Trade Institutions: An Intricate Web of Arrangements

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Today, more than a decade after the First Summit of the Americas which launched the FTAA (Free Trade Area of the Americas) process in 1994, increasing trade among countries of the Hemisphere remains a top priority. For Latin America and the Caribbean, trade agreements, particularly with larger developed countries, create opportunities to expand markets, attract investment, and stimulate job creation. In the mid-1980s and early 1990s, these countries embraced reforms aimed at dismantling protectionist measures in their own markets and at promoting a more open and dynamic pattern of integration into the world economy. They began to liberalize their trade and investment regimes, and negotiated numerous trade agreements, some of which go beyond the elimination of tariffs and non-tariff barriers, whereas others are limited to trade in goods. They also entered into deeper forms of integration at the sub-regional level, which explains why the hemispheric trade regime is made up of a number of overlapping bilateral and sub-regional trade agreements.

In contrast with the optimism of the early 1990s characterized by the return to democracy in the region and the implementation of economic and political reforms, and despite the great strides and progress achieved, the first decade of the new millennium brought new anxieties and concerns. There is a growing perception among citizens in Latin America and the Caribbean that economic reforms, and trade agreements, in particular, have not entirely fulfilled the promise of delivering the benefits of democracy, namely reducing poverty, unemployment and inequality. While these economies have experienced an upsurge in economic activity during the current

decade, due in large part to high commodity prices and a robust demand from the United States and China, massive inequalities still exist and poverty rates are excessively high at 40 percent.

Countries of the region are increasingly aware that signing trade agreements and having access to markets, while necessary, is not sufficient. They know that they need to implement a "complementary" policy agenda to help their economic agents become more competitive and reap the benefits of these trade agreements. In recognition of this fact, several newly negotiated trade agreements, starting with the CAFTA-DR Free Trade Agreement – the multilateral trade agreement among the Central American countries, the Dominican Republic and the United States, include a formal mechanism aimed at addressing trade-related capacity building needs during the negotiating and implementing phases of the agreement, as well as during the transition to free trade with the objective of improving these countries and their firms' competitiveness.

After assessing the early efforts to negotiate trade agreements in the Americas, this chapter discusses the revitalization of sub-regional trade institutions in the 1990s, the motivations behind regional trade agreements, and the developments of the last 15 years on the hemispheric trade front from the Enterprise for the Americas Initiative (EAI) to the FTAA project and the newly signed free trade agreements (FTAs) which have proliferated in recent years, in part as an alternative to the FTAA. The chapter then reflects on the difficulties that overlapping agreements may pose, particularly with respect to rules of origin, dispute settlement or with incorporating by reference provisions from another agreement. Finally, potential options which might help reduce the distortions created by these overlapping trade agreements and increase the transparency related to these instruments are highlighted.

Early Efforts to Negotiate Trade: In Search of Institutions

Two visions have been at play in inter-American trade relations since the nineteenth century (Hurrell 1995). One calls for the negotiation of a hemisphere-wide agreement, whereas the other favors agreements at the sub-regional level. When Simón Bolívar, the leader of the Latin American Wars of Independence, organized the Congress of Panama in 1826, his aim was to foster closer hemispheric cooperation through the creation of a union of Spanish-speaking Latin American republics, with a common military, a mutual defense pact, and a supranational parliamentary assembly, but Bolívar's dream remained unsuccessful, as civil wars imploded in those countries.

The United States was the first to propose a specific plan for a hemisphere-wide trade agreement. In 1889 U.S. Secretary of State James G. Blaine convened the First International Conference of American States and called for the expansion of commercial cooperation between Latin American countries and the United States. Blaine had two main objectives: the establishment of a customs union among countries of the Americas and the adoption of a mechanism for the peaceful settlement of disputes (Mace 1999). The Americans were in search of trade institutions, a set of rules by which countries in the Hemisphere would interact on the trade front. The Chilean Francisco Bilbao had also suggested, a few decades earlier, the elimination of duties among countries of the Hemisphere, as well as a federal union and a common citizenship, whereas Henry Clay, the Speaker of the U.S. House of Representatives in the early 1820s, had championed closer relations with Latin American countries.

By the end of the nineteenth century, an increasing number of countries in Latin America were embracing the view that free trade was a necessary step to promote economic growth and

development. But efforts to negotiate a trade agreement did not succeed because several Latin American states were reluctant to open up their market to the United States only, for fear of losing access to the European markets. The United States also lacked enthusiasm for free trade, as illustrated by the McKinley Tariff Act of 1890, under which Congress raised duties on numerous imports to substantially higher levels.

The collapse of the commodity and capital markets in the early 1930s marked another turning point. Latin America abandoned economic liberalism altogether and sought to reduce its dependence on exports of primary products and imports of manufactures. A new model based on import substitution, and formalized in the 1950s by Raúl Prebisch of the United Nations Economic Commission for Latin America (now known as the Economic Commission for Latin America and the Caribbean or ECLAC), slowly emerged. Tariffs and non-tariff barriers sheltered domestic products from foreign competition and were accompanied, in some cases, by the nationalization of multinational companies, exchange rate and capital controls, and a populist fiscal policy.

