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FROM BOLIVAR TO BUSH: The Free Trade Area of the Americas and its Potential Impact on Regulatory and Legal Systems*

by

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I. Introduction

It has been said that people often do not realize the magnitude of events as they are occurring and that it is only after a period of reflection that history acknowledges the importance of those events. It is doubtful if this can be said of the agreement establishing the Free Trade Area of the Americas (FTAA).¹ What promises to be an historical agreement uniting all countries in the

¹ Reference to the FTAA refers specifically to the Derestricted Free Trade of the Americas Second Draft Agreement (November 1, 2002). The complete FTAA text is available online at http://www.ftaa-alca.org/alca_e.asp.

Western Hemisphere (except Cuba) in free trade is a monumental and Herculean task that certainly cannot escape notice.²

Uniting the nations of the Western Hemisphere is not a recent idea. Simon Bolivar first introduced the idea of a united hemisphere at the Pan American Congress of 1826.³ Although Bolivar's aspirations did not come to fruition during his lifetime, the idea of regional cooperation was not forgotten. In fact, the Organization of American States (OAS), which eventually evolved from the Pan American Congress, remains the oldest regional organization in the world. Further, because of its status in the region and common goals, the OAS plays an integral part in the FTAA negotiation process.⁴

In addition, United States President George W. Bush acknowledged the significance of the Pan American Congress by proclaiming April 8, 2001 as Pan American Day and affirmed that "the true significance of American solidarity and good neighborliness can only mean the consolidation ... of a system of

² The countries participating in the FTAA negotiations are: Antigua and Barbuda, Argentina, The Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, The Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, The United States of America, Uruguay and Venezuela. Cuba was not invited.

³ The plans for a hemisphere-wide trade pact were defeated at that time as being interpreted as a cover for United States dominance. See 8 The Journal of American History (September 1999), [http:// historycooperative.org/cgi-bin/juststop.cgi?act=juststop&url=http://www.historycoop.org/journals/jah/86.2/chronology.html](http://historycooperative.org/cgi-bin/juststop.cgi?act=juststop&url=http://www.historycoop.org/journals/jah/86.2/chronology.html) (last visited March 25, 2003).

⁴ The OAS is part of the Tripartite Committee consisting of the Inter-American Bank, the United Nations Economic Commissions for Latin America and the Caribbean, as well as the OAS. The Tripartite Committee provides technical, analytical and financial contributions to the FTAA Trade Negotiations Committee. See FTAA Ministerial Declaration, Seventh Meeting of Ministers Responsible for Trade in the Hemisphere, Quito, Ecuador (1 November 2002).

individual liberty and social justice based on respect for essential rights of man.”⁵

Now, nearly 177 years after the Pan American Congress, the nations of the Western Hemisphere again stand poised to formally bind and commit themselves “to advancing economic prosperity, strengthening ties of friendship and democratic values and institutions, protecting fundamental human rights and the security of persons, and promoting social development among the Parties.”⁶

This paper will look at the history and latest developments in the negotiation process of the FTAA starting with the Summit of the Americas in Miami in December 1994 through the Seventh Ministerial Meeting in Quito, Ecuador in November 2002 and beyond. This paper will also briefly address the FTAA’s place in the evolution of globalization and the importance of regionalization, summarize the goals of the FTAA, review and outline the procedural and substantive chapters of the FTAA and, where appropriate, assess the impact on local and national governments.

The reader should understand that any provision or provisions of the FTAA Second Draft Agreement may be changed, amended or deleted at any time and that it is not a final version. Further, the FTAA incorporates provisions of the World Trade Organization (WTO), General Agreement on Tariffs and Trade 1994 (GATT) and General Agreement on Trade in Services (GATS). Where applicable and relevant those provisions will be noted.

⁵ Proclamation of the President of the United States of America (2 April 2001) (quoting the Charter of the OAS), <http://www.whitehouse.gov/news/release/2001/04/20010402-11.html>.

⁶ Preamble to the FTAA at p. 1.2.

II. The Role of Regionalization

The concept of the region as a political or administrative entity is a relatively recent one. Over the past several decades the world has seen numerous regional trade zones implemented such as the European Union, the North American Free Trade Agreement (NAFTA), The Southern Common Market (Mercosur), The Andean Community, The Caribbean Community and Common Market (CARICOM), and ASEAN (Association of Southeast Asian Nations). Further, talks have begun recently to create a Central American Common Market (CACM). This is not to say, however, that these relatively new trade zones cannot offer guidance based on their experiences. On the contrary, FTAA countries can, and should, look at other free trade zone agreements for guidance.

