The Negotiation of a Free Trade Area of the Americas*

Gary N. Horlick and Claire R. Palmer

O'Melveny & Myers LLP, Washington, D.C.

I. Introduction

This paper discusses the negotiations toward a Free Trade Area of the Americas (FTAA), principally from a United States viewpoint. The paper attempts to highlight possible sticking points in the negotiations. It also provides an overview of US international trade negotiating priorities, to clarify the US position *vis-à-vis* the FTAA.

II. Strategic Trade Objectives of the United States

The key strategic international trade objective for the United States is the successful negotiation of the Free Trade Area of the Americas (FTAA). Former President George Bush first floated the idea a decade ago and his son, current President Bush, has put this at the top of his list of priorities for international trade.

President George W. Bush is first and foremost a businessman. He runs the White House like a Chief Executive Officer (CEO). He is eager to expand US business opportunities abroad and believes increased trade increases a company's and a nation's wealth. As the former Governor of Texas, he views the North American Free Trade Agreement (NAFTA) as a major success for the US economy (Clinton treated NAFTA as a political liability). He is more oriented toward this hemisphere than toward Asia or Europe.

Two stumbling blocks to FTAA present in the Clinton Administration (organized labor and the pro-environment lobby) have been diminished -but not eliminated- in the new Republican Administration. President Bush is not directly beholden to organized labor, whereas President Clinton was obliged by his domestic political constituency to include labor provisions in any agreement, a move strongly opposed by many Republicans in Congress. President Bush is also not beholden to the US environmental lobby, as has become clear recently, especially with his moves away from the Kyoto Protocol and from regulating carbon dioxide emissions.

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* *Paper presented at the "Second Meeting of the Regional Dialogue on Trade and Integration"; Inter-American Development Bank, Washington, D.C. 22 and 23 May, 2001.*

Democrats in the US Congress still find these issues of great importance; thus President Bush cannot ignore them in international trade negotiations. To obtain fast track/ Trade Promotion Authority from Congress without a bruising fight, the Administration will look to find some middle ground with Democrats on these issues. But the President will not be willing to go beyond the previously negotiated NAFTA side agreements, which require countries only to enforce their existing laws and regulations on labor and environmental issues. If possible, the Bush Administration would like to step back from definitive commitments on labor and the environment, were US domestic politics to allow this. The National Association of Manufacturers, an important US business group, stated after the recent Buenos Aires meeting that it is opposed to the use of trade sanctions to address non-trade issues such as labor or environmental concerns. Thus, these issues may become more of a US domestic political problem than a problem in the negotiations themselves, given that most other FTAA countries are unwilling to establish new international norms on labor and the environment backed up by dispute settlement and trade sanctions in an FTAA.[1]

In general, the US Administration wants increased trade liberalization and will pursue it in all venues. For example, United States Trade Representative (USTR) Robert Zoellick has proposed to Congress that there be one comprehensive trade bill this year which would include a variety of trade proposals: Trade Promotion Authority, the US-Jordan Foreign Trade Advisor (FTA), renewal of the Andean Trade Preferences Act, the US-Vietnam trade agreement, renewal of Generalized System of Preferences (GSP) and Trade Adjustment Assistance, and possibly increased trade benefits to sub-Saharan Africa. Clearly, the Administration hopes to put together an alliance of those supporting individual proposals in an effort to get all passed. Democrats in Congress, however, do not support this approach for fear that President Bush will take inadequate note of Democratic concerns while getting all the credit for increasing trade opportunities abroad.

The United States will use one set of negotiations as leverage over another set. The second trade priority for the Bush Administration (although not as immediate a priority as the FTAA) is to begin a new round of World Trade Organization (WTO) negotiations. The US would like to see increased market opening measures among WTO Members and supports a new round of WTO negotiations, although not all WTO members are as supportive of this initiative. India, for example, seems wary, whereas Egypt and South Africa have issued a statement in favor of a new round. The US Administration believes FTAA negotiations among a large number of WTO Members will spur WTO negotiations. Moreover, concessions negotiated among a smaller group of countries (34 in the FTAA, more than 140 in a WTO Round are normally easier to reach. Once agreed to by the FTAA countries, momentum would exist to extend these concessions among all WTO Members.

Given the debacle in Seattle 18 months ago, few believe WTO negotiations will resume easily or end quickly. The US, thus, supports the FTAA first, in hopes of seeing real market liberalization throughout the Western Hemisphere, which accounted for 36% of all US exports of goods and services and over 23% of US foreign direct investment in 1999.

