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The FTAA Exposed:
A Citizens' Critique of the November 2002 Draft of the Free Trade Area of the Americas

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OVERVIEW: THE FTAA AGENDA: CORPORATE PRIVILEGES OVER DEVELOPMENT NEEDS

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On 1 November 2002, the Trade Negotiations Committee of the Free Trade Area of the Americas (FTAA) published the second draft texts of the nine chapters that will comprise the proposed accord. Like the first draft text (published in July 2001), this version contains numerous "bracketed" proposals, issues on which consensus does not yet exist. In spite of repeated demands by civil society, it does not identify which governments support any of the proposals in the text, and since no country has yet released comprehensive or up-to-date versions of its particular proposals, it is impossible to identify which government is advocating which proposal or even the level of support that exists for competing proposals.

Despite these difficulties, members of the Hemispheric Social Alliance (HSA) has analyzed the draft text and identified particular areas of concern within those proposals. Multinational teams of scholars and activists have analyzed each chapter, comparing them with the HSA's proposals for economic integration in it central document, *Alternatives for the Americas*. They have also identified several issues of concern, including gender, sustainability, which run throughout the draft FTAA text.[1] Their analysis points to an agreement that could, if implemented, have profoundly negative impacts on peoples and environments throughout the hemisphere.

The members of the HSA do not oppose trade or economic relations among our respective countries. We do believe, however, that the rules that govern those relations must be designed to ensure that both trade and investment serve, first and foremost, to promote equitable and sustainable development. The current draft FTAA text does not serve those goals, and is already generating considerable opposition among citizens' groups throughout the Americas.

Several objectives run throughout the official FTAA text: universal coverage under the agreement of all productive and service sectors; the application of the FTAA rules at all levels of government; and the elimination of laws and regulations that restrict the ability of the private sector, particularly foreign investors, to operate in and move among countries in the region. Since agreements reached at the World Trade Organization (WTO) constitute the floor for any regional accords, the FTAA would in practice be "WTO-plus". The strong focus in the FTAA on far-reaching proposals on investment, services and competition policy, among other things, makes it clear that this is also an attempt to reach agreements as a bloc that could then be utilized as a new floor for future global negotiations at the WTO.

[1] This overview is based on the analyses that follow, which reflect the perspectives of their authors, not necessarily the HSA as a whole. We would like to thank the John D. and Catherine T. MacArthur Foundation, the Rockefeller Foundation and the Solidago Foundation, whose generous support made the publication of this document possible. We would also like to thank the translators of this document: Eugenia Gutierrez; Coral Pey; Jaeda Harmon; Marco Velazquez, Jacobo Menajovsky; Keyllen Nieto; Dan Thomas; and Natalie Mariona.

Proponents of the FTAA argue that it would, if implemented, promote economic growth and development throughout the hemisphere. Given the negative impacts of the North American Free Trade Agreement (NAFTA), the WTO and other existing accords that serve as models for the FTAA, it would seem that FTAA advocates have a very different definition of development than the social sectors that so strongly oppose it.

Members of the HSA do not believe that simply empowering transnational corporations to operate wherever they like under the conditions that they deem most profitable will translate into development for our peoples or improvements in our environments. In *Alternatives for the Americas*, we set out the guiding principles by which we would evaluate any trade and investment agreement:

- **Democracy:** citizens must be actively involved in the design, implementation and evaluation of economic policies that affect their lives and have the ability to modify harmful policies;
- **Sovereignty:** countries should have the power to set high standards of living, promoting dignified work, the creation of good jobs, healthy communities and a clean environment within their borders;
- **Equity:** inequalities both within and among nations, as well as between women and men and among races, must be reduced; and
- **Sustainability:** trade and investment agreements should give priority to the quality of development, which implies establishing social and environmental limits to economic growth.

The proposals contained in the draft FTAA text fail to meet any of these criteria. Even a cursory reading of that document shows that negotiators have failed to address the concerns raised by citizens' groups in the Americas. In addition to the general principles described above, the *Alternatives* document lays out detailed proposals both on issues such as agriculture and investment that are subject to official negotiations, and on issues such as gender, labor and environmental standards that must be addressed in an equitable agreement. The draft text does not reflect any of those concerns. There is no mention in the text of the differential impact of trade on women or how the resulting problems might be addressed. There are no proposals to ensure that low wages and poor working conditions do not serve as a country's primary "competitive advantage". The only statements on labor rights and environmental standards are some weak suggestions that countries should strive not to lower those standards in order to attract foreign investment (without any mention of consequences should that occur). There is not a single word within the reams of paper that make up the draft text on the provision of funds needed to raise standards internationally or on the cancellation of illegitimate foreign debts. Beyond those omissions, however, many provisions in the FTAA would serve to actively undermine any country's ability to achieve sustainable and equitable development.

Democracy

The FTAA continues to be negotiated in secret, and the proposed text fails to incorporate the many proposals raised by citizens' organizations in the hemisphere. Representatives of civil-society -- with the possible exception of the members of the Americas Business Forum, who reportedly enjoy significant access to negotiators and trade ministers -- have not been included in

the FTAA negotiations in any meaningful way. The official Committee of Government Representatives on the Participation of Civil Society (CGR) has served as little more than a "suggestion box", receiving submissions that are eventually sent on to trade ministers in a format so summarized as to be useless.

In addition to the lack of democracy in the negotiations process, there are proposals in the draft FTAA text that would themselves serve to undermine democracy in the Americas.
Numerous provisions in the chapters on services, investment, government procurement and elsewhere call for the automatic application of FTAA measures at all levels of government – national, regional, provincial or state, and local. The provisions on services would even apply to non-governmental organizations providing social services. While only representatives of the national government are involved in negotiating the resulting accord, their decisions would be imposed on local-level governments, as well as national, thus potentially overriding local laws and programs resulting from much more democratic processes that ought to be respected.

This issue is especially problematic with regards to the enforcement of FTAA investment rules. Under NAFTA's controversial investor-state mechanism, for example, foreign investors can sue national governments for compensation due to the existence of public-interest laws or regulations that might undermine their profits. Using that mechanism, the U.S.-based Metalclad corporation successfully sued the Mexican government for compensation, for example, when a municipal government refused to allow the company to build a toxic-waste dump in its community. Under the NAFTA rules, neither the local government nor citizens' groups have any right to even participate in these cases, which are decided by unelected panels of experts in international trade law. The FTAA's investment chapter includes proposals to duplicate this mechanism in the FTAA. There is also a proposal to extend that mechanism to cases involving anti-competitive practices by public monopolies, thus potentially submitting public utilities, even those with broad-based public support, to challenge and potential elimination. In addition, the proposals on general dispute resolution fail to address the concerns about lack of transparency in that process, concerns that have been raised by citizens' groups for years.

Sovereignty

Proposals in the FTAA would undermine the ability of governments to direct development policies in a number of ways. At the most basic level, the FTAA would lock in the liberalization of trade and investment and deregulation already implemented under structural adjustment programs and extend the coverage of those programs to new sectors of the economy. The chapter on market access, for example, allows for countries to phase in tariff reductions over a ten-year period, but unless a sector is specifically exempted from the FTAA during the negotiations process, it would not be possible to later decide to extend or cancel the tariff reduction. Similarly, if a government were to decide that the privatization of a key public service, such as health care, had been a mistake and thus decide to retake control of that service, under the FTAA's investment chapter it could be forced to pay millions of dollars in compensation to foreign investors for their lost potential profits. Even if the sector had been only partially privatized, FTAA rules on services would require opening the entire sector to competition from the private sector.

Various proposals limit the ability of governments to direct their own activities so that they help meet broader social and development goals. The chapter on competition policy would place numerous restrictions on the operations of public monopolies. Many public monopolies, such as postal services, were set up to serve both commercial and social objectives. Under the FTAA, however, a supranational commission would be established to monitor and enforce laws against public monopolies that do not operate solely by commercial criteria. There are no proposals, however, to submit the activities of private monopolies to judgment by that commission. The chapter on public procurement would ban the use of almost any non-commercial criteria in procurement decisions, severely restricting governments' ability to give preference to local firms in procurement contracts or to establish social criteria for contracts, such as requiring that contractors pay their workers a living wage. The proposals for "most-favored-nation" treatment in this chapter would require that every country receive the best of the treatment afforded to other countries, thus preventing governments from refusing to do business in countries with egregious human-rights or labor-right practices.

Several provisions in the draft FTAA text would also undermine governments' abilities to protect their citizens' health. Proposals in the chapter on intellectual-property rights would restrict the circumstances under which governments could permit the production of cheaper generic versions of essential medicines, thus severely limiting poor peoples' access to treatment for HIV/AIDS and other serious diseases. The services chapter would allow transnational firms to provide healthcare services in competition with public health systems, potentially leading to foreign firms accepting only relatively healthy patients. Other patients would be left to public systems, most likely under-funded because of provisions found in both the services and competition policy chapters that would cut subsidies.

Many governments are eager to attract foreign investment because of their hope that it will generate much needed employment and economic growth, only to see those hopes dashed as investment flows to speculative activities with few links to the rest of the economy. The FTAA chapter on investment would prohibit capital controls, thus eliminating any "speed bumps" to check capital flight. It would also ban "performance requirements", conditions placed on foreign investors such as insisting that they use a given level of local goods, labor or services in their production, thus ensuring that the benefits of the investment extend beyond an enclave of production. Investors would be able to open or close operations in the country as they please without any responsibility to local communities.

Equity

At every official meeting on the FTAA since the first Summit of the Americas in Miami in 1994, proponents of the FTAA have declared their recognition of the special needs of smaller economies, even setting up a committee on that issue. As with the issue of civil-society participation, however, there has been a lot more rhetoric than substance to those talks. Proposals on government procurement, for example, acknowledge the need for technical assistance and certain limited exceptions for developing countries. That language, as with similar text proposed in chapters on market access and services, is vague and hortatory, particularly compared to the specific binding rules on most-favored-nation, national treatment

and other issues that negotiators clearly consider to be more important than the need to ensure that developing countries benefit from increased trade and development.

One of the issues complicating that discussion is the difficulty in defining exactly which countries should be considered small economies. The truth is that virtually every country in the hemisphere is a small economy compared to the United States, and thus the commitments they make in the FTAA should be substantially different than those made by the larger economies. Even within Latin America and the Caribbean, there are vast differences in terms of levels of development and productive structures. Some countries, such as Brazil and Argentina are net exporters of agricultural goods and might benefit from increased access to new markets and the removal of subsidies. Others, such as Jamaica and Venezuela, are net importers of food products and would likely be affected differently. While each country will be able to make its own proposals on the goods and services it wishes to exempt from the investment, market access services, and other disciplines established in the FTAA, the overarching objective of the negotiations is clearly to subject all sectors to the FTAA rules regardless of a country's particular developmental needs.

Beyond the issue of equity among countries is that of equity within countries. The Mexican experience under NAFTA is illustrative. While certain export industries did expand their production, domestic corn producers were devastated by the massive imports of corn from the United States. And within the export sectors in all three NAFTA countries, wages for the workers involved in that production fell even as productivity increased. The fact that the FTAA text is silent on these distributional issues does not mean that it is neutral. Taken as a whole, the proposals in the draft text will strengthen the position of those firms that already enjoy significant access to financial and other resources, thus likely worsening income and asset distribution within each country.

FTAA proposals on "national treatment" could severely undermine efforts to achieve greater equity between foreign and national businesses. Those rules, which require governments to treat foreign companies at least as well as domestic companies, appear in nearly every chapter of the draft text. While on its surface this concept seems reasonable, in fact foreign companies often already enjoy significant advantages over local firms in terms of access to financial resources, market information and experience.

If, as proposed in the services chapter, it is illegal to give preference to local over foreign-owned companies, transnational financial firms could easily gain control over a country's banking sector. That, coupled with the bans on performance requirements, would prevent countries from requiring that loans be directed to rural areas, or to productive rather than speculative activities. The ongoing crisis in Argentina points to the dangers of that approach. Foreign firms dominate the banking sector in that country and are putting tremendous pressure on the Argentine government not to reduce the debts owed by local businesses and to assume responsibility for personal savings. It appears that the brunt of the burden of that crisis will fall on the few remaining local banks and on Argentine savers and borrowers.

Despite demands from civil-society, the countries negotiating the FTAA have failed to carry out any kind of gender impact assessment of the measures proposed. The experience with trade

liberalization under NAFTA and the structural adjustment programs carried out in many countries demonstrates that women are very often affected differently by these measures than men. Women tend to be much more involved in the production of crops for domestic consumption than in cash crops for exports, so trade liberalization and cuts in subsidies that favor export crops, as is promoted in the FTAA, will likely hit them harder than men.

