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# MULTILATERALISM AND REGIONALISM: THE NEW INTERFACE

**Chapter VIII: Considerations on the Interface  
Between the WTO and the FTAA Negotiations  
and Between the FTAA and Recent Free Trade  
Agreements in the Western Hemisphere**



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## Chapter VIII

### CONSIDERATIONS ON THE INTERFACE BETWEEN THE WTO AND THE FTAA NEGOTIATIONS AND BETWEEN THE FTAA AND RECENT FREE TRADE AGREEMENTS IN THE WESTERN HEMISPHERE

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#### I. Reasons for undertaking North-South agreements

The organizers of this forum have developed a series of pointed questions to be addressed by this panel on the development dimension in North-South agreements, including what would be the gains to be derived under such agreements. For the North, clearly there is competition for access for their providers of goods, services and capital in markets of the South vis-à-vis other providers from the North. The North engages in these negotiations for, and enters into, these North-South agreements with the expectation of achieving greater security and stability for its investors, faster and deeper market access for its providers of goods and services than the slower multilateral route, and other dividends, including support for foreign policy objectives. These agreements also serve to shape coalitions for multilateral disciplines in subject areas of interest and in case of bilateral agreements, for regional disciplines as well. The United States Trade Representative Robert Zoellick has referred to the promotion of competitive liberalization with the “can do” countries.

What are the expected gains from the South for undertaking North-South agreements? Let me quote from Colombia, Ecuador and Peru in their press communiqué of 19 May 2004 following their first round of negotiations with the US, on what they see as the areas of gains for them in their negotiations of a free trade agreement (FTA) with the US. They stated that beyond the trade growth generated by the FTA, it will be the principal tool for generating employment, attracting more investment and bringing more dynamic technological development. The opportunity to negotiate this agreement with their principal trade partner opens the door for a qualitative and quantitative leap in their economic development, promoting fair and equitable integration that will contribute to the reduction of poverty, and help them obtain general welfare gains for their people. Other important considerations are the fight against narco-trafficking and terrorism, regional stability and the consolidation of democratic governance and institutions.

One important objective/incentive for countries of the South is to obtain contractual rights to access to markets of the North as opposed to receiving unilateral preferences that may be unilaterally granted, conditioned and withdrawn — notwithstanding the recent WTO Appellate Body decision setting parameters on the scope that preference-granting countries have to discriminate among preference-receiving beneficiaries. Additionally, the deeper the integration agreement, the more leeway countries of the South have to enforce their

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<sup>107</sup> Any opinions expressed are personal and do not necessarily reflect the official position of the Organization of American States (OAS), its General Secretariat or its Member countries.

contractual rights, provided the agreement allows for cross-sectoral and cross-agreement retaliation.

This forum is entitled Multilateralism and Regionalism: the New Interface. The dictionary definition of the term interface refers to the place at which independent systems meet and act upon or communicate with each other.

## **II. Interface between the WTO regime, including the Doha Development Agenda negotiations, and the FTAA negotiations and their possible outcome**

The construction of the FTAA began at the first Summit of the Americas of the 34 heads of state and government of the hemisphere in Miami, in December 1994 as part of the broader summit goals of advancing the prosperity, democratic values and institutions, and security of the Hemisphere. The leaders' overall objective for the FTAA was the freer movement of goods, services and capital within the hemisphere, through the progressive elimination of barriers to trade and investment, in a market that currently comprises over 800 million consumers with a combined national output of over \$13 trillion—accounting for a quarter of the world's GDP and a fifth of the world's trade.

At the second Summit in Santiago, Chile in April 1998 leaders formally launched the trade negotiations, based on the principles and organizational structure worked out a month earlier at a meeting in San Jose, Costa Rica attended by their Trade Ministers. These agreed principles included: consistency with the WTO; improvement upon WTO rules and disciplines wherever possible and appropriate; consensus in decision-making, transparency; the conduct and outcome of the negotiations to be treated as a single undertaking; coexistence with sub-regional agreements to the extent that the rights and obligations under these agreements are not covered by or go beyond FTAA rights and obligations; attention to the needs of smaller economies; and that countries may negotiate and accept FTAA obligations individually or as members of a sub-regional integration group, negotiating as a unit.

