

## THE FTAA NEGOTIATIONS: A MELODRAMA IN FIVE ACTS

Keynote Address by Kevin C. Kennedy†

On December 31, 2003, the North American Free Trade Agreement (“NAFTA”) marked its tenth anniversary. Another tenth anniversary in free trade also took place at the end of 2003, but this was an anniversary that went largely unnoticed, namely, the tenth anniversary of formal talks on a Free Trade Area of the Americas (“FTAA”). The FTAA was officially launched in Miami in 1994 at the first of four Summits of the Americas, and ten years later a renewed, albeit watered-down, commitment to completing those negotiations took place at the eighth and latest FTAA Ministerial Meeting in November 2003, again in Miami. Whether what occurred at the Miami Ministerial Meeting is cause for celebration or cause for frustration depends, of course, upon one’s views about economic integration and globalization. For reasons that will be explained here, there is nothing to cheer about what took place at the Miami Ministerial.

### Background on the FTAA (and the Dramatis Personae)

A proposal to integrate the economies of the countries in the Western Hemisphere was launched in 1990 by President George H.W. Bush in his Enterprise for the Americas Initiative. This piece of unfinished business was championed by the Clinton administration and restyled as the Free Trade Area of the Americas.<sup>1</sup> The goal of the FTAA, as articulated at the First Summit of the Americas held in Miami in December 1994, and renewed at the third FTAA Ministerial Meeting at Belo Horizonte, Brazil in May 1997, was a free trade area

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<sup>1</sup> See generally Richard L. Bernal, *Regional Trade Arrangements and the Establishment of a Free Trade Area of the Americas*, 27 *LAW. & POL’Y INT’L BUS.* 945 (1996); Frank J. Garcia, “Americas Agreements”—*An Interim Stage in Building the Free Trade Area of the Americas*, 35 *COLUM. J. TRANSNAT’L L.* 63 (1997); Paul A. O’Hop, *Hemispheric Integration and the Elimination of Legal Obstacles Under a NAFTA-Based System*, 36 *HARV. INT’L L.J.* 127 (1995); Carol Stump, *Free Trade Area of the Americas (FTAA)*, 4 *J. INT’L L. & PRAC.* 153 (1995); Ruperto Patino Manffer, *The Future of Free Trade in the Americas*, 10 *CONN. J. INT’L L.* 639 (1995); Kenneth W. Abbott & Gregory W. Bowman, *Economic Integration in the Americas: “A Work in Progress,”* 14 *NW. J. INT’L L. & BUS.* 493 (1994); David A. Pawlak, *Learning from Computers: The Future of The Free Trade Area of the Americas*, 27 *U. MIAMI INTER-AM. L. REV.* 107 (1995); Frank J. Garcia, *NAFTA and the Creation of the FTAA: A Critique of Piecemeal Accession*, 35 *VA. J. INT’L L.* 539 (1995); Charles M. Gastle, *Policy Alternatives for Reform of the Free Trade Agreement of the Americas: Dispute Settlement Mechanisms*, 26 *LAW. & POL’Y INT’L BUS.* 735 (1995); *The Evolution of Free Trade in the Americas: NAFTA Case Studies*, 11 *AM. U.J. INT’L L. & POL’Y* 687 (1996)(conference papers). The FTAA maintains a website at <http://www.alca-ftaa.org>. Other FTAA websites are at <http://www.itaiep.doc.gov> and <http://americas.fiu.edu>.

stretching from Alaska to Tierra del Fuego by 2005.<sup>2</sup> That far-sighted vision turned myopic at the eighth Ministerial Meeting held in Miami in November 2003.

The 34 heads of the democratic nations in the Western Hemisphere (all countries in the hemisphere with the exception of Cuba) launched FTAA negotiations at the 1994 Summit of the Americas in Miami, calling for the completion of a FTAA by 2005.<sup>3</sup> The leaders committed themselves to integrate the patchwork quilt of bilateral and regional trade agreements (at least seven regional trade arrangements and more than twenty-five bilateral trade agreements) that exist in the Western Hemisphere.<sup>4</sup> Upon its completion, the

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<sup>2</sup> See Summit of the Americas, Declaration of the Principles and Plan of Action, Dec. 11, 1994, reprinted in 34 INT'L LEGAL MATERIALS 808 (1995); Free Trade Area of the Americas, Third Ministerial Trade Meeting, Belo Horizonte, Minas Gerais, Brazil, May 16, 1997, Joint Declaration, para. 2.

To date, there have been four Summits of the Americas. The first was held in Miami in 1994; the second in Santiago, Chile in 1998; the third in Quebec, Canada in 2001; and the fourth—a Special Summit—in Monterrey, México in 2004. Summit Declarations and Plans of Action are available at [http://www.alca-ftaa.org/Summits\\_e.asp](http://www.alca-ftaa.org/Summits_e.asp) (last visited Jan. 24, 2004). To date, there have been eight Ministerial Meetings held in the following cities: Denver, United States of America (June 1995); Cartagena, Colombia (March 1996); Belo Horizonte, Brazil (May 1997); San Jose, Costa Rica (March 1998); Toronto, Canada (November 1999); Buenos Aires, Argentina (April 2001); Quito, Ecuador (November 2002); and Miami (November 2003). Ministerial Declarations are available at [http://www.alca-ftaa.org/Minis\\_e.asp](http://www.alca-ftaa.org/Minis_e.asp) (last visited Jan. 25, 2004).

<sup>3</sup> See Summit of the Americas, Declaration of Principles (Dec. 1994), at [http://www.ftaa-alca.org/ministerials/miami\\_e.asp](http://www.ftaa-alca.org/ministerials/miami_e.asp) (last visited Apr. 1, 2003) (“We, therefore, resolve to begin immediately to construct the ‘Free Trade Area of the Americas’ (FTAA), in which barriers to trade and investment will be progressively eliminated. We further resolve to conclude the negotiation of the ‘Free Trade Area of the Americas’ no later than 2005, and agree that concrete progress toward the attainment of this objective will be made by the end of this century”).

<sup>4</sup> See RAJ BHALA & KEVIN KENNEDY, WORLD TRADE LAW: THE GATT-WTO SYSTEM, REGIONAL ARRANGEMENTS, AND U.S. LAW 250-51 (1998). The most economically important of the hemispheric regional trade agreements is, of course, the North American Free Trade Agreement (NAFTA). For an overview of NAFTA’s legal obligations, operation, and impact, see generally NORTH AMERICAN FREE TRADE AGREEMENT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 159, 103d Cong., 1st Sess. (1993). The most recently concluded regional free trade agreement in the Hemisphere is the US-Central America Free Trade Agreement (CAFTA). The CAFTA countries are El Salvador, Guatemala, Honduras, and Nicaragua. See Office of the U.S. Trade Representative, Trade Facts, Free Trade with Central America, Summary of the US-Central America Free Trade Agreement (Dec. 17, 2003), available at <http://www.ustr.gov/new/fta/Cafta/2003-12-17-factsheet.pdf> (last visited Jan. 24, 2004). Within Latin America, five major regional trade agreements have been formed:

- The Central American Common Market (“CACM”), created in 1961, whose members include Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama. See General Treaty of Central American Economic Integration, Dec. 13, 1960, El Salvador-Guatemala-Honduras-Nicaragua, 455 U.N.T.S. 3, entered into force June 4, 1961.
- The Andean Pact (“ANCOM”), formed in 1969, a subgroup of the Latin American Integration Association, whose members include Bolivia, Colombia, Ecuador, Peru, and Venezuela. See Agreement on Andean Subregional Integration, May 26, 1969, Bolivia-Colombia-Chile-Ecuador-Peru, reprinted in 8 INT'L LEGAL MATERIALS 910. Venezuela eventually acceded to the Agreement, but Chile later denounced it, effective October 30, 1976. See Thomas Andrew O’Keefe, *How the Andean Pact Transformed Itself into a Friend of Foreign Enterprise*, 30 INT’L LAW. 811 (1996).