Regionalization has been defined as:

[T]he process which creates a capacity for independent action aimed at developing a specific area (sub-national but supra-local) through the mobilization of its economic fiber and, where appropriate, of features of local and regional identity, and through the development of its potential. This process can occur on the basis of existing institutions, or can give rise to a new territorial organization which will better fulfill these aims. It is always conditioned by the constraints imposed by the political and institutional framework, which in turn can be influenced by other factors.⁷

Based on its studies, the EU Working Paper identifies five types of regionalization and notes that a particular country may experience several forms of regionalization concurrently or even in succession. The five types of regionalization are:

- 1) Administrative regionalization – the creation by the nation of authorities subordinate to the government, or bodies

⁷ Regionalisation in Europe, EUR. PARL. DOC. (REGI 108 A XX/rev.1) (2000), <http://www.europarl.eu.int/workingpapers/regi/pdf/108axx.pdf>.

under its control to act on its behalf. The purpose is to promote regional economic development by working with local entities and economic organizations.

- 2) Regionalization through the existing local authorities – Using existing local authorities, originally created for different purposes, to assume functions connected with regionalization, either by an extension of their duties or by cooperation in a larger context. This type of regionalization occurs by decentralized institutions using their own powers, as compared to administrative regionalization which creates new entities.
- 3) Regional decentralization – the creation or substitution of a new territorial authority at a level above that of existing territorial authorities, which is classed as a region. The region has specific institutional expression, subject to conditions applicable to territorial authorities. It forms a new territorial authority with the same legal status as existing ones, but has a larger constituency and includes existing territorial authorities. Its focus is essentially economic and development-related.⁸
- 4) Political regionalization/regional autonomy (institutional regionalism) – Political regionalization differs from regional decentralization by the granting of legislative power to a general assembly, more extensive powers (defined and guaranteed by a constitution) and an executive
- 5) Regionalization through federate authorities – The process of regionalization, driven by socio-economic developments, also leads federate governments to assume

⁸ China, for example, implements economic development zones. In the United Kingdom, Wales has an elected regional assembly with broad administrative powers (but lacks legislative powers).

corresponding competences and to affirm themselves as regions.

Although regionalization through existing authorities is the most common type of regionalization (and federalism and political regionalization the least common), how a nation integrates into a regional economy is largely dependent on the existing political and economic institutions of that nation. A country with a sound and extensive administrative network, for example, may not wish to disrupt its existing administrative system and, therefore, opt to follow either the administrative regionalization approach or the regionalization through existing local authorities approach. It should be emphasized, though, that every country is different politically, economically and socially and may choose to adopt any of the above regionalization processes, or even a hybrid process. The decision also depends on how a country anticipates the impacts on its country of the specific provisions of FTAA.

The FTAA is flexible in this respect in that it provides, for example, that when a nation is applying FTAA trade regulations it is not necessarily required to eliminate or substitute existing procedures, provided that existing procedures already provide for an objective and impartial review of administrative action.⁹

III. Beginnings of the FTAA and Current Negotiating Status

Although the FTAA arguably began with Simon Bolivar in 1826, United States President George H. Bush initiated the most recent attempt to unite the Western Hemisphere by enacting the Enterprise for the Americas in 1990.¹⁰ The foundation for the enterprise was the creation of a free trade zone consisting of the entire hemisphere. The challenge, however, was getting thirty-four

⁹ FTAA Chapter on General and Institutional Issues, Art. 7.2(c).

¹⁰ Enterprise for the Americas Initiative, 7 U.S.C.S. 1738-38r (2003).

countries with differing political histories, fiscal policies and population sizes to agree on an acceptable framework.

The first step toward hemispheric trade liberalization took place at the Summit of the Americas in Miami, Florida in December 1994. Although the summit was the starting point of hemispheric trade liberalization, it was not the commencement of formal negotiations. The purpose of the summit was to lay the groundwork for future negotiations and to define an agenda. Formal negotiations were to start later after a framework for negotiations was in place. The primary result of the summit was adoption of the Declaration of Principles and Plan of Action.¹¹

The Declaration of Principles committed the nations to four general objectives:

1) preserving and strengthening democracy in the Americas, 2) promoting prosperity through economic integration and free trade, 3) eradicating poverty and discrimination, and 4) guaranteeing sustainable development and conserving the environment. One of the primary objectives in reaching these goals was the development of “trade without barriers, without subsidies, without unfair practices, and with an increasing stream of productive investments.”¹² The leaders recognized that:

Eliminating impediments to market access for goods and services among our countries will foster our economic growth. A growing world economy will also enhance our domestic prosperity. Free trade and increased economic integration are key factors for raising standards of living, improving the working conditions of people in the Americas and better protecting the environment.¹³

¹¹ See Summit of the Americas: Declaration of Principles and Plan of Action, 34 I.L.M. 808, 813 (1995) [hereafter also referred to as the Miami Summit Declaration] (The title Free Trade of the Americas was designated in the Declaration of Principles), available at http://www.ftaa-alca.org/View_e.asp.