The OAS Secretariat is one of three institutions (the Tripartite Committee) providing technical and analytical support to the FTAA negotiating groups and other bodies, as well as technical assistance to participating countries. The other two institutions are the Inter-American Development Bank (IDB) and the UN Economic Commission for Latin America and the Caribbean (UN/ECLAC).

The FTAA is a great laboratory for ideas and cooperation, a microcosm of diversity and challenges, from the superpower to the small island nation, and if they can coalesce, these agreements can help in the search for multilateral understandings and solutions. It has already produced some dividends and innovations in the conduct of trade negotiations in the areas of:

- Business facilitation — through an early harvest of customs-related business facilitation measures;
- Transparency — through the ongoing and permanent invitation extended to civil society to submit written contributions on the FTAA process to the negotiators and through the periodic release to the public of draft versions of the FTAA Agreement (allowing the world at large to engage in the great spectator sport of counting brackets to gauge progress achieved and remaining distance to cover); and

- Trade capacity-building--through the approval of a Hemispheric Cooperation Program (HCP) at the Quito Ministerial in November 2002, to address the needs of less developed and smaller economies in the region.

The HCP aims to strengthen the capacities of recipient countries to participate in the negotiations, implement their trade commitments, and adjust to integration. Countries negotiating the FTAA Agreement did not want to repeat the difficulties encountered after the Uruguay Round when many signatory or acceding member countries were unable to implement their commitments or were not in a position to take full advantage of trade liberalization opportunities. Countries have developed national and/or sub-regional trade capacity building strategies that define, prioritize and articulate their needs under this “aid for trade” programme. The FTAA Consultative Group on Smaller Economies convened a meeting, hosted by the IDB, to match countries seeking assistance under the HCP and donor organizations to discuss financing and implementation of the HCP in Washington D.C. in October 2003 (at which *inter alia* the OAS, UNCTAD and the World Bank participated). More focused roundtables are being planned at the sub-regional level to discuss specific project profiles. In response to some of the needs identified by countries in their strategies, the Trade Unit of the OAS General Secretariat has helped organize for the benefit of Andean officials and negotiators over the last two months, for example, seminars and workshops on investor-state dispute settlement, the international regime regulating pharmaceuticals, trade in services, treaty administration, as well as intensive courses on international trade, drawing from experts throughout the region.

In fact one might say that trade capacity-building is doing better than the FTAA negotiations themselves at the moment.

At their third Summit in Quebec City in April 2001 hemispheric leaders instructed their trade “ministers to ensure that negotiations of the FTAA Agreement are concluded no later than January 2005.” Pursuant to these instructions, Ministers met in Miami November 2003 to provide guidance for the final phase of the FTAA. To accommodate differences in the desired level of ambition for the FTAA among countries, Ministers made what some have described as a course correction. They formally recognized that countries may assume different levels of commitments. They would seek to develop a common and balanced set of rights and obligations applicable to all countries. In addition, negotiations should allow for countries that so choose, within the FTAA, to agree to additional obligations and benefits. Ministers declared that they fully expected that this endeavor will result in an appropriate balance of rights and obligations where countries reap the benefits of their respective commitments.

Ministers then instructed the Trade Negotiations Committee (TNC) which meets at the Vice Ministerial level, to develop a common and balanced set of rights and obligations applicable to all countries in each of the following negotiating areas: market access; agriculture; services; investment; government procurement; intellectual property; competition policy; subsidies, antidumping, and countervailing duties; and dispute settlement. They also instructed the TNC to establish procedures for negotiations among interested parties who may choose to develop additional liberalization and disciplines on a plurilateral basis within the FTAA. Some observers claim that this two-tier or two-track approach with an obligatory common component and a voluntary plurilateral component compromises, if not abandons, the notion of a single undertaking. The TNC was unable to agree on the guidance to give the negotiating groups on the content of the common set under this new negotiating framework at its meeting in Puebla February 2003 and (after two postponements) has yet to be reconvened. Contacts

between the US and Brazilian Co-Chairs and with delegations are ongoing to resolve the impasse.