The US expects that the FTAA negotiations will end before the WTO negotiations. This may cause a problem in some areas of the negotiations, for issues where countries will be unwilling to negotiate concessions without the involvement of WTO members whose trade is critical in that area. The two toughest areas will be antidumping and agricultural subsidies.

Agricultural supports, and discipline on non-export subsidies generally, will be the hardest problem to resolve, because this is a structural problem. For a country such as the US, most of whose exports go outside the FTAA area, it does not make sense to discipline general (non-export) subsidies without parallel discipline from non-FTAA countries (the

EU, Japan, China, etc.). Thus, in the 1987 US-Canada FTA negotiations, Canada (which sent 75% of its exports to the US), proposed to discipline general subsidies, but the US negotiators (because the US sent 75% of its exports to countries other than Canada) rejected[2] the subsidies discipline. The Canadian proposal was later picked up in the Uruguay Round precisely because it was global.

For the same reasons, the US is not likely to constrain its agricultural support programs in FTAA, instead waiting for the US- European Union (EU) fight in the upcoming WTO Round -with support from the many FTAA countries that are Cairns Group members. That said, there is room for creative thinking, going beyond the weak provisions in the Canada-US FTA and NAFTA, to find ways to reduce or eliminate agricultural subsidies and trade barriers in a purely intra-FTAA context.

Antidumping (AD) law will inevitably be a necessary part of the negotiations, because too many FTAA presidents and trade ministers have had "near death" experiences with US AD cases aimed at key exports (crude oil and steel for Mexico and Venezuela; flowers for Colombia; grapes and salmon for Chile; steel and much else for Brazil and Argentina). Even where the cases end without duties, the country's leaders realize that they cannot afford to sign a "free trade" agreement which permits another country to close its borders using so economically capricious a law that its decisions can only be explained by reference to "Alice in Wonderland," and so protectionist a law that it can only be defended as being an (unquantified) level of protection necessary to permit trade liberalization.[3]

The US knows that other FTAA countries want US antidumping law on the table. The Clinton Administration was adamantly opposed to changing antidumping rules (because of its political reliance on US trade unions). We believe that the Bush Administration will be somewhat more flexible in the FTAA negotiations. Major US agricultural exporter groups (including beef, corn and chicken) have been exposed to the vagaries of other countries' AD laws, and realize the potential loss of market access. Even more important, the US agricultural community as a whole sees AD rules as an excellent trade-off for increased market access (when the Clinton Administration claimed in October 1999 that "Congress" would not allow AD on the table at Seattle, major US agricultural companies lobbied to have a resolution to that effect *defeated* in the US House of Representatives).

The US will not consider wholesale changes outside of the WTO negotiations because US trade remedy laws are one of the most important bargaining chips for the US. It will not modify US trade remedy laws unilaterally; the US will require some important quid pro quo in the WTO negotiations. However, the Bush Administration is willing to deal and should ultimately be willing to trade off some changes to the AD regime in exchange for increased liberalization in Brazil and other FTAA countries.

To increase pressure on FTAA negotiators in countries like Brazil, the US is happy to negotiate bilateral Free Trade Areas (FTAs). The US will continue its negotiations with Chile, for example, and would like to complete this FTA by the end of 2001. Chile, with its liberal trade regime, is seen as a good trade partner for the US; US officials have stated that an FTA negotiated between these two countries can act as a model for the FTAA. Any agreement that locks in certain language automatically becomes the starting point for the US for other agreements; this is also true with the NAFTA. (Of course, this is also true with MERCOSUR, which the United States does not want to imitate.)

Uruguay's President mentioned recently that it would like to negotiate a bilateral FTA with the United States. The US response will probably depend on the reactions to the outcome of the Quebec Summit. If progress on the FTAA seems forthcoming as a result of that meeting, the US may see no real immediacy to negotiating with Uruguay; if the meeting has a sour tone, Uruguay might rise on the list of potential US FTA partners.

Although the FTAA and WTO negotiations are central to the Bush Administration's trade policy, the United States will continue bilateral negotiations elsewhere as well. Thus, it will continue its bilateral FTA negotiations with Singapore, although they are not nearly as important as they were under President Clinton, who proposed this bilateral FTA last year. Ultimately a realist, President Bush and his Administration realize that true bilateral trade with Singapore (as opposed to transshipments) is quite small compared to inter-FTAA trade. Furthermore, as both Singapore and the US already have fairly open economies, less liberalization will result from a Singapore-US Free Trade Area (FTA) than through the FTAA (except perhaps for some service areas). The Bush Administration recognizes the tactical benefit of having a foothold via an FTA in Asia, however. As stated earlier, any FTA negotiated becomes the model for the next one. A US-Singapore FTA will be useful for USTR when negotiating in the WTO or bilaterally with the United States' other Asian partners, particularly Korea and Japan. It will also provide China a template of a bilateral FTA in Asia.

