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Dispute Settlement Vulnerability: Distilling the Concern for Small Latin American and Caribbean States under the Proposed FTAA

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DISPUTE SETTLEMENT VULNERABILITY: DISTILLING THE CONCERN FOR SMALL LATIN AMERICAN AND CARIBBEAN STATES UNDER THE PROPOSED FTAA

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'Donkey seh de worl' nuh lebble' (According to the donkey, the world is not a level playing field) – Jamaican proverb

I. INTRODUCTION

THIS article examines aspects of the proposed mechanisms for trade and investments dispute settlement under the Free Trade Area of the Americas initiative (FTAA), which will comprise thirty-four Member States, consisting of every country in the Western Hemisphere, except Cuba. Specifically, this article focuses on the trade and investment dispute settlement vulnerability of small Latin American and Caribbean states. It also includes recommendations that should both be considered and meaningfully represented in ongoing negotiations for the establishment of the FTAA.

The proposed FTAA is primarily concerned with trade and investment.[1] Although it has been touted as a U.S.-led response to integration within the European Union (EU),[2] the FTAA does not represent an express intention for political unionism. Instead, it represents an intention for the establishment and maintenance of a "free zone" for trade and investments in the Western Hemisphere.[3] Beyond trade and investment, express parallels with the EU become blurred, or disappear, and it becomes clear that the socio-political objectives of the EU[4] are not aligned

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1. Free Trade Area of the Americas – FTAA, *Second Draft FTAA Agreement*, art. 1, *available at* http://www.alca-ftaa.org/ftaadraft02/draft_e.asp (Nov. 1, 2002) [hereinafter FTAA].
2. *See* Sarah Anderson, *President Bush Faces Hurdles in Fulfilling his Father's Free Trade Dreams*, Heinrich Böll Foundation, *available at* http://www.boell.org/docs/Cancun_Anderson.pdf (last visited Sept. 2, 2004).
3. FTAA, *supra* note 1, art. 2.
4. Consolidated Version of the Treaty Establishing the European Community, Mar. 25, 1957, pmbl., *available at* http://europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.003301.html (last visited Sept. 2, 2004).

with the "a-political" scope of the FTAA.[5]

There is no comparable institution to the European Court of Justice (ECJ), for example, within the proposed FTAA. By itself, the ECJ cannot level the trade and investments dispute settlement regime within the EU. However, it has been instrumental in the maintenance of a more justiciable framework for EU commercial transactions. In particular, the ECJ serves as a vanguard of the EU community in trade and investments transactions which will not be replicated under the proposed FTAA. In theory, an ECJ-type FTAA institution could be beneficial; however, its non-existence is justifiable on the basis that it would be contrary to the a-political nature of the FTAA.

Although the focus of this article is on the realities of small and vulnerable Caribbean and Latin American states, the establishment and maintenance of an appropriate FTAA regime for the settlement of trade and investments disputes is relevant to all Member States. First, an appropriate dispute settlement regime is a prerequisite for the success of the FTAA.[6] Second, the relevance and viability of the FTAA will ultimately be determined by socio-political and economic considerations. Those considerations are intricately and inseparably bound. The surest way to loose socio-political support and avenues for economic prosperity is by the maintenance of a dispute settlement regime which is ineffective.

II. ECONOMIC DEVELOPMENT

The concept of development is a Western ideology.[7] In a classical sense, development is more or less synonymous with the idea of modernization.[8] The underlying assumption is that the more prosperous states of Europe and North America are more modern than the poorer states of Africa, South America, and Asia. It is further assumed that modernization is desirable and can be achieved "by means of an imitative process, in which the less developed countries gradually assume. . .the qualities of the industrialized [modern] nations."[9]

The modernization paradigm has been subject to heavy criticism, particularly on the basis that it promotes reliance on Western ideology and industries without meaningful consideration for the realities of developing countries. During the 1970s, a growing level of disenchantment with the modernization paradigm led to reliance on a dependency counter-paradigm. This counter-paradigm emphasized the socio-political, institu-

5. FTAA, *supra* note 1, art. 2.
6. *See, e.g.*, Dep't of Foreign Affairs & Int'l Trade, *FTAA Draft Text, Canada's Position and Proposals, and Frequently Asked Questions, available at* http://www.dfait-maeci.gc.ca/tna-nac/DS-P&P-en.asp (last modified Mar. 8, 2004) [hereinafter *Canada's Positions and Proposals*].
7. BJÖRN HETTNE, DEVELOPMENT THEORY AND THE THREE WORLDS: TOWARDS AN INTERNATIONAL POLITICAL ECONOMY OF DEVELOPMENT 29 (Addison-Wesley, Longman Group Limited, 2d ed. 1995).
8. *Id.* at 49-50; MICHAEL P. TODARO, ECONOMIC DEVELOPMENT 79-90 (Addison-Wesley, 7th ed. 2000).
9. HETTNE, *supra* note 7, at 49.

tional, and economic disparities of developing countries, and promoted self-reliance[10] and de-linking of national economies from the world economy.[11]

Both the modernization and the dependency paradigms have inherent weaknesses and neither has provided a sufficient framework or explanation for development. Thus, a number of other developmental paradigms have also been relied upon. These other schools of thought tend to fall somewhere between or within either the modernization or dependency paradigm, and each represents a refinement of one or the other.[12] It appears that current international trade and investment realities, evidenced by the World Trade Organization (WTO) regime and Regional Trade Arrangements (RTAs), favour greater reliance on the modernization paradigm.