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FTAA will integrate a population of over 850 million people into a 13 trillion dollar market.<sup>5</sup>

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- The Caribbean Community (“CARICOM”), formed in 1973, whose members consist of the 13 English-speaking island nations in the Caribbean and Belize. *See Treaty Establishing the Caribbean Community*, July 4, 1973, 947 U.N.T.S. 17, *reprinted in* 12 INT’L LEGAL MATERIALS 1033 (1973).
  - The Latin American Integration Association (“LAIA” or “ALADI”), formed in 1981, a multilateral preferential trade association comprising Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, México, Paraguay, Peru, Uruguay, and Venezuela. *See Treaty of Montevideo (1980) Establishing the Latin American Integration Association (LAIA)*, Aug. 12, 1980, *entered into force* Mar. 18, 1981, *reprinted in* GENERAL SECRETARIAT OF THE ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN TREATIES AND CONVENTIONS 353. LAFTA was restructured in 1980 and renamed ALADI.
  - The Southern Common Market (“MERCOSUR”), formed in 1991, another subgroup within the ALADI, whose members include Argentina, Brazil, Uruguay, and Paraguay, and whose associate members include Chile and Bolivia. *See Treaty of Asuncion*, March 26, 1991, *reprinted in* 30 INT’L LEGAL MATERIALS 1044 (1991).

In terms of its economic impact on Latin America, MERCOSUR is clearly the most ambitious and dynamic of the five Latin American RTAs.

<sup>5</sup> *See* BHALA & KENNEDY, *supra* note 4, at 251. The NAFTA parties wasted no time in pursuing the objectives identified in the Declaration of Principles. Immediately following the Summit, the leaders of the NAFTA parties formally announced that preliminary discussions on Chile’s accession to NAFTA would begin in January 1995, with formal negotiations beginning in June 1995. These plans were derailed, however, following the intense, and at times acrimonious, political battles in the United States over passage of NAFTA in 1993 and the Uruguay Round Agreements in 1994. Congress and the Administration both suffered from free-trade fatigue. President Clinton was unsuccessful in securing fast-track authority from Congress to negotiate Chile’s NAFTA accession. *See* Stewart A. Baker, *After the NAFTA*, 27 INT’L LAW. 765 (1993). Indeed, the stage had been set in part for Chile’s accession to NAFTA prior to the conclusion of NAFTA when Chile and México concluded a free trade agreement (“FTA”) that entered into force January 1, 1992. Trade in most goods became duty free on January 1, 1998. However, Chile seemingly lost patience with Congress and President Clinton in their interminable quarrel over renewal of fast-track negotiating authority—now called “trade promotion authority”—and, instead, found new hemispheric trading partners. *See* U.S. INT’L TRADE COMM’N, THE YEAR IN TRADE 1995, OPERATION OF THE TRADE AGREEMENTS PROGRAM 35 (USITC Pub. 2971 1996); *Latin America Awaits a Call by Clinton*, CHRISTIAN SCI. MONITOR, Nov. 20, 1996, at 6. First, Chile joined MERCOSUR as an associate member on October 1, 1996. Second, Canada and Chile concluded a bilateral FTA on November 18, 1996, that covers tariffs, non-tariff measures, investment, services (excepting financial services), rules of origin, customs procedures, emergency safeguards action, dispute settlement, AD and CVD actions, competition policy, labor, and environment. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, FUTURE FREE TRADE AREA NEGOTIATIONS: REPORT ON SIGNIFICANT MARKET OPENINGS 4-5 (1997); Tom Jennings, *Canada-Chile Free Trade Agreement*, INT’L ECON. REV. 9 (USITC Pub. 3043 May/June 1997); *Canada To Use Free-Trade Agreement With Chile To Press U.S. On NAFTA Accession*, Chretien Says, 13 Int’l Trade Rep. (BNA) 1782 (1996).

The Clinton Administration could be criticized for squandering an opportunity to expand NAFTA by failing to add Chile as NAFTA’s fourth member. The Bush Administration, on the other hand, successfully concluded, and the Senate approved, a Chile-US FTA on July 31, 2003. *See* Office of the US Trade Representative, *Statement of U.S. Trade Representative Robert B. Zoellick Following Senate Approval of Chile and Singapore Free Trade Agreements*, Press Release (July 31, 2003), *available at* [www.ustr.gov/releases/2003/07](http://www.ustr.gov/releases/2003/07). Although Chile was not formally admitted to the NAFTA trilateral relationship, with its web of FTAs among the three NAFTA parties, Chile is de facto, if not de jure, a NAFTA party in all but name. Chile’s eventual accession to NAFTA arguably was an essential step toward hemispheric integration. *See Free Trade Area for the Americas: Chile Is the Linchpin*, INT’L ECON. REV. 11 (USITC Pub. 2934 Nov. 1995).

**Act I: The 1994 Miami Summit of the Americas**

The 1994 Miami Summit Action Plan called on the Trade Ministers of the 34 FTAA participants to meet in 1995 to draft a more complete plan for FTAA negotiations and to meet again in 1996 to develop a timetable for future work.<sup>6</sup> To that end, Trade Ministers met in Denver in June 1995, and issued a Joint Declaration and Work Plan. The Ministers agreed to set up nine FTAA working groups—subsequently renamed “negotiating groups” at the 1998 San José Ministerial Meeting—on investment; agriculture; subsidies, antidumping and countervailing duties; market access; services; competition policy; government procurement; intellectual property; and dispute settlement. It is noteworthy that negotiating groups have not been established for labor and the environment, notwithstanding a call in the Miami Summit Action Plan to “further secure the observance and promotion of worker rights” and to make trade liberalization and environmental policies “mutually supportive.” Several Latin American representatives, as well as private groups, voiced concerns over a US proposal to include the Labor and Environment Ministers in the FTAA process. Opposition to the US proposal was mounted on the ground that neither issue merits inclusion in the immediate action plan required to advance the FTAA process. Moreover, some participants argued that the proposed US language on labor and the environment departed from the more vaguely worded language on labor and the environment in the Miami Summit Action plan. Sources monitoring the pre-Denver consultations reported that the United States agreed to soften its proposed language in order to achieve consensus at the June Ministerial.

