

**GLOBALISATION, REGIONALISATION & THE
AMERICAS**

THE FREE TRADE AREA OF THE AMERICAS: FUELLING THE
'RACE TO THE BOTTOM'?

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ABSTRACT

The framing of the Free Trade Area of the Americas (FTAA) over a period of ten years is a project on a unique scale and with a unique significance. According to Robert Devlin, the FTAA is undoubtedly the most ambitious collective economic initiative in the history of the Western Hemisphere. The intention is to create the biggest market in the world, comprising 800 million people and a GDP of US\$11 - 14 trillion. If it is successful, it will also bring to conclusion ten years of negotiation and bilateral and sub-regional trade agreements that will be essentially subsumed in the FTAA. However, prospects for finalising the Agreement look slim as negotiations on the scope and scale of the FTAA have reached an impasse when the January 2005 deadline passed without consensus. The failure to complete the Agreement raises significant questions about the *raison d'être* of regional agreements, the relationship between globalisation and regionalism, and the balance between free trade and social interests.

The debate surrounding the FTAA presents a particularly interesting illustration of the arguments for and against free trade agreements generally -- first, for their historic place in the global pattern and context of regionalisation within the Americas; second, for the issues raised by the current impasse.

This paper explores the inherent flaws in the FTAA and how it might have potentially negative impacts on the region in terms of social, economic, environmental and political outcomes. The first part of this paper looks at the global and regional context of the FTAA and the growth of regionalism, mediated by the US and the EU. The second part looks at how regionalism and free trade, working through the FTAA, are seen to have serious drawbacks, which have generated a range of opposition, and led to the frustration of negotiations.

This paper also questions whether, given the experience of NAFTA (North American Free Trade Area), the model itself is flawed; and whether the FTAA, in its far wider scope and significance for the Americas, will in effect fuel a 'race to the bottom'. The final question is whether the situation can be retrieved, and whether changes to the FTAA, enabling it to promote economic, social and human development, will in fact be put in place.

Key words: Civil society, Development, European Union, Exclusion/participation, Free Trade Agreements, Free Trade Area of the Americas, Globalisation, Negotiations, North American Free Trade Area, Opposition, Regional Trade Agreements, Regionalism, Southern Cone Common Market (MERCOSUR)

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INTRODUCTION

The failure of FTAs (Free Trade Agreements) to deliver sustainable growth has grown in parallel with the spread of globalisation. Opponents of FTAs condemn them for 'fuelling a race to the bottom', as they pitch poor countries against one other to produce favourable economic conditions for foreign investment, often at a high political, social, and environmental cost.

In January 2005, the debate over the costs and merits of the FTAA (Free Trade Area of the Americas) took on a new edge, with the failure of negotiating parties to reach agreement. The year 2005 has seen not consensus, but polarisation. Currently, the FTAA has reached a deadlock, which can only be broken if Brazil agrees to subordinate its interests in relation to the US.

From the streets of Seattle to the *stradas* of Sao Paulo, opponents have challenged the FTAA and what it signifies. At the heart of the opposition is the claim of civil and democratic lobbies throughout the Americas that the FTAA will reproduce the disabilities of the North American Free Trade Agreement (NAFTA), which, by transferring power to corporate interests, has frustrated democratic governance and autonomy, notably in Mexico.

Much present criticism of the FTAA focuses on Chapter 11 of the NAFTA agreement of 1994, which allows foreign investors to sue governments and demand compensation for any governmental act, including public interest laws that diminish the value of an investment. In the words of Hoebing *et al.*, this "unprecedented power granted to corporations restricts the ability of governments to protect the environment, public welfare, and to ensure that foreign investments support social, economic and environmental goals."¹ Essentially, the mechanism for resolving investor-state disputes sets big business against governments that are often unable to withstand legal challenge. Governments stand to lose sovereign control as governance is determined by vested interests. To date, US corporations have launched 28 lawsuits in Canada and Mexico, claiming damages of US\$38 billion, which strike at the heart of national sovereignty, especially in respect of laws protecting the environment and public health.²

The fact that the FTAA is modelled on NAFTA has set in place a continuing battle. Going far beyond NAFTA, the FTAA offers the whole of Latin America the opportunity for unrestricted free trade. However, civil and democratic organisations throughout the Americas have protested strongly, saying that the planned liberalisation of trade goes too far, and fails to consider the social, political, environmental and economic impact. The corporate business lobby (and particularly Brazilian business) also argues that the Agreement as proposed is fundamentally flawed, because it is not 'free' trade at all, as the US wants to establish markets abroad while protecting economic interests at home. Significantly, interests cross national boundaries. Corporate interest is identical, whether in North or South America.

The structural tensions inherent in this challenge cannot be avoided even if agreement on the FTAA is reached. On the one hand, given the ferocity of globalisation, some sort of hemispheric FTA in the Americas is inevitable. But, to address, let alone to meet the concerns of civil society for social and economic justice may undermine the competitive edge that the FTA has promised to deliver. Therefore for reasons of maximizing competitiveness, civil

¹ San Sebastian, M and Hurtig, A, 'Moving on from NAFTA to the FTAA?: The Impact of Trade Agreements on Social and Public Health Conditions in the Americas', *Revista Pan Americana de Salud Publica/Pan America Public Health Review*, 16 (4), (2004), 273.

