of a final product's value, determined by its import sales price, be attributable to the region. The simplest way of calculating RVC is to add the value of all extra-regional components and then take the sum and express it as a percentage of the final product's value. If it is no more than 40 percent, the final product satisfies

[16] There is also a "net-cost" method that employs a bottom-up approach of adding certain of the costs associated with making a final product.

the test.[17]

This simple explanation of an RVC test conceals many complications in actual practice.[18] To establish RVC for a final product one must have a costed bill of materials for the product. With respect to the cost of each extra-regional component, there must be documentation to substantiate that cost. For example, if the component was purchased, there must be proof of the purchase (e.g., a purchase order and subsequent invoice) and of the price paid (e.g., payment records); and the allocation of that cost (price) must be documented if it is not expressed in terms of unit prices.[19] Finally, with respect to each regional component, there must be documentation to substantiate that it indeed originates within the region.

Red Tape, or Is This Really Free Trade?

Once one has a grasp of even just the basics of the complicated nature of origin rules and their application, it is not difficult to recognize that free trade comes at the cost of increased red tape.[20] For practitioners of international trade it is common to work with clients who are truly shocked to learn of all the hoops through which they must jump in order for them or their customers to take advantage of much-publicized "free trade." The problem is multiplied when a country enters into many regional free-trade agreements and each of those agreements has its own and, to some extent unique, origin rules.[21]

An interesting twist on the burdensome nature of origin rules is that the burden of compliance often falls on exporters, not importers. Importers take advantage of preferences (zero or much-reduced duty rates) under regional free-

[17] If the extra-regional components collectively comprise 40.1 percent or more of the final product's value, the product will fail the RVC test because it will then have an RVC of 59.9 percent or less.

[18] "Whatever else value-added as a rule of origin may be, certain and efficient it is not." Palmeter, *supra* note 10, at 332.

[19] The aforementioned net-cost method, supra note 16, is an especially burdensome exercise in cost accounting. *See generally*, Pawlak, Lawyer's Guide, *supra* note 14, at 346 ("[R]egional value content tests require complicated and costly bookkeeping, as well as subjective interpretations regarding what costs of production may be included in the value content calculation.").

[20] *See* Cao, *supra* note 13, at 469 ("[T]hese highly complex [origin] rules and the equally complex customs regulations implementing them may also be a form of nontariff barrier impeding duty-free trade." (footnote omitted)). An analysis of one regional free-trade agreement found the compliance burden to equal "at least 3 per cent of the value of the goods concerned" and to be sufficient to "lead exporters of up to 25 per cent of presumably eligible trade to forgo the preference and simply pay the normal duty." Palmeter, *supra* note 10, at 332.

[21] Indeed, Jagdish Bhagwati points to a "systemic problem posed by an explosive proliferation of" regional free-trade agreements. Bhagwati employs a "spaghetti bowl" metaphor, arguing that the situation has turned "into a "spaghetti bowl:" a messy maze of preferences as [regional free-trade agreements are] formed between two countries, with each having bilaterals with other and different countries, the latter in turn bonding with yet others, each in turn having different rules of origin (as required by the preferences sought to be given and taken, without "leaks" to nonmembers via entry into members) for different sectors, and so on." Bhagwati, *supra* note 3, at 112-13.

trade agreements. Importers are generally required to request and then maintain some sort of certification from the exporter of the product. In such a certification the exporter states that the product is eligible for preferential treatment under the applicable origin rule. It is up to an exporter in one of the region's countries, therefore, to grapple with the complexities and record keeping burdens of tariff-shift and RVC tests. Market forces generally compel exporters to suffer these burdens because their customers, in other countries in the free-trade region, demand certifications so they may import the exporter's product at the free or reduced preferential duty rate.

The government of the country of importation may, of course, dispute the eligibility of an imported product under the applicable origin rule. Sometimes officials from the customs authority of the importing country audit the exporter's certification, checking the analysis and supporting documentation of the exporter. It is during these audits that disputes over classification of the final product or its components (in tariff-shift tests) or over accounting issues (in RVC tests) come to the fore. When, for whatever reason, an importing country denies eligibility to a product that has been imported with a claim of eligibility in the past, it is the exporter's certifications of eligibility that are invalidated. At this point, the burden of eligibility compliance—or more correctly, of non-compliance—shifts to the importer, who can face a demand for back duties and interest, which can amount to huge sums. An importer in such a situation often in turn demands that it be indemnified by the exporter because it was the exporter's faulty certification that caused the problem. It is understandable that, at this point, the importer and exporter are likely to have lost all enthusiasm for regional free-trade agreements; and they certainly would have been disabused of any notion that this sort of "free" trade has anything to do with the truly unburdened flow of goods.

Conclusion

The foregoing discussion highlights the reality that regional free-trade agreements are not about international trade that is unencumbered by customs duties or red tape. The proposed FTAA Agreement appears headed toward rules of origin modeled after those of NAFTA, which, with a mix of tariff-shift and RVC tests, are complicated and burdensome. One solution is the reduction of general duty rates that apply regardless of an imported product's country of origin, but this is exactly what is not happening as multilateral negotiations at the WTO continue to stall.[22] On the other hand, more regional free-trade agreements, including the FTAA Agreement, appear likely to enter into force, which makes an understanding of rules of origin critical for a true understanding of the nature of today's, and likely tomorrow's, "free" trade.

[22] The current negotiations, the first since the Uruguay Round created GATT-1994, are referred to as the Doha Round.

ALTERNATIVES TO THE FTAA: LESSONS FROM EUROPE

Sarah Anderson†

The debate over economic integration in the Western Hemisphere is more volatile today than at any time since former President George H.W. Bush first announced a grand plan for a free trade zone stretching from the port of Anchorage to Tierra del Fuego in 1990.[1] For nearly 10 years, negotiators have been working to make Bush's dream a reality through a hemisphere-wide Free Trade Area of the Americas ("FTAA"). Until recently, the model for the FTAA, as evidenced by draft texts, has been the North American Free Trade Agreement ("NAFTA"). However, while the official deadline of January 2005 for completing the FTAA is fast approaching, the U.S. government's goal of a NAFTA-style agreement appears more remote than ever.

During the past few years, resistance to "neo-liberal" or free market-oriented policies has driven changes in leadership in several countries. In two of the largest economies in the region, Brazil and Argentina, new Presidents are sharply critical of the proposed FTAA. Brazilian President Luiz Inacio "Lula" da Silva has often described the proposed FTAA as an "annexation project" rather than an integration project.[2] At a recent summit of heads of state in Mexico, Argentine President Nestor Kirchner made a jab at the United States government's approach to the FTAA, reportedly saying "not just any Free Trade Area of the Americas will do. The deal should acknowledge economic differences. It cannot be a one-way street and it cannot be imposed."[3] In Venezuela, President Hugo Chavez has also been a consistent critic, once reportedly describing the FTAA as the "cauldron of hell itself."[4] Leaders of Caribbean nations have demanded strong concessions for small economies. Their proposals for special treatment include longer timelines for implementing FTAA rules, waivers of reciprocity requirements, and special technical

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[1] George H. Bush, Policy Address Concerning the Economies of Latin America (June 27, 1990) (transcript *available at* www.fednews.com).

[2] *Brasil/ Lula: ALCA es un proyecto de anexion, no de integracion*, DEUTSCHE PRESS AGENTUR, June 21, 2002.

[3] *Bush Scrambles to Keep Free Trade Plans on Track at Americas Summit*, CHANNEL NEWS ASIA, Jan. 14, 2004, *available at* http://www.channelnewsasia.com.

[4] *Chavez Urges Venezuela, Cuba "Single Team" Against FTAA 'Cauldron of Hell,'* BBC MONITORING LATIN AMERICA, Sept. 7, 2001.

assistance to help them negotiate and implement FTAA rules and make use of the dispute settlement mechanism.[5] Even Mexican President Vicente Fox, one of the United States' closest economic allies, has suggested that he is dissatisfied with the NAFTA model. In a press interview, Fox stated, "If we were going to do it all over again today, I would insist on introducing a lot of considerations."[6]

The growing backlash caused the trade negotiators meeting in Miami in November 2003 to dramatically alter the course of the FTAA talks. Facing a deadlock, the United States government backed down from its demand that the FTAA be a comprehensive agreement endorsed in full by all 34 governments. Instead, they agreed to a two-track approach that would allow countries to opt out of some of the more controversial provisions.[7] The details of the new approach are yet to be determined, but it is clear that developing country resistance has shaken up the debate and the FTAA is likely to be either a hollowed out version of the original proposal or a pact with far less than 34 parties.

Given the extent of social and environmental problems in the hemisphere, however, most critics of the proposed FTAA believe that an ideal outcome would not be merely the failure of FTAA talks, but rather the development of a different road map for integration in the Americas. Although there is no consensus around an alternative path among leaders, one frequent theme is that the Western Hemisphere should consider the experience of the European Union ("EU"). The Mexican and Venezuelan governments have been most direct in calling for EU-style initiatives. Mexico's Fox has promoted the idea that both the NAFTA and the FTAA include EU-style development funds and that the NAFTA countries adopt a common currency similar to the euro and more open migration policies.[8] In one of several official memos on the subject, Venezuela's Chavez administration stated "one of the key goals of a successful integration project, as demonstrated by the experience of the European Union, is to ensure that integration allows for concrete steps to be taken towards significantly reducing these inequalities."[9] As the Western Hemisphere grapples with its own integration process, the EU offers one of the few concrete examples of an

[5] Fernando Masi, *Preferential Treatment in Trade: Is There Any Room Left in the Americas?* THE NORTH-SOUTH AGENDA, U. MIAMI, Aug. 2001, at 14. *available at* http://www.miami.edu/nsc/publications/pub-ap-pdg/49AP.pdf.

[6] Geri Smith & Cristina Lindblad, *Mexicon: Was NAFTA Worth It: A Tale of What Free Trade Can and Cannot Do*, BUS. WK., Dec. 22, 2003, at 72, *available at* http://www.businessweek.com/magazine/content/03_51/b3863008.htm.

[7] Ministerial Declaration, Free Trade Area of the Americas Eighth Ministerial Meeting, Miami, USA, Nov. 20, 2003.

[8] Worldview: *Mexican President-Elect Vicente Fox Discusses Plans for Economy, Governing*, July 4, 2000, *available at* http://www.cnn.com/transcripts/0007/04/wv.01.html.

[9] Memorandum from Victor Alvarez, Vice Minister of Industry, Government of Venezuela to the FTAA-Trade Negotiations Committee (Apr.16, 2003), *available at* http://www.ftaa.org/TNC/tni123_e.asp.

alternative approach.

The EU and NAFTA approaches are indeed very different. NAFTA is a narrow agreement that combines trade and investment liberalization with strong investor protections. By contrast, the EU, initially formed in the post-war period, has the dual goals of economic prosperity and social and political harmony. Although the economic side has often dominated, social goals were emphasized beginning with the 1957 Treaty of Rome, which created the alliance that has evolved into the EU.

The EU policies that have taken shape over the past 50 years can roughly be grouped into two categories: those that restrict government intervention and those that require it. The restrictive policies include trade and investment liberalization, the adoption of the common currency (which is tied to restrictions on fiscal policy), competition policy (which restricts government subsidies to the private sector) and free movement of labor (which inhibits restrictions on labor flows).

The other category of policies, those that involve government intervention, include the EU's development aid and farm supports, legally binding social and environmental protections, and mechanisms for public participation and consultation. This article focuses primarily on this set of initiatives because they are absent from the NAFTA model and are also those most frequently cited by government officials as well as civil society groups in the discussion around a more favorable alternative to the FTAA. The article also discusses EU migration policy since this issue is of great interest in the Americas.

It should be noted that while governments in the Americas have clashed over the FTAA negotiations, the EU has not been without conflicts of its own. In fact, there are raging debates over virtually every aspect of this complex project. Particularly as the EU has worked to prepare for the enlargement in May 2004 from 15 to 25 members, EU aid, social, environmental, and migration policies have come under intense scrutiny. EU institutions and member state governments have had conflicting views on whether and how to reform these initiatives, as well as the delicate issue of how to pay for them. These debates have produced a rich body of thinking that should be more closely integrated into discussions in the Americas.

Social and Environmental Standards

The challenge of addressing the social and environmental impacts of integration has become a front burner issue in U.S. electoral politics. During the campaign for the Democratic Presidential nomination, all of the leading candidates expressed a commitment to changing U.S. trade policy by incorporating enforceable labor and environmental standards in future trade pacts. For example, at an event to announce that he had obtained the endorsement of the AFL-CIO, Senator John Kerry stated, "I will insist on real

worker and environmental provisions in the core of every trade agreement."[10] Former Vermont Governor Howard Dean, prior to withdrawing from the race, said "I will insist that every new trade agreement include strict and enforceable labor and environmental provisions."[11]

The EU has a long history of work in this area. The Treaty of Rome states in Article 118 that "It shall be the aim of the Commission to promote close collaboration between member states in the social field, particularly in matters relating to employment, labor legislation and working conditions, social security, protection against occupational accidents and diseases, industrial hygiene, the law as to trade unions, and collective bargaining between employers and workers."[12]

Today, the European Commission, the EU's administrative entity, is the guardian of a voluminous body of regulations on labor rights and environmental standards, as well as gender equity, racial discrimination, health and safety, and other issues. The Commission has the authority to bring offending governments before the European Court of Justice. While it occurs only rarely, the European Court of Justice can impose sanctions for non-compliance, from fines to the ultimate punishment of EU expulsion.

By setting a floor for the region's social and environmental policies, the EU has tried to encourage a high-road path to development, instead of competition based on exploitation in areas of weak standards. The EU has taken a particularly strong stance in defending women's rights. Article 119 of the Treaty of Rome states that member states must ensure and maintain the principle that men and women receive equal pay for equal work.[13] This article was largely ignored until 1975, when the European Council issued a directive on equal pay for work of equal value, followed a year later by a directive that required equal treatment for men and women in employment and training.[14] Directives in the 1980s and early 1990s dealt with equal treatment in social security and protections for workers who are pregnant or have recently given birth.[15] The

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[10] John Kerry, Remarks at AFL-CIO Meeting on Jobs and the Economy, Washington, DC, Feb. 19, 2004.

[11] Howard Dean, Remarks in a speech in Des Moines, Iowa, July 30, 2003, *available at* http://www.deanforamerica.com/site/cg/index.html?type=news&id=7343.

[12] TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, art. 118 [hereinafter TREATY OF ROME].

[13] *Id.* at art. 119.

[14] Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, 1975 O.J. (L 45); Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, 1976 O.J. (L 39).

[15] Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, 1986 O.J. (L 225) 40; Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage

Irish government tried to negotiate a waiver from the pay equity directive, but the request was refused.[16] Likewise in Austria, it was only when the EU issued a directive on parental leave that Austrian unions won a long-standing battle to obtain that right.[17]

On the environment, critics charge that enforcement is constrained by the fact that the European Commission must rely on national-level environmental reporting systems, which are lacking in many countries.[18] Nevertheless, there are examples of EU environmental laws that have had significant impact. For example, a directive on large combustion plants sets emissions limits that are more easily attained with modern and cleaner natural gas technologies.[19] This law is cited as at least partly responsible for a reduction of energy-related emissions in the energy supply and industry sectors of 43 and 23 percent, respectively, during the past decade.[20] The European Commission also points to a law on urban wastewater that has resulted in a significant decrease in the number of heavily polluted rivers due to reductions in point source discharges. Organic matter discharges fell by 50 to 80 percent over the last 15 years.[21]

By contrast, NAFTA lacks strong mechanisms on these issues. Although "side agreements" on labor and the environment were negotiated parallel to the trade pact, these have proved extremely weak instruments for strengthening enforcement. For example, although more than 20 complaints have been filed regarding labor rights violations, none have resulted in more than consultations between government officials.[22] As a result, corporations continue to have a strong incentive to export jobs to Mexico, where they can more easily profit from labor repression and environmental degradation. The FTAA is a step

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improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, 1992 O.J. (L 348).

[16] Press Release, Joan Carmichael, Assistant General Secretary of the Irish Confederation of Trade Unions, Comments to Launch the Congress Campaign for a Yes Vote in the Nice Referendum (Sept. 16, 2002).

[17] Gerda Falkner & Simone Leiber, *A Europeanization of Governance Patterns in Smaller European Democracies?* 8th Biennial International Conference, European Union Studies Association, Mar. 27-29, 2003, *available at* http://www.mpi-fg-koeln.mpg.de/socialeurope/downloads/FalknerLeiberEUSA2003.pdf.

[18] Christopher Demmke, *Towards Effective Environmental Regulation: Innovative Approaches in Implementing and Enforcing European Environmental Law and Policy,* JEAN MONNET CENTER, N.Y.U. SCH. L., 2001, *available at* http://www.jeanmonnetprogram.org/papers/01/010501-01.html.

[19] Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants, OJ (L 309) 1, *available at* http://europa.eu.int/scadplus/leg/en/lvb/128028.htm.

[20] European Environment Agency,*Energy and Environment in the European Union*, 2002, at 30, *available at* http://reports.eea.eu.int/environmental_issue_report_2002_31/en/eni-env.pdf.

[21] European Commission, *Global Assessment: Europe's Environment: What Directions for the Future?*, 2000, at 12, *available at* http://europa.eu.int/comm/environment/newprg/99543_en.pdf.

[22] Human Rights Watch, *Trading Away Rights: The Unfulfilled Promise of NAFTA's Labor Side Agreement,* Apr. 2001, *available at* http://www.hrw.org/reports/2001/nafta/.

backwards from NAFTA on social and environmental issues. In the draft text, the only relevant proposals are non-binding recommendations that countries strive to ensure that they do not weaken existing labor and environmental regulations in order to attract foreign investment.

Development Funds

The EU recognizes that stronger labor and environmental regulations, while important, are not enough to level the economic playing field among its member states. The EU has had an explicit commitment to reducing income disparities, beginning with its founding. The preamble to the Treaty of Rome expressed the need to "strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions."[23] Article 3 of the Treaty created the European Social Fund to improve employment opportunities and raise living standards.[24]

Hence, the EU has committed significant financial and technical assistance to helping poorer countries implement and monitor EU social and environmental regulations. Beyond that, the EU invested •324 billion in development grants to reduce disparities between and within its member states between 1961 and 2001, most of it since the mid-1980s.[25] By comparison, the U.S. Agency for International Development spent about one-tenth this amount on economic assistance grants to all of Latin America during this time period.[26]

To obtain these grants, national governments develop proposals in consultation with the European Commission for infrastructure, training, and other development projects. The largest recipients have been the so-called "poor four" – Ireland, Greece, Spain and Portugal. To varying degrees, all have made progress. Between 1982 and 2002, Ireland became one of the wealthiest European countries, while Spain and Portugal have increased their GDP per capita levels from 74 to 82 and 62 to 71 percent of the EU average, respectively. Greece did less well in the 1980s, but has narrowed the gap by 7 percentage points since an infusion of EU aid in the 1990s.[27] There is widespread consensus among scholars that EU supports were a significant factor in this "catching-up" process.

By contrast, NAFTA contained no mechanisms to reduce inequalities and,

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[23] TREATY OF ROME, *supra* note 12.

[24] *Id.* at art. 3.

[25] European Commission, The Community Budget: The Facts in Figures, Table 1, 2000, *available at* http://europa.eu.int/comm/budjet/pdf/budget/procbud/procbuden.pdf.

[26] Calculated by the author based on data in U.S. Agency for International Development, Center for Development Information and Evaluation, *available at* http://www.usaid.gov.

[27] Calculated by the author based on data from World Bank, World Development Indicators Online, *available at* http://www.worldbank.org/data/wdi2002.

despite large increases in exports and foreign investment, Mexico has fallen further behind in per capita income as a percentage of the North American average. This figure was 43 percent in 1982, 33 at the start of NAFTA, and 31 in 2002.[28]

The EU has recognized that as long as extreme income gaps exist, it is unrealistic to expect that labor and environmental regulations alone will be enough to lift up standards. Poorer countries will not only lack resources necessary for infrastructure and human investment. They will also face serious pressure to attract foreign investment by offering an exploited workforce and lax environmental enforcement, undermining efforts to maintain high standards in the richer countries.

To develop and maintain support for development aid in the richer countries, the EU has "de-politicized" aid by assigning administrative responsibilities to a supra-national body (the European Commission) and channeling a portion of aid into the poorer regions of the richer countries, such as eastern Germany.

In the Western Hemisphere, there are many questions that should be explored regarding the most appropriate approach to resource transfer in the Americas. It may be that debt reduction, or a combination of debt reduction and aid, would be a more appropriate approach, given the high level of foreign debt faced by many Latin American governments. The general principle of using resource transfers to narrow the gaps is an important one.

One of the most visible benefits of the EU's efforts to narrow disparities between rich and poor countries is that it has helped make possible an "open border" policy. Article 3 of the Treaty of Rome calls for the abolition of obstacles to the freedom of movement of persons. Thus, EU citizens have the right to live and work in any member state and discrimination against citizens of another member state is banned. During periods of enlargement to poorer countries, the EU responded to fears of massive flows of migrants into the richer countries by focusing aid and other assistance to lift up living standards in the poorer countries to mitigate migration pressures. As a result, when the EU lifted borders with Portugal and Spain, out-migration was negligible. Even though the EU is confronting wider income gaps in the current round of enlargement, countries scheduled to join the EU in May 2004 are slated to enjoy full rights to freedom of movement within seven years.

"By contrast, U.S. negotiators refused to consider the migration issue, aside from offering limited visas for professionals,"[29] and U.S. taxpayers spend billions of dollars every year in border patrol costs. The draft FTAA also

[28] Calculated by the author based on data from World Bank, World Development Indicators Online, *available at* http://www.worldbank.org/data/wdi2002.

[29] Sarah Anderson & John Cavanagh, Lessons of European Integration for the Americas (Feb. 26, 2004), *available at* www.ips-dc.org.

ignores the migration issue. In terms of development funds, the FTAA is also lacking. In 2002, the U.S. promoted the creation of a Hemispheric Cooperation Program, but this is merely an initiative to provide technical assistance to train government officials to participate in negotiations and implement FTAA commitments. The goal is not to reduce disparities and there is no binding commitment to support the program, which is separate from the FTAA text.

There is a great deal the Western Hemisphere can learn from the EU approach in adopting a long-term plan for leveling the playing field among nations and working towards increased labor mobility.

Agriculture

The lessons of the EU's past farm policies are mostly negative. In accordance with Article 39 of the Treaty of Rome, the EU approach to agriculture policy for the first two decades or so centered primarily on boosting yields and production levels. Although this was understandable during the post-war period when the memory of hunger was still fresh, the approach eventually produced massive surpluses that drove down world market prices for many commodities. And with the rise in environmental concerns in the 1970s, the EU agriculture approach drew increased criticism for encouraging intensive farming practices. Although there have been some reforms during the past two decades, many environmentalists argue that they haven't gone far enough to support sustainable agriculture.

Agriculture is the biggest line item in the EU budget, totaling 672 billion between 1963 and 2001. As in the United States, the EU's farm subsidies have disproportionately benefited large producers, and despite massive agricultural spending, the region has had a rapid decline in small farms.[30]

However, more recent attempts to reform the EU agricultural policy, while too early to judge, may produce more fruitful fodder for lessons for the Americas. These changes have focused on de-linking subsidies from production and conditioning them on respect for environmental and other standards. Under a reform plan announced in 2003, the EU is also planning to cut payments to large farmers.[31] These reforms can inform the debate in the Americas region, where small-scale agriculture remains highly significant in terms of employment, as well as social, environmental, and cultural welfare. Like the

[30] Eurostat, *Thirty years of agriculture in Europe, Statistics in Focus, Agriculture and Fisheries*, (Mar. 3, 2000), *available at* http://www.eu-datashop.de/download/EN/sta_kurz/thema5/nn_01_14.pdf.

[31] Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) 1453/2001, (EC) 1868/94, (EC) No 1251/1999, EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001, *available at* http://europa.eu.int/eur-lex/en/archive/2003/1_27020031021en.html.

EU, the Western Hemisphere should recognize that increased exports and other trade liberalization policies will not solve the serious problems facing rural residents.

Agriculture is one of the most contentious issues in the FTAA negotiations. In part, concerns in the rest of the hemisphere are based on the experience of Mexico under NAFTA. That deal required a phased-in lifting of barriers to agricultural trade between the United States, Mexico, and Canada. As a result, there has been a rapid influx of U.S. agricultural products, namely corn, into Mexico, putting pressure on small farmers in that country. According to the Carnegie Endowment for International Peace, the NAFTA period has coincided with a loss of 1.3 million jobs in Mexican agriculture.[32] For many Mexican farm groups, anger over NAFTA is focused on both the reduction of farm protections in Mexico as well as what they see as the hypocrisy of U.S. agricultural policy, which provides billions of dollars in supports for domestic producers (particularly large-scale agribusiness) while promoting free market reforms abroad.

The U.S. government's negotiating position in the FTAA has also been for countries to remove tariffs on imports within 10 years.[33] As in NAFTA, the United States opposed including measures to provide financial assistance to farmers or to encourage more environmentally sustainable practices. Several other countries have rejected this position. Agriculture is still an important source of income and employment in many countries in the region, and it is not uncommon for governments to provide protections for staple foods. For example, the Nicaraguan government applies tariffs of 45-55 percent on certain types of corn and rice imports.[34] Because the United States has been unwilling to offer compensatory aid or reduce U.S. domestic farm subsidies, the agricultural issue has become the main roadblock to progress in FTAA talks.