The June 1995 Ministerial Meeting in Denver failed to resolve two key points of disagreement about the future direction of FTAA negotiations: (1) the scope of the FTAA negotiations, and (2) the approach to be used to achieve the FTAA. Former US Trade Representative Mickey Kantor and former Canadian Trade Minister Roy MacLaren both viewed the FTAA as a two-track integration process—the newly established FTAA negotiating groups as one track, and the deepening and strengthening of existing sub-regional trade agreements as the other track. Under this view, the negotiating group discussions and the existing sub-regional agreements would be mutually reinforcing and would ultimately converge. A middle approach envisioned FTAA negotiations modeled after the Uruguay Round “single undertaking” approach. This scenario envisioned a multilateral forum open to all 34 countries in which they would simultaneously negotiate all aspects of the FTAA and in which all participants would accede to all of the agreements negotiated rather than adopt an “à la carte” approach as had been done in the Tokyo Round.

At the opposite end of the spectrum, former Brazilian Foreign Minister Luiz Felipe Lampreia advocated an approach that would have widened and deepened existing sub-regional agreements. The sub-regional accords would become

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<sup>6</sup> See *Free Trade Area for the Americas: Chile Is the Linchpin*, *supra* note 5.

“building blocks” for broader hemispheric economic integration along a path that ultimately would lead to bloc-to-bloc negotiations. But is this a “building block” or a “bloc building” approach? A constant concern about regionalism is that regional trade agreements (“RTAs”) that create trade blocs may end up being trade diverting rather than trade creating because they close market access to more efficient producers from outside the bloc in favor of less efficient producers within the bloc. Advocates of the building block approach maintained that, by capturing the gains and building on the progress already made in the sub-regional trade blocs, FTAA objectives would be realized more quickly than under the Uruguay Round’s single-undertaking model. However, critics of the “building block” approach argued that much time could be lost in efforts to harmonize a diverse group of sub-regional arrangements ranging from free-trade areas, such as NAFTA, to common markets, such as MERCOSUR.<sup>7</sup>

At the March 1996 Ministerial Meeting in Cartagena, Columbia, the Trade Ministers agreed on “the importance of further observance and promotion of worker rights and the need to consider appropriate processes in this area, through our respective governments.”<sup>8</sup> The lack of significant movement forward at this juncture can be explained in part by the incessant Brazilian-American sparring. While the United States would have preferred that an FTAA be a World Trade Organization (“WTO”) “plus” agreement that would broaden the legal commitments made in the Uruguay Round, the early Brazilian model envisioned an FTAA that would first deepen existing sub-regional trade agreements before broadening them into an FTAA. The Brazilian vision would carry the day at the Cartagena Ministerial Meeting.<sup>9</sup> As events would unfold, the Brazilians would ultimately win the argument over the future of FTAA negotiations.

## Act II, Scene 1: The 1997 Belo Horizonte Ministerial Meeting

The glacial pace of FTAA negotiations was accelerated slightly at the 1997 Belo Horizonte Ministerial Meeting in Brazil. In their Joint Declaration,<sup>10</sup> the Trade Ministers reiterated:

- the FTAA negotiations will be completed no later than 2005;
- the FTAA will be consistent with General Agreement on Tariffs and Trade

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<sup>7</sup> See *id.* at 12.

<sup>8</sup> Free Trade Area of the Americas, Second Ministerial Meeting, Joint Declaration Adopted March 21, 1996, available at [http://www.ftaa-alca.org/ministerials/carta\\_e.asp](http://www.ftaa-alca.org/ministerials/carta_e.asp) (last visited Jan. 25, 2004). The trade ministers also agreed to establish a Negotiating Group on Dispute Settlement, but postponed the establishment of a Negotiating Group on the environment. No such negotiating group was ever established.

<sup>9</sup> Brazil also objected to the negotiating groups using NAFTA language as FTAA draft language. See *Brazil Gets Its Way*, THE ECONOMIST, March 30, 1996, at 45-46. As two commentators have observed, this was a discouraging state of affairs. See Abbott & Bowman, *supra* note 1, at 517.

<sup>10</sup> Free Trade Area of the Americas, Third Ministerial Meeting, Belo Horizonte, Minas Gerais, Brazil, May 16, 1997, Joint Declaration, available at <http://www.alca-ftaa.org> (last visited Jan. 25, 2004) [hereinafter Joint Declaration].

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- (“GATT”) Article XXIV and the General Agreement on Trade in Services (“GATS”) Article V on regional trade agreements; and
- the FTAA will be trade creating, not trade diverting.<sup>11</sup>

The 34 Trade Ministers also agreed on the following points: (1) decision-making is to be by consensus, (2) an FTAA must be a comprehensive undertaking, (3) countries may accede individually or as members of an RTA, and (4) a Secretariat is to be established to support the negotiations.<sup>12</sup> As is explained below, the comprehensive undertaking goal of FTAA negotiations ultimately would be rejected at the November 2003 Ministerial Meeting in Miami.

### Act II, Scene 2: The San José Ministerial Meeting

The participants in the FTAA negotiations held their fourth Ministerial Meeting in San José, Costa Rica, in March 1998.<sup>13</sup> The 34 Ministers of Trade issued a joint declaration recommending to their respective heads of state that they formally launch negotiations on the FTAA at their Second Summit in Santiago, Chile.<sup>14</sup> The Ministers outlined the structure and organization of the negotiations into nine negotiating groups: market access; investment; services; government procurement; dispute settlement; agriculture; intellectual property rights; subsidies, antidumping, and countervailing duties; and competition policy.<sup>15</sup> The Trade Ministers also reaffirmed their commitment “to make concrete progress by the year 2000. We direct the negotiating groups to achieve considerable progress by that year.”<sup>16</sup> Of course, 2000 came and went with no concrete progress having been made. Significantly, non-governmental organizations (“NGOs”) representing labor, environmental, and academic groups were invited to submit contributions to the FTAA Ministerial Meeting to be held in Canada in October 1999. A Committee of Government Representatives on the Participation of Civil Society is responsible for receiving and distributing

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<sup>11</sup> Joint Declaration, *supra* note 10, paras. 1-2.

<sup>12</sup> *Id.* para. 5. The Ministers formally established a Negotiating Group on Dispute Settlement whose terms of reference are to compile an inventory of dispute settlement procedures in the region, identify areas of commonality and divergence, and make recommendations on an FTAA dispute settlement mechanism. *Id.* Annex II.

<sup>13</sup> See US Int’l Trade Comm’n, *Free Trade Area of the Americas*, INT’L ECON. REV., at 1-5 (March/April/May 1998).

<sup>14</sup> See Free Trade Area of the Americas, San José Ministerial Declaration, March 19, 1998, para. 8, available at [http://www.alca-ftaa.org/EnglishVersion/costa\\_e.htm](http://www.alca-ftaa.org/EnglishVersion/costa_e.htm) (last visited Jan. 25, 2004).

<sup>15</sup> See *id.* para. 11. The nine negotiating groups meet at the following three rotating venues according to the following timetable:

- Miami, Florida, from May 1, 1998 to February 28, 2001;
- Panama City, Panama, from March 1, 2001 to February 28, 2003;
- México City, México, from March 1, 2003 to December 31, 2004 (or until the conclusion of the negotiations).

<sup>16</sup> See *id.* para. 18.

submissions from civil society in the FTAA process.<sup>17</sup> The participation of civil society has been ongoing, but whether or not it will have any impact remains to be seen.

