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THE FREE TRADE AREA OF THE AMERICAS AND BRAZIL

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The origin of the Free Trade Area of the Americas (“FTAA”) project can be traced back to the Initiative of the Americas, launched by President George Bush in June 1990.¹ Initially, the FTAA was no more than a statement of intent that would later turn into an ambitious project of hemispheric integration at the Summit of the Americas (“the Summit”), held in Miami, Florida on December 10, 1994.² At the Summit, the heads of government of the Americas agreed to conclude their negotiations of the FTAA by no later than 2005 and also decided upon the topics to be negotiated, including market access for both agricultural and manufactured goods, services, government procurement, intellectual property, investment, dispute resolution, trade remedies (i.e., antidumping, and countervailing duties) and competition policy (e.g., antitrust).

Brazil has played an active and constructive role since the beginning of the negotiating process and has repeatedly reiterated its will to conclude a successful agreement by 2005.³ Brazil’s active participation in the negotiations has been primarily due to the significance of its hemispheric market, which is the destination for more than 55% of Brazil’s total exports, nearly 80% of which are manufactured products.⁴ For Brazil, the FTAA signifies not only obtaining access to the U.S. market, but also the prospect of exporting to other countries in the hemisphere with which Brazil does not yet have free trade agreements.

Brazil’s goals in the FTAA negotiations are well known. Brazil seeks improved access to the markets of the hemisphere for

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1. See Rubens Antonio Barbosa, *FTAA and the Future of Regional Integration: The Brazilian View*, at http://www.brasilemb.org/trade_investment/trade_embaixador_ftaa.shtml; Terry McCoy, *The Free Trade Area of the Americas: Opportunities and Challenges for Florida*, at http://www.latam.ufl.edu/publications/ftaa_paper.html.

2. First Summit of the Americas: Declaration of Principles, Miami, Florida, Dec. 11, 1994, reprinted in 34 I.L.M. 808 (1995).

3. See Barbosa, *supra* note 1; Raul Gouvea & Jana Hranajova, *Brazil and the FTAA: Strategic Trade Options*, 10(2) MULTINATIONAL BUS. REV. (Fall 2002).

4. Source of statistical data: Trade Promotion Section of the Brazilian Embassy to the U.S.

its main export products, which would necessarily involve negotiating a series of commitments, including: (a) the elimination of both tariff and non-tariff barriers; (b) stronger disciplines on the use of agricultural subsidies and food assistance programs; (c) greater transparency in applying trade remedy rules, particularly in antidumping, and countervailing duties and safeguards; and (d) balanced results in the negotiation of other commitments that would be included in the future FTAA Agreement. Brazil has consistently advocated throughout the FTAA negotiations the defense of its national interest based on the following principles: pragmatism, balanced results, inclusion of all the products in the negotiation, compatibility with WTO rules, and co-existence with the existing sub-regional agreements.

A NEW ADMINISTRATION IN BRAZIL

President Luiz Inácio Lula da Silva, in his inaugural speech, reiterated how important trade negotiations are for Brazil as a means of fully integrating Brazil into the most dynamic flows of international trade and investment, while respecting its right to make decisions regarding its development model.⁵ In that spirit, the Lula administration made a commitment to remain engaged in the different negotiating processes entered into by the preceding administration, whether multilateral, regional, or bilateral in scope. These negotiations involve the WTO, FTAA, MERCOSUR-EU, MERCOSUR-Andean Community, MERCOSUR-Mexico, MERCOSUR-India, and MERCOSUR-South Africa.⁶ With regard to the FTAA, the new administration renewed the Brazilian commitment to continue its active participation in the hemispheric negotiations, which entered its decisive stage begin-

5. President Luiz Inácio Lula da Silva, A New Course for Brazil, Address to the Congress by the President of the Federative Republic of Brazil (Jan. 1, 2003) *available at* http://www.mre.gov.br/ingles/politica_externa/discursos/index.asp. The President stated:

Through our foreign trade . . . Brazil's foreign relations will aim at improving the living conditions of Brazilian men and women, at increasing income levels and generating dignified jobs. Trade negotiations are today of vital importance. With respect to the FTAA . . . Brazil will . . . attempt to obtain fairer and more appropriate conditions for fostering the Nation's development.

Id.