In the United States, the Great Depression of the 1930s led to a very different outcome. In 1934, Congress enacted Secretary of State Cordell Hull's Reciprocal Trade Agreements Program, aimed at expanding U.S. exports abroad and at strengthening the foundations of world peace by improving trade relations with key countries. The United States espoused the "free trade idea" and ensured that it would be a pillar of the postwar institutions. Multilateralism and most-favored-nation (MFN) treatment became the core elements of the American approach to trade policy.[2]

On the hemispheric front, participating countries at the Ninth International Conference of American States held in Bogotá in 1948 signed the Charter creating the Organization of

American States (OAS) and the American Declaration of the Rights and Duties of Man, the first international expression of human rights principles. Two trade-related treaties addressing the same key issues discussed in 1889-1890 suffered a different fate. The American Treaty on Pacific Settlement, known as the Pact of Bogotá, covering the peaceful settlement of disputes, and the Economic Agreement of Bogotá, which was meant as an impetus for the negotiation of a free trade area, and which also included rules on investment, were ratified by very few countries.[3]

The 1960s and 1970s were marked by the negotiation of preferential trade arrangements aimed at fostering domestic industrialization. Members of these trade schemes pledged to create customs unions, coordinate their policies in areas such as transport and communications, and establish a common market as their ultimate goal. The Central American Common Market or CACM (1960)[4], the Andean Pact (1969) (now known as the Andean Community), and CARICOM (1973) were established with those objectives in mind. The MFN principle was rejected as an inadequate instrument to level the playing field between developed and developing countries. With the exception of the CACM which was largely successful in its early years, the integration movement failed to cover more than a few sectors. In fact, the industrialization and liberalization programs experienced a number of setbacks. Low levels of intra-regional trade, tension between governments and private-sector coalitions opposed to any form of trade liberalization, and disputes on the distribution of the costs and benefits of the preferential trade schemes led to very poor results. At the Latin American level, in 1960 Mexico and six South American countries established the Latin American Free Trade Association (LAFTA), which sought to eliminate the barriers to trade among its members by 1972. The Association did succeed in increasing its membership, as eleven countries had joined its ranks by 1967 but its

liberalizing exercise never amounted to more than bilateral tariff-cutting negotiations in mostly unimportant sectors.[5]

The 1990s: A New Beginning for Sub-regional Trade Institutions

In the mid-1980s and early 1990s, following the severe effects of the debt crisis, Latin American and Caribbean countries embarked on a series of ambitious economic reforms. They began to dismantle protectionist measures in their own markets and embraced market-focused and outward-oriented policies. To gain credibility and to benefit from the signaling effects that modern trade agreement generate, these countries also revitalized their "old" trade institutions eliminating tariffs among themselves, agreeing on a common external tariff, and adding, in some cases, provisions on services, intellectual property, and investment. While integration gained strength in the 1990s, by the new millennium several sub-regional trade arrangements were experiencing a few setbacks in their long journey towards deeper integration.[6]

Central America

With the return of democracy and the end of political tensions, Central America made a significant shift towards economic openness in the early 1990s. A presidential summit convened in Antigua, Guatemala in June 1990 led to the adoption of a plan to reactivate economic integration. The new Central American Integration System (SICA) set up a legal and institutional structure for regional integration through the Tegucigalpa Protocol, which was signed in 1991 and later ratified by the congresses of all five countries, and Panama (a CACM observer). In 1993, the five CACM members (Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua)

and Panama signed the Guatemala Protocol, which amended the 1960 General Treaty on Central American Economic Integration, with a view to reviving economic integration. Agreements on rules of origin, unfair business practices, safeguards, standardization measures, metrology and authorization procedures, and sanitary and phytosanitary measures were adopted in the 1990s, whereas the agreement on dispute settlement entered into force in 2003.

In 2000, El Salvador and Guatemala ratified the *Acuerdo de Guatemala*, signed in 1992, to establish a customs union. Honduras and Nicaragua expressed interest in joining the union. Two years later, in 2002, in a meeting held in Managua, the presidents of the five Central American countries amended the Guatemala Protocol to design an action plan to implement the customs union. By 2005, El Salvador, Guatemala, Honduras and Nicaragua (known as CA-4) had already simplified their procedures to facilitate the cross-border movement of merchandises, which means that merchandise en route from Nicaragua to Guatemala, passing through Honduras and El Salvador, will only be registered in Guatemala.

Andean Community

The 1990s also marked a new beginning for Andean trade institutions with the establishment in 1993 of a free trade area comprising Bolivia, Colombia, Ecuador and Venezuela. Peru negotiated an agreement with these four countries for its gradual incorporation into the Andean Free Trade Area in 2006. In fact, at their presidential Summit held in the Galapagos Islands in December 1989, the Andean nations set aside the import-substitution model that had dominated their development strategy and hindered their integration, and agreed to establish a free trade area by 1993 and a customs union by 1997.

