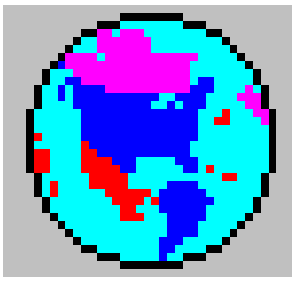
# THE LAW OF
# REGIONAL ECONOMIC INTEGRATION
# IN THE AMERICAN HEMISPHERE



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## Unit IV

## MERCOSUR , ANDEAN COMMUNITY, AND FTAA

# THE LAW OF
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# IN THE AMERICAN HEMISPHERE

## Unit IV

## MERCOSUR , ANDEAN COMMUNITY, AND FTAA

## Table of Contents

## Guiding Questions

*1. MERCOSUR --- What is the most striking difference vis-à-vis NAFTA or EC? What are the similarities? (Think about supranational/ intergovernmental/ neo-functional features) Please pay attention to historical, cultural and political characteristics of MERCOSUR.*

*2. Dispute Resolution in MERCOSUR --- Focus on the evolutionary process of dispute resolution mechanism through the Treaty of Asuncion, Ouro Preto Protocol, Brasilia Protocol and Buenos Aires Protocol. Pay special attention to the role of private parties in the MERCOSUR dispute resolution mechanism. The Buenos Aires Protocol, in fact, falls within private international law. What relation, if ever, does this protocol have with the Common Market structure?*

*3. MERCOSUR and the EU --- Recently, the EU has been vigorously approaching MERCOSUR to create a free trade zone despite some oppositions (from Germany and France). What are the calculations from both sides? What will be the impact (legal and economic) on international trade?*

*4. Andean Community --- At first glance, the Andean Community looks similar to the MERCOSUR. What could be the difference between the two in terms of institutional setting? Which one do you think is more advanced? Please pay attention to a historical background of the economic integration of South America.*

*5. FTAA (Free Trade Area of the Americas) --- Is the FTAA plausible in the near future? What would be possible concerns from MERCOSUR Member States or other small countries in the Western Hemisphere? Would and should the FTAA follow the pattern of the NAFTA?*

# I. TRADE AND INTEGRATION ARRANGEMENTS IN THE AMERICAS

## An Analytical Compendium

### FOREWORD

*From the official web-site of the Organization of American States*
*http://www.sice.oas.org/cp061096/english/foreword.asp*

One of the key tasks assigned by the leaders in Miami to the Organization of American States' Special Committee on Trade was the preparation of a comparative analysis of existing trade arrangements in the Americas. The "compendium", meets this objective.

The "compendium" contains ten horizontal boxes, which correspond to the sixteen agreements or arrangements under examination. These are: the Uruguay Round Agreement (WTO); the Association for Latin American Integration (Aladi); the Southern Cone Common Market (Mercosur); the Andean Group (Andean Group); the Central American Common Market (Central America); the Caribbean Common Market (Caricom); two bilateral arrangements with Caricom on the one hand and Venezuela and Colombia on the other (Caricom Bilaterals); the North American Free Trade Agreement (NAFTA); the Group of Three (Mexico, Colombia and Venezuela); and six Bilateral Agreements (Chile-Venezuela, Chile-Colombia, Chile-Ecuador, Mexico-Chile, Mexico-Costa Rica and Mexico-Bolivia).

Among the above agreements examined, one (the WTO) is multilateral, one regional scope (ALADI), four (Mercosur, Andean Group, Central American Common Market and Caricom) fall into the category of customs unions. The Caricom-Bilaterals fall into the category of temporary non-reciprocal preferential agreements, in that their distinguishing feature is the preferential access accorded to Caricom goods by Venezuela and Caricom for a pre-determined temporary period of time. Both agreements contain provisions for further negotiations leading to full reciprocity. These two elements, taken together, distinguish these two agreements from such arrangements as the General System of Preferences (GSP) and the General Preferential Tariff (GPT) maintained by industrial countries such as the United States and Canada. The next two categories are devoted to an analysis of free trade areas (NAFTA and the Group of Three agreements) involving more than two members. The last category (six agreements) is designed to cover bilateral free trade agreements.

While the "matrix" structure of the "Compendium" may at first glace appear to be somewhat complicated, readers should bear in mind that the structure of this study was chosen so as to achieve a balance between traditional "hard copy" production requirements and the development of a fully searchable electronic version for the Internet. The full Internet version should be available on the World Wide Web in the Summer of 1996. In this format, it is anticipated that the inclusion of updates and

coverage of new developments will be enhanced. In this context, the Compendium is one of the first documents of its length, complexity and comprehensiveness that was specifically designed for Internet publication.

In terms of vertical structure, the "compendium" is a matrix divided into four sections. The first is a general section covering broad issues such as type, scope and objectives of the agreements, their basic administrative and executive structures, accession and withdrawal provisions and dispute settlement. The second section is devoted to an examination of the terms of liberalization, provisions relating to market access and regulation of trade. It includes an examination of safeguard measures, trade remedies, technical and agricultural standards related measures and rules of origin. The third section is devoted to issues such as services, government procurement, the regulation of state enterprises, competition issues, foreign investment and four sectors (energy, autos, textiles and clothing, and agriculture) in which various agreements provide for special approaches.

Lastly, great efforts have been expended to ensure that the information contained in it is as accurate as possible. To this end, the Trade Unit is grateful for the extensive information and cooperation that was extended by individual countries and sub-regional integration and cooperation organizations. It is important to note however, that the contents of the Compendium do not necessarily reflect the views or official positions of the countries or arrangements described herein. Moreover, the descriptions of these regional arrangements have been developed in order to provide a basis for this comparison, and are not intended to reflect the legal positions of the signatories. The document is the sole responsibility of the Trade Unit of the Organization of American States. The compendium is the result of intensive collaboration between Dr. Juan Jose Echavarria, Minister, Embassy of Colombia to the United States, Mr. Bernardo Gluch, OAS Foreign Trade Information System, and Mr. Donald R. Mackay, Special Advisor to the Secretary General, Trade Unit, Organization of American States.

*Trade and Integration Arrangements in the Americas*

At the Summit of the Americas the leaders of the Western Hemisphere recognized the important role played by the subregional trade arrangements in forging the "Free Trade of the Americas." They resolved to "build on existing sub- regional and bilateral arrangements in order to broaden and deepen hemispheric economic integration and to bring the agreements together." 1

The Western Hemisphere is a very different place in 1996 than it was a decade ago. The countries of the region have taken a series of great leaps over the past ten years, with negotiation and implementation of bilateral and subregional trade agreements serving as vital complements to their domestic economic reforms. In contrast to many of the agreements that countries negotiated in the 1960s, the agreements of the 1990s are based on an open and liberalizing trade regime. The region is now poised for even greater progress through the Free Trade Area of the Americas (FTAA).

The 1990s have seen the establishment of new trade arrangements in the region and the revival of old ones. These changes have come about as a consequence to a number of a factors; some global in nature, others of a regional or hemispheric character and yet others as a consequence of the interaction of domestic forces in individual countries. In the context of Latin America and the Caribbean, much of the change can be attributed to the widespread failure of the mix of misguided fiscal and monetary policies that were pursued in the 1980s that resulted in a debt crisis for some and a net outward transfer of financial and other resources for many. In the 1990s, efforts aimed at enhanced participation in the increasingly globalized marketplace, prompted many countries to revive many of their existing trade and integration arrangements and adopt policies aimed at trade liberalization through unilateral efforts to open domestic economic and trade regimes. These unilateral trade measures have helped to facilitate the revival of Latin American and Caribbean integration. In part, this revival was also a reaction to the perceived consolidation of trade blocs in other regions of the world, which have "called attention to the potential benefits of freer trade with existing partners." 2

Meanwhile in North America, increased trade and economic linkages were being built upon the foundation of the multilateral system embodied in the GATT and the increased economic integration of the North American economy. The modern foundation for bilateral based, later to become trilateralized, negotiations in North America was the decision of Canada and the U.S. to negotiate a special arrangement in 1965 to deal with trade in autos and autoparts. The 1965 Autopact ushered in an era of increased sectoral trade, enhanced bilateral relations and contributed to industrial competitiveness. By 1987, however, the two countries had agreed that the sheer size and scope of bilateral trade had outgrown multilateral based trade instruments and the Canada-United States Free Trade Agreement was negotiated and came into force in 1989. In Mexico, domestic economic reforms began with that country's decision to join the GATT in 1986, which set the stage for all three countries to open negotiations in 1991 on a North American Free Trade Agreement (NAFTA) that came into force in 1994.

Examples of various types of trade and integration agreements can be found in the Western Hemisphere today. In addition to the significant number of customs unions and free trade agreements that exist in the Americas, Canada, the United States, and some Latin American countries (e.g., Venezuela and Colombia) also offer preferential non reciprocal access to their markets for developing countries under various types of programs. There are also numerous sectoral agreements, such as the Autopact that the United States and Canada entered into in 1965, and bilateral agreements on specific products negotiated within the framework of LAIA (Latin American Integration Association). The following section describes the agreements found in the Compendium.

### *The World Trade Organization*

The World Trade Organization (WTO), established on 1 January 1995, is the legal and institutional foundation of the multilateral trading system. It provides the principal contractual obligations determining how governments frame and implement domestic trade legislation and regulations. And it is the platform on which trade relations among

countries evolve through collective debate, negotiation and adjudication. The WTO is the embodiment of the results of the Uruguay Round trade negotiations and the successor to the General Agreement on Tariffs and Trade (GATT).

The Preamble of the Marrakesh Agreement Establishing the WTO 3 states that members should conduct their trade and economic relations with a view to "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of development."

The fundamental principles of the multilateral trading system are:

Trade without discrimination

Under the "most-favoured nation" (MFN) clause, members are bound to grant to the products of other members no less favourable treatment than that accorded to the products of any other country. The provision on "national treatment" requires that once goods have entered a market, they must be treated no less favourably than the equivalent domestically-produced good.

Predictable and growing access to markets

While quotas are generally outlawed, tariffs or customs duties are legal in theWTO. Tariff reductions made by over 120 countries in the Uruguay Round are contained in some 22,500 pages of national tariff schedules which are considered an integral part of the WTO. Tariff reductions, for the most part phased in over five years, will result in a 40 per cent cut in industrial countries' tariffs in industrial products from an average of 6.3 per cent to 3.8 per cent. The Round also increased the percentage of bound product lines to nearly 100 per cent for developed nations and countries in transition and to 73 per cent for developing countries. Members have also undertaken an initial set of commitments covering national regulations affecting various services activities. These commitments are, like those for tariffs, contained in binding national schedules.

Promoting fair competition

The WTO extends and clarifies previous GATT rules that laid down the basis on which governments could impose compensating duties on two forms of "unfair" competition: dumping and subsidies. The WTO Agreement on agriculture is designed to provide increased fairness in farm trade. That on intellectual property will improve conditions of competition where ideas and inventions are involved, and another will do the same thing for trade in services.

Encouraging development and economic reform

GATT provisions intended to favour developing countries are maintained in the WTO, in particular those encouraging industrial countries to assist trade of developing nations. Developing countries are given transition periods to adjust to the more difficult WTO provisions. Least-developed countries are given even more flexibility and benefit from accelerated implementation of market access concessions for their goods.

The highest WTO authority is the Ministerial Conference which meets every two years. The day-to-day work of the WTO, however, falls to a number of subsidiary bodies, principally the General Council, which also convenes as the Dispute Settlement Body and as the Trade Policy Review Body. The General Council delegates responsibility to three other major bodies - namely the Councils for Trade in Goods, Trade in Services and Trade-Related Aspects of Intellectual Property Rights.

Four other bodies are established by the Ministerial Conference and report to the General Council: the Committee on Trade and Development, the Committee on Balance of Payments and the Committee on Budget, Finance and Administration and the Committee on Regional Arrangements. The General Council formally established, in early 1995, a Committee on Trade and Environment, which will present a report on its work to the first meeting of the WTO Ministerial Conference in Singapore on December 9-13, 1996.

Each of the plurilateral agreements of the WTO - those on civil aircraft, government procurement, dairy products and bovine meat - have their own management bodies which report to the General Council. The day-to-day work of the WTO, however, falls to a number of subsidiary bodies; principally the General Council, also composed of all WTO members, which is required to report to the Ministerial Conference. As well as conducting its regular work on behalf of the Ministerial Conference, the General Council convenes in two particular forms - as the Dispute Settlement Body, to oversee the dispute settlement procedures and as the Trade Policy Review Body to conduct regular reviews of the trade policies of individual WTO members.