6. *Id.* See, e.g., Juan Blanco Prada, *Da Silva's One-Year Mark: Realism, Fiscal Responsibility*, *MIAMI HERALD*, Jan. 16, 2004; Juan Forero, *Brazil Pushes for South American Trade Pact*, *N.Y. TIMES*, Sept. 17, 2003 (stating "the Andean Community of Nations have agreed to conclude free trade talks with MERCOSUR").

ning with the Quito Ministerial Meeting in November 2002, when Brazil and the United States assumed their roles as co-chairs of the negotiating process.

However, in mid-2002, the U.S. government changed its negotiating strategy in two critical areas. First, on the issue of market access, the U.S. proposed making bilateral offers to countries or groups of countries instead of offering concessions based on most favored nation ("MFN") principle. Second, with regard to the rules governing trade remedies, agricultural domestic support and export subsidies, the United States began to defend the argument that these topics should be dealt with multilaterally, despite the fact that the FTAA negotiating mandate envisaged hemispheric disciplines to be applied to these issues in the future FTAA.

Brazil faced growing U.S. resistance to negotiating within the FTAA process topics that had been included in the original FTAA negotiating mandate, including domestic agricultural supports and trade remedies. Based on the argument that these issues were systemic in nature, the new Brazilian government believed that U.S. non-compliance with the original FTAA mandate had created an imbalance in the negotiating process that needed to be corrected.

This imbalance became even more accentuated when WTO-plus negotiating proposals were advanced on topics such as intellectual property, government procurement, services and investment that went far beyond trade-related aspects, and even included disciplines that would directly affect the regulatory autonomy of the countries involved in the negotiations. The assessment made by the new Brazilian government was that this type of focus had the potential to undermine Brazil's capacity to design and carry out social, environmental, and technological development policies. Moreover, if adopted, such focus would not result in any valuable tradeoff in other areas of special interest to Brazil.

Beyond these imbalances, the negotiating process has endured other tensions. Some of these have been associated with the challenge of promoting integration among a large number of countries with a sharp degree of economic disparities and different levels of ambition vis-à-vis the scope of the future FTAA. In fact, no other trade integration process has ever been

launched on the basis of such a heterogeneous set of countries as the FTAA negotiations.

Other tensions in the negotiating process arise from certain countries' insistence on expanding the negotiating agenda, which is already extremely complex, to include labor and environmental issues that were not part of the original FTAA negotiating mandate. Aside from the lack of a hemispheric mandate, hemispheric disciplines to regulate these issues which are equally systemic in nature, would potentially cause the diversion of trade and investment flows to the benefit of countries that do not have to bear additional costs on labor and environmental issues.

Faced with this situation of imbalances, and after considerable thought, both within the government and with entities of civil society, the government of President Lula approved the key aspects of the Brazilian position in the hemispheric negotiations (the "Brazilian Proposal").⁷ The Brazilian Proposal, which to a large extent incorporated the new U.S. position, may be succinctly described as follows: (a) the topics of market access for goods and, to a lesser extent, for services and investment, would be addressed in a 4+1 negotiating mode between MERCOSUR and the U.S.; (b) the hemispheric negotiation process itself would focus on basic elements, such as rules of origin, dispute resolution, special and differential treatment for developing countries, compensation funds, phytosanitary rules, and business-facilitating measures; and (c) systemic topics, such as intellectual property, certain aspects of the investment chapter, for which disciplines within the FTAA would create free-ride effects (e.g., for trade partners outside the hemisphere), would be transferred to the WTO, as advocated by the United States for the topics it considers most sensitive, such as domestic support and trade remedies.

This Brazilian proposal was not only a response to the current imbalances in the FTAA negotiations, but also a call for pragmatism. Its great merit is its recognition that not only MERCOSUR, but also other trade partners in the hemisphere have significant domestic sensitivities in certain negotiating areas, which must be taken into consideration in designing the ar-

7. See MERCOSUR, *US 4 + 1 Talks*, MERCOPRESS, (May 12, 2003), available at <http://www.mercopress.com/Detail.asp?NUM=2156>.

chitecture of the future FTAA. In other words, Brazil's goal is to have new rules about topics that are highly sensitive to the negotiating parties discussed either at the multilateral level or among those countries that wish to discuss them, but not at the hemispheric level, given that countries such as the United States, Canada, and Brazil have already illustrated the difficulties in establishing hemispheric rules in certain areas of negotiation. The virtue of the Brazilian proposal is that it takes into account the realities of the positions expressed by the countries and translates them into an architecture for negotiation that takes into consideration the sensitivities and asymmetries that exist among the countries participating in the hemispheric negotiation.