Efforts to implement a common external tariff (CET), which had failed in the 1970s, led

to an agreement by February 1995 when the Andean Customs Union took effect. The CET was approved by Colombia, Ecuador, and Venezuela at the basic levels of 5, 10, 15 and 20 percent and entered into force. Bolivia enjoyed preferential treatment and only applied levels of 5 and 10 percent, while Peru did not sign the agreement.

The decision to deepen the customs union was taken by all five members in the 2002 Declaration of Santa Cruz de la Sierra. In October of the same year, the Andean Community members agreed to a new CET, the application of which has now been postponed several times. The ultimate goal of the Andean Community members, as approved in May 1999 at the Eleventh Andean Presidential Council, was to establish, by the end of 2005, the Andean Single Market, a common market providing for the free movement of capital and persons, in addition to the free circulation of goods and services.

While the Community had made significant progress with the establishment of a framework for the progressive liberalization of trade in services, the harmonization of national regulatory regimes in sectors such as telecom and tourism, greater integration in energy and transport, an open skies agreement, and a regime also covering issues such as intellectual property, investment (albeit in a limited fashion), competition policy, rules of origin, technical barriers to trade, sanitary and phytosanitary measures, disputes among members through the Quito-based Court of Justice, the attempt to create a Single Market by 2005 failed.

Andean members began to grow apart in the new millennium and the year 2006 confirmed this new trend when on April 22, Venezuela (which had joined in 1973) formally notified the Andean Community Secretariat of its decision to withdraw from the group. President Chavez denounced the free trade agreement the United States had signed with Peru on April 12 and the agreement being finalized with Colombia. In September 2006, Chile, which had left the

bloc in 1976, announced its return as an associate member.

CARICOM

New impetus was injected to the CARICOM[7] integration process when Caribbean leaders met in Grenada in 1989. Having to compete with larger and more developed markets and recognizing the need for a unified Caribbean community, they agreed to move toward a deeper level of economic integration, the Caribbean Single Market and Economy (CSME). This new initiative revolves around the free movement of goods, services, capital and skilled labor, the freedom of CARICOM nationals to establish enterprises anywhere in the Community, the completion of the application of the common external tariff, more comprehensive harmonization of laws affecting commerce and regulation of economic activities, the reform of the institutions of the Community, and more intensive coordination of macro-economic policy and planning, external trade and economic relations. Preparations for the CSME included the negotiation of nine Protocols amending the Treaty of Chaguaramas, which had established the Caribbean Community and Common Market (CARICOM) in 1973. Protocol 1 providing for the restructuring of the organs and institutions of the Community and redefining their functional relationship entered into force provisionally on July 4, 1997. On July 5, 2001, at their meeting in The Bahamas, CARICOM leaders signed the Revised Treaty of Chaguaramas and by 2002, most States had ratified the Treaty, giving it full force in their respective countries. The CSME has also led to the establishment of the Caribbean Court of Justice (CCJ), which has replaced the London-based Privy Council as the region's final court of appeal. It is charged with the interpretation and application of the Revised Treaty and it exercises exclusive jurisdiction with

respect to dispute settlement, mediation, conciliation, and arbitration.

The first phase of the CSME took effect on January 1, 2006 and was formalized at the launch of the Caribbean Single Market (CSM) on January 30, 2006 in Kingston, Jamaica. The CSM removes barriers to trade in goods, services, and several labor categories. The second phase of the process is the implementation of the CARICOM Single Economy by the end of 2008.

The Commonwealth of The Bahamas, which had joined the Caribbean Community but not the Common Market in 1983, announced in July 2005 that it would not become a member of the CSME. Members of the Organization of Eastern Caribbean States (OECS),[8] which have achieved a significant level of integration among themselves, as reflected by their common monetary policy and common currency, have been particularly vocal in highlighting their difficulties in implementing the CSME and in promoting the Regional Development Fund, a mechanism proposed in the Revised Treaty to assist disadvantaged countries, regions and sectors to compete effectively in the CSME.

Like the Andean Community, CARICOM members have prepared a list of measures restricting trade in services, which will be progressively eliminated. Moreover, although the ultimate goal of CARICOM countries is the free movement for all, the implementation is proceeding in a phased approach. The categories of persons allowed free movement for work purposes now include university graduates, artistes, sports persons, musicians, and media workers. As is the case in Central America and the Andean Community, CARICOM Member States have introduced a new passport using the common CARICOM format.

MERCOSUR

The return to democracy in Argentina and Brazil in the mid-1980s and the structural reforms that followed the debt crisis of the mid-1980s led to the establishment of MERCOSUR in March 1991 when Argentina, Brazil, Paraguay, and Uruguay signed the Treaty of Asunción, with the objective of creating a common market and ensuring the free circulation of goods, services, capital and labor among member countries, through the elimination of tariffs and non-tariff barriers, the adoption of a common external tariff and a common trade policy, the coordination of macroeconomic and sectoral policies, and the harmonization of the members' legislation in relevant areas. Chile, which had at the time an external tariff of 11 percent, lower than the CET set by MERCOSUR members, did not sign the Treaty but became an associate member of MERCOSUR in 1996 after signing a trade agreement with the group under the framework of the Latin American Integration Association (LAIA, or ALADI in Spanish), the successor organization to LAFTA.[9] Bolivia followed in 1997. The other members of the Andean Community have also become associate members of MERCOSUR after concluding a partial-scope agreement under LAIA.[10] Also in 2005, the four MERCOSUR members became associate members of the Andean Community. In 2006, Venezuela joined MERCOSUR as a full member after leaving the Andean Community.