Economic development is a multidimensional process and it represents the fulcrum of Western ideas on development. Its basic objectives are enhanced socio-cultural and economic change, both for the state and its individuals. It is usually measured by reference to: (1) rising per capita incomes; (2) elimination of absolute poverty; (3) greater employment opportunities; and (4) lessening income inequalities.[13] Its benefits are recognized where economic activity enables people to overcome the "helplessness and misery arising from a lack of food, shelter, health and protection."[14] Insofar as the FTAA is concerned, unless it improves the material conditions of the poorer people in the hemisphere, it fails as an instrument of economic development.

Hemispheric economic development under the FTAA is an ambitious objective. It requires special attention to the individual needs of a diverse group, and the principles of special and differential treatment must be entrenched.[15] The role of the United States is critical, and its attitude towards the special and differential needs of Member States will determine the benefits of the FTAA to the small states of Latin America and the Caribbean. Access to the U.S. market, for example, is essential, and the validity of the FTAA will depend on a U.S.-supported regime enabling meaningful trade and investment arrangements with the United States.[16]

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10. TODARO, *supra* note 8, at 91.
11. HETTNE, *supra* note 7, at 87-93.
12. TODARO, *supra* note 8, at 77-104.
13. *Id.* at 16-18; *Declaration on the Right to Development*, U.N. GAOR, 41st Sess., 97th mtg., U.N. Doc. A/RES/41/128 (1986).
14. TODARO, *supra* note 8, at 16-17.
15. Patsy Lewis et al., *The Future of Special and Differential Treatment in the FTAA*, *in* Presentations and Documents, The Greater Caribbean in Trade Negotiations, Seminar-Workshop, Port of Spain, Trinidad & Tobago, July 14-15, 2003, *available at* http://www.acs-aec.org/Trade/s_tr_neg/presentations.htm.
16. Esteban Pérez, *Special and Differential Treatment: Effects and Implications for Small Open Economies*, *in* Presentations and Documents, The Greater Caribbean in Trade Negotiations, Seminar-Workshop, Port of Spain, Trinidad & Tobago, July 14-15, 2003, *available at* http://www.acs-aec.org/Trade/s_tr_neg/presentations.htm.

III. TRADE AND INVESTMENT

Trade and investment activities are critical to the economies of every country. Invariably, trade and investment involve domestic and international components and activities, which are subject to contractual arrangements. In general, the benefits of trade and investment are indisputable. The maxim "let the buyer beware," however, is as relevant in trade and investment as it is in any other commercial activity. Trade and investment are risk intensive, and in all cases interested parties should conduct appropriate due diligence before agreeing to any related activity or policy.

Domestic trade and investment activities rely exclusively on the provisions of national laws and contractual terms. International activities, in contrast, are usually subject to treaty and other official inter-governmental arrangements. Thus, participants in international trade and investment activities have recourse to relevant treaty provisions, in addition to such other protection as may be available under national laws and contractual terms. In many instances, special incentives are available to foreign investors and biases in their favour are justified on their foreign exchange earnings capacity.

Neo-liberal market economics, which includes the concept of free trade and investment opportunities in commercial activities, is in vogue. In short, proponents of neo-liberalism argue that open and free trade and investment opportunities are required for economic growth and development. Consequently, its proponents argue that there is no place in international trade and investment for protective tariffs and preferential trade agreements.

The major proponents of neo-liberalism are the Group of Seven (G7) wealthy nations, with the IMF and World Bank also approving of the philosophy. The U.S.-inspired economic and political bias in favour of neo-liberalism resonates throughout Latin America and the Caribbean. There, the bias is especially significant, since the majority of countries in the hemisphere conduct a significant proportion of their trade with the USA.[17] Foreign investment into the region is also led by U.S. investments. It is not surprising, therefore, that the arguments which favour an open embrace of the FTAA and a deepening regional impact of U.S. led neo-liberalism are attractive to many persons.

The concept of free trade and investment opportunities has emerged as an indispensable aspect of globalization.[18] Where international trade is concerned, bilateral and multilateral agreements require open domestic markets and the elimination of access barriers. International investment

17. *Id.*

18. BILLIE ANTOINETTE MILLER, MANAGING FOREIGN POLICY IN AN INTERDEPENDENT WORLD (Florida International University, Honors Excellence Occasional Paper Vol. 1, No. 1, 2001), *available at* http://honors.fiu.edu/literature/miller.pdf (last visted September 2, 2004).

agreements, on the contrary, facilitate the movement of capital and provide official protection for participants and their activities.

Free trade and investment opportunities are not synonymous with fair trade and investment opportunities. In this context, "free" connotes the capacity to trade and invest without jurisdictional or other borders on terms no less favourable than those enjoyed by other persons. "Fair" connotes the capacity to trade and invest across jurisdictional borders on conditions which do not exploit the inherent vulnerabilities of other persons. Fair trade is a question of substance and it implies adherence to principles of commercial morality across time and space.

The objectives of the FTAA include trade liberalization and the elimination of barriers to free trade among parties.[19] In consonance with these objectives, the FTAA contemplates an absence of preferential trade arrangements and protective tariffs. It provides for the better of Most Favoured Nation (MFN) or national treatment,[20] and parties specifically commit to a standard of fair and equitable treatment.[21] Notwithstanding the express commitment to fair and equitable treatment, the FTAA is primarily committed to free, not fair, trade among Member States.[22] This commitment underscores the bias in favour of neo-liberalism and free market economics.

The obligation to accord MFN, national, or fair and equitable treatment is a contractual undertaking, the breach of which may be visited with significant damages or other remedies.[23] MFN or national treatment, which infers fair and equitable treatment, is a standard feature of bilateral and multilateral trade and investment treaties. From this perspective, where trade and investment are concerned, contracting parties will be no more disadvantaged with than without the FTAA.

