Trade Rules in the Making: An Overview

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Three unremitting trends over the last few decades have fundamentally changed the nature of the debate about regionalism and the way that analysts and policymakers think about the relationship between regional trade agreements and the multilateral trading system. First, trade policy is no longer primarily about trade measures at the border. Deepening economic integration and the increasing fusion of national economies into a global whole make international cooperation across a far broader spectrum of policies more essential than ever before.

Second, the number of countries that have become players in the world economy has increased enormously. Great disparity exists among these countries, adding further to the challenges of securing shared benefits from international cooperation. The increase in the number of countries participating in the world economy is about numbers only in a trivial sense. What has really counted is the changed policy stance of many countries, such that greater openness and continuing liberalization have raised the stakes of dozens of countries in the nature and functioning of the international economy.

Third, more and more countries have entered into regional integration agreements, which can now be counted in dozens and involve all but very few countries in one sort or another of preferential trading arrangement. Some countries, especially in Latin America, are members of several agreements that cover a significant proportion of their international trade relationships.

Many would argue that the first two trends in the international economy noted here—an expanding policy agenda of growing complexity and heightened but disparate national interests in a progressively integrating world—help to explain the third trend, that of growing regionalism. And herein lies the core policy challenge of regionalism and of defining the appropriate relationship between regionalism and multilateralism. Piecemeal economic integration may be seen, at least in part, as an attempt to render economic integration more manageable. It may also be seen as a recipe for securing more rapid results. But because of its geographically exclusionary nature, it also runs the risk of complicating or even frustrating the attainment of the true benefits of economic integration on a global scale. Countless writers on regionalism have inevitably focused on this potential contradiction—that in reaching for the benefits of integration, badly conceived regional approaches may attenuate those very benefits. Therein lies the importance of securing the appropriate balance of emphasis between regional agreements and the multilateral trading system. It is clear that outward-looking regional agreements based on trade liberalization commitments are much more likely to be positive from a multilateral perspective than some earlier regional integration efforts that placed emphasis on enlarging the import substitution base rather than competing in world markets.

Much analysis, both old and new, of the economic effects and political economy implications of regional integration initiatives fails to draw a priori welfare conclusions. The theory of second best finds a prominent place in this discourse, and the theory's baseline conclusion about the welfare effects of partial liberalization scenarios is that "it all depends"; the specificity of circumstances, the details of particular arrangements, and even the political motivation for pursuing them can all be determinants of welfare outcomes. It is for this reason that empirical work has become so important in helping us to understand the likely consequences of particular trade policy arrangements.

It is easy for governments to pay verbal homage to the primacy of their commitment to the multilateral trading system while they focus their efforts on their regional priorities. It is equally easy for defenders of multilateralism to fall into the trap of seeking perfection at the expense of progress. At the same time protagonists of regional arrangements may sometimes succumb to the fallacy of presenting any liberalization, however narrowly drawn in geographical terms, as better than no liberalization. The right balance of emphasis and priorities—the balance that will promote welfare through a judicious mix of emphasis on the regional and the multilateral—requires careful analysis of the many policy issues at stake. Consistency and complementarity are crucial.

The collection of chapters that make up this volume seeks to contribute to our understanding of economic integration issues, entering into considerable detail on an eclectic set of policy questions. These chapters have been written for policymakers, for practitioners—for those who must deal directly with the reality that both regionalism and multilateralism are with us, and they are here to stay for the foreseeable future. The challenge, therefore, is to manage trade relations within these different frameworks in the collective interest, not to question the basic legitimacy of particular types of trade arrangements. Neither do the chapters purport to address theoretical questions that have attracted growing attention among analysts as regionalism has burgeoned.

The chapters are unusually wide-ranging in their scope for a single volume, addressing trade and trade-related policy issues that are relevant in both the regional and the multilateral context, as well as such matters as nonreciprocal preference schemes. No effort has been made to fashion a set of chapters that are in agreement on all issues. It will be readily apparent that the views of authors differ on a number of points, some more fundamentally than others, but such divergence can only enrich the debate. What follows is a brief summary of the main points made in the chapters of the volume, and it must be emphasized that this summary is a poor substitute for reading the chapters themselves.

Part I: Regionalism and Multilateral Rules

Robert Z. Lawrence reviews the tensions between regional and multilateral agreements by tracing the evolution of international trade policy over the last few decades. Taking the perspective of developing countries, he examines historical shifts in the focus of trade policy and the role of regional and multilateral arrangements in achieving trade liberalization. Lawrence sees the current trend toward deeper international integration as a result of the changing realities of trade policy. Whereas the emphasis in the period immediately after World War II was on dismantling at-the-border barriers, leaving countries free to pursue domestic policies in areas such as investment, competition policy, and regulatory standards, there is now a drive for the harmonization and reconciliation of domestic policies at the world level.