Over 70 percent of artisan craft producers in the Americas are women, many of whom have passed down traditional designs for generations. FTAA proposals on intellectual-property rights would allow one person or company to trademark those designs or the geographic designations (such as "Talavera pottery") that make them attractive to consumers. Similar issues apply to traditional knowledge of plants and medicines. An individual or corporation with access to the necessary legal and financial resources could secure a patent on communal knowledge, which would have serious consequences for the indigenous communities that have developed that knowledge.

Sustainability

Many provisions in the FTAA, particularly those on market access, agriculture and investment, would serve to further orient domestic production to exports. The weakening of the role of the State in targeting resources to strategic sectors will also likely mean that many countries will tend to increase exports of primary commodities rather than processed goods with value added. Prices for commodities tend to be volatile, but proposals in the draft text on competition policy would prohibit efforts to establish commodity stockpiles to regulate prices. The combination of falling prices and more open markets would likely lead to increased export volumes both of agricultural goods and natural resources, such as forests and fisheries, thus placing new pressures on already fragile ecosystems.

That pressure could be exacerbated by proposals in the FTAA chapter on services that prohibit limits on the number of service providers in a sector. It would be illegal under the accord, for example, to limit the number of toxic-waste dumps in an area, or perhaps even to limit the number of oil-exploration rigs. The strong tendency throughout the text to limit regulations to the least trade-distorting measures possible and to commercial criteria could also seriously undermine efforts to limit unsustainable economic activities.

The investor-state proposal described above could also inhibit local legislators from implementing new environmental regulations. Several of the cases raised under the NAFTA investor-state provision have involved challenges to environmental regulations, some demanding nearly a billion dollars in compensation. The criteria used to decide those cases is not whether the measure in question is justified on environmental or other social grounds, but only whether the change in rules infringes on the investors' profits.

Conclusions

The proposals described in the FTAA draft text represent one possible set of rules to govern economic relations among our countries. By no means are they the only possible set of rules. In *Alternatives for the Americas*, members of the HSA have set out concrete proposals on each of

the policy issues included as chapters in the FTAA, as well as other crucial issues such as labor, environment, human rights, immigration and gender. Negotiations that start from the premises laid out in *Alternatives* and are carried out under a democratic process would result in a completely different kind of agreement than that presented by our governments in the draft text. Another kind of integration is not only possible, it is imperative.

THE FTAA CHAPTER ON AGRICULTURE: A PRELIMINARY ANALYSIS OF ITS IMPACTS

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SUMMARY

While nearly all of the draft FTAA text on agriculture is in brackets, it is clear that the intention is liberalize agricultural trade in the Americas. The liberalization proposed in this chapter could have important consequences for the entire hemisphere, although it would affect different countries in different ways, depending on whether they are net importers of exporters of agricultural goods.

These differential impacts explain the different government positions, with net exporters in particular promoting the most extensive liberalization. The United States and Canada seek access to Southern markets without removing protection or domestic support measures in their own markets. The effects on agricultural economies will differ according to the degree of liberalization, but in general small-scale rural producers and peasants will suffer the most negative impacts. It is also possible that negative environmental impacts will multiply, as much due to the intensification of production as to the expansion of the agricultural frontier.

The negotiations around market access and support for domestic producers are asymmetrical, given the significant protection and assistance provided by the United States and Canada to their producers, compared to Latin American governments' abandonment of the agricultural sector. The proposals in the draft text do not differentiate between legitimate and perverse subsidies, nor are adequate mechanisms provided to prevent dumping or to control the role of transnational corporations. The draft text, rather than promoting the strengthening of the precautionary principle, weakens it. It does not include mechanisms to provide for food sufficiency and sovereignty, and it focuses on preventing food aid programs from distorting trade.

Because of this mercantilist emphasis, the proposals in the draft fail to incorporate mechanisms to coordinate agricultural policies, and would therefore lead to increased competition among nations, weakening attempts at regional integration. The draft text also fails to incorporate adequate mechanisms to address the environmental and social consequences of agricultural trade.

THE DRAFT TEXT ON AGRICULTURE

The draft chapter on agriculture is made up of six possible sections and four possible Annexes. Nearly all of the text is in brackets, indicating that there is still no agreement or that one or more version has been presented, and there is nothing that demonstrates a principle of agreement.

Section 1: General Dispositions

Reach or scope of application: the latest draft (November 2002) applies to the agricultural products enumerated in Chapter 1 of the WTO Agreement on Agriculture. According to provisions in that agreement, fish and fish products would be excluded from the accord, while

leather and skins, fibers of animal origin (wool and fur), as well as some fibers of vegetable origin (cotton, linen, hemp) would be included, only in raw form except for carded or combed cotton. There is disagreement on whether or not to include clauses on particular sanitary and phytosanitary measures in the agreement. Because of that, there does not seem to be agreement on the inclusion of a special section on that issue.

One issue to highlight is the intention (although there is not agreement on this point) to establish a link between the scope of the FTAA chapter on agriculture and the results of the WTO Agreement on Agriculture. This has resulted in a proposal that any future WTO agreement on this issue automatically be incorporated into the FTAA. This issue, as will be seen below, is key because of the commercial and political implications that an agreement on agriculture would have in the hemisphere, according to whether it was tied to or contradicted the results of the negotiations being carried out in the WTO.

It is also important to point out that there is not even agreement on the need to consider the needs and concerns of the so-called "Small Economies" in the agreement, which itself implies the lack of consideration of inequalities among economies.

Section 2: Market Access – Tariffs and Non-tariff Measures

Even the title of this section is included in brackets, which gives an idea of the level of discussion in this chapter. The term “market access” implies a broad conception of the object of negotiation, and would seem to be one of the essential points in the discussions of a free-trade agreement. The options are either to clearly define the possibility of market access, or instead, to simply negotiate commitments to reduce tariffs or non-tariff barriers from their current levels, thus avoiding the central issues of defining the conditions for market access.

There are important differences in terms of the possibilities of elimination and commitments to maintain or increase tariffs. It is worth highlighting a clause that is designed to condition the tariff liberalization program on compliance with commitments to eliminate subsidies and other obstacles to trade. There are also discrepancies in terms of the possibility of applying price bands and margins and export taxes.

As for the non-tariff barriers and equivalent measures, there is a fundamental difference between a commitment to completely eliminate those measures and the possibly of maintaining them and negotiating to resolve those tariffs that are currently applied. There is also disagreement on the possibility of automatically incorporating the disciplines agreed to in the WTO versus conditionality on that issue, to the degree that that it contributes to improvements in market access for agricultural goods from countries in the hemisphere. The latest draft of the FTAA seems to tend to “mirror” of WTO agreements.

Section 3: Subsidies/export subsidies

In the first part of this section there is evidence of a strong disagreement on the definition of subsidies in their broadest or most restrictive sense, with several possible definitions along different lines. This is especially the case in the sections on export credits, credit guarantees for

exports, insurance programs and other measures of domestic support, as well as international food aid. The Annexes deal in detail with the conditions of disciplines on these issues, which is also subject to discussion.

Other differences that stand out include how to deal with exports and imports to and from third parties (i.e., countries that are not members of the FTAA) that continue to provide subsidies for their own agricultural exports. There is discussion of the possibility of maintaining export subsidies to those third-party countries that continue to apply them themselves, or mechanisms to apply compensatory rights among FTAA countries when one of them imports from third-party countries that subsidize to the detriment of exporters in the FTAA bloc.

As for linkages with the multilateral negotiations in the WTO, there is one position that advocates a more aggressive position to achieve the broad and total elimination of all forms of exports subsidies, as well as another that expresses those intentions, but in a conditional tone. In every case, there are references to the agreements that could be reached in the WTO.

Section 4: Measures that distort trade or production

There are also several alternative titles for this section. This reflects different positions on the reach or scope of application of the agreement (measures that directly affect trade or the inclusion of measures that affect production and therefore, indirectly, trade in the goods thus obtained).

As for the general disciplines and commitments on domestic support, there are different degrees of commitment ("maximum possible" or "elimination") on these measures, depending on their classification as belonging to what is known as the green, blue or yellow boxes. Those distinctions on subsidies originated in the Uruguay Round of the GATT. It divides subsidies into categories based on the colors of a traffic light: red box (non-authorized support), yellow box (support subjects to trade disciplines); and green box (authorized supports). The red and yellow boxes refer to subsidies with significant impacts on international trade, which should be annulled or reduced. There is also a blue box, which refers to direct payments tied to factors of production, but not to the price or to the volume produced, and for which the "a priori" impact on trade has not been determined.

The draft FTAA text includes:

- Limits on or the elimination of the three kinds of subsidies (green, blue and yellow).
- Limits on or the elimination of support for "production limits" (blue box).
- Treatment of measures in the "green" box: elimination and/or revision of the criteria used for those measures
- Disagreement on whether the green box measures should be or not subject to countervailing measures.

In addition, there are disagreements on the identification of and necessity to eliminate other measures and practices that distort trade and agricultural production, as well as on what should be included in the concept of domestic support. On this issue, there are two tendencies, one clearly quite broad ("any measure or policy" on subsidies).

There is also a proposal on the possible establishment of a plan of commitments to reduce the Aggregate Measurement of Support to certain minimum levels, during the so-called implementation period (10 years) starting from a base that is not defined in the agreement.

There are also proposals for the suspension of the tariff preferences and the eventual application of subsidies and countervailing measures by a party when another party does not comply with the commitments made on these issues.

Section 5: Sanitary and Phytosanitary measures

There does not seem to be general agreement on the need to include dispositions on sanitary and phytosanitary measures (SPS) in this chapter. This is made explicit by the existence of a proposed clause establishing that this "Chapter will not imply greater obligations or commitments than the SPS provisions in the WTO". In some cases, the proposals in this section seem to indicate a clear tendency to reinforce the SPS agreement in the WTO. There is also a proposal to establish a Committee on Sanitary and Phytosanitary Measure in the FTAA.

Section 6: Institutional Aspects

This section includes institutional alternatives for dispute resolution, including one for the creation of an Agriculture Committee with a simply consultative character. There are various proposals for dispute resolution in the chapter on agriculture.

Annexes

Besides the sections already discussed, there are proposals for inclusion of four Annexes. Among these is a proposed annex on disciplines for export credits for agricultural goods, one on disciplines for concessions for food aid in the FTAA, one that includes a list of food aid transactions, and another with definitions of emergency situations.

The July 2001 draft included a proposal for an annex on domestic support that would cover issues such as practices that distort trade and production of those agricultural goods that are exempt from the commitments for reduction (or elimination) for those countries that are not small economies (or for all nations). This annex included issues such as general services (such as research, measures against diseases, training and dissemination services, infrastructure) the establishment of public stockpiles for food security, domestic food aid, payments for natural disasters, structural adjustment assistance, and payments within the framework of environmental programs. All of these issues were exhaustively detailed regarding disciplines, but this annex was eliminated in the November 2002 draft.

Context of the agriculture chapter

There are binding linkages between the FTAA chapter on agriculture and the negotiations underway in other chapters. Of particular importance are possible regulations on investment, especially those that affect countries' capacity to establish standards for social or environmental regulations; and agreements on intellectual-property rights, which would cover various important

issues (property rights for genetic resources, patenting systems for plant and animal varieties, seed management, the application of technologies, etc.)

It is also important to consider the context of the negotiations. There are various processes and negotiations for trade or integration that are proceeding parallel to and simultaneously with the FTAA talks, within as well as outside of the hemisphere. Within the hemisphere, the regional integration processes are especially important (Mercosur, Andean Community, Central American Common Market, Caricom), as much because of the advances as the retreats within each of them, as well as issues relating to plans to articulate or advances toward the integration of the two "sub-regional" blocs. At the same time, there are parallel negotiations between the Mercosur and the European Union intended to reach an agreement that would include aspects of assistance and trade liberalization.

ISSUES UNDER DEBATE AND ANALYSIS OF IMPACTS

The diversity of the starting points

The first point that should be considered in an analysis of the agriculture negotiations is the diversity of situations throughout the hemisphere. On the one hand, the United States and Canada are rich countries, and beyond their images as countries with large industrial sectors, they continue to be big global exporters of farm products. They also maintain systems of protection and support for that sector. On the other hand, there is no one situation that characterizes all Latin American countries; there is a great diversity of situations, which also explains the different trade positions advanced by their governments.