The General Council delegates responsibility to three other major bodies - namely the Councils for Trade in Goods, Trade in Services and Trade-Related Aspects of Intellectual Property. The Council for Goods oversees the implementation and functioning of all the agreements (Annex 1A of the WTO Agreement) covering trade in goods, though many such agreements have their own specific overseeing bodies. The latter two Councils have responsibility for their respective WTO agreements (Annexes 1B and 1C) and may establish their own subsidiary bodies as necessary.

Four other bodies are established by the Ministerial Conference and report to the General Council. The Committee on Trade and Development is concerned with issues relating to the developing countries and, especially, to the "least-developed" among them. The Committee on Balance of Payments is responsible for consultations between WTO members and countries which take trade-restrictive measures, under Articles XII and XVIII of GATT, in order to cope with balance-of-payments difficulties. Finally, issues relating to WTO's financing and budget are dealt with by a Committee on Budget.

The WTO continues a long tradition in GATT of seeking to make decisions not by voting but by consensus. This procedure allows members to ensure their interests are properly considered even though, on occasion, they may decide to join a consensus in the overall interests of the multilateral trading system. Where consensus is not possible, the WTO agreement allows for voting. In such circumstances, decisions are taken by a majority of the votes cast and on the basis of "one country, one vote". There are four specific voting situations envisaged in the WTO Agreement. First, a majority of three-quarters of WTO members can vote to adopt an interpretation of any of the multilateral trade agreements. Second, and by the same majority, the Ministerial Conference, may decide to waive an obligation imposed on a particular member by a multilateral agreement. Third, decisions to amend provisions of the multilateral agreements can be adopted through approval either by all members or by a two-thirds majority depending on the nature of the provision concerned. However, such amendments only take effect for those WTO members which accept them. Finally, a decision to admit a new member is taken by a two-thirds majority in the Ministerial Conference.

Surveillance of national trade policies is a fundamentally important activity running throughout the work of the WTO. At the center of this work is the Trade Policy Review Mechanism (TPRM). The objectives of the TPRM are, through regular monitoring, to increase the transparency and understanding of trade policies and practices, to improve the quality of public and intergovernmental debate on the issues, and to enable a multilateral assessment of the effects of policies on the world trading system. In this way member governments are encouraged to follow more closely the WTO rules and disciplines and to fulfil their commitments.

Reviews are conducted on a regular, periodic basis. The four biggest traders - the European Union, the United States, Japan and Canada - are examined approximately once every two years. The next 16 countries in terms of their share of world trade are reviewed every four years; and the remaining countries every six years, with the possibility of a longer interim period for the least-developed countries.

In addition to the TPRM, many other WTO agreements contain obligations for member governments to notify the WTO Secretariat of new or modified trade measures. For example, details of any new anti-dumping or countervailing legislation, new technical standards affecting trade, changes to regulations affecting trade in services, and laws or regulations concerning the TRIPs agreement all have to be notified to the appropriate body of the WTO. Special groups are also established to examine new free-trade arrangements and the trade policies of acceding countries.

*Customs Unions*

*Mercosur*: The Common Market of the Southern Cone was created on March 26, 1991, when Argentina, Brazil, Paraguay and Uruguay signed the Treaty of Asunción. The two main instruments of the Treaty were a four-year Trade Liberalization Program and a commitment to implement a common external tariff by January 1, 1995. 4 Preceding the

Asunción Treaty was the signature in 1986 by Argentina and Brazil of the Acta para la Integración Argentina-Brasileña. This new accord aimed at expanding bilateral trade among the two countries by adopting a sectoral approach. Two other accords, signed by Argentina and Brazil preceded Mercosur: the Tratado de Integración in 1989; and the Acta de Buenos Aires in 1990. A meeting held in August 1990 with Uruguay and Paraguay led to the Asunción Treaty in March 1991.

On December 17, 1994, the presidents of the four Mercosur countries met at Ouro Preto in Brazil to sign a document that set January 1, 1995 as the implementation date of a common external tariff (CET). The CET ranges from 0 percent to a maximum of 20 percent. Each country was allowed a list of exceptions which will be phased out in five years for Argentina, Brazil and Uruguay and ten years for Paraguay. For Argentina, Brazil and Uruguay, each were allowed 300 exceptions and Paraguay was allowed 399. In fact, for each of these products, the tariff will fall automatically every year on a linear basis until it becomes equal to the CET in 2001 for Brazil, Argentina and Uruguay and 2006 for Paraguay. Domestic tariffs will converge to a maximum of 14 percent by 2001 for Argentina and Brazil and 2006 for Paraguay and Uruguay in the case of capital goods, and to a maximum of 16 percent by 2006 for information technology products 5, which might reach lower levels.

The Common Market Council is Mercosur's policy-making body. It is composed of the four countries' foreign and economy ministers. The Common Market Group is the executive organ in charge of overseeing and implementing the Treaty. The Mercosur Trade Commission is the executive organ in charge of overseeing the application of the common external trade policy. The Secretariat is based in Montevideo.

In early 1995, Brazil increased its tariffs from 32 percent to 70 percent on 109 products exempted from the customs union. Examples include cars, audio equipment, and consumer durables. The government of Brazil has emphasized that this increase will be in place for one year only, just to help Brazil to overcome its internal economic difficulties. The Common Market Group met in Asunción on April 25, 1995, and adopted Resolution 7/95 that authorized Brazil to define up to 150 addition exceptions to the Common External Tariff for a maximum period of one year, as an exceptional measure aimed at addressing imbalances in supply and prices that had resulted from its economic stabilization plan.

*Andean Group*: The members of the Pact are Bolivia, Colombia, Ecuador, Peru, and Venezuela. The Andean Group was established in 1969 when Bolivia, Colombia, Chile, Ecuador and Peru signed the Cartagena Agreement. Venezuela joined the group in 1973, and Chile left in 1976. The main objectives of the Andean Group were to eliminate trade barriers within the Group; to create a customs union with a common external tariff; to harmonize economic, social, and economic policies; and to adopt a joint industrialization program.

In the early years of the process, at the beginning of the liberalization program, intra-subregional trade increased between member countries whose markets had few

preexisting links. However, shortly thereafter the deadlines for the fulfillment of the liberalization program and the adoption of a common external tariff were practically abandoned. In 1987, the Quito Protocol acknowledged this fact and modified the Cartagena Agreement by, inter alia, providing for more flexibility in the achievement of the group's goals. In addition, a new safeguard clause and tariff quotas were introduced.

A revival of the Andean Group began in 1989, when the member states signed decided to move forward in their integration efforts. In December 1991, the Act of Barahona was signed in Cartagena. It provided for the establishment of a free trade zone by January 1, 1992, and the definition of a common external tariff with four levels (from 5 percent to 20 percent). Free trade between Colombia and Venezuela met this deadline and, after some side agreements, Ecuador and Bolivia joined them as the Andean Group's free trade area went into effect in early 1993. In March of 1995, a common external tariff (CET) was implemented by these same countries. For most goods, the schedule is as follows: 5 percent for raw materials; 10 and 15 percent for semi-finished products; and 20 percent for finished goods. Although the CET cannot exceed 20 percent, there is an exception for automobiles for which the tariff is 40 percent. Exceptions to the CET were also granted to each country.

Disagreements between Peru and other members of the Andean Group on the need to harmonize certain macroeconomic measures that this country had already enforced led to the adoption of Decision 321 by the Commission of the Cartagena Agreement. This decision authorized Peru to suspend its participation with regard to total elimination of intra regional tariffs, adoption of a common external tariff and harmonization of macroeconomic policies. To preserve reciprocal trade flows, Peru entered into bilateral agreements with each other member. In April 1994, the Commission approved Peru's reintegration on a gradual basis, together with the commitment of the rest of the members on reinforcement of rules of origin and a reduction of their tariff dispersion.

*Central American Common Market (CACM)*: Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. The General Treaty for Central American Integration was signed in 1960, and entered into force in 1961. It provided for immediate free trade on 95 percent of all goods. The remaining tariffs were to be removed by June 1966. Other provisions of the Treaty included an agreement on integration industries. The conflict between Honduras and El Salvador in 1969 led to the de facto withdrawal of Honduras. Then came almost two decades of political unrest and economic difficulties (e.g., low international commodity prices and overvalued exchange rates).

The agreement was reinvigorated in the early 1990s. In a June 1990, presidential summit in Antigua, Guatemala, the Plan de Acción Económica para Centroamérica (PAECA) called for the revival of economic integration in Central America. In 1992, Honduras was "readmitted," 6 and created with El Salvador and Guatemala the Northern Triangle. This led to the establishment of a free trade area in 1993, which Nicaragua later joined to create the Group of Four. They agreed on a common external tariff with four sub-tariffs of 5, 10, 15 and 20 percent. These countries signed the Guatemala Protocol in October

1993, a program aimed at modernizing the General Treaty of 1960. Its main objective is the establishment of an economic union.

The five CACM members and Panama showed their commitment to integration by establishing a new organization, the Sistema de Integración Centroamericana (SICA), which began its work in February 1993. Early in 1995, Costa Rica and Guatemala both increased their tariffs to try to solve their fiscal problems. Costa Rica added an 8 percent surcharge to its initial customs tariff. The Guatemalan decision to adopt a flat rate tariff in April was reversed ten days later. Moreover, at the 16th Presidential Meeting held in San Salvador on March 30, 1995, the region's economy ministers signed an agreement to extend the tariff reductions implemented by El Salvador. As of April 1, 1995, El Salvador has cut its tariffs on capital goods from 5 percent to 1 percent.

*Caricom*: Antigua and Barbuda, the Bahamas (not a member of the Common Market, only of the Caribbean Community), Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago. Suriname joined the Organization in February 1995, and took its seat at the Guyana summit held in July 1995.

The Caribbean Free Trade Association (CARIFTA) was created in 1967 as a limited free trade agreement. It was superseded by Caricom when Barbados, Guyana, Jamaica, and Trinidad and Tobago signed the Treaty of Chaguaramas on July 4, 1973 to create the Caribbean Community. All Commonwealth Caribbean countries are members of the group. In July 1989, the Heads of Governments adopted several measures aimed at stimulating and promoting economic and political integration. One of the main objectives of the Organization is a phased common external tariff on most goods by 1998.

An agreement was signed with Chile in January 1995 to prepare preliminary studies that will analyze the prospect for a free trade agreement.

*Free Trade Agreements*

*North American Free Trade Agreement (NAFTA)*: United States, Canada, and Mexico. The goal of negotiating a free trade agreement between the three North American countries grew out of a number of factors. Canada and the United States, partners in the single largest trading relationship in the world, successfully completed a bilateral FTA in 1988 that included goods, services, and investment, but did not deal in depth with intellectual property. For its part, Mexico had gradually come to be the third-largest trading partner of the United States, and had since the mid-1980s pursued a policy of economic and trade reform during the administrations of Presidents de la Madrid and Salinas. The three countries also shared a view that the size and scope of economic and commercial ties in North America essentially required a unique agreement, one that could be customized to fit the specific circumstances of the region.

The negotiations were launched in Toronto, Canada on June 12, 1991, and were completed fourteen months later on August 12, 1992 in Washington D.C. The agreement

was signed on December 17, 1992. It was supplemented in 1993 by the negotiation of "side agreements" on labor, the environment, and safeguards. Following the approval of the three countries' respective legislatures, NAFTA and its side agreements came into effect on January 1, 1994.

The NAFTA is a comprehensive free trade agreement. In addition to establishing a five or 10-year schedule for the elimination of tariff barriers on most goods, 7 it covers trade in services; provides protection for investment and intellectual property; applies rules to government procurement and the operation of government enterprises; and contains highly developed systems for the settlement of disputes. The agreement liberalizes market access conditions in a number of important sectors critical to the continued development of North America's infrastructure, such as in transportation, telecommunications, and financial services. It facilitates the movement of business people and professionals among the three countries.

The agreement contains an accession clause and the three original members formally launched accession negotiations with the government of Chile on June 7, 1995, in Toronto, Ontario. Subsequent to that, Canada and Chile announced in December 1995, their intention to negotiate an interim arrangement dealing with trade in goods, services and investment on a bilateral basis.

*Group of Three*: Colombia, Mexico, and Venezuela. On June 13, 1994, Colombia, Mexico, and Venezuela signed the Group of Three economic treaty which entered into force on January 1, 1995. Trade between Colombia and Venezuela will still be governed by the Andean Group agreements. The Group of Three agreement calls for the total elimination of tariffs over a 10-year period with some exceptions in the textile, petrochemical and agricultural sectors. Unlike most trade arrangements among Latin American countries, the Group of Three goes beyond tariff provisions, and deals with such matters as intellectual property rights, services, government procurement, and investment.