Public Participation

To facilitate civil society input in policymaking, the EU has established a European Economic and Social Committee, which is made up of representatives of employers, workers, and other civil society sectors from each member state. The Committee provides input to the European Commission on all matters relating to economic and social policy. The EU also has an official "social partnership process," modeled on national-level processes in some countries,

[32] John Audley et al., *NAFTA's Promise and Reality*, Carnegie Endowment for International Peace, Nov. 2003, at 20, *available at* http://www.ceip.org/files/publications/NAFTA_Reprot-full.asp.

[33] Press Release, Office of the U.S. Trade Representative, FTAA Negotiating Group on Agriculture: Public Summary of U.S. Position (Jan. 17, 2001) *available at* http://www/ustr.gov.

[34] General Accounting Office, Free Trade Area of the Americas: Negotiators Move Toward Agreement That Will Have Benefits, Costs to U.S. Economy, Sept. 2001, at 28, GAO-01-1027, *available at* http://usembassay.state.gov/guatemala/wwwfftaarep2001.pdf.

through which trade unions and employer groups develop proposals for EU initiatives. In some cases, such as the directive on parental leave, these initiatives have led to legislation."

EU workers also have rights to consultation at the company level. Since 1994, multinational companies with a significant number of workers in the EU must negotiate agreements with a "European Works Council" ("EWC") representing their employees. At a minimum, employers must give the EWCs the right to meet with central management once a year to receive information regarding the firm's financial situation and plans for new technologies, production transfers, mergers, and layoffs. In all cases, the corporation must pay for the EWC's operating expenses.[35]

The EWCs have a long way to go before they can be considered a significant counterweight to the power of employers in Europe. According to the European Trade Union Institute, only about one-third of the 2,000 or so firms that are technically required to have EWCs actually have complied, and in most cases, the agreements offer only the minimum in consultation rights.[36] Nevertheless, EWCs have offered some important opportunities for workers to gather information that is useful in their national collective bargaining and to influence the handling of corporate restructurings.

While all of these consultation mechanisms have their shortcomings, the EU has made some progress towards creating an institutional framework for ensuring that policies reflect a measure of public consensus. By contrast, neither the NAFTA nor the proposed FTAA offer any significant opportunities for civil society participation in decision-making. A civil society committee set up as part of the FTAA negotiation process is widely derided as nothing more than a "mailbox," since it solicits public input but has no obligation to respond. And there is nothing in the draft FTAA text that would ensure any continued role for civil society once the agreement went into effect. At the company level, neither NAFTA nor the draft FTAA offer any consultation rights to workers.

Conclusion

There are many historical, economic, and cultural differences between Europe and the Americas that would make it both foolhardy and unrealistic to attempt to simply replace the NAFTA model with the EU approach. However, one could argue that the current moment is an auspicious one for moving towards a new, broader approach to integration that would draw general lessons from the EU experience.

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[35] Council Directive 94/45/EC of 22 September 1994 on the Establishment of a European Works Council or a Procedure in Community-scale Undertakings and Community-scale Groups of Undertakings for the Purposes of Informing and Consulting Employees, 1994 1994 O.J. (L 254).

[36] Peter Kerckhofs, *European Works Councils – Facts and Figures*, European Trade Union Institute, Brussels, Nov. 2002.

First of all, it is becoming increasingly difficult for the U.S. government to continue to advance an agenda based on narrow trade and investment liberalization rules. FTAA talks are currently stalled, as well as those at the global level in the World Trade Organization. The current approach is also increasingly unpopular among the U.S. public. A recent Zogby poll, for example, indicated strong resistance to the Bush Administration's goal of expanding NAFTA. The poll found that half of Americans oppose NAFTA expansion, compared with only 31 percent in favor. And those who described NAFTA as a job-destroyer outnumbered those who saw it as a job-creator by 3 to 1.[37] Given these obstacles, it seems sensible for negotiators to broaden the talks to consider alternative approaches.

Secondly, at a time when the U.S. government is largely focused on the war on terrorism, it is important to draw from the EU's experience in promoting stability and harmony among its member states. As Bush Administration officials have pointed out, there is an inextricable link between global security and economic prosperity. For example, Secretary of State Colin Powell stated at the 2002 World Economic Forum: "we have to realize that terrorism really flourishes in areas of poverty, despair, hopelessness—where people see no future."[38] Applying the lessons of Europe's experience in reducing disparity to the Americas region could be a first step in a new, long-term international security strategy based on cooperation and solidarity. This could help make Americans not only safer but more economically secure, since the current gaps in standards make it extremely difficult to reduce incentives for companies to export U.S. jobs to areas of low wages and lax environmental enforcement. The EU experience also demonstrates the benefits that accrue to richer countries when their neighbors can better afford to purchase their products and services.

Thus, given the current conflicts over the proposed FTAA, leaders of the Americas would do well to take a break from the wrangling and begin a discussion of alternative paths, including Europe's concrete experience in pursuing a broader approach to social and economic integration.

[37] Zogby International, *Majority of Americans Oppose Expanding NAFTA to Other Latin American Nations* (Dec. 12, 2003), *available at* http://www.zogby.com/news/ReadNews.dbm?ID=769.

[38] Remarks at the World Economic Forum, Feb. 1, 2002, *available at* http://www.fednews.com.

THE FREE TRADE AREA OF THE AMERICAS: AN IDEA WHOSE TIME HAS COME – AND GONE?

David A. Gantz†

Introduction

The Free Trade Area of the Americas ("FTAA") was conceived in December 1994 at a meeting of Western Hemisphere presidents in Miami.[1] The idea was a comprehensive free trade agreement based closely on NAFTA, which had gone into force at the beginning of 1994.[2] As envisioned in the early years, the FTAA would have covered not only trade in manufactured goods, but also trade in agriculture, services, unfair trade practices, investment, intellectual property, government procurement, competition rules and dispute settlement.[3] The FTAA was to be completed by 2005. However, despite a continuing series of negotiations—including nine negotiating groups over the past nine years and the production of hundreds of pages of heavily bracketed text—disappointingly little real progress has been made. This essay seeks to explain why the FTAA negotiating process has foundered in recent months and is not likely to succeed in the foreseeable future.

This analysis can be accomplished most effectively by viewing the FTAA as one of three separate but related "tracks" of international trade negotiations: global, regional and bilateral. The United States and several other countries in the Western Hemisphere—Canada, Mexico and Brazil, in particular—effectively are participating in this three-track process. For example, each is participating in the WTO's Doha Development Round ("Doha"), the FTAA, and a series of bilateral free trade agreements.[4] Notwithstanding their apparent independence,

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[1] First Summit of the Americas, Declaration of Miami, Dec. 19-11, 1994, at 2-3, *available at* http://www.ftaa-alca.org; *see* Kevin Kennedy, *The FTAA Negotiations: A Melodrama in Five Acts(Keynote Address)*, 1 LOYOLA U. CHI. INT'L L. REV. 2 (2004).

[2] North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

[3] Summit of the Americas Trade Ministerial Joint Declaration, Denver, Colorado, Jun. 30, 1995, *available at* http://www.ftaa-alca.org, paras. 5, 7.

[4] The same could probably be said for the European Union, with its participation in the WTO's

these tracks are closely related and inter-dependent, especially for the United States. In particular, political realities related to agricultural subsidies and to agricultural market issues in the United States and the European Union ("EU") are common to both Doha and the FTAA,[5] and to some extent to the bilateral free trade agreement ("FTA") track as well. At one time, it was believed that all of these tracks showed the promise of significant trade liberalization, but both the FTAA and Doha have been fraught with challenges which to date have retarded any significant progress.

Accordingly, after a brief review of Doha and of the United States' bilateral trade initiatives, I will discuss the following:

1. The current status of the FTAA negotiations and the nature of the impasse;
2. Political factors in the United States, the EU[6] and Brazil that are inhibiting trade negotiations both at the WTO and within the Western Hemisphere;
3. How other U.S. global and bilateral initiatives relate to the FTAA, or at least to some of the FTAA's goals; and
4. Who, if anyone is hurt by the lack of an FTAA?

Two caveats. First, this essay relies heavily on current developments as of late March 2004. Whether later developments in 2004, 2005 and afterwards will prove this assessment flawed remains to be seen. It is possible, for example, that a near miracle will occur, with the EU, United States and Brazil's G-20 suddenly reaching agreement on agricultural market access, which then would permit the Doha negotiations to go forward. I hope this happens, but I don't consider it likely.

Second, this essay is not intended as a comprehensive discussion of the FTAA content and ensuing legal and policy issues; for that discussion, the reader is referred to the excellent presentations included in this symposium issue, beginning with the initial "keynote" address of Professor Kevin Kennedy.

The Doha Development Round

The Doha Development Round of WTO negotiations was initiated in November 2001, in Doha, Qatar, with a broad but vaguely-worded agenda covering, *inter alia*, agriculture, services, market access for non-agricultural products, intellectual property, investment, competition policy, transparency in

Doha Development Round, the expansion of the European Union to twenty-five members from the present fifteen, and newly-announced regional trade negotiations in Africa. *See* Renee Cordes, *EU Sets Talks With 16 African Countries; Sees Economic Strength in Region as Goal,* 21 Int'l Trade Rep. (BNA) 291 (Feb. 12, 2004), at 1. Likewise, Japan is pursuing FTAs with Mexico, Korea, Thailand and several other Asian nations. *See* Martin Fackler, *Japanese Farmers Lose Clout*, Wall St. J., Feb. 20, 2004, at A-10.

[5] *See* David Haskel, *Mercosur Says Same Farm Trade Issues Causing Failure at Cancun Threaten FTAA*, 20 Int'l Trade Rep. (BNA) 1666 (Oct. 9, 2003).

[6] Although the EU is not going to be a member of the FTAA, EU policies as they relate to the WTO negotiations are still critical, albeit indirectly, to the FTAA's success, or lack thereof.

government procurement, trade facilitation and WTO rules.[7] This ministerial meeting followed by two years the debacle at Seattle, where none of the principal developed country players, including the United States, the EU and Japan, were willing to make commitments in the agricultural sector, and the U.S. was unwilling to agree to discuss unfair trade practices. The developing countries decided that there wasn't much in the negotiations for them, and balked.[8]

However, two years after Doha, little has been accomplished except for an agreed interpretation of WTO rules to make it less difficult for smaller developing countries to import generic pharmaceutical products produced under compulsory licensing agreements in circumstances where the countries are unable to manufacture the drugs themselves.[9] In Cancun, Mexico, in September 2003, it became increasingly clear that once again the United States and the European Union were not willing to commit to reducing agricultural subsidies or increasing agricultural market access sufficiently to convince the major developing country members of the WTO—led by Brazil, India, South Africa and Egypt and calling themselves the "Group of 20"—to move forward on services, intellectual property, or the "Singapore Issues" (investment, competition policy, transparency in government procurement, and trade facilitation).[10] A dispute over U.S. and other member subsidies for cotton also became contentious at Cancun, particularly for sub-Saharan African cotton growers seeking the elimination of U.S. cotton subsidies (over $2 billion per year) and financial compensation during any phase out period.[11]

Six months later, little progress has been made at the WTO toward resolving the impasse on agriculture and the Singapore issues. The European Union has indicated that it is prepared to abandon its demand for discussions for two of the Singapore issues, competition policy and investment, but continues to resist setting a date certain for the elimination of all agricultural export subsidies.[12] The United States has never had a serious interest in pursuing either investment

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[7] *See* Ministerial Declaration, Nov. 14, 2001, WT/MIN(01)/DEC/1, at 2-6.

[8] *See* David A. Gantz, *Failed Efforts to Initiate the 'Millennium Round' in Seattle: Lessons for Future World Trade Negotiations,* 17 ARIZONA J. INT'L & COMP. L. 349 (2000).

[9] *See* Council for TRIPS, Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and public health, Aug. 30, 2003, IP/C/W/405, *available at* http://www.wto.org.

[10] *See, e.g.,* Daniel Pruzin & Gary G. Yerkey, *WTO Talks Crashed When Developing Nations Balked at Taking Up some "Singapore Issues,"* 20 Int'l Trade Rep. (BNA) 1533 (Sep. 18, 2003), at 1-3; Ed Taylor, *Brazilian Officials Praise, Defend Leading Role in Cancun Ministerial Talks,* 20 Int'l Trade Rep. (BNA) 1596 (Sep. 25, 2003), at 1-2; [WTO Director General] Supachai Panitchpadki, *Cancun: The Real Losers are the Poor,* Sep. 18, 2003, *available at* http://www.wto.org.

[11] *See* Daniel Pruzin, *Quad Group, China, African Countries to Meet to Discuss Easing Cotton Trade,* 21 Int'l Trade Rep. (BNA) 458 (Mar. 11, 2004).

[12] *See* Christopher S. Rugaber, *Lamy Urges WTO Members To Reach Framework Agreement by May,* 21 Int'l Trade Rep. (BNA) 393 (Mar. 4, 2004).

or competition issues at the WTO.[13] My sense is that there remains considerable opposition to discussions of transparency in government procurement, but not much to discussions of trade facilitation. However, agricultural subsidies and agricultural market access remain the key issues, and most members have rejected United States and European Union proposals to set a date for a new ministerial meeting.[14]

A Network of U.S. Free Trade Agreements?

What is now becoming a United States' network of free trade agreements began in the mid-1980s with Israel[15] and Canada,[16] but the crown jewel is, of course, NAFTA. An agreement with Jordan was concluded in 2001,[17] for political as well as economic reasons. The Clinton Administration began efforts near the end of its term to negotiate comprehensive agreements with Singapore and Chile, based on NAFTA. The Singapore and Chile Agreements were completed by the Bush Administration and went into force January 1, 2004.[18] An agreement with the Central American nations (Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica)—again based on NAFTA—has been concluded,[19] and the Dominican Republic has agreed to be incorporated as a CAFTA party.[20] Negotiations with Australia were concluded in February 2004, and with Morocco in March.[21] Others are underway or planned with Colombia, Ecuador, Bolivia and Panama in this hemisphere, and with Morocco, Bahrain, Thailand and the nations of the South African Customs Union, and perhaps

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[13] *Aldonas Says Lack of Early EU Singapore Deal Aided WTO Collapse,* Inside U.S. Trade (Sept. 19, 2003), *available at* http://www.insidetrade.com.

[14] *See* Daniel Pruzin, *WTO Members Defer Making Decision on U.S. Request to Set Date for Ministerial,* 21 Int'l Trade Rep. (BNA) 303 (Feb. 19, 2004).

[15] U.S.-Israel Free Trade Agreement, Aug. 19, 1985.

[16] Free Trade Agreement, Dec. 22-23, 1987 and Jan. 2, 1998 [Can.-U.S.] 27 I.L.M. 281 (1998).

[17] Agreement Between U.S. and Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, Dec. 17, 2001.

[18] United States - Chile Free Trade Agreement, Jun. 6, 2003, *entered into force Jan. 1, 2004, available at* http://www.ustr.gov/new/fta/Chile/text/index.htm (visited Jun. 12, 2003); United States - Singapore Free Trade Agreement, May 6, 2003, *entered into force Jan. 1, 2004, available at* http://www.ustr.gov/new/fta/Singapore/20text%20final.PDF (visited Jun. 12, 2003).

[19] *See U.S. & Central American Countries Conclude Historic Free Trade Agreement,* USTR Press Release, Dec. 17, 2003; *U.S. and Costa Rica Reach Agreement on Free Trade,* USTR Press Release, Jan. 25, 2004; Central American Free Trade Agreement [draft], Jan. 28, 2004, *all available at* http://www.ustr.gov.

[20] *See U.S. & Central American Countries Conclude Historic Free Trade Agreement, supra* note 19 at 3 ("The United States will begin negotiations with the Dominican Republic early next year, and will seek to bring that country into the CAFTA negotiations next year, prior to Congressional action on legislation to approve and implement the agreement"); U.S. & Dominican Republic Conclude Talks Integrating the Dominican Republic into the North American Free Trade Agreement, USTR Press Release, Mar. 15, 2002, at 1.

[21] *See* U.S. and Australia Complete Free Trade Agreement, USTR Press Release, Feb. 8, 2004, at 1; U.S. and Morocco Conclude Free Trade Agreement, USTR Press Release, Mar. 2, 2003, at 1.

others, elsewhere.[22] The FTAs, discussed further below, have moved forward in large part because the parties are willing to conclude comprehensive trade agreements covering not only industrial goods but services, intellectual property, investment, and the like, even without receiving significantly better U.S. market access for agricultural products.

The Stalled FTAA Negotiations

This author is not an optimist when it comes to the FTAA negotiations. Any pessimism was reinforced by the comments of Brazilian Ambassador Adhemar Bahadian at the Pueblo, Mexico, vice-ministerial meeting the week of February 2, 2004. Ambassador Bahadian was quoted as comparing the FTAA to "a stripper in a cheap cabaret. At night under the dim lights, she is a goddess. But in the daytime she is something different. Maybe not even a woman."[23] This kind of "endorsement" by one of the two major players is not a hopeful sign, even if the remarks were made in jest.

In this author's estimation, there will be no FTAA, or even an "FTAA-Lite" or FTAA "ultra-lite" in 2004 or 2005, and perhaps not even after that. Support within the Western Hemisphere is waning. A Cancun-like debacle was avoided at the November 2003 FTAA ministerial meeting in Miami only because the United States agreed to accept watered-down language in the Communiqué, permitting FTAA members to accede to "different levels of commitments" and engage in "plurilateral" negotiations. Consequently, an agreement on investment protection, for example, would have to be accepted only by those countries that favor it. The earlier "single undertaking" concept was dropped, and it remains unclear whether nations opting out of certain commitments might also lose certain benefits. (The United States view is "yes"; Brazil says "no"). There is no consensus on what a "balanced set of rights and obligations applicable to all countries" really means.[24]

The weakness of the collective commitment to the FTAA was even more evident in the Summit of the Americas "Declaration of Nuevo Leon" in mid-January 2004, where the Presidents could do no more than "welcome the progress achieved to date toward the establishment of a Free Trade Area of the Americas" and reiterate the earlier agreed (January 2005) framework and calendar for completing the negotiations. Even there, Venezuela dissented, and Brazil refused to agree to explicit mention of the date.[25]

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[22] *See Status of U.S. Trade Agreement Negotiations*, 21 Int'l Trade Rep. (BNA) 168 (Jan. 4, 2004).

[23] Jane Bussey, *Brazil, U.S. Deadlocked on Even of FTAA Deadline,* Miami Herald (Electronic Ed.), Feb. 6, 2004, at 2.

[24] *See* Rossella Brevetti, *FTAA Trade Ministers Agree to Scale Back Framework for FTAA at Shortened Ministerial*, 20 Int'l Trade Rep. (BNA) 1960 (Nov. 27, 2003); Ministerial Declaration, Free Trade Area of the Americas, Eighth Ministerial Meeting, Nov. 20, 2003, *available at* http://www.ustr.gov.

[25] *See Summit of the Americas Concludes with Careful Wording on FTAA,* Inside US Trade

The vice ministers' meeting in Puebla, Mexico, several weeks later, resolved nothing. The vice-ministers, not surprisingly, were unable to flesh out the sparse details of the November 2003 ministerial declaration and the concept of a "common set of rights and obligations." There was no evidence that either the United States or Brazil had made significant changes in their negotiating positions, other than by beginning to take items *off* the negotiating table. The negotiations were simply suspended for a few weeks, without resolving the coverage issues.[26] Not surprisingly, efforts to negotiate a two-tiered FTAA package, with an "FTAA-Lite" applicable to all 34 nations and more significant commitments only for those 14 nations still wanting a comprehensive agreement, are foundering. The U.S. concept of a balanced set of rights and obligations is really very simple. As a U.S. official noted, "if a country is not willing to go to a very high standard on market access for services, they should not expect a very high standard for market access in goods."[27] Both the United States and Canada continue to resist pressures from the Mercosur nations to reduce or remove tariffs on agricultural products that currently enjoy significant price supports and subsidies, such as beef, soybeans and dairy products,[28] at least in the absence of a comprehensive agreement covering the issues important to them: investment, services, intellectual property and so on.

One result of the stalemate has been increasing talk of this two-tiered FTAA, in which the United States, Canada, Mexico, Chile, Costa Rica and ten other nations would seek a "plurilateral" agreement[29]—binding on themselves but not on the other 21 countries in the FTAA group—that would cover services and investment, as well as market access in goods.[30] The United States is party to or has already negotiated free trade agreements with seven of this group—Canada, Mexico, Chile, Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica—and is in the process of negotiating FTAs with all of the rest,[31] which raises the question as to why a separate agreement, with or without the "FTAA" label, among the 14 nations is necessary or even useful.

While some U.S. officials profess confidence that FTAA negotiators will be

(Electronic Ed.), Jan. 16, 2004, *available at* http://www.insidetrade.com; Declaration of Nuevo Leon, Jan. 13, 2004.

[26] Joint Communique of the Co-Chairs of FTAA TNC in Puebla, Feb. 6, 2004.

[27] Transcript, Background Teleconference Call by a "U.S. Trade Official" Regarding the Free Trade Area of the Americas (FTAA) Trade Negotiations Committee Meeting in Puebla, Mexico, Feb. 7, 2004, at 1, *available at* http://www.insidetrade.com.

[28] *See* Jane Bussey, *Free Trade Talks End Much as They Began*, Miami Herald (online ed.), Feb. 8, 2004.

[29] At the WTO, the "multilateral trade agreements" are mandatory and binding for all Members. The "plurilateral trade agreements"– addressing government procurement, civil aircraft, dairy products and bovine meat– are optional; only those interested need sign on.

[30] *See* John Nagel & Christopher S. Rugaber, *FTAA Talks Make Little Progress; U.S. to Begin Negotiations with 13 Nations,* 21 Int'l Trade Rep. (BNA) 279 (Feb. 12, 2004), at 1.

[31] Panama, the Dominican Republic, Bolivia, Colombia, Ecuador and Peru. *Id.*

able to bridge their differences,[32] this is not a uniform view; Argentina's deputy minister has suggested that "[w]e've reached an impasse."[33] It seems quite clear at this writing—early April 2004—that the talks remain stalled over agriculture subsidy and market access issues,[34] and that there is little prospect of significant progress unless and until the United States and/or Brazil change their positions.[35]

Politics in the United States, Europe and Brazil

Why the impasse? The reasons are political and economic, mostly domestic, and arise primarily with regard to the United States, Brazil and the European Union. None of the prospective FTAA members, other than the United States and Brazil, really have a major role in deciding whether there will ultimately be an FTAA. Mexico, along with Canada and the United States, has advocated a comprehensive FTAA, mostly because it has an important political role supporting the economic interests of smaller nations in the Hemisphere. But Mexico probably does not want or need an FTAA; why should they share their current NAFTA preferential access to U.S. and Canadian markets with any additional competitors—particularly Brazil—than is already the case under the various unilateral programs, such as the U.S. Caribbean Basin Initiative? In any event, Mexico has its own broad network of FTAs with Chile, Venezuela, Colombia, Central American and other nations,[36] and has been seeking to conclude negotiations on an FTA with Japan for some time.[37]

From a strictly economic point of view, most of the other nations in the Western Hemisphere are not sufficiently important traders for the United States to care. In any event, they can probably be gathered in through the current series of FTA negotiations, in which the United States decidedly has the upper hand.

United States - A Weakened Commitment to Freer Trade

More broadly, the ability of the United States government to conclude international trade agreements has weakened since 1995. The United States

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[32] *See* Rossella Brevetti, *Chief U.S. FTAA Negotiator Confident Countries Will be Able to Bridge Differences*, 21 Int'l Trade Rep. (BNA) 325 (Feb. 19, 2004), at 1.

[33] Bussey, *supra* note 28, at 1.

[34] *U.S. Mercosur Fight Over Agriculture Stalls FTAA Negotiations,* Inside U.S. Trade, Feb. 13, 2004, *available at* http://www.insidetrade.com.

[35] Negotiations remained stalled as of this writing; *see FTAA Meeting Postponed Raising Doubts Over Final 2005 Deadline,* Inside U.S. Trade (Mar. 12, 2004), at 1; *Informal FTAA Talks Fail to Break Deadlock, TNC Again Delayed,* Inside US Trade (Apr. 2, 2004), at 1 (quoting Deputy U.S. Trade Representative Peter Allgeier as indicating that the earliest that the Trade Negotiating Committee meeting was likely to reconvene was "sometime in May."

[36] *See* OAS Foreign Trade Information System (SICE), "Mexico - Free Trade Agreements," *available at* http://www.sice.oas.org.

[37] *See Japan, Mexico to Continue Free Trade Talks After Failing to Agree on Key Commodities,* 21 Int'l Trade Re. (BNA) 446 (Mar. 11, 204).

remains one of the most open markets in the world, with a trade-weighted average applied tariff rate of 1.6 percent, and imports—$642 billion worth in 2003 from middle and low-income nations—continue to support economic development through trade.[38] However, long-standing U.S. policy continues to provide impressive protections to agriculture, steel, textiles and clothing. None of this, even the $1.6 billion in annual cotton subsidies that are destroying African farmers, is likely to change during a Presidential election year. CAFTA's provision for increasing the regional sugar quotas to just over one percent of the U.S. market sparked a strong adverse reaction from the U.S. sugar industry,[39] and the apparel provisions attracted the ire from textile producers and workers.[40] Australia, despite its close security and political relationship with the United States, had to settle for an FTA that provides *no* additional access to the U.S. sugar market, and only modestly increased access to the beef and dairy product markets.[41] It has been reported that Karl Rove, senior adviser to President Bush, instructed Ambassador Zoellick that increased sugar quotas could not be part of the FTA with Australia.[42]

Needless to say, one cannot blame either the Republicans or the Democrats alone for protectionism. The 2002 farm bill, for example, which increased annual farm subsidies by more than $10 billion annually to a level of about $19 billion annually, prompting criticism by Brazil and others for potentially undermining FTAA negotiations,[43] was a broadly bipartisan effort.[44]

The United States is best at concluding major trade agreements when there is both a political and an economic imperative to do so, as with NAFTA, the Uruguay Round of GATT negotiations, and the bilateral accession agreement

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[38] Linnet Deily, *Opening Statement [WTO] U.S. Trade Policy Review,* Jan. 14, 2003, at 5, *available at* http://www.wto.org.