MERCOSUR made considerable progress in its early years. On January 1, 1995 intra-trade benefiting from duty-free rates accounted for some 85 percent of trade but as the automotive sector and products originating in free zones, two sectors along with sugar not covered by the free trade area, already receive preferences in the context of LAIA's bilateral agreements signed by MERCOSUR members, it is estimated that 95 percent of intra-

MERCOSUR trade is duty free. But as is the case in other sub-regional agreements in the Americas, the implementation of the CET proved to be challenging when it came into force on January 1, 1995. A number of country- and sector-specific exceptions (capital, informatics, and telecommunication goods, as well as for the automotive and sugar sectors) remained. Moreover, the CET ceiling increased by three percentage points to 23 percent in November 1997. The temporary increase was then lowered to 2.5 percent in 2001, 1.5 percent in 2002, and eliminated at the end of December 2003. The CET was scheduled to be fully implemented by 2001 in Argentina and Brazil and by 2006 in Paraguay and Uruguay. In 2003, however, under MERCOSUR Decisions No. 31/03 and 34/03, Uruguay and Paraguay were given an extension until 2010.

In addition to market access for goods and related issues, MERCOSUR agreements cover issues such as dispute settlement, environment, competition policy, services, investment, and government procurement. MERCOSUR has two dispute settlement mechanisms. The 1995 Protocol of Ouro Preto, which established the organizational structure of MERCOSUR, provides for a longer procedure, whereas the Protocol of Olivos, which entered into force on January 1, 2004, is automatic and of an expedited nature. It includes a choice of forum (MERCOSUR or WTO), recourse to mediation, and the establishment of a Permanent Review Court of five arbitrators, which sits in Asunción. Moreover, the MERCOSUR Framework Agreement on Environment, which came into effect in all four countries on June 27, 2004, provides for the application of MERCOSUR dispute settlement procedures in case of disputes under that agreement. The 1997 Protocol of Montevideo, which aims to liberalize trade in services over a ten-year period, came into force on December 7, 2005.

MERCOSUR is still facing numerous challenges with respect to implementing intra-

MERCOSUR negotiated agreements. At the Twenty-Eighth MERCOSUR Summit held in Asunción in June 2005, President Luiz Inacio Lula da Silva (Lula) of Brazil acknowledged that MERCOSUR "failed to put into practice decisions it has reached and agreements it has signed." (Latin News Daily 2005). At the time of his declaration, the 1996 MERCOSUR Competition Protocol had been ratified by only two countries, that is, Brazil and Paraguay. Moreover, the 1994 rules on investment from member (Protocol of Colonia) and non-member countries (Protocol of Buenos Aires) had not entered into force, whereas the 2003 Protocol on Government Procurement was also awaiting ratification by member countries.

As a way to foster trade among member countries, in 2005, MERCOSUR members created a US$100 million structural convergence fund (FOCEM) aimed at developing infrastructure, fighting poverty, and promoting competitiveness. Brazil's contribution accounts for 70 percent of funds to the scheme, Argentina's 27 percent, Uruguay's 2 percent and Paraguay's 1 percent. Paraguay is slated to receive 48 percent of the funds, Uruguay 32 percent, and Argentina and Brazil 10 percent each to pay for development projects in needy areas. MERCOSUR members also agreed on the establishment of a parliament where Brazil would have 36 seats and Argentina 31, whereas Paraguay and Uruguay would receive 16 each.

In addition, MERCOSUR countries have also agreed to create a temporary "MERCOSUR visa" in order to facilitate the entry and stay of natural persons, and a framework agreement has been drawn up to facilitate the mutual recognition of professional licenses.

The Motivations Behind Regional Trade Agreements

Preferential liberalization has been flourishing in the Americas, as illustrated by the revitalization of the "old-type" sub-regional trade arrangements in the early 1990s and the

numerous free trade agreements negotiated between countries of the region since the 1990s over the past fifteen years. The new regionalism represents a break with history. Instead of sector-specific tariff concessions, most recent trade agreements signed by Latin American countries include a universal, automatic and across-the-board elimination of tariff barriers (da Motta Veiga 2004), as well as new disciplines. In fact, these agreements respond to a new economic logic, which is investment-driven (Lawrence 1997; Ethier 1998). This is particularly true for smaller economies, for whom the signaling effects of a free trade agreement (FTA), above all, with a developed country, in addition to locking in domestic reforms, help them attract investment, serve as an export platform of goods and services to larger markets, and, in so doing, contribute to foster growth and development (Salazar-Xirinachs 2004). This explains why free trade agreements that have entered into force over the past decade contain disciplines calling for deeper integration in "new" areas such as trade in services, investment, and intellectual property.

