

The Future of Special and Differential Treatment in the FTAA

Prepared for the ACS Secretariat

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Introduction

FTAA - the largest RTA in the global economy

- 34 countries
- combined market of 800 million
- aggregate GDP of some US \$13 trillion, reflecting primarily the strength of the North America Free Trade Area (NAFTA) group

Introduction

- The FTAA will bring together a disparate set of countries not only in terms of size, but also in terms of levels of development, history, culture and peoples
- levels of vulnerability
- levels of development – e.g. per capita income, ranging from a high of US\$15,404 in the Bahamas, to a low of US\$472 in Nicaragua
- country size – St. Kitts, 340 km² vs. Canada, 9.10m km²

Introduction

Features of FTAA

- WTO-plus commitment
- aims to secure a single undertaking of mutual rights and obligations
- reciprocity
- Given above asymmetries, SDT provisions would play a crucial role in its success

Introduction

Inadequacies of SDT in WTO

- ‘flexibilities’ (roughly half of SDT measures) are granted arbitrarily with no real attempt being made to link provisions to the objective requirements and constraints for compliance
- SDT provisions relating to developed country support are non-mandatory, in other words, couched in ‘best endeavour’ language and, for the most part, have simply not been provided
- Third, technical assistance has been disjointed and insufficient

Introduction

DESIGNING THE FUTURE OF SDT

SDT measures must:

1. **Assure** *Policy Flexibility* or “*Spaces for Development Policy*” which enables countries to actively pursue their development needs.
e.g. lower levels of obligations, or exceptions and exemptions throughout the agreements,

Introduction

2. **Ensure** effective developed country support in critical areas, such as technology transfer, SDT consideration in handling disputes, transforming unbound promises by developed countries to assist developing countries, to binding commitments.
3. **Insure** developing countries from the risks involved in deeper integration processes by enabling proper technical assistance for capability development.

Introduction

Elements of an effective SDT approach in FFAA

- FTAA goals of free trade must be reconciled with the SOA's broad agenda of political and social institution-building – current absence of concrete linkages
- Absence of linkages poses the danger of the FTAA creating a legally binding mechanism in the absence of a similar mechanism to put teeth into broad objectives in support of development with equity.

Introduction

- SDT must reflect the specific capacities, limitations or needs in a given area.
- It requires a shift in emphasis from a “one size fits all” perspective to one which permits exceptions to legal obligations based on the individual circumstance of Members, including their individual levels of development

Competition Law and Policy

Challenges in including Competition Law and Policy in FTAA – arise from the unevenness in country size and state of development, as well as the relative differences and unevenness in competition policy experiences

- less than half of the 34 negotiating states have laws dealing with Competition Policy

Competition Law and Policy

SDT must thus be guided by following approaches (as recommended by Stewart (2003) and Hamilton (2003)):

Progressivity: allowing for the gradual introduction of competition law in small economies, including the ‘core principles’ of non-discrimination, transparency and due process

- *Flexibility*: allowing each country to choose which prohibitions are relevant to its situation

Competition Law and Policy

- Introduction of a ‘peace clause’ allowing a transitional period of X years which exempts small states in cross border disputes with other FTAA states, from legal sanctions.
- *Effectively Supported Technical Assistance for Capacity Building.*

Competition Law and Policy

Recommendations: developing and smaller economies should be allowed to:

1. carve out relevant exclusions and exemptions, which will enable domestic policy flexibility
2. give priority to administratively determined exemptions, as well as block (sectoral) exemptions, as done in the EU. Open decisions to a process of judicial review.

Competition Law and Policy

3. Institute periodic reviews to investigate the need for continued exemptions, based on productivity and sustainability goals, as opposed to a narrow cost benefit approach.

Scope should also be given to allow the *flexibility to add exemptions as merited by circumstances*.

4. recognize the state's responsibility to protect the interests and security of its citizens, and evaluate its activities on the basis of 'public interest' objectives, rather than purely on commercial considerations

Competition Law and Policy

5. seek to ensure that natural and legal persons have ‘standing’ in any member state so that those affected could initiate actions under the jurisdiction of the particular antitrust authority
6. permit the incorporation of a competition standard in the evaluation of antidumping measures.
7. shift to a more extensive use of safeguards in restraining the anti-competitive effects of anti-dumping.