[39] *See* Rossella Brevetti, *Costa Rica and U.S. Reach Trade Deal in CAFTA Negotiations,* 21 Int'l Trade Rep. (BNA) 200 (Jan. 29, 2004), at 2.

[40] *See* Elizabeth Becker, *A Pact on Central American Trade Zone, Minus One,* N.Y. Times, Dec. 18, 2003, at C-1.

[41] *See U.S., Australia Reach Deal That Excludes Sugar; Offers Some Beef, Dairy Openings,* Inside US Trade, Feb. 8, 2004, *available at* http://www.insidetrade.com. Australia currently enjoys a relatively large sugar quota of 87,000 tons. *See also* Paul Blustein, *U.S., Australia Agree on Free-Trade Pact; Bush Administration Maintains Protection Against Sugar, Beef, Dairy Imports,* Wash. Post, Feb. 9, 2004, at A-17.

[42] *Top Political Advisor Played Role in Removing Sugar from Australia FTA,*, Inside US Trade, Feb. 13, 2004, *available at* http://www.insidetrade.com.

[43] *See* Chris Rugaber, *Zoellick Defends Farm Bill Against Foreign Critics, Says Other Nations Worse*, 19 Int'l Trade Rep. (BNA) 829 (May 9, 2002). The United States level under the WTO's Agreement on Agriculture for trade-distorting subsidies is $19.1 annually, and some believed that the new legislation would result in the United States exceeding this limit. *Ibid.* (quoting Reps. Cal Dooley (D-California) and John Boehner (R-Ohio) that "[t]here is little doubt that under this bill we will exceed" the $19.1 billion limit).

[44] *See* Derrick Cain, *Farm Bill Conferees Complete Details; House, Senate Likely to Vote This Week*, 19 Int'l Trade Rep. (BNA) 794 (May 2, 2002) (quoting then Senate Majority Leader Tom Daschle (D-S.D.) as indicating that Democrats would "overwhelmingly" support the bill).

with China. Even the most free trade oriented administrations—and the Bush Administration does not really fall into that category despite the herculean efforts of United States Trade Representatives Ambassador Zoellick—are not likely to brave domestic political opposition unless there is enormous pressure from the business community to move forward and some semblance of bipartisan support in Congress. In this author's opinion, the business community, despite some support, has never been solidly behind an FTAA; during most of the last half of the 1990s their major concern, for perfectly good economic reasons, was China. Business interests are even less likely to provide strong support for an "FTAA-Lite" that fails to deal with investment protection, intellectual property, and services, among others. As a National Association of Manufacturers Vice President said after Miami, "This is not what we wanted, and we have serious concerns, but the alternative, allowing the talks to collapse because a way could not be found to bridge the gap with Brazil, would have been a disaster for all."[45]

Certainly, nothing has changed in this respect during the three years since China acceded to the WTO. It really is not fair to blame President Clinton for not pushing forward with the FTAA: two of his major constituencies, the unions and environmentalists, were generally opposed; no one in the Clinton Administration or Congress was prepared to publicly tout the benefits of freer trade; and the business community sat on its hands. It is also worth remembering that President Bush's "Trade Promotion Authority" (formerly "fast track") was passed in the House of Representatives in 2002 by only three votes, despite the Administration's decision to offer protection to the domestic steel industry.[46]

One sees today within the United States a re-evaluation of the United States' post World II support for increased trade through new trade agreements. Public support is declining; at least 40% of U.S. citizens believe trade barriers are being lowered too quickly, even though most favor increased trade in principle.[47] President Bush's freer trade policies, conservative and contradictory as they are, are not likely to help him with the Presidential election in November.[48] The presumed Democratic candidate, John Kerry, is more pro-trade than most of his Democratic rivals, but he, like Presidential candidate Clinton in 1992, is demanding that future trade agreements contain "strong labor and environmental standards," and has called for a 120-day review of all existing trade agreements

[45] *NAM Lends Support to FTAA Declaration,* Nov. 19, 2003, Press Release quoting Frank Vargo, at 1.

[46] 19 U.S.C. §§ 3801 et seq. (2002). The House vote was 215 to 212; the Senate approved TPA by a vote of 64-34. *See* Rossella Brevetti, Fawn Johnson & Brett Ferguson, *Bush Signs TPA Bill After Senate Approval, Will Pursue Free Trade with Other Nations,* 19 Int'l Trade Rep. (BNA) 1378 (Aug. 8, 2002).

[47] *See* Gary G. Yerkey, *President Bush's Handling of Trade Issues Seen as Negative for Re-election Prospects*, 21 Int'l Trade Rep. (BNA) 181-182 (Jan. 29, 2004).

[48] *Id.*

to ensure that other parties are meeting their labor and environmental obligations.[49] (As far as this author is aware, Kerry has not said what he would do if he finds a lack of compliance.) On the other hand, Kerry's only real competition for most of the primary season, Senator John Edwards, was highly critical of NAFTA and other trade agreements when campaigning. Nonetheless, Edwards, like Kerry, supported China's accession to the WTO in the Senate.[50] Edwards' written position paper was somewhat milder, stating "Our country needs to enforce the trade agreements that we have on the books."[51] Kerry, in particular, appears to be focusing more on changing tax "loopholes" and other domestic laws that encourage the shifting of American jobs overseas, rather than on more restrictive trade agreements.[52]

Nevertheless, the job issue is increasingly a campaign issue. Recently, the migration of a relatively few but high-paying service jobs—perhaps 250,000 to 500,000 over the past three years—to countries such as India seems to be having a disproportionate effect on traditional supporters of free trade in business, Congress and the Executive Branch, including Senators Kerry and Edwards. Perhaps this is because, as some have suggested, their neighbors are directly affected by loss of these positions.[53] In any event, much of this criticism is, no doubt, misplaced. Sending such service jobs overseas is, as Professor Jagdish Bhagwati has observed, "no different than importing labor-intensive textiles and other goods. . . ."[54] Moreover, U.S. trade policies themselves create job losses; employment in the candy industry in Chicago, for example, has fallen from 15,000 in 1970 to less than 8,000 today, largely because U.S. tariff-rate quotas on imported sugar make sugar—the primary ingredient in the candies produced by Fannie May and Lifesavers—cost two to three times the world market price.[55]

Services job outsourcing alone probably would not have much impact, but it should not be ignored given the ever-present protectionist pressures in key sectors, uneasiness over slow domestic job growth during the current U.S.

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[49] *See* John Kerry for President, *International Trade*, undated, *available at* http://johnkerry.com/issues/trade (visited Feb. 19, 2004).

[50] Katharine Q. Seelye, *Here's Where Kerry and Edwards Stand*, N.Y. Times, Feb. 19, 2004, at A-20. Senator Edwards opposed Trade Promotion Authority in 2002 and opposed the approval of the Chile and Singapore FTAs.

[51] *See* John Edwards for President, *John Edwards' Plan to Create Jobs and Help Working Americans*, undated, *available at* http://johnedwards2004.com.

[52] *See* Jonathan Weisman, *Democrats Can't Get Firm Grip on Jobs Issue,*, Wash. Post, Feb. 19, 2004, at A-1; *John Kerry's Plan to Create 10 Million Jobs* (undated) (detailing Kerry's international tax reform plans), *available at* http://www.johnkerry.com.

[53] Such concerns were apparently raised repeatedly a Davos, Switzerland, in January, 2004, by persons who are overwhelmingly free traders. *See* Bob Davis, *Migration of Skilled Jobs Abroad Unsettles Global-Economy Fans*, Wall St. J., Jan. 26, 2004, at A-1.

[54] Jagdish Bhagwati, *Why Your Job Isn't Moving to Bangalore,*, N.Y. Times, Feb. 15, 2004, Sec. 4, at 11.

[55] *See* George F. Will, *Sweet and Sour Subsidies*, Wash. Post, Feb. 12, 2004, at A-37.

economic recovery, concerns over trade with China, union fears over lost manufacturing jobs, and the continuing uneasiness of environmental groups with trade agreements. The problem is not limited to election year politics. Trade Promotion Authority is renewable from June 1, 2005 to June 1, 2007 unless Congress adopts a disapproval resolution.[56] Assuming that either President Bush or his successor obtains Congressional support for renewal—by no means certain—the "window" of opportunity for concluding the Doha Development Round, the FTAA and most bilateral FTAs will exist only until mid-2007.

Historically, the United States' interest in the well-being of Latin America and the Caribbean ebbs and flows. This author is old enough to remember the Alliance for Progress in the 1960s, the Spirit of Tllateloco in the early 1960s, and Ronald Reagan's Caribbean Basin Initiative in the early 1980s (the only one that has become long term). If one looks at the current FTAA-oriented cycle, beginning in December 1994—interrupted for most practical purposes for nearly two years after September 11, 2001—one wonders whether it can be sustained in the absence of progress with the FTAA for another several years. The commitment of a few high administration officials—Ambassador Zoellick, Deputy USTR Peter Allegier and Under Secretary of Commerce Grant Aldonas—is unquestioned, but a broader commitment with the United States government is lacking. It was no surprise to many that the general atmosphere at the Monterrey, Mexico, summit in mid-January 2004 was chilly. Skepticism is growing within the region of the Washington formula for economic development – more open markets, privatization, and balanced budgets ("Do as we say, not as we do!" on that one).[57]

Brazil - Freer Trade Under Certain Conditions

Brazil has been reluctant, and even ambivalent, about going forward for both economic and political reasons. Economic, because Brazil sees little benefit in an FTAA unless it deals with agricultural subsidies, agricultural market access (to the U.S. and Canada, not to Brazil, of course), and trade remedies that restrict Brazilian exports of sugar, citrus fruits, orange juice, steel and other products to the United States market. Brazil has brought the first WTO agricultural subsidies case—Upland Cotton—against the United States; with the expiration of the "Peace Clause" in the Agreement on Agriculture, more may be coming.[58] Another irritant [The most] [recent irritant] is a recently initiated U.S. anti-dumping case against shrimp imported from Brazil, as well as Ecuador, China,

[56] *See* Rossella Brevetti et al, *Bush Signs TPA Bill, supra* note 46.

[57] Geri Smith, *The Latin Chill May Get Even Frostier; Bush's Frigid Reception t the Monterrey Summit May be Just the Tip of the Iceberg, as Latin Leaders Express Doubts About the U.S. Agenda,* Business Week Online, Jan. 26, 2004.

[58] *See* WTO Agreement on Agriculture, Arts. 1(f), 13; *United States - Subsidies on Upland Cotton [Brazil],* WT/DS267, *both available at* http://www.wto.org.

India, Thailand and Vietnam.[59] Brazilian trade negotiators are also aware that if the U.S. were to make difficult concessions in these areas, there would be pressure on Brazil to accept investment protection, better intellectual property protection and the opening of its own highly protected domestic agricultural market to products from both the United States and from developing nations in the region. President Lula da Silva, a populist who has moved well toward the center during his first year in office, has pleased the domestic and foreign financial sectors with his economic policies and high interest rates that have limited inflation. However, he now faces dissent within his cabinet and among his traditional supporters.[60] Nine out of ten Brazilian citizens are said to be opposed to the FTAA.[61] He thus has little to gain from an FTAA unless it means very significant job and export growth for Brazil. It is not surprising that Brazil has sought a scaling back of the FTAA and would prefer to deal with many issues, such as agriculture, services, investment and trade remedies, only in the WTO.[62]

Brazil's go-slow posture is political as well as economic. Brazil's plan since 1995 has been to be in a position to negotiate on behalf of all of South America, as a major player on the international scene. As the *de facto* leader of Mercosur (with partners Argentina, Paraguay and Uruguay), Brazil spearheaded the conclusion of FTAs with Chile and Bolivia, and more recently, with the rest of the Andean Group (Venezuela, Colombia, Ecuador and Peru). However, many details with regard to the Andean Group agreement remain to be worked out, so Brazil is not in a hurry. Additional time would permit Mercosur to move forward on long-pending negotiations for an FTA with the EU, although one wonders how useful such an FTA would be without significantly improved access for Mercosur to the EU agricultural markets.[63] Additional time would also permit Mercosur to continue to deal with the after-effects of the Argentina financial crisis and to work on the many Mercosur implementation issues that remain.

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[59] International Trade Administration, *Notice of Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp From Brazil, Ecuador, India, Thailand, the People's Republic of China and the Socialist Republic of Vietnam,* 69 Fed. Reg. 3876 (Jan. 27, 2004).

[60] Matt Moffett, *Economic Discord Begins to Emerge in Brazil's Cabinet*, Wall St. J., Feb. 6, 2004, at A-15.

[61] *See* Jane Bussey, *Brazil, U.S. Deadlocked on Eve of FTAA Deadline,* Miami Herald (Electronic Ed.), Feb. 6, 2004, at 2.

[62] *See* Ed Taylor & David Haskel, *Brazil's Lula, Argentine Officials Laud FTAA Framework, But Brazilian Businesses Uneasy,* 20 Int'l Trade Rep. (BNA) 1961 (Nov. 27, 2003); Peter Menyasz, *Canadian Officials See Brazil- U.S. Face-Off on FTAA Scope as Key to Miami Ministerial,* 20 Int'l Trade Rep. (BNA) 1883 (Nov. 13, 2003).

[63] Karl Friederich Falkenberg, the director of free trade agreements for the European Commission, was quoted in mid-March as saying that the EU will have a "difficult time" improving its offer in the area of agriculture. *See EU, Mercosur to Swap Improved Offers in Free Trade Talks This April, Official Says*, 21 Int'l Trade Rep. (BNA) 439 (Mar. 11, 2004).

Moreover, Brazil is thinking about non-global, non-regional free trade areas. President Lula da Silva has proposed an FTA among the members of the G-20 group, and Brazil, through Mercosur, is already negotiating FTAs with two G-20 partners, India and South Africa.[64] Whether a G-20 FTA is realistic remains to be seen. The group was formed primarily to deal with agricultural subsidies and market access issues. Moreover, some of its members — Bolivia, Chile, Mexico and Thailand — already have or are negotiating FTAs with the United States.

European Union — Distracted by Expansion

The EU is important because there can be no progress in the WTO's Doha Development Round unless and until the EU agrees to eliminate agricultural export subsidies by a certain date, and to reduce other agricultural subsidies. Since the United States cannot rationally reduce its own agricultural subsidies unilaterally, real progress on an FTAA, at least anything other than an FTAA-Lite, depends on progress in Geneva. However, now is not a good time for EU concessions on agriculture. In May 2004, ten additional members,[65] and millions of additional farmers (the majority in Poland), will join the EU.[66] Agricultural issues, as well as the new "Constitution" and voting rights, will take further time to negotiate, even though pressures to reduce the enormous cost of an agricultural subsidy program three times the size of the United States' program will eventually grow.[67] The new members' GDP is about 40% of that of the current EU membership. Many, including former Brazilian president Henrique Cardozo, expect the EU expansion to result in "less European attention [to Latin America]" (and less financial aid), perhaps for years or decades.[68] Also, the European Commission—the principal executive body of the EU—will experience a change in governance in November 2004.[69]

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[64] Ed Taylor, *Brazil's Lula Proposes G-20 Trade Area; Lamy Says New EU Subsidy Proposal Coming,* 20 Int'l Trade Rep. (BNA) 2056 (Dec. 18, 2003). The membership of the G-20 varies somewhat from week to week, but as of December 2003 included, in addition to Brazil, Argentina, Bolivia, Chile, Cuba, Egypt, Indonesia, Mexico, Pakistan, Paraguay, the Philippines, South Africa, Thailand, Venezuela and Zimbabwe. *Id.*

[65] Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic and Slovenia; *see* Enlargement, *available at* http://europa.eu.int/comm/enlargement/enlargement.htm.

[66] European Commission, *Relations with Poland*, undated, *available at* http://europa.eu.int/comm/enlargement/poland/index.htm . (Poland has a population of 38.6 million; a fifth of all working Poles are engaged in agriculture.)

[67] EU Trade Commissioner Franz Fischler contends that the EU has already reduced the amount it spends on agricultural subsidies as a percentage of the area's gross domestic product, and that per capita amounts will be diluted further when four million farmers are added to the EU population in May 2004. He also claims that the EU is preparing to provide improved market access to cotton and sugar. *See* Elizabeth Becker, *Europe's Farm Minister Says is on U.S. in Subsidy Fight,* N.Y. Times, Feb. 21, 2004, at C-3.

[68] Andres Oppenheimer, *EU's Expansion May Hurt Latin America; The Oppenheimer Report*, Miami Herald, Feb. 1, 2004, at A-17.

[69] *See* Christopher S. Rugaber, *Lamy Urges Members, supra* note 12.

Barring a major change of heart by the United States, Brazil, or both, and despite continued activity of multiple working groups, this author believes all of this means that there will be no significant progress toward the FTAA in the foreseeable future.

The Relationship of FTAA, Doha and the U.S. FTA Program

In retrospect, it was probably unrealistic for the United States and Brazil to contemplate a "comprehensive" FTAA, even in the mid-1990s. The United States cannot, as a practical matter, reduce agricultural subsidies in the FTAA context because the EU would simply flood the region with their subsidized agricultural products. If the agricultural subsidies issues are prerequisites for a comprehensive FTAA, then there simply cannot be meaningful FTAA negotiations unless and until these issues have been resolved on a global basis through WTO negotiations. And the United States *will not* discuss modification of its highly controversial anti-dumping law practices in a regional agreement; there was great Congressional opposition to the decision by Ambassador Zoellick to include dumping in the Doha Declaration in November 2001.[70]

The reaction to CAFTA by the sugar lobby, and Karl Rove's determination not to permit *any* opening in the U.S. sugar market (both noted above) is illustrative. Particularly since Brazil is one of the world's largest sugar exporters, it is difficult to imagine how the United States in the current political situation could provide sufficiently improved access for Latin American agricultural products to satisfy Brazil. The lesson of the Australian FTA is probably much broader than this; it means no serious discussion of agricultural issues at the WTO—or anywhere else—is likely for the United States until well after the November 2004 presidential election.

Similarly, Brazil remains generally opposed to expansion (in the Western Hemisphere or elsewhere) of intellectual property protection, investment protection and government procurement.[71] Even if agricultural market access could be negotiated in an FTAA, the scope of the FTAA would be difficult to establish until the United States and Brazil know the full parameters of agricultural subsidy reduction in the Doha Round, an issue not likely to be resolved for a year or more.

Is an FTAA-Lite Worth the Bother?

An FTAA probably makes economic and administrative sense only if it can make gains in areas not readily achievable at the global level, such as tariff reduction and other trade liberalization in agriculture, manufactured goods,

[70] Daniel Pruzin, *U.S. Seeks to Water Down Antidumping Provisions in Doha Ministerial Statement,* 18 Int'l Trade Rep. (BNA) 1591 (Oct. 1, 2001).

[71] *See* Ed Taylor, *Free Trade Area Meeting Set for February Cancelled Due to Dispute Over Invitation List,* 21 Int'l Trade Rep. (BNA) 60 (Jan. 8, 2004).

services and investment. A reduction of tariffs on industrial goods to zero, for example, is not at all likely in the Doha Round, at least for developing country members, but it was widely assumed that this would be a result of the FTAA. Nor will investment provisions similar to those in NAFTA, Chapter 11 or the various BITs be part of the Doha results, as noted earlier. However, elimination of agricultural tariffs and non-tariff barriers over a 10-15 year period, investment protection, and limited provisions on competition policy *were* all expected to be part of the FTAA; the third FTAA draft contains extensive and heavily bracketed sections revealing substantial disagreements on all three.[72] While elimination of tariffs on non-agricultural goods in the FTAA may still be achievable, agreement among the 34 FTAA countries on agricultural market access, major market opening in services, or on investment no longer seems realistic under today's conditions.

Under these circumstances, the advantages of negotiations among 34 nations in the Western Hemisphere become rather ephemeral. Both variations in level of development and concerns over major issues are almost as great as with the 148 members of the WTO; consequently, a regional negotiation does not appear any more likely to achieve success. As between the two, the United States might as well concentrate—at least for the foreseeable future—on Doha, because the rewards of success there are much broader and because a comprehensive FTAA cannot be negotiated until agricultural subsidies and market access issues are resolved in the WTO.

Nor is the idea of a "plurilateral" FTAA, among the 14 nations willing to negotiate more broadly, particularly attractive. It is not really an "FTAA" if there are only 14 nations, excluding not only Mercosur but all Caribbean nations except the Dominican Republic. For the United States, it would be largely duplicative of NAFTA, CAFTA and those "wheel and spoke" arrangements already planned or under way with the rest of the willing nations. Of course, such an agreement would have some benefit in generating intra-regional trade and investment not involving the United States for nations without extensive bilateral FTAs. For example, a 15-nation free trade agreement in which both Costa Rica and Peru were parties could stimulate trade and investment between Costa Rica and Peru, as well as between Costa Rica and the United States and Peru and the United States.

The FTA Network Alternative - Trade and Economic Development

If neither the FTAA nor Doha move forward, what then? Ambassador Zoellick's strong response is, "we will move toward free trade with can-do countries."[73] If this focus on smaller regional FTAs works—and there are real

[72] Third Draft FTAA Agreement, Nov. 21, 2003, chapters IX, VII, XIX, respectively, *available at* http://www.ftaa-alca.org/FTAADraft03/Index_e.asp.

[73] [U.S. Trade Representative] Robert Zoellick, *America Will Not Wait for the Won't-do Countries,* Financial Times, Sep. 22, 2003, London ed., at 23.

questions regarding Congressional acquiescence—the United States may be able to achieve much of what it once hoped for in the FTAA. Success with smaller regional FTAs would also demonstrate to the recalcitrant members of the Hemispheric and world trading communities that those who "don't play ball" won't have the highest level of access to the U.S. market. While far from an ideal solution, for the time being it appears to be the only game in town.

In the Western Hemisphere alone, as noted earlier, the United States has FTAs in force with Canada, Mexico and Chile. USTR has essentially completed negotiations with Central America (Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica) and the Dominican Republic in a single CAFTA. In a year or two, the United States could have FTA relationships with at least the other fourteen countries in the Western Hemisphere who are part of the FTAA "plurilateral group" noted above, with the United States and those fourteen probably accounting for at least two thirds of total hemispheric exports.[74] And those FTAs, judging from the Chile FTA and CAFTA, *will* be comprehensive agreements, covering trade in goods, agriculture market access (but not U.S. agricultural subsidies), services, intellectual property, investment, and very importantly, trade facilitation measures designed to make it easier for developing countries to take advantage of freer trade.

CAFTA presumably represents the latest thinking in United States views of the appropriate content of FTAs with developing nations in the Western Hemisphere. Much of CAFTA is derived from NAFTA and from U.S. proposals for the FTAA. The departures from NAFTA represent both ten years' experience with NAFTA and with shifting priorities. Central America/Dominican Republic - United States trade is not insignificant, over $31 billion per year in exports and imports, and will undoubtedly increase once CAFTA goes into force.[75] However, increased trade is not the only major focus of CAFTA.

Rather, CAFTA is probably as much a vehicle for economic development as it is for trade expansion *per se*, more so than NAFTA or any other earlier FTA, in such areas as rule of law, "trade capacity building," customs procedures, regulatory transparency, private property rights, competition, "civil society" participation, environmental protection, and labor law.[76] More than forty years

[74] These fifteen nations account for 90.2% of Western Hemisphere exports (to all destinations) (2002 data), WTO, "World Merchandise Exports by Region and Selected Economy, 1992-02," *available at* http://www.wto.org.

[75] *See U.S. & Central American Countries Conclude Historic Free Trade Agreement*, USTR Press Release, Dec. 17, 2003 at 2 (indicating that U.S. trade with Guatemala, El Salvador, Nicaragua and Honduras is approximately $15.4 billion); *U.S. and Costa Rica Reach Agreement on Free Trade*, USTR Press Release, Jan. 25, 2004 at 2 (indicating that U.S. trade with Costa Rica is approximately $6.9 billion annually); *U.S. and Dominican Republic Conclude Trade Talks Integrating the Dominican Republc into the Central American Free Trade Agreement*, USTR Press Release, Mar. 15, 2004, at 2 (indicating that U.S. – Dominican Republic trade is approximately $8.7 billion annually).

[76] *See Strengthening Democracy, Promoting Prosperity; Highlights of Trade Capacity Building*

after the General Treaty on Central American Economic Integration was concluded,[77] the CAFTA, along with promised negotiations in 2004 of an FTA with the European Union, may provide the necessary impetus for the Central American nations to complete the customs union and harmonization of commercial law that was agreed to long ago.