The US-Jordan FTA, although not the model for the FTAA, is relevant to the discussion because of the ascendancy of labor and environment provisions in that agreement. For the first time, a US Administration (under former President Clinton) placed labor and environment provisions in the actual text of an FTA, rather than in side agreements. The Bush Administration is currently reexamining this agreement and testing the political waters to see if it can change these provisions, either by removing them to a side agreement or removing a party's right to take trade sanctions where the other country does not enforce its labor or environment standards. What happens in this agreement will forecast the likely US position regarding labor and the environment issues in the FTAA.

Although the US-Jordan FTA is not generally important for the FTAA negotiations, the NAFTA's role during the FTAA negotiations for these three countries will be important, given that the NAFTA is the starting point of negotiations for the NAFTA countries. NAFTA provisions will remain in effect for Canada, Mexico and the US, as they try to extend the provisions to other countries. The weaker the FTAA, the more important NAFTA will remain to the three countries involved. However, NAFTA members may be encouraged through the FTAA process to deepen integration in NAFTA beyond trade issues. Mexico's President Fox would like to tackle immigration issues.

As far as small countries are concerned, the US, traditionally, has been willing to negotiate preferential trade deals with such countries whose exports generally do not threaten powerful US domestic interests (e.g., the Caribbean Basin Initiative, (CBI) requirement to use US-origin fiber or fabric to take advantage of liberalized access to the US market). The CBI is a warning sign to South America that the US will press forward and provide trade benefits to other countries ahead of those in South America if FTAA negotiations proceed too slowly.

III. Major Issues from a United States Viewpoint

The US-Brazil Relationship

One obvious key factor in the FTAA negotiations is whether the United States and Brazil will be able to make the necessary concessions the other requires.

From the US perspective, will Brazil accept liberalization at the end of the day in the FTAA?[4] Will the Brazilian and US political machinery be strong enough to push reforms forward over the objections of domestic industries? What can the Brazilian government offer

domestically to its largest industries to encourage them to accept the disciplines and reduced trade barriers of the FTAA? The US will also try to discover what it can offer (apart from completely eliminating the antidumping duty law, which will not happen) to encourage export-oriented Brazilian industries to support the FTAA and lobby their government accordingly.

The fact that Brazil is entering a Presidential election cycle soon may also have an impact on this stage of the negotiations. President Cardoso has indicated that Brazil wants flexibility from the US on market access for agricultural and industrial products before Brazil will make concessions to liberalize its services sector.[5]

As a recent Council on Foreign Relations report has said, "Brazil is the fulcrum"[6] Without market-opening measures in Brazil, the FTAA does not provide much value added for the United States. On the other hand, as Brazilian officials have pointed out, non-tariff barriers cover 60% of its exports to the United States. These barriers are in politically sensitive US industries -steel, textiles, frozen orange juice and sugar. Unless these barriers come down, Brazil may believe it has little incentive to look beyond MERCOSUR. Certainly, many Brazilians

- do not trust the US;
- believe the FTAA will work only to the advantage of the US;
- believe that the US wants to open Brazil's market without opening its own to Brazilian exports; and
- believe the US will use trade remedy laws and labor and environment provisions for protectionist purposes.

Beyond this, however, lies also the fact that some Brazilian industries see no gain from an FTAA because they do not want to compete in the areas of strongest US domestic demand.[7] In the long run, Brazil cannot make itself the economic powerhouse it wants to become without increased foreign trade and without industries that can compete on the world market. To be so competitive, they must become more efficient and less protected in the domestic market. Giving up this domestic protection -albeit on a reciprocal basis- is at the heart of the FTAA.

The US will try to capitalize on any internal dissension within South America in the negotiations. Argentina has recently suspended MERCOSUR's common external tariff and said that it might want to negotiate an FTA with the US. As stated above, Uruguay is also considering such a move. In the meantime Chile, an associate member of MERCOSUR, decided to negotiate an FTA with the US instead of fully joining MERCOSUR (because Chile did not want to raise its tariffs to MERCOSUR's common external level). Chile's position is somewhat offset by Venezuela, which recently stated its intention to join MERCOSUR.

That said, Bush Administration officials are realists and recognize that it is in the US's commercial interest for the US to gain a trade agreement with MERCOSUR before the EU does. Thus, the US will look for some tradeoffs it can offer to Brazil at the end of the negotiations when the deals are struck and the public posturing is over. The US industries most likely to be affected will be contacting their Congressmen and high-level Bush Administration officials to try to stay off the tradeoff list.