### *Bilateral Agreements*

The Compendium also contains information on a number of bilateral agreements, negotiated principally by Chile and Mexico with their respective trading partners. Chile has negotiated free trade agreements with Mexico (implemented on January 1, 1992), Venezuela (implemented on July 1, 1993), Colombia (implemented on January 1, 1994) and Ecuador (implemented on January 1, 1995). For its part, Mexico has negotiated Agreements with Chile (see above), Bolivia (January 1, 1995) and Costa Rica (January 1, 1995).

# II. MERCOSUR (SOUTH AMERICA'S COMMON MARKET)

*From the U.S. Department of Commerce website*
*http://www.mac.doc.gov/ola/mercosur/HM28BEC.HTM*

## 2-1. Overview

*Updated: July 1998*

The formal inauguration of the Mercosul/Mercosur integration process began on January 1, 1995. This undertaking was initiated in a restrictive framework by Argentina and Brazil in 1986 and now comprehends the economies of four countries representing a combined GDP of about $800 billion, or 65% of South America's GDP and 52% of the entire GDP of Latin America. Notwithstanding the fairly long gestation period for this effort, the available information and knowledge is relatively limited and many instances contradictory. Each member seems, in some instances, to have slightly different interpretations about the process. The set of papers on the theme of the Mercosur are derived from a series of documents provided by a Brazilian law firm, supplemented by assessments of other documents provided by the governments of the Mercosur group and private sector observers in the region. The objective of this set is to provide an overview of different elements of the Treaty of Asuncion and subsequent agreements and events that will bring the reader as much information that is publicly available about the Mercosur.

*Mercosul/Mercosur*

The Treaty of Asuncion, which provides the legal basis for the Mercosul, was signed in 1991 between Brazil, Argentina, Paraguay, and Uruguay. The Treaty established the goals to be accomplished in creating the common market, eventually allowing for the free movement of goods, capital, labor, and services among the four countries. The agreement envisions no central institutions in its initial stages, at least there is opposition to this concept; however, as the countries institute policy harmonization goals, there will be a tendency for greater centralization in the decision-making institutions.

As of January 1, 1995, the members instituted the common external tariff (CET) on approximately 85% of the tariff categories for Brazil and Argentina. Paraguay and Uruguay adopted the CET on January 1, 1996, except for those tariff categories exempted from CET. Currently, those tariff categories exempted from the CET are to move toward the established CET rates during the period 1996-2006. Some categories between 1995 and 2000 are subject to intra-Mercosur tariffs (see tariff paper in the Mercosur series). On January 1, 1995 a common external tariff (CET) ranging from 0-20 percent was established on those tariff items subject to the CET. Those CET of exempt categories

include capital goods, telecommunications, and informatics, as well as country-specific lists of exceptions (see attached country exemptions lists).

*Common External Tariffs*

Goods entering any of the four Mercosul countries are subject to a uniform tariff. Since implementation on January 1, 1995, the members adopted a common external tariff (CET) ranging between 0-20 percent that covers approximately 85 percent of the tariff schedule (approximately 9,000 items). However, in June 1995, Brazil and Paraguay apparently asked that additional excepted items be substituted in the list of exceptions to the CET with the understanding that the overall number of exempted items would not exceed the negotiating cap agreed by all the members. Apparently, every 90 days each country is able to substitute for 50 items on their respective exception lists; nonetheless, each country's items would remain subject to the annual tariff rate adjustments required to bring them to the agreed CET rate. The remaining 15 percent fall under a commonly agreed "exceptions" category.

Included are approximately 900 capital goods items and 200 telecommunications/ informatics products. Also two sectors were excluded from the Mercosur agreement -- autos and sugar -- which will be subject to further negotiations to establish a permanent regime. The specific elements of an auto regime were agreed to between Argentina and Brazil January 1996. This is a transition regime that will expire in 1999 to conform with Argentina's commitments to the WTO.

The exceptions list for Brazil concentrates on the chemical and petrochemical sectors, milk products, and raw materials for the textiles industry. The Argentine list of exceptions includes goods from the chemical and steel sectors, the paper industry and footwear. These items will be covered by the CET no later than 2006. The 14 percent tariff for capital goods will enter into force in 2001. This common tariff will be implemented through the gradual harmonization of member countries' tariffs. The CET for informatics will be established in 2006 at 16 percent, with tariffs harmonized in the same fashion. The Paraguay and Uruguay are larger and concentrated in agriculture goods and other diverse categories.

There are also national lists of intra-Mercosul trade exceptions. Each member country has composed a list of items that will not be immediately subject to a tariff free treatment within Mercosul. Brazil and Argentina have lists of 29 and 221 products, respectively. These products (including wine and peaches for Brazil) will enjoy this special status for two more years. The Paraguay and Uruguay lists of 427 and 950, respectively, will be effective for three more years.

*Rules of Origin*

According to the transition rules of origin, which have been extended until at least 2006, annexed to the Treaty of Asuncion, there are three criteria applied to products traded within the Mercosul . These categories are:

- products manufactured using materials exclusively originating in Mercosul countries;
- products that meet the 60 percent Mercosur content rule of there final valuer (obviously this would exclude products that involve simple assembly, division into lots or volumes, selection and classification, marking, packaging, etc.);(1)
- products manufactured using foreign materials that undergo a transformation in a member state that results in a change in the product's NAM classification (*Nomenclatura Aduaneira do Mercosul* or the tariff nomenclature of Mercosul). Nonetheless, the member countries may determine that the requirement of Article 2 of Annex 2 (explained below) must also be met;

In order for imports of products originating in the member country to benefit from the reductions in duties, charges and restrictions, they have granted each other, the export documentation for such products must include a declaration certifying that the product meets the requirements of origin established in the Treaty or its amendments.

With the mutual consent of the member countries, a member state may establish specific requirements of origin that will prevail over these general requirements. The treaty specifies a set of guidelines for establishing these specific requirements in Article 4, Chapter I, Annex

*Settlement of Disputes*

Any dispute arising between the member states as a result of the application of the Treaty shall be settled by direct negotiations.

If no solution can be found, the member parties to the dispute shall refer the dispute to the Common Market Group which, after evaluating the situation, shall within a 60 day period make the relevant recommendations to the members for settling the dispute. To this end, the Common Market Group may establish or convene panels of experts or groups of specialists in order to obtain the necessary technical advice. If the Common Market Group also fails to find a solution, the dispute shall be referred to the Council of the common market to adopt the relevant recommendations.

The above transition provisions have been extended until an agreed formal procedure is established for the full common market structure that should be in place by 2006.

*Safeguards Clauses*

Although the safeguards provisions were to apply only to the transition period through December 31, 1994, these provisions were effectively extended until at least 2006. Each member may apply safeguard measures to imports of products benefitting from the trade liberalization program embodied in the Treaty and its amendments.

In general, if imports of a given product damage or threaten to damage to a members' market as a result of a significant increase in imports from another member over short time frame, the importing member shall request the Common Market Group to hold consultations with a view to solving the problem or agreement to take an action (most likely the imposition of a quota for a defined period of time -- a maximum of two years) in order to overcome the problem. Whatever action is contemplated will be agreed upon the members through the Group.

Attached to this document are series of papers providing background and information on the Mercosur or Mercosul. These papers were derived from various sources, but primarily from the Brazilian law firm of Pinheiro, Netto. The lack of official documentation on many issues has prevented us from dealing with many questions that companies may have about the functioning of the Mercosur.

(1) According to Article 2 Annex 2 of the Treaty of Asuncion, in cases where a product does not undergo a transformation that results in a reclassification in the tariff nomenclature the value added in a member country determines whether it qualifies or not as originating in a member country. The c.i.f. value of the materials at the port of destination can not exceed 40% of the f.o.b. export value of the good in question (except for Paraguay where the transition rule of origin is 50%).

## 2-2. History

*Updated: August 1998*

*Introduction*

Shortly after the creation of the European Coal and Steel Community (1954) and the European Economic Community (1957), Latin America was already beginning to work toward regional integration. In 1960, the Latin American Free Trade Association (ALALC) was established by the Treaty of Montevideo. It was conceived as an area where there would be the free circulation of goods negotiated one by one in regular sessions, and enrolled in a list of products to be liberalized. The main goal of this treaty was to remove trade barriers among the member countries over a period of 12 years. However, this proved to be both controversial and difficult. By the end of 1978, the 11 signatories agreed that a restructuring of the Association was needed.

In 1980, the Latin American Integration Association (ALADI) was created to replace ALALC. Its objective was to increase "bilateral trade among the member countries and between member countries and third countries through bilateral and multilateral agreements, with the goal of eventually achieving regional free trade." In place of the free-trade zone for specific products established by ALALC, an economic preference zone was established creating conditions favorable to the growth of bilateral and multilateral initiatives as a means of stimulating regional integration. ALADI made possible agreements and joint actions between countries in the region that until then had only limited commercial ties. The establishment of a common market, however, was still the long-term objective.

*Closer Relationship Between Brazil and Argentina*

Under the ALADI system, Brazil and Argentina signed twelve commercial protocols in 1986. They were the first concrete steps toward bringing the two countries closer together. In order to supplement and improve on their former agreements, Brazil and Argentina signed a "Treaty for Integration, Cooperation and Development" in 1988. This set the stage for a common market between the two countries within ten years. It contemplated the gradual elimination of all tariff barriers and the harmonization of the macroeconomic policies of both nations. It was further established that this agreement would be open to all other Latin American countries. After the addition of Paraguay and Uruguay, a new treaty was signed by all four countries on March 26, 1991 in Asuncion, Paraguay, providing for the creation of a common market among the four participants to be known as the Southern Common Market (MERCOSUR). Finally, in December 1994, Argentina, Brazil, Uruguay and Paraguay signed the Protocol of Ouro Preto, implementing MERCOSUR.

*Associate Members*

The Asuncion Treaty provides for the possibility of other nations joining the common market. The Mercosur members can examine applications from any such nations

provided that the interested parties are not already a part of any sub-regional integration or extra-regional associations. Approval of applications would require the unanimous approval of the four member nations.

Mercosur has brought in associate members in the hopes of building a South American coalition. Chile signed a free trade agreement with Mercosur that went into effect in October 1996, and Bolivia signed on in March 1997. These new agreements point to the creation of a customs union in a maximum of 18 years and establish the framework for integration, commercial safeguards, and dispute settlement. Currently negotiations are underway between Mercosur and countries from the Andean Pact (Colombia, Peru, Ecuador, Venezuela and Bolivia). Negotiations are also underway with several Central American nations, as well as with the European Union. Potential trade pacts with these countries will be significant and will result in more opportunities for trade and investment.

## 2-3. Institutional Structure

*Updated: August 1998*

In December 1994, the member countries approved the creation of an institutional structure for MERCOSUR through the Protocol of Ouro Preto. These changes modified the structure established in the Asuncion Treaty (signed in 1991) and created the basis for the launching of the customs union.

***The MERCOSUR Council*** This council is composed of the Foreign and Finance Ministers of the member countries. Its primary functions are the formulation of policies and the negotiation of agreements with third countries and international organizations. The MERCOSUR Council already existed during the transition stage, however not as a legal body.

***The Common Market Group.*** Since the signing of the treaty in 1991, the Common Market Group has served as the executive body of MERCOSUR and is compromised of four representatives from the member nations. The Group's principal functions are to issue resolutions, adopt the necessary measures for achieving active resolutions, negotiate and sign agreements as delegated by the MERCOSUR Council and organize the meetings of the Council.

***The MERCOSUR Trade Commission.*** This body is in charge of administering matters related to trade and proposing new norms to the MERCOSUR Council. The Commission also modifies existing norms of trade and customs policies, and passes judgement on specific issues that arise in relation to the application of such norms and procedures. The Trade Commission has the authority to create technical committees - charged with analyzing specific topics and proposing solutions - which shall replace the trade-related Working Subgroups of the MERCOSUR Council and their numerous commissions that have functioned since the Treaty of Asuncion.

***The Joint MERCOSUR Parliamentary Commission.*** This commission was recently created to represent the national parliaments. Its functions consist of promoting national legislative procedures for the prompt entrance into force of norms approved at the subregional level.

***The Economic and Social Consultative Forum.*** Representative body of business people, workers, and consumers which can formulate recommendations for the Common Market Group.