Certainly, CAFTA does not go as far as one might hope in this direction. For example, CAFTA creates various "unfunded mandates"[78] but does not necessarily provide the massive technical assistance to implement the CAFTA nations' new obligations. The U.S. government provided over $61 million in trade capacity building assistance in 2003 (roughly $12 million per Central American nation), and the Inter-American Development Bank has approved over $320 million in "CAFTA-related operations."[79] These amounts reflect a general Bush Administration commitment to increased "trade capacity building" assistance made at the time of the October 2002 FTAA Ministerial meeting.[80] At the same time, a shift in U.S. foreign assistance allocation criteria (to poor countries respecting civil liberties and promoting economic freedom) may actually reduce economic assistance by around 10% to countries such as El Salvador and the Dominican Republic; like most very poor Latin American countries, their per capita incomes are too high to qualify under the new criteria.[81]

Some have suggested that what is [probably] needed is a new, "Marshall Plan" type program for the Western Hemisphere, or something similar to the European Union's Regional Assistance Program through which the wealthier EU member nations provide financial assistance to poorer member nations at the rate of about $227 billion over a five year period.[82] Unfortunately, with U.S. budget deficits and concerns over terrorism, a similar program simply is not going to happen. In any event, such massive aid would probably not have the desired positive impact without accompanying changes in the rule of law, respect for

Initiatives In Support of the US-CAFTA Negotiations, USTR Trade Facts, Jan. 8, 2003; *Free Trade with Central America; Summary of the U.S.-Central America Free Trade Agreement,* USTR Trade Facts, Dec. 17, 2003, at 5-8; U.S. - Central America Free Trade Agreement [draft], Jan. 28, 2004, *all available at* http://www.ustr.gov. *See also* [Assistant Secretary of State] Roger F. Noriega, *The Bush Administration's Western Hemisphere Policy,* Jan. 6, 2004 (Remarks to the Council of the Americas).

[77] Dec. 13, 1960, *available at* http://www.sieca.org.gt/SIECA.htm (in Spanish).

[78] That term, normally applied to federal - state government relations in the United States, was accurately used by conference participant Sarah Anderson, in the CAFTA context.

[79] *Free Trade With Central America*, USTR Trade Facts, *supra* note 76, at 8.

[80] *See* Annex III to the [FTAA] Ministerial Declaration, "Hemispheric Cooperation Program), Nov. 1, 2002, *available at* http://www.ustr.gov.

[81] Christopher Marquia, *New System Begins Rerouting U.S. Aid for Poor Countries*, N.Y. Times, Feb. 22, 2004, sec. 1, at 1.

[82] *See* Timothy A. Canova, *Fix NAFTA Before Stretching it Hemisphere-Wide*, Albuquerque Journal, Nov. 18, 2003, at A-5. (This author does not necessarily share Mr. Canova's views regarding any of the other issued discussed in this op-ed piece!)

private property rights, reduction in corruption and the like.

Is this FTA program a better approach than the FTAA? Almost certainly not, if coverage is comparable, although negotiating with small groups such as the Central American nations eliminates many of the problems of dealing with developing countries at different levels of development. As noted earlier, it does not stimulate intra-Latin American trade, as would a broader free trade agreement such as the FTAA. Also, multiple FTAs add to the explosive growth of FTAs in recent years, now more than 250 worldwide and likely to reach 300 by the end of 2005,[83] with a mass of necessarily differing and sometimes conflicting legal rules. As the Brazil Business Coalition, which opposes Lula's "FTAA-Lite" approach, has complained,

> The new structure proposed increased greatly the degree of complexity of the negotiations and uncertainties over the result. Environments with multiple rules generate uncertainties, insecurity, and difficulties for the integration of smaller companies.[84]

The FTA network approach almost certainly would detract from efforts to complete the FTAA and the Doha Round, *if* there were any prospect for ongoing negotiations at the regional and global levels. Perhaps USTR can handle a dozen separate negotiations—although some doubt this—but there are not any other trade ministries in the Western Hemisphere that can do more than one or two at a time. (It's worth remembering that NAFTA was negotiated largely during the period in 1991-1992 when the Uruguay Round negotiations were stalled.) Yet if the FTAA network approach works, it may make the FTAA unnecessary, or less necessary, at least for the United States. If Brazil and the United States reconcile their differing views on FTAs, the United States could always try to negotiate an FTA with Mercosur, but only after a large network of FTAs has been concluded.

The potential difficulties of obtaining Congressional approval for the FTAs are very substantial, for the reasons discussed earlier; the piecemeal approach may be less attractive to Congress, and less consistent with the legislative agenda, than a single more comprehensive FTAA. Given the traditional opposition to free trade agreements by U.S. unions, textile industry and some agricultural sectors, the political costs for a president of seeking approval for an agreement of relatively limited geographic scope and impact on the U.S. economy, such as CAFTA, may approach those of obtaining approval for a major agreement, such as the results of a new WTO negotiating round. The Singapore and Chile FTAs, which sailed through Congress in 2003, and the Australia FTA, which may be approved in 2004 despite the election, are not really typical. No one in Congress seems seriously concerned about a new flood of imports from those nations, or significant job shifts.

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[83] WTO, Regional Trade Agreements, undated, *available at* http://www.wto.org/english/tratop_e /region_e/region_e.htm.

[84] Ed Taylor & David Haskell, *Brazil's Lula, Argentine Officials Laud FTAA*, *supra* note 62.

The CAFTA approval process will be a much more challenging test. Opposition to CAFTA was evident, particularly from U.S. sugar and textile interests and their friends in Congress, from the moment the agreement was announced in mid-December 2003. Labor rights groups and environmentalists are also among those raising concerns.[85] Even Ambassador Zoellick has voiced doubt that Congressional approval will be sought or obtained in 2004,[86] although a large group of business associations and companies, operating as the "Business Coalition for U.S. - Central American Trade," have begun to lobby for approval of CAFTA this year.[87] Bush aide Karl Rove is said to believe that any electoral advantage can be gained by Bush through seeking Congressional approval of FTAs in 2004, a view which if accurate further decreases the likelihood of Congressional action on CAFTA before the election.[88]

Even if it becomes evident that these agreements can receive prompt Congressional approval, a network of FTAs is no substitute for the successful completion of the Doha Development Round. Eventually, Doha or some successor WTO negotiation *will* be completed. But if some trade negotiation has to be abandoned because the benefits don't outweigh the costs, or too few countries have the personnel necessary to negotiate the agreements, it won't be the Doha Round, and in the near term, at least, it won't be the network of FTAs. Of the three tracks, the FTAA is the easiest one to abandon, or postpone indefinitely. In my view this is a very significant risk, and it becomes more significant with every passing month of stalemate between the United States and Brazil.

What Are the Costs of Abandoning the FTAA?

For the United States, the costs of abandoning the FTAA depend in large part on the results of the WTO and FTA negotiations, respectively. If the FTA program is successful over the next few years—admittedly a big "if"—the principal loss is better access for U.S. exporters, service providers and investors to the Brazil/Mercosur markets, potentially the largest remaining partially closed markets in the Hemisphere, but hardly vital in global terms. At present, however, neither the United States nor Brazil is prepared to make the politically

[85] Elizabeth Becker, *A Pact on Central America, supra* note 40. The concern of U.S. labor activists relates in part to concerns that the CAFTA labor provisions offer less leverage over governments that fail to observe internationally recognized labor rights than do provisions of the unilateral Generalized System of Preferences and the Caribbean Basin Initiative, both of which provide, at least in theory, for loss of benefits under such circumstances. *See* CAFTA, Chapter 16 and art. 20.17; 19 U.S.C. § 2702(b)(7) (CBI); 19 U.S.C. § 2462(b)(2)(G) (GSP).

[86] *See Zoellick Says CAFTA Approval Less Likely This Year Than Morocco, Australia FTAs*, Inside US Trade, Mar. 2, 2004, at 1.

[87] Rossella Brevetti, *Representatives of Major Sectors of U.S. Economy Back CAFTA Passage*, 21 Int'l Trade Rep. (BNA) 200 (Jan. 29, 2004).

[88] *See Congressional Action Seen as Doubtful on Dominican Republic FTA in 2004*, Inside US Trade (Mar. 12, 2003), at 1 (quoting Dominican Republic Ambassador to the United States Hugo Guilani Cury).

sensitive compromises that are required. Most of the United States' other significant trading partners in the Western Hemisphere could be subject to FTAA-like disciplines under the FTAs within a couple of years if the "network" approach works. The largest group (in number) that are not significantly involved in regional trade negotiations are the members of the Caribbean Common Market ("CARICOM").[89] If these nations as a group were to request that the United States conclude an FTA with them, and the members met the minimum standards for such negotiations, it is difficult to believe that the United States would decline to negotiate. In any event, The Caribbean Basin Initiative, with its unilateral preferential access to the U.S. market, will presumably continue to apply to the members of CARICOM.[90]

Yet, even if there are *no* new trade agreements in the region during the next 3-5 years, this probably doesn't hurt the United States very much; the potential loss of a few billion dollars of additional exports and imports with Brazil just does not matter that much in a ten trillion dollar economy. Only about one fourth of the United States economy depends on world commerce; while increased exports could reduce the United States' chronic trade deficit, many believe that the health of the U.S. economy in the next few years is much more dependent on resolving domestic problems, such as half billion dollar a year budget deficits. In the international trade context, increasing trade and investment with faster-growing Asian markets, particularly China, India and Vietnam, will likely be more important than increasing trade with Latin America.

Presumably, Brazil would reap some benefits from freer trade with the United States, even if the United States were not fully responsive to Brazil's concerns. However, it is obvious that the Brazilian government has determined that *no* FTAA is better for Brazil than an FTAA that does not meet Brazil's key objectives with regard to U.S. market access. President Lula da Silva undoubtedly has to deal with his own domestic protectionists, who currently enjoy a variety of tariff and non-tariff advantages over foreign competition. Like every other national leader, he must balance the likely benefits from an FTAA with the economic and political costs. This author is certainly in no position to fault his analysis. Nor, as noted earlier, is Lula foregoing the possibility of FTAs entirely; he has proposed a free trade area with the members of the so-called G-20, which includes eight Latin American members, including Brazil.

The situation for some of the smaller countries in the Hemisphere is, however, much more critical. As of January 1, 2005, under the WTO's *Agreement on Textiles and Clothing*, the existing international cartelization of the world textile

[89] The current members of Caricom are Antigua and Barbuda; the Bahamas; Barbados; Belize; Dominica; Grenada; Guyana; Haiti; Jamaica; Montserrat; St. Lucia; St. Kitts and Nevis; St. Vincent and the Grenadines; Suriname; and Trinidad and Tobago; *see* http://www.caricom.org. Most are formerly British Colonies who maintain close relations with the United Kingdom.

[90] *See* 19 U.S.C. § 2702(b) (listing all of the Caricom nations as beneficiary developing countries under CBI).

and apparel market will cease.[91] Textile quotas will be banned in almost all circumstances, and replaced with tariffs. The ATC was widely supported by developing nations during the Uruguay Round negotiations, as a means of improving developed nation market access for textiles and clothing, one of the industrial sectors in which developing nations have traditionally benefited from a comparative advantage, particularly with regard to low labor costs.

However, elimination of the quota system is a double-edged sword. If the largest and most efficient producers, such as China, are limited in their exports to developed country markets, as is the case today, smaller, less efficient producers are effectively guaranteed a share of those markets. That guaranty almost certainly will end January 1, 2005,[92] despite the continuing likelihood of "safeguard" actions against floods of Chinese textiles. According to the U.S. International Trade Commission, China will become the dominant U.S. supplier of textiles during 2005, with India and a few other low-cost textile exporting countries in South Asia likely to become major U.S. suppliers. Mexico and the Caribbean producers will remain competitive only in niche markets, and only if they can provide quick turnaround of orders.[93] Thus, there are great concerns, particularly among the smaller apparel producers such as the Dominican Republic and the countries of Central America—whose wages are three or four times higher than in China or India—that they will no longer be able to compete once the quotas disappear.[94]

For these countries, the only likely relief is through programs providing unilateral market access, such as the Generalized System of Preferences (where Brazil is the third-largest beneficiary world-wide, in terms of total exports to the United States subject to GSP benefits[95]), the Caribbean Basin Economic Recovery Act or similar legislation applicable to the Andean Group, if the

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[91] WTO Agreement on Textiles and Clothing, *available at* http://www.wto.org, art. 2(8)(c) provides that the special treatment of textiles and clothing—permitting the use of quotas which would otherwise be illegal under the GATT/WTO system—will cease as of the first day of the twenty-first month after the Agreement entered into force, i.e., January 1, 2005.

[92] While a group of African nations have called for a delay, the effort is not supported by the United States, China or India, among others, and the likelihood of achieving a consensus in favor of delay is remote. *See* Christopher S. Rugaber, *African Textile Groups Sign Declaration Calling for Delaying End to Textile Quotas,* 21 Int'l Trade Rep. (BNA) 505 (Mar. 18, 2004).

[93] Christopher S. Rugaber, *ITC Says China Expected to Become "Supplier of Choice" for Clothes in 2005*, 21 Int'l Trade Rep. (BNA) 320 (Feb. 19, 2004).

[94] *See* Rossella Brevetti, *Apparel Group Calls for Fast Implementation of Proposal for U.S.-Dominican Republic FTA*, 20 Int'l Trade Rep. (BNA) 1713 (Oct. 16, 2003). The concerns over competition with China and a decline in apparel operations in the Dominican Republic were highlighted in a meeting between the author and representatives of the Consejo Nacional de Zonas Francas de Exportacion in Santo Domingo, February 3, 2004. A study financed by the Inter-American Development Bank is investigating how operations in the Dominican Republic can be made more competitive with China and other Asian competitors.

[95] Trade Partnership, *The U.S. Generalized System of Preferences Program: An Update*, May 2003, at 3 (Table 1), *available at* http://www.tradepartnership.com/pdf_files/GSP2003.pdf. $2.124 billion of Brazil's 2002 exports to the United States benefited from GSP.

programs are sufficiently generous to offset lower labor costs and operating efficiencies in Asia, or through FTAs. The advantage of the FTAs is that market access cannot be unilaterally withdrawn if, as is always possible, Congress and the President decide it is no longer justified domestically.[96] The elimination of such uncertainties is thus likely to be a significant factor in encouraging new investment, or maintaining existing investment, in the apparel and other sectors. A delay of even a year in bringing CAFTA on line could significantly affect the ability of these nations to hold onto their current apparel production in the face of relentless Chinese competition, or to stimulate the new investment that may be necessary to replace lost textile jobs.

The other cost to the smaller Western Hemisphere countries is loss of improved market access for manufactured and agricultural exports to the larger developing countries, such as Mexico, Argentina and Brazil, and to other nations where there is no free trade agreement relationship. As noted earlier, Mexico and Mercosur both have their own network of free trade agreements, which may or may not provide significant market access for sensitive products, but there are still many countries left out, such as most of those in the Caribbean.

Meaningful trade expansion and reform, in which there is a better balance between the needs of developing nations and the desires and bargaining power of the United States and other developed nations, is a necessary if not sufficient step on the road to economic development, even if it is not followed by the significant increase in economic assistance that is likely required to implement internal reforms. Beyond the textile and apparel sector, better access to the U.S. market and the types of internal reforms that will be required under the CAFTA—or the full FTAA—are critical to this task. FTAs and the FTAA will not deal with the issue of U.S. agricultural subsidies, and increased agricultural market access will likely be limited and uneven, but delays in bringing about these changes virtually guarantee a continuing level of poverty in much of a region where many live on less than $2 per day, and where several nations – Haiti, Nicaragua, Honduras, Bolivia among them – are among the world's least developed.

Conclusion

Most free traders, including this author, hope for success in all three tracks. In an ideal world, the Doha Development Round would be concluded in 2005, if not this year. A comprehensive FTAA would be concluded soon after; both of

[96] A recent WTO panel decision holding that it was improper for the EU to attach conditions to the granting of special tariff preferences, could, if affirmed by the Appellate Body, signal the death knell of such unilateral preference regimes as the Caribbean Basin Initiative and the Generalized System of Preferences, since the United States Congress is not likely to give up long-standing conditions to the granting of such preferences. *See European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries,* WT/DS246/R, Dec. 1, 2003; Caribbean Basic Economic Recovery Act of 1983, as amended, 19 U.S.C. §§ 2702(b) "Countries eligible for designation as beneficiary countries; conditions," (c) "factors determining designation."

these are simpler and neater, from both a legal and political point of view, than a group of FTAs. A comprehensive FTAA would be superior to the United States' spoke and wheel FTA system in potentially stimulating intra-regional trade, rather than simply trade with the United States. However, if, as this author believes, the FTAA and Doha are not feasible in the foreseeable future, a network of relatively comprehensive U.S. FTAs is still much preferable to nothing.

April 2, 2004

PROTECTING THE INDIGENOUS PAST WHILE SECURING THE DIGITAL FUTURE: THE FTAA AND THE PROTECTION OF EXPRESSIONS OF FOLKLORE

By Anthony Cartee†

Overview

The Free Trade Area of the Americas ("FTAA") Agreement encompasses many different areas of commerce and trade. Of all of these areas, the scope of intellectual property protection remains a crucial subject and widely contested area of debate.[1] With one year left to go before expected ratification, the text of this significant portion, Chapter XX, remains mostly bracketed and undecided.[2] Still, despite the doubts surrounding its scope, most of the chapter will certainly find its way into the Agreement itself because of the important issues involving changing technologies in international trade. The chapter's purpose: "To reduce distortions in trade in the Hemisphere and promote and ensure adequate and effective protection to intellectual property rights. Changes in technology must be considered,"[3] sets forth a challenging agenda. Reducing "distortions in trade" while maximizing intellectual property protection remains the focus for most developed economies. Because of this, some proposals outside the foreground of our digital age are in danger of being left behind and left out of any final draft altogether. Subsection B.2.d., the "[Protection of [Expressions of] Folklore]," is one such proposal.[4] This note explores this short subsection in the FTAA's intellectual property (IP) Chapter and the growing likelihood that it will not be incorporated into the scheduled upcoming Agreement. Specifically, because of

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[1] At the first draft of this paper, delegates again met to discuss this important chapter. January 28th through 30th, 2004, were the dates of the Third Issue Meeting with the Participation of Hemispheric Civil Society on Intellectual Property Rights, held in Santo Domingo, Dominican Republic.

[2] For the latest draft of the IP chapter and links to the entire Treaty at the time of this writing, visit the official webpage *at* http://www.ftaa-alca.org/ftaadraft03/chapterXX_e.asp.

[3] *Ministerial Declaration, Objective by Issue Area: Intellectual Property Rights,* Free Trade Area of the Americas, 4th meeting of Ministers of Trade, Annex 2, (March 19, 1998). Link *available at* http://www.ftaa-alca.org/ngroups/ngprop_e.asp.

[4] *See* the current FTAA draft, *supra* note 2. I include the brackets deliberately, as it is written in the current draft, to emphasize the real chance it may not make it further in the negotiation process.

the lack of an accepted definition of "expressions of folklore," because of the still nascent debate on what approach should be taken in protecting it once it is defined, and because of the vagueness of the third FTAA draft itself, the questions overwhelm the possible solutions and will likely table the issue for further debates outside the free trade realm.[5]

The FTAA's Chapter XX itself faces numerous challenges, but the most pressing ones concern the more publicized debates on globalization and modern economic integration or regulation. "The FTAA draft agreement's Chapter on Intellectual Property Rights reads like a 'wish list' for 'special interests' such as Microsoft, the MPAA, and the RIAA. Instead of promoting free trade and encouraging creativity, the proposed agreement threatens to chill speech and create monopolies for a few [United States'] corporations."[6] Some of the more chilling concerns opponents have regarding this "wish list" include proposals to have Internet domain name disputes decided by "a private unaccountable organization" and to expand copyright to include "data and facts."[7] Both of these concerns, however, are not absolutely contrary to American law. The United States ("US") already participates in ICANN, the International Corporation for Assigned Names and Numbers, which most likely will be the body overseeing the dispute resolution process for domain names for the FTAA.

Moreover, although the refusal to protect facts is a cornerstone of American copyright law,[8] the current push for a new, *sui generis*, form of protection for databases is not entirely remote. Lobbyists continue to ask for legislation similar to the European Union's 1996 Database Directive, and with the economic interests attached to this technology, some form of protection will likely take shape.[9] These more publicized economic interests have overshadowed the growing concerns among so-called "developing countries" to protect their indigenous knowledge, cultures, and heritage within the FTAA. Still, because the majority of the delegations to the FTAA are made up of these developing nations, these concerns have found a way to remain in the drafts of the

[5] Furthermore, some observers note that "[t]he U.S. has a very aggressive stance on issues such as government procurement, intellectual-property rights and market access, and is not willing to put on the table things that interest Brazil . . . ." Geraldo Samor & Scott Miller, *Latin America Warms Up to EU in Trade Talks*, WALL ST. J., April 15, 2004, A13.

[6] There are many writings opposing the FTAA available online. This quote is taken from one of the more colorful, the IP Justice website *at* http://www.ipjustice.org/FTAA. This site also contains the entire "wish list" IP Justice opposes regarding this Agreement.

[7] *Id.*

[8] Feist Publications, Inc. v. Rural Telephone Service, Co., 499 U.S. 340 (1991).

[9] *See* Charles R. McManis' *Intellectual Property and Unfair Competition in Cyberspace*, for an overview and discussion of the protection of facts and database producers in America *at* http://www.kafil.or.kr/old_kafil/seminar/t-2001.PDF (last visited March 27, 2004). Given that the purpose of the EU Database Directive, according to McManis, is "to favor European database producers at the expense of their customers and non-EU competitors" coupled with the fact that the U.S. currently "dominates the database market," some U.S. legislative response is plausible despite any current Congressional stalemate. *See also* Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 Fla. L. Rev. 135 (Jan. 2004).

Agreement.[10] The US certainly has not turned a blind eye to these concerns, but when it comes to cultural heritage and traditional expressions of a people, it is quite difficult to place them within the context of US intellectual property laws.[11] One of the obvious difficulties comes in defining what exactly is being protected. As far as "folklore" is concerned, there still remains no wholly agreed upon definition, and because of this, the "Expressions of Folklore" provision has a significant hurdle to overcome if it is to be part of a final drafting. Because of this, defining "Folklore" is a very appropriate place to begin this inquiry.

The Problems of Defining "Folklore"

Although indigenous expressions, heritage, and knowledge have different and sometimes interchangeable names in the legal community, for purposes of this paper and to remain in line with the third FTAA draft, "Folklore" is kept distinct from "Traditional Knowledge."[12] Moreover, the focus of this note includes the intangible forms, such as oral traditions, or folkloric expressions that fall outside the traditional notions of arts and crafts. The American Heritage Dictionary defines "folklore" as the "traditional beliefs, myths, tales, and practices of a people, transmitted orally."[13] The World Intellectual Property Organization ("WIPO") has defined "expressions of folklore" as "characteristic elements of traditional artistic heritage developed and maintained by a community."[14] It also encompasses the individuals who reflect "the traditional artistic expectations of such a community" either through verbal, musical, visual, and active physical expressions such as dance.[15] However, this is not an exclusive definition. As

[10] *Supra* note 2. One interesting example of these concerns is the placement of the rights protected in the Copyright subsection. Currently, "Moral Rights" is assigned to Article 3 under that section. "Economic Rights" make up Article 4. Not surprisingly as quoted in an endnote of the text, "One delegation indicated that they [sic] prefer to place the provisions on moral rights after the provisions on economic rights." As to the identity of this country, it's anyone's guess.

[11] The Department of State handles cultural property and policy and has seen an increase in utilizing legislation such as the Convention on Cultural Property Implementation Act and National Stolen Property Act. *See* Molly Torsen, *Cultural Property Protection: International and U.S. Current Affairs*, for an interesting look at developments in this field. *Available at* http://cyber.law.harvard.edu/bold/devel03/torsentk.html (last visited January 25, 2004).

[12] For traditional knowledge and other forms of indigenous and cultural rights, an excellent starting point is found in the "Traditional Knowledge, Intellectual Property, and Indigenous Culture" Symposium issue of the Cardozo Journal of International and Comparative Law at 11 Cardozo J. Int'l & Comp. L. 239 (Summer 2003). *See also* Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 Am. Univ. L. Rev. 769 (1999); Paul J. Heald, *Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPs Game*, 88 Minn. L. Rev. 249 (Dec. 2003); Shubha Ghosh, *Globalization, Patents, and Traditional Knowledge*, 17 Colum. J. Asian L. 73 (Fall 2003).

[13] Definition from the American Heritage Dictionary online edition *available at* http://www.bartleby.com/61/72/F0227200.html.

[14] *See* Rory J. Radding, *Interfaces Between Intellectual Property and Traditional Knowledge and Folklore: A U.S. Perspective*, *at* http://articles.corporate.findlaw.com/articles/file/00310/008753#_ednref3 (quoting WIPO's study, *WIPO/GRTKF/STUDY/1*).

[15] *Id.*

WIPO notes, "there are many definitions of TK [traditional knowledge] and folklore," and "it may not be possible (or necessary) to develop an all-purpose term."[16] Opponents disagree, and emphasize that a clear definition is likely necessary before protection can be granted. During the 2001 request for comment period to the FTAA text, the International Intellectual Property Alliance ("IIPA") noted "that the inclusion of provisions on folklore in a regional trade agreement is premature."[17] It went on to state the simple reality facing proponents today: "There is no international consensus on how to address this issue."[18]

This lack of consensus is not attributable to a lack of effort. WIPO's definition comes from its *Model Laws*, drafted in 1982, which followed the broad and ambitious *Tunis Model Law on Copyright* of 1976; coincidentally the same year Congress completed its draft of our current Copyright Act. The *Tunis* definition of folklore encompassed "all literary, artistic, and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage."[19] Subsequent attempts to define and protect folklore have been less ambitious, yet the attempted definitions remain broad.[20] Problems may come from the nature of the word itself and exactly what any law would be trying to protect. The most recent attempt at defining this term, the *South Pacific Model Laws* of 2002, equates folklore with "cultural expression."[21] This term does not do much to narrow any of the definitions above but rather reinforces the many questions regarding the protection of this broadly defined form of expression. Unfortunately, the third draft of the FTAA agreement also leaves the term undefined.[22] Can such a wide range of knowledge even be protected, and if so, how? From the early debates of the 1970s to now, there are two basic views on how to answer these questions: (1) implement protection for "folklore" through existing IP laws, or (2) *sui generis* protection.