In the meantime, the EU and MERCOSUR have met several times and announced they plan to start talks in July, 2001 toward an FTA. Neither the US nor the EU wants to have its industries left out of a preferential trading bloc with MERCOSUR. But if the US has some agriculture problems with MERCOSUR, these are multiplied many times over between the EU and MERCOSUR, which will likely slow down any overall agreement between the two groups. The EU would never agree to make large changes to its domestic agricultural support program in the context of a plurilateral trade agreement, but access to the EU's market for MERCOSUR agricultural products is a MERCOSUR priority.

Smaller/Least Developed Countries

Another major negotiating problem will be how to take into account the smallest and least developed countries. The Caribbean and Central American countries have already stated their position: they need special treatment. They want a longer period in which to phase in tariff changes; some perceive the need to protect their economies from being overwhelmed while securing special treatment because of their small size.[8]

Since their economies are small, providing them additional time to phase in/out special programs/tariffs should not result in large adverse trade effects for the larger FTAA economies in general. The US will be principally concerned about two issues: 1) what criteria establish which countries fit into this special treatment category; and 2) how to carve out special products for which special treatment will not apply (product/industry-specific sectors that are politically sensitive, e.g., textiles and apparel, sugar). The US may not be willing to provide accelerated access to the US market for these and other particularly sensitive exports from the smaller economies just to ensure their acceptance of the FTAA.

Venezuelan President Chavez has said that the early implementation of the FTAA would disrupt the integration process in Latin America and the Caribbean states and harm the small/weak economies of the FTAA, thus, implicitly arguing for increased time limits for these economies. On the one hand, the US will no doubt be willing to negotiate some special treatment, along the lines of what it has already agreed to in the CBI and similar legislation. But, on the other, the US will also be able to point to the fact that there is no "special and differential treatment" language in the San Jose Declaration on General Principles. Thus, the US can argue negotiators did not bind themselves from the outset to provide separate treatment for small economies, thus reducing pressure on the US to provide benefits beyond what it is willing to concede to small countries.

Given the San Jose Declaration, it seems unlikely that "special and differential treatment" would now be provided to all small economies. It seems more likely that negotiators could agree, once they come to terms with who is a small economy, that such economies may receive differential treatment in a transition period, perhaps a longer timeframe over which to reduce tariffs and make domestic laws and policies FTAA-compatible.

Another possibility is a country-by-country, product-by-product negotiation for each designated small economy, but this seems much more difficult. It could also lead to different "large" countries providing different treatment to the same small country, which would be inconsistent with the whole idea of the FTAA.

Starting and Ending Dates of the Negotiations

Most importantly, regarding starting dates, is how and whether the US's trading partners will negotiate substantively with the US before the Bush Administration receives Trade Promotion Authority from Congress. This is seen by some as a line not to be crossed. Some Latin America and the Caribbean countries have indicated at times that they will not negotiate with the United States until Congress gives the Administration such authority. Others note that the US has negotiated other trade deals without officially having this authority and that negotiations can at least begin, although not end, without this. US officials would like to have Trade Promotion Authority, but it is tied to numerous other trade issues that the Administration also wants, which may hold it up in Congress for some months.

Although Chile, supported by the US, proposed moving the end date of the negotiations forward to 2003, it seems clear the negotiations will end as originally scheduled in 2005. Countries seem to be agreed now, after the Buenos Aires meeting, that this means countries should complete the FTAA negotiations by January 1, 2005, in time to implement

the FTAA by December 31, 2005. One should keep in mind that 2005 is the year the Multi-Fiber Agreement (MFA) expires and textiles and apparel become subject to tariffs only. Given this industry's importance in the US, this change in the international market framework for textiles and clothing will inevitably affect the deal offered to small economies that rely heavily on this industry for exports. Countries desiring access to the US textile/apparel market may wish to negotiate sooner rather than later with the US. The closer negotiations edge to the end of the MFA, the harder the US textile/apparel industry will lobby the Bush Administration to keep the US textile/apparel market closed.