Although the requirement of MFN, national, or fair and equitable treatment is consistent with accepted practice, the absence of preferential trade arrangements and protective tariffs question the concept of fair and equitable. Invariably, small states depend heavily on international trade, and the nature and extent of preferences extended to them have determined their economic development.[24] The unmitigated adoption of rules for the elimination of preferences and tariffs is "likely to create a higher degree of difficulty for these [small] states when compared to larger

19. FTAA, *supra* note 1, art. 2 (concerning the general provisions).
20. *Id.* art. 5 (concerning the chapter on investments).
21. *Id.*
22. *Id.* art. 2 (concerning the general provisions).
23. CME Czech Republic B.V. (The Netherlands) v. Czech Republic, UNCITRAL Arbitration Proceedings (Neth. - Czech Rep. 2001), *available at* http://www.mfcr.cz/static/Arbitraz/en/PartialAward.doc (last visited Sept. 2, 2004).
24. Michael Witter et al., *Measuring and Managing the Economic Vulnerability of Small Island Developing States*, Small Island Developing States Network, at 10, *available* at http://www.sidsnet.org/workshop/Jamaica_rt_presentations.html (last visited Sept. 2, 2004) (presented at Global Roundtable for the World Summit on Sustainable Development, Montego Bay, Jamaica, May 9-10, 2002).

ones."[25] In most instances, small states rely on a narrow range of resources and suffer diseconomies of scope and scale, and the removal of preferential arrangements may have the effect of crippling their only substantial income-creating resources.[26]

The fate of the Windward Islands' banana industry under the WTO regime is an appropriate point of departure. Export bananas have been produced by Windward Islands' growers for many years under EU tariff quota protection. Bananas have been their main income-creating resource, and have had a critical role in their developmental strategy. The industry employs significant numbers of persons, encourages rural stability, and attracts foreign exchange earnings. However, the general consensus is that the industry is uncompetitive and cannot exist without preferences and quota guarantees.[27] In essence, preferences, which have "formed an important part of the global trade architecture since the inception of the Generalised System of Preferences (GSP) in 1968,"[28] have kept the Windward Islands' banana industry alive.[29]

In 1997, the EU/ACP banana regime, which applied to the Windward Islands, was found to be WTO non-compliant. Non-compliance was determined on an application from the United States against the EU/ACP regime, and the Windward Islands were not allowed to represent their interests. The deliberations were decidedly legalistic, and on April 11, 2001, the United States and the European Commission agreed on a new tariff-only regime for implementation by 2006.[30] The new regime has had a devastating impact on the economies of the Windward Islands and was determined without sufficient regard for the developmental benefits of preferential arrangements.[31]

A. SIZE AND VULNERABILITY

There is no single definition of what constitutes a small state, and size can be measured in terms of population, land mass or gross national

25. Lino Briguglio, *The Vulnerability Index and Small Island Developing States: A Review of Conceptual and Methodological Issues*, University of Malta Website, at 6 (Draft Version), *available at* http://home.um.edu.mt/islands/vulnerability_paper_sep03.pdf (Sept. 3, 2003).
26. Witter, *supra* note 24, at 6-10.
27. REPORT OF THE CARIBBEAN TRADE AND ADJUSTMENT GROUP, IMPROVING COMPETITIVENESS FOR CARIBBEAN DEVELOPMENT 16 (Caribbean Regional Negotiating Machinery, Report No. CRNM/CTAG/Final Report/Rev2/08/01, 2001), *available at* http://www.crnm.org/documents/studies/Improving%20Competitiveness%20for%20Caribbean%20Development.pdf (last visited Sept. 2, 2004) [hereinafter RTAG].
28. Initiative for Policy Dialogue, *Adjustment to the Doha Trade Regime: Policy Problems and Solutions for Developing Countries and International Economic Institutions*, at 9 (2003), *available at* http://www.cgdev/docs/CommWTO. . . .pdf
29. RTAG, *supra* note 27, at 16.
30. *Id.*
31. Witter, *supra* note 24, at 22. The authors correctly state, "Because of their intrinsic economic vulnerabilities, many SIDS may not have survived as independent states in the absence of 'artificial' props to mitigate their intrinsic vulnerabilities." *Id.* at 22.

product.[32] Notwithstanding the inherent difficulties associated with stratification on the basis of size, smallness is associated with a number of economic and other disadvantages. Those disadvantages include: (1) limited natural resource endowments and high import content; (2) limitations on import substitutions possibilities; (3) small domestic market and dependence on export markets; (4) dependence on a narrow range of products; (5) limited ability to influence domestic prices; (6) limited ability to exploit economies of scale; (7) limitations on domestic competition; and (8) problems of public administration.[33]

The disadvantages of small size indicate significant exposure to systemic and other risks. The type of systemic risks to which small countries are exposed would include, for example, crises in the financial sector as a result of volatility in the international financial market. In essence, small states are vulnerable and susceptible to harm from external forces over which they have no control.[34] In this context, external forces assume a liberal definition since the phenomenon of globalization, which encourages trade and investment liberalization and deregulation, has in many ways localized the presence and threat of external forces. In the financial sector, for example, multinational financial conglomerates operate in and are able to transfer their problems from one state to another almost instantaneously. Insofar as the commonwealth Caribbean is concerned, "by comparison to larger countries, small states are more susceptible to environmental and economic risks,"[35] and their vulnerability has increased with liberalization and deregulation in trade and investment.[36]

Small Latin American and Caribbean states are inherently vulnerable to "economic marginalization in the context of trade liberalization and globalization."[37] Therefore, unless their interests are adequately represented and protected, arrangements, such as the FTAA, which rely on neo-liberalistic ideals of free and unmitigated trade and investment opportunities, could sacrifice their socio-economic wellbeing.[38] Conse-