There are political as well as functional reasons for this trend. As foreign trade and foreign investment have become increasingly complementary, trade policymakers have sought to cover the regulatory conditions under which

foreign investors operate. Already present at the multilateral level, particularly since the agreements reached during the Uruguay Round, the new regulatory orientation of trade policy is also permeating regional arrangements, including those concluded among developing countries. As these countries try to attract foreign investment, they tailor their agreements to meet the regulatory concerns of foreign firms. Lawrence thinks that trade agreements "are motivated by the desire to facilitate international investment and the operations of multinational firms as much as by the desire to promote trade. Although liberalization to permit trade requires the removal of border barriers—a relatively shallow form of integration—the development of regional production systems and the promotion of investment in services requires deeper forms of international integration of national regulatory systems and policies."

Seen in this light, regionalism in developing countries is a result of their increasing participation in the global economy. Still the question as to the relevance of regionalism vis-à-vis multilateralism remains. Lawrence sees no cause for concern. Historically regional trade arrangements and the international system have coexisted and complemented each other, as both have allowed countries to move toward free trade. In Lawrence's view it would be erroneous to consider regional arrangements as "second best" alternatives and thus inferior to the multilateral approach, as traditional analyses do. In fact, some issues are better dealt with at the regional level. For issues of "deeper" integration, which involve domestic regulatory concerns, regional arrangements could well be the "first best." After all, a results-oriented approach—with the ultimate end of trade liberalization—need not be biased by predetermined value judgments about the means.

Still, the debate continues. Robert E. Hudec and James D. Southwick examine the implementation problems posed by Article XXIV of the General Agreement on Tariffs and Trade (GATT)—the legal instrument by which the multilateral system addresses regional arrangements—and the extent to which those have been addressed by the Uruguay Round understanding on this provision. These authors see Article XXIV as reflecting a basic tension in the world trading system. It recognizes the desire and right of countries to enter into regional agreements—customs unions and free trade areas. At the same time it seeks to prevent the trade diversion that could result from allowing "members of a regional trade agreement to treat each other more favorably than they treat other WTO [World Trade Organization] members."

The two basic requirements of Article XXIV—not to raise duties and other trade barriers to third countries and to eliminate trade restrictions on "substan-

tially all" trade—have been subject to different interpretations. The Uruguay Round Understanding on Article XXIV helped to clarify some of the issues, such as the methodology for estimating the overall incidence of duties of customs unions on third countries. On other issues such as rules of origin, limited progress was made in spite of the widely held view that rules of origin could have a detrimental effect on multilateral trade relations. Neither was progress made toward clarifying the "substantially all" trade requirement, leaving open the question of whether the exclusion from the agreements of entire economic sectors, such as agriculture, would make them fail the test of Article XXIV.

A related issue is that of the right of members of a regional agreement to exclude other members from restrictions—quantitative restrictions, tariffs, and other measures—that they can apply under various GATT provisions. In some cases excluding partners from the measures could impose additional burdens on nonmembers. For example, in a balance of payments crisis the exclusion of partner countries from the restrictions imposed to cope with the crisis might make those restrictions more severe or of a longer duration, thus affecting the trade of nonmembers beyond what would be necessary had members also been included. The same principle applies to safeguards—an area in which the tendency in modern regional agreements is to exclude members—and to antidumping and countervailing duties. These are certainly issues not yet satisfactorily resolved. They may be tackled in future WTO negotiations or further clarified by recourse to dispute settlement procedures.

Closing the section on regionalism and multilateralism, Miguel Rodríguez Mendoza focuses on two of the most dynamic Latin American regional agreements, those of the Southern Common Market (Mercosur) and the Andean Community. He seeks to assess the impact of these regional agreements both on members' trade with one another and on their trade with third countries using a number of analytical tools. He points out that these agreements have had a positive impact on members' trade liberalization efforts and on trade growth among their member countries. At the same time, trade with the rest of the world has not suffered as the agreements have moved forward in accomplishing their objectives. He attributes this to the greater market orientation of the arrangements and to the trade liberalization measures implemented by their member countries in the late 1980s.