After the Quebec summit in April, 2001, Ecuador has become the chair of the FTAA negotiating process for 18 months. Perhaps it will be able to act as an "honest broker" between Brazil and the US.[9]

Specific Negotiating Groups

Market Access for Goods

Trade ministers have now given negotiators a year in which to recommend methods and modalities for tariff and rules of origin negotiations, understanding that not only the actual tariff reductions and the schedule for reductions, but also the rules of origin and transparent customs procedures, are critical to a successful FTAA. Rules of origin which prevent manufacturers (those from the EU or Asia, for example) outside the FTAA from entering components into a low duty country for light assembly or processing into a more advanced product with no duty are critical to the US and probably many other countries. The US will be particularly concerned about rules of origin in FTAA trading partners that have trade agreements with countries outside the FTAA. The US has proposed, generally, using the NAFTA model for rules of origin, a "general tariff shift with exceptions," rather than the "uniform tariff shift," but does not want item-by-item rules.

Reducing US tariffs to zero is not an issue for the US (other than in certain well-known sensitive industries, like textiles and apparel). Rather, the US wants increased market access and reduced tariffs abroad. The US has proposed using 1998 as the base year, eliminating tariffs over 10 years in three tranches, with the same proportion of imports (by value) in each tranche. Obviously, since US tariffs are already low, it wants tariffs abroad reduced as quickly as possible, so it proposes that the base rate for opening tariff negotiations be the lower of the WTO bound rate or the MFN applied rate. All these issues will be contentious; other countries have already suggested a 20-year phase down period for tariffs, for example (and the NAFTA provides for a 15 year tariff phase out for the most sensitive items).

The US will press for transparency in customs procedures and requirements that non-tariff barriers not replace tariffs. The US (and Canada) have also indicated that the WTO Agreement on Technical Barriers to Trade should provide the template for eliminating such barriers among FTAA signatories.

The US will also require a temporary safeguard procedure that permits countries to account for surges in imports, but the US wants the safeguard remedy limited to tariff increases, not quantitative restrictions or tariff rate quotas. The US does not want to automatically exempt FTAA members from global safeguard actions a member takes (but should be willing to give FTAA countries better treatment, within WTO rules).

The biggest snags will be drafting language that commits FTAA members to open, transparent procedures; deciding which products fall into which tariff reduction category; deciding how to provide special treatment for small economies; and drafting the exact rules of origin language.

Agriculture, including Sanitary and Phytosanitary Standards

The US wants to focus on eliminating border barriers. The principal negotiating difficulties in the agricultural sector will concern specific tariff reductions for import sensitive products (sugar, peanuts, dairy, in the US for example) and whether to discipline domestic support subsidies to the agricultural sector. US companies selling processed agricultural products want the US Government to try to reduce tariffs first on processed products, which often face higher tariffs than those on unprocessed products.

Argentina has stated that it would like to discuss eliminating domestic subsidies, but the US has stated that discipline on domestic agricultural subsidies can only be discussed in the WTO and the Bush Administration is unlikely to waver from this position. The US is concerned that the large, unrestricted domestic subsidies provided by non-members of the FTAA (principally the EU) could give those products an advantage over agricultural products produced within the FTAA. The US is willing, however, to discuss eliminating agricultural export subsidies within the hemisphere, as long as the agreement ensures non-FTAA members cannot undersell FTAA members through the use of export subsidies.

The US wants countries to agree to abide by WTO rules for Sanitary and Phytosanitary measures (SPS) and Technical Barriers to Trade (TBT). In particular, US processed foods producers have noted that differences in sanitary and phytosanitary standards can prevent the same product from being sold in different countries. Such companies are keen to harmonize standards in order to sell the same product throughout the hemisphere.

Another potential negotiating snag could arise when discussing state trading enterprises. The US wants the FTAA to permit private trading companies to trade in all markets; state-trading enterprises could not have exclusive rights in certain products. Furthermore, the US wants an agreement that governments cannot fund their state trading enterprises.

Some thought could be given to "WTO-plus" provisions in the FTAA that would prevent or deal expeditiously with sudden unilateral threats to market access (such as the recent dispute about Brazilian beef reports to NAFTA countries or the 1989 US ban on Chilean grapes).

Investment

The Bush Administration's negotiating stance is that the FTAA commitment on investment should go beyond that in the WTO. Potential problems principally exist where different countries have used different language in prior investment agreements and the language must now be reconciled in one FTAA agreement. One example concerns which companies are covered by the FTAA. Is the standard only where the company is constituted, or that plus the company must have effective economic activities in the country, or where the company is headquartered? US BITs generally use the term "every investment" is covered, whereas other countries have used "every asset". Should the FTAA require national/MFN treatment as a condition for both the pre and post establishment phases of a new investment or only the latter? The US will want both phases covered by the FTAA; current investment agreements by other countries sometimes only cover the post-investment phase.