INTELLECTUAL PROPERTY RIGHTS

The primary issue for ACS members is whether the FTAA should be the forum for opening a discussion on IPRS at all

- seek to maximize the flexibility that currently exists in the TRIPS, while pursuing a review of the Agreement more favourable to their developmental goals
- Secure a commitment that favourable developments in TRIPS that extend beyond FTAA provisions, should be incorporated into the agreement

INTELLECTUAL PROPERTY RIGHTS

Areas of concern to ACS developing countries

- SDT under FTAA concerns mainly technical cooperation and transitional arrangements
- Technology transfer – proposed SDT measures are weak, with a reliance, as with TRIPS, on voluntary measures by developed countries

INTELLECTUAL PROPERTY RIGHTS

Recommendations

Access to patented drugs

- FTAA provisions should be tailored to address the cost of drugs to smaller economies, including the possibility of subsidizing the right holder so that drugs can be made more affordable
- FTAA developed countries could agree to intervene in negotiations with their right holders to lower their prices to make drugs more affordable to smaller economies.

- Alternatively, the Hemispheric Cooperation Fund could provide financial assistance to offset the costs of crucial drugs.
- In respect of article 31(f) agree to treat customs unions or free trade areas, as domestic markets (as proposed by the African Group) allowing a member with drug production capacity to supply the entire region

Protection of plant varieties

- allow smaller economies to develop their own *sui generis* system of plant varieties protection, rather than being required to adopt UPOV
- Allow the proposed Committee on Intellectual Property to be used to strengthen the negotiating capacity in relation to large companies (or countries on behalf of their companies).

INTELLECTUAL PROPERTY RIGHTS

Extending IPRS

- designing measures to allow smaller countries to make use of the extended IP rights, particularly in patenting

Copyright

provide for flexible application of copyright rights, especially if these prove harmful to public services, for e.g., education.

INTELLECTUAL PROPERTY RIGHTS

Technology transfer

- establishment of a review process to assess the extent to which technology transfer is occurring
- Provision of financial assistance through an independently administered regional fund to offset costs of implementing IPRS among ACS members, particularly among smaller economies.

Services

Services industry -- major component of international economic activity -- dominates as a percentage of GDP and contribution to employment

Recommendations for increasing its effectiveness

- Smaller and developing countries should seek to maintain the positive list approach of the WTO
- seek to incorporate provisions on emergency safeguards

Services

- Seek to limit any FTAA Financial Services provisions on the Chapter on Services to a Plurilateral Agreement
- Extend definition of national security (included as an exemption) to include financial volatility
- Ensure that monitoring institutions established under FTAA exclude the persistent monitoring of domestic implementing agencies

Services

- Limit review to fixed intervals, with the possibility of varying periods for different levels of development
- consider a Reporting Mechanism by which a country's record of implementation can be displayed
- Small economies should seek to tie the record of implementation of SDT commitments by the more developed participants to their continued application of certain commitments, which may prove onerous with the passage of time.

Services

- This must be structured in such a manner and be subject to specific guidelines, which allow for the possible withdrawal of commitments, without the need for compensation
- This would go beyond the existing limited tendency to negotiate general (and specific) obligations with one-time negotiated exceptions, in order to give meaning to concepts of sustainability and flexibility

Services

- Small economies should consider registering exclusions or limitations to national treatment
- Small economies should argue for a strict and narrow interpretation of national treatment, excluding those sectors and service suppliers where subsidies are considered as necessary for achieving legitimate economic and social objectives

Services

- to promote technology transfer seek to attach requirements of associations and joint ventures in order to ensure the inclusion of local companies (especially SMEs)

GOVERNMENT PROCUREMENT

The study highlights developing countries' reluctance to negotiate a multilateral agreement on government procurement.

This derives from a hesitance to embrace national treatment and MFN obligations which have the potential to reduce their policy options for achieving domestic policy objectives.