The Mercosur and the Andean Community have moved well beyond what previous Latin American agreements achieved. They have effected a significant reduction of barriers to trade among their members and implemented common

external tariffs whose levels are comparable to the lower tariff rates achieved through the members' trade liberalization. Although exemptions still exist, they are in the process of being phased out. Both agreements have weathered crises, financial as well as political. The agreements have been kept open to the outside world, thus benefiting other countries as well, and are being implemented with due regard to the multilateral commitments of their member countries.

Part II: Preferential Trade and Regional Agreements

In the first chapter of this section Bonapas Onguglo analyzes in depth existing unilateral trade preference schemes and speculates as to their future. Barbara Kotschwar then sets forth the challenges facing smaller economies integrating into reciprocal trade agreements and discusses some policy options to address these issues. Next Jean-Marie Grether and Marcelo Olarreaga measure the magnitude of preferential trade in relation to world trade. Finally Roberto Bouzas draws parallels between today's preferential trade agreements and earlier ones.

In his chapter Bonapas Onguglo looks at a number of preferential schemes, including the Generalized System of Preferences (GSP), the Caribbean Basin Initiative (CBI), the Andean Trade Preference Act (ATPA), the South Pacific Regional Trade and Economic Cooperation Agreement (SPARTECA), and the Lomé Convention. He explores these kinds of trade relationships, explains the evolution away from preferential arrangements, and speculates on future trade relationships between developed and developing countries. Onguglo thinks these schemes have been "resilient and durable instruments of development cooperation." The GSP, for one, has been in operation for over twenty-seven years and in 1996 covered about 24 percent of U.S. imports from beneficiary countries. In the European Union GSP preferences covered 37 percent of imports from beneficiary countries for the same year. Preferential trade arrangements have allowed some countries to diversify their exports and develop new export industries.

Despite these benefits, Onguglo recognizes a number of constraints. For example, while product coverage includes most agricultural and industrial exports, there are always a few notable exceptions. In order to benefit from these schemes, countries must meet certain noneconomic conditions. At the same time, the tariff decreases and increases in bound duty-free treatment of goods in developed countries have greatly reduced the margin of preference available to

beneficiaries of special and differential treatment, and thus may decrease the desirability of these preferences.

The participation of smaller economies in the process of negotiating the proposed Free Trade Area of the Americas (FTAA) is the focus of Barbara Kotschwar's chapter. A debate between theory and practice is at issue. Although conventional trade theory points unequivocally to the gains from trade that accrue to small countries as they open their economies or enter into trade agreements with larger countries, the real world may not be quite so tidy. As Kotschwar writes, "Although smaller size may net unequivocal gains in the simple classical trade model, this same factor of smallness is associated with market and resource constraints that . . . may weigh quite heavily on the consciousness of policymakers while deciding whether to engage in trade and integration arrangements."

The countries involved in negotiating the FTAA vary widely in size, territory, population, natural resource endowments, and levels of economic development. One illustration of this disparity is the case of Jamaica, a country that is not the smallest of the FTAA participants, but could fit 250 times into the territory of Argentina, not by any stretch the largest FTAA participant. This asymmetry explains why the participation of the smaller economies has been an important topic in the FTAA negotiation process.

Kotschwar's chapter considers some of the characteristics that make the smaller countries "different" from the other countries participating in the negotiations—and that require consideration by the architects of the FTAA framework. At stake is how to ensure the fullest participation of these countries in the FTAA while taking due account of their basic needs and concerns. As the FTAA will be a reciprocal agreement, this will involve allowing the smaller economies the greatest flexibility in meeting their obligations. Measures include extended time frames for the phasing out of tariff and nontariff barriers; flexibility in the implementation of the agreements, including joint implementation of some measures; and provision of technical assistance in the negotiating process as well as the implementation phase.

For most of the smaller economies in the Western Hemisphere the cost of nonparticipation in the FTAA would outweigh that of participation in the agreement, as they would be isolated from the markets that now constitute a large part of their trade. By participating fully in the FTAA, Caribbean and Central American countries will be legally entitled to enter their most important markets—those of the United States and Canada—by means of a binding agreement rather than by relying on the fragile unilateral preferential arrange-

ments now in place. Therefore, the FTAA process, through its participatory, consensual principles, gives the small countries the opportunity to shape the framework in which they will conduct trade with their hemispheric partners.

As Grether and Olarreaga show, preferential trade agreements have proliferated in recent years. The authors estimate that the share of world trade represented by preferential trade is about 42 percent for the period from 1993 through 1997. This proportion varies across regions; Europe is the most concentrated participant, with a 70 percent share. In the Western Hemisphere the share of total trade represented by preferential trade is about 25 percent. Disaggregating these figures to see the impact of unilateral preferences and taking the GSP as a proxy for unilateral preferential trade, the authors find that trade under the GSP has declined over the two periods studied—roughly the first and second halves of the 1990s—from 7 percent to 3 percent of preferential trade. This suggests that developing countries rely less than previously on the GSP as a means of integrating into the world economy than previously and more on other means of integration—for example, on preferential trade agreements with developed countries.