Four large groups of countries can be distinguished. On the one hand, there are net importers and net exporters of primary agricultural commodities. On the other hand, there are net exporters and net importer of processed agricultural goods. Taking into account each of these possibilities, countries can be divided into four groups, as presented in Table 1. These groupings help to explain the different negotiating positions in the FTAA. For example, the large net exporters of primary commodities and processed goods are among the most interested in broad liberalization. Argentina and Brazil have exercised a great deal of pressure to liberalize trade and dismantle subsidy programs. The United States is operating by a double strategy, under which it attempts to broaden its possibilities to export surplus goods, while at the same time conditioning imports of processed goods. At the same time, these different national situations also explain, in part, the diversity of positions among citizens' organizations citizens, especially regarding the level of questions they raise about subsidies. These and other differences are discussed in the analysis that follows.

Table 1: Schematic classification of countries in the Americas in relation to agricultural production and income levels. Net exporters with the capacity to compete in international markets are in bold. Net importers that are not potentially self-sufficient are in italics. Members of the Cairns Group (which also includes Australia, New Zealand, and other countries) are underlined. Developed based on information from van Meijl and van Tongeren, 2001.

	Level of Development		
Trade position	Low and low to medium income countries	Medium to high income countries	High-income countries
Net exporters of raw and processed agricultural goods	Nicaragua, **Bolivia**, Guatemala, Ecuador, Costa Rica, Peru	**Argentina, Brazil, Uruguay, Chile**	**Canada**
Net exporters of raw agricultural goods and net importers of processed goods	Haiti, Honduras, **Paraguay**, Panama, Dominican Rep., El Salvador, Colombia	Mexico	**U.S.A.**
Net importers of raw agricultural goods and net exporters of processed goods	Cuba		
Net importers of raw and processed agricultural goods	Jamaica	Venezuela, Barbados, Antigua Barbuda, *Trinidad and Tobago*	*Caiman Islands, Bermuda, Aruba*

The rhetoric of the free trade

All the countries participating in the negotiations agree on essential aspects of a discourse that assumes free trade to be positive for trade, and, starting from that premise, also as positive for economic growth and development. These basic ideas are presents in the chapter on agriculture. The general tone of that chapter, as in the rest of the draft FTAA, is to liberalize trade.

In this case, the debate is centered on the difference between protected trade versus free trade. Several South American countries (especially the large net exporters, in particular Argentina, Brazil and Uruguay) are the most fervent supporters of strong trade liberalization in the FTAA, while at the same time criticizing the U.S. position to protect its agricultural sector. Many analysts have demonstrated the costs of the protectionism on the part of the industrialized countries for global trade. They generally estimate the “profits" that would be achieved for the global economy by trade liberalization, especially of agriculture. In ex-post analyses of the results of the Uruguay Round of the GATT and studies on the potential benefits of future liberalization resulting from the 2000 Round of the WTO, they estimate the possible benefits of a 50 percent reduction in protectionist agricultural measures on the order from US$50 to 70 billion (van Meijl and van Tongeren, 2001).

The problem is that the majority of those indicators of "welfare" profits are expressed in equivalent monetary terms, emphasizing economic efficiency, but say nothing about questions of distribution. Generalized trade liberalization, as proposed in the FTAA, would have different impacts on different countries, and within these countries, would affect different sectors differently (for example, peasants, farmers with higher levels of technology, agro-industrial businesses and the workers who work in them, etc.). Just as there should be different starting points for each of the countries in the hemisphere, it is important to consider the different repercussions of agricultural trade. It is not possible to seriously claim that generalized liberalization, in and of itself, with be the best strategy for all countries and for all social sectors.

For example, it seems clear that a change as important as a decrease or even the complete elimination of barriers to agricultural trade in the hemisphere would lead to important changes in the structure of production throughout the hemisphere over the medium term. The distribution of production among countries would change, and, as a result, domestic production patterns would also tend to change, along with changes in the prices of the factors of production, which would have important impacts on income distribution within countries. That is, beyond simply summing up the potential global gains, there would also be winners and losers along the way.

Differential impacts

There are winners and losers in the process of trade liberalization (van Meijl and van Tongeren 2001, ABARE 2000). In those countries that are net exporters of agricultural goods, the results at the national level could be positive, in terms of increasing production and managing to place them in export markets. It is possible that the increase in exports would be especially beneficial for agro-industries and large landowners, given certain necessary scales of production. In some sectors, this could increase employment in the industrial segment of the agricultural production chain. However, even the large Latin American agro-industry companies and some of the large plantations could be threatened, as they could be displaced by transnational agricultural corporations. In all cases, the benefits for the peasant sector and for small and medium-scale producers could be smaller or nonexistent.

There are other negative effects, especially those caused by an expansion of the agricultural frontier or more intensive use of land (with greater use of agrochemicals, irrigation, etc.), unleashing an increase in negative environmental impacts. Moreover, in many cases (at the national level, as well as in the destination countries for exports) the decrease in subsidies could lead to increases in the prices of certain foods. Liberalization could also lead to the cancellation of programs for preferential access to markets that some countries receive (for example, the trade preferences granted to Andean countries by the United States).

In the case of countries that are net importers, the general impact will be negative. Many of the foods they import could possibly become more expensive. In some cases there could be repercussions for national production that has been displaced by cheaper subsidized agricultural goods.

A recent analysis by ALADI (Vaillant, 2001), shows that Argentina, Brazil, Bolivia, Paraguay and Uruguay would be negatively affected negatively by free trade with the United State. The

greatest threats would occur in Argentina and Brazil, and to a lesser degree in Uruguay and less still in the other countries. Considering the flows of imports into the ALADI countries, the study indicates that imports from the United States and Canada would displace intra-regional trade among the ALADI member countries, especially Argentina, Brazil and Colombia. In the case of exports, the countries with fewer trade opportunities in U.S. and Canadian markets are Bolivia, Paraguay, Ecuador and Venezuela; those with greater opportunities are Argentina, Brazil and Uruguay.

These and other cases highlight a problem in the draft FTAA text: the impacts are quite diverse, and the supposed benefits rest above all on rhetoric. This is especially beneficial for the large countries, but it is not based on much empirical evidence. In reality, there are very heterogeneous situations, under which it is not possible to develop agricultural policies that only respond to international trade. They should instead respond to much broader development goals.

Linkages between the FTAA and the New Round of the WTO

The draft of the FTAA establishes several references and conditionalities on the results of the WTO negotiations. At the same time, if the FTAA advances more quickly than the current round of the WTO, the agreements reached in the hemispheric accord could condition positions in the WTO.

There is a heated debate in the WTO negotiations on agricultural subsidies that is especially critical of the European Union. However, it is important to remember that the United States also has enormous programs to protect it farm sector. This is due to two kinds of factors. Among the external factors, Washington frequently maintains that it is not willing to reduce domestic support to its producers as long as the European Union does not change its subsidy policy, since it does not want to lose competitiveness. Among the internal factors, pressure exerted by organized groups, especially in United States (associations of farmers and especially businesses), has been effective in achieving support by Congress to maintain those protections.

This generates a tense situation for the United States, both in the FTAA and WTO negotiations. Washington seems want to deepen commitments in the FTAA to eliminate export subsidies and to pressure other countries to adopt that position in the WTO negotiations. At the same time, it wants to maintain the possibility of continuing its support for domestic producers. Under that strategy, Washington would seek to consolidate in the FTAA all the advances on agricultural trade liberalization that it achieves in the WTO, but at the same time ensure the continuation of protection measures (domestic support) within the FTAA in case it does not achieve the advances it hopes for in the WTO.

Clearly, a position could be held that all other FTAA countries could establish their own equivalent domestic aid programs. However, the vast differences between the possibilities of the U.S. treasury and that of any Latin American country to fund such programs are more than obvious.

Tariffs and Market Access

Access to Latin American markets is one of the central objectives of the U.S. negotiations for the FTAA. This is clear in the agriculture chapter, where the asymmetry of positions is evident, as Washington resists opening its own market. This problem is also related to tariffs; escalating tariffs that increase with the degree of processing of the imported good are often applied in the agricultural sector. Those peak tariffs are very common on processed foods; in the United States, the food industry accounts for more than one sixth of all peak tariffs (Oxfam 2002). The dominant conceptual position among government is that the lowering of tariffs, as would eventually be agreed to in the FTAA, would benefit the countries applying the measure to the degree that they are price takers for the goods they import. But, even beyond that, a generalized reduction in tariffs would increase demand for those goods, which would increase the prices of those goods to the advantage of the net exporting countries, and especially those that produce those goods, resulting in a net benefit. That position, however, is again a simplification, since there will be winners and losers.

For example, for those countries that at the beginning of the tariff liberalization process are facing high tariffs on their exports, the result of the reduction would clearly be beneficial. However, for a country that is not now facing high tariffs, the result is irrelevant.

On the other hand, a country that is already applying low tariffs on its imports of agricultural goods will find that consumer prices increase while their producers will be encouraged to increase production. In a country that at the beginning of this process is applying high tariffs, the reduction will lead to lower prices for its consumers while its producers are harmed.

There are varying positions among the Latin American countries, so the results of broad liberalization would also be dissimilar. There is no single tendency.

There are also proposals in the draft FTAA text to suspend the so-called tariff preferences; these are bilateral or sub-regional agreements that establish lower tariffs for imports of goods from the member countries in the accord. The generalized tariff reductions in the FTAA would eliminate tariff preferences among Latin American countries through regional agreements, so that they would lose the commercial advantages some Latin American countries enjoy over those who do not have them. The U.S. objective is undoubtedly to increase its own share of Latin American markets. A high ranking Department of Agriculture official maintains that the FTAA negotiations will give the U.S. "much greater access to the 450 million consumers outside of NAFTA…Conservative studies indicate that this could increase the sales of our products by US$1.5 billion a year when the agreement is fully in force…Although many countries in the Americas already have preferential agreements, the FTAA will be an opportunity to improve the situation of U.S. exporters."

Subsidies

The role of subsidies continues to be a central problem in the negotiations. Agriculture is by far the most subsidized and most protected sector in international trade. In 2000, rich countries spent US$245 billion in subsidies on their products. While during the Uruguay Round, rich

countries declared over and over again that they would reduce agricultural subsidies, in reality they have done the opposite.

These measures include subsidies and export credits, compensatory payments, mechanisms to ensure minimum prices for farmers, etc. It is broadly acknowledged that subsidized exports distort international markets by depressing prices, which blatantly harms exporting countries that do not provide such support, among which are various Latin American countries. Therefore, a reduction in those subsidies would benefit those exporters, especially the large net exporters. However, the net importing countries would be hurt due to the increase in international prices.

In any case, export subsidies cannot be modified without changing the domestic support policies, or, what amounts to the same thing, there is no point in eliminating export subsidies if domestic support schemes are not changed, as they continue to generate surplus production delinked from international prices.

On the other hand, subsidies can be positive under certain circumstances, such as that provided for social protection of peasants, conversion toward healthier and cleaner forms of production, or food sufficiency. There is no evidence in the draft FTAA text that mechanisms would be established to differentiate between perverse and legitimate subsidies, nor how the latter would be employed. The problem is particularly serious given the fact that many Latin American governments are among the strongest critics of any kind of subsidies, even those that appear to be legitimate.

Domestic Support Measures and the 2002 Farm Bill

There are proposals in the draft FTAA text to establish commitments to reduce Aggregate Measurements of Support (AMS), understood as the annual level of assistance, expressed in the currency provided to one or more agricultural goods. The reduction of Aggregate Measurements of Support to determined minimum levels is presented, during the so-called transition period (10 years) starting from a base that is not defined in the agreement. The definition of that base is not a minor issue. There are two alternative proposals in the agreement: 1) Total AMS bound under the WTO for the year 2000 by developed countries and 2) the mean of the Current Total AMS for the certain years to be determined, with reductions to be determined.

The recent approval of the U.S. "Farm Bill", with its enormous increase in domestic support to agriculture, takes on enormous importance in this context. From the U.S. point of view in the FTAA negotiations, the higher the current level of domestic support approved the better, as it provides Washington with a better position from which to negotiate with the other countries. In other words, it is not the same thing to negotiate future commitments to reduce domestic support from a current level of US$17.5 billion than to start from a lower level. The situation is particularly serious in some Latin American countries where AMS is very small or does not exist. For example, in the list of commitments to reduce AMS in the WTO, the base the U.S. would start from is US$19 billion, while in Brazil it was $912 million, in Argentina US$79 million and in Costa Rica US$16 million.