But the motivation of most countries in signing trade agreements goes beyond economic factors. For the United States, a number of geo-strategic objectives were front and center in negotiating CAFTA-DR, including strengthening efforts to control drug traffic, reducing immigration, and promoting political stability and democracy in the region (Salazar-Xirinachs and Granados 2004, p. 230). Political and strategic objectives were also among the core objectives that led to the establishment of most sub-regional groupings in the Americas. For example, fostering better relations between Argentina and Brazil played a significant role in the creation of MERCOSUR, whereas deepening ties -beyond trade- among Caribbean countries was one of the key factors leading to the establishment of CARICOM. The efforts to unite the economies of the Western Hemisphere into a single free trade agreement, the Free Trade Area of the Americas, were also from the outset part of a broader agenda.

From the Enterprise of the Americas Initiative to the FTAA Project

At the end of the 1980s, securing their market access to the United States and, most importantly, attracting foreign investment were the driving force behind the quest of Latin American countries for a closer relationship with the United States. A mini Summit on the control of illicit drug trafficking, held in Cartagena in February 1990, with the presidents of Colombia, Bolivia and Peru helped convince the administration of President George H.W. Bush that market-friendly reforms were being implemented in the region and that a post-Cold War policy was greatly needed to support those efforts. The response of the US government came in the form of the Enterprise for the Americas Initiative (EIA), announced by President Bush on June 27, 1990. Trade was the most ambitious of the EAI's three pillars since its ultimate goal was the establishment of a hemisphere-wide agreement. The new US initiative also envisaged the creation of a multilateral fund within the Inter-American Development Bank (IADB) to foster investment. Easing the debt burden through bilateral debt relief to increase incentives for reform was the third EAI pillar. Although the EAI took a back seat to the negotiation of the North American Free Trade Agreement (NAFTA), the new administration of Bill Clinton, which took office in 1993, supported the negotiation of a hemisphere-wide trade agreement and called for a Summit of Heads of State and Government of the thirty-four democratically-elected governments of the region, held in Miami in December 1994.

The FTAA Process: The Miami Summit Vision

From the very beginning, the FTAA was part of the broader Summit agenda, which aims to preserve and strengthen the community of democracies in the Americas, to promote prosperity

through economic integration and free trade, to eradicate poverty and discrimination from the Hemisphere, to guarantee sustainable development, and also to fight corruption and drug trafficking, as well as to develop infrastructure. In fact, when the leaders agreed on the target date of 2005 for the completion of the FTAA negotiations, they clearly made the link between free trade, growth, jobs, social progress, and democratic stability (Feinberg 1997). When President George W. Bush announced the desire of his administration to explore the negotiation of a free trade agreement with Central America at the OAS on January 16, 2002, he reiterated the Summit of the Americas vision that "the future of this hemisphere depends on the strength of three commitments: democracy, security, and market-based development." He added that "these commitments are inseparable." (Salazar-Xirinachs and Granados 2004).

The launching of the negotiations took place at the Second Summit, held in Santiago, Chile in April of 1998. Ministers Responsible for Trade had met a month earlier in San José, Costa Rica to recommend the initiation of the negotiations. By November 2003 when Ministers met in Miami, FTAA participating countries had completed four negotiating phases and three drafts of the Agreement. Canada (May 1998-October 1999), Argentina (November 1999-April 2001), Ecuador (May 2001-October 2002), and Brazil and the United States jointly (since November 2002) had served as chair of the process. In addition to Ministers, the Trade Negotiations Committee (TNC), which is composed of the Deputy Ministers Responsible for Trade, was guiding the work of the Negotiating Groups (market access; investment; services; government procurement; dispute settlement; agriculture; intellectual property rights; subsidies, antidumping and countervailing duties; and competition policy) and other Committees and Groups (Technical Committee on Institutional Issues or TCI, the Consultative Group on Smaller Economies or CGSE, and the Committee of Government Representatives on the Participation of

Civil Society or SOC). The Tripartite Committee, consisting of the IADB, the OAS, and ECLAC, was providing technical, analytical, and financial support to the FTAA process, whereas the FTAA Administrative Secretariat was attending to the administrative and logistical aspects of the negotiations.

Four results (agreement on business facilitation measures, release of the draft Agreements, dialogue with Civil Society, and creation of the Hemispheric Cooperation Program) are of particular importance. In Toronto, in November 1999, Ministers agreed on a number of business facilitation measures, eight of which were customs-related, whereas ten others addressed transparency issues, amounting to the publication and dissemination of inventories and databases. The release of the draft Agreements, first at the Quebec Summit following the Ministers' decision at the Buenos Aires Ministerial Meeting in April 2001, was a pioneer event in the history of trade negotiations. It was a clear demonstration of the leaders' collective commitment to transparency and to increasing and sustained communication with civil society in response to the call by the NGO community for more transparency and for the publication of the draft FTAA text. The dialogue with civil society took different forms, one of which was the input received by SOC, a group established at the outset of the negotiations and a unique feature of the FTAA. Finally, the Hemispheric Cooperation Program (HCP) approved at the Quito Ministerial in November 2002 was set up to ensure that FTAA countries would strengthen their capacities to participate in the negotiations, implement their trade commitments, and most importantly address the challenges, and maximize the benefits of hemispheric integration through increased competitiveness. National and sub-regional strategies were prepared by FTAA countries, with the support of the Tripartite Committee, to identify their trade-capacity building needs. A first meeting between potential donors and those requesting assistance for the implementation of the

HCP took place in Washington, D.C., on October 14-15, 2003.