Grether and Olarreaga also find that the move toward preferential trade seems to depend on country size and level of GDP per capita. This, they speculate, may be due to factors such as bargaining power incentives and financial constraints. Another observation is that countries that have entered into regional arrangements in the latter half of the 1990s have tended to be the most open economies, supporting the notion that the rise in regionalism can be an engine for the multilateral system rather than an impediment to it.

Roberto Bouzas examines past regional arrangements and assesses the elements that have made them successful—or not. An essential element, according to Bouzas, is political commitment. The strength of this political commitment is determined by broader governance questions and the economic policy environment. To date, all success stories examined involve developed countries with mature governance institutions, stable macroeconomic environments, and relatively common values and objectives.

The institutional designs of successful regional arrangements differ. At one extreme is the European Union with its highly structured institutions and supranational decisionmaking bodies. Other successful initiatives have adopted alternative frameworks. Considering the multitude of failed regional integration experiences, institutional design does not appear to be a major explanatory factor. Whatever the institutional framework, Bouzas finds that successful arrangements aim toward a “deepening and leveling of the playing field.” As

market integration develops, the demand for a more stable and predictable environment increases, thus stimulating a deepening of the scope of regional preferential agreements. Similarly, as market integration grows, demands for a level playing field mount.

Regional arrangements are the result of a variety of motives, which include political, strategic, bargaining, and trade policy considerations. These arrangements have rarely resulted from a careful, objective examination of economic costs and benefits. But the existence of net economic benefits and the issue of their distribution among member countries have turned into important factors as agreements have been implemented.

Part III: Enhancing Trade Rules

This section examines the heart of the matter—improving market access through trade liberalization. Although at both the regional and the multilateral level trade policy has become increasingly complex and topics on the trade agenda broader, barriers at nations' borders continue to be significant. As the agenda increasingly involves disciplines, many posit that traditional market access issues have lost importance. In many elements of interest to developing countries this is not yet the case.

A "traditional" issue, but one that remains central to market access negotiations, is that of reducing tariffs and nontariff measures. The main focus of negotiations in the first seven rounds of multilateral negotiations, border measures lately have been eclipsed as complex disciplines have taken their place on the international trade agenda and as countries have undertaken unilateral trade liberalization initiatives. Average tariffs have fallen considerably over the last fifty years, and developing countries, especially those in the Western Hemisphere, have dramatically liberalized their trade regimes. The reduction of tariffs and nontariff measures will, however, remain a major issue in future multilateral market access negotiations, as will the elimination of such barriers in the context of the FTAA.

In his chapter Sam Laird presents a comprehensive overview of the different approaches to negotiating the reduction of tariff and nontariff barriers, taking as his point of departure the techniques employed during the Uruguay Round. He explains the benefits and challenges of each type of approach and its applicability to developing countries. His chapter sets out the important tariff and nontariff issues that will be on the market access agenda of the FTAA negotiations.

Laird emphasizes the importance for developing countries of participating actively in multilateral negotiations, as the improved security of access through increased tariff bindings may offer more advantages to developing countries than unilaterally granted but unbound preferential access. The advantage of their making their own commitments is that they can provide themselves with stable and credible trade regimes to attract investment and the associated technology needed for their further development. Laird also emphasizes the need for developing countries to develop technical expertise to deal with the depth and complexity of the negotiating issues.

The next chapter, by Francisco Javier Prieto and Sherry M. Stephenson, deals with trade in services, an issue that only recently has been brought under multilateral or regional disciplines. The General Agreement on Trade in Services (GATS) was a main result of the Uruguay Round. It provided a legal framework for the continued liberalization of trade in the services sector—as witnessed by the agreements on basic telecommunications and financial services concluded in the last two years—and is structured along the principles of most favored nation treatment, national treatment, and transparency. These same principles guide the agreements on services concluded by countries in the Americas: the North American Free Trade Agreement (NAFTA), the Mercosur, and a number of recent bilateral free trade agreements entered into by Mexico and Canada with other Latin American countries.