This is what gave rise to the idea of a feasible FTAA, as opposed to a "maximalist" FTAA that is simply unrealistic, given the changes that have taken place in the region in the last ten years.⁸ The Brazilian proposal is aligned with the position advocated by the United States, under which the topics of agricultural subsidies and antidumping measures can only be negotiated in the WTO. Applying the same logic used by the United States, Brazil understands that the negotiation of new rules for services, investment, intellectual property and government procurement must also be left to the multilateral negotiations.

The Brazilian position is not merely a tactical reaction to the U.S. negotiating strategy regarding the so-called systemic issues. In fact, Brazil has a clear interest in preventing hemispheric disciplines on topics such as investment, intellectual property, government procurement, and services from curtailing its ability to formulate and implement public policies that are in its highest national interest.

The fact is that the legacy of the Uruguay Round was a harsh lesson for Brazil, proving that the negotiation of additional multilateral disciplines in areas that are central for Brazil's technological, scientific, and social development should be preceded by impact studies, so as to avoid any possible constraints on Brazil's freedom of action. This was the case, for example, regarding the policy on patents and public health, affected by the Trade-Related Aspects of Intellectual Property Rights

8. See Gary C. Hufbauer & Barbara Kotschwar, *The Future of Regional Trading Arrangements in the Western Hemisphere*, at <http://www.sice.oas.org/geograph/papers/iie/hufbauer0998.asp>.

("TRIPs") agreement, and the policy on incentives and matching contributions for the installation of foreign companies in Brazil, affected by the Trade Related Investment Measures agreement

The proposals currently being considered as possible hemispheric disciplines in areas such as services, investment, intellectual property, and government procurement may constitute constraints on Brazil's future development options, which is why Brazil is not currently interested in making any commitments regarding them.

The rules on investment provide the clearest example of being contrary to Brazil's future development. Reflecting the concerns that led to the debacle of the negotiations for a Multilateral Agreement on Investment ("MAI"),⁹ the Brazilian Congress has indicated on several occasions that it has no interest in approving investment agreements that may contravene Brazil's fundamental constitutional principles and essential interests, which have not prevented foreign investors from investing in Brazil or having their interests protected by contracts and the due process of law.

In addition to the pragmatic approach of taking into account national sensitivities regarding specific topics, the Brazilian Proposal endorses another important mode of negotiation that is already being used in the FTAA negotiating process — the bilateral negotiation (or 4+1, in the case of MERCOSUR) to exchange market access offers.

When presenting its initial offers, the United States decided to distinguish among groups of countries that would receive different offers, with MERCOSUR having received the least favorable offer in terms of tariff reductions in order to gain access to the U.S. market.

The MERCOSUR proposal establishes that other countries or groups of countries may have the same opportunity to differentiate between what they can offer to this or that trade partner in the FTAA negotiations. In other words, the negotiating methodology proposed by Brazil and its MERCOSUR partners is not at all different from that presented by the United States. Just as the U.S. negotiators distinguished between the poorest countries in the Caribbean and the countries of MERCOSUR, Brazil be-

9. OECD, *The Multilateral Agreement on Investment* (Apr. 24, 1998), available at <http://www.oecd.org/dataoecd/46/40/1895712.pdf> (last visited Feb. 17, 2004).

lieves it is also fair for MERCOSUR to offer more favorable tariff reduction schedules to countries such as Ecuador and Venezuela, for example, because Brazil is less sensitive to these two countries' export capabilities.

Therefore, the main aspects of MERCOSUR's negotiating proposal are, on the one hand, to transfer to the WTO, or to the venue of a smaller group of countries, those topics that are clearly sensitive for the countries negotiating the FTAA and, on the other hand, to negotiate market access concessions on a bilateral basis.

This is a constructive proposal that neither restricts nor imposes prior commitments, since it also allows desiring countries to further discuss hemispheric disciplines, without the need for other countries to accept those disciplines agreed under bilateral or "plurilateral" agreements. In addition to favoring balanced and attainable results by 2005, this proposal has the additional advantage of accommodating different degrees of ambition regarding the future FTAA over the short, medium, and long term.

Showing again its willingness to negotiate and to find a compromise to allow the process to advance in the Ministerial Meeting in Miami (November, 2003), Brazil agreed to adjust its proposal and negotiate all issues within the FTAA, provided that the systemic components of certain issues were left to the WTO.