¹² *Id.* at 811.

¹³ *Id.*

The leaders then resolved to “immediately construct the ‘Free Trade of the Americas.’” Trade discussions were to show “concrete progress” by the end of the century and be concluded no later than 2005.¹⁴ All members are to take such “reasonable measures” so as to ensure “observance by regional and local governments and authorities within its territory” so that the FTAA enters into force on 1 January 2006.¹⁵

The Plan of Action was more specific setting forth twenty-three detailed items to achieve the Declaration’s purposes. Although development of the FTAA was listed ninth in the Plan and receives the most publicity, twenty-two other items are enumerated in the Plan and cover goals such as promoting cultural values, combating corruption, improving education, preventing pollution, and establishing/maintaining telecommunications infrastructure. The FTAA is, therefore, intended to be far more encompassing than simply an economic trading zone.

Following the Miami Summit Declaration was the Denver Ministerial in 1995. In addition to reiterating the objectives of the Declaration of Principles and Plan of Action of the Miami Summit, the Denver Summit moved forward with preparations for the negotiations. It was concluded that the FTAA should proceed on a “single undertaking comprising mutual rights and obligations.”¹⁶ The single undertaking approach called for all countries to commit to trade liberalization in a single agreement.

The Denver Ministerial was followed by similar meetings in Cartagena, Colombia in 1996, Belo Horizonte, Brazil in 1997 and San José, Costa Rica in 1998. At the San José meeting, Ministers recommended to their respective governments the

¹⁴ *Id.*

¹⁵ FTAA Chapter on General and Institutional Issues, Arts. 4, 28.

¹⁶ Summit of the Americas Trade Ministerial, the Denver Ministerial Declaration (June 30, 1995) (visited 16 March 2003), http://www.ftaa-alca.org/ministerials/Denver_e.asp.

initiation of negotiations and set out the general structure to guide the negotiation process. Then, based on the San José Declaration, formal FTAA negotiations were launched at the Second Summit of the Americas in Santiago, Chile in April 1998. Of significance was the decision to make the negotiating process transparent and to take into account the differences in levels of development and size of the economies in the Americas.

The fifth Ministerial meeting took place in Toronto in November 1999. At this meeting the negotiating groups were instructed to prepare a draft text of the FTAA to be presented at the sixth Ministerial meeting in Buenos Aires in April 2001. At the Buenos Aires meeting and at the Third Summit of the Americas in Quebec City in April 2001, the negotiations continued and, notably, a draft text of the FTAA was presented. Further, in an unprecedented move to increase transparency, it was decided to make the draft text available to the public.

A second draft agreement was prepared in record time and released immediately following the latest Ministerial Meeting held on 1 November 2002 in Quito, Ecuador. Most significant was the approval of the Hemispheric Cooperation Program (HCP).¹⁷ Intended to strengthen the capacity of small and developing countries seeking assistance in participating in the FTAA negotiations, the HCP has a mechanism to assist these countries in developing “national and/or sub-regional trade capacity building strategies that define, prioritize and articulate their needs and programs pursuant to those strategies, and to identify sources of financial and non-financial support.”¹⁸ With the help of the Inter-American Development Bank and USAID, assistance could include training for government officials (such as customs officers, environmental analysts, bank regulators, patent and copyright

¹⁷ FTAA Seventh Meeting of Ministers Responsible for Trade in the Hemisphere, Ministerial Declaration (1 November 2002).

¹⁸ *Id.* at para. 18.

officials, food safety inspectors and trade analysts); programs fostering trade policy coordination among government agencies and identifying ways to make such agencies more effective and transparent; programs to establish and improve statistical and analytical institutions to provide impartial and transparent information to governments and civil societies on trade policy issues; programs for business development (such as identifying new market opportunities for small and medium size companies); and programs to assist governments with regulatory reform in areas such as revenue systems, environmental protection and competition policy.¹⁹

Finally, the Quito Ministerial Declaration announced that Brazil and the United States would co-chair the FTAA negotiations through its conclusion in January 2005. Additionally, the next scheduled meetings will be in Miami in late 2003 and in Brazil in 2004. Also, three meetings of the Trade Negotiation Committee will occur in 2003 in Trinidad and Tobago, El Salvador and Mexico.

IV. Chapters of the FTAA

Specifically, the chapters of the FTAA (addressed separately hereafter) are:

- 1) General and Institutional Issues
- 2) Agriculture
- 3) Government Procurement
- 4) Investment
- 5) Market Access
- 6) Subsidies, Anti-Dumping and Countervailing Duties
- 7) Dispute Settlement

¹⁹ See HCP, Helping Small and Developing Countries to Fully Benefit from the FTAA, Office of the U.S. Trade Rep. Trade Facts (visited March 16, 2003), <http://www.ustr.gov/new/2002-11-01-hcp.pdf>.