The United States maintains that the recently approved Farm Bill is within the limits of its commitment to reduce the value of AMS and that the measures are presented so that they can be considered disconnected from production levels and therefore would not distort international trade. However, it is simply not possible that these measures would not distort trade given the solid evidence to the contrary. (Roberts and Jotzo 2001). In effect, the majority of the aid approved in the 2002 Farm Bill, which provides for US$175 billion in assistance over the next ten years, is focused on guaranteed prices for producers, mainly for wheat, corn, soybean, rice and cotton. In fact, these measures will inevitably contribute further reductions in international prices for agricultural products as long as there continues to be a stimulus for the production of various goods in the United States, even when prices in international markets are depressed. The Brazilian National Agricultural Confederation estimates that the new Farm Bill will lead to damage to Brazilian exports on the order of the 10 trillion dollars over the next four years.

On the other hand, the majority of the Latin-American countries have not made commitments to reduce AMS in the Uruguay Round, so that, if the FTAA were approved, they could not provide support to agriculture over a level estimated at 10% of the total value of production for a good or of the total value of agricultural production.

In fact, the Brazilian Minister of Foreign Affairs of Brazil recently indicated that the approval of the Law in question will have surely negative consequences on the FTAA negotiations and that it is contrary to the WTO mandates.

We should also remember that within the United States, the agricultural support system directs a greater proportion of the aid to high-income farmers, while those with low incomes receive a minimal part of the aid (the 80% of the farmers receive just 16% of the aid, while the remainder go to the large businesses), which in fact ends up benefiting the large businesses. There are no guarantees that changes in the system will lead to greater equity, so that those subsidies are also unjust within U.S. society. Because of all of these factors, the Farm Bill has caused a serious loss of credibility among international agencies for that country's free-trade discourse.

Likewise, the draft FTAA text does not offer adequate mechanisms to attack the domestic support that actually only benefits corporations, or ways to confront the establishment of agribusiness oligopolies (which in some cases behave as price "cartels"). There must be measures to attack "dumping" practices, anti-trust regulations, and competition among companies. In that case, it should start by challenging the U.S. refusal to revise its anti-dumping mechanisms, which have highly distortionary effects and do not serve social or environmental objectives.

On the other hand, there should be space within the FTAA for legitimate subsidies as long as they serve social and environmental goals and are applied domestically without leading to effects on trade. In that case, it would be best to direct that support to rural families and the environment, not to companies.

Sanitary and Phytosanitary Measures

On this issue, the tension seems to be focused on the United States' well known position to keep agreements on sanitary and phytosanitary (SPS) measures within the WTO. Washington does not want a new set of rules on these issues in the FTAA, since the current regulations allow them to avoid the possibility of market access limits on its exports resulting from the application of measures based on the "so-called precautionary principle", which is included in various multilateral environmental agreements, while preserving its ability to invoke them in order to hold up imports from Latin American countries.

Given this situation, many Latin American countries have attempted some modifications of the measures in the SPS agreement in the WTO, especially through the establishment of periods for adopting decisions, or their continuation, and procedures for notifications and counter-notifications, as well as harmonization and transparency measures for the adoption of sanitary and phytosanitary measures. Several Latin American exporting countries seek these changes in order to facilitate the possibly entry of their goods to export markets, since even though it is already recognized in the SPS agreement, they confront various obstacles (long procedures for risk analyses and other opaque bureaucratic measures). While there are references to harmonization with Codex Alimentarius (FAO-WTO), it is clear that the U.S. as well as other governments also hope to limit the capacity to regulate foods through that accord, and there is strong resistance to the precautionary principle, but the linkages between those negotiations and the FTAA are not clear.

The problem is that measures for legitimate regulation, especially of health and environmental issues, are not considered under either of these two options. The United States, as well as nearly all Latin American governments and businesses are critical of intensive use of the precautionary principle. This issue is attracting public attention, since it involves trade in genetically modified-organisms, including the use of modified seeds and exports of products derived from them. In these terms, the FTAA would seriously limit the ability of farmers and governments to reject genetically-modified organisms, since they could be accused of establishing unjustified barriers to trade (or to investment).

Food Sovereignty and Sufficiency

The agriculture chapter in the draft FTAA text does not include substantive measures to deal with food sufficiency and sovereignty within each country. The negotiations have centered on food aid and how to prevent that from becoming a kind of distorted trade. On the other hand, national measures oriented to food sufficiency could be attacked as forms of trade barriers or protectionism, except for in small economies, which seem to be treated better in the most recent draft of the agreement. However, this kind of program is especially important for those Latin American countries that are net importers (the issue is especially complicated in Venezuela, Colombia and Caribbean countries). The empirical evidence also shows that while agricultural trade can increase, it can also lead to greater food dependency (as has happened in Colombia and Venezuela).

There are no guarantees in the draft text on food aid programs, on the quantities that can be donated in relation to each country's domestic consumption, or references to quality standards for those goods. The latter issue is linked to the scope of the sanitary and phytosanitary measures, given the complaints about U.S. donations that were contaminated with genetically modified corn. Likewise, the attempt to reduce (or eliminate) domestic food aid programs could affect efforts to achieve food sufficiency.

The possible scenarios and their effects

The potential distribution of winners and losers under the trade liberalization proposed under the FTAA is very complex. On the one hand, there are the different starting points indicated above, where especially the net exporting countries and the net importers should be differentiated (Table 1). On the other hand, the depth of the agreements that might be reached is still not clear (just tariff reductions, reductions of tariffs with a decrease in domestic support, liberalization limited to raw commodities, liberalization that also incorporates processed goods, etc.)

It is also important to keep in mind how the results of the FTAA negotiations would be linked to the WTO negotiations. There are three possibilities:

1) FTAA liberalization aligned with WTO agreements;

2) limited FTAA liberalization, but with broader liberalization in the WTO;

3) broad FTAA liberalization but with limited liberalization in the WTO

To start with, we should clarify that the second option is unlikely. We should also clarify that, under the first option, if there is agreement in the FTA on a reduction in tariffs and exports subsidies on primary commodities, that would increase the prices of these goods, an increase that would be even greater if domestic support is reduced (especially for grains for human consumption and animal feed grains). If trade in processed goods is also liberalized, prices for products of animal origin would also increase.

The trade balance in that case would lead to improvements for those countries that are net exporters and would worsen the situation of countries that are net importers of those goods. There are exceptions, such as Haiti or Honduras, whose structure of production and export of raw materials is mainly based on the cultivation of sugarcane or vegetable fibers. In those cases, the prices of their imports would increase and those of their exports would fall, added to the fact that the reduction in tariffs would lead to increases in the volumes of the goods that they would naturally import, which in turn are the goods that would increase in price in the world market.

From the point of view of agricultural development, liberalization of trade in primary commodities will lead to an expansion of that production among the net exporters of those goods and a reduction in the agro-industrial sector. In the importing countries the impact will be the opposite.

From an environmental perspective, the scenario will have negative consequences, since it will lead to an even greater expansion of the agricultural frontier in those countries that are net

exporters of primary commodities. We should remember that the expansion of the agricultural frontier due to cultivation of export crops is one of the most serious environmental problems in Latin America (a good example is the impact of increased soybean production on the Brazilian Cerrado). There is evidence that, below certain thresholds, the reduction in prices will lead to a drop in the land used for such crops, while an increase in prices or greater demand for production through the expansion of export markets leads to an increase in the land utilized.

If only the multilateral form of domestic support and aid to agriculture is eliminated, this would happen in the most developed countries, which are the countries that currently have these programs, especially the United States and Canada. This situation would not necessarily bring substantial improvements for the development of the agricultural sector in many Latin American countries, since there would be a reordering of production within the United States and Canada (who would continue to be large global producers of various crops), while other countries such as Australia or New Zealand would enter as strong competitors.

The most important effects would occur if the FTAA and the WTO were to reduce barriers to trade in primary commodities and processed agro-industrial goods in addition to eliminating domestic support measures for primary goods production. In this case, the agro-industrial sectors in the high-income countries would reduce their activities in favor of an expansion of manufacturing sectors in the medium-income countries. At the same time, primary commodity production in the Latin American exporting countries would benefit, and they could take advantage of the expansion of manufacturing in other medium-income countries. The curious thing is that the big winners under this kind of scenario of multilateral liberalization would be farmers and agro-industrialists in the Pacific countries, and not necessarily in Latin America.

From the perspective of food security, in general the partial liberalization scenarios (only lowering tariffs and export subsidies) would result in a reduction in the purchasing power for food by low-income groups in the countries that are net exporters of primary commodities, while farmers would receive increases in income obtained from their exports. This would not occur in the case of countries that are food importers, since they would have relatively higher initial tariffs and, as they are lowered, domestic prices for food should fall, improving access for waged sectors, while incomes for farmers and producers in those countries would fall.

We should then analyze the third option, that is, in which there would be greater liberalization under the FTAA, but no important progress in the WTO. There would be a reduction in tariffs for both primary commodities and processed goods within the FTAA, while outside the Americas, tariffs would be at higher levels if agreements had not been reached in the WTO to lower them. This would lead to trade diversion within the Americas, with net exporters experiencing an improvement in their situation. However, as many Latin American countries have subregional agreements that apply low or zero tariffs among the member countries, their market share would not increase much from this tariff factor. In this situation, the greatest trade benefits would be for Canada and the United States.

This situation, added to the enormous domestic support that Washington provides for its producers, would result in the region being inundated with primary agricultural commodities from the United States. The big losers would be the Latin American countries that are net

exporters, and within them the biggest losers would be farmers and their families. Consumers in those countries and the countries that are net importers of agricultural goods would probably benefit from a reduction in prices of agricultural goods, with losses for their farmers. At the same time, under these conditions, intra-regional trade in Latin America would weaken, which would reduce the possibilities of advancing in other integration processes.

There is a possibility under which the results could be more balanced, which is if the United States, in addition to implementing a general tariff reduction, would also dismantle its domestic support. As explained above, Washington does not seem ready to take this road, as much due to domestic pressure as because of the competition it faces from the EU. The clearest proof of this is the recent approval of the 2002 Farm Bill.

Limitations of the commercial perspective in the FTAA

The problems illustrated above are associated with the restriction of the FTAA to a mere trade agreement that it only considers trade balances. This conceptual "isolation" of the agreement occurs on at least two fronts. On the one hand, the majority of Latin American governments have abandoned the active design of an agricultural development strategy. Their strategies have been abandoned to the market. Therefore, they have no conceptual references against which to analyze the trade proposals in the FTAA. It is a different situation in the United States and Canada (and in part in some countries such as Brazil), where there is an agricultural development strategy, whether shared or not, or with misguided points or not.

On the other hand, discussions on agriculture do not adequately include social and environmental components. Issues such as food sufficiency and security have been secondary; they do not include environmental measures (which are perceived as obstacles to the expansion of this sector); they have abandoned a good deal of local-level research and development, etc. Decisionmaking is not participatory or transparent, and there are failures in such initial steps as access to information.

A serious consequence of this situation is that the draft FTAA text does not offer any mechanism to establish coordination among countries on agricultural issues. The current situation, in which Latin American countries compete against each other on agricultural trade, could be aggravated under the FTAA. In this context, there are groups of countries that produce more or less the same products, competing for volume, and ending up depressing prices, and falling into greater pressure to increase the volume of exports and to intensify production (with the consequent social and environmental impacts). From this perspective, experience with integration agreements demonstrates the importance of mechanisms to coordinate agricultural policy. However, the draft FTAA text would exclude this kind of space from policy discussions. Likewise, the chapter does not incorporate mechanisms for special and differential treatment for different countries according to their agricultural, economic and social conditions.

The draft FTAA text does not adequately incorporate the social and environmental aspects of agricultural trade. There are no clear references linked to goals to reduce poverty, increase food sufficiency, improve labor conditions in rural areas, etc. In the case of the environmental measures, there are references to the "green box", but those are left to decisions at the WTO.

The development measures for national or local food sufficiency, support for research and development of local cultivation, and the role of farmers are not incorporated, or rather they receive only marginal mentions in those points considered to be related to trade. Likewise, the proposal for a new "development box", which would include various forms of support, and which was proposed by various countries (with the support of Cuba, Honduras and the Dominican Republic in Latin America) in the WTO, deserves to be considered in the FTAA negotiations.