### Act II, Scene 3: The Santiago Summit

At the Second Summit of the Americas held in Santiago, Chile, in April 1998, the 34 heads of state accepted the recommendations made by their trade ministers in San José and officially launched negotiations on a Free Trade Area of the Americas.<sup>18</sup> The Santiago Declaration reiterates the negotiators' commitment to complete FTAA negotiations by 2005. The Declaration also states that the FTAA will be balanced, comprehensive, WTO-consistent, and will constitute a single undertaking (i.e., will be an all-or-nothing package deal). The FTAA negotiations have been chaired on a rotating basis according to the following timetable:

- Canada (vice-chair Argentina), from May 1, 1998 to October 31, 1999;
- Argentina (vice-chair Ecuador), from November 1, 1999 to April 30, 2001;
- Ecuador (vice-chair Chile), from May 1, 2001 to October 31, 2002;
- Brazil and the United States (co-chairs), from November 1, 2002 to December 31, 2004

### The Intermission: Intervening Ministerial Meetings Before the 2001 Quebec City Summit

Every play has an intermission, but the melodrama that is the FTAA negotiations was especially long. Fast-track negotiating authority had expired in 1993. In the absence of a renewal of fast-track negotiating authority, the United States' ability to negotiate effectively was completely hamstrung. As a result, the three intervening Ministerial Meetings between the 1998 Santiago Summit and the 2001 Quebec City Summit were largely exercises in reaffirming the principles announced in the Santiago Summit Declaration: the FTAA would be balanced, comprehensive, WTO-consistent, and a single undertaking, i.e., an all-or-nothing, package deal.<sup>19</sup> As will be explained shortly, the 2003 Ministerial

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<sup>17</sup> The contributions made by civil society in the FTAA process are available at [http://www.alca-ftaa.org/SPCOMM/COMMCS\\_E.ASP](http://www.alca-ftaa.org/SPCOMM/COMMCS_E.ASP) (last visited Jan. 25, 2004).

<sup>18</sup> See Second Summit of the Americas, Santiago Declaration, April 19, 1998, available at [http://www.sice.oas.org/ftaa/santiago/sadop\\_e.htm](http://www.sice.oas.org/ftaa/santiago/sadop_e.htm) (last visited Jan. 25, 2004). The heads of state also issued a Plan of Action, a body of concrete initiatives intended to promote the overall development of FTAA countries. See Second Summit of the Americas, Plan of Action, April 19, 1998, available at [http://www.sice.oas.org/ftaa/santiago/sapoa\\_e1.stm](http://www.sice.oas.org/ftaa/santiago/sapoa_e1.stm) (last visited Jan. 25, 2004).

<sup>19</sup> See, e.g., Free Trade Area of the Americas, Fifth Trade Ministerial Meeting, Declaration of Ministers, Toronto, Canada, November 1999, para. 2 ("We reaffirm the principles and objectives that have guided our work since Miami, including *inter alia* that the agreement will be balanced, comprehensive, WTO-consistent, and will constitute a single undertaking. We agree that we are on our way to completing our work by 2005."), available at [http://www.alca-ftaa.org/ministerials/minis\\_e.asp](http://www.alca-ftaa.org/ministerials/minis_e.asp) (last visited Jan. 25, 2004); Free Trade Area of the Americas, Sixth Meeting of Ministers of Trade of the Hemisphere, Ministerial Declaration, Buenos Aires, Argentina, April 7, 2001, para. 2 ("We affirm the principles and objectives that have guided our work since the First

Meeting was to depart dramatically from these consistently stated goals of the FTAA negotiations.

### Act III, Scene 1: A Draft Text Emerges (The Plot Thickens)

In an effort to improve transparency, and at the same time to quell rumors and correct misinformation about what was being negotiated, it was agreed at the Third Summit of the Americas held in Quebec City in April 2001 that a draft FTAA text would be made public.<sup>20</sup> A preliminary first draft was published on July 3, 2001.<sup>21</sup> Slightly revised versions were published in 2002 and again in November 2003.<sup>22</sup>

Practically every line in the draft text is bracketed. Although I have not actually counted, I have heard that there are over 7,000 brackets in the draft text. There clearly is much work to be done and many differences to be bridged. A quick review of the text—if such a thing is possible considering that the text is several hundred pages long—raises many intriguing questions. The following is a small sample:

- Chapter V calls for special and differential (“S&D”) treatment of countries in the hemisphere “that takes into account levels of development and size of the economies of the Parties . . . .”<sup>23</sup> But will S&D treatment mean extended

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Summit of the Americas, in particular, the basic principle of consensus in decision making within the FTAA process and the achievement of a balanced, comprehensive agreement that is consistent with the rules and disciplines of the World Trade Organization. We reaffirm that the result of the FTAA negotiations shall constitute a comprehensive single undertaking, that incorporates the rights and obligations that are mutually agreed for all member countries.”), *available at* [http://www.alca-ftaa.org/ministerials/BAMin\\_e.asp](http://www.alca-ftaa.org/ministerials/BAMin_e.asp) (last visited Jan. 25, 2004); Free Trade Area of the Americas, Seventh Meeting of Ministers of Trade, Ministerial Declaration, Ecuador, 1 November 2002, para. 5 (“We reaffirm the principles and objectives that have guided our work since the First Summit of the Americas, in particular, the basic principle of consensus in decision making within the FTAA process and the achievement of a balanced and comprehensive agreement that is also consistent with the rules and disciplines of the World Trade Organization (WTO). We reaffirm that the result of the FTAA negotiations shall constitute a comprehensive single undertaking that incorporates the rights and obligations that are mutually agreed for all member countries.”), *available at* [http://www.alca-ftaa.org/ministerials/quito/minist\\_e.asp](http://www.alca-ftaa.org/ministerials/quito/minist_e.asp) (last visited Jan. 25, 2004).

<sup>20</sup> See Third Summit of the Americas, Declaration of Quebec City, April 20-22, 2001, *available at* [http://www.alca-ftaa.org/ministerials/Quebec/declara\\_e.asp](http://www.alca-ftaa.org/ministerials/Quebec/declara_e.asp) (last visited Jan. 25, 2004) (“The decision to make public the preliminary draft of the FTAA Agreement is a clear demonstration of our collective commitment to transparency and to increasing and sustained communication with civil society.”).

<sup>21</sup> See USTR Zoellick Says Publication of Free Trade Area of the Americas (FTAA) Text Will Help Explain Trade Benefits, Office of the US Trade Representative, Press Release, Jul. 3, 2001, *available at* <http://www.ustr.gov/regions/whemisphere/ftaa.shtml> (last visited Jan. 25, 2004).

<sup>22</sup> Free Trade Area of the Americas, Second Draft Agreement, *available at* <http://www.ustr.gov/regions/whemisphere/ftaa2002/secondtext.htm> (last visited Jan. 25, 2004); Free Trade Area of the Americas, Draft Agreement, FTAA.TNC/w/133/Rev.3 (Nov. 21, 2003), *available at* [http://www.ftaa-alca.org/FTAADraft03/Index\\_e.asp](http://www.ftaa-alca.org/FTAADraft03/Index_e.asp) (last visited Jan. 25, 2004) [hereinafter Third Draft Agreement].