² Hoebing, J, Weintraub, S and Delal Baer M, (eds) *NAFTA and Sovereignty: Trade-Offs for Canada, Mexico, and the United States*, (Washington, DC: Center for Strategic and International Studies), 1996.

society's concerns have not been incorporated into the negotiations, whereas big business, with its ability to influence national politics, has.

The conflict over the FTAA, and what it represents and can deliver, and the failure to incorporate a social plan, are the latest and most acute moments in the historic debate about the consequences of unrestrained free trade agreements which, by definition, have excluded or limited a regulatory social agenda. In this context, the EU represents a more progressive and successful model, which has promoted the interdependence of social and economic growth.

This paper argues that the present model for the FTAA is flawed. By focusing upon short term economic profit rather than long term investment, it is narrow minded and undermines chances for increasing competitiveness in the region. Not only does the Agreement threaten the economical, political, social and environmental landscape, it could also limit the hemisphere's long term potential and restrain its development and therefore be directly counter-productive to aspirations for a progressive agenda in the Americas.

THE MAKING OF THE FTAA

The Impact of Globalisation: Regionalism and Trade Liberalisation

Since the end of the Second World War, globalisation has encouraged the formation of competitive regional blocs to foster internal and external trade. The expansion of investment provides new opportunities for social and economic change in developing regions such as Latin America, but only if this is accompanied by conditions that ensure equitable, stable and sustainable growth, social cohesion, and development.

Since the 1990s, there has been a proliferation in the number of regional integration agreements throughout the world, and in the renewal and strengthening of others. This process is taking place against a new global dynamic, and within a new and expanding agenda. This agenda challenges an unrestrained market and puts forward ambitious aims to assert democratic control. As Jean Grugel suggests, there are three kinds of region building initiatives: integration through trade liberalisation; regional governance; and regionalism as citizenship. Onto the trade agenda, within the so-called 'new regionalism', have been grafted 'questions of democracy, accountability, participation, transparency, security and social policy'. This has brought with it a new set of social and political actors.³

The questions remain, who owns this agenda, how significant is it, and how effectively can it be pursued? To what extent can new actors, whether civil society or political groups, move beyond a mere presence, to having a real influence? To date, their influence has been extremely limited within NAFTA. However, despite the risks, governments across the globe have remained committed to regional integration in the belief that its benefits outweigh the risks. Economically, it has been thought that trade liberalisation will lead to greater flows of commerce and investment, which will in turn create jobs, reduce poverty, raise the quality of life, and promote more balanced economic development. Politically, governments have favoured integration in order to promote regional security and stability.

Regionalism in the Americas

For Latin America, economic regionalism is supposed to bring larger domestic markets, greater competition, better bargaining power and an ability to exploit complementarities.

³ Grugel, J, 'Civil Society and Inclusion in New Regionalism: Can Civil Society Influence a Trade-led Agenda?' (Paper prepared for the Second Annual Conference of the Euro-Latin Trade Network, Florence, 2002).

However, the benefits of regionalism have not met expectations, and inequalities continue to rise.

Despite the formation of sub-regional blocs, the pace and direction of regionalism in Latin America has been set by the US. While this in part reflects the pressure from the EU -- which has seen its membership rise from 15 to 25 over 10 years, and is seen as a competitor for market space -- it also reflects a historic territoriality, established by the Monroe Doctrine in 1823, that the US has ever since exercised over its southern neighbours.

Indeed, since the coming into force of NAFTA, the US has been developing bilateral FTAs and RTAs (Regional Trade Agreements) in order to make the prospect of the FTAA more acceptable. However, it was not until Latin America emerged from the economic depression of the early 1980s, and adopted fiscal discipline, trade liberalisation, deregulation and other policies that would later be defined as the 'Washington Consensus', that the US regarded Latin America as a potential market.⁴ Unlike the traditional regional imperative, which was characterised by closed and protectionist trading blocs as a way of managing economic policy, new regional trends reflects greater interdependence between states and the global trend away from protectionism. New associations have been created as a means of increasing competitiveness.

Regionalism within the Americas has also been driven by the demands of the North American economy. NAFTA illustrated the growing desire of the US to enter into formal free trade agreements with Canada and Mexico to gain economic leverage against the emerging influence and impact of MERCOSUR (Southern Cone Common Market) in South America. The coming of NAFTA revealed a global reality -- the growing trend of regionalism as a means to guarantee markets. Thus, NAFTA was signed against the backdrop of the Maastricht Treaty, which brought a single currency to the EU.

Competition for market space led the way for the US to begin negotiations on a number of other agreements, such as the Central American Free Trade Agreement (CAFTA), which was signed on 28 May 2004 and approved by the Congress on 28 July 2005. The Central American countries were added to the list of nine other countries, including Israel, Chile and Jordan, with which the US has signed FTAs.

But the US is no longer the sole potential partner. Aware of the economic and political issues, and not wanting to be excluded from Latin America, the EU has also established, or is in the process of establishing, three FTAs in Latin America (Chile, Mexico, and MERCOSUR), and pressure is mounting on Latin America to establish stronger links with Asia.

Although regional agreements may differ in shape and content, what they have in common is that they serve the loudest voices -- and those domestic lobbies that have the most to gain. Therefore, what we define broadly as a free trade agreement may, in fact, be something much more focused, as domestic groups try to protect themselves against negative consequences.