The FTAA negotiations and the negotiations under the WTO Doha Development Agenda are running in parallel of course. Both negotiations have the same official deadline and similar but not the same goals. The objectives for constructing the FTAA as defined by Ministers in San José in 1998 are more ambitious: for example, on market access in goods “to progressively eliminate, tariffs, and non-tariff barriers, as well as other measures with equivalent effects, which restrict trade between participating countries.” One of the questions posed at this session refers to the implications of North-North agreements. Certainly with respect to the FTAA, a North-North or really North-South-East-West agreement in the WTO July 2004 on a framework for negotiating the three pillars of agriculture would provide a boost not only to the Doha negotiations but also assist in resolving the current dilemmas faced in the FTAA. These include how to make operational a commitment to ban export subsidies in the hemisphere and how or whether to link that with an effective mechanism against other subsidizing non-FTAA members; as well as how to ensure that opening the tariff door does not open the door to unfair competition from trade-distorting domestic and other subsidies.

The WTO imposes parameters on any free trade agreement between and among WTO members. It is the declared intent of the FTAA participating countries to be consistent with those parameters. Under GATT Article XXIV and the Uruguay Round Understanding on its interpretation, an interim agreement to form a free trade area must eliminate duties and other restrictive regulations of commerce (with some exceptions) on substantially all trade in goods between parties within 10 years. A comparable requirement for internal liberalization or negative integration exists under GATS Article V for an economic integration agreement in services to have substantial sectoral coverage (in terms of number of sectors, volume of trade affected and modes of supply) and to provide for the absence or elimination of substantially all discrimination in sectors covered. There are divergent views on the meaning and scope of almost all these terms. GATT Article XXIV and GATS Article V also have external requirements to protect the interests of third countries, for example, that duties and other regulations of commerce on goods at the formation of a free trade area not be higher or more restrictive than prior.

FTAA participating countries agreed that their schedules for progressive elimination of tariffs would comprise four phases: immediate, no more than 5 years, no more than 10 years, and longer. It was agreed to allow for some adjustments in the base tariffs, for example, CARICOM was permitted to use bound tariffs for a limited list of goods instead of the (lower) MFN applied tariff, from which to initiate reductions. For services offers, countries were free to follow a positive list or negative list approach. Offers on goods, services, investment and government procurement were submitted contingent on the overall results of the negotiations. Market access negotiations are not yet at the stage of requests for improvement in offers and further yet from improved offers. One cannot prejudge what may be the final outcome of these negotiations and how this will mesh with WTO requirements including whether under the WTO examination process flexibility will be needed to take into account development aspects: for example, the extent to which any country will make use of the fourth basket of longer than 10 years for sensitive products and/or exclude them from any liberalization commitment at all.

The idea of two tracks within one agreement raises some interesting questions, not the least of which is how negotiators will go about drafting appropriate MFN clauses therein. It is not uncommon in free trade agreements of more than two Parties to have provisions specifying

that certain rights and obligations under the agreement apply only as between some of the Parties and not among all of them, however, a two-track agreement among 34 parties would appear without precedent in terms of potential scope and complexity. Will the first tier cover "substantially all" trade in goods? "Substantially all" services sectors? Will the second tier provide "substantially all" plus treatment then? Will the first tier be primarily a free trade area in goods while other features common to a deeper integration agreement be in the second tier? Will the second tier be a self-contained whole? Will Parties be able to subscribe to plurilateral disciplines on some subject areas but not on others? What will the linkages be between the two tracks?: will the second plurilateral tier be one to which all parties should aspire and eventually subscribe to? What if schedules differentiate the pacing of reduction commitments by origin in terms of category of parties? This potential and perhaps transitional discrimination within internal integration may or may not have a development dimension. If the agreement eventually eliminates barriers to trade and investment, should it matter to the rest of the WTO how the parties get there as long as the parties primarily concerned agree to this? This is a systemic issue related to regional trade agreements that the WTO Negotiating Group on Rules may not have thought of and one to add to its checklist.

In the worst case and exceedingly unlikely scenario that the FTAA Agreement that is concluded is not WTO-compliant, with a backlog of around 150 agreements under examination, it is doubtful that FTAA parties would have to fear anytime soon a finding by the Committee on Regional Trade Agreements that the FTAA Agreement once notified, is not likely to result in the formation of a free trade area within a reasonable period. Given the continued practice of consensual decision-making and of the participation by the parties to the agreement being examined in that consensus, the chances of such disapproval by the Committee would seem nil.