- 8) Services
- 9) Intellectual Property Rights
- 10) Competition Policy

A. General and Institutional Issues

This chapter contains the general operating guidelines and framework of the FTAA including subchapters on the Preamble (reiterating the principles and objectives of the Summit of the Americas), costs and governance. Of particular note is the requirement that each party is “fully responsible for the observance of all provisions of the FTAA agreement, and shall take reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its territory”²⁰ and “shall ensure that their laws, regulations, and administrative procedures are consistent with the obligations of” the FTAA.²¹ Although the FTAA “shall co-exist with bilateral and subregional agreements,”²² it will be necessary for parties to compare their existing laws and regulations to the FTAA agreement because where national laws (including different levels and branches of government) conflict with the FTAA, the FTAA will govern. Specific provisions provide that:

- Parties must designate a central office responsible for communicating with other parties concerning FTAA matters and providing information on national legislation and other FTAA related issues. The designation must include general information such as the name and title of the official in charge, the name of the institution and contact information

²⁰ FTAA Chapter on General and Institutional Issues, Art. 4.1.

²¹ *Id.* at Art. 4.2.

²² *Id.* at Art. 3(b) and 4.3.

- Laws, regulations, judicial decisions and administrative decisions pertaining to the FTAA must be published promptly. Although the FTAA does not state a specific manner of publication, such publication must “enable governments and interested sectors to become acquainted with them.”²³ There are three exceptions to the publication requirement:
 - Where the disclosure of confidential information would impede law enforcement
 - Where publication would otherwise be contrary to public interest
 - Where publication would prejudice the legitimate commercial interests of particular enterprises, public or private.
- Publish in advance, if possible, any FTAA related measures a party proposes to adopt and provide a reasonable opportunity for comment on such proposed measures
- To the extent possible, provide prior notice of any measure that may materially affect the operation of the FTAA or another party’s interest under the FTAA
- Promptly respond to inquiries of other parties of actual or proposed FTAA related measures
- Maintain or establish independent judicial, arbitral or administrative tribunals or procedures, guarantee proper notice and due process and provide an independent review/appeals process of matters involving FTAA issues
- Harmonize national legislation with the obligations imposed by the FTAA

²³ *Id.* at Art. 7.1.

B. Agriculture

The significant proposal under this Chapter is the elimination of tariffs on agricultural products. The FTAA incorporates the definition of agricultural products listed in Annex 1 of the WTO Agreement on Agriculture and includes, for example, basic agricultural products such as wheat, milk and live animals as well as the products derived from them such as bread, butter and meat and all processed agricultural products such as chocolate and sausages. Also included are wines, spirits and tobacco products, fibers such as cotton, wool, silk, and raw animal skins destined for leather. Excluded from agricultural products are fish, fish products and forestry products.

Material provisions of this Chapter are:

- National treatment – each member must accord the same treatment for agricultural products of other members
- Elimination of tariffs (and other import-related duties or customs). It is unclear at this time if elimination of tariffs will be pursuant to a schedule, which may differ with each country, or implemented progressively
- Ensure that sanitary and phytosanitary measures are not applied in a manner that are arbitrary or unjustifiably discriminate between countries or amount to a disguised international trade restriction. The goal is to prevent protectionist trade practices and to facilitate trade. The FTAA adopts the WTO Agreement on the Application of Sanitary and Phytosanitary Measures. These measures will be applied to gain the necessary levels of protection for human, animal or plant life or health, and will be based on scientific principles and evidence

C. Government Procurement

The broad objective of the Chapter on government procurement is to expand access to government procurement markets of the FTAA countries. Specifically, the objectives are:

- To achieve a framework that ensures openness, transparency, non-discrimination, due process and publicity in the government procurement processes
- To ensure impartial and fair review of procurement complaints and appeals by suppliers

Material provisions include:

- National treatment and most favored nation treatment – parties must accord to the goods, services, suppliers and public works of other parties treatment no less favorable than accorded to their own
- A party cannot accord a locally established supplier treatment less favorable than other locally established supplier based on the degree of foreign affiliation or ownership
- A party cannot discriminate against a locally established supplier on the basis that the goods or services offered for a particular procurement are goods or services of another party
- A party may deny the procurement benefits of this Chapter (after notice and consultation) to a service supplier from another party in the following circumstances:
 - Where the supplier has no substantial business activity in the territory of another party
 - Where the supplier is not established in an FTAA country with “substantial connections” to that country

- Where the supplier is owned or controlled by persons of a non-FTAA party.