In environmental terms, many impacts are likely. There are no measures in the draft FTAA text directly linked to environmental protection beyond the possibility of countries adopting measures to mitigate the possible environmental impacts of agriculture. Even that possibility is questioned by many Latin American governments, as they understand them to be disguised barriers to free trade. However, even if these measures were accepted, if there is no harmonization between the multilateral environmental and sanitary agreements and the trade disciplines agreed to among countries, there will continue to be conflicts and contradictions. From a broader perspective, it is obvious that even accepting environmental mitigation measures, we would be far from dealing in depth with the problems of sustainability in the agricultural sector. On the other hand, the draft does not offer any ways to link a trade agreement with the international agreements that already exist on agricultural issues and that would impact agriculture (for example, the Cartagena Protocol, the Biodiversity Convention).

One might maintain that the reason for a trade agreement is not to reach or correct environmental or social problems but simply to improve the economy. But it is exactly in that goal where the main limitations of an agreement like the FTAA lie in terms of development strategy, as it negatively affects social and environmental contexts throughout the hemisphere without including any strategies to manage those consequences for development. Said another way, the agreement will result in winners and losers, and to deal with that situation everyone should do what they can, and since the inequalities between countries is not recognized, the result will be the application of an ecological law: "the big fish eats the little one."

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THE FTAA, REQUIEM FOR DEVELOPMENT POLICIES IN LATIN AMERICA AND THE CARIBBEAN: A VIEW FROM SMALL ECONOMIES

An analysis of the Draft Text on Market Access

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INTRODUCTION

On 3 July 2002, the drafts of each of the issues being negotiated in the FTAA were made public. These texts, while still containing numerous brackets indicating the different points of views in the negotiations, do allow for a clear sign that the proposals being put forward are intended to finish off our countries' productive development and trade policies. In essence, the proposals ignore the recognized need for special and differential treatment for smaller and developing economies, they do not recognize the principle of inequalities among countries with different levels of development, and they would enormously restrict poorer countries' practical ability to implement development policies.

Since its beginning, the Hemispheric Social Alliance has promoted a kind of integration that goes beyond the neoliberal principles that are at the core of most free-trade agreements. Through its document *Alternatives for the Americas*, the HSA has promoted the construction of a hemisphere that, beyond economic doctrines, includes our countries' social and environmental integration, ensuring that all people share in the benefits.

Therefore, analysis of the FTAA draft text on market access should start from the basic premise that the issues related to market access should be evaluated and defined within the framework of national development plans.

The FTAA negotiations are being carried out on nine major issues: market access; investment; services; government procurement; agriculture; intellectual property rights; subsidies, anti-dumping and compensatory rights; competition policy; and dispute resolution. This paper focuses on the issue of market access in the negotiations.

The negotiating group on market access covers six issues: tariffs and non-tariff barriers, rules of origin; customs procedures; safeguard measures; safeguards; and standards and technical barriers to trade. Of these, tariffs, non-tariff measures and safeguards are at the heart of the agreement.

These issues are of crucial importance not only for developed countries, which, from an offensive (as opposed to defensive) perspective focus on future markets for their products, but even more so for smaller and developing countries, which, from a defensive perspective, are seeking gradual liberalization that includes the domestic development policies needed to ensure their economic well-being.

The purpose of the market access negotiations is to achieve the progressive elimination of tariff and non-tariff barriers to trade (prohibitions, quotas and import permits, sanitary and phytosanitary rules that limit trade, etc).

The issues related to market access are extremely important, as they define of vital importance within trade agreements, since they define countries' ability to expand markets for their goods and services abroad, thus increasing their economic potential. The reality, however, has been different for smaller and developing countries. The problems that such countries as Jamaica, the Dominican Republic and Guyana have had in gaining access to the U.S. market or even the Caribbean regional market due to unfair practices by the larger economies are well known. Guyana, for example, has lost access to the Jamaican market, a fellow member of CARICOM, because of unfair competition caused by the influx of U.S. food aid.

Developed countries such as the United States, in their zeal to quickly eliminate tariff and non-tariff barriers to trade, ignore the adverse effects that immediate liberalization with no consideration of the inequalities among countries at very different levels of development will have on smaller economies. This enthusiasm also conceals a double standard on the part of developed countries.

On the one hand, developed countries comply in reducing or eliminating tariffs and non-tariff barriers on products – generally industrial goods – tied to their companies' investments abroad. On the other hand, they react in a way that totally contradicts their rhetoric, imposing high levels of protection on goods that are vitally important to developing and smaller economies (such as sugar, dairy products, grains, etc.). A concrete example of this dynamic is the recent increase of U.S. agricultural subsidies, to the detriment of smaller economies that are highly dependent on this sector.

PRINCIPAL FINDINGS

WTO or NAFTA Plus: Although the principles established for the FTAA negotiations state that this agreement should be "WTO plus", a look at the negotiating text on market access demonstrates that, more than a WTO-plus agreement, what is being negotiated is a NAFTA-plus accord. The majority of the proposals contained in the draft agreement are the same as those found in the North American Free Trade Agreement.

National Treatment: As in all the other FTAA proposals, National Treatment is at the heart of the drafts. Theoretically, the main purpose of this principle is to ensure that tariff concessions are not undermined by direct or indirect protection for national goods. This means that an imported product, once it has entered the country, should be treated the same as a similar domestic product, thus creating competitive conditions of equality between domestic and imported goods. However, this limits the ability of smaller countries' governments to use economic policies to stimulate national industrial development.

Subregional Agreements: Although the FTAA allows for the coexistence of subregional agreements, it is clear that these hemispheric negotiations are a disincentive to the proliferation

of such agreements, since the countries within a subregional accord cannot offer each other greater trade concessions than those in the FTAA.

Tariffs and non-tariff barriers: In terms of tariffs and non-tariff barriers, the draft text on market access maintains a strict relationship to NAFTA. In fact, there are articles that are textually equal to NAFTA, and in the case of tariffs, the dominant proposal calls for the total elimination of tariffs on goods. This greatly limits countries' ability to rely on criteria of national well-being in setting tariffs.

Safeguards: The scope of application for safeguards is not clearly defined, but, as in NAFTA, the application of the measures are based on the existence of serious damage or threat of serious damage to a particular sector during a transitional period or when the tariffs are reduced – there is no consensus on this point yet. This criteria is too limited. The need to limit trade liberalization could arise when it is considered strategic within the new development model or plan.

Non-acknowledgement of asymmetries: In 1998, the countries negotiating the FTAA agreed to create a Consultative Group on Smaller Economies (CGSE) which would report to the Trade Negotiations Committee (TNC) and whose functions would be to monitor the negotiations and to evaluate and make recommendations to the TNC on issues of interest to the CGSE. In spite of the committee's good intentions and constant statements in official forums on the need to establish special and differential treatment for smaller economies, the reality is that there has been little substantive progress in support of those economies.

ANALYSIS OF THE DRAFT TEXT

1. WTO or NAFTA "Plus"

The principles and objectives that would guide the FTAA negotiation were proposed at the fourth Trade Ministers' Meeting held in San Jose, Costa Rica. These principles were ratified by the Heads of State at the Second Summit of the Americas in Santiago de Chile, also in 1998.

One such principle is related to the fact that the FTAA should be allowed to improve on the WTO rules. This has been interpreted to indicate that the FTAA should be a WTO "Plus" accord. This means that, in terms of the commitments reached, the FTAA should go much further than the WTO has gone, meaning that in some cases, the FTAA should improve on the agreements reached in the WTO and the concessions granted by the member countries. A comparative analysis of between the FTAA and NAFTA, however, demonstrates that many of the proposals found in the FTAA draft text on market access, particularly those related to tariffs and non-tariff barriers, are the same as those found in the corresponding NAFTA articles.

The following table illustrates these similarities.

Chapter	FTAA Article	NAFTA Article
Tariff and Non Tariff Barriers	4	302
Tariff and Non Tariff Barriers	5	303
Tariff and Non Tariff Barriers	5.2	305
Tariff and Non Tariff Barriers	10.1	309
Tariff and Non Tariff Barriers	10.2	316
Safeguards	1.1	801

Therefore, the FTAA, would be "Plus", not because it goes beyond the WTO in terms of the commitments reached and concessions granted, but rather because it would be NAFTA extended to the rest of the hemisphere. This is alarming, since the Mexican experience with NAFTA has demonstrated the failures of that agreement. The countries in the region would hope that an agreement that goes beyond the WTO would begin by changing the rules of the game and using the issue of expanded market access not as an end to itself, but rather as a means for the development of countries in the Americas.

2. National Treatment

Article 2 of the draft text establishes the granting of national treatment. Theoretically, the main purpose of this principle is to ensure that tariff concessions are not overridden by direct or indirect protection for domestic goods. This means that an imported product, after entering the country, should be treated the same as a similar domestic product. National Treatment is aimed at establishing competitive conditions of equality between the imported product and the national product in the national market.[2]

This article would effectively limit a government's ability to utilize any political-economy tools to encourage any specific productive activities, since it requires countries to equalize domestic taxes or any other kind of rule that might differentiate between domestic and foreign producers. That is to say, national treatment seeks to ensure that any kind of incentive that a government provides to national sectors in order to increase their competitiveness does not become a source of discrimination against foreign producers. Therefore, any kind of domestic policy that governments apply to favor national production would also have to be available to foreign producers. If not, the country could be subject to sanctions by another Party to the FTAA.

As indicated in *Alternatives for the Americas*, market access, rather than being defined by the principle of national treatment, should fit within the framework of a county's national development plan. This means that the guiding principle should be special and differential treatment designed to correct the inequalities in our hemisphere. Small and developing countries' lack of competitiveness and very limited resources, together with the lack of any linkage between trade and development policy, provide the basis for the argument of special and differential treatment.

[2] Arroyo Picard, A. et al. 1999

Negotiations on market access generally, and for the FTAA in particular, should be carried out under the principle of special and differential treatment. The draft texts produced so far point to the non-recognition of the differing levels of development among the countries of the hemisphere.

3. Subregional Agreements

Although this article -- and all others in the market access chapter – is in brackets, the current proposal reads as follows, "None of the dispositions in this Chapter modifies or alters in any way the agreed upon concessions on the subject of customs tariffs and non-tariff measures within the framework of other trade agreements ratified in the liberalization sections in Article XXIV in GATT of 1994, unless the preferences agreed to in the FTAA framework are equal or greater". There is a proposed exception that says, "except in those cases when the dispositions in this Chapter grant greater advantages that benefit one or more parties that have ratified these agreements, in which case the arrangements enumerated in this Chapter will prevail."

The purpose of this article is to clarify that FTAA does not modify the agreed-upon concessions by the parties in previous agreements as long as they do not grant larger concessions than those granted under the FTAA. In our judgment, this article creates a series of implications for our economies, some of which are:

- As proposed, the article weakens the establishment or consolidation of regional and sub-regional agreements, since they lose their ability to expand their scope and borders, and therefore markets. If the FTAA is implemented, the large economies' markets, such as the U.S. or Brazilian markets, could become more attractive to the members of such agreements as the Central American Common Market or the Andean Community, thus prioritizing trade with those countries under an agreement that would divert intra-regional trade.

- Integration efforts intended to go beyond economic and commercial motives (which is just one of the sources of integration) will be weakened and will lose relevance in regional arrangements.

4. Tariff and Non-Tariff Barriers

The proposal being negotiated on tariff reductions would provide for the progressive elimination of tariffs: a first round of total elimination of tariffs for 40% of each country's imports, to be implemented immediately when the agreement takes effect; a second round 5 years after the first that would eliminate tariffs on 30% of imports; and a round 5 years or more later for the remaining 30%. Each country will decide the specific goods included in each round.

In proposing three baskets of goods of equal weight for all countries without giving importance to development level or the differential impacts, the proposal fails to recognize the need for special treatment for less developed countries, despite the various ministerial declarations along those lines. The proposal assumes that it is sufficient that each country can decide on the basket of goods to be included in each round, without any recognition that differences in levels of

development require differential treatment on various issues, including time periods and exceptions.

In addition, the United States is proposing very strict limits to the so-called technical trade barriers to trade. This proposal would severely limit countries' capacity to appeal to public health, environmental or safety criteria to condition imports of certain products. While this would protect countries and businesses from abusive trade practices and disguised protectionism, it would also restrict governments' abilities to protect the public good.