A key difference between these agreements, however, is the approach they take to promoting trade liberalization. As Prieto and Stephenson point out, "liberalizing trade in services involves a different approach than the reduction of price-based measures; it requires the removal, modification, or nondiscriminatory application of national regulatory mechanisms." To accomplish this the GATS and the Mercosur take a "positive list" or "bottom-up" approach whereby countries open only the services sectors they expressly include in their commitments under the agreements. The NAFTA and most of the existing trade agreements in the Americas—many of which are NAFTA-inspired—follow a "negative list" or "top-down" approach whereby all services sectors except those totally or partially excluded are covered by the agreements.

Although a debate is going on as to which of these two approaches is more conducive to trade liberalization, neither seems to guarantee full liberalization of trade in services. They do not, as a general rule, include obligations to achieve a certain level of openness by a given period of time. Their end result essentially depends on the will of countries to move the process forward. This is an important consideration for the FTAA negotiations. Equally important

would be for the FTAA participants to craft their agreement in such a way as to take into account a variety of concerns that derive from existing asymmetries within the region. The FTAA participants vary widely in terms of size, level of development, and availability of resources. These factors influence the industry composition of their services sectors, their degree of openness to foreign competition, and their readiness to confront a more open and competitive environment.

Luis Jorge Garay and Rafael Cornejo address rules of origin in preferential trade agreements. Rules of origin are a key component of free trade agreements and one of the most complex issues in trade negotiations. In free trade areas they are used to avoid or control trade deflection or trans-shipment, whereby goods from a third country are imported into a free trade area through a low-tariff member country and moved duty-free to higher-tariff members. Because trade agreements are intended to benefit traded goods originating in the participating countries, such trans-shipment is prevented by requiring that goods meet minimum levels of regional content as a condition of benefiting from preferences. Such rules could be a very sensitive tool. The stricter the rules of origin, the more likely they are to distort trade (and investment).

Several regimes for rules of origin exist in the Americas. The oldest, the system used by the Latin American Integration Association (Aladi), is based on a shift in tariff classification and alternatively on regional content requirements. The newer NAFTA regime mixes various criteria—change in tariff classification, regional content, use of certain technical processes, or a combination of these—and applies them on an item-by-item basis. Most recently the Central American countries have designed a new system that falls between the more permissive Aladi arrangement and the stricter NAFTA regime. The FTAA negotiations will draw on these different approaches.

Garay and Cornejo argue that the FTAA negotiations should aim at facilitating trade by agreeing to a system of rules of origin that is "transparent, objective, and predictable." As in other areas of the negotiations, account should also be taken of developments within the WTO with regard to rules of origin for nonpreferential trade, as these may help negotiators in designing the FTAA rules. However, the FTAA participants should not wait until the end of the negotiations to start harmonizing their various rules of origin, as their simultaneous application at present is a significant source of inefficiency in terms of resource allocation and specialization patterns.

Another important market access issue is that of standards and technical barriers to trade, which is taken up in the next chapter by Sherry M. Stephenson. The role

of standards and the importance they may have as potential nontariff barriers within the Western Hemisphere is increasingly being recognized, as is the ability of harmonization or mutual recognition of standards to facilitate trade. The nucleus of a common Western Hemisphere approach to the treatment of standards already exists. As Stephenson points out, common disciplines are included in the WTO Agreement on Technical Barriers to Trade (TBT Agreement) negotiated during the Uruguay Round. Common guidelines for standardization activities, including conformity assessment and quality control, have been elaborated under the International Organization for Standardization (ISO) and the International Electrical Commission (IEC). At the regional level, most countries are members of the Pan American Commission on Technical Standards (COPANT), the regional standardizing body for the Americas. Many regional arrangements include explicit provisions on standards and conformity assessment procedures and are developing harmonized standards as well as common policies in this respect.

The difficulty in this area is to distinguish the legitimate use of technical regulations for the purpose of protecting consumer health and safety, as well as the environment, from those put in place for protectionist purposes. The challenge is to ensure that legitimate standards and technical regulations are enforced with minimal adverse effects on trade. These difficulties are underscored by the lack of objective information and quantitative estimates of the impact of technical barriers on trade flows and consumer welfare.

As well as examining these commonalities, Stephenson's chapter considers whether establishing common disciplines and approaches to the elaboration of standards and mutual recognition of conformity assessment procedures that do not yet exist for the majority of FTAA participants is feasible. The task for negotiators in the standards area is not only to determine the shape of an ultimate agreement, but also to devise incentives and policies that will permit countries to implement existing disciplines and to participate in multilateral and regional standards-related activities. The FTAA negotiators will have to consider to what degree and in what areas it might be desirable to go beyond the existing multilateral disciplines that were included in the WTO TBT Agreement. Full compliance with the provisions of the TBT Agreement will certainly be one of the objectives of the negotiations. However, to what extent additional (WTO-plus) disciplines are felt to be appropriate will depend upon the political decisions of participating governments.