***The Administrative Secretary of MERCOSUR.***This unit continues to support operations and is responsible for providing services to the principal commissions and groups, including maintaining archives of their resolutions and additional documents emanating from their work. (…)

## 2-4. Dispute Resolution

*Updated: August 1998*

### Scope

Any controversies during the transition period between the member states, or between private individuals and member states, arising from construction, applicability or noncompliance with the provisions of the Asuncion Treaty, or from the agreements executed under its scope, or even from decisions made by the Common Market Council and resolutions taken by the Common Market Group during the transition period, were subject to the settlement procedures listed below. The Ouro Preto Protocol provides that the Market Trade Commision will handle all claims submitted by the MTC National Sections, whether by member states or private individuals.

### Direct Negotiations

An attempt to settle any disputes between member states will first be made through direct negotiations, which will be limited to 15 days as from the date one of the member states raises the matter, unless otherwise agreed to by the parties.

### Intervention by the Common Market Group

If by means of direct negotiations an agreement is not reached between the member states, or if the controversy is only partially resolved, any of the member states may submit the matter for the examination of the Common Market Group, which will hear the parties involved in the conflict, and request outside advice from specialists, if necessary. The Common Market Group will subsequently make its recommendations to the parties involved in an attempt at resolution of the matter. This procedure may take no longer than 30 days, as of the date the dispute was submitted for the consideration of the Common Market Group.

### Arbitration

**Institution.** In the event an agreement is not reached through direct negotiations or with the intervention of the Common Market Group, any of the member states may request that the Administrative office of the Common Market Group institute arbitration. Each member nation will defray the expenses for the arbitrator appointed thereby.

**Arbitration Court.** The arbitration proceeding will be handled by an ad hoc court that will establish its headquarters in one of the member states, depending on the case, and will follow its own rules in the proceeding, deciding on the dispute based on the provisions of the Asuncion Treaty and the agreements executed thereunder, on the Common Market Council decisions and Common Market Group resolutions, as well as on such international law principles and provisions as are applicable thereto.

**Court Composition**. Each member state will appoint ten arbitrators to be placed on a list to be filed at the Administrative Office of the Common Market Group. Each arbitration court will be composed of three arbitrators taken from this list. Each member state (or two or more member states maintaining the same stance in the controversy) will designate an arbitrator, with the third arbitrator's being selected by mutual agreement of the other two arbitrators (such arbitrator may not be of the same nationality as either of the parties involved in the controversy). This third arbitrator will be the presiding judge. All arbitrators must be jurists of renown in their particular field of activities and will be appointed within 15 days of the Administrative Office's having informed the member states that it would institute an arbitration proceeding.

**Decision.** The court will render its written decision within two months of the date its presiding judge is appointed, extendable for another 30-day period. The arbitration award will be decided by a majority vote. The voting will be confidential and dissident votes may not be Justified.

**Effects of the Award.** The awards rendered by the Arbitration Court are unappealable, and will inure to the member states involved in the dispute with the force of res judicata. The awards must be effected immediately, unless otherwise established by the Arbitration Court. In the event any member state fails to comply with the arbitration decision within 30 days, the other member states may take temporary compensatory steps to cause compliance therewith. Any member state involved in a dispute has 15 days as from award notification to ask for any clarifications required. The Arbitrator Court will have 15 days to answer, and may stay award performance until a decision on the request is handed down.

**Private Claims**

- **Definition.** There is a system applying to any claims made by private persons (natural persons or legal entities) as a result of any sanction or application of any legal or administrative steps with restrictive, discriminatory effects, or of unfair competition from any of the member states in violation of the Asuncion Treaty, the agreements executed under the scope thereof, Common Market Council decisions or Common Market Group resolutions.

- **Procedure.** Claims will be made before the National Section of the Common Market Group of the member state in which the claimant maintains a regular residence or business headquarters, providing sufficient evidence to permit the National Section to determine the veracity of the violation, threat or loss. After hearing the claimant, the National Section of the Common Market Group of the member state will make direct contact with the National Section of the Common Market Group of the member state charged with having violated the provision, or will forward the claim within 15 days of receipt to the Common Market Group, without further examination.

- **Expert Testimony.** After receiving the complaint, the Common Market Group will immediately call in a group of specialists that will decide whether there are grounds for the claim; this group will take no more than 30 days after appointment to do so. This group of specialists will be composed of three members designated by the Common Market Group. If an agreement is not reached, the specialists will be elected from a list of 24 specialists registered with the Administrative Office of the Common Market Group, with each member state's being entitled to elect six specialists of recognized competence in the matters under dispute. The expenditures resulting from activities performed by the group of specialists will be proportionally borne by the parties, as determined by the Common Market Group or, should they not reach an agreement, divided equally between the parties involved in the dispute.

- **Expert Opinion and Advice.** The group of specialists will submit their opinion to the Common Market Group. If according to this opinion it is found that there are grounds for the claim against the member state, any other member state may call for the adoption of corrective measures or annulment of the measures in dispute. Should this requirement not be complied with in 15 days, the member state calling for such measures may resort directly to the arbitration proceeding specified in the above section on arbitration.

## 2-5. MERCOSUR and EU

* From the Official EU Website
http://europa.eu.int/comm/external_relations/mercosur/intro/index.htm#4

### 1. Outlook

The European Union has always favoured and supported a **strengthening** of the process of regional integration in Mercosur and has therefore supported the Mercosur initiative from its very conception in 1991. Notwithstanding the current cyclical downturn on both sides of the Atlantic, the EU continues to work towards a stronger relationship with Mercosur and a deepening of the Mercosur process internally.

Mercosur's ambition to **become a real common market** is a building block and positive element in the creation of an association between the two regions. Part of the current work between the EU and Mercosur, but also part of the on-going negotiations, aims at reinforcing and completing the internal Mercosur programme to complete its common market by 1 January 2006.

The 6th Round of Association negotiations has taken place between the European Union and Mercosur. It is important to point out, that the 5th Round of negotiations was held in Montevideo from 2-6 July 2001 and, that at this occasion the European Union unilaterally presented to Mercosur the Tariff Offer and negotiation texts for goods, services and government procurement. This EU initiative speeded up the negotiation process. In reciprocity, Mercosur presented its Tariff Offer and negotiation texts on services and public procurement at the 6th Round of Negotiations EU-Mercosur, which was held in Brussels from 29-31 October 2001. The real negotiation process has already started.

It was also agreed, that the venue of the 7th Round should become Argentine in April 2002. The intention is to make a substantial progress before the Madrid Summit on 17 May 2002.

The European Union/Latin America **Summit in Madrid in 2002** also has a particular significance for EU-Mercosur negotiations, as the European Commission hopes to have established by that time a "critical mass" of progress in the negotiations, which by then will have completed 3 years of discussions on co-operation, political dialogue and non-tariff issues and nearly 1 year of discussions on tariffs and services. Without any doubt, the Madrid Summit will give a strong impetus to the negotiation process.

- The EU & Latin America

### 2. EU-Mercosur Relations 1991-2002

The European Commission and the European Union have **supported Mercosur** from the very beginning. Less than one year after its creation the European Commission signed an Interinstitutional Agreement with Mercosur in 1992 to provide technical and institutional support to the fledging structures of Mercosur. At present, the EU-Mercosur relationship is based on the EU-Mercosur Interregional Framework Co-operation Agreement signed on 15 December 1995 in Madrid between the EC and its Member States and the Mercosur and its Party States, which fully entered into force on 1 July 1999 (though provisional application already took place from 1996 onwards). This Framework Agreement consists of three main elements: political dialogue, co-operation and trade issues.

Before this Framework Agreement the EU conducted an informal **political dialogue** with the Mercosur, which was formalized and institutionalized through the Framework Agreement and the Joint Declaration that is an annex to this agreement. This agreement established various levels of political dialogue both at the Heads of State/Government level, as well as ministerial level, as well as senior officials' level. As a results, during 1996-2001 joint ministerial meetings in the context of the political dialogue have taken place (1996-Luxembourg, 1997-Noordwijk, 1998-Panama City, 2000-Vilamoura, 2001-Santiago de Chile) and in the margin of United Nations General Assembly (UNGA) ministerial meetings with the EU Troika were held in New York (September 1996, September 1997, September 1998, September 1999, September 2000, November 2001). Since the 1998 ministerial and UNGA meetings the political dialogue meetings have included the participation/presence of Chile and Bolivia, which both are full members of Mercosur's own political dialogue mechanism.

Further steps are being undertaken to expand this dialogue through meetings of high level officials from both sides. A first meeting at such a level took place in November 1998 in Brussels and was mainly devoted to the topic of how to formally include Chile and Bolivia in the political dialogue arrangement between the European Union and Mercosur. During the 2000 Vilamoura ministerial meeting Mercosur proposed an action plan in the field of political co-operation, which the EU promised to study and discuss at a future meeting of senior officials. The first meeting of the EU-Mercosur Co-operation Council (ministers) in November 1999 in Brussels also included topics related to the political dialogue. The second meeting of the Co-operation Council took place under the Swedish Presidency of the EU on 26 June 2001 in Luxembourg, in conjunction with a second senior officials meeting to discuss Mercosur's proposal for an action plan in the field of political co-operation.

The EU Council adopted this action plan formally and is waiting for the reaction of Mercosur.

- *Press Release EU-Mercosur ministerial meeting in Panama, Feb. 1998*
- Press release EU-Mercosur ministerial meeting in Vilamoura, February 2000
- *Press Release EU-Mercosur ministerial meeting in Santiago, March 2001*
- Speech by Commissioner Patten on Latin America, Santiago, March 2001

**Co-operation and technical assistance** between the EU and Mercosur (as a common market) was already set up on the basis of the 1992 Interinstitutional Agreement, but reinforced and continued through the 1995 Framework Co-operation Agreement. The main aim of this co-operation is to reinforce the process of regional integration of Mercosur and as such it follows closely the Mercosur process and the timetable indicated by the Mercosur governments as regards each phase of the integration process. This type of co-operation with Mercosur at the regional level supplements the various co-operation relationships that the EU has with the individual members of Mercosur on a bilateral basis.

- The EU's relations with Argentina
- The EU's relations with Brazil
- The EU's relations with Paraguay
- The EU's relations with Uruguay
- Description des projets de coopération UE-Mercosur
- EuropeAid Co-operation Office website

Projects with Mercosur have taken place, are continuing, or are being prepared in the fields of:

- Institutional Support to various Mercosur bodies: Administrative Secretariat-SAM (latest project +/- 900,000 euro), Joint Parliamentary Committee- CPC (917,175 euro), Economic and Social Consultative Forum- FCES (+/- 950,000 euro);
- Customs Harmonization-Phase I already completed, a Phase II project is currently being prepared (5,000,000 euro);
- Veterinary and Phythosanitary Rules (11,200,000 euro);
- Technical Norms and Standards (3,950,000 euro);
- Statistical Harmonization (4,135,000 euro);
- Support to the (Mercosur) Single Market, which also includes SMEs (4,600,000 euro);
- Macroeconomic Co-ordination (2,500,000 euro).

The **main objective** of the 1995 Framework Agreement is the preparation of negotiations on an Interregional Association Agreement between the EU and Mercosur, which should include a liberalization of all trade in goods and services, aiming at free trade, in conformity with WTO rules, as well as an enhanced form of co-operation and a strengthened political dialogue. After three years of preparatory work between the Commission and the Mercosur governments, involving the preparation of a series of over 20 trade studies, three joint working groups, four rounds of meetings, a marathon session

of meetings in Punta del Este in November 1997 and much expenditure on reseach and analysis, the Commission was able to put forward in July 1998 to EU Member States a proposal for a negotiating mandate (comparable to Fast Track Authority/Trade Promotion Authority in the US context), accompanied by an impact studying analysing the possible consequences of a liberalization of trade with Mercosur. On the basis of this proposal, and the subsequent decision by Member States to adopt it, the Heads of State and Government of the European Union and Mercosur were able, at their summit meeting on 28 June 1999 in Rio de Janeiro, to formally decide to launch negotiations on a future Interregional Association Agreement.