THE EUROPEAN MODEL

While regional trading blocs have been growing in Latin America, the EU has been developing different models, in which specific relationships with Latin and Central America form an explicit part.

A FTA linking countries in Latin America is of great concern to the EU. With a population of 220 million and a GDP of US\$1100 billion, making it the fourth largest economic power in the world -- after the EU, NAFTA and Japan -- Latin America is of immense interest to the

⁴ Williamson, J 'What Should the World Bank Think About the Washington Consensus?' World Bank Research Observer, 15, (2), (August 2000), 251-264.

EU. Indeed, a major objective of the EU in recent years has been to prise open the potential of the region by means of bilateral, gradual and reciprocal trade liberalisation.

However, that these debates have taken place is a commentary on the judgement that the EU is a political lightweight in the field of international relations, and suffers from the absence of a Common Foreign and Security Policy (CFSP). Contrary to the image of the success of the EU as a global economic power, the absence of a CFSP has inhibited the evolution of the EU as an international actor.

Despite this weakness, the EU still carries substantial political weight as a 'soft power', determining political change through economic incentives. Its volume of trade, investment, financial flows and regional trade agreements are testament to its prominence. The EU has used its competitive advantage to bring change by imposing conditions as well as economic incentives -- including terms of entry into bilateral and multilateral agreements, and accession to the EU itself.

The EU and Latin America

The political principles behind the EU's relations with Latin America are outlined in Article 177 of the Treaty establishing the European Community (Treaty of Rome, 1957). The Treaty makes clear that 'human development and civil society [should be] at the heart of the relationship between the two regions.' As a result, relations between the two continents reflect three priorities: first, the promotion and protection of human rights, second, the promotion of the information society, and third, the reduction of social imbalances through a global approach to poverty.

Overall, we are witnessing the emergence of the EU as a global force. Policy towards Latin America has mirrored the EU's development as a political and economic agency. Just as the EU has sought to reflect the diversity of areas of regional cooperation such as ASEAN, so EU-Latin American relations have reflected the diverse needs and opportunities of the Americas.

The EU's strategy reflects a shift away from traditional policy, towards policies that encompass general EU concerns with poverty, democracy and the rule of law. A decisive factor in forging a greater role for Latin America in EU foreign policy has been the decision of the US to take a more assertive role in Latin America. NAFTA has indeed prompted the EU to consider other 'strategic inter-regional partnerships'⁵ However, driven by its comparative advantage, this strategy is economic, rather than political. It is replicating its internal success internationally, and increasingly flexing its muscle by extending its economic reach via inter-regional cooperation. According to Mark Leonard, 'the EU's success has let the genie of regionalism out of the bottle, and it will be impossible to put it back again. This new regionalism is not about autarchic blocs at war with one another: it is about clubs that promote global development, regional security and open markets for their members'.⁶

In Latin America, the EU is determined to forge wider and deeper relations with the region as part of its broader goal for a greater international presence. Inter-regional partnerships are a *de facto* collective strategy, as they allow the EU to pursue political goals, such as good governance, human rights and democracy, through economic means. The policies and principles underlining EU strategies of bilateral agreements and region forming are thus directly at odds to the present model of the FTAA.

⁵ European Commission, Directorate-General for External Relations, European Union Relations with the United States (Luxembourg, Office for Official Publications of the European Communities, 2002).

⁶ Leonard, M. *Why Europe Will Run the 21st Century* (London: Fourth Estate, 2005).

THE ORIGINS OF THE FTAA

The inspiration for the FTAA came in 1990, with the establishment of the 'Enterprise for the Americas' initiative by President George Bush. During the 1990s, discussion of the FTAA ran parallel to the formation of NAFTA in 1994. The motivation for the US to proceed with the FTAA was the opportunity to establish wider economic re-engagement with the hemisphere as a whole. In 1994, and with the first Summit of the Americas in Miami, the FTAA began to take shape.

The countries that had most to gain and who were most interested in promoting the FTAA were either those who felt most excluded from the international markets - Central America, Andean Community (CAN)⁷ (excluding Venezuela) -- and countries that could maximize the benefits of an institutionalised free trade area - particularly Chile, Argentina, and Brazil.

The FTAA was expected to be the most comprehensive trade and investment regime in the world. It was designed to be an aggressive expansion of NAFTA, and include universal coverage for all productive and service sectors, and fixed rules at all levels of government.

For the US, the FTAA represented a chance to consolidate its economic interests in the region, and to push forward an economic model which, in time, it was hoped would become a model for FTAs endorsed by the WTO.

Opportunities and Threats

Formal negotiations began in 1994, when 34 leaders of the Western Hemisphere (except Cuba) agreed to the creation of a basic structure to enable their governments to conduct formal negotiations. The objective was a deal that would by 2005 progressively eliminate barriers to trade and investment among the participating countries.

The mission was nothing less than to establish rules for business to trade freely throughout the region. Although based on the model of NAFTA, the FTAA went far beyond NAFTA in its scope and power. It covers many countries and all industries (from agriculture to health care), and both public and private sectors. In function, it introduces into the Western Hemisphere all the disciplines of the services agreement of the WTO and GATS (General Agreement on Trade in Services), and thereby creates a trading powerhouse.