On the issue of non-tariff barriers to trade, the first part of Article 10 would commit the Parties to the total and immediate elimination of non-tariff measures. The first part of this article would consider allowing small economies and those in exceptional situations to apply temporary restrictions or prohibitions on exports to alleviate critical supply imbalances. As in nearly every part of the draft text where some kind of special treatment for smaller economies is proposed, this provision is ambiguous. The concepts on which this differential treatment would be based are not clear. In this case specifically, a critical supply imbalance is mentioned but is not defined, nor are the cases under which the special treatment could be applied.

5. Safeguards

As mentioned in the article, "NAFTA 5 Years Later", limiting or suspending trade liberalization measures in determined sectors when necessary is a country's sovereign right; and although the FTAA proposals apparently recognize that principle, Parties to that accord would be severely limited to a certain number of circumstances under which these emergency measures and methods could be applied.

The following points stand out in the section on safeguards in the draft chapter on market access:

- From a careful reading of the proposals in the chapter, it appears that there are many proposals on the scope of application of safeguards and types of safeguards. Within the same section there is discussion of bilateral, multilateral, hemispheric and FTAA safeguards. There are proposals on the period under which safeguards would be applied, removed, as well as transitions.

- The concepts describing how safeguards would be applied are ambiguous. There is discussion of grave harm or the threat of grave harm for a substantial portion of total imports. The concepts of harm and substantial portion are very vague and do not provide clear criteria for application.

- Among the requirements for the application of a safeguard, there are proposals that would require that countries seeking to impose the measure present or analyze the feasibility of adopting a conversion plan or adjustment plan for the domestic sector that would benefit from such a measure. This proposal could be problematic for many countries depending on the direction that the proposal eventually takes. In no case are these conversion or adjustment programs tied to international assistance, so they could function to limit the

application of safeguards, since if a country cannot present a conversion plan, it cannot apply the safeguard.

In our judgment, the safeguard section of the market access chapter is one of the most relevant places for the application of special and differential treatment to the benefit of the region's smaller and less developed economies. This will depend on the definition of when a safeguard can be applied and under which criteria, the duration, as well as the magnitude and transition schedule, which should be clearly defined in the negotiations. If this were to be done, each of these issues would need to be defined according to special and differential treatment based on the type of countries involved.

6. Non-recognition of the asymmetries

Even though one of the objectives of the FTAA is to facilitate the inclusion of the smaller economies in the integration process, and one of its principles is to ensure the full participation of all the countries (so the differences in the countries' development levels should be taken into account), the agreement on market access seems to ignore these objectives and principles, which were established in the Santiago Summit and reaffirmed in the Quebec Summit.

The few articles that take into account the differing levels of development are subordinated to the criteria to be defined by the Consultative Committee on Small Economies, which has so far advanced very little in this regard. At the Trade Negotiations Committee meeting held in Managua in September 2001, however, there was agreement that the approach to special and differential treatment within the FTAA, based on level of development, should be determined within each negotiating group. This means that each discipline negotiated within the FTAA should define to what degree special and differential treatment is to be applied.

This measure complicates the situation for smaller economies, since many of them do not have the necessary resources and research to be able to negotiate special and differential treatment, while at the same time it requires each negotiating group to address an issue that may not be relevant to its area. Nevertheless, it is worth noting that negotiating special and differential treatment by discipline could be either a disadvantage or an advantage for smaller economies.

The advantage would come from the fact that, if negotiating by subject, general criteria would not be applied to a set of commitments that are distinct in terms of nature and scope. This would therefore allow for each negotiating group to define the most appropriate special and differential treatment. On the other hand, if governments are to be effective in those negotiations, they must have an in-depth understanding of all of the implications of the commitments they are agreeing to, not only on economic issues but also on social and environmental concerns..

CONCLUSION

A first look at the market access agreement negotiated within the Free Trade Area of the Americas makes it clear that, once again, countries' ability to continue to promote their people's development is at stake. The similarity between the FTAA and the agreement signed in 1994 by

the United States, Canada and Mexico should alert our governments to reflect on the "benefits" obtained by a country like Mexico eight years after that agreement began.

As in other proposals within the FTAA draft text, the market access chapter contains many brackets that indicate points on which there is not yet consensus. This is because these are sensitive issues of vital importance to the hemisphere's developing economies. Therefore, it is important that civil society organizations in general, and especially those that defend the interests of the most vulnerable populations, initiate and articulate a movement around these issues, analyzing the implications that the different possible negotiation scenarios could have on them.

Rather than simply asking ourselves how we can maximize trade and market access, we should be negotiating trade agreements that allow us to empower countries to grow and emerge from poverty. A key consequence of this change in mentality would be that developing countries would come together around their needs and not around the hoped for market access. This would allow countries to preserve their capacity to apply development policies and to maintain a degree of autonomy in the exercise of those policies.

However, the Free Trade Area of the Americas negotiations as such, and this reading of the chapter on market access in particular, indicate that the gaps between the poorest and wealthier countries in the hemisphere will only continue to grow, since it appears that each country's level of development is not being taken into account in the negotiations. Instead, the negotiations will continue to be carried out based on the premise that all countries are equal, favoring criteria of reciprocity over that of special and differential treatment.

Likewise, the analysis of this chapter points to a tendency for developing countries to continue to make commitments, now at the hemispheric level, which they must fully comply with if they are to achieve access to the region's markets, especially the U.S. market.

In regard to the negotiations on the different baskets of goods on which tariffs would be removed, it is critical to work to establish priorities among countries' productive sectors. However, prioritizing productive sectors within the framework of trade negotiations requires not only measuring the degree of sensitivity of specific sectors and products to trade policies (static criteria such as degree of competitiveness and/or capacity of resistance to imported goods) but also evaluating the development potential of concrete productive sectors (dynamic criteria), as well as the implications of binding trade agreements on the government's capacity to offer effective incentives to increase productivity.

Trade liberalization itself can not only contribute to the decrease and/or disappearance of noncompetitive productive sectors (which might or might not have relatively extensive social impacts depending on the degree of absorption of the labor force), but such liberalization, especially when it is carried out through binding trade agreements, could jeopardize the ability to implement policies that encourage productivity and capital investment, to the degree that such agreements impose "hard ceilings" on government incentives. Therefore, when criteria for the consideration of sensitive sectors are defined, they should take into account at least three kinds of criteria: commercial; social; and criteria related to development.

For the first two, it is possible to identify relevant indicators to assist in this task, such as the starting tariffs subject to technical correction within the WTO or the level of employment as a percentage of the Economically Active Population. The identification of criteria related to the last set of issues (those related to development), however, presents a real challenge. This task could begin from two fundamental elements: potential growth in productivity and positive externalities. If these elements are ignored in the negotiations, countries' ability to implement development policies could be lost.

It is necessary, just as stated in the *Alternatives for the Americas* document, that when negotiating market access for goods, issues such as quality, protection of public health and the environment, and labor rights are taken into account so that those concerns do not themselves become obstacles to the free flow of goods from developing to developed countries.

CRITICAL COMMENTS ON THE SERVICES CHAPTER OF THE FTAA DRAFT TEXT

Claudio Lara Cortés, Consumers International/ Alianza Chilena por un Comercio Justo y Responsable[3]

Introduction

Services (banking, insurance and finance, transport, telecommunications, mail, health, tourism, distribution and treatment of water, education, electricity, etc.) are tremendously important, not only for the economy but also for people, as they are products that satisfy needs, many of them basic and vital to people's lives.

Precisely for that reason, people understand that many of those services do not have profit as their goal, differentiating them from goods or merchandise. Likewise, they understand that the provision or sale of a service implies, in most cases, the presence of the person or company providing the service. Given these characteristics, production, as well as consumption, of services are activities with a fundamental role at the national level, that is to say, within each country. This is independent of whether the company providing the service is local or foreign, or whether there are some services that are exported or imported. It is not surprising, therefore, that current discussions focus on international trade in services and the agreements that promote this supposed trade. This is the case with the Free Trade Area of the Americas (FTAA).

The San Jose Ministerial Declaration delivered a very ambitious mandate to the negotiating group on services: "Establish disciplines to progressively liberalize trade in services, so as to permit the achievement of a hemispheric free trade area under conditions of certainty and transparency;" and "Ensure the integration of smaller economies into the FTAA process".

There is agreement that these disciplines must be compatible with the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS), which the WTO started to implement in 1995. The GATS was the result of long and complicated negotiations that took place during what was known as the Uruguay Round (1986-1984). In these negotiations, the Untied States imposed the idea of negotiating a multilateral agreement on services, which would highlight two important points: on the one hand, the attempt to extend to services all standards or rules that had been agreed to on trade in goods, that is to treat services as goods. On the other hand, it demonstrates the clear U.S. interest in such important issues as market access for services by transnational corporations, and the resolution of operating problems within each country once access to those markets has been achieved.

This last point implied recognizing the need for a country to be present in another country's market if it wanted to provide a service. This is the reason why the United States introduced in the negotiations the idea of replacing the term foreign investment with "commercial presence".

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The GATS, after accepting these U.S. proposals, recognized these modalities for service provision:

- *Movement of the provider*: the provider goes to the foreign country to provide services, for example, a communications consultant.
- *Movement of the consumer*: the consumer goes to the country providing the service, for example a patient who travels to have surgery.
- *Cross-border supply*: where there is no physical movement of persons, for example, a long-distance telephone call or an international bank transfer.
- *Commercial presence*: the service provider establishes itself in another country's territory, for example an insurance company or an electric company.

Among these modalities, taking into account the increase in large transitional service companies, technological changes, and the implementation of liberalizations policies in the sector, especially in Latin America, it is clear that the fourth stands out. There is no doubt that the majority of services are provided internationally through the establishment of companies abroad. From the perspective of where a company is established, this is an investment, not a trade issue. That is why, as CEPAL recognizes, "the GATS could be conceived as a kind of framework for a multilateral agreement to promote and protect investment in services."[4]

Once the issue of foreign investment has been introduced into the services agreement, the issue becomes how to deal with market access by transnational companies and their freedom and protection within each country. Toward that end, there are references to three important principles under the GATS: *non-discrimination; progressive liberalization; transparency and reciprocity.*[5] That is to say, market liberalization should be carried out in a gradual and transparent manner, ensuring that foreign companies are not discriminated against and that they receive the same treatment as national companies.

The modalities of service provision and the three basic principles established in the GATS, have been adopted in the FTAA. This was made clear in the first draft text of the future services chapter, which was published on 3 July 2001 and which has hardly changed at all in the second draft, published in November 2002. The draft of the future chapter on services in the FTAA is made up of eight articles. They cover such issues as scope of application, sectoral coverage, most-favored nation treatment, transparency, denial of benefits, national treatment, access to markets, and definitions. To these sections is added a long "Section On Other Issues Related To The Above," which lays out issues such as domestic regulation, national regulations, general exceptions and those related to national security, special and differential treatment, and

[4] CEPAL (2001), La Inversión Extranjera en América Latina y el Caribe, 2000. P. 30-31. Santiago, Chile

[5] "Non-discrimination" alludes to two different principles. One is Most Favored Nation Treatment (MFN) and the other is National Treatment (NT). The first establishes that any advantage, favor, privilege or immunity granted to a service provider from another country, must be immediately and unconditionally granted to all similar services from other countries. National treatment requires that foreign service providers not be treated less favorably than local companies. The second and third principles, progressive liberalization and transparency, recognize the differences in capacities among countries to liberalize their markets, and establishes that such liberalization, once achieved, must be irreversible (status quo) and that the remaining restrictions are gradually and completely eliminated.

restrictions and special safeguards, among others. The chapter also includes as an annex a draft communication from the Mercosur.

It is important to point out that the majority of the proposals in this chapter, especially the articles, are in brackets, and there is more than one version of many of the articles. This means that the negotiating countries have not yet reached definitive agreements on all of the issues. It is noteworthy that on some subjects there are very different positions. Those differences, however, must be evaluated within a basic agreement consisting of the "floor" established under the WTO GATS agreement and the secret consensus achieved by the negotiating group in October 1999.[6] In what follows, we develop our comments regarding five issues that we believe are fundamental and at the end, as a synthesis, we propose relevant conclusions.

Scope and reach of application of the agreement

The scope of the FTAA services agreement, i.e., what it would cover, is one of the primary issues to consider. This issue is dealt with in Article 1 of the draft. There are three proposals, however, the third proposal seems to bring together the different definitions and the spirit of the chapter (progressive liberalization of services). According to that proposal, the agreement will apply to all *measures* adopted by the Parties that affect trade (investment) in services adopted or maintained by national governments or authorities (central, regional or local). It is important to note that the concept of measures is very broad and refers to measures "whether in the form of a law, decree, regulation, rule, procedure, decision, administrative order, or any other form".