- Joint Photography of Trade Relations between the European Community & Mercosur (April 1998)
- Commission staff working paper concerning the establishment of an inter-regional association between the EU & Mercosur
- Report on EU Interests in Mercosur-Chile (November 1999)
- EU-Mercosur Heads of State & Government meeting in Rio de Janeiro on 28 June 1999 (Joint Press Release)
- Bilateral Trade Relations

### 3. EU-Mercosur Association Negotiations 1999-2002

The **negotiating directives** were only formally approved by the Council on 13 September 1999, based on the political compromise reached by the EU ministers in Luxembourg on 21 June 1999. This compromise instructs the Commission to start negotiations on non-tariff elements immediately, to begin negotiations on tariffs and services on 1 July 2001, and in the meantime to hold a "dialogue" with Mercosur about tariffs, services, agriculture, etc. in the light of the WTO round. Negotiations can only be concluded after the end of the WTO round. Though creating important restraints on its negotiating position, the Commission has nevertheless been able to set up the negotiations on the basis of this mandate and by now is close to starting negotiations on tariff issues and services from 1 July 2001 onwards.

In practice the **negotiations started in November 1999** in Brussels, when Mercosur and EU negotiators presented to their ministers a document on the structure/methodology/calendar for the negotiations. The main forum for negotiations is the EU-Mercosur Biregional Negotiations Committee (BNC), to which are linked a Subcommittee on Co-operation (SCC), three Subgroups on specific co-operation areas and three Technical Groups (TG) dealing with trade matters.

- First EU-Mercosur cooperation council on 24 November 1999

#### 1st Round

The **first round** of negotiations in the BNC was held on 6-7 April 2000 in Buenos Aires under the Portuguese Presidency of the EU and the Argentinean Presidency of Mercosur.

Negotiators reached conclusions on general principles, political dialogue, co-operation and trade matters. They also formally established the three Technical Groups for trade matters and three subgroups for specific co-operation areas. Some of the general principles established relate to free trade, no exclusion of any sector, conformity with WTO rules, single undertaking principle, conclusion at the earliest possible time, intention to aim at comprehensive negotiations and balanced results, and the reinforcement of consultations on WTO matters. In the trade chapter a set of ambitious objectives was set up that clearly indicated that the future Interregional Association Agreement should not only cover a liberalization of trade in goods and services, but that it will also deal with government procurement, investment, intellectual property rights, competition policies, trade defence instruments and a dispute settlement mechanism. The various areas to be covered by the TGs were identified and a working programme was established until mid-2001. This working programme included exchanges of information, discussions on objectives and modalities on non-tariff measures, ways of addressing non-tariff obstacles to trade and exchanging working texts. After mid-2001 discussions will start of the methodology and schedule for the progressive elimination of tariffs in goods and the liberalization of trade in services.

- Conclusions of the First Meeting of the EU - Mercosur biregional negotiations committee (6-7 April 2000)

**2nd Round**

The **second round** of negotiations, which took place both at the level of the BNC, as well as in the TGs and one of the co-operation subgroups, was held during 13-16 June 2000 in Brussels and the trade negotiations focussed on three issues: 1) the exchange of information; 2) the identification of non-tariff obstacles; 3) the definition of specific objectives for each area of the negotiation. During the preparatory phase the Commission presented to Mercosur an initial list of non-tariff obstacles and transmitted to Mercosur, following the agreement made in Buenos Aires, a large amount of information (paper, diskettes, CD-ROMs) as regards the EC's legislation and regulations. Mercosur in return also sent a large amount of information to the Commission and presented a draft document containing specific objectives. During the second round the first meetings of the TGs took place, where both sides mainly discussed the information requirements and the various elements of information exchanged. During the course of the next months, in the run up to the third round, these activities continued, while the elements of identifying non-tariff obstacles and specific objectives also underwent further development. Political dialogue negotiations were conducted at the highest level in the BNC itself during this second round, while co-operation negotiations took place for the first time at the level of the subgroups, in particular in the subgroup dealing with Financial & Technical Co-operation. The parties agreed on a draft text for this type of co-operation.

- Conclusions of the Second Meeting of the EU-Mercosur biregional negotiations committee (13-16 June 2000)

**3rd Round**

A **third round** of negotiations was held between 7-10 November 2000 in Brasilia, under the French Presidency of the EU and the Brazilian Presidency of Mercosur. This round coincided with the visit of Commissioner Patten to Brazil, Argentina and Chile. Commissioner Patten opened this round together with his colleague Luiz Felipe Lampreia, the Brazilian Minister for External Relations. This third round included meetings of the BNC, the TGs and the co-operation subgroup on Economic Co-operation. Trade experts and negotiators could discuss and exchange technical data with their counterparts and much was clarified between the parties. Also agreement was found on a draft text for economic co-operation and on political texts relating to the political dialogue, preamble and institutional framework of the future agreement. It should be noted the atmosphere during the third round between the experts was positive and congenial and this produced both good results and a good psychology to continue discussions.

- Conclusions of the Third meeting of the EU-Mercosur biregional negotiations Committee (7-10 November 2000)
- Joint press release: Third round of Negotiations in Brasilia (Nov 2000)
- EU-Mercosur biregional Negotiations Committee, Speech by Chris Patten

**4th Round**

A **fourth round** of negotiations was held between 19-22 March 2001 in Brussels under the Swedish Presidency of the EU and the Paraguayan Presidency of Mercosur. During this round the BNC met again, together with the three TGs, the Subcommittee on Co-operation, the subgroup on Social and Cultural Co-operation and the subgroup on Economic Co-operation. Co-operation discussions focussed on various topics, among others the discussion on how to upgrade the present co-operation under the new agreement. In the political field discussions continued on the institutional framework of the agreement. In the trade area the parties presented for the very first time text proposals/working documents in the field of various non-tariff issues, while the Commission also presented and explained a new initiative as regards Business Facilitation. Preparations were discussed for the future tariff negotiations, while negotiators decided to organize the next round in July 2001.

- Conclusions of the Fourth meeting of the EU-Mercosur biregional negotiations committee (19-22 March 2001)
- Preparatory Memorandum on BNC-4
- Debate on MERCOSUR- Speech by Chris Patten (March 2001)
- EU proposes Business Facilitation Initiative with Mercosur & Chile on eve of negotiations (March 2001)

**5th Round**

A **fifth round** of negotiations was held in Montevideo from 2-6 July 2001 under the Uruguayan Presidency of Mercosur and the Belgian Presidency of the EU and the tariff and service negotiations started between EU and Mercosur.

At this round of negotiations, the European Union unilaterally presented to Mercosur the tariff offer and negotiation texts for goods, services and government procurement. Mercosur highly appreciated this political gesture by the EU in a delicate moment of the regional integration process and considered it as a strong support of the European Union to the Mercosur process. With respect to the Institutional Framework of the future agreement, discussions took place and the parties exchanged their points of view on the widening and deepening of the contents of the future political dialogue. As to the negotiations on co-operation, the parties agreed on joint texts in the field of customs, competition, statistics and scientific and technological co-operation.

- Conclusions of the Fifth meeting of the EU-Mercosur biregional negotiations committee (2-6 July 2001)
- V Ronda de negociaciones Union Europea-Mercosur Oferta de negociación de la UE (05/07/01)
- Preparatory Memorandum on BNC-5

**6th Round**

The **sixth round** of the EU-Mercosur Negotiations was held in Brussels from 29-31 October 2001, and Mercosur presented its tariff offer as well as negotiation texts on services and public procurement. The results of this Round were very positive and the real negotiation process has already started. In spite of the internal difficulties of Mercosur, one could note a strong political commitment of Mercosur, aiming at making a real progress in the negotiations. A substantial progress in the co-operation chapter was made and joint texts in several fields, inter alia, Science, Telecommunications, Energy, Transport were agreed. Furthermore, for the first time, a whole text relating to the Institutional Framework and Political Dialogue Chapter was discussed. Moreover, it was agreed that the 7th Round should take place in Argentine, most likely in the week of 8-12 April 2002. Before this Round, a technical meeting is scheduled for the end of February concerning trade aspects. Naturally, both parties have the political will to make substantial progress in the negotiations for the next Madrid Summit of 17 May 2002. It remains to be seen how the political and the financial crisis of Argentine which is now the Secretariat pro Tempore of Mercosur could influence the present state of EU-Mercosur negotiations.

- Conclusions of 6th sixth meeting of the EU-Mercosur Bi-regional negotiations committee
  Brussels, 29-31 October 2001

**7th Round**

The Seventh Meeting of the EU-Mercosur Bi-regional Negotiations Committee (BNC) will take place in Buenos Aires, in Palacio San Martin, on 8-11 April 2002.

From the EU side the meeting will be chaired by Mr. Legras, Director General for External Relations and from the Mercosur side by Mr. Martin Redrado, Secretary of State for International Relations of Argentina.

This Seventh Round will focus on the following issues:

1. Political chapter
2. Co-operation chapter
3. Trade Facilitation Measures
4. Exchange of views of the draft joint communiqué Mercosur-European Union for the Madrid Summit

The main objective of this meeting is to make a substantial progress in the different points of the agenda, before the next EU-Mercosur Summit on 17 May 2002. The Round will be very much focus on trying to finalise the Political and Co-operation Chapters and also agreeing on a Trade Facilitation Measures Package to be delivered at the Madrid Summit on the basis of the EU-Mercosur Business Forum.

- Conclusions of the 7th Meeting of the EU-Mercosur Bi-regional Negotiations Committee
  Buenos Aires, Argentina, 8-11 April 2002

### 4. Mercosur Background Information

The **Mercosur was created** by Argentina, Brazil, Paraguay and Uruguay in March 1991 with the signing of the Treaty of Asuncion. It originally was set up with the ambitious goal of creating a common market/customs union between the participating countries on the basis of various forms of economic co-operation that had been taking place between Argentina and Brazil since 1986. The Treaty of Ouro Preto of 1994 added much to the institutional structure of Mercosur and initiated a new phase in the relationship between the countries, when they decided to start to implement/realize a common market. A transition phase was set to begin in 1995 and to last until 2006 with a view to constituting the common market. In 1996 association agreements were signed with Chile and Bolivia establishing free trade areas with these countries on the basis of a "4 + 1" formula. During this period Mercosur also created a common mechanism for political consultations, which was formalized in 1998, in which the four countries plus Bolivia and Chile all participate as full members of the so-called "Political Mercosur".

The Treaty of Ouro Preto in 1994 established an **institutional structure** for Mercosur, which was inspired by the example of the EU, but which did not copy the exact details of the EU model. The main difference compared to the EU is Mercosur's rejection of any notion of supranationality or of autonomous (supranational) central institutions. Thus Mercosur functions on the basis of a 100% intergovernmental structure, notwithstanding the fact that it aims to achieve objectives very similar to the European ideal, i.e. the

creation of a common market and possibly later on in the future an economic and monetary union with a common currency.

Although the **smaller countries** of Mercosur (Uruguay, Paraguay) would prefer a larger degree of supranational governance in Mercosur, this is opposed by the larger members of Mercosur, which up to the present time have stalled or rejected initiatives in this direction. A good example is given by the arbitration mechanism in Mercosur, based on the 1994 Protocol of Brasilia, which does not lead to an easily binding mechanism for solving disputes, at times even necessitating the intervention of the Presidents of the four countries to solve (trade) disputes of a technical character. In this respect the EU strongly differs from Mercosur in its supranational and centralized set-up, with strong central entities such as the Commission and the European Parliament and with impartial arbitration by institutions such as the Court of Justice in Luxembourg.

* Eighth meeting of the European Union - Mercosur
http://europa.eu.int/comm/external_relations/mercosur/ass_neg_text/ip02_1684.htm

IP/02/1684 -Brussels, 15 November 2002

**Bi-regional Negotiations Committee: 11-14 November 2002-Brasília**

**Final conclusions**

Negotiators from the Mercosur and the European Union met for the eighth time in the context of the EU-Mercosur Bi-regional Negotiations Committee during 11-14 November 2002 in Brasília, continuing the economic and trade negotiations for the conclusion of the Interregional Association Agreement between the European Union and the Mercosur.

The Brazilian Ambassador to the European Communities, José Alfredo Graça Lima, on behalf of the pro tempore Presidency of Mercosur, and the Director for Free Trade Agreements of the Directorate-General for Trade of the European Commission, Mr. Karl Falkenberg, on behalf of the European Union, jointly opened the eighth meeting of the BNC with statements that strongly reiterated the Parties' commitment to a rapid progress of the negotiations.

They recalled the conclusions of the Negotiators' Meeting at Ministerial Level, held at Rio de Janeiro last July. On that occasion, Ministers and Commissioners discussed the state of the negotiations and agreed to a schedule of meetings for 2002 and 2003, giving a new impetus to the economic and trade negotiations of the Interregional Association Agreement.