In addition, this Chapter applies to procurement by any contractual means, including purchase, lease, rental or hire purchase and build, operate and transfer contracts and concessions for public works. Important exceptions to which this Chapter does not apply include:

- Subsidies or donations by a party or state enterprise (such as loans or guarantees)
- Government services or functions (such as implementation of laws, unemployment pension or insurance services, or services related to social security, social welfare, and public education)
- Procurements between governmental entities

Further, all laws, regulations and administrative measures relating to procurement must be publicly disseminated. The FTAA goes further and specifies that parties “shall endeavor to implement a unified electronic information system” for the dissemination of all procurement laws and procedures.²⁴ This will also likely require coordination among other countries to establish a uniform electronic information system to ensure that information is smoothly exchanged.

D. Investment

The purpose of this Chapter is to establish a fair and transparent legal framework that promotes investment by creating a stable environment that protects the investor and the investment without interference from outside the hemisphere. This Chapter applies generally to all measures adopted (or maintained) by a party and

²⁴ FTAA Chapter on Government Procurement, Art. X(1)(a), (b).

encompasses “all aspects of its investments.”²⁵ At this time the negotiators are uncertain if existing investments (existing as of the date of entry into force of the FTAA) will fall under the jurisdiction of the FTAA or will be exempt. Depending on the definition of investment the FTAA negotiators adopt, this Chapter provides a non-exclusive list of what “investment” means:²⁶

- An enterprise, shares of an enterprise, debt instruments of an enterprise where
 - The enterprise is an affiliate of the investor, or
 - The original maturity of the debt is at least three years
 - A loan to an enterprise
 - Intellectual property rights
 - Shares in capital stock of firms organized in another member party country
 - Rights derived from contributions made for the purpose of creating economic value (bonds, claims to money and claims to performance having economic value)
 - Movable and immovable property and property rights such as mortgages and liens
 - Futures, options and other derivatives
 - Bank accounts and similar accounts
 - Concession, licenses, authorizations, permits and similar rights
 - Any asset that has the characteristics of an investment
- Just as important, ‘investment’ does not include:
- Debt instruments of an FTAA member country

²⁵ FTAA Chapter on Investment, Art. 1.

²⁶ *Id.* at Art. 16.

- Money claims that arise solely from:
 - Commercial contracts for the sale of goods or services, or
 - The extension of credit in connection with a commercial transaction
- A payment obligation of a member state or a state enterprise and the granting of such credit to a state or state enterprise
- Tangibles or intangible property not directly linked to the production investment

Other pertinent provisions on investment include:

- National treatment/most favored nation treatment
- Cannot impose or enforce any of the following requirements:
 - To export a certain level or percentage of goods or services
 - To achieve a given level or percentage of domestic content
 - To prefer goods produced in, or services from service providers located in, own country
 - To act as the exclusive supplier of goods produced in a member country to a specific regional or world market
 - Any commitment, undertaking or requirement between private parties is excluded
 - Smaller economies have the right to impose development-related performance requirements if compatible with WTO guidelines

Disputes between two or more members are first encouraged to exhaust diplomatic channels within a reasonable

time, defined as at least six months. If not amicably settled, then the dispute can be referred to the FTAA for resolution.

E. Market Access

The Chapter on market access is one of the longest chapters in the FTAA Draft Agreement and is further divided into sub-chapters: 1) safeguard measures, 2) origin regime, 3) customs procedures, 4) procedures related to rules of origin, and 5) standards and technical barriers to trade. Generally, the objective of this Chapter is the progressive elimination of tariffs, and non-tariff barriers, consistent with the provisions of the WTO, including article XXIV of GATT 1994 and the Understanding on the Interpretation of Article XXIV of GATT 1994.

Specifically, other notable provisions of this Chapter include:

- All tariffs are subject to negotiation
- Different trade liberalization timetables may be negotiated
- The integration of smaller economies will be facilitated
- Applies to all domestic products as defined in GATT 1994 (or as otherwise agreed by the parties).²⁷ Only products that are obtained or produced entirely in the territory of a party benefit from preferential tariff treatment²⁸
- Cannot increase existing customs duty or adopt new customs duty²⁹

Noteworthy is the sub-Chapter on Customs Procedures which provides that parties shall not adopt or maintain customs procedures so as to constitute unnecessary obstacles to

²⁷ See GATT 1994, <http://usinfo.state.gov/usa/infousa/laws/gatt/toc.htm>.

²⁸ FTAA Chapter on Market Access, Sub-Chapter on Origin Regime, p. 5.29.

²⁹ See FTAA Chapter on Market Access, Sec 1, Art. 4.11 for exceptions.

international trade. Even though a country has proper laws on its books, this provision is designed to also prevent improper application of those laws. To this end, the FTAA requires each party to maintain transparency by disseminating its customs procedures, laws, rulings and regulations “through the Internet or other [broad] means of dissemination . . .”³⁰ and to simplify customs procedures.³¹ Moreover, national laws and regulations are not only subject to FTAA review, but subject to review by other FTAA countries as well. This system of cross-checks and balances will hopefully lead to a more standardized and uniform application of customs laws throughout the hemisphere.