The FTAA Process: The Turning Point

The election of Lula as President of Brazil in the Fall of 2002 marked a turning point for the FTAA. Representing the Workers' Party, Lula committed himself to broadly maintaining the macroeconomic policies pursued by the government of Fernando Henrique Cardoso, namely fiscal discipline, a floating exchange rate and inflation targeting, in short the orthodox policy platform that broadened his support among voters. On the trade front, however, Brazil made clear that the multilateral negotiations at the WTO, where prospects for a meaningful reduction in agricultural trade barriers (tariffs and subsidies) – a key Brazilian demand in the FTAA – were more promising, and the consolidation of the MERCOSUR integration as well as of the South American continent were its main priorities. This led Brazil to call for a new framework for the FTAA negotiations, one which would depart from the Miami Summit vision and focus first and foremost on market access (elimination of tariffs and other related barriers) rather than on a comprehensive FTA also containing trade rules. Brazil's political desire was first to deepen MERCOSUR, which did not have a common regime in place on intellectual property, investment, government procurement and services, as discussed earlier in this Chapter, as rules on these issues were either inexistent or not in force at the time.

Brazil was also concerned that the FTAA had to meet the 17 objectives set out by the U.S. Congress in the U.S. Trade Act of 2002 signed into law on August 6, 2002. Congress had on the same occasion renewed the Fast Track Authority (now know as Trade Promotion Authority or TPA), which grants the Administration the authority to negotiate trade agreements for Congressional approval on an up-or-down basis within a specified time frame.

The appointment by President George W. Bush in 2001 of Robert B. Zoellick as U.S. Trade Representative had also marked a key turning point for the FTAA. Zoellick complained that the United States was falling behind the rest of the world when it came to trade liberalization. He noted that out of 130 FTAs in 2001, the United States was party only to two: the North American Free Trade Agreement (NAFTA) with Canada and Mexico, and a bilateral agreement with Israel, whereas the European Union had free trade or special customs agreements with 27 countries, 20 of which it completed in the previous 10 years. With Zoellick, the Bush administration decided to move on multiple fronts (multilateral, regional, and bilateral) and to advocate "competitive liberalization," which main objective was to increase U.S. leverage and promote open markets at the bilateral level, in the Hemisphere and around the world. In a statement before the Subcommittee on Trade of the Committee on Ways & Means of the U.S. House of Representatives on May 8, 2001, U.S. Trade Representative Zoellick mentioned that "leaders from many (…) nations in this Hemisphere have now told us they want to pursue free trade agreements with the United States. We will consider each of these offers seriously, while focusing on the FTAA."[11] The United States was clearly signaling to all that bilateral and regional trade deals would be used to press countries to make concessions in the WTO negotiations, and that bilateral deals were a real alternative to the FTAA.

The FTAA Process: The Miami Ministerial Vision

Two different visions were at play when FTAA countries met again at the Eight FTAA Ministerial held in Miami in November 2003. The two Co-Chairs, the United States and Brazil, had different interests. Brazil's objective was to negotiate greater market access on goods and agriculture, in particular, and to leave the discussion on rules for the WTO negotiations, whereas

the United States wanted a comprehensive agreement but was ready to move on the bilateral front with countries of the region should the hemispheric talks slow down. To demonstrate that it was serious about bilateral negotiations, two days prior to the Ministerial the United States announced that it would launch bilateral negotiations with the Dominican Republic and Panama, respectively. Moreover, in Miami, the United States made public its intent to pursue free trade agreements with four Andean countries, Bolivia, Colombia, Ecuador, and Peru.

Unable to agree on how to move ahead in their negotiations, FTAA countries took "a new approach" in Miami – different from the single undertaking principle – allowing "all nations to buy into – and benefit from – a common set of rights and obligations in a two track approach, while a path remains open, for the nations that want to be more ambitious, to do so within the FTAA." (Zoellick 2004).

Ministers Responsible for Trade agreed on a two-tiered approach for the FTAA. They instructed the TNC to develop a common and balanced set of rights and obligations applicable to all countries. They also affirmed that interested parties may choose to develop additional liberalization and disciplines. The TNC was tasked to establish procedures for these negotiations. During the first week of February 2004, the TNC met in Puebla to carry out the instructions of the Miami Ministerial. After a week of intensive work, TNC members needed more time to consult in capitals and among delegations. To facilitate this process, the Co-Chairs agreed to recess the TNC and to reconvene this same meeting tentatively during the first week of March 2004 in Puebla. Consultations were undertaken in Buenos Aires on March 31 and April 1, 2004 but did not lead to progress. The meeting between Brazilian Foreign Minister Celso Amorim and U.S. Trade Representative Robert Zoellick in Davos on January 30, 2005 and the meeting of the TNC Co-Chairs on February 23-24, 2005 in Washington, D.C. also did not move the process

forward, leaving the negotiations at a standstill.