<sup>23</sup> Third Draft Agreement, *supra* note 22, ch. V, art. 1.1.

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transition periods for implementing obligations, as was the case in most of the Uruguay Round agreements, or will there be a substantive dimension as well? For example, under the WTO Agreement on Agriculture developed countries were obligated to reduce their export and domestic agricultural subsidies by percentages greater than those required of developing countries.<sup>24</sup>

- Chapters VI and VII on the environment and labor, respectively, are completely bracketed, even their titles, meaning that provisions on environment and labor might not be included in any final agreement. An introductory sentence in both Chapters states that environmental and labor commitments “shall not be utilized as conditionalities or subject to disciplines, the non-compliance of which can be subject to trade restrictions or sanctions.”<sup>25</sup> In other words, no trade penalties may be imposed for a country’s failure to enforce domestic labor and environmental standards.

- Chapters X and XI on rules of origin and certificates of origin are disturbingly reminiscent of NAFTA’s labyrinthine rules of origin, including the nightmarish regional value methodologies of transaction value and net cost.<sup>26</sup> These methodologies are truly the trade lawyers’ revenge on the tax lawyers. I am hard pressed to cite a more efficient non-tariff barrier to trade adopted in the name of free trade. Will small and medium-size enterprises, both here and in the rest of the hemisphere, have the resources to comply with the record keeping that will be necessary to complete and substantiate a certificate of origin to the satisfaction of the US Customs Service? We shall see, but I am skeptical.

- Chapter XVII on investment mirrors much of NAFTA Chapter 11 on investment, but with important clarifications, including a provision that—except in rare circumstances—government regulation for purposes of public health, safety, and environmental concerns does not amount to an indirect expropriation.<sup>27</sup>

- Chapter XXIII on dispute settlement is a hybrid of NAFTA Chapter 20 on government-to-government dispute settlement and the WTO Dispute Settlement Understanding (DSU). Like NAFTA Chapter 20, Chapter XXIII permits the complaining party to choose either the FTAA dispute settlement mechanism or the WTO DSU in cases where the responding country’s measures violate both FTAA and WTO obligations.<sup>28</sup> Dispute settlement panelists may not be citizens of any of the disputing parties, reflecting Article 8.3 of the DSU.<sup>29</sup> Chapter XXIII would also create a seven-member, standing appellate body, again

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<sup>24</sup> See WTO Agreement on Agriculture, art. 15.2.

<sup>25</sup> See Third Draft Agreement, *supra* note 22, ch. VI, second sentence; ch. VII, second sentence.

<sup>26</sup> See *id.* ch. X, art. 4.

<sup>27</sup> See *id.* ch. XVII, annex XX.

<sup>28</sup> See *id.* ch. XXIII, art. 8. Compare NAFTA art. 2005.1.

<sup>29</sup> See *id.* ch. XXIII, art. 13.2(c).

mirroring the WTO DSU.<sup>30</sup>

### Act III, Scene 2: The Cancún Meeting of the WTO Ministerial Conference and the Fallout

On September 14, 2003, the fifth meeting of the WTO Ministerial Conference was held in Cancún, Mexico. As everyone knows, that meeting collapsed when developed and developing countries could not strike a compromise on the so-called Singapore issues, i.e., trade facilitation, investment, competition policy, and transparency in government procurement.<sup>31</sup> A subtext was the inability of the European Union and the United States to achieve any breakthroughs on agricultural subsidies or market access for agricultural goods. No consensus emerged in the immediate aftermath of the Cancún failure as to what the impact, if any, would be on the FTAA negotiations. At least one US negotiator offered the opinion, in Solomon-like fashion, that the failed Cancún Ministerial Conference “could cut either way” as far as its impact on the FTAA negotiations,<sup>32</sup> while Deputy US Trade Representative Peter Allgeier stated that the 2005 deadline for concluding the FTAA was still achievable.<sup>33</sup> One activist predicted that the Cancún failure would have a negative impact on the FTAA negotiations.<sup>34</sup> Apprehensive over the negative impact that the Cancún collapse might have on the FTAA, the US business community urged US negotiators not to retreat from a comprehensive agreement in the FTAA negotiations.<sup>35</sup> Participants in the FTAA negotiations, including key players Argentina and Brazil, warned—perhaps presciently, perhaps in a self-fulfilling prophecy—that disagreement over agricultural subsidies and market access for agricultural products (the same issues that have divided the WTO members not only at Cancún but also in the entire Doha Development Round) could also derail the FTAA negotiations.<sup>36</sup>

In the weeks leading up to the FTAA Miami Ministerial Meeting in November 2003, Brazil made rumblings that the FTAA’s goal of reaching a

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<sup>30</sup> See *id.* ch. XXIII, art. 25. Compare WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 17.

<sup>31</sup> See Daniel Pruzin & Gary G. Yerkey, *WTO Talks Crash as Developing Nations Balk at ‘Singapore Issues,’* 20 Int’l Trade Rep. (BNA) 1533 (Sept. 18, 2003).

<sup>32</sup> See, e.g., Rossella Brevetti, *USTR Official Says WTO Failure Could ‘Cut Either Way’ for FTAA Talks,* 20 Int’l Trade Rep. (BNA) 1555 (Sept. 18, 2003).

<sup>33</sup> See Rossella Brevetti, *Allgeier Says FTAA 2005 Target Date Is ‘Achievable’ Despite Cancun Failure,* 20 Int’l Trade Rep. (BNA) 1625 (Oct. 2, 2003).

<sup>34</sup> See Gary G. Yerkey, *Failure of WTO Talks in Cancun Likely to Negatively Impact FTAA Negotiations,* 20 Int’l Trade Rep. (BNA) 1583 (Sept. 25, 2003).

<sup>35</sup> See Rossella Brevetti & Michelle Amber, *Businesses Urge Administration to Seek High-Level FTAA in Light of Cancun,* 20 Int’l Trade Rep. (BNA) 1627 (Oct. 2, 2003).

<sup>36</sup> See David Haskel, *Mercosur Says Same Farm Trade Issues Causing Failure at Cancun Threaten FTAA,* 20 Int’l Trade Rep. (BNA) 1666 (Oct. 9, 2003).

comprehensive agreement would have to be cut back.<sup>37</sup> Brazil argued that if the US position is accepted, and agricultural subsidies and antidumping rules are to be negotiated exclusively in the WTO as part of the Doha Round, then so too would investment, competition policy, and government procurement. Brazil's vision, at least as I understand it, is an FTAA agreement basically limited to trade in goods, i.e., issues related to tariffs, customs procedures, market access, rules of origin, and dispute settlement, with other issues—investment, intellectual property, government procurement, competition policy, and agricultural subsidies—being moved either to bilateral negotiations or to the WTO in the Doha Round.<sup>38</sup> Matters came to a head in the running Brazil-US battle for the hearts and minds of the FTAA participants less than a month before the Miami Ministerial Meeting when Brazil accused the United States of “systematic arrogance” for allegedly trying to isolate Brazil in the FTAA negotiations. This was a truly melodramatic moment.<sup>39</sup> The stage was now set for abandoning the comprehensive, single-undertaking package deal consistently sought by the United States in the FTAA negotiations.<sup>40</sup>

#### **Act IV, Scene 1: The 2003 Miami Ministerial Meeting (The Dénouement)**

At the November 2003 Ministerial Meeting in Miami, the FTAA Trade Ministers apparently bowed to the inevitable, namely, a scaled-back FTAA.<sup>41</sup> In a sharp departure from its earlier trajectory, the FTAA negotiations will no longer be a comprehensive, single undertaking as had been announced and reiterated over the previous nine years. Dubbed “FTAA-lite” by its critics, the US business community put the best face on the situation, observing that the outcome of the Miami Ministerial was better than a total collapse of the negotiations.<sup>42</sup>

The Miami Ministerial Declaration left a few observers scratching their heads.<sup>43</sup> For example, the Declaration at one point states, “The Ministers

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<sup>37</sup> See Gary G. Yerkey, *USTR's Allgeier Heading to South America To Inject New Life into FTAA Negotiations*, 20 Int'l Trade Rep. (BNA) 1709 (Oct. 16, 2003).