Murray G. Smith proposes that an alternative to antidumping and countervailing duties, especially for smaller economies, could be safeguards. The

procedural requirements of the WTO Antidumping Agreement, he argues, could be cumbersome and challenging to smaller economies, which lack the administrative and legal traditions of larger economies. Also, imposing special import duties will impose net economic costs on small, open economies. The least costly alternative for a small country that wishes to have resort to import-relief laws is the development of safeguards legislation. Administration of such laws is less costly and the procedural requirements in the WTO are less burdensome than those for the Antidumping Agreement.

As border barriers have been eliminated and as tariffs have become increasingly less effective as instruments of protection, trade-remedy law has grown in importance. As developing countries have participated more in the international trading system, their use of trade-remedy procedures has increased. Brian Russell examines antidumping and countervailing duty law from a net welfare perspective. He points out that the trend toward using antidumping measures is accelerating: between 1990 and 1995 the number of active antidumping measures of which the GATT/WTO were notified increased by over 1,000 percent. This trend, which is mirrored in the developing countries, also held in the Western Hemisphere: from 1991 to 1995 the number of Mexico's antidumping measures increased from eighteen to sixty-seven; meanwhile, Brazil's jumped from four in 1990 to twenty-three in 1995, and Argentina's increased from four to twenty from 1994 through 1995 alone.

This trend is not justified by a correspondent increase in the volume of trade. Instead, says Russell, there is "troubling evidence that antidumping measures are becoming preferred tools for protection of domestic industry as more traditional forms of trade barriers are reduced or eliminated." Although trade remedy law is often justified by intuitively appealing arguments, Russell finds that these arguments do not hold water. In fact, he argues, both antidumping and countervailing duties are economically unnecessary: "Based on the net national welfare of the importing country, the economic effects that they are designed to correct would best be left uncorrected or could be more efficiently addressed by other policies."

In their contribution Gary N. Horlick and Steven A. Sugarman examine the underlying rationales offered to explain dumping and antidumping law from a legal perspective. The basic argument that imperfect trade conditions create dumping by foreigners that harms domestic producers and consumers is, they claim, at best overstated. Often-used rationales include protected home markets, government subsidies, nonmarket economies, cross-subsidization, dumping to export unemployment, national defense, and overproduction. In reality, these

authors assert, antidumping laws often fall far short of responding coherently to their purported justifications. The authors argue that "If open competition between companies based in different countries is the optimal system of trade, antidumping laws must be tailored directly to their purposes such that they do not become so broad as to deter acts of beneficial competition." Therefore, they propose a system to close this gap, asking that all petitioners who claim harm to prove their stated rationales.

In the last chapter of this section Rosine M. Plank-Brumback addresses dispute settlement issues. As the frontiers of trade policy have expanded to deal with a variety of policies and regulations, an effective dispute settlement mechanism has become an increasingly important ingredient of successful trade agreements. Plank-Brumback argues that the experience of the GATT/WTO shows how initial reliance on "diplomatic jurisprudence" has been replaced by greater institutional and legal discipline in handling disputes in order to accommodate the recent evolution of the multilateral trading system itself. As trade negotiations have evolved from an initial concern with border measures toward greater preoccupation with what governments do within borders, "the substantive rules and obligations of trade, and in parallel the system to enforce them, have become more intrusive over national autonomy."

Making rules on dispute settlement is no longer confined to the fringes of trade negotiations. This is a principal task of negotiations, because designing an effective and efficient dispute settlement mechanism will help to guarantee that the commitments undertaken in trade agreements are fulfilled. The GATT/WTO system provides some practical lessons for the FTAA negotiations and some guiding principles or features that the FTAA negotiators need to consider. Some of these include mandatory consultations, adjudication by ad hoc panels or impartial experts, a negative consensus rule for panel establishment, adoption of rulings or recommendations, and authorization for retaliation, a standing appellate body, and restraints on unilateral determinations and retaliation. However, the WTO dispute settlement system remains a work in progress, and the future may bring new ideas and experiences that need to be closely monitored.

Part IV: The Newest Trade Policy Issues

The completion of the Uruguay Round and the creation of the WTO broadened and deepened the scope of the multilateral trading system. Issues that previously had been deemed too sensitive or had not been considered part of

the trade agenda have been brought into the WTO framework. Services, trade-related intellectual property rights, and trade-related investment measures showed up on the agenda. Competition policy, not yet part of the WTO framework but the subject of a working group, is the focus of an FTAA negotiating group. Other issues that have traditionally been considered as outside the scope of trade policy—labor and the environment—are increasingly entering trade policy discussions.