The FTAA was front and center again at the Fourth Summit of the Americas held in Mar del Plata, Argentina in November 2005. It remained until the very end the main stumbling block to having a final Declaration. While job creation was the official theme of the Summit, it is the FTAA which captured the leaders' attention and time, as they argued on how (and whether) the Summit Declaration should refer to this issue. They finally agreed on two paragraphs. The first paragraph (Paragraph 19a of Mar del Plata Declaration) expressed the views of the vast majority of countries in Mar del Plata which were prepared to resume their FTAA meetings and negotiations, whereas the second paragraph (Paragraph 19b of Mar del Plata Declaration) represented the position of the other countries, which stated "that the necessary conditions (were) not yet in place for achieving a balanced and equitable free trade agreement with effective access to markets free from subsidies and trade-distorting practices...." In view of both positions, the Government of Colombia was tasked to undertake consultations, after the WTO Ministerial Conference held in Hong Kong in December 2005, with a view to a meeting of the officials responsible for trade negotiations.

Challenges Posed by the Proliferation of Trade Agreements

Although it has proved difficult, concluding a hemisphere-wide trade agreement establishing one set of rules or bringing under the same umbrella all the free trade agreements in the Americas would contribute to eliminating the distortions created by the proliferation of trade agreements at the bilateral and regional levels in the region. In addition to customs unions and free trade agreements, several "new generation" partial scope agreements negotiated under the LAIA framework, and known in Spanish as *acuerdo de complementación económica* (ACE),

also provide for the automatic elimination of tariffs but do not cover new issues such as trade in services, intellectual property, investment, and government procurement in any substantive manner. Moreover, a number of non-reciprocal trade agreements (such as the Andean Trade Promotion and Drug Eradication Act (ATPDEA), the U.S.-Caribbean Basin Trade Partnership Act (CBTPA), and CARIBCAN) are one-way concessions providing for the elimination or reduction of tariffs and other barriers on a selected group of products originating in beneficiary countries.

Overlapping trade agreements are particularly burdensome for businesses and governments when rules and market access differ from agreement to agreement, as is the case with tariff schedules and rules of origin. Therefore, businesses must devote resources applying these rules, whereas governments must spend money enforcing them. Preferential rules of origin aim at preventing trade deflection, whereby imported commodities would enter the free trade area through the country with the lowest tariff. This explains why rules of origin become much less relevant when free trade partners deepen their relationship and adopt a common external tariff. Rules of origin also specify criteria determining which goods not entirely produced within the free area qualify for duty-free treatment.

Proliferation of bilateral and sub-regional agreements may also create problems of judicial cohesion with respect to dispute settlement. Let’s assume that country A has entered into a trade agreement with country B and a similar agreement with country C, and that B and C bring the same claim against A based on the same discipline in their respective agreement. It is not entirely implausible to think of a situation where the AB panel finds that A has violated the AB agreement, whereas the AC panel decides that A has not violated the AC agreement. Moreover, should both agreements include a choice of forum provision thereby allowing the

complaining Party to bring its claim either under the FTA or the WTO, and assuming that the alleged breach violates a WTO obligation, and that one of the parties (B, for example) decides to bring its claim to the WTO dispute settlement mechanism (DSU), the same "alleged breach" may theoretically lead to different results. Now, the matter could be further complicated if both B and C bring a claim against A under their respective FTA, and that later C decides to bring the same claim under the DSU, regardless of the fact that this would be a breach of the choice of forum provision in its FTA with A (Salazar-Xirinachs 2004).

A similar problem could arise if a trade agreement incorporates by reference a provision from another agreement such as the WTO or the text of a provision from another agreement verbatim, be it with respect to intellectual property rights, services, antidumping, or any other issue. The AB and AC panels and the DSU panel could theoretically reach a different decision. The investor-State dispute settlement mechanism contained in the investment chapter of most FTAs in the Americas has dealt with the issue of judicial cohesion by including a consolidation provision which provides that claims against a Party, submitted to arbitration by investors of other Parties, that have a question of law or fact in common may, under certain conditions, be heard or determined together.

The proliferation of bilateral and sub-regional trade agreements is in general less of a problem for disciplines on services, as their provisions and exceptions (list of non-conforming measures) are the same – or very similar – in most FTAs, with the exception of financial services.

The co-existence of bilateral and sub-regional agreements may also bring challenges of its own. CAFTA-DR is a prime example of this, as it is a multilateral trade agreement among seven parties, the United States, the Dominican Republic, and the five Central American

countries which are subject to preferential rules under the CACM. CAFTA-DR governs, as a general rule, trading relations among Central American countries. The agreement is very clear though that "… nothing … prevent[s] the Central American parties from maintaining their existing legal instruments for Central American integration, adopting new legal instruments of integration, or adopting measures to strengthen and deepen these instruments, provided such instruments and measures are not inconsistent with th[e] Agreement." (Article 1.3.2). CAFTA-DR allows Central American countries to deepen their agreement, as long as the CAFTA-DR disciplines are not eroded. Except in a few cases, Central American producers will have the choice between the CAFTA-DR rules of origin or the Central American rules of origin. If the CAFTA-DR rules are invoked, this means that an originating good from one Central American country to another Central American country will be given the same tariff treatment that the importing country grants the United States. In contrast, if the producer chooses to use the Central American rules of origin, the good will be exempt from customs tariff, with the exception of sugar and coffee (González 2005). CAFTA-DR also takes into account the 1998 free trade agreement between Central America and the Dominican Republic and allows for three exceptions in the multilateral application of the CAFTA-DR with respect to rules of origin.

