

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

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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

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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 EU⁶ 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 Haskell, *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.

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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

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).

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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 Israel¹⁵ 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

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

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

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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" agreement²⁹—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.*

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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

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, 2004).

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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

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 billion 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).

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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.*

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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.

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 at 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.

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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 Tlateloco 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>.

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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.

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).

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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

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).

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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.

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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 Republic 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*

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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 issues 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.

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.

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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).

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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).

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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 benefits⁹⁵), the Caribbean Basin Economic Recovery Act or similar legislation applicable to the Andean Group, if the

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.

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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.”

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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.

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