32. Lino Briguglio, *Small Island Developing States and their Economic Vulnerabilities*, Global Environment Information Centre, at 2, *available at* http://www.geic.or.jp/islands/docs/lino.html (last visited Sept. 2, 2004).
33. *Id.*
34. Witter, *supra* note 24, at 3.
35. Tuiloma N. Slade, Small Island States: Special Characteristics for Development, Keynote Address at Brussels Seminar on Small Island Developing States: Their Vulnerability, Their Program of Action for Sustainable Development, Their Opportunities for Post-Lome (Sept. 1-2, 1998), *available at* http://www.oneworld.org/ecdmp/en/events/98013/slade.htm.
36. Witter, *supra* note 24, at 9-10.
37. REPORT OF COMMONWEALTH SECRETARIAT/WORLD BANK JOINT TASK FORCE ON SMALL STATES, SMALL STATES: MEETING CHALLENGES IN THE GLOBAL ECONOMY 80 (World Bank, 2000), *available at* http://wbln0018.worldbank.org/html/smallstates.nsf/(attachmentweb)/final/$FILE/final.pdf (last visited Sept. 2, 2004) [hereinafter REPORT OF COMMONWEALTH SECRETARIAT].
38. Vanessa C. Rolle, *Resist Pressure to Join FTAA, Bahamas Urged*, BAH. NEWS, June 4, 2003, at Business Section, *available at* http://www.bahamasb2b.com/news/wmview.php?ArtID=1804. Sir Shridath Ramphal, then Chancellor of the UWI, is quoted, concerning entry into the FTAA, as follows: "No society in the world is ready . . . Caribbean countries cannot enter into an arrangement of this kind given

quently, continued dialogue among FTAA Member States must seriously re-assess the fundamentals of neo-liberalism and the need for special and differential treatment for the small states of Latin America and the Caribbean.[39]

The hemispheric economic space contemplated under the FTAA cannot exist without the small states of Latin America and the Caribbean. The initiative contemplates the Americas as a single entity. By definition, small Latin American and Caribbean states are included; without them the FTAA would be unrepresentative. The FTAA includes the United States on the one hand and Haiti on the other. Between those two extremes are thirty-two other states, whose economic development evidence significant disparities.[40] Given the manifest economic disparities, the FTAA has had to depart from its neo-liberalistic proclivity and include provisions for special and differential treatment, without which small Member States cannot be active participants.

In general, small states have a weak voice and limited power at the international level.[41] Their weak voice and limited power derive from "difficulties they frequently experience, in light of their small governmental scale, in operating effectively within multilateral decision-making and implementation systems."[42] In many instances, larger states agree on multilateral policy frameworks with little or no input from smaller states, which have significant impact on their economies. The WTO regime, for example, represents a multilateral framework for international trade and investment that under-represents the input and interest of small states.[43] It institutionalizes trade liberalization and globalization without adequate special and differential treatment safeguards for small states.[44]

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our inequalities. They must have special and differential treatment for us - for small economies, for weak economies, for poor countries." *Id.*

39. H.E. Jayen Krishna Cuttaree, *Rules Issues and Special and Differential Treatment*, Deutsche Stiftung Für Internationale Entwicklung (DSE), *available at* http://www.dse.de/ef/wto02/cuttaree.htm (last visited Sept. 2, 2004). The Honourable Minister of Industry and International Trade of Mauritius posits, "The notion of Special and Differential treatment is an important trade policy instrument that enables weak and less developed countries to integrate in the multilateral system by granting them special advantages and flexibilities". *Id.*

40. Lewis et al., *supra* note 15.

41. Gerry Helleiner, *Small Economies, Trade Negotiations and Poverty Reduction*, Third World Network, at 1, *available at* http://www.twnside.org.sg/title/gerry2.htm (July 2001).

42. *Id.*

43. *See* Joseph E. Stiglitz, *Cancún Failure: A Triumph for Democracy*, 79 S. BULL. 230 (2004), *at* http://www.southcentre.org/info/southbulletin/bulletin79/bulletin79-04.htm#P583_104219 (last visited Sept. 2, 2004). Note Stiglitz's comment:

> When I was Chief Economist at the World Bank in early 1999, I went to Geneva and gave a talk to the WTO in which I tried to highlight the ways in which the Uruguay Round had been unfair to developing countries, how the agenda that had been set at the Uruguay Round was an agenda that had been set by the advanced industrial countries for the advanced industrial countries and wasn't really concerned about the well-being of the developing countries. *Id.*

44. Rolle, *supra* note 38.

Although the concept has received consideration at various levels, there are no agreed-on indicators of what constitutes a small economy in need of special and differential treatment, under any multilateral agreement.[45] There are working guidelines, and their application should promote the encouragement of competitiveness. Its measures should also make dispute settlement access mechanisms available to small economies. The principle has been recognized in the framework of the WTO[46] and is a critical feature of the Caribbean Community (CARICOM).[47] It has also received special consideration in FTAA negotiations, and the question is not whether, but to what extent, it will be recognized and implemented under the Final FTAA Agreement.