Investment is a prime candidate for multilateral negotiations and is already an integral part of the FTAA negotiations. In this area a sea change has taken place in Latin American countries. As pointed out by Maryse Robert and Theresa Wetter in the first chapter of this section, there is a new consensus throughout the region on issues that just a few years ago were highly controversial. Most countries now grant national treatment to foreign investors in all phases of an investment, have eliminated or significantly reduced restrictions on capital and profit transfers, and are ready to accept international arbitration as a means of solving disputes. This new approach to foreign investment is reflected in national policies as well as a series of regional and bilateral agreements. The latter are the focus of the chapter by Robert and Wetter.

Countries in the Americas have entered into a variety of binding obligations aimed at promoting and protecting foreign investment. Many of these obligations have been incorporated in trade and integration agreements, such as the NAFTA and the agreements of the Mercosur and the Andean Community. Others have been worked out in bilateral investment treaties, of which more than sixty have been concluded between countries of the region in recent years. These agreements provide a basis for the participation of these countries in the upcoming FTAA and WTO negotiations on investment. The latter negotiations, however, would pose additional challenges. They might need to address issues not yet included in existing agreements, such as investment incentives, which many countries would probably resist. The extent to which the FTAA and any eventual WTO negotiations on investment would provide for progressive liberalization of nonconforming measures or the opening of specific sectors will also be a critical issue.

Competition policy is perhaps the newest of all trade issues being considered for inclusion within the WTO framework. As Edward M. Graham points out in his chapter, a few years ago there was little or no perceived need to pursue competition policy goals in multilateral negotiations. This perception has changed recently as a consequence of the global extension of markets and the fact that the activities of enterprises spill across international frontiers. There is

now an increasing need to make competition policy, once largely the domain of domestic law and local enforcement, more responsive to international concerns.

Competition policy includes, but is not restricted to, traditional antitrust and antimonopoly policies, such as policies related to the regulation and control of restrictive business practices that have the effect of restricting entry into a market. It also encompasses government laws, policies, and regulations that protect the enterprises established in a given market. Therefore, Graham points out, trade and investment liberalization measures are inextricably linked to competition policy as they seek to open markets and promote greater competition: "The gains from an open trade policy are increased if barriers to domestic market contestability are reduced via effective competition policy, whereas competition policy works best if the economy is open to imports and foreign direct investment."

At the international level, some of the relevant issues regarding competition policy include conflicts and overlaps among national policies; market access—that is, the extent to which domestic regulations that prevent further competition could be the subject of a multilateral agreement; and the relationship between competition policy and antidumping procedures. In none of these areas will progress be easy or fast. However, as Graham suggests, difficulties should not deter developing countries, including Latin American countries, from moving forward in this area.

Competition policy is important for developing countries for at least two reasons: it allows them to increase the contestability of their domestic markets and strengthen the trade and investment policies they have already implemented, and it allows them to open noncontestable markets by removing existing barriers and thus promoting export interests. In general, international action in the area of competition policy would be facilitated by lack of conflict between different national regulations. Unfortunately, the two sets of competition laws that countries could look to as models to eventually follow—those of the United States and the European Union—share some commonalities but also important differences, which Graham examines at some length. Graham thinks the Latin American countries should take into account their own experience in enforcing competition policies and should "add their voice—and their growing weight—to the international discussions that are now ongoing" as they "have a substantive and significant contribution to make that is in the collective interests of everyone."

For José Tavares de Araujo, Jr., and Luis Tineo, competition policy is a priority concern of the Latin American countries. These countries are focusing

on the establishment of an appropriate institutional and legal framework to deal with competition issues. However, only ten Latin American countries have competition policy laws and institutions at present, and of these just a few—Brazil, Mexico, Peru, and Venezuela among them—have set up strong competition policy agencies that are autonomous and strong enough to question other public policies when necessary. Even for those countries, experience with competition policy is recent, as it has been only in the 1990s that competition policies have been implemented or updated in the region.

After reviewing competition policies at the regional level—in the NAFTA, the Andean Community, and the Mercosur—and at the national level, the authors conclude that the FTAA negotiations will need to address a variety of issues. Prominent among them are the coexistence of different policies and approaches, the fact that many countries lack competition laws and institutions, and the relationship between competition policy and other public policies as they affect trade (and investment) flows. In this sense the goals of multilateral and hemispheric negotiations on competition policy do not seem to diverge much.