One particular problem will be whether to include an investor-state dispute settlement provision, as in Chapter 11 of the NAFTA. The US has not yet come to an internal policy agreement on this issue, so it cannot negotiate this in the FTAA. Canada does not want to replicate the NAFTA language in the FTAA.

Another potential problem area concerns performance requirements. The US is adamantly opposed to performance requirements as a condition related to investing in another FTAA member country, whereas the Andean Pact and CARICOM, however, contain

performance requirements for investments. The US will not want such requirements included in the FTAA.

The US under Clinton had proposed adding a provision in this section of the FTAA requiring countries not to weaken environment or labor law to attract investment. Since previous negotiating instructions did not contain such language, other countries could likely disagree with this suggestion.

Services

The principal negotiating snag will be how to decide which sectors are excluded from the FTAA. The US wants to proceed on a negative approach, i.e. all services are in, unless a country specifically negotiates one out (thereby implying some concession is granted elsewhere to offset this exclusion). The US believes strongly that its service industries have a competitive advantage and wants other countries to open their services market fully.

The World Trade Organization General Agreement on Trade in Services (WTO GATS), however, is based on a so-called positive approach, whereby countries exchanged concessions in specific services sectors and the sector is not covered unless negotiated into the agreement. Although the US wants to include as many services sectors as possible in the FTAA, it may be forced to negotiate using the positive approach, given other countries' vocal opposition to conceding market access in services unless the US offers improved market access in other areas.

One sector the US does not want included, however, is air transport services, although the US has indicated that certain services related to air transport could be included.

For each covered service, the US has called for Most Favoured Nation (MFN) national treatment for service providers, additional market access provisions to ensure effective market access (no quantitative restrictions, guaranteed access to and use of publicly-provided telecommunications networks, no local presence requirements), and transparent procedures in implementing regulations, policies, etc. on service sectors. The US also proposes to deny FTAA benefits to companies directly or indirectly owned by investors from non-FTAA countries with which the US has no diplomatic relations (i.e., Cuba). The US will strongly resist weakening these provisions, arguing that they are required to ensure that practical market access is provided, as well as theoretical access.

Competition Policy

Most large FTAA countries already have competition policy regimes. The US has already shown (in a WTO context) strong resistance to a binding competition policy agreement and that seems unlikely to change. That said, negotiators could consider a softer forum (such as the Global Competition Initiative proposed last year). In addition, FTAA could be a good place to work on some of the growing problems rising from the increased number of national competition policy systems (such as duplicative/conflicting/wasteful merger reviews).

Dispute Settlement

The US proposes using the WTO model for dispute settlement provisions, which is also the general model followed by the NAFTA. The general system should not be too controversial, although certain specifics will invariably be.

Dispute settlement is an area in which the US may be able to accept some changes that would affect its trade remedy laws. In the NAFTA, Chapter 19 provides that parties can

appeal national Anti-Dumping/Countervailing Duties (AD/CVD) decisions to a binational arbitration rather than going through the domestic court system if they prefer. Chapter 19 is under attack by protectionist forces in the US, but Canada and Mexico may need to maintain it.

One interesting approach to dispute settlement may be found in the Canada-Chile FTA. Here, dispute resolution for CVD cases (and for AD until it phases out) is by the WTO, with pre-agreement to implement WTO decisions and refund illegal AD/CVD duties.

Government Procurement

At the federal level, the US has two primary goals: include as much procurement as possible (although allowing certain general exceptions) and make the procurement process as transparent as possible (so that foreign companies may compete more fairly). This is relatively easy for the more advanced countries, such as the US and Canada, but more difficult for countries whose procurement process is not already transparent. The details of this section of the FTAA will provide the negotiating disagreements more so than the overall ideas covered by the agreement.

US goals include non-discriminatory treatment of foreign companies, prohibiting the use of offsets; applying the rules to the full range of procurement financing and contracting arrangements; limiting qualification requirements to the essential minimum so that as many companies as possible qualify to bid; objective tendering specifications that are followed when awarding contracts; and prompt review procedures by unsuccessful tenderers. In addition, the US has offered several proposals to improve transparency: all laws, regulations, judicial decisions, etc. regarding procurement should be published; tendering procedures should be transparent, open and competitive; procurement notices should be published in advance; and public notice of the contract decision should be widely disseminated.

One outstanding issue in the procurement area involves procurement by sub-federal entities. Negotiators of the NAFTA were unable to include procurements by states/provinces because the states/provinces were unwilling to bind themselves and the federal government had no constitutional authority to force the issue. The US will likely be unable to go beyond the NAFTA requirements in the FTAA, although many government procurements in the United States are by sub-federal entities. To the extent other countries have a similar constitutional division of authority, this will not pose a negotiating snag, but it could be a major issue for countries with central procurement.