It is clear, therefore, that the services agreement would be intended to restrict or modify all institutionalized government actions that supposedly "unnecessarily" restrict foreign trade/investment in services, including measures carried out by regional or local authorities. The only measures left out of the scope of application for this chapter are measures related to "certain air transport services" and "those services supplied in the exercise of governmental authority, on a non-commercial basis".

Government measures or actions refer to those implemented in all service sectors. There are no a priori exceptions or distinctions among sectors. They also include activities carried out by state-owned enterprises, monopolies, and even non-governmental organizations. Universal

[6] This consensus has six elements: 1)Sectoral coverage: universal coverage of all service sectors. Governments maintain the right to regulate services and establish certain exceptions in the accord; 2) Most-favored nation (MFN) treatment: access granted to investors/companies in an FTAA country must be granted to investors/businesses of all other FTAA countries. This applies to all sub-sectors and service providers; 3) National treatment (NT): investors/businesses from any FTAA country must be granted the same treatment as that given to national and local service providers. This applies to all sub-sectors and service providers; 4) Market access: additional disciplines on NT and the MFN principle relative to measures that restrict the ability of service providers to enter certain markets; 5) Transparency: disciplines must be included in this area that "provide public notification of all relevant measures that could include, among other things, new laws, regulations, administrative directives and international agreements adopted by any level of government that affects trade in services." 6)Denial of benefits: "the members of the FTAA will have the ability to deny benefits under the service agreement to providers that do not comply with established criteria." These criteria could include property, control, residency and substantial business activities.

coverage under the agreement is a starting point, not just *an objective* to be achieved as defined under the GATS.

The agreement would also cover "all trade in services" and "all the different modes of supply" of a service,[7] as recognized by the GATS and indicated above. These modes would include all forms of service provision imaginable, without any distinctions among persons/professionals and large local or foreign businesses. In an admission of the inconsistencies presented by the "commercial presence" mode (foreign investment), some countries propose dealing with that issue in the Negotiating Group on Investment.

In summary, the agreement is comprehensive and universal, as it would apply to all government measures related to the supply of services, to all service sectors and to all modes of supply, with "commercial presence" as a central focus.

If we consider the "commercial presence" of foreign companies in the territory of another country, together with "the provision of services by the public sector", which generally occurs at the local, regional or national level, it is clear that the FTAA proposal has more to do with *domestic trade* in services than with *"cross-border trade"*. The agreement would directly service activities and service regulations within each country. This demonstrates the "invasive" character of the FTAA agreement on services.

National Treatment and Market Access

The proposed agreement on services has more to do with investment than with trade as such. So the obligations related to Investment, National Treatment and Market Access, are its fundamental pillars. These principles are intended to ensure favorable conditions for foreign investment and for the activities of transnational corporations. In order to achieve that end, they would become "general obligations".

The definition of the principle of National Treatment that appears in the FTAA services chapter (Article 6) was adopted by the GATS (services provided by foreign companies can not be treated less favorably than those provided by local companies). However, in the GATS, National Treatment is a "specific commitment" agreed to by a country, to be applied only in the specific service sector that it has offered to liberalized (included in the list of commitments). In the FTAA proposal, the intention is for National Treatment to be accepted as a "general obligation" applicable to all countries in the agreement and to "all subsectors and service providers" (see the points of consensus in the confidential report).[8] If this were the case, exceptions would be established, according to two proposed definitions: one limited to small economies and another that would add "developing countries".

[7] In the draft, "*trade in services is defined as the delivery of a service,"* but the supply of a service "covers the production, distribution, marketing, sale and supply of a service," (see Article 8). That is to say, trade in services is understood not as the purchase and sale of a service, but rather the entire chain of a market in services, beginning with its production. This would therefore even further broaden the scope of coverage of the agreement.

[8] This assumes the adoption of a "positive list" for service liberalization.

National Treatment and Most-Favored Nation Treatment are insufficient in and of themselves to ensure effective liberalization that favors transnational service companies. This leads to the need to discuss additional disciplines relative to market access that could also become a "general obligation". There are two proposals in Article 7 of the draft text on this issue. They share the definition that "Each Party shall accord to services and service providers of the other Parties, access to its market, through any of the modes of supply established for trade in services." The difference between refer to how to facilitate "the development and strengthening of services trade in smaller economies and developing countries" and the countries' commitment to "permit the cross-border movement of capital where this is an essential part of a market-access commitment on cross-border trade."

And that is not all. The proposals would also prohibit countries from applying "quantitative restrictions", stating that "no Party will apply limitations" on certain aspects (number of providers, total value of assets, number of physical persons, etc.). This would eliminate certain policy options that governments now have, absolutely and unconditionally diminishing their democratic authority.

In summary, foreign investors and transnational corporations will encounter be best of all possible worlds in the FTAA services agreement: National Treatment and Market Access as "general obligations" applicable to all Parties to the accord, to all sub-sectors and service providers and to all forms of supply. In this sense, the FTAA would go far beyond the GATS, since the latter would only recognize Most Favored Nation treatment as a general obligation.

Government services

One of the principle concerns generated by the FTAA draft is related to government services. Many services continue to be supplied by governments, whether at the federal, state, or municipal level, or by government agencies, but the neoliberal ideologues understand those services as lost commercial opportunities for the private sector, unfair competition or barriers to the entry of services offered by transnational companies.

There are three definitions in the draft text on "services supplied in the exercise of governmental authority." The common denominator among these definitions is their residual and negative character: they are services that are **not** supplied under commercial conditions or in competition with one ore more service suppliers (activities of a central bank, for example).

Inversely, that means that government services offered in a commercial manner would be subject to the dispositions of the FTAA, as well as those provided in competition with other providers. In this hemisphere, there are services supplied exclusively by the state (social security, for example). There are also many services that are supplied in a mixed fashion (government and private sector), such as education, health, housing and public security, among others. If this is so, one could argue that in these cases the public service offered by the government is commercial in character or that the public service competes with other private providers, and in consequence both situations should be included in the FTAA.

In the case in which public services are provided exclusively by the government, there is no

doubt that there would be pressure on governments to privatize them or permit competition by the local private sector and foreign companies, which, in fact, has already been happening. This work has already been carried out in the region for some time by the International Monetary Fund, the World Bank and the Inter-American Development Bank. It is important to keep in mind that a public service, once privatized – even partially – is no longer a service exonerated from the FTAA, since it does not qualify as "supplied in the exercise of government authority." This would therefore broaden the investment opportunities for private capital, whether local or transnational.

Regulation

This is one of the most controversial issues, since the nature of the agreement points to restrictions on or modifications of all government measures related to services, including those related to regulations. Logically, the greater the degree of liberalization, the lower the level of regulation. This does not mean eliminating regulations and countries' right to implement them. In effect, the FTAA draft text recognizes this right (section on "domestic regulation"), including National Treatment and Market Access, although of course they would be subject to the obligations and commitments established in the agreement. There is also an attempt to make certain benefits for transnational companies explicit, such as that "Each Party shall, following the entry into force of this Agreement, eliminate all citizenship or permanent residency requirements".[9]

On the other hand, "the necessary disciplines shall be developed" in order to ensure that there are no, "unnecessary barriers to trade in services."[10] At the same time, governments would have to demonstrate that their regulations are limited to what is necessary and that they are compatible with other disciplines required in the agreement.

That is to say, it is not against regulation, but rather it stipulates the "type" of regulation that should be ensured: one that protects suppliers (businesses) and promotes competition as well as the "utilization of market mechanisms to achieve its objectives." In other words, the new regulations – in reality, not so new in many Latin American countries – would seek to replace the government with the market (supply) as regulatory agent. The government would cease regulating and companies would begin to *self-regulate.* So, government regulation would become unnecessary, as it would lose its reason for being and would progressively disappear.

This kind of regulation in retreat assumes the *commodification* of services, their transformation into commodities, and that that is the only way that market forces could operate in the service sector.

And if this were not enough, local and foreign businesses can, moreover, bring suit against

[9] See point 3 of the section "Granting [permits, Authorizations] [licenses and certificates]".

[10] See point 6 of the section on "domestic regulation." This point introduces disciplines that would ensure that "measures related to prescriptions and procedures on issues of skill titles, technical standards and prescriptions for licenses do not constitute unnecessary barriers to trade." Moreover, such disciplines would be applied horizontally, in any service sector.

governments in national courts or arbitral or administrative judicial procedures.[11] They should allow, "at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services." The complaints can also proceed through the FTAA dispute resolution mechanism, in order to ensure the effectiveness of the disciplines and restrictions.

In addition, the services draft provides for the development of new standards in three areas: safeguards; subsidies; and competition. In regard to the first of these, in particular situations Parties, "may adopt safeguard measures in a non-discriminatory manner with the proviso that they will be eliminated gradually as the reason for their adoption disappears." In second place, "The Parties shall develop disciplines in order to avoid and counteract the effect of subsidies that distort trade in services." Finally, "Each Party shall adopt the measures necessary to prevent, avoid and sanction practices that distort competition in the trade in services within its domestic market."

It is likely that the negotiation of these three subjects will lead to numerous difficulties and complex issues. This will all be aggravated by the lack of data, both among governments and multilateral organizations. In the case of competition, it would be promoting an approach opposite that of domestic laws or practices in developing countries that favor local businesses, with the argument that they would be contrary to free competition and the principle of National Treatment, since they change the conditions of competition in favor of some services or local service suppliers.[12]

In summary, with minimal regulation, this is not just an issue of facilitating and guaranteeing foreign capital access to markets and permanence there, but rather, in addition to imposing a kind of regulation treats services like goods (commodification) and that leaves them subject to the obligations and commitments under the agreement (dependent regulation), it stimulates competition and the utilization of market mechanisms to reach its objectives.

Special and differential treatment

The FTAA process takes place in a context of structural asymmetry and along economic and political terms that places the United States against the other countries. There cannot be equal treatment for members who are so profoundly unequal in term of their size and levels of development. The FTAA appears to recognize these asymmetries, since it has delivered a mandate to the negotiating group on services[13] which states that "the Parties undertake to accord special and differential treatment to smaller economies and less developed countries in the Hemisphere, with respect to: time periods, temporary exceptions in fulfilling their obligations and special assistance to facilitate the adjustment process and improve competitiveness."

Various Articles in the FTAA chapter on services (national treatment, for example) make special reference to "smaller economies" and grant them differential treatment. But this differential

[11] See point 5 of the section on "domestic regulation".
[12] Point 6.4 of the Article on national treatment.
[13] See section on "Special and Differential Treatment" that appears at the end of the "Section on Other Issues Related to the Above."

treatment is not extended to those economies that, while not small, are very backward or in an incipient stage of development. This is, without a doubt, a significant difference that will cause even greater harm to the countries in the region that find themselves in the latter condition. Special and differential treatment for smaller economies actually runs the risk of disappearing if the more radical visions from the United States opposing that concept are imposed, as it subjects to questioning the concept of reciprocity.

The FTAA : More of the same on services

In reality, the ultimate objective of the FTAA chapter on services is the attempt to deepen the liberalization and economic deregulation processes that have been imposed on the region after the debt crisis. The privatization of state-owned enterprises under these policies (the "Washington Consensus") was one of the most significant phenomena during the nineties and the beginning of this decade. This process was of such magnitude that the figures that describe it grow continuously, becoming a very large portion of capital movements in stock markets and direct foreign investment in many countries. Nearly 50 percent of the foreign investment that went to the region during the nineties was related to privatization. This reveals that the principle buyers of state-owned enterprises were foreign firms, especially in Argentina, Bolivia, Ecuador, Peru, Brazil, Mexico, etc.

Chile was a pioneer country in the privatization process (since 1974) and transnational companies now dominate nearly all important service sectors. They have even penetrated higher education, increasing pressure to raise the "price" of a university education. In fact, between 1996 and 2002, tuition costs increased 41.7 percent (34.9 percent in public universities and 44.1 percent in private universities). That implies that fees increased annually by six percent in real terms, practically double the increase in the costly U.S. universities, and far above the increase in GDP per capita and the cost of living in Latin American countries. This price increase has also generated a high drop-out rate, which ranges from 30 to 50 percent of students who enroll. If this trend continues, the vast majority of the country's young people will be deprived of access to higher education. If a medium-income family now must pay 30 percent of its income for higher education, the projection is alarming: by 2020 it could be two-thirds. And that is to finance just one child.