In practice, under the WTO, countries focus upon industries that have a competitive advantage, specialising in what is most economical, exporting products and using foreign exchange to purchase other goods for local consumption. This process depends on participating countries not competing with subsidised markets - particularly in agriculture, where the US has protected large agri-business.

However both experience and analysis suggest that economies of scale will ensure that the larger countries will fare better - and that countries will profit from their in-built advantages. This could have serious implications for the smaller Latin American economies where, as NAFTA has demonstrated, exports and overall productivity have increased income - but equalities between regions and within countries have not disappeared.

Opponents of the FTAA have argued that, without accommodation for asymmetries, the prospect that economic integration will lead to economic convergence is unrealistic. Without protection for small economies, and without the transfer of technology, education and infrastructure from large economies to smaller ones, there is no means to 'level the playing field' and inequalities will grow.

⁷ CAN comprises Bolivia, Colombia, Ecuador, Peru, and Venezuela.

Negotiations and Current Status

For many reasons, negotiations over the FTAA have been protracted and difficult. For example, the Venezuelan government has 'decided' that it would take no further part in the negotiations and suggested its own strategy instead – the ALBA (*Alternativa Bolivariana para America Latina y el Caribe*) – which attempts to promote economic and social development via controlled regional economic integration.⁸

In addition, there is a strong current, led by Brazil, that a SAFTA (South American Free Trade Agreement) would be more appropriate, given the detrimental effects NAFTA has had on Brazil's manufacturing and agricultural trade to Mexico. Brazil (together with Argentina and Venezuela) has, in fact, urged the formation of SAFTA, and has been a key agent in driving through the formation of the South American Community of Nations (SACN), which was formed on 8th December 2004 in Cusco, Peru.⁹ The new trading bloc is to unite MERCOSUR and the CAN with Chile, Guyana, and Suriname in one large trading bloc.

According to Isaac Bigio, 'South America has two options. One is to proceed totally behind the North American economic engine, and the other is to maintain good relations with the United States, while seeking to explore connections with new emerging powers.'¹⁰ As part of a wider strategy, the SACN fulfils the Brazilian determination to build bargaining power in negotiations with the US, thereby appeasing regional and domestic interests.

It was always acknowledged that negotiating the FTAA and meeting the ambitions as well as the fears of competing economic and social groups would be extremely difficult. In effect, opposition has come from two sources, representing two competing points of view. On the one hand, there is the civil lobby that argues that the Agreement, by subscribing solely to an economic model, will have a damaging social and economic effect on the most vulnerable. The opposing lobby, the corporate interest, led by the Brazil has obstructed the agreement, complain that the terms of trade are neither fair nor free. One of the most important issues for Brazil is access to US markets in orange juice, soybeans, and beef. The US currently has high tariffs on all three products. These industries are well represented in the nine trade negotiating committees of the FTAA, and the US is reluctant to constrain them because of domestic political considerations.

In addition, if created, the public and political power of the FTAA will be extremely wide. The conditions will apply to all laws and regulatory acts of all governments, and will apply to measures taken by non-governmental institutions at all levels. While governments have the right to regulate services, they will be able to do so only in ways that are compatible with the rules created by the FTAA.

Negotiations for the FTAA have continued regularly for the last ten years. During three Ministerial meetings – in Quebec City in April 2000, Buenos Aires in April 2001, and in Quito, in October 2002 – negotiators have tried to work out differences in draft texts. But the differences have widened. As more progressive governments have been elected in Venezuela, Brazil, Bolivia, Chile and Uruguay – there has been less rather than greater willingness to negotiate their countries' futures under the current FTAA. At the Ministerial meeting in

⁸ Interview with Hernan Escobar, Political Attaché, Venezuelan Embassy, Brussels, 15 April 2005.

⁹ SACN is the result of ten years of negotiation that brought together the two South American subregional integration blocs MERCOSUR and CAN.

¹⁰ Turck, Mary, South American Community of Nations (Comunidad Sudamericana de Naciones – CSN): <http://www.americas.org>

Miami in November 2003, for example, negotiators vastly scaled back the scope of the proposed FTAA because of these growing divergences.

In Puebla, Mexico in February 2004 and later in Buenos Aires, in April 2004 the negotiations faltered. The main obstacle has been not the smaller countries with their small overall influence, but, predictably, Brazil which has traditionally flexed its muscles by virtue of its powerful economy. Brazil has refused to sign the Agreement, alleging that it contradicts the notion of free trade. Specifically, Brazil has complained that the US has refused to give way on agricultural and steel subsidies and intellectual property. In response, the US has proposed the 'FTAA-lite', by which each country can cherry pick the agreement for itself. However, despite the fact that Brazil subsidises its industries within MERCOSUR, when dealing with the FTAA, it favoured a WTO-plus, a no-holds-barred approach. As they currently stand, FTAs designed by and suited to the US have not met Brazilian approval, and have brought the FTAA to a stalemate.

The deadline for signing the deal of 1 January 2005 passed without agreement. As of October 2005, negotiations remain suspended.

While Latin American countries consider their position, the Bush Administration is allegedly using 'divide-and-conquer' tactics to negotiate. This means, in effect, the use of bilateral, and regional agreements to pressurise Brazil into reducing its conditions. The Central American Free Trade Agreement essentially provides further evidence of the US's desire to expand NAFTA on a regional scale.