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[16] *Id.* The term, "traditional knowledge," has come to be focused narrowly on the knowledge of indigenous people regarding medicinal and usually patentable subject matter. However this term, like defining "expressions of folklore" lacks any true consensus.

[17] Michael N. Schlesinger, *IIPA Comments on the FTAA IPR Negotiating Text*, August 22, 2001, *available at* http://www.iipa.com/rbi/2001_Aug22_FTAA.pdf (last visited March 13, 2004).

[18] *Id.*

[19] *See* WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Comparative Summary of Sui Generis Legislation for the Protection of Traditional Cultural Expressions*, Annex April 28, 2003, *available at* http://www.wipo.int/documents/en/meetings/2003/igc/pdf/grtkf_ic_5_inf_3.pdf.

[20] *Id.* After the *Model Laws / Provisions* were released, debate waned, but a resurgence of interest into this topic has seen new proposals, most recently the *Bangui Agreeement* of 1999, *Panama Law No. 20* of 2000, and the *South Pacific Model Laws for National Laws* in 2002.

[21] *Id.*

[22] *Supra* note 2.

Finding a Home for the "Expressions of Folklore" within Existing IP Laws

Congress has the Constitutional power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[23] This is the cornerstone of American IP law, for which all American IP students are familiar. The logic goes that by protecting authors' writings for a set period of time, Congress promotes others to introduce their own works, thus enriching and adding to the pool of knowledge the public can then dip into. In other words, American intellectual property laws do not solely exist to protect economic interests. Yet, the general consensus that has developed places this economic concern squarely as the pinnacle goal of American negotiators.[24] If so, "expressions of folklore," like other "moral rights" may play only a bit part in the final draft of the FTAA agreement, if any at all. Moreover, the problems of "fitting" folklore into US laws are readily apparent without any in-depth discussion of copyright and trademarks.[25]

Not only is folklore itself difficult to define, but the "author" of folklore is equally elusive. American copyright laws can protect anonymous works, but only for "limited times."[26] The biggest dilemma obviously is that folklore, as a deeply imbedded core set of beliefs and expressions, has long since fallen into the public domain. Trademark protection also presents significant problems. "Trademark law is limited by its commercial basis and focus."[27] While symbols and other marks signaling a particular group or tribe can be protected as a "collective" mark,[28] these marks will only remain protected if they remain a "source indicator" for the indigenous tribe. Once the mark fails to do this, any trademark protection is lost.[29] For example, a Native American tribe would be protected with respect to "goods or services to which it affixes the tribal name and currently sells in commerce. This protection could be analogized to the protection given the marks used by guild associations in Europe."[30] However,

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[23] U.S. Const. art. I, § 8, cl. 8. *available at* http://www.law.cornell.edu/constitution/constitution.articlei.html#section8.

[24] *Supra* note 6. The IP Justice website points out in great detail the dubious economic concerns of the U.S. FTAA negotiators.

[25] As this paper does not focus on "traditional knowledge," the problems with patents are not discussed. However, the same problems would exist with patents because it derives from the same "Copyright Clause" of the Constitution. Moreover, the "limited times" for patents is much shorter.

[26] *Supra* note 23.

[27] Stephen D. Osborne, *Protecting Tribal Stories: The Perils of Propertization*, 28 Am. Indian L. Rev. 203, 226 (2003/2004).

[28] 15 U.S.C. § 1054 (2003).

[29] Moreover, simply using a mark does not satisfy the requirements for federal protection. One must also show that one "actually used the designation at issue *as a trademark*." Rock & Roll Hall of Fame v. Gentile Prods., 134 F.3d 749, 753 (6th Cir. 1998) (emphasis in original).

[30] Richard A. Guest, *Intellectual Property Rights and Native American Tribes*, 20 Am. Indian L. Rev. 111, 129 (1995/1996).

this does not give the tribe "exclusive use" of any of its marks,[31] and others can use them as long as there is no likelihood of confusion—as seen most publicly through the continuing "Indian Mascot" controversy.[32] Moreover, §1052 of the Lanham Act may prevent registration of "matter which may disparage" or bring into "disrepute" certain names, but again, this does not prevent unregistered use of tribal names by others.[33] The goal of trademark law is to keep the consumer free from confusion, and this goal does not align with indigenous goals to prevent uses of tribal symbols, names, and marks that an indigenous group finds offensive. Moreover, trademark laws will only protect marks that "signal" the people from where the marks came. They will not extend to the songs, stories, and expressions that carry these peoples' traditional cultural expressions.

Still, the Group of Latin American and Caribbean States ("GRULAC") has noted that "[m]any of the protection claims, needs and expectations expressed by the holders of genetic resources and traditional knowledge (including folklore) c[an] be entirely or partly addressed by means of the systems and provisions currently available in the intellectual property field."[34] This may be somewhat true for other countries that make room for this type of protection, specifically Latin American countries who align themselves with a more "*droit moral*" or moral rights approach to IP law, but in terms of American law, this is a difficult sell. At best, copyright protection can only extend to new expressions that utilize folklore already in the public domain. Indeed, the *Tunis Model Laws* make this distinction, protecting new expressions that are "'works derived from national folklore' as original copyright works," while folklore itself, which has long fallen into the public domain and is described as "works of national folklore," receives a special (*sui generis*) type of copyright protection "because they are unprotected by copyright."[35] This split approach seems contrary to the overall goal of garnering a single effective form of protection for all respective traditional cultural expressions, however, and leaves a possibility, questionably at least, whether some new expressions can ever move from current "limited times" IP protection to perpetual cultural protection. This may be the case with *droit moral*, where "the moral right is conceived as perpetual, inalienable, and imprescriptible. In theory, therefore, even today in France, an outrageous stage or film version of [Moliere's] *Le Medecin Malgre Lui* could be challenged and

[31] *Id.*

[32] *See generally* Gavin Clarkson, *Racial Imagery and Native Americans: A First Look at the Empirical Evidence Behind the Indian Mascot Controversy*, 11 Cardozo J. Int'l & Comp. L. 393 (Summer 2003).

[33] 15 U.S.C. § 1052 (2003). *But see* Pro-Football, Inc. v. Harjo, 284 F. Supp. 2d 96 (D.D.C. 2003) (holding there was insufficient evidence to show that Washington "Redskins" was disparaging and that the suit was barred by laches).

[34] *Traditional Cultural Expressions/Expressions of Folklore Legal and Policy Options*, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 6th Sess., at 28, *WIPO/GRTKF/IC/6/3*, December 1, 2003.

[35] *Id.* at 12.

subjected to the full range of sanctions for violation of the moral right."[36] Such is not the case with US law, however. As mentioned above, "limited times" protection serves to allow authors to build from a healthy and free pool of public knowledge.[37] Essentially, because of these reasons, no federal IP law proves an easy fit for the problems above. This leaves existing state laws, if any, as a possible fit for this form of expression.[38] Because of the difficulties in fitting "expressions of folklore" into existing IP laws, the *sui generis* approach is the system that carries the most weight, sense, and momentum.

A Sui Generis Approach

Congress tackled the problem of protecting folklore before, specifically in terms of Native Americans. There, it chose to separate folklore from existing intellectual property laws and dealt with it in a more traditional cultural property sense. In 1976, Congress implemented The *American Folklife Preservation Act* ("AFPA").[39] The AFPA extends and intends to cover more than solely Native Americans, however.[40] The Act defines "American folklife" as meaning the traditional expressive culture shared within the various groups in the US.[41] This definition is not so different from the latest working world definition of folklore or "traditional cultural expression" found in the *South Pacific Model Laws* of 2002, discussed above. Because of this, it seems a difficult task for negotiators to convince the US into a draft of the FTAA that recognizes expressions of folklore as IP rights. Indeed, to convince the US into agreement on this issue would most likely require acknowledgment of efforts the US has already made in this realm and an effort to fit protection of folklore into non-IP existing US laws, such as incorporation of language in the American Folklife Preservation Act or other similar US laws.[42]

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[36] 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8D.01 (2002).

[37] *But see* Maureen Ryan, *Copy Fight: Two Veterans of the Internet Wars Debate the Raging Battle over Who Should Control Our Entertainment*, CHI. TRIB., March 28, 2004, sec. 7 pg. 1, at 5. In this interview, Stanford Professor and leading scholar on IP matters, Lawrence Lessig, puts the reality of the term "limited times" succinctly: "[C]reators have been able to build upon the culture around them and that came before them. All of Disney's great work is built upon stuff that was in the public domain. But what we've done under the law is eliminate the possibility of the public domain. Copyrights don't expire anymore. The average copyright term when Disney produced his work was 30 years. The average term now is 100 years."

[38] This also is unlikely because IP issues are normally federal questions, and the only differences between state and federal IP protection exist primarily with the previously mentioned "moral rights" issue, rights of publicity, and trade secrets. Yet, with U.S. compliance to the Berne Convention, the addition of the Visual Artists Rights Act of 1990, and the Federal Economic Espionage Act of 1996, these differences continue to shrink.

[39] 20 U.S.C. §§ 2101-2107 (2003).

[40] *Id.*

[41] 20 U.S.C. § 2102 (2003).

[42] *See* Lucy M. Moran, Note, *Intellectual Property Law Protection for Traditional and Sacred "Folklife Expressions" – Will Remedies Become Available to Cultural Authors and Communities?*, 6 U. Balt. Intell. Prop. L.J. 99, 106-116 (Spring 1998) (discussing possible solutions in protecting

A *sui generis* approach, however, would force parties to step back and redefine the classification of expressions of folklore in general. Professor Rosemary J. Coombe essentially equates protection of cultural expressions and property, not as further legislation of intellectual property rights, but rather legislation of human rights.[43] This characterization may help in deciphering the importance South American countries place in this issue, but at the same time, it increases the likelihood US negotiators will dismiss the provision in an agreement on free trade. Yet, the goals of the FTAA do not solely encompass free trade but also encourage mutual growth and development.[44] Keepers of folklore and traditional knowledge, whoever they may be, generally do not want to prevent expressions of folklore by others completely. Instead, they merely want to gain entrance "into the intellectual property system and to establish, where appropriate, benefit-sharing arrangements consonant with notions of communal, as opposed to individual or private, property."[45] Most of these "benefit-sharing" arrangements occur, if at all, in the traditional knowledge arena. One example occurred in 1991 when the pharmaceutical giant Merck "paid over one million dollars to INBIO, Costa Rica's national institute for biodiversity, to gain access to the country's genetic resources."[46] If a drug developed from Merck's research, there would be a sharing of profits, but it left open "how the indigenous people who help in the selection of plants will be remunerated."[47] In context of folklore, however and to put it bluntly, the view is that the "bastardized commercialization of native and indigenous cultures results in a loss of the cultural and religious significance of traditional culture in the public memory."[48] Certain sacred symbols and beliefs used by outsiders by being incorporated into stories and artwork, the depiction of these images and beliefs outside the ceremonial or oral context in which they were intended to be applied, arguably show the misappropriation of "intangible assets," which now "serve as the primary remaining means of identifying and uniting [native tribes] themselves as a community."[49] Current US intellectual property laws do not

American folklife and general cultural expressions through the American Folklife Preservation Act and The Native American Graves Protection and Repatriation Act).

[43] ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW (Duke University Press, Durham NC, 1998). Chapter Five of this work, "The Properties of Culture and the Politics of Possessing Identity," specifically looks at protecting traditional cultural expression and property, although this theme runs through the entire book.

[44] *Supra* note 3.

[45] Daniel J. Gervais, *The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New*, 12 Fordham Intell. Prop. Media & Ent. L.J. 929, 972 (Spring 2002).

[46] Cécile Guérin, *Out of the Forest and into the Bottle, at* http://www.unesco.org/courier/2000_05/uk/doss24.htm.

[47] *Id.*

[48] Jean Raymond Homere, *Intellectual Property Rights Can Help Stimulate the Economic Development of Least Developed Countries*, 27 Colum. J. L. & Arts, 277, 294 (Winter 2004).

[49] Amina Para Matlon, *Safeguarding Native American Sacred Art by Partnering Tribal Law and Equity: An Exploratory Case Study Applying the Bulun Bulun Equity to Navajo Sandpainting*, 27

protect these "intangible assets," certainly not copyright law, which by statute requires a "fixed," "tangible medium of expression."[50]

Proposed *sui generis* approaches are not being pulled from thin air but rather from central principles of American jurisprudence, including unjust enrichment, misappropriation, and contracts, as will be discussed more fully below.[51] Additionally, "the trademark concept of geographic appellations of origin, a perpetual right, that can be controlled by the source country" has been proposed as a possible *sui generis* solution.[52] Other possibilities include the previously discussed *moral rights*,[53] a concept slowly creeping into US law, initially through state action but now through the Visual Artists Rights Act;[54] *domaine public payant*, an unlikely alternative that creates essentially a fee-based system for using cultural heritage, a clearance system so to speak; and *authentication marks*, a concept that incorporates attribution and is an approach closest to the one included in the current FTAA draft.[55] These last three possibilities are mentioned only to show the wide range of possible avenues a *sui generis* system might take. However, an accepted new systematic approach in a free trade agreement would most likely have to fit an existing US alternative, not in its IP laws but rather its cultural property principles, folklife protection, or general principles of unjust enrichment to be ultimately accepted.

An initial step in establishing protection of folklore while incorporating general principles of common law can be seen through the so-called *Bulun Bulun equity*.[56] This Australian case involving Aboriginal art started as a straight-forward copyright issue. A tribal artist, John Bulun Bulun, discovered significant portions of his painting, *Magpie Geese and Water Lilies at the Waterhole*, were being reproduced and sold as t-shirts without his permission.[57] The painting incorporated "depiction of a site of great spiritual significance" to his tribe.[58] The cornerstone of this case came with respect to the holding regarding the Ganalbingu People, of which he belonged. The court held that

Colum. J. L. & Arts 211, 220 (Winter 2004).

[50] 17 U.S.C. §102 (2003).

[51] *See supra* note 45, at 973-976.

[52] Ralph Oman, *Folkloric Treasures: The Next Copyright Frontier?*, Association of Teachers and Researchers in Intellectual Property Annual Meeting pg. 7, August 24, 1998. The U.S. does acknowledge "geographic indications" as a protected IP right under Trademark law. *See* 15 U.S.C. § 1054 (2003).

[53] *Supra* note 36.

[54] Additionally, Subsection B.2.c, Article 16 of Chapter XX extends moral rights to "performers." If incorporated, this would broaden U.S. moral right protection, which is currently limited to visual or fine artists. *See supra* note 2.

[55] *Supra* note 2, Subsection B.2.d, Article 1.2.

[56] Bulun Bulun v. R & T Textiles Pty. Ltd., 41 I.P.R 513 (1998). *See also* Matlon, *supra* note 49, who provides an excellent and in-depth discussion of this famous Australian case.

[57] Matlon, *supra* note 49, at 222.

[58] *Id.*

Bulun Bulun owed a fiduciary duty to the traditional owners to guard against infringement of this sacred knowledge and that "if he did not, the custodians had an interest 'in personam' through which they might compel him to preserve the integrity of the community's culture and ritual knowledge."[59] The court recognized two things: (1) tribal customary law and (2) a fiduciary relationship.[60] The setbacks come in the facts that Bulun Bulun was a member of this tribe and had acquired permission from the tribe to use this sacred symbol. The court also stopped short and rejected declaring rights via "communal title, express trust, and [the tribe's] contract claims"[61] While these shortcomings are significant and the fact that most misuse of folklore would come from outsiders, the common law fiduciary duty concept is one avenue deserving of further exploration. Coupled with a growing, albeit slow, acceptance of moral rights by the US, perhaps a constructive trust idea is also a related possibility to consider. These are all questions too involved and complex for this short note.[62] However, the continual push to protect cultural expressions grows, and the US finds itself negotiating extensive economic pacts with countries that hold this issue key. So the inquiry becomes, does the US tackle this concern now in an agreement that supposedly places all the Americas on equal footing, or does it set it aside, further disparaging the proponents who find this type of protection central to their countries' development, discouraging any equal footing with regards to the importance of their cultures and protection of their citizens?

The Vagueness of FTAA Protection

Both existing IP laws and the *sui generis* systems above merely reflect the two main camps in determining how to go about incorporating protection for expressions of folklore. Subsection B.2.d itself does not necessarily endorse either.[63] Instead, it lists general goals and aspirations of its supporters:

> [Article 1. Protection of [Expressions of] Folklore]
>
> [1.1. Each Party shall ensure effective protection of all expressions of folklore and artistic expressions, of the traditional and folk culture.]
>
> [1.1. Each Party shall ensure effective protection of all expressions of folklore, particularly those forms that are the product of the traditional and folk culture of indigenous people and communities, Afro-American and local communities.]
>
> [1.1. Each Party shall protect traditional and popular culture manifested in any

[59] Kamal Puri, Seminar, *Is Traditional or Cultural Knowledge a Form of Intellectual Property?*, *available at* http://www.oiprc.ox.ac.uk/EJWP0100.pdf.

[60] *Id.*

[61] Matlon, *supra* note 49, at 225.

[62] As mentioned before, Matlon's article, *supra* note 49 but also Puri's overview, *supra* note 59, are excellent places to get a more developed analysis of this analysis.

[63] *Supra* note 2. However, the subsection itself stands alone after the Copyright subsection and before the Patents subsection. The substantive sections that precede the Protection of Expressions of Folklore are as follows: Subsection B.2.a covers Trademarks, B.2.b covers Geographic Indications, and B.2.c covers Copyright and Related Matters.

> kind of folklore expression and production, as well as creations of popular art or craftwork.]
>
> [1.2. Each Party shall provide that any fixation, representation or publication, communication or use in any form of a literary, artistic, folk art or craft work, shall identify the community or ethnic group to which it belongs.][64]

This is the entire article, and it is readily apparent that there would have to be a great deal of leeway given to parties in determining how to protect expressions of folklore. No terms are defined and there is simply no guidance as to what "effective protection" might be. Because of the vagueness of this subsection, it is highly likely that when it comes time for a final draft, the parties will simply agree to look into this matter further, politically saving face but substantively brushing aside the above stated concerns. In that light, the use by others of traditional cultural expressions will essentially continue to go unchallenged, and even use with good intentions will raise concerns. Consider an example by Coombe of a Picasso painting: "When a primitive statue, produced in a collectivity for social reasons, makes its way into a Picasso painting, the statue itself may still embody the identity of the culture from which it sprang, but any reproduction of it is legally recognized as the embodiment of Picasso's authorial personality."[65] This is a common occurrence in the arts, as painters and artists often find uses for sources in the public domain. Still, the example raises legitimate concerns. "Royalties flow not to the statue's culture of origin but to the estate of the Western author, where the fruits of his or her original work are realized for fifty years after death.[66]

The FTAA supposedly will bridge economic gaps that exist between developing and developed countries. Certainly, there is one inherent gap in the example above; however, is there anything *per se* wrong with this? If put into context of the Expressions of Folklore subsection itself, Article 1.2 requires attribution to the group from which this expression was taken. Practically, it is difficult to see this happening. First, something in the public domain does not require attribution because it belongs to all. However, the growing concerns of "developing" nations really have fostered a push for "cultural nationalism."[67] This leads to an interesting question of whether there is only one public domain, or are there multiple cultural domains that come with rights to keep intruders, so to speak, out? This may seem a trivial question but it is one way to look at the concerns expressed by the proponents pushing for this type of protection. Second, the method of attribution itself is vague in the draft. Like everything else in the section, it leaves open completely how minutely or how broadly any attribution would have to be. Could it be as simple as including the indigenous tribe's name in the work, for example, in the title of the painting above? Or does

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[64] *Id.*

[65] Coombe, *supra* note 43, at 225.

[66] *Id.* U.S. protection extends for 70 years after death currently. *See generally* 17 U.S.C. §§ 302-305.

[67] Coombe, *supra* note 43, at 224.

it require a complete disclaimer?[68] Beyond concerns of attribution is the free use of a cultural icon for commercial gain. While the Picasso example above may not be a commercial enterprise, it certainly has economic repercussions.

A closer and recent example of freely using cultural icons and expressions signaled a victory for indigenous peoples, but reinforced the shortcomings of the lack of an international consensus on handling this issue. In 2001, popular toy maker Lego dipped into the legends of the Rapa Nui for a new game and product line entitled "Bionicle."[69] Of course, the legends of Easter Island and the Rapa Nui people are plentiful and fascinating. Admittedly, Lego "borrowed" names from Polynesian culture in building its story of six heroes fighting for peace on the mythical island of "Mata Nui."[70] Subsequently, the Polynesian Maori tribes of New Zealand challenged Lego's use, obtaining a small victory as Lego apologized and partially withdrew the game, pledging "to draw up a code of conduct to govern the way it uses folklore to spice up its toys."[71] However, the game is still available in the US and any challenges here would most likely have proved difficult. There are no "attributions" found on the game or the Lego site itself.[72] Geographic indicators might be available as one avenue to explore, yet the names have been changed so they do not falsely indicate any actual source or place, currently or historically. As far as trademarks are concerned, these are not likely to confuse and are not misleading as to its source. Copyright protection does not extend to names but only to the overall expressions or story, which Lego would hold because the myths have fallen into the public domain.[73] We are only slowly embracing droit moral, and US protection here is currently limited to visual artists. Given these possibilities, this partial victory of the Maori shows the need for more international consensus on this issue and likely "a code of conduct to govern" the way folklore is used. This is the main problem of the current draft of the FTAA. It seems to completely defer "effective protection" to each country itself. Because of the lack of consensus dealing with this problem, the US can much more easily dismiss this specific subsection as "premature" and overbroad.[74]

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[68] This last possibility has led to interesting scenarios. One Canadian discussion thread opposing the FTAA joked, "I'd love for the Pagans to sue Hallmark for not attributing the Easter bunny to them," *at* http://www.digital-copyright.ca/discuss/442.

[69] Andrew Osborn, *Maoris Win Lego Battle*, THE GUARDIAN, October 31, 2001, *available at* http://www.guardian.co.uk/print/0,3858,4288446-103681,00.html.

[70] *Id.*

[71] *Id.*

[72] The official Bionicle site is *available at* http:www.lego.com/eng/bionicle/default.asp.

[73] *What Does Copyright Protect?, at* http://www.copyright.gov/help/faq/faq-protect.html.

[74] *See* Schlesinger, *supra* note 15.

Conclusion: One Small Step Forward is Still One Step in the Right Direction

Despite its shortcomings and vagueness, the US should not merely set this tiny subsection aside. Though small, the subsection can be a significant step into building future international consensus. The Sixth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore meets in Geneva in March 2004. Among its scheduled discussions, the Committee plans to lay out "Practical Steps for Setting Overall Directions," including steps in establishing "how national systems would interact with each other to provide regional and international protection, through bilateral, regional or international legal frameworks."[75] The current FTAA draft, though vague, is rather simple as it essentially leaves open the scope of protection to each individual country and asks the US to do two things: "ensure effective protection of all expressions of folklore" and require attribution to the original cultural group when using its folklore. Both are difficult positions—the latter, because of our deep interest in maintaining the concept of one free public domain. The former, however, seems daunting but may be possible if the US is willing. The phrase "all expressions" seems a significant undertaking, but as discussed before, the US already sets aside protection of its own folklife. Recognition of the folklife of other nations would not require a complete overhaul of existing US laws. Moreover, the broad leeway in ensuring "effective protection" is free for the US to interpret. Still, as the sunset approaches in the debates and the time for ratification draws nearer,[76] the actions of the US in securing individual free-trade pacts do not encourage those who would support the current draft of the FTAA.[77] Moreover, another danger, especially for those in IP, is an agreement that is kept from the eyes of the public.[78] Still, the US has never expressed outright opposition to protection of expressions of folklore. At most, it emphasizes instead the growing concerns of the digital age. Yet, the other negotiating nations refuse to leave the issue of folklore and traditional knowledge behind. While traditional knowledge takes

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[75] *WIPO/GRTKF/IC/6/3 supra* note 32, at 51.

[76] *Free-Trade Meeting Postponed for Third Time*, WALL ST. J., April 2, 2004, A7 (recognizing the current impasse negotiators face and noting "the 34 nations already have agreed to drop their goal for a more ambitious accord and focus on a so-called 'FTAA-lite'").

[77] Michael Schroeder, *U.S., Australia Reach Free-Trade Agreement*, WALL ST. J., February 9, 2004, A4 (noting that "U.S. trade officials said they planned to separately negotiate a trade agreement with 13 of the 34 nations taking part in the Free Trade Area of the Americas talks).