The WTO assumes that its rules are beneficial to small developing states. Its approach to special and differential treatment is to provide adjustment tools, which should enable developing countries to modify their laws and economic policies in line with its rules.[48] An evaluation of the adjustment tools and their impact is beyond the scope of this article. However, the WTO approach, which has been adopted by the FTAA, accords with orthodox neo-liberalism. In principle, the FTAA provides for special and differential treatment on terms no less favourable than those contemplated by the WTO.[49] This approach could, in practice, lead to an extension of the coverage, range, and character of adjustment tools relied on by the WTO.[50]

Although the promise of special and differential treatment is admirable, its implementation is problematic, and the framers of the FTAA agreements are yet to agree as to what constitutes a small state in need of special and differential treatment.[51] Since the late 1990s, there has been a growing neo-liberalistic trend which favours pre-determined limits on

45. Antonio Romero, *International Trade Negotiations and Small Economies in Latin America and the Caribbean: Asymmetries and Special and Differential Treatment*, *in* Presentations and Documents, The Greater Caribbean in Trade Negotiations, Seminar-Workshop, Port of Spain, Trinidad & Tobago, July 14-15, 2003, *available at* http://www.acs-aec.org/Trade/s_tr_neg/presentations.htm (presented by the Permanent Seretariat Latin American Economic System (SELA)).

46. Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, pmbl., 33 I.L.M. 13 (1994) [hereinafter WTO Agreement]. The agreement is premised, *inter alia*, on the recognition that "there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development." *Id.*

47. *See, e.g.*, Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, July 4, 1973, art. 49, *available at* http://www.caricom.org/archives/revisedtreaty.pdf.

48. General Agreement on Trade in Services, April 15, 1994, art. XIX(2), WTO Agreement, Annex 1B, 33 I.L.M. 1168 (1994). This provision, for example, enables developing countries to progressively liberalize their economies as they develop.

49. Perez, *supra* note 16.

50. *Id.*

51. Commonwealth Secretariat, *Small States in Transition – From Vulnerability to Competitiveness*, *available at* http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=36004 (Jan. 18-21, 2004) (paper presented at the Executive Forum on National Export Strategies).

special and differential treatment for small states without promoting their inherent vulnerabilities.[52] Notwithstanding this intellectual stance, small states are inherently vulnerable, and the FTAA has a principled position which requires it to determine special and differential treatment on a case by case basis.

The small states of Latin America and the Caribbean are interested in the broadest application of special and differential treatment.[53] Their economies are vulnerable and increased globalization, through the WTO and FTAA, "translate into competitive challenges, some of which can be analyzed as external shocks that may entail a risk of marginalization from the global economy."[54] Unfortunately, globalization is an irreversible trend.[55] It is promoted primarily by developed countries whose agendas do not necessarily coincide with those of developing countries. Developed countries, for example, do not require special and differential treatment and will not promote it with the level of enthusiasm that they would liberalization and privatization, which are more critical to their economies.

The FTAA is an initiative among former colonies of imperial European states. They all, at one time or another, served as primary producers for the benefit of Europe. Thus, the historical realities which influence their economic development, levels of diversification, and current vulnerabilities have been determined, to a greater or lesser extent, by the vicissitudes of European tastes. In recent years, the small states of Latin America and the Caribbean have come to rely more on the vicissitudes of the U.S. economy.[56] Thus, the U.S. attitude towards their sovereign and economic aspirations is critical.

Although the United States shares a history of colonialism with other Member States, the FTAA has not been galvanized on this front.[57] The United States, more so than any other member, has progressed beyond the clutches of its colonial past and does not require special and differential treatment. The FTAA ascribes hegemony to the United States and it anticipates developmental benefits for all. Unfortunately, multilateral trade and investment arrangements do not result in equal benefits and can be used as instruments of political and economic control. There is no evidence to suggest improper FTAA motives, and an evaluation of

52. Manuel Tortora, *From Development to Trade or from Trade to Development* 5, in SPECIAL AND DIFFERENTIAL TREATMENT AND DEVELOPMENT ISSUES IN THE MULTILATERAL TRADE NEGOTIATIONS: THE SKELETON IN THE CLOSET (UNCTAD, Draft No. WEB/CDP/BKGD/16, 2003), *available at* http://www.unctad.org/sections/ditc_tncdb/docs//webcdpbkgd16_en.pdf.
53. Rolle, *supra* note 38.
54. REPORT OF COMMONWEALTH SECRETARIAT, *supra* note 37, at 80.
55. DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS, FOREIGN DIRECT INVESTMENT IN THE CARIBBEAN BASIN: BACKGROUND AND ISSUES 2 (Organisation for Economic Co-operation and Development, Report No. DAFFE/IME(2000)4, 2000), *available at* http://www.oecd.org/document/51/0,2340,en_2649_34863_1898803_1_1_1_1,00.html (last visited Sept. 2, 2004).
56. Perez, *supra* note 16.
57. FTAA, *supra* note 1, arts. 1 & 2 (concerning the general provisions).

whether it could be used as an instrument of political and economic control is beyond the scope of this article. However, the possibility exists, and through its own instrumentality, the FTAA could become a "court of sovereign and economic doom" for small Latin American and Caribbean states.[58]

Notwithstanding or perhaps as a result of their inherent vulnerabilities, the small states of Latin America and the Caribbean largely depend on international trade and investment. They maintain significant trade links with the United States, and their interest is intricately bound to U.S. domestic and foreign policy. However, it is naive to believe that U.S. altruism will promote a hemispheric agreement to the detriment of its own economy. Orthodox neo-liberalism pigeonholes trade and investment as a "win win" economic arrangement. However, some gain more than others. Individual states must conduct their own due diligence to determine how the FTAA will impact their aspirations for development.

Invariably, trade and investment arrangements give rise to disputes at one level or another. Consequently, however well intentioned the parties are and however well documented the arrangement is, prudence requires parties to prepare for disputes. Thus, with or without broad-based support for the principle of special and differential treatment, the small states of Latin America and the Caribbean must improve and maintain their capacity for dispute settlement.

