AN EFFICIENT AND SIMPLIFYING APPROACH TO CREATING A BALANCED FTAA: CUTTING AND PASTING FROM OTHER TREATIES AND INSTITUTIONS

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A CHALLENGE IN CRAFTING the North American Free Trade Agreement (NAFTA) was to produce a balanced package that not only addressed trade issues, but other issues, such as labour standards and the environment. Other familiar items that might be addressed in crafting such an agreement include human rights. In addition, the Free Trade Area of the Americas (FTAA) could provide an innovative model of international cooperation in some new areas. The control of corruption at the public and commercial level should be number one on the list of such a new area. But the framers of the FTAA should develop a package which is as economic and efficient as possible to operate, and which reinforces many existing global institutions, rather than creating conflict or confusion with them.

Within the FTAA, many issues can and should be addressed without creating new norms and new dispute settling institutions. Rather, the framers of the FTAA should rely heavily on existing international institutions. Thus:

- rather than creating a new human rights package, parties to the FTAA might be required to ratify the Convention on Civil and Political Rights and use the dispute process set out in the Optional Protocol;
- rather than creating a new labour package, parties to the FTAA might be required to ratify some core International Labour Organizations (ILO) conventions and use the ILO dispute resolution process.

The use of existing institutions will help these global bodies to expand their expertise and track record, thereby enhancing their credibility. In contrast, creating new norms and institutions contains several risks. Governments may not have the resources to participate adequately in both global and regional organizations. Business enterprises and individuals that must comply with international standards may also be overloaded by the proliferation of norms at both the regional and global level. International trade law has a profound

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effect on the day-to-day lives of citizens and they should have a reasonable opportunity to understand and assess developments. It is difficult to do so when there is an unnecessary excrescence of norms at both the international and regional level. Simplicity and coherence will contribute to public understanding of international trade developments.

New norms and institutions should be selectively created in a regional agreement like the FTAA where existing international norms and institutions do not address a pressing problem. In this manner, regional organizations can make a positive contribution to the creative development of global law. NAFTA was a useful and innovative model in areas such as trade and services. A number of NAFTA ideas were later incorporated into the World Trade Organization (WTO) system.

The FTAA could include innovative provisions with respect to the reduction of corruption in the public or private sectors. The FTAA should be an arena in which developed, developing, and underdeveloped countries come together and establish an innovative and effective anti-corruption regime to address corruption at both the public and private level. Corruption distorts international business, whether public authorities are involved or the parties are strictly private. It causes enormous losses of wealth to society, and greatly disturbs attempts to distribute wealth fairly within societies. Global and regional trade agreements usually do not include components or side-deals that address corruption. The FTAA could usefully innovate in this respect.

Some creative new features could be included in an FTAA anti-corruption system. But while corruption may be one place where some real creativity could be involved, extensive use might be made of ideas or monitoring mechanisms that have been developed in other forums. The Organization of Economic and Co-operate Development (OECD) and the Organization of American States have both sponsored conventions on the elimination of corruption. An FTAA component on corruption might usefully adopt or refine many of the concepts, phrases, or mechanisms from these earlier efforts.

In dealing with trade disputes themselves, the FTAA can make use of existing global norms and institutions. While the FTAA incorporates many WTO norms, the NAFTA norm is slightly and unnecessarily different at times, which creates confusion. Furthermore, an aggrieved party often has the choice of using the FTAA or the WTO dispute settling process in the context of a particular dispute. These different channels scatter diplomatic, political, and legal time and energy, and make the overall pattern more difficult for the general public to understand.

To the extent that the FTAA does incorporate existing WTO norms, it seems fairly obvious in principle that disputes could be referred to existing WTO dispute settlement processes. Even where the NAFTA creates new trade norms, there is no reason in principle why disputes

could not be referred to the WTO processes. Doing so would make economical use of existing WTO infrastructure and expertise, and would permit the WTO to establish a great body of precedents and directives that would enhance the overall credibility and coherence of the WTO system.