Following the opening, the Parties met at separate Technical Groups to work intensively on the proposals. As agreed in the Rio de Janeiro Work Programme, discussions focused on texts on standards, technical regulations and conformity assessment procedures;

competition; general rules of origin; intellectual property rights; customs procedures; and dispute settlement. Proposals from both sides were reviewed and substantial progress was made on consolidation of negotiating texts. Both Parties agreed to continue their efforts of consolidating texts, aiming at having a first common draft text of the Interregional Association Agreement for the next meeting of the Bi-regional Negotiations Committee.

Furthermore, the delegations finalised their discussions on methods and modalities for the negotiations on market access on goods, including agricultural products, and for the negotiations on services.

Finally, the Parties considered the implementation of the business facilitation measures that were launched during the Second Meeting of Heads of State and of Government of the European Union and of Mercosur, held in Madrid, on 17th May 2002.

The next meeting of the Bi-regional Negotiations Committee shall take place, tentatively, on 17 to 21 March 2003, in Brussels, in conformity with the Rio de Janeiro Work Programme.

# III. ANDEAN COMMUNITY

* From the Andean Community General Secretariat
http://www.comunidadandina.org/ingles/document/Canada.htm

## 3-1. Institutional framework and juridical security in the Andean Community

By Mónica Rosell,
Jurist, functionary of the General Secretariat of Andean Community

### I. Introduction

- The Andean Community is the economic and social integration bloc made up of Bolivia, Colombia, Ecuador, Peru and Venezuela, whose aims are to promote the balanced and harmonious development of the Member Countries under equitable conditions by means of integration and economic and social cooperation.
- The Andean Group was born as the result of a historical and economic moment in which the need for a collective response to underdevelopment and the successful experiences of European integration converged.
- Article 48 of the Cartagena Agreement defines the Andean Community, from an organizational standpoint, as a subregional organization with an international legal status, composed on the one hand of the five Sovereign States and, on the other, of the bodies and institutions comprising the so-called "Andean Integration System."
- The conversion into "Andean Community" reflects the will to give our subregional process a broader and more significant content, one involving the Andean citizen more directly and introducing an association between the aspirations of the countries and the Community institutions that have been created in order to properly channel those aspirations.
- After almost 30 years of experience with integration, the Andean Community considers that increasing the competitiveness of the Member Countries calls for building an enlarged economic space and exercising political determination, combined with a technical capacity to take common stands in an internationalized economy in which the creation of blocs and steady progress toward globalization are the hallmarks.
- Both of these aspirations depend to a large extent on the existence of a consolidated juridical and institutional structure that goes beyond the individual will of its component elements to stand as an effective guarantee of juridical security and stability in managing integration policies.

### II. Institutional framework

- 1996 stands as the year of institutional reform. It was in March 1996 that the Andean countries signed the Trujillo Protocol that modified the Cartagena Agreement, thereby creating an organizational system composed of several bodies and institutions entrusted with the direction, control, and general administration of subregional integration and responsible for the performance of specific financial and social management tasks. This system was given the name of "Andean Integration System."

- The following bodies and institutions comprise the Andean Integration System today:

  - The Andean Presidential Council;
  - The Andean Council of Foreign Ministers;
  - The Commission of the Andean Community;
  - The General Secretariat of the Andean Community;
  - The Court of Justice of the Andean Community;
  - The Andean Parliament;
  - The Business Advisory Council;
  - The Labor Advisory Council;
  - The Andean Development Corporation;
  - The Latin American Reserve Fund;
  - The Simón Rodríguez Agreement, any Social Agreements that are made a part of the Andean Integration System, and all others that are created within its framework;
  - The Simón Bolívar Andean University;
  - Any Advisory Councils the Commission may set up; and
  - Any other bodies and institutions that may be created within the framework of Andean subregional integration.

- The Andean Court of Justice was added to the System in 1979 because of the growing complexity of the Andean juridical system. The Parliament, on the other hand, grew out of the conviction that a democratic vocation was essential for the bloc's future projection. The Labor and Business Advisory Councils were created later and have been the source of a fruitful exchange of mutual experiences and recommendations for advancing Andean integration.

- The Andean integration process has not been problem-free, as the crises throughout its history attest. It was to bring the process under more direct control that the Andean Presidential Council was set up in 1989, with the gathering of Foreign Ministers acting as the preparatory stage for its meetings.

- In 1996, as already stated, the various decision-making, executive, jurisdictional, deliberating, advisory and specialized bodies were brought together into a coherent and coordinated system. That is why we now speak of the Andean Integration System. In the eyes of the Andean legislator, Andean institutions and bodies are interlinked more by the complementary nature of their functions under

the political direction of a single body, the Andean Presidential Council, than by their hierarchy.

- The institutional structure of the Andean Community can be seen to be based on a kind of division of functions between the legislative, executive, and judicial powers; they exercise a counterbalance of sorts, a control and balance among the interests of the countries and the Community.

- It is important to point out here that within the institutional structure described, the Cartagena Agreement has a General Secretariat that operates as the Andean Community's executive body and as such acts only in accordance with the interests of the Subregion as a whole.

**Legal security in the Andean Community:**

- We have already touched upon three essential characteristics of the Andean Community: the presence of an Andean juridical system, its supranational nature, and the existence of Community bodies that are also supranational and that are responsible for administering justice at the Andean administrative jurisdictional levels (The General Secretariat and the Court of Justice of the Cartagena Agreement). To these we can add a fourth characteristic, having to do with the fact that Community provisions cover a growing spectrum of areas of economic and social activity.

- The Treaty Creating the Court of Justice, as amended by the Cochabamba Protocol, which is to become effective shortly, stipulates in its article 1 that the juridical system of the Andean Community is made up of:

    1. The Agreement of Cartagena, its Protocols and Additional Instruments;

    2. The Treaty Creating the Court of Justice of the Andean Community and its Amending Protocols;

    3. The Decisions of the Andean Council of Foreign Ministers and of the Commission of the Andean Community;

    4. The Resolutions of the General Secretariat of the Andean Community; and

    5. The Industrial Complementarity Agreements and any others the Member Countries may adopt among themselves and within the framework of the Andean subregional integration process.

- It is essential to bear in mind that the General Secretariat Resolutions are subordinate to the Decisions only when they regulate those Decisions or are issued in exercise of a power delegated by the Commission or the Council of Foreign Ministers. In all other cases, they are on the same hierarchical level as the latter (obviously, they are undeniably subordinate to the Treaties), precisely because the relationship between the bodies involved is not hierarchical, but functional.

**a) Supranationality:**

- The most distinctive features of this Andean juridical system stem from its supranational nature. This distinguishes Integration Law in general and Andean Law in particular from classical Public International Law and from national laws, of which, paradoxically, it forms a part and integrates.

- The notion of supranationality has also been refined gradually since the birth of the European Economic Community with the signing of the Treaty of Paris in April 1951. It is no longer understood as the creation of a "Super State" with its own territorial sovereignty. Just the opposite. Supranationality, in Integration Law, is the negation of the "Imperium" in the Roman manner and the affirmation of the autonomy of management created by the States that are integrated.

- The supranationality, in turn, is expressed in what doctrine has called "Direct Applicability" and "Preeminence," which we also find in the integration system of the European Union.

**Direct Application:**

- "Direct application," as the first characteristic deriving from the concept of supranationality, has its legal basis in article 2 of the Court Treaty in force and in the Cochabamba Protocol amending that Treaty, which stipulates that "the Decisions are binding on the Member Countries as of the date of their approval by the Commission." Article 3, for its part, states that "the Decisions of the Commission shall be directly applicable in the Member Countries as of the date they appear in the Official Publication of the Agreement, unless those Decisions stipulate a later date...".

- Consequently, Community laws do not require reception procedures in the domestic laws of the Member Countries in order to become fully effective. Andean provisions require compulsory and immediate compliance by Member Countries at all jurisdictional levels, the bodies of the Andean Community, and private individuals. This means that Andean provisions are binding on the branches of government of the states, without distinction throughout their territory and do not allow for any state, regional, or municipal limitations whatsoever. It also signifies that the common citizen acquires rights and obligations whose fulfillment he/she can demand from both national courts and the Community's administrative and judicial jurisdictional levels.

**b) Preeminence:**

- In its rulings, the Court of Justice has repeatedly emphasized the preeminence of Andean Community Law as its second characteristic, pointing out that its application prevails over domestic or national provisions. By way of example, In its Verdict in Proceeding 3-AI-96, in which it cited several jurists, the Court referred to its preeminence as the virtue by which the Community body of law prevails over a provision of domestic law that is contrary to it, irrespective of the hierarchical level of the latter. Therefore, should a conflict arise between the

national provisions of the Member Countries and Community provisions, the application of the latter shall prevail over the former.

- This principle of the preeminence of Community provisions means that the Member Countries may not invoke provisions of their domestic law as a reason for failing to comply with the obligations they have assumed in the context of the integration process.

- An Andean provision may be amended only by another Andean provision issued by the appropriate Community bodies and not by the legislatures of the Member Countries. This, of course, does not hinder the development of a Community law through national legislation, but only in the case that such is necessary for the correct application of the Community law.

**III. Consequences of the existence of a preestablished community institutional system and of a supranational juridical order:**

**- The autonomy of the Community's Institutional and Juridical System:**

- It can therefore be seen that Community Law is effectively an autonomous and independent juridical system, with its own provisions and its own Community institutions and that by its very nature it is applied immediately and directly and enjoys preeminence over the domestic law of the Member Countries. The reason for this is that it arises from the will of the signatory States and of the bodies created for that purpose with their own regulatory framework.

**- Juridical Stability and Security**

- The recognition and implementation of the principles of direct application and preeminence have been instrumental for the progress of the integration process. Today the Andean Community is able to reveal itself to the world as a free trade zone that is virtually consolidated and moving toward the creation of a common market. But we must add a further element: it has gone beyond merely commercial and economic matters to penetrate into the social and political fields, placing it on a course toward shaping its own and original model.

- It is also undeniable that the fulfillment of these principles and of the body of Andean provisions in general has rested on an organized institutional fabric. The regulation of the substantive aspects and procedures of that fabric by a juridical order that is also Community-generated, have made it a guarantor that integration commitments will be fulfilled, irrespective of and more important than the ups and downs in economic circumstances that the Member Countries must face on an individual basis.

- Thus, for example, if under the political direction of the Council of Presidents, it is decided to strengthen the Community's enlarged economic space and its relationships as a bloc with third parties, then it will be the decision-making bodies that are called upon to make that mandate viable from the normative point of view. The executive and judicial bodies, for their part, will be responsible, in

correspondence with the specialized bodies, for guaranteeing the effective execution of that decision.

- The institutional structure is entrusted not only with ensuring that the Member Countries and the subjects of Community law fulfill its provisions, but also with protecting the latter from illicit acts, including any misuse of authority by the institutional system itself. In this way, the juridical and administrative effectiveness of the integration movement is guaranteed.

- Just as the individual political will yields to the collective political will that is superior to it, the individual dispute settlement mechanisms yield to those of the Community, and domestic law yields to Community law, individuals, both national and foreign, are entitled to have Andean provisions applied to them.

- Inasmuch as Community law and institutional structure are at all times under scrutiny by the five Member Countries --both by their government jurisdictional levels and their civil populations--, they must both operate with a considerable degree of transparency and predictability.

- In closing, we can affirm that the Andean Community offers effective juridical stability and security, both of them prerequisites for the development of competitive and unbiased political, trade, and social relations within the enlarged economic space and with third parties. The challenge facing the Andean Community today is to reinforce that juridical stability and security and to continue enhancing its levels of transparency and predictability.

### 3-2. Dispute Settlement Mechanism

* From the Andean Community General Secretariat
http://www.comunidadandina.org/ingles/treaties/trea/explanation.htm

The Cartagena Agreement signed by the Member Countries in 1969 and amended through its respective Protocols establishes the legal and institutional framework for the Andean integration process. The jurisdictional function within the integration process is assigned to the Court of Justice of the Andean Community. The General Secretariat, for its part, is charged with the administrative investigation (also known as the pre-litigation phase) to determine whether State Parties are responsible for non-compliance, and with monitoring the Andean juridical system to ensure that it remains consistent.

The Treaty creating the Court of Justice of the Cartagena Agreement, signed by the Member Countries in 1979, establishes that body and defines its spheres of competence. The first part of the Treaty establishes what is called the "Andean Juridical System," which is made up of: a) the Cartagena Agreement, its Protocols and Additional Instruments; b) the Treaty creating the Court of Justice; c) the Commission Decisions; and d) the Resolutions of the Board (today replaced by the General Secretariat of the Andean Community).