Proliferation of Trade Agreements in the Americas: The Way Forward

The proliferation of trade agreements in the Americas -and indeed worldwide- is a phenomenon that is unlikely to fade away soon. In fact, it is in part because of the slow pace of multilateral liberalization at the WTO and hemispheric level that countries of the region, including the United States, are now concluding bilateral and sub-regional agreements (Goldfarb 2005). The simplest way to reduce the distortions created by overlapping agreements would be to

make progress in reducing multilateral trade barriers and in negotiating a rules-based hemisphere-wide trade agreement. Another, albeit related, option would be to eliminate the need for preferential rules of origin. This could be achieved by lowering MFN tariffs or abolishing them altogether. An MFN rate of zero percent means that there is no need to determine whether a good not entirely produced within the free trade area is entitled to duty-free treatment since the tariff is the same for free trade and non-free trade partners. If the MFN rate is very low and the preferential rules of origin very restrictive, businesses may decide that it is more economical to pay the tariff than to be subject to the rules of origin (Crawford and Fiorentino 2005).

As the proliferation of trade agreements in the Americas is a relatively recent occurrence, this might explain why very few claims have been brought under bilateral or regional instruments. In fact, most countries of the region have preferred to bring and pursue claims against their trading partners at the WTO level. Therefore, the problems that the proliferation of trade agreements may engender with respect to dispute settlement remain for the time being more theoretical than a matter of historical record (Salazar-Xirinachs 2004).

Improving transparency on tariffs, regulations, and rules of origin in a user-friendly fashion would also contribute to easing the burden on businesses. Another option to improve transparency with respect to the proliferation of trade agreements in the region would be to have a peer review of each agreement on a regular basis, for example every two or three years. This would entail that countries of the Hemisphere would meet two or three times a year to discuss the main issues covered in the agreements being reviewed, based on a report prepared by the parties to each agreement and/or hemispheric or regional organizations. The peer review would essentially be an exercise in transparency, which would encourage participants to enforce their own rules. Moreover, it would also provide an excellent opportunity for countries of the region

to share best practices – concrete examples – of how to reap the benefits of these agreements, as in addition to having high poverty rates and income inequality levels, the Hemisphere must also confront unemployment rates, which are almost double what they were in the mid-1990s, whereas crime and violence have reached distressing levels, and democracy remains fragile.

NotesA

[1] The author is Acting Chief of the Trade Section in the Department of Trade, Tourism and Competitiveness at the General Secretariat of the Organization of American States (OAS). The views expressed in this paper are personal and should not be attributed to any OAS Member State or the General Secretariat of the OAS.

[2] A notable exception was the decision of the United States and Canada to negotiate, in 1965, a "free trade" agreement in the automotive sector. See Robert (2000, pp. 170-176).

[3] The original OAS member states are Brazil, Haiti, the United States, and the Spanish-speaking countries of the Western Hemisphere. All other sovereign countries of the region subsequently joined the Organization, Canada (1990), Belize and Guyana (1991) being the most recent members.

[4] The General Treaty was signed on December 13, 1960, by El Salvador, Guatemala, Honduras, and Nicaragua. Costa Rica acceded on July 23, 1962. For more on the CACM, see SIECA (2005).

[5] LAFTA Members: Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Venezuela.

[6] This section does not cover the North American Free Trade Agreement, as it is only a free trade agreement with no intention on the part of NAFTA Parties (Canada, United States, and Mexico) of becoming a customs union or a common market. Moreover, NAFTA is covered in great detail in Louis Bélanger's Chapter.

[7] CARICOM members are: Antigua and Barbuda, The Bahamas, Barbados, Belize, Commonwealth of Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago. Barbados, Guyana, Jamaica, Suriname and Trinidad and Tobago are designated as More Developed Countries. All other Member States, other than the Bahamas, are designated as Less Developed Countries. The five associate members are: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, and Turks and Caicos Islands. See www.caricom.org.

[8] The Organization counts nine members, two of whom are associate members (Anguilla and the British Virgin Islands). Antigua and Barbuda, the Commonwealth of Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia, and St. Vincent and the Grenadines are the other OECS members. See www.oecs.org.

[9] LAIA offers a framework to its members for negotiating among themselves partial trade liberalization agreements in the goods sector.

[10] A country can become a MERCOSUR associate member upon fulfillment of two conditions: being a LAIA member, and concluding a free-trade agreement with MERCOSUR.

[11] See the prepared Statement of Robert B. Zoellick, U.S. Trade Representative, before the Subcommittee on Trade of the Committee on Ways & Means of the U.S. House of Representatives. Washington, D.C., May 8, 2001, p. 7.

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