There is nothing unusual about using a single set of adjudicative mechanisms to resolve disputes that emerge from different bodies of law. The International Court of Justice (ICJ) has jurisdiction that arises under a wide variety of bilateral, regional, and global agreements. In its heyday, the Judicial Committee of the Privy Council in Great Britain acted as the court of final appeal for scores of overseas colonies and former colonies of Great Britain, and interpreted an enormous variety of different kinds of local laws. In Canada, the Supreme Court of Canada still acts as the court of final resort for questions of both federal law and the law of ten different provinces, each with its own set of legal principles.

It may be necessary, legally and politically, to work with the WTO system to ensure that WTO parties are ready and willing to allow WTO institutions to assist in the operation of the FTAA process. But WTO parties should welcome the opportunity to ensure that regional trade agreements operate in a manner which is coherent and supportive with the WTO system.

It may be useful to make minor adaptations in the WTO system to deal with a regional agreement. For example, the WTO could set up a regional office somewhere in the Americas to manage some functions that would ordinarily have to be referred to WTO headquarters in Geneva.

The FTAA, like NAFTA, should establish norms to deal with private investor disputes, and should do so using existing dispute settling processes such as the International Centre for Settlement of Disputes (ICSID) system and United Nations Commission of International Trade Law (UNCITRAL). In creating the FTAA, the experience with NAFTA should be closely studied. There may be useful lessons to be learned from the practice that is developing in the NAFTA context. The UNCITRAL rules on commercial arbitration, for example, were crafted with disputes between purely commercial parties in mind. There may be lessons to be drawn about how the UNCITRAL rules need to be adapted where one of the parties is a sovereign government.

The proposal here obviously includes the idea that most disputes will be settled by different specialized bodies, rather than one centralized, all purpose dispute settling mechanism. By referring different disputes (human rights, labour standards, the environment) to different bodies, there will inevitably be the risk of disagreements between the specialized bodies. An increasingly common problem in

international law is how to reconcile the different, sometimes conflicting demands, of distinct regimes. A human rights body may be more understanding and sympathetic with human rights norms than it is with free trade norms, and that same human rights body may end up interpreting the overall shape of the law in a way that unduly devalues those free trade norms. In crafting the FTAA, parties should try to anticipate these potential tensions and conflicts. In some cases, parties to the FTAA will find it useful to specify in advance which regime or institution has priority in case of conflict. Parties may also find it useful to provide that generally, where there is a dispute within the WTO system on how different legal regimes and institutions interact, the ICJ should make the decision. Doing so would be one more means by which to make constructive use of existing international institutions. As always, parties can consider adapting the ICJ system to meet regional needs. They could, as Canada and the United States have done in their bilateral disputes, provide that a chamber of the ICJ should settle the matter. It could be guaranteed that the chamber would include several judges from the Americas.

To conclude, economists have often expressed concern about the "trade diverting" effect of regional agreements, which can have adverse effects on global trade. The framers of the FTAA should be concerned about the "politic energy diverting" effect of regional agreements. If handled imprudently, regional agreements like the FTAA can deplete the resources available for managing global organizations, and can create conflict and confusion with global norms and institutions. But it should be possible instead to create an FTAA that makes use of many existing global institutions, and supports their development. At the same time, the FTAA should create new norms and institutions in selected areas where existing global law is inadequate. The FTAA, like NAFTA, can thereby serve as a model that might eventually be incorporated into the global system.

What has been proposed, in summation, is that:

- the FTAA be shaped in a way that makes effective use of existing global norms and institutions;
- that new norms and dispute settling mechanisms be selectively created in areas, like corruption, where no adequate global regimes and institutions currently exist.

The paper that follows will apply this approach to the areas of labour, the environment, and human rights. The companion piece immediately thereafter will concentrate on incorporating an anti-corruption regime into the FTAA system.