[78] *See* Medecins Sans Frontieres [Doctors Without Borders], *Open Letter Concerning Intellectual Property and Access to Medicines in the U.S.-Central American Free Trade Agreement ("CAFTA")*, (October 15, 2003) (regarding the lack of public disclosure for the recently signed CAFTA agreement. "The draft text of CAFTA has not been made public, so it is impossible to provide an informed analysis of the IP provisions proposed in the agreement. However, IP provisions in other bilateral free trade agreements [e.g. the U.S.-Singapore agreement] are clearly TRIPs-plus, and these are consistent with proposed provisions in the Free Trade Area of the Americas agreement), *at* http://www.cptech.org/ip/health/trade/cafta/mcf10152003.html.

up a bulkier part of Chapter XX of the current FTAA draft and has more consensus and economic weight to work with,[79] the subsection for the protection of folklore does need a lot of work. Most likely, its current form will not find its way into a final agreement. However, if countries can somehow negotiate and work the subsection itself into the final draft, no matter how limited, it will be a significant step towards recognizing this issue as an important one for the 21st century. As more countries join the global digital age, it is imperative that the US take a step back and find room for these countries' cultures and folklore, not in order to assure these peoples' IP rights, but in an effort to acknowledge their dignities, histories, and growing contributions to this digital age.

[79] *Supra* note 2. Subsection B.2.f covers Traditional Knowledge. *See also* Homere, *supra* note 46, at 292 (noting "Traditional knowledge has been used as a significant source of commercial research, as well as a starting point for product development in the areas of medicine and pharmaceuticals [e.g. herbal treatment, medicinal plants and botanical medicine], agriculture and horticulture [e.g. recipes, farming and fishing techniques], toiletries and cosmetics. It is estimated that seventy-four percent of the 119 plant-based compounds used in pharmaceutical medicine worldwide have used traditional knowledge as a starting point towards the development of the compounds").

RECONCILING THE FTAA AND TRIPS: CAN A FREE TRADE AREA OF THE AMERICAS BE A FAIR TRADE AREA OF THE AMERICAS? IMPLICATIONS OF A HEMISPHERIC INTELLECTUAL PROPERTY AGENDA.

Anwar Imam†

Introduction

Information is undoubtedly valuable. The increasing value of information has led innovators to withhold reinvesting the fruits of their labor into society until they can reap the benefits of its value. Of course, some say that genuine scholars let the later world discover their work, rather than promulgate and profit from it themselves.[1] But much of our theories on scholarship and innovation have swayed far from the idea of "genuine scholars." Quite acceptably, the modern world has devised a solution to catalyze the dissemination of information with incentives. These incentives are more commonly known as intellectual property (IP) rights, which work by granting exclusive monopolies to those who expand the depth of knowledge to ensure constant innovation.

Allocating IP rights involves the weighing of social benefits of increased incentives for innovation against the social cost of the monopoly granted to the holders of those rights. However these interests often become unbalanced and the social costs of monopolization begin to circumvent the social benefits of innovation. Of course, it is not expected that these interests be permanently balanced, considering the rate of change in our developing world. However, the globalization of trade has exploited this problem in a new manner. Rather than examine and correct the problem, many have threatened to turn a blind eye to this balance in the name of globalization and the prospect of free trade. Because of this neglect, consumer groups and others are concerned that international dealings in intellectual property are biased toward the interests of a handful of large entities and corporations capable of lobbying national and international governments.[2] More specifically, there is a particular concern with patents, because a high volume of patents is concentrated in countries with economies strong enough to promote research and development. Thus, patents pose a

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[1] WILLIAM P. ALFROD, TO STEAL A BOOK IS AN ELEGANT OFFENSE 28-29 (1995).

[2] *See* Susan K. Sell, *Post-TRIPs Developments: The Tensions Between Commercial and Social Agendas in the Context of Intellectual Property,* 14 FLA. J. INT'L L. 193, 194 (2002).

particular problem in the international forum.

Patents can result in an exclusive monopoly and usually involve critical technologies and improvements.[3] A patent holder may hold the key to the future, but may nonetheless refuse to make an invention available to the public, "in order that the fruit of his genius and skill may not be reaped by another without his will and consent; and that, if he enjoyed some prerogative concerning this, he would open up what he is hiding, and would disclose it to all."[4] This is essentially the concept of United States' (US) patent law, as other countries often require compulsory licensing of patented technologies, not leaving the decision up to the inventor.[5]

On a national level, the US focuses on an incentivized approach to patent rights embodied in Article I, section 8 of the Constitution "to promote the progress of Science and the useful Arts."[6] Arguably, the preamble of the IP Clause, as it is called, has been interpreted to primarily allow Congress to create incentives for inventors for the diffusion of useful knowledge, thus recognizing the social value of proprietary knowledge.[7] In the forum of trade, however, many believe that the US takes a rather unbalanced approach to these rights. More specifically, the US emphasizes the self-interest of its own IP rights holders, and consequently puts the global progress of science and social welfare in the backseat. Although global progress might not be required by the IP clause, the globalization of trade and the linking of global economies make a broader reading and application of the clause much more attractive.

Internationally, patent protection and enforcement have become key issues in the negotiation of trade agreements. The ongoing Free Trade Area of the Americas (FTAA) agreement negotiations present new opportunities to weigh the IP rights balance once again. This note will explore the role of IP rights in the Free Trade Area of the Americas agreement. Specifically, this note will explore IP rights and trade policy, prior IP rights agreements in relation to the FTAA, the ethical controversy of certain patents in developing nations, and possible enhancements to reconcile the differences among negotiating countries, specifically in IP rights and trade policy.

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[3] Patent Laws vary from country to country In the US, the main source of patent law is Title 35 of the United States Code. Patents are granted to whoever invents any "new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof." 35 U.S.C. § 101 (1952).

[4] Owen Lippert, *One Trip to the Dentists is Enough: Reasons to Strengthen Intellectual Property Rights Through the Free Trade Area of the Americas*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 241, 249 (1998) (citing BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 17 (Public Affairs Press 1968)).

[5] *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197 (1994) [hereinafter TRIPs].

[6] U.S. Const. art. I, §8, cl. 8.

[7] Lippert, *supra* note 4, at 252.

IP Rights and International Trade Policy

The protection of IP rights abroad can be a critical issue in the development of a nation's economy. Lack of this protection can result in the loss of millions of dollars in profits as a result of international piracy. Piracy of US owned intellectual property has been, and continues to be, a serious problem in many countries.[8] The most notable industries affected by such piracy are media and entertainment, which rely on copyright laws to protect investments. As markets expand, more crucial industries such as software and biomedical technologies begin to have a noticeable impact on international economies. However, one of the most historically controversial IP industries is the "patent-dependent" US pharmaceutical industry.[9]

The US is constantly the source of new and innovative life-saving drugs. Conveniently, the US patent system allows for pharmaceutical prosperity by assuring the protection of pharmaceutical investments through exclusive monopolies. Pharmaceutical companies enjoy this because of the high-cost associated with developing drugs. For example, a new pharmaceutical product usually requires millions of dollars of research and development funds.[10] Without an incentive drafted to ensure that pharmaceutical companies will have the chance to re-capture the costs of development, investors will refrain from entering such a high-risk venture. Therefore, protection of pharmaceuticals becomes a fundamental national interest, and the US pushes patents to the top of its agenda in negotiating with other countries.

In regards to international negotiations, the US is known for its hard-line stance for patents and other intellectual property agendas. With more specific language about US foreign IP policy, United States Trade Representatives (USTRs) have mentioned, "We press countries hard. . .we put a lot of resources into pressing other countries to do more to protect intellectual property . . . one of our goals has been to get it and get it fast."[11] Eventually, the US received what they pressed for through the World Trade Organization (WTO) in its adoption of the Agreement on Trade Related Aspects of Intellectual Property (TRIPs).

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[8] Peter N. Fowler & Alice T. Zalik, *Globalization's Impact on International Trade and Intellectual Property Law: a U.S. Government Perspective concerning the Agreement on the Trade-Related Aspects of Intellectual Property: Past, Present and Near Future*, 17 ST. JOHN'S J.L. COMM. 401, 402 (Spring, 2003) [hereinafter Fowler & Zalik].

[9] Hernan L. Bentolila, *Lessons from the United States Trade Policies to Convert a "Pirate": The Case of Pharmaceutical Patents in Argentina*, 5 YALE SYMP. L. & TECH. 1 (2002/2003).

[10] *See* Alan S. Gutterman, *The North South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L. REV. 89,125 (1993) (the costs associated with developing and obtaining market approval in 1990 was $231 million per single drug).

[11] Joseph Papovich, *NAFTA Revisted: NAFTA's Provisions Regarding Intellectual Property: Are They Working as Intended? – A U.S. Perspective*, 23 CAN.-U.S. L.J. 253, 257 (1997).

The Agreement on Trade Related Aspects of Intellectual Property

The General Agreement on Tariffs and Trade (GATT) negotiations began an era of international trade agreements. The initial purpose of GATT was to reduce trade barriers.[12] During the Uruguay Round of GATT negotiations, the attendees finalized the TRIPs agreement.[13] The same round of negotiations created the World Trade Organization (WTO), the successor to GATT, which would also serve as the organization monitoring compliance with the TRIPs "minimum" standard for IP rights and protection worldwide.[14]

Being a key negotiator in the agreement, the US approved TRIPs and began modification of domestic patent law in order to execute the United States' international obligations.[15] Essentially, the changes implemented were (1) expansion of the scope of infringement actions to include offers to sell, (2) the use of inventive activity abroad to satisfy the date of invention criteria for patent applications, (3) the extension of patent protection to a term of twenty years,[16] and (4) the publishing of patent applications 18 months after filing.[17] In comparison to measures that other countries might have been asked to adopt, the US hardly stretched for compliance. Countries with infantile patent systems, or no system at all, were asked to implement modern patent legislation within ten years of signing.[18] Essentially, they were asked to do in ten what the US took

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[12] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

[13] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994). The Punta del Este Declaration defined the scope of the Uruguay Round negotiations, which were aimed to "clarify GATT provisions and elaborate as appropriate new rules and disciplines on intellectual property rights." Considerable debate followed regarding the interpretation of the Punta del Este declaration, and thus also the scope of intellectual property to be included within the Uruguay Round negotiations. *See* Monique L. Cordray, *GATT v. WIPO*, 76 J. PAT. & TRADEMARK OFF. SOC'Y 121, 139-140 (1994).

[14] Currently, the WTO hosts 146 members. Of those 146, many countries are negotiating in the FTAA. Prominent ones include Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, The Dominican Republic, El-Salvador, Ecuador, Guatemala, Honduras, Mexico, Nicaragua and Panama. A list of all 146 countries can be located *at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

[15] *See generally* Uruguay Round Agreement Act, Pub. L. No. 103-465, 108 Stat. 4809,4814 (1994). *See also* Adam Isaac, Note, *Domestic Implementation of International Obligations: The Quest for World Patent Law Harmonization*, 25 B.C. INT'L & COMP. L. REV. 373, 381 (Spring, 2002).

[16] Specifically, 35 U.S.C. § 154 was amended to provide that the term of patent protection begins on the date of grant, and ends 20 years from the filing date of the application. 35 U.S.C. § 154.

[17] Isaac, *supra* note 15, at 381.

[18] TRIPs, *supra* note 5, at art. 65, 66. (No member is obliged to apply the provision before a period of one year, however, developing countries are entitled to delay for a further period of four years. Article 66 further qualifies this for so called "least-developed" countries by declaring "in view of the special needs and requirements of least-developed country Members . . . shall not be required to apply the provisions of this Agreement . . . for a period of 10 years from the date of application.")

hundreds of years to develop through common law in more favorable circumstances.

Although controversies concerning the TRIPs Agreement are not at the heart of this note, they play an important role in recognizing recurring problems in the attempt to harmonize IP rights. Therefore, it is important to briefly touch upon some provisions of TRIPs and the problems it presented.

The patent infringement provision of TRIPs is Article 28, which gives patent owners the right to prevent third parties not having the owner's consent from making, using, offering to sell, selling or importing patented products or processes.[19] This also includes products derived from the processes themselves.[20] Thus third parties in Argentina, Brazil, Canada and other prominent countries using generic drugs would be infringing the US patent for the same branded drug likely to be inaccessible due to high pricing. Problems occurred, obviously, when countries like Argentina did not believe pharmaceuticals should be patentable in the first place.[21] Therefore, many "least-developed" countries feared that patent holders in developed nations would overwhelmingly abuse Article 28.

For developing countries, Article 30 seemed to bring comfort to those nations who feared an abuse of patent rights by providing limited exceptions to members. The broad language of Article 30 creates exceptions where they do not unreasonably conflict with the normal exploitation of the patent, and do not unreasonably prejudice the legitimate interests of the patent owner.[22] However, the interpretation of Article 30 has been a major issue for TRIPs. [23] Specifically, the controversy stems from the interpretation of Article 30 as applied to export restrictions under TRIPs Article 31(f).[24] What is referred to as the "Paragraph 6 Problem" leaves countries lacking pharmaceutical manufacturing capabilities without a way to procure needed drugs from those that have well established pharmaceutical industries.[25] To address this problem, scholars and representatives have argued for a broad and authoritative interpretation of Article 30 to allow unchecked compulsory licensing in the face of Article 31.[26] The results of these arguments have yet to be observed.

Of course, the ongoing process of TRIPs compliance has many problems and

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[19] *Id.* at art. 28.

[20] *Id.*

[21] Bentolila, *supra* note 9.

[22] TRIPs, *supra* note 5, at art. 30.

[23] *See* Thomas A. Haag, *TRIPs Since Doha: How Far Will the WTO Go Toward Modifying The Terms for Compulsory Licensing?* 84 J. PATENT & TRADEMARK OFF. SOC'Y 945, 947 (2002).

[24] *Id.*

[25] *Id.*

[26] *Id.* at 952.

challenges. For instance, the TRIPs implementation by underdeveloped members could have a devastating impact upon their future growth. In its promotion of patent right protection, TRIPs could make critical innovations, such as life-saving drugs or even new forms of energy more expensive in the countries that need them most. [27] Another concern is that TRIPs is an instrument of US policy to assert unilateral property claims, considering that products coming from third world countries will not meet the criteria for protection.[28] What might be a decade old technology in the US would be groundbreaking in some developing countries.[29] Even if such countries developed such a technology independently, the novelty requirement would not be satisfied for an international patent because of limited resources and lack of investment that would place those countries at a significant disadvantage to compete with US inventors. Also, there are suggestions that developing countries only agreed to TRIPs because they believed signing on would eliminate unilateral trade sanctions. Thus, many of the drawbacks were not entirely unforeseen, but rather a pressured choice.

TRIPs and "Special 301"—the "H bomb of Trade Policy"

For the US, TRIPs did not seem to be enough. Soon enough, it was becoming apparent that TRIPs was just another weapon in an army of laws. One such weapon is Special 301. Special 301 is known as the set of provisions under the Trade Act of 1974, which require the United States Trade Representatives to identify foreign countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access for US companies that rely on intellectual property protection.[30] Under this provision, a country can be found to be providing inadequate and ineffective intellectual property protection even if it is in compliance with TRIPs.[31] Essentially, although TRIPs is a multilateral agreement in which IP rights standards were agreed upon by many countries, Special 301 has been interpreted to allow the threat of "unilateral retaliation" by the United States in order to persuade countries to raise their standards of protection in this field.[32] This was used, along with other measures, to pressure Argentina to raise its levels of intellectual property protection of pharmaceuticals.[33] Now, the same unilateral measures are

[27] Isaac, *supra* note 15, at 386.

[28] *Id.* at 385.

[29] Another ting to note, "lacking the scientific and financial infrastructure necessary to create patent-induced innovations, developing countries are far more interest in technology transfer than in the encouragement of domestic innovation. Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights,* 28 WAKE FOREST L. REV. 89, 121 (1993) *citing* Robert P. Merges, *Battle of Lateralisms: Intellectual Property and Trade,* 8 B.U. INT'L L.J. 239, 244 n. 9 (1990).

[30] Bentolila, *supra* note 9.

[31] *Id.*

[32] *Id.*

[33] *Id.*

being used to pressure FTAA negotiators to accept strong patent protection as the norm across the western hemisphere.

The FTAA is geared at mainly the Latin American countries, which hardly have economies developed enough to compete with patent producing powerhouses.[34] Moreover, many of the countries in FTAA negotiations are already bound by the TRIPs agreement.[35] The TRIPs agreement being a bare minimum standard, it is argued that the US is attempting to enforce a larger than TRIPs standard on certain "pirate" countries.[36] So how do the aforementioned TRIPs provisions affect the outcome of the FTAA? The FTAA proposes to adopt the TRIPs Agreement and grant even stronger patent rights to their present holders, thus manifesting a regional, self-executing "TRIPS plus."

The FTAA Proposal on Patent Rights: TRIPs+ for the Western Hemisphere

Although it is considered a ground-breaking agreement, TRIPs is not an ideal document, partially because much of it is rather vaguely defined and complex.[37] However, TRIPs does propose that there be an international minimum standard for some IP rights. However, TRIPs should not be the definitive formula that new treaties and agreements are based on. As mentioned before, the signers have yet to sort out all the problems arising from domestic implementation of the TRIPs standards. Unfortunately, in the case of the FTAA, TRIPs is the foundation of the chapter on Intellectual Property, a strategy that seems to resemble the process of building structures when problems with the foundation have yet to be determined and repaired.

The second draft of the FTAA specifically requires parties to adopt Articles 9 through 40 of the TRIPs agreement. Of course, many provisions are also left out or even expanded upon, and will be part of this discussion.[38] It is also important to recognize that many of the problems discussed above are only reintroduced within the FTAA due to its blanket adoption of some of the TRIPs provisions.

In general, the FTAA provides that each party shall provide in its territory to the nationals of the other parties adequate and effective protection and

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[34] In 2001 alone, the United States granted 166,038 patents, 87,606 of those belonging to US residents. In comparison, Brazil issued 3,589 patents, and only 685 of those belonged to Brazilian residents. Mexico issued 5,476 patents, with a mere 118 belonging to Mexican residents. Other Latin American countries, such as Colombia and Honduras all registered less than 1,000 patents issued. *See* WIPO IP/STAT/2001/A, *available at* http://www.wipo.int/ipstats/en/publications/a/pdf/patents.pdf.

[35] *See supra* note 14.

[36] *See generally* Bentolila, *supra* note 9.

[37] Some argue that being vague is an advantage for developing countries. *See generally* J.H. Reichman, *The TRIPs Agreement Comes of Age: Conflict or Cooperation With the Developing Countries,* 32 CASE W. RES. J. INT'L L. 441 (2000).

[38] Free Trade Area of the Americas, Second Draft Agreement Chapter on Intellectual Property Rights, Part I, Article 5.2(e) [hereinafter FTAA].

enforcement of intellectual property rights.[39] What adequate and effective protection of IP rights is becomes a largely subjective determination. This creates a danger for those countries that are not used to the stringent standards of US patent law, and as a result, will need significant adjustment to reach that level. Another general provision of the FTAA dealing with IP rights is the most-favored nation treatment rule, where "any advantage, favor, privilege or immunity granted by a member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members."[40] Under this policy, the US would be hesitant to implement a policy granting patent privileges to poorer countries. The same national treatment provisions were introduced in TRIPs under Article 3, however, with much more lenient language for application.[41] For instance, the most-favored nation treatment rule was met with exceptions provided in the Paris Convention, the Berne Convention, and the Rome Convention.[42]

Also, the threshold of patent protection proposed in the FTAA exactly mirrors that of TRIPs, which is very similar to US law. Article 1, Section 5 states that "each party shall make patents available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application."[43] For purposes of Article 1, the terms "inventive step" and "capable of industrial application" are treated as being synonymous with the terms non-obvious and useful, respectively.[44] An issue raised within these provisions is the unwillingness of some countries to give protection to certain inventions that the US insists on enforcing. One example is pharmaceuticals, which Argentina asserted do not deserve patent protection (although the processes themselves were patentable).[45] On the other hand, the US is willing to patent "anything under the sun made by man."[46] Thus an essential dilemma is apparent: how do we handle countries not willing to grant exclusive monopolies for crucial technologies, or that believe that patents hold a higher threshold than "anything under the sun made by man?" Does setting a minimum standard of protection really mean a low threshold for patentability? The same dilemma has echoed itself throughout the TRIPs agreement, and again, without reconciliation, the same is being applied yet again through the FTAA.

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[39] *See id.*, at Part 1, art. 1.1.

[40] TRIPs, *supra* note 5, at art. 4.

[41] *Id.*, at art. 3

[42] *Id.*

[43] FTAA, *supra* note 38, at Part II, § 5 art. 1. *See also* 35 U.S.C. §101.

[44] *Id.*

[45] *See* Bentolila, *supra* note 9.

[46] *See* Diamond v. Chakrabarty, 447 US 303, 308 (1980) (holding that patentable subject matter includes "anything under the sun made by man").

With respect to rights conferred on FTAA patent holders, the proposed draft does adopt and apply Article 28 of the TRIPs agreement.[47] Importantly, the FTAA further qualifies Article 28 by claiming that each party may prohibit, regulate, or limit exploitation of patented inventions, and further solidifies this absolute right stating, "no provision of this chapter shall be construed in any other manner."[48] Again, this confers upon the patent holder the ultimate right to limit the uses of his innovation. Of course, logically, most of these holders will be US companies, as the patent systems in other countries are nowhere near as developed as the US.[49] Thus, the most likely scenario will involve US patent holders having the discretion to allow or inhibit the dissemination of knowledge to underprivileged societies. Subject to exceptions, patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether the products are imported or locally produced.[50] Thus, the FTAA creates a broader scope of patent protection for signatories. And although some countries may disagree as to patentable subject matter, the qualification of Article 28 in the FTAA will limit the ability of concerned signatories to find any exceptions.

In comparison, the same FTAA allows developing countries only a one-year grace period to apply its provisions. More stunning, if a developing country has problems with applying the provisions, they may be granted an extra two years.[51] TRIPs offered a much more relaxed term of adjustment. Pursuant to Article 65, developing members were entitled to delay TRIPs implementation for four years.[52] In the case of the least developed members, application of TRIPs is delayed for ten years.[53] This lenient application allowed a developing country an opportunity to adapt and expand its economy prior to compliance.[54] The extra time given to the developing TRIPs members was a compromise to assure that the underdeveloped economies would not be suppressed. However, this balance did not seem to work out, as several developing nations that were required to be in full compliance by 2000 indicated that they were not able to implement their TRIPs obligations as required.[55] If some members could not do this within ten years, what does the FTAA seek to accomplish by shortening that period? Perhaps TRIPs was really aimed at harmonizing IP laws in strong patent countries, and perhaps the US was not as concerned with the adaptation of the standard in less innovative countries. Instead, the focus of the FTAA seems to be

[47] FTAA, *supra* note 38, at Part II, §5, Article 3.1. *See also* TRIPs, *supra* note 5, at Art. 28.

[48] *Id.*, at Article 1.3.

[49] *See supra* note 34.

[50] FTAA, *supra* note 38, at Part III, § 5, art. 1.3.

[51] FTAA, *supra* note 38, at Part V, art. 1.

[52] TRIPs, *supra* note 5 at art. 65.

[53] *Id.* at art. 66.

[54] Isaac, *supra* note 15, at 378.

[55] *Id.* at 385.

enforcement, and requiring countries to implement the provisions within two years will most certainly solidify US intentions of pursuing patent "pirates" in the eyes of the countries who host them.

Yet another mechanism the FTAA fails to adopt from TRIPs is the concept of the WTO's Dispute Settlement Mechanism (DSM).[56] Under TRIPs, developed nations could not unilaterally impose trade sanctions against countries utilizing the DSM even if they did not adhere to the agreement.[57] Instead, a Special 301 type proceeding was to be used TRIPs nations to bring troublesome signatories before the WTO. However, as of yet, the FTAA draft does not provide this forum for alternative resolutions to IP rights problems. Notably, many of the FTAA negotiating countries are already part of the WTO, therefore they might be successful in bringing complaints under the WTO's DSM, however, it is questionable whether FTAA complaints may be brought under the WTO, because the WTO does not oversee that agreement.

Nonetheless, not all of the FTAA's provisions are negative. As a result of negotiations, certain provisions have been included to enhance the development of developing nations signing on to the agreement. One such chapter is the Chapter on Technical Cooperation.[58] For example, parties are required to offer to companies and institutions in its territories "incentives designed to promote and encourage the transfer of technology and know how to other parties in order to enable them to establish a solid, competitive and viable technological base."[59] Moreover, those parties shall report each year to the Committee on Intellectual Property the technical cooperation that they have entered into with other parties, in particular, with those parties with smaller economies.[60] Quite noticeably, however, those are the only provisions that positively reinforce incentives to help developing nations. It is also worth mentioning that the same tech provisions in TRIPs have yet to be utilized.[61] Nonetheless, the Chapter on Technical Cooperation is promising to the extent that countries actually enforce and utilize those provisions.

Also, in adopting Article 40 of TRIPS, the FTAA recognizes that some licensing practices or conditions pertaining to IP rights that restrain competition may have adverse effects on trade and may impede the transfer and

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[56] Dr. Ron Corbett, *The Judicial of Intellectual Property Rights in Argentina - Is Society Being Served?* 10 CURRENTS INT'L TRADE L.J. 3, 11 (Winter 2001).

[57] *Id.*

[58] FTAA, *supra* note 38 at Part IV.

[59] *Id.* at Part IV, art. 1.4.

[60] *Id.* at Part IV, art. 1.5.

[61] In the case of designated "Least-Developed Country Members", TRIPs Article 66 requires developed members to provide "incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed members in order to enable them to create a sound and viable technological base. TRIPs, *supra* note 12, at art. 66.

dissemination of technology.[62] Members may adopt appropriate measures to prevent or control such practices, which may include exclusive grant back conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that member.[63] However, many developing countries will lack the negotiation power to prevent the "abuse" of IP licensing. In fact, many countries will not have the capacity to adopt any measure to prevent such practices, considering the high need for critical information. Essentially Article 40 establishes a forum of complaint, but requires full and sympathetic consideration to the rights of IP holders.