Finally, the sub-Chapter on Standards and Technical Barriers to Trade adopts the WTO Agreement on Technical Barriers to Trade and directs that countries should adopt uniform application of standards and technical regulations to prevent unnecessary barriers to hemispheric trade.

F. Subsidies, Anti-Dumping and Countervailing Duties

One of the principles enumerated in the General Articles of the FTAA Agreement is the “coexistence of [the FTAA] with bilateral and subregional agreements, to the extent that the rights and obligations deriving from these agreements are greater in scope than [under the FTAA].”³² Otherwise, where the FTAA conflicts with the provisions of other regional or bilateral agreements, the provisions of the FTAA govern. Other such agreements can offer greater rights or protections than under the FTAA, but cannot detract or impinge on rights granted under the FTAA.

³⁰ FTAA Chapter on Market Access, Sub-Chapter on Customs Procedures, Art. 2.1.

³¹ To simplify customs procedures, the FTAA encourages use of automation, compatible electronic data interchange systems, and a core set of data elements. *Id.* at Sub-Chapter on Customs Procedures, Art. 5.

³² FTAA Chapter on General and Institutional Issues, Art. 3(d).

The FTAA negotiators in the Chapter on Subsidies, Anti-Dumping and Countervailing Duties, however, caution that the relationship between this Chapter and regional agreements “remains to be determined.”³³ This is likely due to the fact the negotiators are considering adopting the WTO provisions in their entirety to address these issues.³⁴ In that case, bilateral or subregional agreements addressing these issues would only apply where specifically provided in the FTAA.

First, ‘dumping’ is the practice of exporting a product at a lower price than normally charged in the home market. The FTAA (as well as the WTO) does not pass judgment on whether this practice constitutes unfair competition. Instead, the FTAA and WTO attempt to control and regulate what actions a government may take in response to such practices. Anti-dumping measures are unilateral remedies which may be applied by a party only after an investigation and determination that an imported product is causing material injury to a domestic industry producing a like product. Therefore, the majority of the Chapter on Subsidies, Anti-Dumping and Countervailing Duties consists of definitions of related terms, criteria to determine whether dumping has occurred and an injury sustained, as well as procedures for review.

Likewise, the FTAA defers to the WTO provision regarding subsidies and countervailing measures and provides for these measures to be taken only after an investigation and a determination that specified criteria have been satisfied. As with Anti-dumping, the FTAA provisions concerning subsidies and countervailing measures focus on the methods of investigating and determining whether a subsidy is prohibited, actionable or non-

³³ FTAA Chapter on Subsidies, Anti-Dumping and Countervailing Duties, p. 6.2, n.3(ii).

³⁴ The WTO incorporates Article VI of GATT 1994 (Anti-Dumping Agreement) and the FTAA incorporates the WTO Agreement on Subsidies and Countervailing Measures. *See Id.* at Art. 1.1.

actionable. For countries already familiar with the WTO guidelines, the impact on existing regulatory frameworks should be minimal. For those unfamiliar with the WTO guidelines, there are numerous organizations which countries may consult.³⁵

G. Dispute Settlement

The Chapter on Dispute Settlement provides a means to resolve disputes between member countries. If a member believes that a measure adopted by another member does not comply with a provision of the FTAA, that member is first required to request consultations with the other member. Consultations consist of written notice to the member and identification of the action (or inaction) perceived to conflict with the FTAA³⁶ The member to which the request is made is required to respond within a certain period of time (not exceeding 30 days).

During consultations, parties must:

- Act in good faith
- Provide sufficient information to reach a conclusion of the issue in dispute
- Keep such information confidential (at least as confidential as the party providing the information)
- Seek to avoid any resolution that adversely affects the interests under the FTAA
- Keep consultations confidential
- If a mutually acceptable resolution is reached, the parties shall notify the FTAA Secretariat, who in turn notifies all other FTAA members

³⁵ See, e.g. WTO Training Institute (offering courses for government officials), http://www.wto.org/english/tratop_e/devel_e/train_e/train_e/htm.

³⁶ Notice to other entities, such as the FTAA Secretariat and other members, also may be required. See FTAA Chapter on Dispute Resolution, Art. 7, para. 41.

If a response to consultations is not made, or a member refuses to enter into consultations, or at any time during consultations, a party may request the establishment of a neutral panel.³⁷ The neutral panel then has 90 days to hear evidence and issue its final report.

Parties at any time may agree to refer their dispute to arbitration. In fact, the FTAA encourages the use of such alternative means of dispute resolution and even requires that each member provide for “appropriate procedures to ensure observance” of international arbitration conventions and the recognition and enforcement of arbitral awards. The FTAA deems a member in compliance with this requirement if it is a party to (and in compliance with) the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), the 1975 Inter-American Convention on International Commercial Arbitration, or the Arbitration Rules of the United Nations Commission on International Trade Law. Any country of the FTAA, therefore, that is not already party to at least one of these conventions should be encouraged to begin measures to adopt such convention or conventions.