Evidence of these tactics emerged in November 2004, when the US announced the beginning of negotiations with Ecuador, Peru, and Colombia for an Andean Free Trade Agreement (AFTA) - a clear attempt to break Andean unity with Venezuela.

The question now is whether the concept of FTAA will survive these attacks – and whether it can be salvaged, and under what terms? Is there time, or the political will for a renegotiation which will give way before the realities of a new regionalism, and give equal weight to civil and social needs?

CONCERN, CONFLICT AND FAILURE

There are two main arguments against the FTAA as it presently stands. First, there are those who object in principle to free trade as a policy objective, on the grounds that it disadvantages poor economies and poor people. This lobby, made up largely of people outside the process, is neither organised, focussed or effective.

Second, there are those who object to the FTAA in terms of flaws in the model, the evidence of disadvantage already seen in NAFTA, and the exclusive and narrowly defined nature of the interests represented by the process. They condemn the FTAA as doomed to failure because of the model on which it is based, and because of the flaws that the FTAA seem doomed to reproduce -- and that are likely to set sovereignty and autonomy in unfair competition against market interests. This group has taken issue with the process itself, which has excluded the voices of those who are most affected, and in particular, those who represent civil society. Such lobbies, including the Hemispheric Social Alliance, have highlighted the contradiction between the rhetoric that token representation is somehow equal to influence, and the reality of the process.

ARGUMENTS IN PRINCIPLE

One of the most principled and powerful arguments against the Agreement is the fundamental claim that RTAs or FTAs can never benefit weaker or poorer countries, because they offer unfair odds. This section examines these arguments, as background to reviewing arguments against the FTAA in general.

Levelling the field

A central political and economic argument against the FTAA is that, like NAFTA, it is built on asymmetries that reinforce inequalities in power and opportunity. The most conspicuous inequality is that the US has a GDP equal to 75 percent of the total goods and services of the hemisphere. Yet, the FTAA would establish a system under which poor countries and wealthy countries alike are held to the same standards.

It is also argued that the FTAA will exacerbate inequalities in relation to investment. If NAFTA is any indication, the FTAA has the potential to hamper, and not provide, for real sustainable and equitable development unless GDP grows and wealth can be redistributed. However, there is neither the means nor the structure for this to occur if the same economic prescriptions continue.

On the larger canvass, opponents of the FTAA see it as another manifestation of the perils of globalisation, in which the benefits of trade liberalisation are determined by the global market, country specific conditions, and economic policies. An 'un-level' playing field reinforces asymmetries between exports and growth that can create distortions for developing countries. Its opponents say that the FTAA will lock in place legal structures that enforce the negative consequences of structural programs.

The answer to persistent inequalities, it is argued, and the way to address the disadvantages developing countries face, is to enable them to invest in industrial innovation, which includes transfers of technology, production, and new processes. In addition, they would be able to strengthen ties between production and export sectors and encourage diversification. Flexibility within domestic markets and a degree of protectionism become important. The FTAA, however, denies both.

Among those who support the FTAs, and specifically the FTAA, there is a view that asymmetrical trade relations can act as incentives to development. This argues that a relative comparative advantage of one country over another will lead to trade and FDI, which will lead to gains for the weaker side – this has become the 'rising tide lifts all boats' model. Its efficacy has yet to be tested.

In summary, those who argue against the FTAA argue that it will increase disadvantages, distort the economy, and prevent diversification. Predominately negotiated behind closed doors, with unbalanced input from civil society and corporations, the FTAA is an example of free-market fundamentalism, driven by corporate interest. Protest has taken the form of broad groups, from environmentalists to defenders of women's rights – all of whom see globalisation as the enemy. By raising awareness of the potential detrimental effects of the FTAA, protestors from the Pampas to Portland have challenged FTAA negotiators to abandon their quest for free trade in exchange for fair trade in their region.

Opposition to the FTAA: A model built on failure

Currently, opposition to the FTAA has intensified. Opponents have argued that it will exacerbate on a regional scale the negative externalities suffered following the introduction of NAFTA, which gave the rules for FTAA negotiations. It does seem the case that, despite the

widely held view that strong institutions and good governance -- and by implication, strong democracy-- are conducive to economic growth, FTAA negotiators have ignored the potential detrimental effects that the agreement will have on democratic governance, the rule of law, and state capacity to promote equitable development. At the heart of these concerns is the fact that, if unchallenged, the FTAA will reproduce Chapter 11 of the NAFTA agreement as the core of the FTAA's agreement. That this is likely to be the case is seen in the most recent draft of the FTAA, made public after the 2002 Quito ministerial meeting.

Under Chapter 11, investors obtain in-built protection that can work against the public interest. Through the investor-state dispute mechanism (ISDM), where states are pitched against companies, a private investor in one signatory state may claim that another state has violated legal obligations it has to him. In detail, investors are entitled to compensation for government measures that:

- Accord foreign investors less favourable treatment than domestic investors (national treatment standard, (Article 1102);
- Accord foreign investors of one state less favourable treatment than foreign investors of other states (the most favoured nation standard Article 1103);
- fail to afford investors minimum standards of fair and equitable treatment and full protection and security as defined by international law (minimum international standards, (Article 1105)
- Impose certain enumerated performance requirements on foreign investment (Article 1106)
- Expropriate the investment whether 'directly or indirectly or by any measure tantamount to expropriation (Article 1110)¹¹

Overall, it is argued, the effect of Chapter 11 has been 'to challenge democracy, sovereignty, the rule of law, regulatory practices and administrative effectiveness'.¹² In a wide range of examples across the NAFTA region, corporations have been able to appeal and challenge decisions made on environmental and other grounds that have infringed on labour rights.