One other issue affecting the US will be the Buy America and Small Business Set-Aside exceptions. Canada has already stated that it wants the US to modify these programs in the FTAA, although clearly the US will not want to.

Intellectual Property Rights (IPR)

The US position is to increase obligations in this area in ways that will require other countries, but not the US, to change their laws. This will no doubt be controversial for the US's negotiating partners. Primarily, the US wants to expand obligations agreed to in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights. The US seeks not only to broaden IPR protection, but also to ensure that adequate domestic enforcement procedures exist in each FTAA member. What the US wants and what other countries, given their domestic political and legal systems, can provide often lead to differences in negotiating positions.

A particularly troublesome area will be what kind of protection to extend to pharmaceutical and agri-chemical patents. The US position, requiring substantial protection

for such patents and limits on compulsory licensing, is fiercely opposed by Argentina and Brazil. In particular, the US proposal would require that, as long as the patent remains valid, the product or process might be made, used or sold in an FTAA country by competitors only to meet marketing approval requirements.

Subsidies/Antidumping/countervailing duties

This is perhaps the most controversial section of the FTAA negotiations. The US wants no changes to its trade remedy (particularly antidumping) laws; Brazil, Chile, and other partners have stated there will be no FTAA without such changes.

One problem is that the Administration and Congress sell free trade to US interest groups by stating that the government ensures free trade will not become "unfair" trade because there are US laws to prevent this. Thus, the quid pro quo for lower tariffs and increased imports and competition in the United States is that US import-competing industries have access to laws to offset "unfair" (i.e., dumped or subsidized) imports. This quid pro quo will not change until Congress could be convinced that an antitrust model of examining unfair competition is as effective as the AD law[10] or US importers and exporters become more politically powerful than US domestic producers, neither of which is likely before 21005.

To some extent, the Administration allows Congress to play bad cop; that is, the Administration relies on Congress (which must implement any agreement) to articulate the US refusal to change its AD law. Then the Administration can use Congress' strident statements as its rationale for refusing to consider changes when, in fact, Bush negotiators might be willing to soften some trade remedy law provisions at the end of the day when the deals are made in order to get, say, improved market access for services, IPR protection, etc. To some extent, however, this is reality in the United States. Members of Congress are intimately connected with the industries in their states and recognize they will not be reelected if they are seen as selling out an industry (say, steel) to its subsidized and dumped competition.

On the other hand, many in the US do not clearly see the position of the US's negotiating partners. FTAA countries cannot afford a system where, every time that they build a non-traditional domestic industry that begins to be competitive internationally, its largest market is cut off through the AD law, thus destroying the industry.

The relative size of the markets is also an essential part of the problem. Other countries use AD laws, Canada, Mexico, Brazil and Argentina among them. Their markets are not large enough, however, to destroy a US industry that is cut out of that market through an AD case. The US industry can always "retreat" to its domestic market. The reverse is not true for products from other countries. Furthermore, generally, the US economy is too large and diverse to be harmed by setting AD duties on an imported product, unlike that of smaller economies.[11]

Although all the trade remedy laws have some controversial provisions FTAA partners want changed, clearly the focus is on the AD law and regulations. Thus, we list here some suggested AD changes for negotiators to consider.

1. Include some antitrust concepts in AD rules (although the US public negotiating position rejects this). Authorities could accept a "meeting competition" defense that would preclude affirmative injury determinations. The concept of injury could be modified so that, as is already the case in some countries, the dumping would need to be the cause of material injury, not simply a cause of injury to the domestic industry. Authorities could calculate production costs based on the antitrust model of an average variable or marginal cost methodology.

2. Require substantive pre-initiation consultations among the domestic and foreign industries and governments with a view to preventing cases.

3. Require higher standards for initiating AD/CVD cases. Require governments to corroborate the accuracy of a petition or require that a petition provide greater support for its allegations.

4. Require a higher material injury standard at the preliminary injury stage, e.g., give less benefit of the doubt to the petitioner.

5. Require a public interest test, i.e., is the country's overall public interest served by continuing an investigation.

6. Require that margins equate to the level necessary to prevent injury, even if the overall margin of dumping or subsidization is greater. The EU already does this.

7. Suspend duties if the domestic industry in the importing country cannot satisfy demand for the product in a reasonable time period at a non-aberrant price.

8. Promote settlements as the preferred method of resolving cases.

9. Change de minimis standards. For example, base de minimis margins for injury on market, not import, share; increase the de minimis threshold for FTAA countries; establish a market share percentage below which FTAA imports would be considered de minimis.

