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# THE FREE TRADE AREA OF THE AMERICAS: THE GREAT CHALLENGE FOR DISPUTE RESOLUTION

*Salvador J. Juncadella\** and *Matthew S. Poulter\*\**

The effort to unite the economies of the Americas into a single free trade area began at the Summit of the Americas, which was held in December 1994 in Miami, Florida. The heads of state and government of the 34 democracies in the region agreed to construct a Free Trade Area of the Americas (FTAA) in which barriers to trade and investment would be progressively eliminated. They agreed to complete negotiations towards this agreement by the year 2005 and to achieve substantial progress toward building the FTAA by 2000. While some issues have slowed FTAA negotiations recently, most countries in the region are working hard to come to an agreement and reap the benefits of commercial integration and lower trade barriers.

One of the most important aspects of the FTAA will be the Dispute Resolution System created by the FTAA draft agreement (FTAA Agreement).<sup>1</sup> Since the FTAA Agreement will govern major trade, economic and legal matters among the members of the FTAA, the FTAA Agreement must provide an

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<sup>1</sup> Third Draft FTAA Agreement (Nov. 21, 2003) available at [http://www.ftaa-alca.org/FTAADraft03/Index\\_e.asp](http://www.ftaa-alca.org/FTAADraft03/Index_e.asp).

excellent mechanism to resolve disputes in a fair, transparent and efficient manner or there will be a chaotic end to the FTAA's objectives.

Multinational dispute resolution systems are common features of most sub-regional free trade agreements in the Western Hemisphere. For example, NAFTA and MERCOSUR have established mechanisms for consultation, mediation and arbitration that solve disputes between their various member states. NAFTA Article 2022, for example, includes the concept of private commercial dispute settlement to solve disputes among party states.

Like NAFTA, the FTAA Agreement contains a chapter on dispute settlement that describes specific conciliation, mediation and arbitration schemes (Chapter). The Chapter's rules apply to the settlement of all disputes arising between the parties (States) regarding (i) the interpretation or application of the FTAA Agreement, (ii) situations in which a State considers that an actual or proposed measure of another State is or would be inconsistent with the obligations of the FTAA Agreement or (iii) situations in which a State considers that an actual or proposed measure of another State could cause nullification or impairment of any benefit that a State could reasonably have expected to accrue to it under the FTAA Agreement. While only individual States may initiate dispute settlement procedures, private parties involved in a dispute may petition their own governments to initiate dispute resolution procedures on their behalf.

Since the FTAA will encompass so many countries and govern a wide range of issues, virtually any dispute between States will fall under the FTAA

Agreement's dispute resolution regime. Conflicts are most likely to arise in the following areas: tariffs and non-tariff barriers affecting trade in goods and services, agriculture, subsidies, investment, intellectual property rights, government procurement, technical barriers to trade, rules of origin, antidumping and countervailing duties, sanitary and phytosanitary standards and antitrust policies.

One unique provision of the FTAA Agreement provides that disputes arising between States that are parties to sub-regional integration agreements (e.g., NAFTA or MERCOSUR) on matters governed by such an agreement and the FTAA Agreement shall be subject to the dispute settlement system of the sub-regional agreement to which the States are party. Once a State has initiated dispute settlement procedures under either the FTAA Agreement or a sub-regional agreement, the State is excluded from availing itself from the other forum.

One of the matters that we consider of great importance for minimizing the number of conflicts under the FTAA is the harmonization of laws. If laws between States are significantly different, cross-border transactions will generate large numbers of conflicts and disputes. Many States have begun this harmonization by adopting uniform laws. Some examples of uniform laws include the Inter-American Convention Against Corruption and the Inter-American Convention on the Law Applicable to International Contracts. While many States have adopted some uniform laws in order to smooth commercial

integration, these efforts must be stepped up, specifically in the areas of competition, investment, intellectual property and credit instruments.

The FTAA Agreement establishes that each State shall encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes between private parties. Private international commercial arbitration under the New York Convention of 1958 (NY Convention) or the Panama Convention of 1975 (Panama Convention) is the most feasible way to resolve the increased number of private conflicts arising under the FTAA Agreement.

Many countries such as Mexico, Peru, Uruguay, Brazil, Costa Rica and Venezuela have significantly improved their local mediation and arbitration laws, and as a result have expedited the enforcement of international arbitration awards under the NY and Panama Conventions. As a general rule, such awards are enforceable in the countries that have ratified any of the Conventions. International Commercial Arbitration under the NY and Panama Conventions may be used to resolve conflicts derived from commercial transactions or agreements, including (i) international sales, (ii) agency, representation and distribution, (iii) technology, (iv) trademarks, licenses, patents and (v) joint ventures.

The FTAA Agreement's Chapter on dispute resolution is necessary in order to regulate and efficiently resolve conflicts and disputes between the FTAA States and also between private parties dealing with international transactions.

The States must continue to harmonize their laws, improve their local laws relating to mediation and arbitration, and expedite the enforcement of international arbitration awards. We are confident that as States cooperate to efficiently resolve commercial disputes, the FTAA Agreement's Chapter on dispute resolution will contribute to successful commercial integration in the Americas.