THE CURRENT U.S. ADMINISTRATION

The current economic and political situation in the United States is not conducive to the negotiation of a balanced FTAA. On the one hand, there are U.S. economic sectors with aggressive interests such as services, finance, investment, cutting-edge technology industries, and intellectual property, which have been pressuring for a maximalist FTAA. On the other hand, the increasing strength of the protectionist lobbies (representing economic sectors such as agriculture, textiles, steel, unions, and environmental non-government organizations ("NGOs")) limits the possibility of achieving the necessary tradeoffs necessary to advance the hemispheric negotiations. The slowdown in the U.S. economy in 2001-2003 and the concerns with unemployment have only aggravated this trend.

Despite its free-trade rhetoric, the protectionist bias in U.S.

trade policy, which aside from China also views Brazil as a favorite target for trade remedies promoted by U.S. lobbies, is likely to worsen during the 2004 presidential election campaign. Adding to the difficulties imposed by the politicized climate of the U.S. presidential campaign are the restrictive terms of the Trade Promotion Authority and the trade-distorting agricultural subsidies established in the new Farm Bill.¹⁰ Together, these two laws serve as a straitjacket, limiting the U.S. government's ability to make concessions, especially regarding topics of interest to Brazil, such as agricultural subsidies, tariff peaks, and trade remedies. This statutory rigidity, combined with the competitive liberalization strategy adopted by the United States Trade Representative of launching parallel free trade agreement negotiations with the countries in the hemisphere, have created additional tensions for the FTAA negotiating process. Although initiatives aimed at providing better market access conditions within the region should be fully supported, there is a potential risk of dissipating the negotiating efforts to complete the FTAA, once our partners have achieved their main trade goals through other negotiating fora.

From the perspective of the United States, what is attractive about simultaneous negotiations is not their potential for creating significant volumes of U.S. exports, given the small size of the markets of the countries that are now candidates to become favored U.S. trading partners. Rather, the U.S. interest in negotiating these bilateral agreements seems to lie primarily in their potential for creating negotiating precedents for the future FTAA, in terms of both "offensive" and "defensive" topics, and in shattering potential coalitions with positions that are at odds with U.S. negotiating ambitions.

POSSIBLE NEGOTIATING SCENARIOS AFTER THE FTAA MINISTERIAL MEETING IN MIAMI

The FTAA Ministerial Meeting in Miami offered a unique opportunity for the thirty-four countries present to re-examine the overall architecture of the FTAA negotiations. It allowed them to establish principles whereby each country may assume

10. See Congressional Research Service, *Trade Promotion (Fast-Track) Authority: Summary & Analysis of Selected Major Provisions of H.R. 3005* (Apr. 15, 2002), available at <http://fpc.state.gov/documents/organization/10090.pdf> (last visited Feb. 12, 2004).

differentiated commitments, in accordance with their level of ambition on a specific topic, taking into account their respective national sensitivities, as a way to enable the negotiations to conclude no later than January 2005.

From a political perspective, the most significant section of the Ministerial Declaration was “the Vision of the FTAA,” in which the countries in the hemisphere reaffirmed their commitment to a negotiating process leading to a comprehensive and balanced FTAA.

The Miami Ministerial Meeting also served to reiterate the established principle that had already been recognized in other Ministerial Declarations — taking into account the different levels of development and sizes of economies in each area of negotiation, as well as devoting special attention to the smallest economies when establishing horizontal disciplines. In this context, recommendations were made about financing methods and mechanisms to address the need for adjustments as a result of the different levels of development and sizes of economies. These recommendations will allow the discussions to advance towards establishing a compensation fund within the scope of the FTAA.

The FTAA Trade Negotiations Committee was instructed to develop a balanced and common set of rights and obligations, which would be applicable to all countries. The negotiations regarding the common set of rights and obligations will include provisions in the areas of market access, agriculture, services, investment, government procurement, intellectual property, competition policies, subsidies, antidumping, and countervailing duties.

Countries are free to negotiate additional disciplines or liberalizations “plurilaterally,” with a small group of countries, rather than multilaterally, with all the other thirty-four FTAA countries. Those countries that do not wish to actively engage in these plurilateral negotiations may participate in the negotiation groups as observers and may later endorse the conclusions reached in these negotiations.