The case of the Ethyl Corporation *versus* Canada is perhaps the clearest example of how NAFTA has limited the three government's ability to regulate or control corporations —in this case, to the detriment of public health. Canada prohibited the importation of Ethyl's gasoline additive called MMT -- on the grounds that it was a health and environmental hazard. The Ethyl Corporation responded that this was unfair under the terms of NAFTA, and Canada lost the case in the NAFTA tribunal. Rather than pay the penalty of US\$ 250 million, Canada decided to settle, paying the Ethyl Corporation US\$13 million, removing the ban on MMT, and giving a public apology to Ethyl Corporation. Canada lost because its 'precautionary principle' was not solid enough, implying that there has to be active and

¹¹ In addition, under the ISDM tribunal, there is no independent panel of judges and no system of review. Each ISDM tribunal consists of a body of three arbitrators chosen *ad hoc*, one selected by each of the two sides in disagreement, and the third selected following agreement between the two (Article 1123). Since a majority of two is enough to make a decision, it is possible that a result can be reached solely by arbitrators whom the private investor has chosen. Arbitrators are not obliged to follow earlier NAFTA decision (Article 1136) and are normally international lawyers financed by disputing parties. Public access to oral hearings of the arbitration systems is not permitted, and the decision whether to divulge documents is left to tribunal to decide. The public can be effectively banned from learning about NAFTA proceedings. Barenberg, M and Evans, P, 'The FTAA's Impact on Democratic Governance' in Estevadeordal A, Rodrik, D, Taylor, A and Velasco A, (eds.), Integrating the Americas: FTAA and Beyond (Cambridge, MA: Harvard University Press, 2004), 780-781.

¹² Ibid, pg. 791.

proved environmental and human damage before a product can be removed. Canada's defeat in this case contributed directly to its later retraction of tough cigarette packaging regulations.

In effect, evidence suggests that the tribunals are giving greater protection to investors than investors enjoy under domestic laws. The tribunals have also enlarged the definition of property against expropriation, and have diminished the degree of regulation necessary to require compensation of affected property holders.

The fundamental criticism of Chapter 11, however, is that NAFTA has reinforced inequalities. Opponents suggest that the FTAA will be socially, economically and environmentally detrimental. First, poverty will increase as wages will be lowered, in order for industries to be competitive. Second, workers' rights will be forgotten, as these would imply conditions that might put off investors, and third, that environmental standards will be disregarded, lest they be another disincentive to investors.¹³ Moreover, in a clear indication of its lack of concern towards social and environmental issues, the FTAA's 'social' regulations, which are similar to those later incorporated into NAFTA, and which allow for private arbitrator panels in labour relations matters, are not binding. To date, the NAFTA commission dealing with labour issues (NAALC) has not exercised its discretion to move any inquiry beyond the consultative phase, and there has been neither expert report nor arbitration.¹⁴

Proponents of NAFTA, however, highlight the massive growth that has occurred in trade among the US, Mexico and Canada. From 1994 to 2000 foreign investment grew 128% and total exports reached US\$621 billion. Canadian exports to Mexico and the US grew from US\$117 billion to US\$229 billion, and Mexico's exports to the US and Canada reached US\$139 billion, representing a 225% increase. From 1993, US exports to Canada and Mexico grew from US\$142 billion in 1992 to US\$265 billion in 2001.¹⁵

The evidence suggests, however, that while trade grew, growth has been uneven. NAFTA rules allow companies to pit worker against worker and to drive down wages and working conditions, and companies use the threat of leaving to break unions and get concessions at the bargaining table. There is little evidence that NAFTA has created a balanced healthy economy in Mexico, with the losers outnumbering the winners. Indeed, as a result of its large external debt and inability to control speculation, Mexico devalued its currency in 1994/1995 and is still recovering. Wages are lower than they were before NAFTA; poverty levels are higher; more jobs in the agricultural sector have been lost than created; and income inequalities have increased. Regional and economic disparities have persisted, and rather than producing 'more and better jobs' to keep workers at home, NAFTA has failed to stem

¹³ Coote, B, NAFTA: Poverty and Free Trade in Mexico (London: Oxfam Publications, 1995); Echeverri-Carroll, E, (ed.), NAFTA and Trade Liberalization in the Americas (Austin: Bureau of Business Research, Graduate School of Business, IC2 Institute, University of Texas at Austin, 1995).

¹⁴ The North American Agreement on Labour Cooperation (NAALC) and the North American Agreement on Environmental Cooperation were incorporated into NAFTA following US Congressional pressure. NAALC requires each NAFTA country to enforce its domestic laws but does not impose supranational labour rights. However, NAALC does allow for worker representatives to request the NAALC commission to investigate if a NAFTA country has failed to enforce its domestic laws. The commission can decide to take the investigation further through the following phases -- *consultation* among the three ministries of labour, a *report* by a committee of experts, and *arbitration* by members of tribunals chosen by the NAFTA states. Barenberg, M and Evans, P, 'The FTAA's Impact on Democratic Governance' in Estevadeordal A, Rodrik, D, Taylor, A and Velasco A (eds.), Integrating the Americas: FTAA and Beyond (Cambridge, MA: Harvard University Press, 2004), pg. 770

¹⁵ San Sebastian, M and Hurtig, A, 'Moving on from NAFTA to the FTAA?: The Impact of Trade Agreements on Social and Public Health Conditions in the Americas', in Revista Pan Americana de Salud Publica/Pan America Public Health Review, 16 (4), (2004), 273.

migration to the US or to boost Mexico's export-agricultural industry. Moreover, as Mexico heads towards 'NAFTA-parity', regional economic divergences are widening.