<sup>38</sup> See *id.* at 1710; Ed Taylor, *Brazil's Chief FTAA Negotiator Accuses U.S. Officials of 'Systematic Arrogance'*, 20 Int'l Trade Rep. (BNA) 1798 (Oct. 30, 2003).

<sup>39</sup> See *Brazil's Chief FTAA Negotiator Accuses U.S. Officials of 'Systematic Arrogance'*, *supra* note 38, at 1798; Ed Taylor & David Haskel, *U.S., Brazil Harden Positions [sic] Over Scope Of FTAA, With Allgeier, Lula Standing Firm*, 20 Int'l Trade Rep. (BNA) 1799 (Oct. 30, 2003).

<sup>40</sup> See Rossella Brevetti, *Allgeier Sees Question of Scope as Immediate Challenge in FTAA Talks*, 20 Int'l Trade Rep. (BNA) 1844 (Nov. 6, 2003).

<sup>41</sup> See Rossella Brevetti, *FTAA Trade Ministers Agree to Scale Back Framework for FTAA at Shortened Ministerial*, 20 Int'l Trade Rep. (BNA) 1960 (Nov. 27, 2003).

<sup>42</sup> See Rossella Brevetti, *U.S. Chamber of Commerce Welcomes Miami FTAA Ministerial Declaration*, 20 Int'l Trade Rep. (BNA) 1962 (Nov. 27, 2003).

<sup>43</sup> See Rossella Brevetti, *Mexican Official Says FTAA Declaration Raises More Questions for Negotiations*, 20 Int'l Trade Rep. (BNA) 2001 (Dec. 4, 2003).

reaffirm their commitment to a comprehensive and balanced FTAA . . .”<sup>44</sup> in all nine negotiating groups. Two paragraphs later, however, that same Declaration states, “Ministers recognize that countries may assume different levels of commitments. . . . One possible course of action would be for these countries to conduct plurilateral negotiations within the FTAA . . . .”<sup>45</sup> The scope of the FTAA negotiations have thus shifted from a single-undertaking approach to a two-tiered—or perhaps a multi-tiered—approach. The one prior commitment that was reaffirmed was to conclude the negotiations by January 1, 2005, with a new and earlier deadline of September 30, 2004 set for concluding the market access negotiations.<sup>46</sup>

The details of the negotiations have yet to be worked out, but that process was scheduled to begin at a meeting of deputy trade ministers in Puebla, México in early February, 2004 (after reaching an impasse, the Puebla meeting was recessed until March 2004).<sup>47</sup> Exactly what the direction of the FTAA negotiations will be in the aftermath of the Miami Ministerial Meeting is anyone’s guess. Does it mean a FTAA on trade in goods and services without any linkages to the other negotiating groups, such as investment or government procurement, which seems to be Brazil’s position? Does it mean a FTAA with baseline commitments in all nine negotiating groups, but with trade benefits on goods being reduced if a country does not make significant commitments in all areas addressed by negotiating groups, i.e., a “you get what you pay for” approach, which seems to be the US position?<sup>48</sup> Does it mean a FTAA with significant commitments in all nine negotiating groups, with obligations being phased in over time depending on a country’s level of development but with all participants eventually assuming the same level of obligations, which seems to be the Canadian and Chilean position?<sup>49</sup> As one Mexican official warned, the FTAA negotiators could find themselves “negotiating a process instead of a deal.”<sup>50</sup>

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<sup>44</sup> Free Trade Area of the Americas, Eighth Ministerial Meeting, Miami, USA, Ministerial Declaration, para. 5 (Nov. 20, 2003), available at [http://www.alca-ftaa.org/Ministerials/Miami/declaration\\_e.asp](http://www.alca-ftaa.org/Ministerials/Miami/declaration_e.asp) (last visited Jan. 25, 2004).

<sup>45</sup> *Id.* para. 7.

<sup>46</sup> *See id.* paras. 5, 13.

<sup>47</sup> *See Joint Communiqué of the Co-Chairs of FTAA TNC in Puebla*, Feb. 6, 2004 (co-chairs agree to recess the Trade Negotiations Committee meeting held in Puebla until March 2004), available at [http://www.insidetrade.com/secure/pdf5/wto2004\\_rh28b.pdf](http://www.insidetrade.com/secure/pdf5/wto2004_rh28b.pdf); *FTAA Faces Uphill Struggle to Meet Miami Declaration Targets*, 22 *Inside U.S. Trade* No. 5 (Jan. 30, 2004).

<sup>48</sup> *See id.*

<sup>49</sup> *See id.*

<sup>50</sup> *Mexican Official Says FTAA Declaration Raises More Questions for Negotiations*, *supra* note 43, at 2001.

**Act IV, Scene 2: The “Special” Summit of the Americas (FTAA Negotiations Derailed?)**

Perhaps realizing that the FTAA negotiations were close to being put on life support, a “special”<sup>51</sup> Summit of the Americas was held in Monterrey, México, on January 13, 2004. The heads of state of the 34 participating countries engaged in a rather dull and hollow one-day meeting. In the words of Hugo Chavez, President of Venezuela, “We arrive, we greet each other, make speeches, sign a declaration, take some photos, smile, eat and go.”<sup>52</sup> Those are hardly the words of someone truly committed to the FTAA process. Despite President Chavez’s apparent disenchantment, the Monterrey Declaration does make a commitment to the FTAA, but puts an unbelievable spin on the outcome of the Miami Ministerial Meeting—a meeting that may very well have dealt a mortal blow to the FTAA process. The Monterrey participants issued a rambling and essentially vacuous declaration that had the following to say regarding the FTAA negotiations:

We welcome the progress achieved to date toward the establishment of a Free Trade Area of the Americas (FTAA) and take note with satisfaction of the balanced results of the VIII Ministerial Meeting of the FTAA held in Miami in November 2003. We support the agreement of ministers on the framework and calendar adopted for concluding the negotiations for the FTAA in the established timetable, which will most effectively foster economic growth, the reduction of poverty, development, and integration through trade liberalization, contributing to the achievement of the broad Summit objectives.<sup>53</sup>

My questions are these: Exactly what “progress has been achieved to date” after five years of negotiations? What “balanced results” are they referring to? What “framework for concluding the negotiations” was adopted in Miami? Is it significant that the Declaration fails to make an explicit reference to the January 2005 deadline for concluding negotiations? Some observers think it is. Reportedly, there was a fight at the Monterey Summit over this very question.<sup>54</sup> The Monterrey Declaration also dropped this ominous footnote:

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<sup>51</sup> “Special” in this case means “previously unscheduled.” The next Summit of the Americas was scheduled to be held in Argentina, most likely sometime in late 2004 or early 2005. See Third Summit of the Americas, Declaration of Quebec City, April 20-22, 2001 (“We . . . have accepted the offer of the Government of the Republic of Argentina to host the Fourth Summit of the Americas.”), available at [http://www.ftaa-alca.org/ministerials/Quebec/declara\\_e.asp](http://www.ftaa-alca.org/ministerials/Quebec/declara_e.asp) (last visited Jan. 25, 2004).