Despite the positive discussions in Miami on market access negotiations, which are expected to be concluded by September 30, 2004, Brazil does not rule out the realistic possibility that, as a result of these negotiations, a significant proportion of Brazil-

ian export products may be included in the U.S. list of “sensitive products.” In practice, this would mean excluding free trade from the hemisphere during a transitional period that could last much more than ten years. Some sensitive products in the US-Australia FTA recently negotiated will only be liberalized in eighteen years.

A negotiating scenario less detrimental to Brazil would involve the possibility of negotiating concessions that, even if they fail to liberalize trade in the short term, would at least ensure a gradual opening of regional markets to Brazilian exports with an MFN provision. In an even more optimistic scenario, the future FTAA would include commitments to gradually eliminate all tariff and non-tariff barriers imposed on important Brazilian export products, primarily in agribusiness and the steel industry. It also would incorporate clearer disciplines, not only in the area of trade remedies, but also in agricultural subsidies (domestic support for production and export subsidies), thus creating conditions for fair market competition for Brazilian exports in the markets of the hemisphere.

From the U.S. perspective, it is possible to envision two negotiating scenarios. In the first, and more optimistic, scenario, the U.S. government would accept the political cost of confronting protectionist lobbies and would moderate its aggressive agenda. In the second, and more probable, scenario, the current U.S. administration would, on the one hand, find it impossible to make concessions in its “defensive” agenda, and, on the other hand, would maintain its maximalist approach with a view to implementing its aggressive agenda. It also would push the option of pursuing bilateral free trade agreements to their limits, taking advantage of the vulnerability of the Latin American countries, due to their current political and economic situations, as well as the fact that most countries in the region are dependent on some preferential trade agreement with the United States (such as the Caribbean Basin Economic Recovery Act, or the Andean Trade Preference and Drug Eradication Act).¹¹

These scenarios take into account not only the difficulties

11. Some sensitive products in the US-Australia FTA recently negotiated will be only liberalized in eighteen years.

See Office of the United States Trade Representative, *First Report to the Congress on the Operation of the Andean Trade Preference Act As Amended* (Apr. 30, 2003), available at <http://www.ustr.gov/reports/2003atpa.pdf> (last visited Feb. 17, 2004).

that currently exist at the negotiation table, but also the specific domestic situations of the countries in the hemisphere, beginning with the U.S. electoral schedule and the prevailing anti-free trade mood in the U.S. Congress, which raises even greater doubts about the capacity of one of the major trading partners in the negotiation to make effective concessions on access to its market.

It is with good reason that Brazil, as one of the co-chairs of the hemispheric negotiating process, has been calling for both realism and pragmatism in the negotiations, in order to conclude the negotiations by early January 2005, as well as to achieve its goal of an FTAA that is both balanced and satisfactory to all of the thirty-four countries.

Despite the accomplishments achieved in Miami, which have made it possible to conclude negotiations by the agreed deadline, there are still many political and technical difficulties to overcome, both in establishing rules and disciplines and in reaching a satisfactory package on market access. It will be difficult to accept, for instance, a cross-sectoral balance of rights and obligations, in which countries that do not participate in the WTO-plus negotiations of certain rules would be penalized in the area of market access, as was mentioned during the meeting in Miami.

The Miami decisions have faced a first test in Puebla, Mexico in February 2005 and will be tested again when the Trade Negotiating Committee (TNC) resumes talks next March.

Brazil continues to be cautiously optimistic that the countries can agree on a common framework when the TNC resumes. If the TNC is able to reach an agreement in the next meeting, prospects for completing the FTAA on time will be good. But if there are still difficulties to arrive at a consensus on balanced and common set of rights and obligations, it could start to be worrying, since September 2004 is the deadline for completing market access negotiations, as set out by the hemisphere's trade ministers last November in Miami.

It is important to point out that the prevailing mood in Washington, especially in Congress, in an electoral year is not favorable to free trade agreements. The recently concluded U.S. trade agreements with Central America and Australia, in which the United States either refused to place sensitive sectors on the

table — like sugar in the Australia FTA — or insisted on lengthy transition periods before tariffs end is a good example of that mood.

The United States and the G-14 member countries are looking for similar exemptions for their sensitive products in the FTAA. Canada, for example, proposed keeping ninety-seven of its products completely off the negotiating table in its market access offer. While the G-14 is offering less-than-total market access in goods, especially in agriculture, it wants countries to agree to WTO-plus rules in areas like services, investment, intellectual property and government procurement. And at the same time, the United States continues to insist that farm supports and trade remedy laws cannot be negotiated in the FTAA. This is not a balanced proposal for Brazil and MERCOSUR.