B. DISPUTE SETTLEMENT

Dispute settlement mechanisms are indispensable. Although classical definitions highlight the distinctions between trade and investment, an investment involves an aspect of trade. Thus, it is not surprising that the dispute settlement mechanisms relied upon in international trade are also relied upon for investments.

As a general rule, trade and investment disputes can be distinguished from ordinary commercial disputes on several grounds. More often than not, the quantum in dispute is significant, and the issues involved may have considerable political implications.[59] Ordinary commercial disputes are usually resolved by judicial or non-judicial mechanisms that do not involve the state in a diplomatic capacity. Trade and investment disputes, however, are usually resolved by mechanisms that involve the state in a diplomatic capacity at one stage or another.

Dispute settlement mechanisms are of two basic types - judicial and non-judicial. In essence, judicial mechanisms are adjudicative and limit disputants to reliance on the process of national courts. In contrast, non-judicial mechanisms take a variety of forms and do not always rely on the process of national courts.

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58. Rolle, *supra* note 38.

59. JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ch. 1 (Kluwer Law International 2003).

The variety of non-judicial dispute settlement mechanisms includes re-negotiation, diplomacy, mediation, conciliation, and arbitration.[60] Re-negotiation involves a re-examination of the parties' agreement and usually precedes other mechanisms for dispute settlement. Diplomacy represents re-negotiation at the state level, and if it fails, parties may resort to other mechanisms. Conciliation and mediation are essentially the same mechanism. Each enables parties to resolve their disputes with the assistance of a third party who fulfils a facilitative rather than adjudicative role. Arbitration enables parties, subject to legal prohibitions and their own requirements, to resolve disputes in an agreed manner without the involvement of national courts.[61]

Arbitration is adjudicative and contrasts with other forms of non-judicial mechanisms which are mediative.[62] In general, arbitration and other adjudicative dispute settlement mechanisms apply established, legalistic rules to issues and compliance with decisions. Re-negotiation, conciliation, and other mediative mechanisms, on the other hand, encourage pragmatic, usually power-based negotiation, while diplomacy is heavily relied upon to ensure compliance.[63]

Appropriate dispute settlement mechanisms are critical in regional trade and investment arrangements.[64] Whether adjudicative or mediative, trade and investment dispute settlement mechanisms are inherently unjust. Thus, appropriateness does not necessarily translate as absolute fairness or an absolute lack of bias. As with the settlement of domestic disputes, economic and other disparities weigh heavily, and a just outcome may substantively represent no more than an appearance of justice having been done.[65]

Inherent weaknesses notwithstanding, the settlement of international trade and investment disputes relies on established mechanisms. The significance of particular dispute settlement mechanisms invariably are determined by established goals and their capacity to actually resolve disputes and promote credibility. There is an ongoing evolution and history that suggests established trade and investment dispute settlement mechanisms have become more adjudicative over the years.[66] Despite this evolution, national courts remain unpopular with international trade

60. *Id.* at 9-15.
61. *Id.* at 1-9.
62. *Id.*
63. JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS ch. 7 (West Group, 4th ed. 2002).
64. *Canada's Position and Proposals*, *supra* note 6.
65. *See* King v. Sussex Justices, ex-parte McCarthy [1924] 1 KB 256. In that case, Lord Hewart, C.J., emphasised that in each case justice must not only be done but it must manifestly appear to have been done. Unfortunately, many reported cases suggest what may be greater adherence to the appearance of justice than absolute justice on the merits.
66. JACKSON, *supra* note 63, at ch. 7.

and investment disputants.[67] As a general rule, for example, international investment disputants believe that national courts do not provide sufficient assurances to foreign investors. They cite a number of reasons for reliance on external, non-judicial mechanisms over national courts, including: (1) unfamiliarity with local procedures; (2) risk of partiality towards the local party; (3) risk of corruption; (4) risk of delay; and (5) risk of appeals.[68]

The reasons posited for non-reliance on national courts are justifiable, the underlying basis being that "investors are suspicious animals; before placing their capital in markets not known for political or economic stability, they need to see a clear 'Exit' sign ensuring safe passage for capital and returns to their home state."[69] They believe reliance on an external non-judicial mechanism enables greater control and gives greater assurances.[70]

Arbitration is the principal dispute settlement mechanism contemplated under the FTAA.[71] Its significance is justified, even if for no other reason than on the basis that it assumes pride of place and has received wide acceptance in the settlement of international commercial disputes.[72] Its flexibility,[73] and the recognition and enforcement of domestic and international arbitration awards, is subject to established procedure.[74]

Established arbitration procedure includes conduct regulated under International Chamber of Commerce (ICC) or United Nations Commission on International Trade Law (UNCITRAL) rules, or within the International Centre for the Settlement of Investment Disputes (ICSID) framework. Established procedure also includes enforcement under the provisions of the New York Convention on the Recognition and Enforcement of Arbitration Awards (NYC). In every case, the enabling arbitration instrument and the provisions of national law are critical. Those sources determine the conduct of proceedings, including forum and framework.[75]

Dispute settlement vulnerability is one of the greatest handicaps small Latin American and Caribbean states could encounter under the FTAA. Vulnerability arises, in part, because of the economic disparities that exist between larger and smaller states. However, states' human resource capacity and the international dispute settlement savvy of their practitioners both influence the nature and extent of small state vulnerability. In the arbitration context, for example, special attention to detail is required, and vulnerability multiplies where there is a lack of expertise.

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67. INTERNATIONAL ARBITRATION IN LATIN AMERICA ch. 1 (Nigel Blackaby et al. eds, Kluwer Law International 2002) [hereinafter INTERNATIONAL ARBITRATION].
68. *Id.*
69. *Id.*
70. *Id.*
71. *See* FTAA, *supra* note 1, chs. Dispute Settlement & Investments.
72. *Id.*
73. *See* LEW, *supra* note 59, at 5-6.
74. *Id.* at ch. 26.
75. *Id.* at chs. 21 & 26.