H. Services

In order to liberalize trade in services, the FTAA provides that member countries cannot adopt discriminatory measures affecting cross-border trade in services by service suppliers. Countries must apply their laws and regulations on the basis of national treatment and most-favored nation principles. The scope of this chapter is broad and applies generally to the “production, distribution, marketing, sale, and supply of a service.”³⁸ ‘Services’ do not

³⁷ The neutral panel, part of the Dispute Settlement Body, consists of the Vice-Ministers Responsible for Trade of each member country, or their representatives. FTAA Chapter on General and Institutional Issues, Arts. 15, 22.

³⁸ FTAA Chapter on Services, Art. 1.1.

include, however, those services supplied “in the exercise of governmental authority” which are not supplied on a commercial basis or in competition with other service suppliers (for example, law enforcement, social security, insurance, education, health).³⁹ Other services, or service sectors, to which this chapter does not apply are:

- Financial services involving cross-border trade
- Air transportation services
- Government procurement
- Subsidies or other developmental measures granted by a member (tax incentives, government-supported loans, guarantees)

Substantive provisions on prohibited measures that countries cannot adopt or maintain relating to market access include:

- Limits on the number of services suppliers (no numerical quotas, monopolies, exclusive service suppliers or requirement of an economic needs test)
- Limits on the value of service assets or transactions in the form of numerical quotas or the requirement of an economic needs test
- Limits on the number of service operations
- Limits on the number of natural persons that may be employed in a particular service sector or that a service supplier may employ
- Measures restricting or requiring a specific type of legal entity or joint venture

³⁹ *Id.* at Art. 1.6.

- Limits on the amount of foreign capital in terms of maximum percentage on foreign share holding

Moreover, the chapter on services applies to all levels of government whether at the national, regional, local, departmental or municipal level. The challenge to governments in general, then, is to sufficiently educate employees to recognize permissible and prohibited service practices.

I. Intellectual Property Rights

The purpose of intellectual property rights protection is to promote “technological innovation and the transfer and dissemination of technology in the Americas, to the mutual advantages of producers and users of technological knowledge, with a view to fostering social and economic welfare and a balance of rights and obligations.”⁴⁰ These purposes are furthered by granting to inventors and authors a period of protection during which they have the exclusive right to use their invention or publication. To this end, various regional and worldwide treaties or conventions granting various rights and protections are already in place. The FTAA recognizes many of these international agreements and directs that member countries take efforts to ratify or accede to them, if they are not already a party, on or before the entry into force of the FTAA.⁴¹ The required treaties and conventions under the FTAA that members must be party to are:

- Berne Convention for the Protection of Literary and Artistic Works (Articles 1-21 and Appendix)

⁴⁰ FTAA Chapter on Intellectual Property Rights, Art. 2.1.

⁴¹ See FTAA Chapter on Intellectual Property Rights, Arts. 5.2 and 5.4 (Alternate language provides that members shall ratify or accede to these international agreements within one year from the entry into force of the FTAA).

- Paris Convention for the Protection of Industrial Property (Articles 1-12 and 19)
- Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms (unspecified articles)
- International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Articles 1-31)
- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Articles 9-40)
- International Convention for the Protection of New Varieties of Plants (UPOV Convention) (Articles 1-14)
- Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Brussels Convention) (Articles 1-7)
- Trademark Law Treaty (unspecified articles)
- WIPO Performances and Phonograms Treaty (Articles 1-23)
- WIPO Copyright Treaty (Articles 1-14)
- Patent Law Treaty (Articles 1-16, 22, and Regulations)
- Instrument for the Protection of Audio-Visual Performers Rights (currently being negotiated) (unspecified articles)
- Treaty for the Protection of Non-Copyrightable Elements of Databases (currently being negotiated) (unspecified articles)
- Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks
- WIPO Protocol on Trademark Licenses Databases (currently being negotiated)

- Convention on Biological Diversity (Articles 1-22)
- Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet (currently being negotiated)
- Instrument for the Protection of Broadcasting Organization's Rights Internet (currently being negotiated)
- Patent Cooperation Treaty
- Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks
- Hague Agreement Concerning the International Deposit of Industrial Designs
- Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purpose of Patent Procedure

For small or developing economies, ratifying each of these agreements may be costly and time-consuming. Not only will a review of each treaty or convention be necessary, the appropriate office for filing or registration must be established or updated, personnel must be trained in the technical application of each treaty or convention, including the use of new software programs, and coordination with other national filing offices must be established.