That Treaty also establishes the supranational characteristics of Community provisions, namely their direct application (horizontal and vertical) and immediate effectiveness in the Member Countries. As a result, the Decisions of the Council of Foreign Ministers and of the Commission and the Resolutions of the General Secretariat of the Andean Community do not require ratification by national parliaments in order to become operative and enter into force on the date of their publication in the Cartagena Agreement's Official Gazette. They are binding on both government branches, bodies, and offices, and Andean citizens.

The fifth article of the Treaty, by the same token, establishes the general obligation of Member Countries to take the necessary measures to ensure compliance with the rules and regulations that constitute the juridical system of the Cartagena Agreement. They also may not adopt or implement any measure whatsoever that is at variance with those provisions or that hinders their application in any way.

The Court consists of five judges, one from each Member Country, who are appointed to six-year terms and may be reelected a single time. The headquarters of the Court are in Quito, Ecuador.

Under the Treaty, the Court has jurisdiction today over actions of three kinds: nullification, non-compliance, and pretrial interpretation. In the first case, the Court is responsible for declaring the nullity of Commission Decisions and General Secretariat Resolutions that violate the provisions of the Andean Community's juridical system, even those resulting from the deviation of power, if challenged by a Member Country (provided that the Decision was not adopted with its affirmative vote), the Commission,

the General Secretariat, or natural or juridical persons to which they are applicable and detrimental. This action must be brought during the year following the Decision or Resolution's entry into force.

A non-compliance action is a complaint alleging that a Member Country is failing to comply with its obligations under the provisions constituting the Andean juridical system. The General Secretariat of the Andean Community must first institute administrative proceedings in the pre-litigation or administrative phase referred to above, before a non-compliance action may be brought before the Court.

Decision 425 of the Council of Foreign Ministers contains the Regulations for the Administrative Proceedings of the Andean Community's General Secretariat. They stipulate that the General Secretariat must, by administrative initiative or at the request of a Member Country or of a citizen, send its written observations to the Member Country that is allegedly failing to comply with Andean provisions, setting a deadline for its answer. On receiving that answer or at the expiration of the deadline, the General Secretariat should go on record with a justified opinion. Regardless of the opinion or of whether or not it was issued, the option of turning to the Court exists as of that moment.

Under the pretrial interpretation procedure, national judges trying a case in which a provision of the Andean juridical system should be applied must obligatorily request the interpretation of the Andean Court of Justice with regard to the content and scope of that provision. They should then, in keeping with that interpretation, judge the facts and settle the dispute. The aim of this mechanism is to ensure that Andean provisions are applied uniformly throughout the territory of the Member Countries.

On May 28, 1996, the Member Countries signed the Protocol Modifying the Treaty creating the Cartagena Agreement's Court of Justice, known as the Cochabamba Protocol. Its ratification by the five Member Countries will broaden the Court's spheres of competence and amend the non-compliance action. The latter point is particularly important because the entry into force of the amendments will allow natural and juridical persons to appeal directly to the Court should a Member Country fail to comply with Andean provisions, provided that the cited pre-litigation proceedings before the General Secretariat are first carried out.

The Cochabamba Protocol will also establish a new legal recourse for cases of omission or failure to act, under which the Council of Foreign Ministers, the Commission, the General Secretariat, and natural or juridical persons may request the Court's verdict if one of those Community bodies fails to carry out an activity for which it is expressly responsible under the Andean Community's juridical system. It also gives the Court the competence to settle via arbitration any disputes that may arise as a result of the application or interpretation of contracts, accords, or agreements signed between bodies and institutions of the Andean Integration System or between the latter and third parties, if the parties so agree. The Court and the General Secretariat may also settle via arbitration any disputes citizens may submit to them with regard to the application or interpretation of aspects contained in private contracts regulated by the Andean Community's juridical system. The Cochabamba Protocol, in addition, gives the Court

the jurisdiction to try labor disputes that arise in Andean Integration System bodies and institutions.

## 3-3. Current Developments

* From the Andean Community General Secretariat
http://www.comunidadandina.org/ingles/treaties/trea/court.htm

### The Andean Court goes South

By Jorge Castro Bernieri
Professor of Law at the Catholic University of Peru. Legal adviser to the Andean Community General Secretariat
Lima, February 26, 2002

An important decision was made at the recent Summit of Mercosur Presidents and Foreign Ministers in Buenos Aires to set up a permanent court to settle any disputes that may arise within that bloc.

Mercosur from the very beginning had chosen to seek integration without institutions. This implied a conscious decision on the part of the Member States not to establish courts or any other community bodies. In this way, their chosen model was different from that adopted by the Andean Community, which for many years had institutions but no trade. But as we Andean people have recently discovered, particularly in the past ten years in which our intra-Community trade has grown with increasing rapidity, institutions are needed to prevent inequalities, correct distortions and ensure legal security.

Today its Community institutions are part of the wealth of the Andean integration movement. Entities like the CAF help to redistribute resources in the region and stand as a model for the entire world. The General Secretariat gives the Member Countries technical assistance, while the Andean Court, headquartered in Quito, handles a growing caseload that that builds up ever-stronger relations among our countries. This Court has managed disputes in the region in a transparent and reliable way and was recently given important recognition by the Heads of State meeting in Santa Cruz at the Andean Summit.

For some years now, Mercosur experts have been pushing for the creation of a permanent court following the Andean example. Under the terms of the Cartagena Agreement, the Andean Court settles differences that arise among the countries with regard to the fulfillment of Community commitments, controls the operation of bodies like the Andean Commission or the General Secretariat to ensure that they do not exceed their given functions and backs national judges when the latter must implement or interpret the System’s provisions.

The wording of the Olivos Protocol, whereby the political bodies of Mercosur agreed to create their permanent court, reveals just how deeply our neighbors were inspired by the Quito Court. The stated aims of the Mercosur Protocol are to "depoliticize disputes among the Members, give them a measure of institutional predictability and advance

toward a uniform interpretation of Mercosur’s body of law and the creation of a common jurisprudence."

With the establishment of the permanent court, the Mercosur countries are moving ahead with the institutional strengthening of their trading bloc. This is good news for those of us who believe that regional integration is the best mechanism our countries have today to advance their development.

# IV. FREE TRADE AGREEMENT OF THE AMERICAS (FTAA)

## 4-1. Overview of the Process

* From the Official FTAA Website

http://www.ftaa-alca.org/View_e.asp

### Overview of the FTAA Process

The effort to unite the economies of the Western Hemisphere into a single free trade agreement began at the Summit of the Americas, which was held in December, 1994 in Miami. The Heads of State and Government of the 34 democracies in the region agreed to construct a Free Trade Area of the Americas, or FTAA, in which barriers to trade and investment will be progressively eliminated, and to complete negotiations for the agreement by 2005. The leaders also committed to achieve substantial progress toward building the FTAA by 2000. Their decisions are contained in the Miami Summit's Declaration of Principles and Plan of Action.

Four ministerial meetings took place during the preparatory phase of the FTAA process: the first was in June 1995 in Denver, USA, the second in March 1996 in Cartagena, Colombia, the third in May 1997 in Belo Horizonte, Brazil and the fourth in March 1998 in San José, Costa Rica. At their meeting in San José, Ministers recommended to their Heads of State and Government the initiation of negotiations and set out the structure and general principles and objectives to guide the negotiations. On the basis of the San José Declaration, the FTAA negotiations were launched formally in April 1998, at the Second Summit of the Americas in Santiago, Chile. The leaders agreed that the FTAA negotiating process be transparent and take into account the differences in the levels of development and size of the economies in the Americas, in order to facilitate full participation by all countries.

The fifth Ministerial meeting – the first since negotiations were formally initiated — took place in Toronto in November 1999. At this meeting, Ministers instructed the Negotiating Groups to prepare a draft text of their respective chapters, to be presented at the sixth Ministerial meeting in Buenos Aires in April 2001. Groups responsible for market access issues were directed to discuss the modalities and procedures for negotiations in their respective areas. Ministers also approved several business facilitation measures, designed to facilitate commercial exchange in the Hemisphere, particularly in the area of customs procedures.

At the sixth Ministerial meeting, held in Buenos Aires, and at the Third Summit of the Americas held in Quebec City in April 2001, a number of key decisions were made regarding the FTAA negotiations. Ministers received from the Negotiating Groups a

draft text of the FTAA Agreement, and, in an unprecedented move designed to increase the transparency of the process, recommended to their heads of State and Government to make this text publicly available. The draft FTAA agreement was made available to the public in all four official languages on July 3, 2001. Ministers also highlighted the need to foster dialogue with Civil Society, and the summaries of the second round of Civil Society submissions in response to the open invitation were agreed to be placed on the FTAA Website. Ministers reiterated the importance of the provision of technical assistance to smaller economies to facilitate their participation in the FTAA.

Deadlines were fixed for the conclusion and implementation of the FTAA Agreement. Negotiations are to be concluded no later than January 2005; entry into force will be sought as soon as possible thereafter, no later than December, 2005.

As instructed by Ministers Responsible for Trade, recommendations on methods and modalities for negotiations were submitted by April 1, 2002, and market access negotiations were initiated on May 15, 2002. Principles and guidelines for these negotiations are set out in the Document on Methods and Modalities for Negotiations. A second version of the draft FTAA Agreement is being prepared during this third negotiating phase, which ends in October 2002 at the Seventh Ministerial Meeting, to be held in Ecuador.

**Guiding Principles of the FTAA Negotiations**
A number of agreed principles guide the negotiations. These include, among others:

- decisions will be taken by consensus;
- negotiations will be conducted in a transparent manner;
- the FTAA will be consistent with WTO rules and disciplines, and should improve upon these rules and disciplines wherever possible and appropriate;
- the FTAA will be a single undertaking (“nothing is agreed until all is agreed”);
- the FTAA can coexist with bilateral and sub-regional agreements and countries may negotiate and accept the obligations of the FTAA individually or as members of a sub-regional integration group; and
- special attention will be given to the needs of the smaller economies.

**Structure and Organization of the FTAA Negotiations**
The FTAA negotiations are carried out under an agreed structure that is member-driven and ensures broad geographical participation. The Chairmanship of the entire process, the site of the negotiations themselves, as well as the Chairs and Vice Chairs of the various negotiating groups and other committees and groups, all rotate among participating countries.

Chairmanship of the Negotiations: rotates every eighteen months, or at the conclusion of each Ministerial meeting. The following countries have been designated to serve as Chair of the FTAA process for successive periods: Canada; Argentina; Ecuador; as well

as Brazil and the United States (jointly).

The Ministers Responsible for Trade exercise the ultimate oversight and management of the negotiations. They meet generally every eighteen months and, since the negotiations were launched, do so in the country which is holding the FTAA Chairmanship.

The Vice Ministers Responsible for Trade, who as the Trade Negotiations Committee (TNC), have a central role in managing the FTAA negotiations. The TNC guides the work of the negotiating groups and other committees and groups and decides on the overall architecture of the agreement and institutional issues. The TNC is also responsible for ensuring the full participation of all the countries in the FTAA process, ensuring transparency in the negotiations, overseeing the administrative secretariat, and overseeing the identification and implementation of business facilitation measures. The Committee meets as required and no less than twice a year at rotating sites throughout the hemisphere.

**Nine FTAA Negotiating Groups**, which have specific mandates from Ministers and the TNC to negotiate text in their subject areas. They were established for market access; investment; services; government procurement; dispute settlement; agriculture; intellectual property rights; subsidies, antidumping and countervailing duties; and competition policy. The negotiating groups meet regularly throughout the year.

Three Committees and Groups address horizontal issues related to the negotiations.

A **Consultative Group on Smaller Economies** follows the progress in the negotiations with regard to the concerns and interests of the smaller economies and makes recommendations to the TNC. The Group has sought to determine the needs of smaller economies for trade-related technical assistance in their participation in the FTAA and to disseminate information about sources of such technical assistance. These databases have been made available through the FTAA homepage. In addition to these databases, the Tripartite Committee manages the Trade Education Database (TED), "an inventory of training opportunities available in FTAA-relevant areas of trade policy and negotiation for both government officials and the private sector in the region in order to facilitate access to technical assistance" as mandated by Ministers at the Toronto Ministerial meeting.

To further transparency in the negotiating process and to broaden public understanding and support for the FTAA, Ministers created the **Committee of Government Representatives on the Participation of Civil Society**. The purpose of this Committee is to facilitate the input of the business community, labor, environmental, academic groups, and others who wish to present their views on the issues under negotiation and on trade matters in a constructive manner. The FTAA is the first major trade negotiation where such a group has been established at the outset of the negotiations.