FTAA: Fair Trade Area of the Americas

There are three major concerns for developing countries in the face of the strong IP protection fostered by the FTAA. Losses would stem from (1) the inability to copy patented products cheaply and easily, (2) the lack of access to the latest technology, and the dependency on developing countries, and (3) unfair market abuse by patent holders.[64]

James Love, an economist at the Center for Study of Responsive Law (CSRL), explains that the CSRL is "concerned that United States foreign trade officials are advocating international rules for intellectual property that are inappropriate for both less developed and more developed countries, including the United States itself.[65]

Of course, it is constantly argued that free trade remains the dominant policy to improve the welfare of individuals in the world.[66] While not incorrect, this statement is also not complete. Free trade needs to be coupled with fair trading practices. Essentially, those legislating IP rights need to consider antitrust laws dealing with monopolies before agreeing on a set standard of protection and enforcement. Moreover, what is trade if it is done unilaterally? If monopolies drive out competition, wouldn't international trade be administered solely by the Microsofts of the world?

It is not suggested that developing countries maintain the lowest standard of protecting both foreign and domestic patent rights, but rather, that the international treaties recognize the need for justice by creating incentives for

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[62] FTAA, *supra* note 38, at art. 1.3. "Each party shall apply Article 40 of the TRIPS Agreement."

[63] *Id.*

[64] *See* Free Trade Area of the Americas, Seventh Meeting of Ministers of Trade, Ministerial Declaration: General Instructions (Quito, Ecuador, November 1, 2002).

[65] James Packard Love, *A Free Trade Area for the Americas: A Consumer Perspective on Proposals As They Relate to Rules Regarding Intellectual Property*, Comments for the Working Group on Intellectual Property Rights, Third Trade Ministerial and Americas Business Forum (Belo Horizonte, Brazil, May 13-16,1997). *Available at* http://www.cptech.org/pharm/belopaper.html.

[66] Lippert, *supra* note 4, at 269.

developed countries and their patent holders to ease restrictions, while also creating incentives for developing countries to foster competition.

In relating the FTAA with TRIPs, the developing members were contending that the stringent protection of IP would impede their development, and believed that TRIPs would result in a loss of their sovereignty and increased dependence on more developed members.[67] The reason for even entering negotiations, however, was that potential gains from free trade were irresistible when compared to the dependency of other IP abundant nations. The problem of enforcing patent rights in smaller and less developed economies has become a barrier to many trade negotiations. The FTAA has essentially substantiated this fear.

On the other hand, many theories have been advanced promoting stronger IP protection in developing countries. Some use a "prospect theory" to argue that government can use creative measures such as patent buy-outs to ensure the rapid diffusion of technology and knowledge. One author continues by recognizing that in 1839 the French government purchased the patent on the Daguerreotype process and placed it in the public domain, which allowed France to lead the world in creative development of photography during the subsequent century. [68] The example, however, is inappropriate for two reasons in the face of the FTAA. First, the example is archaic. In 1839, the value of intellectual property, and the focus of patents were not as market driven as it is today. The strength of intellectual property rights has undoubtedly changed within the last two centuries, and IP rights have become a method for strategic investment and development. Second, France was nowhere near the threshold of "underdeveloped" in 1839. Developing nations today are not financially capable of spending such money for patent buy-outs. The governments of the less powerful countries of the Western Hemisphere must deal with many more issues before deciding to spend millions of dollars they might not even have to buy-out one patent.

In summary, some argue that the FTAA should negotiate a higher than TRIPS level of IP rights protection. Specifically, "both developed and developing nations will benefit from the resulting further entrenchment of property rights, the expansion of free trade, the shaping of a global optimal standard, and the settling of the intellectual property debate at least in the short term." [69] This is incorrect. Free trade without fair trade does not foster competition and the development of poor nations. Rather, it creates the ultimate right for innovators in prosperous countries to be the gatekeepers of development for underdeveloped countries.

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[67] Isaac, *supra* note 15, at 378.

[68] Lippert, *supra* note 4, at 269.

[69] *Id.* at 275.

FTAA As a Strategic Means of Implementing US Patent Policy

Huge portions of TRIPs are incorporated into the FTAA agreement by reference; however, these standards do not have enforcement provisions. US IP rights holders in particular, especially the pharmaceutical industries, wanted to latch on enforcement provisions that ensured maximum profitability from international trade.[70] This type of policy is seemingly evident in the North American Free Trade Agreement (NAFTA), where certain software piracy was decriminalized. However, US software industries did not sit quietly, and, of course, the US went back to negotiations with Mexico over the decriminalization of such software.[71] This was done without consulting Mexican software industries.[72] This problem has been dealt with in advance under the FTAA, as the second draft inherently creates criminal provisions for many types of infringement. For instance, a party may provide criminal procedures and penalties to be applied in cases of infringement of patents where they are committed willfully and on a commercial scale.[73] This provision goes far above and beyond both TRIPs and US patent law. In comparison, willful infringement by US commercial entities only provides for civil penalties, the most severe being treble damages.[74] This type of selective policy should be tested towards other nations, considering the "most-favored nation treatment" rule, and the US should at the very least enforce the same punishment for its own offenders, as it is willing to pursue against violators in a foreign country.

As demonstrated above, the US's intent behind IP negotiations in the FTAA is easily recognizable. The United States has long been attempting to achieve higher than TRIPs protection in pirate countries such as Argentina, while focusing more on harmonization with more developed countries. The subregional trading bloc, Common Market of the South (MERCOSUR) loosely joined the markets of Argentina, Brazil, Uruguay and Paraguay in 1995.[75] Importantly, MERCOSUR does not offer a region wide standard of intellectual

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[70] Papovich, *supra* note 11, at 257. *See also generally* Donald L. Dubuque, *The Implication of NAFTA to Intellectual Property Protection in the U.S. and Mexico and the Extraterritoriality of U.S. Intellectual Property Laws*, 5 J. INT'L L. & PRAC. 139 (1996).

[71] *Id.*

[72] *Id.*

[73] FTAA, *supra* note 38, at § 12, art. 4.2.

[74] *See* 35 U.S.C § 281 ("A patentee shall have remedy by civil action for infringement of his patent"). *See also* 35 U.S.C § 284 ("the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer.." and " the court may increase the damages up to three times the amount found or assessed"). For a history of treble damages in US Patent law, *see* Matthew Powers and Steven Carlson, *The Evolution and Impact of the Doctrine of Willful Patent Infringement*, 51 SYRACUSE L. REV. 53 (2001).

[75] Wendy S. Vicente, *Questionable Victory for Coerced Argentine Pharmaceutical Patent Legislation*, 19 U.PA. J. INT'L ECON. L. 1101, 1102 (Winter, 1998).

property protection.[76] These nations have long rejected integrating their patent protection standards, and MERCOSUR has no developed member nation that insists on a high level of IP protection. Rather than be satisfied on sub-regional agreements, the US plans to use the FTAA to achieve a greater than TRIPs protection with MERCOSUR nations by offering a "comprehensive package."[77] Negotiating countries will be so overwhelmed by the prospect of free trade, and so blinded by US intentions that IP rights will become the extra baggage lost in the process. Thus, the negotiation power of the US in this context is overwhelming, especially with TRIPs and a Special 301 army backing it.

Pharmaceuticals: Problems and Solutions

When it comes to weighing the social costs and incentives of IP rights, pharmaceutical patent holders are the most easily criticized. Easily enough, granting monopolies to large corporations that seemingly have the power to deny life in some cases is of major concern for US consumers. The US is a powerhouse for pharmaceutical drug research. Consequently, the US holds, and will probably continue to hold the most pharmaceutical patents, and currently represents at least 18 percent of the worldwide pharmaceutical market.[78] Of course, these same companies spend millions of dollars researching and developing their products.[79] Thus, proposing no protection at all, as proposed by Argentina, is a futile endeavor. On a national level, US consumers are concerned about the cost of healthcare and the ability to buy cheaper drugs. This problem is only further magnified on the international level, where certain consumers are concerned about receiving healthcare in the first place, and pharmaceutical companies are seen as having the power to deny life merely because they are not happy with profits. However, the Pharmaceutical Research and Manufacturer's Association (PhRMA) argues that the significant levels of investment into pharmaceuticals cannot be sustained unless foreign markets, including those in developing countries, are available to help recoup costs.[80] However, developing countries resist this type of pressure, and resistance to the implementation of patent protection for pharmaceuticals becomes an issue of "national sovereignty."[81]

US policy towards the pharmaceutical problem in Argentina puts this problem into an alarming perspective. US State Department officials have claimed that they received nearly all their information regarding the Argentina

[76] *Id.*

[77] *Id.* at 1112.

[78] Gutterman, *supra* note 29, at 127. Patents & Sales.

[79] *See* Gutterman, Supra note 29, at 125. (citing Thomas Mesevage, *The Carrot and the Stick: Protecting U.S. Intellectual Property in Developing Countries,* 17 RUTGERS COMPUTER & TECH L.J. 421,426 (1991)).

[80] Gutterman, *supra* note 29, at 125.

[81] *Id.*

pharmaceutical patent dispute from the Pharmaceutical Research and Manufacturing Association (PhRMA).[82] Thus, the decisions were based on policy put forth by one, clearly interested source. Moreover, the same officials were unaware of proposals to use compulsory licenses to control excessive prices for pharmaceutical drugs.[83] Parallel imports were another issue, and although the practice is permitted in a couple of European Union Countries, the US is extremely aggressive to ban the practice in South America. One State Department official said he wanted Argentina to be "more Catholic than the Pope" with respect to intellectual property policies.[84] Thus, the attitude of US representatives toward Latin American countries on issues of IP is apparent.

Some solutions to balance these problems are starting to surface. For instance, Professor Lawrence Lessig of Stanford University has suggested that "price discrimination" is a way to solve these problems, which would allow these industries to tailor the pricing of drugs for certain developing countries.[85] Of course, if companies are going to consider charging less to developing countries, they are going to require displacing those lost profits by charging more in the developed countries that can afford to pay more for those drugs.[86] This is especially true in the US's patent system, which forces drug companies to set a semi-standard price across the board, essentially denying medicine to those who need it most.[87] Although price discrimination can favor developing countries, the doctrine of exhaustion is beginning to discourage this practice as free trade agreements such as the FTAA open the doors to cross-market transactions. Thus, patents can quickly lose their value once free trade allows consumers to buy from the cheapest market. This is more commonly known as parallel importing.

The practice of parallel imports is not entirely outlawed. The parallel import concept, premised on a "first sale" right of the patent holder, allows consumers to shop the world market for the lowest price of a patented good, and import it to their host country.[88] This practice has been admitted in many countries, developed and underdeveloped alike. The doctrine of regional exhaustion of rights is enforced across the European Communities (EC). Once a patented product has been sold in an EC country, it can be legally resold in any other member country.[89] Importantly, TRIPs does not address the same issue,

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[82] Love, *supra* note 65, at 10.

[83] *Id.*

[84] *Id.*

[85] Lawrence Lessig, *Stop Making Pills Political Prisoners: Want Drugs to Reach Developing Nations? You'll Pay the Price*, WIRED, Feb. 2004, at 83.

[86] *Id.*

[87] *Id.*

[88] Carlos M. Correa, *Public Health and Patent Legislation in Developing Countries*, 3 TUL. J. TECH. & INTELL. PROP. 1, 36 (Spring, 2001).

[89] *Id.* at 38-39.

therefore, neither does the FTAA.

Another way to disseminate information while allowing countries to develop and remain competitive with large pharmaceutical companies is to create an experimental use exception. Such experimental use exceptions can foster technological growth based on "inventing around" or improving prior inventions.[90] Thus allowing the dissemination of the information before the patent expires gives more time to develop generic drugs, which in turn would create more competition in the industry and correspondingly, more affordable drugs.[91] Even outside the realm of pharmaceuticals, a broad experimental use exception can foster technological growth to the point of steady competition in a multinational environment while ensuring proprietary rights are not abused.

Although these concepts originate in the context of pharmaceuticals, they could be easily applied to other goods. Crucial technologies are becoming just as important to developing countries as is health. By creating investment, this backbone of economical growth could spring third world countries out of overwhelming poverty levels.

"Non-Violation" Complaints and TRIPs Article 8

Proposed in 2002, some recommendations to the negotiations that were reached by consensus were to adopt positions that will facilitate the transfer of technology towards less developed countries in order to reduce the asymmetries in the economies of the hemisphere. This language was completely missing in the second draft of the FTAA, and hopefully, the negotiators will come to realize the inherent need for adopting such a measure. In fact, the same measure was included in the TRIPs agreement.[92]

Article 8 of the TRIPs agreement expressly states that Members may adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socioeconomic and technological development, provided the measures are consistent with the provisions of the Agreement.[93] As Fowler and Zalik put forth, "It would be a poor lawyer indeed or a particularly malevolent government that could not devise a TRIPs consistent way to accomplish its objectives related to any of those policy areas. In any non-violation case, therefore, the party accused could in addition to the precedents provided by prior GATT/WTO cases, raise Article

[90] *Id.* at 34.

[91] *Id.*

[92] FTAA – Committee of Government Representatives on the Participation of Civil Society Contribution in Response to the Open and Ongoing Invitation: Intellectual Property Rights Workshop: Conclusions (January 24, 2002), *available at* http://www.ftaa-alca.org/spcomm/soc/2Quito_e.asp.

[93] TRIPs, *supra* note 5, at art. 8.

8 as authorizing the action it had taken."[94] I propose that the same policy be adopted in the FTAA, and further, for the FTAA to encourage its use and adoption by certain less-developed governments. Although not likely to be applied with the same breadth that Fowler and Zalik foretell, a non-violation forum would give signatories the opportunity to make an equitable case. Why not allow these provisions into the FTAA, if patent law harmonization is the overall goal? This would possibly create a DSM type forum where developing countries could voice their concerns over unfair trading practices, or abuse of rights.

Finally, another policy based alternative mechanism is to provide foreign aid to Latin American research & development. Such an investment would surely result in competition for US companies. However, at the same time, promoting research and development would jumpstart innovation in those countries, which would become interested in enforcing effective intellectual property protection.[95] Some of the "technical cooperation" measures included in the FTAA can be utilized for their full value, but only if legislatures, private entities, and industries as a whole take the initiative to help. Although companies may cringe at the idea of helping create a future competitor, competition for US companies could enhance the global marketplace and create a more efficient market at home.

Conclusion

This note uses pharmaceuticals as an example; however, other developments and innovations in technology have become just as critical to developing nations. Thus, the implications of IP rights in the FTAA are far beyond pharmaceuticals. The central issue is really fair trade of proprietary knowledge. Fair trade will only become a reality if IP holders begin promoting global progress in science and becoming aware of global welfare problems. Perhaps a reason the FTAA is in danger of not being enacted is because of its inability to reconcile many interests. IP rights serve an invaluable role in the US to ensure that innovation is constant. In fact, the US system of IP rights is one of the keys to the technological prosperity it has seen for centuries. However, it is necessary to recognize that certain nations are not prepared for the same system. Developing nations might one day have economies strong enough to maintain a US IP rights agenda. Until then, however, placing pressure upon those countries to swiftly adopt the FTAA and TRIPs, as well as threatening sanctions and other proceedings, can fracture the ice under the prospect of free trade.

[94] Fowler & Zalik, *supra* note 8, at 412-413.

[95] Bentolila, *supra* note 9, at 14.

THE CIRCLE OF LABOR: THE NAALC, ILO, FTAA AND LABOR DISPUTE RESOLUTION MECHANISMS

Laura L. Milnichuk†

Introduction

Globalization is "the process by which a business or company starts operating on an international level."[1] Some experts believe that international commerce has led to globalization. But many would argue that globalization is no longer effective, because it has been corrupted by "powerful nations and powerful interests within such nations."[2] In fact, 20 percent of the world controls 80 percent of the gross domestic product, thus furthering the gap between the rich and the poor.[3] Perhaps one of the hottest debates governing globalization revolves around labor,[4] around finding politically acceptable solutions for implementing fair labor standards and improving working conditions within various nations of the globalized world.[5]

In an effort to create an even smoother transition into a globalized world, in 1992, Canada, Mexico, and the United States (US) entered into an agreement that would allow free trade among them: the North American Free Trade Agreement (NAFTA).[6] Under NAFTA, the three member states are obliged to lower their tariff barriers and to allow for free trade arrangements.[7] Two years

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[1] WEBSTER'S NEW WORLD COLLEGE DICTIONARY 574 (4th ed. 1999).

[2] Tina Rosenberg, *Globalization*, N.Y. TIMES, Aug. 18, 2002, at 28.

[3] *Globalisation Has Widened the Gap between Rich, Poor*, BUS. LINE, Jan. 14, 2004, *citing* Velma Veloria, State Representative and Head of Joint Legislative Oversight Committee on International Trade Agreements [hereinafter *Globalisation*].

[4] *See* Joel R. Paul, *The New York University-University of Virginia Conference on Exploring the Limits of International Law: Do International Trade Institutions Contribute to Economic Growth and Development?*, 44 VA. J. INT'L L. 285, 286 (2003).

[5] Kimberly Ann Elliott, *Labor Standards and the FTAA*, Institute for International Economics, Working Paper 03-7, *at* http://www.iie.com/publications/wp/wpauthor.htm#elliott (last visited Mar. 29, 2004).

[6] North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-US, 32 I.L.M. 289 (1993).

[7] Craig L. Jackson, *The Free Trade Agreement of the Americas and Legal Harmonization*, AM. SOC. INT'L. L. NEWSLETTER [hereinafter Jackson]. In addition, NAFTA involves arrangements involving areas of economic cooperation. The idea of free trade can best be articulated via an example of an individual entrepreneur: when this entrepreneur decides to sell his product in

later, in December of 1994, a formal declaration was made in Miami, disclosing plans to expand the tripartite free trade area to countries in the Caribbean and Central and South America via the creation of a Free Trade Area of the Americas (FTAA).[8] With roughly a year remaining until the 2005 proposed deadline,[9] a significant challenge lies ahead: how will the member countries resolve disputes that arise involving alleged violations of labor norms?

Labor is a complex topic with many facets, ranging from its cost, which varies in each country, to the enforcement of domestic labor standards that ensure worker rights. In the initial FTAA discussions, labor standards were somewhat of a vague yet prominent topic.[10] Although the initial lack of specificity was not shocking, it was somewhat surprising, as many believed that the FTAA would be a larger version of NAFTA and the North American Agreement on Labor (NAALC), commonly referred to as NAFTA's right arm.[11] While free trade advocates have espoused the argument that labor standards have no place in multi-national trade agreements because they can act as a smokescreen that allows the penetration of a nation's sovereignty, many have countered that there is a certain absurdity in claiming that labor has no place in trade when "labor is commerce, and commerce is trade."[12]

Despite the heavy rhetoric surrounding the inclusion of labor standards, the FTAA opted to place the heavy burden in the hands of the International Labor Organization (ILO or Organization).[13] On November 1, 2002, at the Seventh Meeting of the Ministers of Trade held in Quito, Ecuador, the Ministers responsible for trade in the hemispheres proposed the following regulation:

> . . . in accordance with our respective laws and regulations, the observance and promotion of internationally-recognized core labor standards, renewing our commitment to observe the International Labour Organization 1998 Declaration of Fundamental Principles and Rights at Work and its follow-up, acknowledging that this organization is the competent body to promote, set and deal with these core

another country with which his home country has a free trade agreement, the product will, ideally, be allowed to enter the other country tariff free. In contrast, compare the result of a product sold in a third country, with which the entrepreneur's home country has no free trade agreement: the tariff imposed on the product will be passed along to the consumer via a price increase. The free trade agreement allows the entrepreneur to sell his goods at a cheaper price, and thus fosters an advantage to both the consumer and the entrepreneur.

[8] *Id.*

[9] *Id*; *see also* Robert B. Zoellick, *US to Promote Active, Comprehensive Trade Agenda in 2004*, AFR. NEWS, Mar. 2, 2004 (explaining that America's agenda in 2004 is "to push firmly forward toward the vision set out by President Bush of 'a world that trades in freedom'").

[10] *See* Jackson, *supra* note 7.

[11] *See id.*

[12] Chantall Taylor, *NAFTA, GATT, and the Current Free Trade System: A Dangerous Double Standard for Worker's Rights*, 28 DENV. J. INT'L. L. & POL'Y 401, 434 (2000) [hereinafter Taylor].

[13] *Ministerial Declaration of Quito*, *at* http://www.ftaa-alca.org/ministerials/quito/minist_e.asp (last visited Nov. 19, 2003).

labor standards.[14]

In essence, this Ministerial meeting proclaimed that the FTAA intends on following the labor standards of the ILO and that the ILO should serve as the competent body to monitor labor disputes.

The FTAA has been criticized for its failure to adequately address the issue of labor standards and to remedy the inefficacies of the NAALC's labor dispute resolution mechanism. Accordingly, this comment will begin by briefly detailing the history of the NAALC and its procedural mechanism used to resolve a labor dispute. Next, it will compare the ILO's dispute resolution mechanism to that of the NAALC in order to better understand the possible advantages and disadvantages of implementing one over the other. Finally, this comment will highlight the debate surrounding the inclusion of workers' rights provisions in the FTAA and a potential remedy that has arisen from the recently enacted US-Chile Free Trade Agreement (FTA).

The History of NAALC and the Process Behind Resolving a Labor Dispute

The evolution of NAALC can be attributed to politics.[15] Many American labor unions and pro-labor politicians strongly opposed a NAFTA that lacked explicit provisions for labor standards.[16] US Congressional opponents[17] lobbied for an alternative NAFTA agreement that would "harmonize labor norms in all participating countries, sanction violations from these norms as 'actionable unfair trade practices,' and create a dispute resolution mechanism that would enforce North American labor standards."[18] Accordingly, it was the 1992 presidential campaign that fostered the birth of NAALC.[19] When President Clinton decided to condition his acceptance of NAFTA on the provision that it

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[14] *Id.*

[15] Sarah Lowe, *The First American Case Under the North American Agreement for Labor Cooperation*, 51 U. MIAMI L. REV. 481, 487 (1997) [hereinafter Lowe].

[16] *Id.*

[17] *See id.* at 487-88. The labor advocates' opposition to NAFTA stemmed from the fear that the US job market would be negatively affected in two ways: first, that the elimination of tariffs and other trade regulations on both sides of the border would lead to import surges from Mexico, which would create losses in the US job market; and second, Mexico would have a competitive advantage over the US because of Mexico's lack of enforcement of its labor laws, which would also result in the loss of US jobs.

[18] *Id.*, *citing* Michael J. McGuinness, *The Protection of Labor Rights in North America: A Commentary on the North American Agreement on Labor Cooperation*, 30 STAN. J. INT'L L. 579, 579 (quoting H.R. 1445, 103d Cong. (1st Sess. (1993))).

[19] Lowe, *supra* note 15 at 487; *see also* Hannah L. Meils, *A Lesson from NAFTA: Can the FTAA Function as a Tool for Improvement in the Lives of Working Women?*, 78 IND. L. J. 877, 888-89 (2003) (explaining that the administration of senior President George Bush advocated the exclusion of labor standards from NAFTA for two reasons: first, Mexico, for example, already had comparable labor standards to the US; and second, although the financial resources to implement labor standards were lacking, NAFTA would remedy that problem by generating the necessary economic resources to allow for the effective enforcement of such standards) [hereinafter Meils].

was accompanied by a supplemental labor agreement, it was not long before Congress passed and the President signed the North American Free Trade Agreement Implementation Act on December 8, 1993.[20]

Although on paper this may have been a political victory for the advocates of worker's rights, the language of the NAALC is purposely vague in order to ensure that the member countries retain their sovereign rights to establish and control their own domestic labor laws.[21] For example, Article II of the NAALC guarantees full respect for each Party's constitution, and recognizes the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws.[22] Furthermore, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productive workplaces, and shall continue to strive to improve those standards in that light.[23] Nevertheless, the signatories of the NAALC resolved to promote and incorporate eleven principles into their domestic labor law and practice.[24] The eleven principles are: (1) freedom of association and protection of the right to organize; (2) the right to bargain collectively; (3) the right to strike; (4) prohibition of forced labor; (5) labor protection for children and young persons; (6) minimum employment standards; (7) elimination of employment discrimination; (8) equal pay for women and men; (9) prevention of occupational injuries and illnesses; (10) compensation in cases of occupational injuries and illnesses; and, (11) protection of migrant workers.[25] If any interested person believes that a member country is violating one of these eleven standards, then the recourse available is contingent upon where the norm falls within a three-tiered hierarchy.[26] The three-tiered hierarchy classifies the norms as follows: tier one includes labor protections for children, minimum employment standards, including minimum wage, and the prevention of occupational injuries and illnesses; tier two consists of prohibition of forced labor, compensation in cases of occupational injuries and illnesses, protection of migrant labor, elimination of employment discrimination, and equal pay for men and women; and, tier three addresses violations of freedom of association, the right to bargain collectively, and the right to strike.[27]

With respect to the procedural aspects of the NAALC, each member country

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[20] Lowe, *supra* note 15 at 487; *see also* Bobbi-Lee Meloro, *Balancing Goals of Free Trade with Worker's Rights in a Hemispheric Economy*, 30 U. MIAMI INTER-AM. L. REV. 433, 441-42 (1999) [hereinafter Meloro].