International trade and investment dispute settlement capacity and savvy require a sound understanding of the theoretical and practical realities of the international commercial environment. Practitioners must understand how socio-historical, economic, and political realities impact: (1) foreign trade and investments; (2) globalization and international standardization; (3) bilateral, regional and multilateral arrangements; and (4) options for dispute settlement. In short, the settlement of international trade and investment disputes cannot be understood in a vacuum. Thus, astute and prudent practitioners are well advised to broaden their horizons beyond traditional legalistic boundaries.

Since 1970, legal training in the commonwealth Caribbean has been conducted through the University of the West Indies (UWI). The UWI has produced a significant number of legal practitioners, all trained in the common law tradition and armed with significant local knowledge. However, the UWI is yet to establish itself as a significant institution of learning in the area of international trade and investment law. Thus, its graduates could be lacking in the intellectual capacity and savvy required of international trade and investment dispute settlement practitioners.

The training deficit in the Caribbean is more or less mirrored among small Latin American states. The Latin American problem is compounded as legal training is geared toward a civil law legal system, which is not the preferred legal system in international trade and investment transactions. Instead, the preferred legal system in these transactions is the common law. The FTAA will rely on the common law, and that legal system will significantly impact the principal FTAA trade and investment arrangements.

The perceived, if not real, lack of international trade and investment capacity suggests small Latin American and Caribbean states will have to outsource much of their short term requirements for FTAA-related dispute settlement expertise. However, outsourced expertise has to be recognized as a gap-filling measure. Critical day-to-day decisions require prudent corporations and government departments to involve trade and investment dispute settlement practitioners at an early stage. It will be uneconomic, regressive, and administratively cumbersome to rely on outsourced expertise *ad infinitum*. Such expertise lacks substantial local knowledge and should never be relied upon as a permanent solution.

IV. RECOMMENDATIONS

Although the small states of Latin America and the Caribbean are Members, the FTAA is U.S.-driven, and entry negotiations for those states are best treated as negotiations for entry into an external arrangement. In essence, the FTAA is an outgrowth of the North American Free Trade Agreement (NAFTA), and it is "part of a dynamic and evolving

process of economic reform that has been at play in Latin America."[76] There is strength in unity, and small state negotiators benefit from joint positions on common areas of interest. Through the Caribbean Regional Negotiating Machinery (CRNM), for example, the Caribbean presents a united front which inures to its benefit. The small states of Central America, through the Central American Common Market, have joined forces with CARICOM in the creation of an Association of Caribbean States (ACS), through which joint negotiating positions can be pursued.[77] The process of integration should be further encouraged and appropriately supported, especially in ongoing FTAA negotiations.

Concerted action on the principles of special and differential treatment, for example, could address the concerns of the several Latin American and Caribbean small states in a more holistic manner than through separate negotiating strategies. Although Caribbean states have consistently promoted their need for special and differential treatment, primarily on the basis of inherent vulnerabilities of Small Island Developing States (SIDS), the promoted concept of vulnerability transcends geographic island limitation.[78] The small states of Latin America share many of the vulnerabilities of Caribbean states. Together with the Caribbean, they must unwaveringly promote the implementation of mutually beneficial principles of special and differential treatment.

The FTAA is incompatible with domestic protectionism, and it has been noted as representing the next major push forward in the process of corporate globalization. It has been argued that its legal framework protects the interests of multi-national corporations, without adequate considerations for the benefit of small corporations and ordinary citizens. There are good economic and other arguments in favour of corporate globalization, especially as it impacts consumer benefits from economies of scope and scale. However, current hemispheric realities suggest that the corporations of small Latin America and Caribbean states are unable to compete with their more established and broad-based competitors from large states. Here, commercial morality requires equivocal support for small corporations and individuals in ongoing FTAA negotiations.

Dispute settlement is a necessary corollary to international trade and investment. In recent years, there has been increasing reliance on adjudicative dispute settlement mechanisms, which requires an increase in the involvement of rules-based practitioners. Although lawyers are a natural choice for dispute settlement, the parameters have changed and tradition-

76. JOSEPH J. NORTON, FINANCIAL SECTOR LAW REFORM IN EMERGING ECONOMIES 286 (British Institute of International and Comparative Law 2000).

77. SHELTON NICHOLLS ET AL., TRADE AND ECONOMIC RELATIONS BETWEEN THE CARIBBEAN COMMUNITY (CARICOM) AND THE CENTRAL AMERICAN COMMON MARKET (CACM) (Caribbean Regional Negotiating Machinery, Final Report, 2001), *available at* http:// http://www.crnm.org/documents/studies/CACM%20Report%20Exec%20Sum%20-%20Nicholls.pdf (last visited Sept. 2, 2004) (prepared for the CRNM/IDB Regional and Technical Co-operation Project).

78. Witter, *supra* note 24, at 3

alist legal practitioners are unable to function in the international trade and investment arena. Here, the challenge requires a new breed of lawyers who possess the requisite dispute settlement savvy. Small Latin American and Caribbean states must ensure that their human resources capacity for dispute settlement is sufficiently developed.

There is no direct evidence in support of an international trade and investment dispute settlement capacity deficit among the small states of Latin America and the Caribbean. Prudence suggests, however, that there is an immediate need for empirical evaluation and legal capacity building. The assumptions of international trade and investment rely primarily on economic considerations; however, the framework within which trade and investment are conducted is law-based. Consequently, capacity building, particularly in the area of dispute settlement, must promote and maintain adequate mechanisms for legal training. Given that the common law is the preferred legal system of international trade and investment, the UWI, which teaches a common law program, could be developed and promoted as a centre for hemispheric training in international trade and investment law.