10. Eliminate the cumulation provision for FTAA countries, along the lines of the US-Israel rule, whereby these countries are not cumulated with any others unless the FTAA imports alone cause injury.

11. Change the standard for standing for petitioners so that companies that import over 50% of their domestic sales cannot be considered to support the petition.

12. Change AD methodology to reflect normal business practices concerning, e.g., record keeping, sales below cost, etc.

13. Calculate a more reasonable cost of production by using longer periods for the extended and reasonable periods of time mentioned in US law and regulations, thus resulting in fewer sales below the cost of production.

14. Make it more difficult to find, or eliminate the possibility of threat of injury.

15. Make the domestic producers post a bond to avoid frivolous cases. This makes especially good sense in the United States since the domestic industry now receives the antidumping/countervailing duties (rather than the national treasury keeping the additional duties).

Labor and the Environment

These are very disruptive topics between the US and its negotiating partners. Several, notably Brazil, view these as the US attempt to force other countries to adhere to US labor and environment standards as a way to protect US workers. Democrats in the US are adamant that no agreement will be passed which does not include some provisions upholding labor and environment standards. Latin America and the Caribbean countries have rejected the idea of sanctions for labor and environment infringements.

Although the Clinton Administration had begun to put labor and the environment in FTAs themselves (i.e., the US-Jordan FTA), the Bush Administration prefers the NAFTA formula of side agreements on labor and environment where the parties agree to uphold their own laws and regulations (and without meaningful sanctions—which could be used against the US). No doubt Republicans would just as soon leave these provisions out of FTAs, but it seems doubtful Democrats in Congress would agree to implement the FTAs without some labor and environment language.

As mentioned earlier, USTR Zoellick has floated the idea of monetary fines instead of trade sanctions for labor and environment infringements, but countries will need to consult with their private sectors before it is clear if this idea is preferable to trade sanctions.

IV. Conclusion

The Bush Administration is determined to push ahead to an FTAA agreement, while simultaneously seeking a new WTO Round and using bilateral FTA negotiations to spur FTAA and WTO talks. Brazil and other key FTAA countries realize that FTAA is the best chance to remove major US trade barriers. No other FTAA county can afford to be left behind. What will follow will be a lot of very hard-nosed bargaining, and even more dramatic public and private posturing, both for domestic and foreign consumption. The end result could "ratchet" up (liberalization of trade, services, and investment going well beyond the WTO-mandated tariff phase-outs) or down (tariffs, plus other trade provisions), depending on how skillfully the negotiators build domestic coalitions that permit domestic market opening.

Notes

[1] USTR Robert Zoellick and Rep. Bill Thomas (R, CA) have recently, separately, floated the idea of assessing monetary fines in lieu of trade sanctions when agreed labor and environment provisions are violated (as well as for violations of trade provisions). It is yet unclear how much US support exists for this idea.

[2] Media and politicians in the US and Canada ignored this underlying reality and continued to portray the US as fighting subsidies and Canada as defending them.

[3] See Horlick and Sugarman, "Antidumping Policy as a System of Law" in *Trade Rules in the Making*, pp. 341 (Rodriguez M., M.; Low, P.; and Kotschwar, B. eds.), Brookings Institution Press, 1979.

[4] Brazil's Foreign Minister was quoted in February as saying he believes Brazil will give up more than it gains in the ALCA/FTAA. Some large Brazilian industries believe they will be unable to compete given an ALCA/FTAA. Mr. Guimaraes, a Foreign Ministry official, stated his view that an ALCA/FTAA would destroy MERCOSUR (although the Foreign Ministry stressed that his views do not represent those of the Brazilian Government). See "Bush anxious for trade bloc" *Financial Times*, March 30, 2001.

[5] See *Inside US Trade*, February 2, 2001, page 23.

[6] "A Letter to the President and A Memorandum on US Policy Toward Brazil", Council on Foreign Relations, NY, February 12, 2001.

[7] *Ibid.* note 4.

[8] GAO Report on ALCA/FTAA, March 2001, page 11.

[9] Suggested by Jon Huenemann.

[10] But an antitrust model is not as effective as the antidumping law for US industries because the AD law is quicker and less expensive, especially when the US industry brings AD/CVD cases on the same product from different countries at the same time, thus reducing its marginal cost per case.

[11] The only exception to this general principle we have yet seen concerns the AD/CVD petitions on Crude Oil from Mexico, Venezuela, Saudi Arabia and Iraq. Substantial duties on crude oil could have crippling effects on the US economy. These petitions were not accepted by the US administering authority.