Together with investment and competition policies, government procurement is gaining prominence in multilateral and regional trade negotiations, as described by Simeon A. Sahaydachny and Don Wallace, Jr., in their chapter. Until relatively recently most government procurement activities remained on the fringes of trade liberalization efforts. In the late 1970s the Tokyo Round Government Procurement Agreement (GPA) began to change this situation. The agreement, however, was accepted by just a few countries—all of them industrialized—and was limited in scope. It applied only to procurement of goods by expressly listed national or federal entities, and it had fairly high monetary thresholds. The Uruguay Round resulted in a substantial expansion of the scope of the agreement, which now covers construction and services, applies to subnational entities, and has lower thresholds, and it has become a WTO plurilateral trade agreement. The number of countries that are members of the agreement is still very limited.

At the regional level progress has also been made. The European Union is perhaps where common rules on government procurement have gone further, as this area has been singled out as a large and essential element for the construction of the European market. In the Americas the NAFTA inaugurated a new approach to government procurement—along the lines of the GPA—that is being replicated in various trade agreements concluded by Mexico with a number of Latin American countries. In the Mercosur and the Andean Community con-

sideration is also being given to setting up rules in this area. Negotiations have also begun within the FTAA with the aim of expanding access to government procurement markets.

As Sahaydachny and Wallace indicate, "Although the future extent and velocity of procurement market opening may be unclear from today's vantage point, what is increasingly beyond question is that the trade liberalization process in the procurement field—pioneered by the [GPA] and the regional efforts in the European Union—will continue to expand." This trend certainly is present in the WTO, as the work under way on "transparency" in government procurement—initiated after the Singapore Ministerial Conference—may lead to the first truly multilateral understanding in this area, limited though it is to this particular aspect of procurement markets. This trend is also present in the Americas, as seen in the negotiations for the FTAA and other subregional initiatives under way.

Much less support is forthcoming for the inclusion in trade negotiations of issues related to civil society. These include, for the moment, labor rights and environmental concerns. Differences have evolved around the specific standards that the term *labor rights* would encompass, as well as the merits of linking trade and labor considerations. Beyond agreement that there is a need to proscribe the most egregious practices, such as slave, prison, and child labor and discrimination in its various forms, little common ground can be found in the debate on this issue. Most countries take the conventional view that poor working conditions—low wages, for instance—are a function of development and will go away as countries grow richer and more efficient, so there is no need to introduce artificial incentives or apply undue pressure to alter this natural evolution.

Others disagree, especially in the United States, where labor (and environmental) issues have been at the forefront of the trade policy debate. This debate cuts across the executive and legislative branches of the U.S. government, business and union leaders, nongovernmental organizations, and academics. Differences over this issue have so far prevented the United States from developing a consensual trade policy and clarifying its trade negotiation objectives. As noted by Craig VanGrasstek in his chapter, "The controversy surrounding labor rights and the environment continue to complicate the politics of trade liberalization in the United States and to delay or block a new extension of fast-track negotiating authority."

No agreement is in sight either at the multilateral level or at the regional level as to how to link labor issues and trade negotiations. The situation is not much

different in the case of trade and the environment, although in this area a committee was established in the latter stages of the Uruguay Round to look at the relationship between GATT/WTO disciplines and regional and multilateral environmental agreements. This relationship is important, as many environmental concerns have been addressed by regional or multilateral agreements, of which some 200 are currently enforced. The problem arises when enforcement of these agreements is pursued through trade restrictions. Although the measures can be mandated by the agreements themselves and imposed on their signatories, in many instances they could be applied to nonparties. In the latter case they may violate one key WTO principle, that of nondiscrimination.

WTO members are free to protect the environment by imposing conditions on the production and consumption of products within their national borders. This freedom also extends to imported products and domestic production processes, but it does not extend to production processes in other countries. Therefore, imposing trade restrictions on third countries to induce changes in the way a given good is produced leads to the extraterritorial application of national regulations. This practice is a source of tension in the multilateral trading system, as exemplified by the two GATT "tuna-dolphin" cases.

The WTO should be supportive of action at the multilateral and regional levels for the protection of the environment, but the WTO should not be called upon to legitimize trade restrictions ex post facto. As noted by Gary P. Sampson in his chapter on trade and the environment, "[Changing] WTO rules to accommodate . . . measures that are inconsistent with WTO rules constitutes an unbalanced and isolated approach." Whatever constraints countries may face with respect to their policy choices for protecting the environment, the "key requirement from the WTO point of view is that trade-related environmental measures not discriminate between home-produced goods and imports or between imports from or exports to different trading partners."

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