Such options include favouring small and medium-sized enterprises and, as the UNDP notes, extends to important considerations such as equity, social cohesion, employment and political considerations

GOVERNMENT PROCUREMENT

These concerns are likely to be intensified in ACS smaller economies, particularly among its micro states, given their limitations which include:

- small size; general uncompetitiveness of domestic firms in relation to foreign firms; inexperience in presenting bids and in making attractive offers

GOVERNMENT PROCUREMENT

Concerns in relation to liberalization of government procurement for small states:

- Reduced policy flexibility if proposed measures severely curtail the use of performance requirements as a development tool
- These would include employment provision, commitments to purchase locally, which are important to social and political stability in countries of high unemployment and poverty levels

GOVERNMENT PROCUREMENT

Recommendations:

- reserve a percentage of the market of developed countries to smaller economies.
- Allow smaller countries to adopt a positive list approach to government procurement
- allow them to maintain safeguards and exceptions in respect of the sectors open to liberalization
- Allow for differentiation between permanent and temporary SDT measures. Permanent measures should not be subject to review.

GOVERNMENT PROCUREMENT

- Allow developing countries and smaller economies to privilege bids which engage in joint ventures with local concerns to address issues of the transfer to technology and know how, and improve training
- Widen the ambit of the Committee on Government Procurement to address broader issues of the effect of the agreement on development
- Consider the possibility of excluding smaller economies from its provisions altogether, or for a limited period

Agriculture

The report argues that without an effective agreement on agriculture that is indeed WTO-plus, the region has little hope of being able to significantly dent its comparatively high levels of poverty and structural inequality, given that rural development lies at the heart of poverty and inequity reduction

Agriculture

Recommendations

1. Market access

- Smaller economies should argue for asymmetric or ‘less than full’ reciprocity in all negotiations on reductions in tariffs, with safeguards introduced to protect against the ‘dumped’ agricultural products
- In agro-industry products negotiate for immediate or early harvest (significant) reductions on tariffs peaks

Agriculture

- Negotiate for special safeguards (volume and price) to address food security objectives
- Propose tariff rate quotas to preserve a market space for domestically produced and domestically marketed staples, food crops.
- In implementing any proposed customs and tariff reforms, smaller economies should seek flexibility in determining the time table for such reforms

Agriculture

Domestic Support

- **Seek exemptions from subsidy reductions, or if none is notified, then seek to raise the floor of *de minimis* non-actionable domestic support subsidies**
- **Export Subsidies**
- Exempt all export subsidies deployed in pro-poor rural development programmes in ACS countries
- Consider introduction of a longer phase out period of 15 years for these exemptions.

Agriculture

Sanitary and Phytosanitary Measures

The proposed committee on SPS should include under its terms of reference the conduct of reviews every three years in order to assess levels of compliance and implementation problems and concerns

INVESTMENT

Foreign investment plays an important role in capital formation in CARICOM and, according to ECLAC, it is the main source of financing for Latin American and Caribbean countries

The UNDP (2003) argues that the quality of FDI and the policy mechanism of the host government, are more important indicators of the success (from a development perspective) of FDI.

Thus, the host country has a strong role in policy formation first, to attract and then to maximize the kind of FDI considered to be desirable, and to ensure that it advances development goals

Investment

Recommendations

- Allow smaller economies, particularly micro states (OECS) to derogate from national treatment, especially as it relates to access to land
- strengthen SDT measures by the inclusion of women, as a separate category for which derogation from performance requirements is allowed.

Investment

- Tighten SDT measures in relation to small firms by defining ‘small’ and ‘medium’ sized firms in such a way as to take account of the vast differences in size and resources available to larger FTAA countries
- Small states should push for the acceptance of the proposal for a regional integration fund to pay half of the legal fees when a company of a large or developed country brings a case against a smaller economy

Investment

- enable Small states within the FTAA to selectively target and screen foreign investment by allowing them to maintain reservations ‘necessary to achieve national and developmental objectives’, as permanent, rather than temporary measures.