<sup>52</sup> *Loveless brothers*, THE ECONOMIST, Jan. 17, 2004, at 30.

<sup>53</sup> Special Summit of the Americas, Declaration of Nuevo León, Monterrey, México, January 13, 2004, available at [http://www.ftaa-alca.org/Ministerials/NLeon\\_e.asp](http://www.ftaa-alca.org/Ministerials/NLeon_e.asp) (last visited Jan. 25, 2004).

<sup>54</sup> See *FTAA Faces Uphill Struggle to Meet Miami Declaration Targets*, 22 Inside U.S. Trade No. 5 (Jan. 30, 2004).

Venezuela enters a reservation with respect to the paragraph on the Free Trade Area of the Americas (FTAA) because of questions of principle and profound differences regarding the concept and philosophy of the proposed model and because of the manner in which specific aspects and established timeframes are addressed. We ratify our commitment to the consolidation of a regional fair trade bloc as a basis for strengthening levels of integration. This process must consider each country's particular cultural, social, and political characteristics; sovereignty and constitutionality; and the level and size of its economy, in order to guarantee fair treatment.<sup>55</sup>

One is forced to wonder whether or not this statement portends disaster, but trouble is definitely brewing. Within a week after the "special" Monterrey Summit, the February 2004 Puebla meeting of deputy trade ministers was threatened with cancellation after Brazil learned that Chile had organized a pre-Puebla preparatory meeting to which only a hand-picked group of countries was invited – the United States, Canada, Mexico, and Costa Rica, all of which had supported a broad FTAA Agreement.<sup>56</sup>

### **The Unwritten Final Act: Brazil Has "Won," But Is It A Pyrrhic Victory?**

In the aftermath of the Miami Ministerial Declaration and the nearly-aborted February deputy ministers' meeting in Puebla, it is impossible to predict just what the outcome of the FTAA negotiations will be. It should seem fairly obvious to even the casual observer that the current negotiating climate is not particularly hospitable to a successful conclusion of negotiations. I will go out on limb and predict that the September 30, 2004 deadline for completing the market access negotiations will not be met, nor will the January 1, 2005 deadline for completing negotiations on other issues be met. Let me suggest a few scenarios.

• *If "[t]he course of true love never did run smooth,"<sup>57</sup> then what are the chances of Brazil and the United States patching up their differences? Frankly, not very good. In this scenario the United States or Brazil or both walk out, resulting in a complete collapse of the FTAA negotiations. This scenario is possible for several reasons, either standing alone or in combination. First, US frustration with Brazil may reach the breaking point, driving the United States to isolate Brazil in the FTAA negotiations. In response, Brazil's MERCOSUR partners circle the wagons; other countries, in particular Venezuela, that feel an allegiance to MERCOSUR or Brazil are torn; and the result is an FTAA*

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<sup>55</sup> See *id.*

<sup>56</sup> See Ed Taylor, *Free Trade Area Meeting Set for February Cancelled Due to Dispute Over Invitation List*, 21 Int'l Trade Rep. (BNA) 60 (Jan. 8, 2004).

<sup>57</sup> WILLIAM SHAKESPEARE, *A MIDSUMMER NIGHT'S DREAM*, act 1, scene 1.

collapse. Second, with the bilateral and/or plurilateral two-tiered course that apparently has now been set for the FTAA negotiations, the United States could conclude that there is little advantage in pursuing negotiations under FTAA auspices and instead opt for comprehensive, package-deal agreements with countries in the Western Hemisphere, either bilaterally (as in the case of the Chile-US Free Trade Agreement) or plurilaterally (as in the case of the CAFTA, the US-Central America Free Trade Agreement with El Salvador, Honduras, Guatemala, and Nicaragua).<sup>58</sup> In late January, the United States concluded a free trade agreement with Costa Rica (which will join the CAFTA<sup>59</sup>); it has just initiated free trade negotiations with the Dominican Republic,<sup>60</sup> and it has stated its intention to pursue free trade agreements with Panama, Ecuador, Colombia, Peru, and Bolivia in 2004.<sup>61</sup> Counting its two NAFTA partners, that will mean free trade agreements with more than one-third of the nations in the Hemisphere.

• *The US Trade Representative (“USTR”) stays the course, but Congress balks at an FTAA Agreement that is less than comprehensive.* Mindful of the admonition, “Do not let the best be the enemy of the good,” in this scenario the USTR swallows hard, holds its nose, and delivers a FTAA Agreement, but one that is limited to trade in goods and perhaps trade in a few services sectors. However, Congress reacts with displeasure because a “FTAA-lite” that covers only trade in goods and perhaps includes some modest openings in the services area would definitely fall short of Congressional objectives. The principle trade negotiating objectives established by Congress in the Bipartisan Trade Promotion Authority Act of 2002 (the “Trade Act of 2002”)<sup>62</sup> include improved market access not just for US goods, but for services and capital as well; stronger protection of intellectual property rights; transparency in government procurement; and trade-related environmental and labor standards.<sup>63</sup> Congress could send a strong signal that any FTAA Agreement that fails to meet the objectives laid out in the Trade Act of 2002 is dead on arrival, or it could actually disapprove a less-than-comprehensive FTAA trade agreement.<sup>64</sup> The

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<sup>58</sup> See *U.S. & Central American Countries Conclude Historic Free Trade Agreement*, Office of the U.S. Trade Representative, Press Release (Dec. 17, 2003), available at <http://www.ustr.gov/releases/2003/12/03-82.pdf> (last visited Jan. 25, 2004).

<sup>59</sup> See *U.S. and Costa Rica Reach Agreement on Free Trade, Costa Rica Will Join Recently Concluded Central American Trade Pact*, Office of the US Trade Representative, Press Release 04-03 (Jan. 25, 2004), available at <http://www.ustr.gov/releases/2004/01/04-04.pdf> (last visited Feb. 4, 2004).

<sup>60</sup> See *Zoellick to Visit the Dominican Republic January 14 as Free Trade Negotiations Begin*, Office of the US Trade Representative, Press Release 2004-02 (Jan. 13, 2004), available at <http://www.ustr.gov/releases/2004/01/04-02.pdf> (last visited Jan. 25, 2004).

<sup>61</sup> See *Zoellick Announces FTA Negotiations With Four Andean Countries, Panama*, 20 Int'l Trade Rep. (BNA) 1935 (Nov. 20, 2003).

<sup>62</sup> Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107-210, 116 Stat. 993 (2002), codified at 19 U.S.C. §§ 3801-3812.