What is more problematic as an outcome is WTO litigation with respect to a regional trade agreement. In *Turkey-Textiles*, the WTO Appellate Body seemed to pronounce itself in favour of panels with the jurisdiction to assess the compatibility of a customs union, and by extension a free trade area, with the requirements of Article XXIV. This was part of a two-prong test it enunciated to determine whether it was necessary, hence allowable to impose a quantitative restriction in order to form a customs union and whether such a customs union existed. Moreover, the Appellate Body has yet to rule on whether as a general principle a member of a regional trade agreement can exclude imports from other members from the application of a safeguard measure or other trade remedy or whether mutual recognition agreements relating to standards, technical regulations or sanitary or phyto-sanitary measures in regional trade agreements are authorized.

### **III. Interface between the FTAA and certain recent bilateral or subregional agreements in the western hemisphere**

As pointed out in the background note prepared by the UNCTAD Secretariat, the Western Hemisphere has been fertile ground for regional trade agreements. Canada, Mexico, Chile, and more recently the US have been keen NAFTA missionaries.<sup>108</sup> While the basic template of this second generation agreement remains the same, each iteration does bring changes. Some have referred to the proliferation of bilateral and sub-regional agreements as a spaghetti bowl, posing problems of administration, especially for customs procedures and rules of origin, as

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<sup>108</sup> In fact, the background note needs to include also the opening of negotiations between the US and Panama, and the US and Colombia, Ecuador, and Peru, to be joined by Bolivia. Events are moving quickly.

well as raising potential risks to judicial cohesion and judicial economy in the resolution of trade disputes. This makes the creation of a single structure of preferences and rules of origin, harmonization of rules and disciplines, institution-building at the hemispheric level even more compelling in order to disentangle overlapping agreements.

On 5 August 2004, the United States, the Dominican Republic and five Central American countries will formally sign a free trade agreement. The US-DR-CAFTA negotiations provide an interesting case study of the incorporation of trade capacity-building within negotiations of a free trade agreement. A trade capacity-building group comprising donors and countries met concurrently with negotiating groups. This has been institutionalized under the US-DR-CAFTA Agreement with the establishment of a Committee on Trade Capacity Building, composed of representatives of each Party, which will *inter alia* invite appropriate international donor institutions, private sector entities and non-governmental organizations to assist in the development and implementation of trade capacity building projects pursuant to the developing country Parties' trade capacity building strategies, and monitor and assess progress in the implementation of these projects. The Committee will report annually on its activities to the Free Trade Commission, comprised of cabinet-level representatives.

The provisions of the recent FTAs may set in place certain future contours of the FTAA Agreement. Parties to these recent FTAs have already accepted disciplines, which they may not have accepted or expressed positions on in the FTAA context. It may be difficult for them to resist adhering to these disciplines in the regional or multilateral context. As illustration, I would refer to provisions, for example, that:

- make obligatory the taking of certain enforcement measures which are discretionary under the WTO TRIPS Agreement;
- open dispute settlement panel hearings to the public; or
- subject to dispute settlement, the failure to effectively enforce one's domestic labor laws or domestic environmental laws through a sustained or recurring course of action or inaction in a manner affecting trade between the Parties, which may lead to the imposition of a fine on the Party complained against, and if this Party does not pay, eventually to trade sanctions against it.

### **Concluding remarks**

There are indeed benefits to be derived from North-South agreements, particularly as regards contractually-protected access but also challenges for developing countries in terms of preparedness (both at the public and private levels), prioritization, negotiating leverage, and strategic planning in the business/art of trade negotiations. It is challenging for any country to negotiate at three or more levels simultaneously in this multi-layered trading world: bilaterally, regionally and multilaterally, and to assure that the results are consistent and advance one's economic and development needs. The fewer the parties involved in the negotiation, perhaps the faster the conclusion but also perhaps the less the leverage. The recent spate of free trade agreements in the Western Hemisphere mostly follows the NAFTA template. Deviations are possible but limited, requiring calculation and steadfastness to bring about. No less of a challenge is implementing and administering the negotiating results. The increasing complexity of the landscape of tariffs, origin rules and other trade norms in the hemisphere as a result of bilateral and sub-regional agreements makes more compelling the need for business-friendly consolidation and harmonization at the hemispheric level under an FTAA Agreement. Finally there is the challenge of harnessing the new trading opportunities

presented for development. Initiatives such as the Hemispheric Cooperation Program and the capacity-building activities pursued alongside the US-DR-CAFTA and US-Andean countries negotiations offer a step in the right direction.