During the first phase of negotiations, the FTAA Committee of Government Representatives on the Participation of Civil Society issued its initial Open Invitation to

Civil Society. This invitation called on interested parties to share their views on the FTAA process in a constructive manner. The submissions were studied by the Committee of Government Representatives on the Participation of Civil Society, who forwarded executive summaries of these positions to Ministers, and prepared a report outlining the range of views received in response to the open invitation. At the Toronto Ministerial, Ministers received this report and requested the Committee to "obtain ongoing input from Civil Society on trade matters relevant to the FTAA." A second Open Invitation was issued after the Toronto Ministerial, and the Committee was again asked to summarize the range of views and forward this to Ministers. The Committee's second report, including the executive summaries of the submissions received by Civil Society groups, was made publicly available on the FTAA Website after the Buenos Aires Ministerial meeting, at which Ministers urged "civil society to continue to make its contributions in a constructive manner on trade-related issues of relevance to the FTAA". The Open Invitation to Civil Society was extended permanently.

Another unique feature of the FTAA process is the **Joint Government-Private Sector Committee of Experts on Electronic Commerce** established to study how to broaden the benefits to be derived from the electronic marketplace in the hemisphere, and how to deal with this cross-cutting issue within the negotiations.

An ad hoc group of experts was established to report to the TNC on the implementation of the customs-related **business facilitation measures** agreed upon at Toronto. These measures, which do not require legislative approval but can be implemented administratively, are designed to facilitate commercial exchange within the Americas, and indeed benefit all traders. The transparency-related measures, initiatives to increase the flow of information about trade and trade-related issues among the countries of the Americas, are disseminated through the FTAA Homepage.

**Technical and Analytical Support:** The Tripartite Committee, which consists of the Inter-American Development Bank (IDB), the Organization of American States (OAS) and the United Nations Economic Commission for Latin America and the Caribbean (ECLAC) provides analytical, technical and financial support to the process and maintains the official FTAA Website. The individual Tripartite institutions also provide technical assistance related to FTAA issues, particularly for the smaller economies of the Hemisphere.

**Administrative Support:** The FTAA Administrative Secretariat, located in the same site as the meetings of the negotiating groups, provides administrative and logistical support to the negotiations. It keeps the official archives of the negotiations, and provides translation and interpretation services. The Secretariat is funded by a combination of local resources and the Tripartite Committee institutions.

**Venue of the Negotiations:** has also been established on a rotating basis. Three countries have been designated as hosts of the negotiations, namely: the United States (Miami) from May 1998 to February 2001; Panama (Panama City) from March 2001 to February 2003; and Mexico (Mexico City) from March 2003 to December 2004.

## 4-2. Draft Treaty (The Third Draft FTAA Agreement)

* From the Official FTAA Website

http://www.ftaa-alca.org/FTAADraft03/Index_e.asp

November 21, 2003 Version

**4-3. Miami Declaration (Nov. 2003)**

* From the Official FTAA Website
http://www.ftaa-alca.org/Ministerials/Miami/Miami_e.asp

***FREE TRADE AREA OF THE AMERICAS***
***EIGHTH MINISTERIAL MEETING***
***MIAMI, USA***

## *November 20, 2003*

### *MINISTERIAL DECLARATION*

**INTRODUCTION**

1. We, the Ministers Responsible for Trade in the Hemisphere, representing the 34 countries participating in the negotiations of the Free Trade Area of the Americas (FTAA) held our Eighth Ministerial Meeting in Miami, United States of America, on November 20-21, 2003, in order to provide guidance for the final phase of the FTAA negotiations.

2. We recognize the significant contribution that economic integration, including the FTAA, will make to the attainment of the objectives established in the Summit of the Americas process: strengthening democracy, creating prosperity and realizing human potential. We reiterate that the negotiation of the FTAA will continue to take into account the broad social and economic agenda contained in the Miami, Santiago and Quebec City Declarations and Plans of Action with a view to contributing to raising living standards, increasing employment, improving the working conditions of all people in the Americas, strengthening social dialogue and social protection, improving the levels of health and education and better protecting the environment. We reaffirm the need to respect and value cultural diversity as set forth in the 2001 Summit of the Americas Declaration and Plan of Action.

3. We reiterate that the FTAA can co-exist with bilateral and sub-regional agreements, to the extent that the rights and obligations under these agreements are not covered by or go beyond the rights and obligations of the FTAA. We also reaffirm that the FTAA will be consistent with the rules and disciplines of the World Trade Organization (WTO).

4. Commitments assumed by the countries of the FTAA must be consistent with the principles of the sovereignty of States and the respective constitutional texts.

**The Vision of the FTAA**

5. We, the Ministers, reaffirm our commitment to the successful conclusion of the FTAA negotiations by January 2005*, with the ultimate goal of achieving an area of free trade and regional integration. The Ministers reaffirm their commitment to a comprehensive

and balanced FTAA that will most effectively foster economic growth, the reduction of poverty, development, and integration through trade liberalization. Ministers also recognize the need for flexibility to take into account the needs and sensitivities of all FTAA partners.

6. We are mindful that negotiations must aim at a balanced agreement that addresses the issue of differences in the levels of development and size of economies of the hemisphere, through various provisions and mechanisms.

7. Taking into account and acknowledging existing mandates, Ministers recognize that countries may assume different levels of commitments. We will seek to develop a common and balanced set of rights and obligations applicable to all countries. In addition, negotiations should allow for countries that so choose, within the FTAA, to agree to additional obligations and benefits. One possible course of action would be for these countries to conduct plurilateral negotiations within the FTAA to define the obligations in the respective individual areas.

8. We fully expect that this endeavor will result in an appropriate balance of rights and obligations where countries reap the benefits of their respective commitments.

**General Instructions**

9. The Agreement will include measures in each negotiating discipline, and horizontal measures, as appropriate, that take into account the differences in the levels of development and the size of the economies, and are capable of implementation. Special attention will be given to the needs, economic conditions (including transition costs and possible internal dislocations) and opportunities of smaller economies, to ensure their full participation in the FTAA process.

10. We instruct the Trade Negotiations Committee (TNC) to develop a common and balanced set of rights and obligations applicable to all countries. The negotiations on the common set of rights and obligations will include provisions in each of the following negotiating areas: market access; agriculture; services; investment; government procurement; intellectual property; competition policy; subsidies, antidumping, and countervailing duties; and dispute settlement. On a plurilateral basis, interested parties may choose to develop additional liberalization and disciplines. The TNC shall establish procedures for these negotiations that shall, among other things, provide that: countries negotiating additional obligations and benefits within the FTAA shall notify the Co-Chairs of their intention to do so before the outset of the negotiations; and any country not choosing to do so may attend as an observer of those additional negotiations. Observers, by notifying the Co-Chairs, may become participants in these negotiations at any time thereafter. The results of the negotiations must be WTO compliant. These instructions are to be delivered by the TNC to the Negotiating Groups and the Technical Committee on Institutional Issues (TCI), no later than the seventeenth meeting of the TNC to enable the negotiations to proceed simultaneously and to be completed according to the schedule.

**Guidance on text issues**

11. We instruct the TCI to present to the eighteenth TNC meeting its draft text as well as its recommendations on the institutions required to implement the FTAA Agreement, including proposals on the funding mechanisms, the administrative rules and the implications for human resources for the functioning of the institutional structure of the FTAA Agreement.

12. We direct the TCI with due regard to the provisions contained in this Declaration to provide to the TNC, as soon as possible, a proposal on the process for finalizing the agreement. This proposal shall contain, *inter alia*, specific steps, including legal review, translation, verification and authentication, necessary to finalize the text of the agreement, as well as the process and timetable for the completion of those steps.

**Guidance on market access negotiations**

13. We instruct that the negotiations on market access be conducted at a pace that will lead to the conclusion of those negotiations by September 30, 2004.

**Differences in levels of development and size of economies**

14. We acknowledge the differences in the levels of development and size of economies in the hemisphere and the importance of all the countries participating in the FTAA to attain economic growth, improved quality of life for their people, and balanced and sustained social and economic development for all its participants. We therefore reaffirm our commitment to take into account in designing the FTAA, the differences in levels of development and size of economies in the hemisphere to create opportunities for their full participation and increase their level of development. We will establish mechanisms that complement and enhance the measures that address differences in the level of development and size of economies, in particular smaller economies, in order to facilitate the implementation of the Agreement and to maximize the benefits that can be derived from the FTAA. Such measures shall include but not be limited to technical assistance and transitional measures including longer adjustment periods.

(…)

**Transparency and the Participation of Civil Society**

(…)

28. We express our interest in creating a civil society consultative committee within the institutional framework of the FTAA upon the Agreement's entry into force. Such a committee could contribute to transparency and the participation of civil society on an on-going basis as the FTAA is being implemented. We instruct the Committee on Government Representatives on the Participation of Civil Society, in coordination with the TCI, to continue to study the issue and make recommendations to the TNC concerning it. We ask the TNC to review these recommendations and make a proposal concerning this matter for our future consideration.

(…)

## 4-4. Against the FTAA

### The Free Trade Area of the Americas and the Threat to Social Programs, Environmental Sustainability and Social Justice in Canada and the Americas

*by Maude Barlow*

http://www.canadians.org/campaigns/campaigns-tradepub-ftaa2.html


**Summary**

The Free Trade Area of the Americas (FTAA), currently being negotiated by 34 countries of the Americas, is intended by its architects to be the most far-reaching trade agreement in history. Although it is based on the model of the North American Free Trade Agreement (NAFTA), it goes far beyond NAFTA in its scope and power. The FTAA, as it now stands, would introduce into the Western Hemisphere all the disciplines of the proposed services agreement of the World Trade Organization (WTO) - the General Agreement on Trade in Services (GATS) - with the powers of the failed Multilateral Agreement on Investment (MAI), to create a new trade powerhouse with sweeping new authority over every aspect of life in Canada and the Americas.

The GATS, now being negotiated in Geneva, is mandated to liberalize the global trade in services, including all public programs, and gradually phase out all government "barriers" to international competition in the services sector. The Trade Negotiations Committee of the FTAA, led by Canada in the crucial formative months when the first draft was written, is proposing a similar, even expanded, services agreement in the hemispheric pact. It is also proposing to retain, and perhaps expand, the "investor-state" provisions of NAFTA, which give corporations unprecedented rights to pursue their trade interests through legally binding trade tribunals.

Combining these two powers into one agreement will give unequalled new rights to the transnational corporations of the hemisphere to compete for and even challenge every publicly funded service of its governments, including health care, education, social security, culture and environmental protection.

As well, the proposed FTAA contains new provisions on competition policy, government procurement, market access and dispute settlement that, together with the inclusion of services and investment, could remove the ability of all the governments of the Americas to create or maintain laws, standards and regulations to protect the health, safety and well-being of their citizens and the environment they share. Moreover, the FTAA negotiators appear to have chosen to emulate the WTO rather than NAFTA in key areas of standard-setting and dispute settlement, where the WTO rules are tougher.

Essentially, what the FTAA negotiators have done, urged on by the big business community in every country, is to take the most ambitious elements of every global trade and investment agreement - existing or proposed - and put them all together in this openly ambitious hemispheric pact.

Once again, as in former trade agreements like NAFTA and the WTO, this free trade agreement will contain no safeguards in the body of the text to protect workers, human rights, social security or health and environmental standards. Once again civil society and the majority of citizens who want a different kind of trade agreement have been excluded from the negotiations and will be shut out of the deliberations in Quebec City in April 2001.

However, the stakes for the peoples of the Americas have never been higher, and it appears a confrontation is inevitable.

**4-5. Recent Developments**

Bridges Weekly Trade News Digest (Vol. 7, No. 40, Nov. 26, 2003)
http://www.ictsd.org/weekly/03-11-26/story3.htm

## FTAA MINISTERIAL LEAVES FUTURE WIDE OPEN; US MOVES TOWARD NEW BILATERALS

The eighth Ministerial meeting of the Free Trade Agreement of the Americas (FTAA) wrapped up early on 20 November with the adoption of a Declaration that by all accounts avoided tough decisions and left many options on the table. The Ministerial followed lower-level talks between the 34 future FTAA parties (see BRIDGES Weekly, 19 November 2003), and saw particularly tough negotiations between FTAA co-chairs Brazil and the US. As delegates failed to broach their wide differences, they chose to adopt a broad and vague declaration in order to prevent a failure -- such as the breakdown of WTO negotiations in Cancun in September -- and keep the talks alive.
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