J. Competition Policy

Competition policies and laws are designed to promote economic efficiency and consumer welfare by limiting anti-competitive business practices. Such practices include price fixing, rigged bids, output restrictions or quotas; sharing or dividing markets by customer allocation, suppliers, or territories; anticompetitive practices by enterprises with a dominant position in a relevant

market; and concentrations, mergers or acquisitions with substantial anticompetitive effects.

To ensure that such anticompetitive practices are kept in check, the FTAA establishes a committee consisting of representatives from each party to monitor competition policy and promote communication between member country competition authorities. The FTAA establishes a Dispute Settlement Mechanism to address any anti-competitive practices. Although the Dispute Settlement Mechanism has no enforcement authority, it does report to the FTAA Commission which can take appropriate enforcement measures.

V. A Focus on Small and Developing Economies

For small and developing countries, particularly in the small Caribbean countries, trade is a primary driver of economic growth. This is evidenced by the proliferation of trade agreements in which Caribbean countries are increasingly joining and implementing (for example, the Organization of Eastern Caribbean States (OECS), CARIFORUM (includes CARICOM and the Dominican Republic), and the Caribbean Single Market and Economy (CSME). CARICOM has also reached agreements with the Dominican Republic, Venezuela, Colombia and Cuba and is negotiating with the newly formed Central American Common Market (CACM)). Moreover, Caribbean exports benefit from preferential trading agreements with the European Union, United States and Canada.

However, under the WTO, preferential treatment is being worn away and, with the FTAA on the horizon, the region faces an unprecedented array of trade negotiations. For several reasons, Caribbean countries are currently focused on the FTAA negotiations: 1) FTAA negotiations are already in progress, 2) FTAA negotiations are demanding in terms of meetings, preparatory work, personnel and funds 3) most of the Caribbean

trade is with the Western hemisphere, and 4) the principal competitors to Caribbean exports of goods and services are Latin American countries where some Caribbean sectors are losing market share.⁴² This is not to say that Caribbean countries are ecstatic about the FTAA. In fact, some see the FTAA as “lacking a development dimension and concentrating solely on reducing trade barriers and harmonizing regulations with little concern about development or economic or political security.”⁴³

To mitigate these concerns, the FTAA in its Declaration of Principles recognizes that the creation of a free trade zone will be a complex endeavor, “particularly in light of the wide differences in the levels of development and size of economies existing in our Hemisphere. We will remain cognizant of these differences as we work toward economic integration in the Hemisphere.”⁴⁴ To that end, the Hemispheric Cooperation Program (HCP) was adopted at the FTAA Ministerial in Quito on 1 November 2002 and is designed to provide a flexible framework to respond to the particular needs of each country.⁴⁵

Moreover, Caribbean country negotiators have been instrumental in securing (at least at this point) some flexibility for smaller or developing economies. For example, the Chapter on Agriculture provides that smaller economies will be permitted to maintain existing export subsidies in conformity with WTO agreements (or in the alternative, given a period of time (10-20

⁴² Caribbean Perspectives on Trade, Regional Integration and Strategic Global Repositioning 4, Final Report to the European Union (15 October 2002), *available at* <http://www.dgroups.org/groups/icacaribbean/docs/CRSS-study-Report-final.pdf?ois=no>.

⁴³ *Id.*

⁴⁴ Summit of the Americas, Declaration of Principles, *available at* http://www.ftaa-alca.org/ministerials/Miami_e.asp.

⁴⁵ See discussion of the HCP beginning at p. 10.

years?) after the effective date of the FTAA to eliminate export subsidies).⁴⁶

Seeking special terms for smaller or developing economies is certainly not an admission of defeat. Some level of assistance is essential and recognized by the FTAA. Trade liberalization is an important element of trade agreements and ultimately benefits all members. However, time is needed to encourage restructuring of economies and to develop competition in new areas.

St. Lucia, for example, has been in the process of replacing import taxes with consumption taxes. This is not something that can be accomplished in a short time, especially when in 2000 St. Lucia derived 50.2 per cent of its tax revenue from taxes on international trade.

VI. Conclusion

It is anticipated that a final draft of the FTAA will be concluded no later than January 2005. With a target date of 1 January 2006 for the FTAA to come into force, countries have little time to identify, understand and implement the wide range of issues set out in the FTAA.

Moreover, leaders should realize that the FTAA does not create new regulatory or legal problems; instead, it merely highlights weaknesses in existing frameworks. Undoubtedly, governments will have to evaluate current regulatory and legal frameworks in light of the FTAA. This will involve internal reviews as well as advice and consultation from experts in topics covered in the FTAA. Countries that have already taken steps to begin reviewing and adopting appropriate measures in anticipation of the FTAA will likely face less confusion and legislative burdens than countries that wait until a later date to take such steps.

⁴⁶ FTAA Chapter on Agriculture, Art. 11.5 and 11.6.