Capacity building is a process, not an event. It requires ongoing training, propagation of intellectual thought, and shared practical experience. Invariably, capacity is enhanced through established professional bodies, which regulate the maintenance of appropriate minimum standards, transparency, and a reliable system of accreditation. Professional accreditation does not, in and of itself, lead to better quality representation. However, it has been successfully relied upon in other disciplines, such as medicine and accounting. Accounting professionals in Jamaica, for example, are subject to accreditation by the Institute of Chartered Accountants, whose Continuing Professional Development Committee's training programs have been of tremendous benefit. At present, international trade and investment practitioners in the small states of Latin America and the Caribbean are not recognized as distinct professionals, nor are they subject to a system of accreditation. Accreditation could be beneficial to the international trade and investment human resources capacity of these small states, and thus it should be pursued as part of an ongoing capacity building program.

Arbitration is and will increasingly continue to become a significant mechanism for the settlement of hemispheric trade and investment disputes.[79] Invariably, arbitration instruments refer to or infer reliance on one national system or another and proceedings are usually conducted within the jurisdiction of a particular state.[80] In the context of regional arrangements, which rely significantly on arbitration, the establishment and maintenance of viable arbitration centres in Member States could promote confidence in the system. Arbitration centres will not eliminate inherent vulnerabilities or economic disparities. They could, however,

79. *See* INTERNATIONAL ARBITRATION, *supra* note 67, at ch. 1.
80. *See* LEW, *supra* note 59, at 172.

encourage a sense of inclusion, and it may be a good idea to promote their establishment and maintenance among FTAA Member States.

V. CONCLUSION

The FTAA could improve the economic wellbeing of individual Member States and that of the entire Western Hemisphere. Ironically, it could exacerbate hemispheric economic disparities and compromise the sovereign and developmental aspirations, particularly of small Latin American and Caribbean states. Whether it serves as an engine of hemispheric economic development or as an instrument of sovereign and developmental doom will be determined by provisions in the FTAA Final Agreement and their implementation.

The FTAA is U.S.-led, and its promise of hemispheric economic wellbeing is reliant on U.S. domestic and foreign policy. It promotes neoliberalism and commitment to the principle of free trade among Member States. Here the United States retains a critical position, and fair and equitable access to its market is a pre-requisite if the FTAA is to become successful. Although the small states of Latin America and the Caribbean require access to the U.S. market, unmitigated free trade could lead to their economic doom. Theirs has been a history of reliance on preferences and tariffs, which offend the principle of free trade. However, those preferences and tariffs have been critical to their economic development. Without them, their economies could be threatened in the absence of appropriate safeguards.

Appropriate safeguards have been mooted on the basis of special and differential treatment. Special and differential treatment is a recognized principle in multilateral arrangements; however, it lacks certainty and has not been specifically defined under the FTAA. The principle has received much consideration at various levels and its implementation is desirable. However, FTAA and other multilateral negotiators are yet to determine an agreed basis for implementation. Notwithstanding the implementation hurdles, the small states of Latin America and the Caribbean require special and differential treatment, and their capacity to actively participate in the FTAA depends on its broadest application.

Small states are inherently vulnerable. They suffer a number of economic and other disadvantages and are susceptible to harm from external forces, over which they have no control. The FTAA represents a giant step in corporate globalization and through its instrumentality external forces will become localized. In the construction services sector, for example, the FTAA could lead to an unmitigated reduction in uncompetitive major projects for local firms and an increase in expatriate construction labour. Many small economies rely on the employment capacity of their construction sector, and an erosion of domestic firms could have devastating impact on the socio-economic fabric of their societies.

The inherent vulnerabilities associated with small size may include capacity deficits among international trade and investment dispute settle-

ment practitioners. While size is not synonymous with dispute settlement vulnerability, small state practitioners are more likely than their counterparts in larger states to lack the required intellectual capacity and savvy. Arbitration, for example, is the principal dispute settlement mechanism in international trade and investments. It has become increasingly adjudicative and its rules-based practitioners require an intellectual capacity and savvy which transcends traditional practice areas. It appears, however, that legal practitioners in the small states of Latin America and the Caribbean, who are natural choices for dispute settlement, lack the required expertise. Thus, insofar as dispute settlement is concerned, these states are vulnerable and they will be forced to rely on external expertise which lacks significant local knowledge.

Dispute settlement vulnerability can be minimized through appropriate training programs. Given that international trade and investment rely on rules-based mechanisms, training should be particularly geared towards the development and maintenance of appropriate legal programs. Training should also be complimented by an appropriate system of accreditation and monitoring for trade and investment practitioners. Here, the small states of Latin America and the Caribbean should focus on joint programmes of capacity building among legal practitioners. The UWI, unlike other institutions of higher learning in the small states of Latin America and the Caribbean, is dedicated to training in the preferred legal system of international trade and investment. It could perform a critical role in the training of hemispheric dispute settlement practitioners and should be developed, with both government and private sector support, to function in that capacity.

The FTAA promises much and it will be judged by its capacity to improve the lives of the ordinary people of the hemisphere. The small states of Latin America and the Caribbean are an integral part of the FTAA and every effort should be made to enable their active participation. Clearly, the larger states, particularly the United States, have critical roles to play in their active involvement. However, they also suffer improvable capacity deficits, for example, in the area of dispute settlement, and it is their responsibility to enhance those deficits. Dispute settlement vulnerability is a clear and present danger, and every state in Latin America and the Caribbean should build and maintain its capacity for dispute settlement under the FTAA.