<sup>63</sup> 19 U.S.C. § 3802(b)(1)-(6), (11).

<sup>64</sup> See *U.S. Chamber of Commerce Welcomes Miami FTAA Ministerial Declaration*, *supra* note

latter would be a first, however.

• *The USTR stays the course, a 34-nation FTAA Agreement covering only trade in goods is successfully negotiated, and Congress blesses it. A patchwork quilt of bilateral and plurilateral agreements emerges on services trade, investment, and enhanced intellectual property protection.* The international trade regime has been analogized to riding a bicycle: in order not to fall over, you have to keep pedaling. In this scenario, the bicycle theory of international trade triumphs. Considering that the FTAA consists of two developed nations and 32 developing countries, it seems probable that bilateral or plurilateral agreements on investment will be concluded in tandem with agreements on trade in services between the United States and several of its labor-rich, capital-poor neighbors to the south. The sticking points will occur in exempted sectors, e.g., state-owned public utilities and natural resources, and with regard to whether services trade negotiations should proceed on a negative list basis (i.e., all service sectors are presumptively open unless expressly exempted, which is the approach taken in NAFTA) or a positive list approach (i.e., all service sectors are presumptively closed unless specifically listed in a schedule of commitments, which is essentially the approach taken in the General Agreements on Trade in Services (“GATS”).<sup>65</sup> Once again, Brazil and the United States are divided over this question, with Brazil preferring the GATS positive list approach and the United States preferring the NAFTA negative list approach. A related problem with such agreements could be their WTO-consistency. If whole sectors, such as agriculture, are excluded in the trade in goods negotiations, or entire service sectors are not part of a trade in services agreement, e.g., financial and telecommunications services,<sup>66</sup> such agreements face serious problems of inconsistency with GATT Article XXIV and GATS Article V.<sup>67</sup>

• *On a variation of the previous scenario, FTAA negotiations are successfully concluded on trade in goods by the September 30, 2004 deadline, but other unresolved issues become the subject of follow-on FTAA negotiations à la the Uruguay Round “built-in” agenda on agricultural and services trade.* This concept, floated by Brazil in 2003, envisions a FTAA on trade in goods being concluded by September 30, 2004, with more nettlesome issues being the subject of future negotiations after 2005.<sup>68</sup> However, if the Doha Round moves forward

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37, at 1962-63 (Senator Baucus warns that any FTAA Agreement that does not address environment and labor standards will violate the Trade Act of 2002 and will be unacceptable to Congress).

<sup>65</sup> See *Brazil’s Chief FTAA Negotiator Accuses U.S. Officials of ‘Systematic Arrogance,’ supra* note 38, at 1798.

<sup>66</sup> Brazil has stated that it does intend to make financial and telecommunication services part of any FTAA services negotiations. See *Brazil’s Chief FTAA Negotiator Accuses U.S. Officials of ‘Systematic Arrogance,’ supra* note 38, at 1798.

<sup>67</sup> For a discussion of GATT Article XXIV and GATS Article V on regional trade arrangements, see *BHALA & KENNEDY, supra* note 4, at 163-70.

<sup>68</sup> See *U.S. and Brazil to Hold High-Level Talks Ahead of FTAA Mini-Ministerial Nov. 8-9, 20 Int’l Trade Rep. (BNA) 1843 (Nov. 6, 2003).*

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to a successful conclusion, then most of the issues that would be part of these FTAA follow-on negotiations—investment, expanded commitments in services trade, competition policy, transparency in government procurement—would be absorbed in Doha Round agreements in any event.

### Conclusion

Just as NAFTA was viewed as a telltale for the ultimate success or failure of the parallel Uruguay Round negotiations, arguably the FTAA negotiations are a barometer of the ultimate fate of the parallel Doha Development Round. In the case of NAFTA, the feeling at the time was that if two developed nations, Canada and the United States, could not reach agreement on integrating their economies with a single developing country, México, then the chances of success for the Uruguay Round as a whole were slim, given that several developed countries were attempting to do the same with nearly 100 developing countries. Similarly, in the case of the FTAA, if two developed countries, again, Canada and the United States, cannot reach agreement with 32 developing countries on a range of issues that are also on the Doha Round agenda, then what chance of success does the Doha Round have with its 146 participants, 80 percent of which are developing countries? In short, the success or failure of the FTAA negotiations is a fair predictor of the success or failure of the Doha Round, so perhaps the FTAA negotiations cannot be allowed to collapse.

Just as the Canada-US Free Trade Agreement was the foundation for NAFTA, NAFTA could have been a major step toward eventual hemispheric economic integration. Although no blueprint yet exists for achieving this ambitious plan for hemispheric economic integration by 2005,<sup>69</sup> NAFTA itself contains an accession clause permitting accession by other countries regardless of location “subject to such terms and conditions as may be agreed between such country or countries and the [NAFTA] Commission and following approval in accordance with the applicable legal procedures of each country.”<sup>70</sup>

Some useful lessons for the FTAA negotiators can be drawn from recent experiences with economic integration in Asia and the Pacific Basin. There are many parallels between the two regions. First, the rapidly growing nations of the Pacific Rim are experimenting with new forms of integration while continuing to support the multilateral system. At the same time, they are forced to make accommodations among nations of vastly different size, structure, and level of development, as well as a growing number of sub-regional groupings, such as the Association of Southeast Asian Nations Free Trade Area.

Second, countries in the Asia-Pacific region, like their Western Hemisphere counterparts, hope to use economic integration to achieve important political

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<sup>69</sup> See Craig L. Jackson, *The Free Trade Agreement of the Americas and Legal Harmonization*, Am. Soc. Int'l L. Newsletter (June-Aug. 1996).

<sup>70</sup> NAFTA art. 2204.1.

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goals. The Asian experience suggests that, in an era of economic transition like the one the Western Hemisphere is experiencing, a more flexible, yet progressive, program of creating regional legal and economic institutions may prove to be the best path to integration.<sup>71</sup>

In the absence of fast-track negotiating authority (or trade promotion authority as it is now called), FTAA negotiations were a futility.<sup>72</sup> Now that trade promotion authority has been renewed,<sup>73</sup> it is obvious that trade promotion authority has always been a necessary, but never a sufficient, condition for the success of the FTAA negotiations. In short, the FTAA negotiations may still be a futility. Regardless of whether a FTAA Agreement is negotiated, and regardless of whether Congress eventually approves such an agreement as truncated, as it will likely be, the existing regional trade arrangements—NAFTA, CAFTA, MERCOSUR, the Andean Community, CARICOM, ALADI, and the Central American Common Market—still offer the prospect of accelerating the pace of economic integration within the Western Hemisphere even in the absence of an agreement on a FTAA.

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<sup>71</sup> See Abbott & Bowman, *supra* note 1, at 519-23 (an FTAA modeled more closely after APEC than NAFTA is preferable).

<sup>72</sup> See *The road from Santiago*, THE ECONOMIST, at 25-26, April 11, 1998. *But see Free Trade Area of the Americas Off to Strong Start from Miami Talks*, Office of the USTR, Press Release 98-94 (Oct. 22, 1998).

<sup>73</sup> See 19 U.S.C. § 3803.