ARGUMENTS IN PRACTICE

The Failure of the Process

Against the history of NAFTA, much of the opposition to the FTAA has focused on the process itself, and what it represents --and more particularly, excludes. Despite repeated calls for the open and democratic development of trade policy, opponents believe that the FTAA negotiations have been conducted without sufficient input from civil society. As Barenberg and Evans observe, "US corporate and financial elites have played an undemocratically disproportionate and non-transparent role in the crafting and ongoing defence of the prospective FTAA's exceptionally broad investor protections."¹⁶

From the beginning of the process at the Miami Summit in 1994, a variety of groups made strenuous attempts to gain access to the negotiations, but all were rejected. In addition, when the Committee of Government Representatives on the Participation of Civil Society was finally created in 1998, three years after ministerial meetings had begun, participation was limited to a suggestions box. This was largely perceived as a 'slap in the face'. Engagement has been seen as begrudging rather than enthusiastic. The first meeting between ministers and the public in Quito was seen as more symbolic than substantive.

Evidence that the FTAA was entirely a trade-led process was highlighted by the fact that, since December 1994, of the eight ministerial positions within the US negotiating team - the main driving force behind the Agreement - more than two thirds come from the office of the USTR (US Trade Representative). Moreover, there has been no participation by elected representatives or appointed officials whose mandate encompasses broader issues of democratic government.

An Alternative for the Americas?

Opponents of the FTAA have put forward alternative agendas. For example, the Hemispheric Social Alliance has presented proposals for an 'Alternative for the Americas', which prioritise workers over corporations and capital.¹⁷ Groups opposed to the FTAA feel dismayed because early pledges were made that negotiations would reflect both private and public sectors. The first open invitation in San Jose in 1998 was followed by an FTAA ministerial meeting in Toronto in 1999, which requested the Committee of Government Representatives on the Participation of Civil Society to 'obtain ongoing input from civil society on trade matters relevant to the FTAA.' However, the dialogue has not taken place.

Following the first meeting in October 1998, Oxfam stated that "this meeting cannot be considered consultation because it does not meet the necessary conditions for it to claim that civil society is participating fully in the process. The process has been more of a matter of formality than a real exchange and consultation."¹⁸

Similarly, although a process has been set up to solicit citizens' views, there is no mechanism to incorporate public concerns into the actual negotiations. Indeed, critics complain that the

¹⁶ Barenberg, M. and Evans, P., 'The FTAs Impact on Democratic Governance', in Estevadeordal A, Rodrik, D. Taylor, A and Velasco, A (eds.), *Integrating the Americas: FTAA and Beyond* (Cambridge, MA: Harvard University Press, 2004), pg 778

¹⁷ 'Hemispheric Social Alliance, Alternative for the Americas 2002', <http://www.art-us.org>

¹⁸ Oxfam's testimonial to the committee of government representatives on the participation of civil society 1998: http://www.alca-ftaa.org/spcomm/soc/thm_meet/cstmi8_asp

demands of industry have been accepted at the cost of civil society, and that industry has written the rules. Certainly, under the so-called 'trade advisory committee system,' more than 500 corporate representatives have the security clearance to get advance access to FTAA negotiating texts. This opportunity is not open to civil society groups. The Business Forum for the Americas has met in close liaison with negotiators, whereas the public has been reduced to offering proposals without being invited to discuss them.

The outcome of this unbalanced process is that the social agenda has been driven to the margins, exacerbating fears that the FTAA in its present form will serve only big business, and that small producers, farmers, workers and families will be left at the mercy of the market. Given the failure to engage fully with the social agenda, it is therefore unsurprising that many interests in North and Latin America remain sceptical, if not actively opposed to the FTAA.

The failure to resolve these matters so far, presents an opportunity to return to negotiations to ensure that a more balanced reflection of both economic and societal needs are included in the Agreement.

CONCLUSION

Despite multilateral liberalisation, there remains little doubt that bilateral and regional trade agreements will remain on the international agenda. However, given the difficulties over the FTAA, the failure of the NAFTA model, and the nature of the opposition, it may be that FTAs/RTAs are entering an age when 'new regionalism' and a more democratic agenda may be taking shape.

As long as regionalism is seen mainly in terms of the mercantilist interests of the leading parties, then its beneficial impact on development will remain limited. In particular, as we are inclined to agree, "bilateral individual RTAs between a rich and poor country can lead to a situation where the initial income imbalances and divisions of labour will be permanently 'crystallised' along a North-South divide."¹⁹

To work for investors, producers and consumers in a proper, sustainable partnership, North-South agreements must balance between the tenets of sustainable development: stable growth, and social progress, including core labour standards and environmental protection. As Kimberly Ann Elliot has observed, "global labour standards are not only politically necessary but also substantially complementary to economic integration in the hemisphere."²⁰ Although the EU is championing these issues in the Doha Development Agenda, it has yet to promote them through RTAs already in force or under negotiation.