Allow smaller countries to:

- maintain a positive list approach to investment
- apply a conditional MFN, which would enable them to target development-friendly investment

Investment

- apply WTO-compatible performance criteria, as well as offer incentives, in terms of geographic location, employment and training of workers and the undertaking of research and development activity.
- Strive for the inclusion of a review mechanism which would consider the effects of proposed SDT on development goals
- For purposes of adjudication, allow for development objectives to be defined locally

Investment

- With regards to national treatment, the agreement should provide specific provisions for smaller economies to treat local investors more favourably.
- The measure could also be strengthened by providing that all other FTAA members consider offering more favourable treatment to investors from smaller economies

Investment

- In respect to disasters, ACS countries should seek to maintain the right to extend assistance to domestic firms, without the need for national treatment
- As an SDT measure, the provisions for the rights of investors and their staff to locate in the host country without restrictions, should be extended to include a broader concept embracing the free movement of labour – skilled and unskilled (Ocampo and Bustillo, 2003).

DISPUTE SETTLEMENT

In relation to dispute settlement the report notes that the FTAA draft provisions do not expressly acknowledge the differences in size and levels of development among the participants

Most special and differential treatment provisions appear to have imported the “best efforts” language informing special and differential treatment provisions in the WTO.

For small/developing countries therefore, a critical choice has to be made regarding the pursuit of “facilitative” or cooperative NAFTA –type dispute resolution provisions and/or a legalistic and binding dispute settlement approach.

Dispute Settlement

Recommendations

- In order to build legal capacity, small economies should seek to include training in international trade law (especially the WTO, NAFTA and ICSID) as part of any agreed technical assistance programme. Funding may be provided from the Hemispheric Fund
- A review process must be an integral aspect of the FTAA framework -- periodic review of the dispute settlement system, possibly every three (3) years

Dispute Settlement

- This would allow for the clarification and provision of final interpretations (whether by means of Protocols or Understandings).
- Small economies should consider including a provision allowing for possible modification and renegotiation of agreed to obligations
- Existing regional and bilateral dispute settlement mechanisms (and measures favouring small economies) should not be disadvantaged by the more substantive rules and disciplines of the FTAA.

Dispute Settlement

- International Law principles should apply in the event of any conflict. This is particularly important for CARICOM countries and the proposed establishment of the CCJ.

Sustaining Participation

Conclusions

The study stresses the notion of flexibility, both in interpretation and application of the substantive aspects of the proposed treaty, the implementation of SDT measures, and space for the development and operationalisation of national policy to further developmental goals

This requires a conscious elevation of ‘development goals’ as a central element of the FTAA.

Sustaining Participation

- The *Summit of the Americas Plan of Action (SOA)*, with its reference to sustainable development and poverty reduction, *inter alia*, should serve as a possible context for future interpretations of any agreed to FTAA text.
- Such an approach should lead to a broader acceptance and legal bindings of provisions requiring SDT measures, beyond hortatory statements of a general recognition of the problems of smaller economies, as well as the extension of some of these measures to other developing countries of the FTAA

Sustaining Participation

Main cross-cutting recommendations of the Report

- Flexibility – making flexibility a cornerstone of the FTAA agreement, especially as it relates to smaller economies

Ensuring Space for Policy Development:

- Allowing developing countries to maintain some space for policy manoeuvres to pursue development goals

Sustaining Participation

- This is particularly important as a challenge to the trade liberalization approach promoted under the auspices of the WTO, and being reinforced within the FTAA, which employs a ‘one size fits all’ approach to liberalization

Strengthening SDT through regional institutions

- technical and financial assistance and technology transfer, should move beyond best-endeavour language and include legally binding commitments

Sustaining Participation

The study identifies a number of regional institutions/mechanisms which would strengthen the application and effectiveness of SDT.

- Regional Integration Fund to provide funds or oversee provision and implementation of assistance to countries negatively affected by liberalization process

Sustaining Participation

- Alternatively, the proposed Hemispheric Cooperation Program, (HCP), could perform this function, although its focus has to extend beyond the narrowly defined guidelines, which are focused on compliance.
- Introduction of mechanism to transfer resources from areas which benefit from FTAA process to those that experience negative effects
- Inclusion of a review mechanism to assess the effectiveness of SDT measures