[21] Taylor, *supra* note 12 at 415.

[22] Agreement on Labor Cooperation, Sept. 13, 1993, US-Mex.-Can., art. II, 32 I.L.M. 1499, 1503 [hereinafter NAALC].

[23] *Id.*

[24] *Id.* Annex 1 at 1515-16.

[25] *Id.*

[26] Meils, *supra* note 19 at 890.

[27] *Id.*

must maintain a National Administrative Office (NAO), which receives complaints from any interested party.[28] The NAO of the country where the complainant resides must receive the complaint, and it maintains the discretion to determine if the complaint warrants review.[29] If the NAO determines that the complaint merits review, then it will begin consultations, which take the form of government-to-government talks, with the accused NAALC member.[30] This procedure may be the final stage of the complaint process depending on the tier within which the alleged norm violation falls.[31] Accordingly, for any alleged violations that fall within the third tier (i.e. a violation involving the prohibition of freedom of association, the right to organize, the right to bargain collectively, or the right to strike), the best outcome results in cooperation between NAALC member nations and a non-binding recommendation by the NAO as to which avenues are likely to lead to a remedy.[32]

If the alleged violation falls within the first or second tier and the negotiations between the NAO and the violating country are not successful, then the complainant can request the creation of an Evaluation Committee of Experts (ECE), which is composed of people from each of the three nations.[33] Once again, the ECE can only issue a "'non-adversarial and non-binding recommendation[s] on the issue.'"[34] For alleged violations that fall within the second tier, this is the sole remaining remedy.[35]

As to alleged violations that fall within the first tier, a complainant, if displeased with the results of the ECE, may submit the matter to a Council of Ministers for mediation.[36] If this mediation proves unsuccessful, then the complaint may be submitted to an arbitration panel, which is capable of imposing fines and suspending benefits of member countries.[37] While the arbitration panel wields more power than any other mechanism in the dispute resolution process, it will only impose such sanctions when a pattern of

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[28] *Id.*; *see also* NAALC, *supra* note 22, art. 16, 3 at 1057 (providing "each NAO shall provide for the submission. . .of public communications on labor law matters arising in the territory of another Party. Each NAO shall review such matters, as appropriate, in accordance with domestic procedures").

[29] Meils, *supra* note 19 at 890.

[30] *Id.* at 890-91.

[31] *Id.* at 891.

[32] *Id.*

[33] *Id.*; *see also* Lowe, *supra* note 15 at 492 (explaining that the second tier "provides for evaluation and recommendations by a tri-national Evaluation Committee of Experts").

[34] Meils, *supra* note 19 at 891 (quoting Joel Solomon, *Mexico, Labor Rights and NAFTA*, 8 HUM. RTS. WATCH/ AMS 2 (1996)).

[35] *Id.*

[36] *Id.* The Council of Ministers consists of labor ministers from each signatory country. For a further discussion on this topic, *see* Lowe, *supra* note 15 at 490-91.

[37] Lowe, *supra* note 15 at 493-94.

violations has been established.[38] Consequently, only consistent failures to provide labor protections for children, to provide minimum employment standards, and to provide the action and enforcement necessary to prevent occupational injuries and illnesses will warrant sanctions under the NAALC.[39]

One of the first illustrations of the NAALC's resolution mechanism occurred when a complaint alleged that Mexico failed to enforce its law preventing antiunion discrimination.[40] On February 14, 1994, the International Brotherhood of Teamsters (IBT) and the United Electrical Radio and Machine Workers of America (UE) filed a complaint with the US NAO, alleging that antiunion discrimination had occurred at a Honeywell plant in Chihuahua and a General Electric plant in Juarez.[41] Because antiunion discrimination falls within the third tier of labor norms, the best remedy available in this situation would have been an agreement or compromise between the governments of Mexico and the US regarding Mexico's enforcement of its anti-discrimination law.[42] Instead, despite the fact that the US NAO "conducted hearings, communicated with the Mexican NAO, commissioned studies of Mexican labor law and administrative procedures, and recommended a series of cooperative programs regarding associational and organizing rights, it did not, in its final report, conclude that Mexico failed to enforce its domestic labor law."[43]

ILO Core Labor Standards and Processes

While "[t]he NAFTA/ NAALC debate provides evidence that some form of workers' rights provisions in the future FTAA will be necessary to garner the requisite support in Congress for the passage of any new free trade agreement,"[44] it is evident that the FTAA has decided to defer labor standards to the ILO. The consequences of such a deferral remain to be seen.

Historically, the roots of the ILO began to find ground when delegates from a fifteen-member Commission on International Labor Legislation met at the Paris Peace Conference at the end of World War I.[45] In order to maintain social peace, the delegates sought to develop the structure of a permanent international organization that would be able to promote labor standards and protect labor

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[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] Meils, *supra* note 19 at 891.

[43] Lowe, *supra* note 15 at 493-941.

[44] Meloro, *supra* note 20 at 442.

[45] Robert W. Gilbert, 1 INTERNATIONAL LABOR AND EMPLOYMENT LAWS 40-1 (William L. Keller ed., BNA Books 2d ed. 1999) (1997) [hereinafter ILEL].

legislation worldwide.[46] Moreover, a significant portion of the efforts dedicated to creating this body stemmed from the fear that with an increasingly global marketplace of free trade, the absence of international labor standards would precipitate a "race to the bottom."[47] In 1919, under Part XIII of the Treaty of Versailles, the Commission established the ILO as an autonomous body within the League of Nations.[48] The League of Nations later transferred all of its assets and power to the UN in 1946.[49]

Structurally, the ILO includes an International Labor Conference, a Governing Body, and an International Labor Office.[50] Commonly, the ILO is referred to as a tripartite organization because the three branches are composed of government, employee, and worker representatives from the various member nations.[51] The International Labor Conference (henceforth "Conference") is the "legislative body" of the ILO, and some of its obligations include: "adopt[ing] new Conventions and Recommendations to be submitted to member countries, monitor[ing] the application of existing labor standards, and provid[ing] a world forum for the discussion of social and labor matters."[52] The Conventions range from topics dealing with social security to maternity protection, and, at the choice of the member nations, may be ratified within each nation.[53] Recommendations, on the other hand, are not subject to ratification because they set non-binding guidelines that either supplement a Convention or cover a labor-related topic area.[54]

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[46] *Id.*

[47] Michael J. Trebilcock, *Trade Policy and Labour Standards: Objectives, Instruments, and Institutions*, LAW AND ECONOMICS RESEARCH PAPER NO. 02-01, 10 (2001), *at* http://ssrn.com/abstract_id=307219 (explaining that the "race to the bottom" occurs when exporting countries with low labor standards undermine higher labor standards in importing countries, which eventually results in all countries relaxing their standards for fear of a loss of market share) [hereinafter Trebilcock].

[48] ILEL, *supra* note 45 at 40-1.

[49] *See* http://worldatwar.net/timeline/other/league18-46.html) that sits, to this day, in Geneva, Switzerland.

[50] ILEL, *supra* note 45 at 40-3.

[51] *Id*; *see also* Dinah Shelton, *Symposium: Globalization & the Erosion of Sovereignty in Honor of Professor Lichtenstein: Protecting Human Rights in a Globalized World*, 25 B.C. INT'L & COMP. L. REV. 273, 315 (2002).

[52] ILEL, *supra* note 45 at 40-4.

[53] *Id.* at 40-8. If ratified, the countries must supply the ILO Director-General, who runs the International Labor Office and is elected to a five-year term by the Governing Body, with documentation and a plan to undertake five specific treaty obligations: "1) To maintain national law and practice in full conformity with the Convention's provisions; 2) To report periodically (between one-year and five-year intervals) to the Organization on the national measures taken to carry out those provisions; 3) To report implementing measures taken to ensure compliance with the Convention; 4) To report whether employer or worker organizations have sent the government concerned comments on the practice under the Convention and its application; and 5) To accept the supervisory system of the Organization."

[54] *Id.* at 40-10.

The issues that become the topic of the Conventions or Recommendations can be made by any government, employers', or workers' representative to the Governing Body.[55] If the Governing Body determines that the issue has merit, it will place the issue on the agenda; while, in the meantime, the International Labor Office researches it, conducts surveys from other member governments, and analyzes the comments that have been made.[56] These findings and draft Conventions and Recommendations are presented to the Governing Body, which then determines those that shall be referred for debate and consideration at the annual Conference.[57] Normally, the Convention or Recommendation will be debated and examined by a tripartite technical committee in two successive annual Conferences.[58] A two-thirds majority vote of all the Conference delegates is necessary to pass the Convention or Recommendation.[59] If such a Convention or Recommendation is ratified, then the member nations of the ILO have 18 months to report to the Organization the steps that are being taken to ratify the Convention.[60] Notable, however, is the fact that "the individual countries are not required to ratify Conventions and are not bound by Recommendations in any event."[61]

In 1998, the ILO adopted a Declaration of Fundamental Principles and Rights at work (ILO Declaration), which provided that all member nations have an obligation to promote and respect four core labor standards: "(1) freedom of association and right to engage in collective bargaining; (2) the elimination of forced and compulsory labor; (3) the abolition of child labor; (4) elimination of discrimination in employment."[62] Although there are six subsidiary bodies[63] that monitor the implementation of these standards, the ILO member nations have not surrendered any sovereignty to the Organization, and thus, the ILO has no power to impose these standards on any member country.[64] Rather, the effectiveness of the ILO's power stems from "exercising persistent moral persuasion and shaming, in the 'court of world opinion,' governments that fail to live up to their voluntarily undertaken international obligations, reinforced by a

[55] *Id.* at 40-6.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* at 40-7.

[61] *Id.*

[62] ILO Declaration of Fundamental Principles and Rights at Work art. 2, International Labor Conference, 86th Sess., Geneva, June 1998, *available at* http://echo.ilo.org/pls/declaris/DECLARATIONWEB.INDEXPAGE?var_language=EN (last visited February 13, 2004) [hereinafter ILO Declaration].

[63] *See* ILEL, *supra* note 45 at 40-12-19.

[64] *Id.* at 40-5.

consensus established among governments, employer, and workers. . . ."[65]

In 1994, one of the subsidiary monitoring bodies, the Committee of Experts, reported that in the previous three decades, over 2,000 cases involved the alteration of national legislation or practice in order to comply with a ratified Convention.[66] According to the Committee of Experts, the criticism stemming from the various ILO supervisory bodies is what fostered such changes.[67] Furthermore, the ILO Declaration provides that labor standards "should not be used for protectionist trade purposes, or call into question a country's comparative advantage."[68] The idea is that if a country violates a core labor standard, which, in the view of many, is a gross human rights violation, then the worldwide community will accordingly respond with the appropriate trade sanctions.[69] Thus, although there appears to be no legal mechanism that forces compliance, the ILO has been efficacious, at least on some level, in unifying international labor standards via moral and economic pressure in the worldwide community.[70]

Comparative Analysis between the NAALC and the ILO

When comparing the end results of labor disputes under the NAALC with those under the ILO, one difference is that only violations of tier one standards will actually result in trade sanctions under the NAALC.[71] While that tier includes standards for labor protections for children, minimum employment standards, including minimum wage, and the prevention of occupational injuries and illnesses, trade sanctions will only be warranted when there is a pattern of violations.[72] Otherwise, any other tier two or tier three violations will, at best, result in a non-binding recommendation to resolve the issue.[73]

A similar result is scene under the ILO, where a violation of a core labor standard can result in a Convention, which the violating country has the choice to ratify.[74] If the violating country ratifies such a Convention, then there are

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[65] *Id.* at 40-13.

[66] *Id.*

[67] *Id.*

[68] ILO Declaration, *supra* note 62, art. 5.; *see also* Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 133 (1999) (explaining that the ILO Declaration seeks to enforce trade sanctions in order to penalize a country for gross human rights violations rather than "level the playing field" for protectionist purposes) [hereinafter Howse].

[69] *See* Howse, *supra* note 68 *at* 133.

[70] *Id.*

[71] *See* Lowe, *supra* note 15 at 493-94.

[72] *See id.*

[73] *See* Meils, *supra* note 19 at 890-91.

[74] *See* ILEL, *supra* note 45 at 40-7.

further steps of inquiry and implementation to ensure that the problem is corrected.[75] However, if a violating country chooses not to ratify a Convention or follow the advice of a Recommendation, then the only other form of punishment is for the global trading partners of the violating country to voluntarily impose trade sanctions.[76] Ideally, this would then force the violating country to succumb to moral and economic pressures.[77]

Moreover, both bodies rely on a certain sense of formality. While the NAALC has a formal dispute resolution mechanism that can result in trade sanctions, the ILO engages in a formal procedure for investigating and issuing its Conventions and Recommendations.[78] Although the ILO has subsidiary bodies to monitor the implementation and enforcement of core labor standards, such investigations only begin when there is a complaint or an inquiry into a member nation's specific actions.[79] The same situation occurs under the NAALC, where a formal complaint must first be made before further steps can be taken.[80]

Neither body contains the resources or the manpower to implement its non-binding recommendations.[81] The best remedy occurs when trade sanctions impose economic pressure on the violating country to alter its errant ways.[82] Nevertheless, a violating country only has to prove its willingness and plans to better its labor norms in order to lift a sanction.[83] Thus, what began as an attempt to foster equal labor standards on the international level through trade agreements, has circled back to the starting point, where a country may recognize the variance in its labor standards as compared to other countries, but only espouses its hope of remedying such differences.[84]

Brief History of the Debate On the Inclusion of Workers' Rights Provisions in the FTAA and Implications for the Future

Opponents of including workers' rights in the FTAA argue not to include such rights is because "benefits to social welfare will automatically accrue from

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[75] *See* ILEL, *supra* note 45, additional text.

[76] *See* Howse, *supra* note 68 at 133.

[77] *Id.*

[78] *See e.g.* Lowe, *supra* note 15 at 493-94; *see also* ILEL, *supra* note 45 at 40-7.

[79] *See id.* at 40-12-19.

[80] *See* Meils, *supra* note 19 at 890.

[81] *See* Kimberly Ann Elliott, *The ILO and Enforcement of Core Labor Standards*, International Economics Policy Briefs, No. 00-6, 6 (July 2000), *at* http://www.iie.com [hereinafter Elliott].

[82] *See id.* at 5-7 (detailing the critique of the ILO's enforcement capability through the example of forced labor problems in Burma, Myanmar).

[83] *See generally Breaking the Labor-Trade Deadlock*, Inter-American Dialogue and the Carnegie Endowment for International Peace, Working Paper 17 (Feb. 2001) *at* http://www.thedialogue.org/publications/ (for a critique of the use of trade sanctions in enforcing labor standards).

[84] *See id.*

the economic prosperity free trade is promised to bring."[85] The idea is that free trade creates new jobs and new income, and thus, the benefits will "trickle down" to all levels of society.[86] Moreover, opponents believe that free trade has an inherent self-correcting mechanism that will force countries with lower labor standards to raise their standards to an equal level with other countries.[87] Furthermore, the placement of labor standards in a free trade agreement would be an infringement on a nation's sovereignty; labor issues are a domestic concern.[88] Finally, opponents argue that labor standards are a social issue, completely independent from trade.[89]

In contrast, advocates of the inclusion of workers' rights believe that with free trade comes further stratification between the social classes.[90] For example, contrary to the anticipated self-correcting mechanism furthered by opponents, since the passage of NAFTA, the rich have been getting richer, while the poor are getting poorer.[91] As to the infringement upon a nation's sovereignty, the advocates argue that the decision to enter into a free trade agreement is completely voluntary.[92] Moreover, the basic idea of a trade agreement houses the concept that a nation will have to forego a certain amount of sovereignty in order to participate.[93] Finally, advocates of the inclusion of workers' rights strongly highlight the fact that labor provisions and trade are interdependent—trade impacts labor and labor impacts trade.[94]

Perhaps the best illustration of this dispute can be understood through what has been termed by one commentator as "the ambiguous legal issue" that surrounds the World Trade Organization (WTO) and the ILO.[95] While the WTO delineates what constitutes a violation of a worldwide trade obligation and the "ILO commitments impose legal obligations regarding labor rights, there is no international legal instrument that addresses the connection between the two issues."[96] Although there is some debate as to whether Article XX of the

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[85] Meils, *supra* note 19 at 881.

[86] *Id.*

[87] Howse, *supra* note 68 at 132-33.

[88] Meils, *supra* note 19 at 883.

[89] *Id.*

[90] *Id.* at 882.

[91] *Id.* Meils explains that in Mexico, the number of people living in poverty has increased and wages have decreased; *see also Globalisation*, *supra* note 3 (explaining that the minimum and manufacturing wages have dropped by 25 and 12 percent, respectively, since NAFTA came into force).

[92] Meils, *supra* note 19 at 883.

[93] *Id.*

[94] *Id.* at 884.

[95] Andrew T. Guzman, *Trade, Labor, Legitimacy*, 91 CAL. L. REV. 885, 889 (2003).

[96] *Id.*

General Agreement on Tariffs and Trade (GATT) implicates labor rights, the general consensus is that there is no explicit provision nor any WTO panel or Appellate Body (AB) ruling on the issue.[97] Thus, what exists for the member countries is a set of worldwide trading obligations alongside an international organization that has adopted core labor standards, without any entity connecting the two. Commentators on trade and labor acknowledge this ambiguity,[98] and yet what is even more ironic is the fact that the FTAA has deferred all labor disputes to the ILO.[99] Thus, what could potentially exist in the future is a regional agreement, seeking to impose trading obligations alongside an international organization that strives to enforce core labor standards, with no mechanism that connects the two bodies together.[100] Hence, the perennial debate continues, despite any lessons learned from the ambiguity surrounding the WTO and the ILO.

Even more compelling is the question of whether the FTAA will require a side agreement on labor in order for its passage in Congress, as did its predecessor NAFTA. If so, then perhaps the different committees should begin focusing their energies on finding a proposed dispute resolution mechanism that will attempt to effectively enforce labor standards without enflaming the many opponents who seek to separate trade from labor. But even then, one must question the efficacy of the NAALC. If an alleged labor dispute does not fall within the first tier, then the implications are no different from the remedies found under the ILO non-binding recommendations.

One commentator has suggested that perhaps the drafters of the FTAA should begin looking to the recent US-Chile FTA for guidance on this issue.[101] In that agreement, the formula for the minimal protection of environment and labor issues has two attributes: the first is that the US and Chile have agreed to effectively enforce their own domestic labor standards; the second, is that such enforcement is limited to a "sustained pattern of failure to enforce."[102] If such a pattern is found to exist, then it must affect trade between the two countries, such

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[97] *Id.* at 888-91.

[98] Elliott, *supra* note 81 at 6.

[99] *See* Gary J. Wells, *Trade Agreements: a Pro/Con Analysis of Including Core Labor Standards*, US Department of State Summary, *at* http://fpc.state.gov/6119.htm (explaining that the FTAA could follow the sunshine, carrots, and sticks approach of the ILO at the regional level. Sunshine, carrots, and sticks refer to openness, technical assistance and reward for compliance, and penalties for non-compliance, respectively. Regardless of the method, many critics have pointed to the ILO's incapability of enforcing core labor standards).

[100] *See* Elliott, *supra* note 81 at 6.

[101] Stephen J. Powell, *A Clear Formula Has Emerged for Including Minimal Protections of Environment and Labor in Trade Agreements*, Lecture (Jan. 23, 2004) [hereinafter Powell]; *see also* Marley S. Weiss, *Symposium: Two Steps Forward, One Step Back- Or Vice-Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America and Beyond*, 37 USF. L. REV. 689, 721-23 (2003) [hereinafter Weiss].

[102] *See* Powell, *supra* note 101; *see also* Weiss, *supra* note 101 at 721-23.

as the imports and exports.[103] Moreover, the penalty for such a violation is not a normal trade sanction,[104] but rather a monetary penalty, limited solely to the sector of trade that is affected and is effective so long as the offending country is noncompliant.[105]

In essence, this type of agreement remedies the sovereign contention of many opponents by allowing for the enforcement of the country's domestic standards. Moreover, the agreement parallels the NAALC by incorporating procedural obligations that deal with labor rights.[106] However, it ingeniously provides an impetus to follow labor and environmental standards.[107] If a country offends its own domestic laws, then a monetary penalty for that particular sector will drain the offending country's budget until it complies with its own standards.[108]

Conclusion

The trade-labor dispute is not an issue that will quickly be resolved. Rather, this debate will continue so long as there are parties who believe that the issues are completely unrelated, and thus continue to argue vehemently against those who cannot forge a barrier between the issues, finding them inextricably linked. Nevertheless, this comment has sought to draw distinctions between what was, what is, and what might be. Under NAFTA and the WTO, the NAALC and the ILO are what was and what is. Under the FTAA, the question of what might be is somewhat more difficult. To defer all labor-related issues to the ILO further fuels the perennial, yet ambiguous, debate as to whether trade and labor should be intertwined. And, although the NAALC sought to provide a dispute resolution mechanism that could provide a legal and binding form of sanctioning for violations of a limited category of core labor standards, it did not satiate the appetites of its opponents who believe that international penalties for labor violations clearly infringe on domestic sovereignty. Perhaps the best remedy then is to recognize the fact that there is a better avenue to appease the sovereign opponents—the agreement that imposes penalties for violations of a country's own domestic labor standards, as evidenced by the US-Chile FTA. In the end, there is no easy solution, but one thing is clear: with an ever-increasingly globalized marketplace and the erasure of borders with free trade, the trade and labor dispute cannot continue to lurk in the shadow. The only way to resolve an ambiguity is to take steps to recognize its existence and generate potential solutions.

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[103] *See* Powell, *supra* note 101; *see also* Weiss, *supra* note 101 at 721-23.

[104] *See* Powell, *supra* note 101 (explaining that the normal trade sanction is a 100% tariff on imports from other sectors).

[105] *Id.*; *see also* Weiss, *supra* note 101 at 722.

[106] *See* Free Trade Agreement, US-Chile, *at* http://www.ustr.gov/new/fta/Chile/final/.

[107] Weiss, *supra* note 101 at 722.

[108] *Id*; *see also* Kimberly Ann Elliott, *Fin(d)ing Our Way on Trade and Labor Standards?*, Institute for International Economics, Policy Brief 01-5 (Apr. 2001) *available at* http://www.iie.com/publications/pb/pb01-5.htm.

INTERNATIONAL FOCUS AT LOYOLA CHICAGO SCHOOL OF LAW

Loyola's international curriculum offers students international experience as well as international courses. Our students can participate in two foreign programs:

- A four-week summer program at Loyola's permanent campus in **Rome**, focusing on international and comparative law.

- A four-week summer program on European legal institutions which includes visits to the Council of Europe in **Strasbourg, France**, the European Court of Justice in **Luxemburg**, and the Commission of the European Union and the headquarters of NATO in **Brussels**, followed by two weeks of international courses in **Oxford**.

In addition, Loyola offers two field study opportunities:

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- The Comparative Law Seminar: Legal Systems in the Americas, a full semester course taught by Professors Thomas Haney, Anne-Marie Rhodes and Stacey Platt, offers students the option of traveling to **Santiago, Chile** over spring break to meet with lawyers and judges as well as faculty and students from the Law Faculty of Universidad Alberto Hurtado.

Students also hone their international skills in three moot competitions: (1) the Philip Jessup Competition, which involves a moot court argument on a problem of public international law; (2) the Niagara Cup Competition which involves a moot court argument on a problem involving an area of dispute between the U.S. and **Canada**, with competing teams from both U.S. and Canadian law schools; and (3) the Willem C. Vis International Commercial Moot Arbitration, involving a problem under the United Nations Convention on Contracts for the International Sale of Goods. Two separate teams of student oralists argue against law school teams from all over the world, one team going to **Hong Kong**, and the other to **Vienna.**

Students have the opportunity to write for the international student journal, the "Loyola University Chicago International Law Review," which is published twice during the academic year. The staff of the International Law Review would like to thank John H. Calhoun for his advice and involvement with the

Review and the FTAA Symposium. Students also can participate in the International Law Society which brings in speakers to discuss international law issues and international legal careers with the students.

The Law School gives some summer stipends for students who want to work with international not-for profit agencies. Our students have held positions with, for example, the International Bureau for Children's Rights in **Montreal**, the Midwest Immigrant & Human Rights Center, Defence for Children International, in **Geneva**, **Switzerland**, the International Bar Association, in **London**, and the International Develpment Law Organization, in **Rome**.

The School of Law also offers a broad range of courses in international law, international business, international human rights, and comparative law. These include courses such as Public International Law, and Transnational Litigation, both taught by Professor Patrick McFadden, International Business Transactions, International Commercial Arbitration, and International Trade Finance, taught by Professor Margaret Moses, International Tax, taught by Professor Christian Johnson, International Human Rights, taught by Professor Alan Raphael, International Children's Rights, taught by Professor Diane Geraghty, Comparative Law, taught by Professor Richard Michael, and a variety of international health law courses taught by Professor John Blum and other faculty through the Institute for Health Law.

Through the Wing Tat Lee Lecture Series and other programs, the School of Law regularly invites established scholars and speakers to Loyola to enrich the existing curriculum through their international perspective on global legal issues.

We would like to recognize friends and alumni of the law school who have contributed within the last year to our international law program, specifically to the Willem Vis International Commercial Moot Arbitration program:

John H. Calhoun, Esq.
Peter B. Carey, Esq.
Cezar M. Froelich
Quinlan & Carroll, Ltd.
Zeina Alame
Cara Boyle
Paul Burmeister
Ellie Carey
Jennifer Diamond
Kevin Deuschle
Kelly O'Brien
Caitlin M O'Connor