The evidence suggests that, under the current model, the US and the big producers are not interested in producing a benevolent model; they support FTAs that will serve their own interests. But even for the US, to build a free trade area based on low wages, low skills and profits, in a fast shifting global market, is short-term thinking. Supporting sustainable development is surely the better long-term option, both in terms of investment and in view of increasing competition from the rest of the world.

¹⁹ Defraigne, P, Deputy Director General DG Trade, European Commission, *New Regionalism and Global Economic Governance*, in UNU/CRIS e-Working papers, Bruges, 2002.

²⁰ Elliot, K, 'Labour Standards in the FTAA' in Estevadeordal A, Rodrik, D, Taylor, A and Velasco A, (eds), *Integrating the Americas: FTAA and Beyond*, (Harvard University Press, Cambridge, 2004), pg 251-254

Some in Latin America have called for a type of FTA with a 'Marshall Plan', where the US and other regional leaders focus on long-term economic and political gains. As long as the FTAA fails to recognise and negotiate a sustainable agenda, it is unlikely to help economies and communities make for real growth and fair markets. Failure to invest in human capital, in transfers of knowledge and technology, and in the encouragement of innovation and development, limits the growth of North as well as South, and will limit Latin America to being a large warehouse for raw materials and manufactured goods.

The race for competitiveness has, according to critics of the FTAA, produced a 'race to the bottom.' Globalisation has forced developing countries into a situation they cannot win. Either they join regional blocs in order to compete on a regional as well as an international level, or else they become economically excluded from the international market. However, the consequences of integration can be negative, as poor countries try to compete for investment with other poor countries by offering potential investors favourable economic conditions at the price of workers' rights and the environment. Therefore, in order to prevent a 'race to the bottom', policy-makers must change the rules of engagement and the basis of global competition. To sustain and promote growing employment and better working conditions, those who are negotiating the FTAA must include enforceable workers' rights principles in its foundations. These core principles include freedom of association, the right to organise and bargain collectively, a minimum age for the employment of children, and prohibitions on forced labour and employment discrimination. Commitment to observing these core principles should be a condition for entry into the FTAA, and appropriate enforcement mechanisms should be established.

While failure to do this so far is particularly acute in relation to the FTAA, it reflects on the model of globalisation itself -- which reinforces asymmetries, and which does not encourage convergence within a realistic timescale, let alone cost effective policies such as debt repayment. Ignoring the inescapable link between trade and social and environmental consequences will continue to alienate public support. It is only by including these larger factors in the debate that nations will achieve sustainable development based on legitimate competition. It is not simply a question of encouraging more active participation; it is also an issue of credible participation, to ensure that appeal and dispute mechanisms are fair, robust and honoured. For too long, negotiators have entered FTAs on the basis of a win-lose game with the interests of trade set against those of social and environmental protection. But, just as social responsibility in industry, ethical investment and community development have come to be seen as elements of successful business practice, so must these principles be integrated into international affairs as well.

This is where the EU can provide a particularly powerful role model. In supporting a trade agenda, environmental and social standards have been identified as promoting economic objectives. This strategy for development and competitiveness is contrary to the FTAA where the sole motivating factor is short term economic gain, and in which integration is only a means to bring markets rather than societies together.

The idea of the 'new regionalism', with its optimistic overtones for democracy, offers a potential solution for the Americas. The fundamental challenge of the 'new regionalism', as it has been defined, is to combine participation with influence; to move beyond token presence to inform decision. But the failure of the FTAA, squeezed between rival world-views, shows how far away from power those who seek to influence governance, improve democracy and promote citizenship actually are. As the matter stands, by repeating the mistakes of the past and fuelling the 'race to the bottom', the FTAA is missing an opportunity to establish a benevolent and successful economic agreement that respects and accommodates social and environmental imperatives.

It is too early to say whether the FTAA can or will be rescued, or whether Chapter 11 will be removed from the final plan; or indeed, whether civil society groups or countries with vested interests -- such as Brazil -- will prevail in the final form. What is undoubted, is that the negotiations for a FTA of the Americas, which were once conducted behind closed doors, have now been flung wide open to international criticism. The entire process is now open to public debate. We can only hope that this will encourage successful business practice and good government for the benefit of the whole community.

As Tunku Abdul Aziz told the International Institute of Finance in Kuala Lumpur three years ago:

The bottom line is simply that no change or improvement in the way we manage our business operations can be sustained if our attitude to good governance is out of kilter with contemporary global trends...Business is not just about making sound investment decisions, taking and managing risks, and dealing with economic uncertainties. Today, it is about social responsibility, putting all of our actions under public scrutiny, and responding to the concerns of those among whom we conduct our business in open and accountable way. It is important for all of us to remember that good governance, like personal integrity, is no longer the luxury of the virtuous; it has become a global business necessity.²¹

What was true in 2002 is no less true today.

²¹ Speech by Transparency International Vice-Chairman Tunku Abdul Aziz at the Fourth Meeting of the Asian Programme of the International Institute of Finance, Kuala Lumpur, 10-11 June 2002, http://www.transparency.org/speeches/meeting_asia_programme.html

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