It has been argued in many countries that the service sector is now the engine of development, rather than the industrial sector. However, in spite of profound liberalization, foreign control and expansion of services, the region has suffered at least three crises in one decade (in 1995, in 1998-1999 and the current crisis, which is distinguished by the spectacular collapse of the Argentine economy). The annual rate of growth of GDP per capita was just 1.2 percent between 1991 and 2001, and just 0.1 percent for the last three years.

Many of the privatizations of public services in the hemisphere have failed, worsening the quality of services (with frequent energy blackouts, for example) and provoking sharp price increases (potable water, for example), which has restricted access to services, especially for poor people. Corruption continues to be a problem in the majority of privatization cases. For their part, consumers have been left totally unprotected against the ineffectiveness of regulatory agencies. Latin Americans' disenchantment with privatization, therefore, is not surprising.

According to an opinion poll carried out by the IDB in 17 countries in the region in May 2002, 64 percent think that privatization has not been a good thing.

With these results, it is an absurdity of enormous proportions that the failure of the liberalization, privatization and deregulation policies that have been applied dogmatically on services in the region is not recognized. The FTAA should not propose more of the same.

Conclusions

There is no doubt that the negotiations for new standards and disciplines on services in the FTAA will be directed toward deepening and broadening the liberalization processes experienced in the sector throughout the hemisphere. Obviously, this will go far beyond the commitments for liberalization that developing countries in the hemisphere have made in the GATS, since it would not make any sense to agree to a services chapter similar to the GATS.

With this objective, the current chapter will be applied to all *measures* adopted by governments relative to services. Key concepts such as most-favored nation treatment, national treatment and market access not only come to be defined much more broadly than before but other "general obligations" applicable to all Parties to the accord, all sub-sectors, service suppliers and all forms of supply will be imposed. This status of general obligations would require consideration of alternative liberalization methods different than the "positive list" adopted by the GATS, such as the "negative list" or a hybrid approach, among others (see Confidential Document). The substitution of a positive list approach for a negative list would imply making commitments on all sectors and modes of supply -- unless they are explicitly included in a list of exceptions --, which would enormously broaden and accelerate the process of liberalization of services.

This would result in *maximizing* the liberalization of services, but that would contradict the very objective of the negotiation, which is to "*progressively* liberalize trade in services." Countries in the region could not liberalize their services at the pace and in the sectors selected by them in a "voluntary offer". This would exceed the principle of flexibility in the GATS (Article XIX) that permits developing countries to open fewer sectors and liberalize fewer transactions according to their level of development. This situation would be tremendously aggravated if there is no special and differential treatment for smaller economies, given the resistance of the most radical U.S. positions to that principle.

Of course, this is not just a problem of asymmetries among the countries in the agreement, but also that is a proposal that is, in essence, absolutely unilateral. In effect, all obligations and commitments under the agreement are directly related to local or foreign service companies, not to consumers of those services. For the experts who are secretly negotiating the agreement, the service provider can exist without the consumer.

Moreover, according to the new definitions, the vast majority of government services could be included in the agreement. Even more worrisome is the issue of regulation, which is "reduced" and modified as a function of the obligations and commitments in the services agreement. This new dependant regulation assumes the commodification of services and changes in supply conditions (the influence of competition). The limitations imposed both by the obligations and

commitments under the agreement and by the commodification of services meant the concrete erosion of each nation's sovereignty. In the final analysis, democratic decisions on sectoral and development polices, to the degree that they still exist, will be affected.

While it is true that everything has not yet been decided in the services chapter of the draft text and that there are various proposals in the majority of the articles, there has been an increasingly generalized conviction that the terms of the agreement will be imposed by the United States, which promotes the most radical positions on liberalization, and that the outcome of "take it or leave it" is practically a given.

THE FTAA PLAN AND INVESTORS' RIGHTS "NAFTA PLUS"

AN ANALYSIS OF THE DRAFT INVESTMENT CHAPTER OF THE FTAA

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INTRODUCTION

Prior to the release of the draft FTAA text, there had been intense speculation over the FTAA investment negotiations, particularly on the question of whether the blueprint for these talks would be the investment rules of the North American Free Trade Agreement (NAFTA). NAFTA's Chapter 11 goes further than any other agreement in the world to extend rights and protections to international investors. The most controversial aspect of the agreement is that it allows private investors to sue the governments of the NAFTA parties directly to demand compensation for a breach of any of Chapter 11's long list of obligations. For example, under NAFTA companies have used these rules to challenge prohibitions on the use of toxic chemicals or the discharge of toxic wastes that threaten drinking water.

This unprecedented power granted to corporations restricts the ability of governments to protect the environment and public welfare and to ensure that foreign investment supports social, economic, and environmental goals.

In 1998, concerns about Chapter 11 fueled the international opposition that contributed to the abandonment of talks around a similar agreement among OECD nations called the Multilateral Agreement on Investment (MAI). These concerns have also contributed to opposition to a new round of negotiations in the World Trade Organization, which would likely include expansion of investment rules. The draft text reveals that governments are once again attempting to expand NAFTA's investment rules, possibly with some modifications that could affect the scope of application, this time through the FTAA.

Although virtually the entire draft is enclosed in brackets (indicating areas where there is not yet official consensus), the draft text closely mirrors NAFTA Chapter 11, including its "investor-state" provision.

The Hemispheric Social Alliance has worked to advance an alternative approach to rules on investment that would ensure that basic human, labor, environmental, and indigenous peoples rights, as defined by international protocols, would take precedence over investor rights.[14] However, the draft makes it clear that FTAA negotiators have ignored these recommendations. Although it contains one proposal on labor and environmental standards, this is a non-binding and therefore meaningless provision that countries "strive to ensure" that such standards are not relaxed in order to attract investment. Moreover, the negotiators appear to have learned nothing from the defeat of the MAI or the alarming use of NAFTA's investment chapter to challenge legitimate public interest regulations. In fact in several areas, they are attempting to use the FTAA to grant investors even stronger protections than they enjoy under NAFTA.

These positions reflect the demands of the largest corporations in the hemisphere. On April 19, 2001, 29 U.S. corporations and corporate associations, including leading U.S. chemical and petroleum firms, signed a letter to top U.S. officials endorsing FTAA investment provisions modeled on NAFTA.[15] The letter lays out a wish list of provisions that includes the NAFTA rules that have been the target of the strongest public opposition.

In a few areas, the draft includes proposals that break with the NAFTA model. For example, the second draft of the FTAA includes new proposals in nearly every article regarding special and differential treatment for smaller economies. However, these provisions will be extremely contentious in the negotiations and are unlikely to be accepted. This analysis focuses on the aspects of the FTAA draft that hold the most serious implications for democracy, environmental sustainability, and social and economic justice in our hemisphere.

MAJOR FINDINGS

Investor-State: The draft text includes virtually verbatim the full text of NAFTA's undemocratic and unbalanced dispute settlement mechanism for corporate investors. This would give foreign corporations special rights to use unaccountable international arbitration rather than domestic courts to roll back democratically enacted laws and regulations throughout the hemisphere—as they have already begun to do in North America.

Expropriation: The draft proposes definitions of expropriation that are just as broad as in NAFTA, covering direct and indirect expropriation as well as measures tantamount to expropriation. This means that private corporations would be allowed to sue over any government act that may diminish their profits.

Minimum Standard of Treatment: The draft also includes a vague and open-ended NAFTA obligation on minimum standard of treatment that has been used by foreign investors in all of the successful claims to date. The title of the article in the FTAA referring to "Fair and Equitable Treatment" is deceptive. Fair and equitable treatment would seem to be a minor issue, but under the NAFTA cases, the transnational corporation's lawyers have used the lack of definition of minimum standards to extend the interpretation of chapter 11 to other chapters in NAFTA. They have also effectively cited issues such as the lack of communications from a government office

[14] For details, see: "Alternatives for the Americas" (www.asc-hsa.org).
[15] Published in "Inside US Trade," April 27, 2001.

as a case of lack of minimum treatment. This obligation is particularly problematic because investors have attempted to use it to expand the ambit of investor-state claims to include NAFTA obligations outside the agreement's investment rules. Canada has proposed new articles in the second draft of the FTAA. Although they are still bracketed, they could modify the use of this obligation (see Articles 6.2 and 6.3 on page 4.6 of the 1 November 2002 draft). The new proposal says that fair and equitable treatment does not require "treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." It is impossible to judge if this kind of amendment would effectively limit the use of minimum treatment to extend the scope of the "investor-state" clause until there are other cases in which lawyers can examine article to light in the courts.

Capital Controls: The proposed FTAA would go further than NAFTA to prevent governments from using capital controls, despite the growing consensus among financial officials that such measures can be useful in combating international financial crises. The draft expands the types of transfers that must be permitted freely and without delay to include contributions to capital, royalties, fees and any other payment related to intellectual property rights and royalties derived from exploiting natural resources.

National Treatment: Like NAFTA, the FTAA would require governments to treat foreign investors at least as favorably as domestic ones. Governments could negotiate exceptions to this obligation for specific sectors. However, this would be a one-time opportunity to exempt only existing measures. Moreover, prospects for obtaining effective exceptions are limited by the lack of consultation in most countries between negotiators and the general public, as well parliamentarians and sub-national governments.

Performance Requirements: The first proposal in this section is a nearly verbatim repeat of NAFTA's broad ban on the use of performance requirements to ensure that investments support the host country's economic and social goals. These prohibitions are inconsistent with fostering sovereign economic and social development and therefore a threat to democratic policy making.

Definition of Investment: The current draft of the investment chapter of the FTAA includes eight alternative definitions of investment, revealing that there is some level of disagreement among negotiators as to who and what should be protected by the FTAA's investment rules. However, most propose definitions that are even broader than NAFTA's. For example, some of the proposals would extend coverage to intellectual property rights, derivatives, licenses, and commercial contracts. In some cases, these proposals replicate language from the failed MAI.

ANALYSIS OF THE DRAFT TEXT

1. Investor-State Mechanism

FTAA investment rules would unnecessarily grant corporate investors sweeping rights to challenge democratically enacted domestic laws through secretive and unjust international tribunals.

The draft text includes virtually verbatim the full text of NAFTA Chapter 11's undemocratic and unbalanced dispute settlement mechanism for corporate investors. Given the breadth of the substantive provisions being considered, the "investor-state" procedure would give foreign corporations special rights to use secretive and unaccountable international arbitration rather than domestic courts in their effort to roll back democratically enacted laws and regulations.

Investors have increasingly made use of the investor-state provision of NAFTA to aggressively challenge a wide range of laws or regulations that they feel interfere with their profits. For example, following a NAFTA investor challenge brought by the U.S.-based Ethyl Corporation, Canada paid US$13 million in compensation and withdrew a 1997 ban on the use or sale of a gasoline additive, MMT. Arbitration panels have found violations of NAFTA investment rules based on:

- a Mexican municipality's decision to deny a permit to Metalclad Corporation for a hazardous waste facility;
- a Canadian measure challenged by Pope and Talbot Inc implementing a complex system of export quotas and fees on certain softwood lumber pursuant to an agreement with the United States; and
- another Canadian regulation challenged by S.D. Myers Inc. that briefly prohibited exports of toxic PCB wastes.[16]

Pending investor challenges include:

- Methanex Corporation's suit over a California decision to phase out MTBE, a groundwater-polluting gasoline additive;
- Loewen Group Inc.'s suit over a U.S. civil trial in which it claims the jury was influenced by references to the fact that the funeral business is Canadian-owned and a similar claim by Mondev International related to legal proceedings that resulted from Boston's refusal to allow the firm to purchase city property;
- United Parcel Service's allegation that Canada Post, the Canadian crown corporation responsible for mail delivery, uses its "letter mail monopoly infrastructure" to subsidize its non-monopoly courier services;
- a decision in British Columbia not to grant licenses to Sun Belt Water Inc. for bulk freshwater exports; and
- the application of "Buy American" rules in government procurement decisions.

Taken together, these cases force the NAFTA governments to spend significant resources to defend their regulatory and judicial process from challenges by disgruntled investors. Given that the compensation sought by investors ranges from a few million to over a billion dollars in each case, the three NAFTA countries face the prospect of being compelled to pay corporate investors vast sums in order to regulate their activities.

[16] These and other investor challenges to national laws are detailed in *Private Rights, Public Problems: A guide to NAFTA's controversial chapter on investor rights* (International Institute for Sustainable Development and World Wildlife Fund, 2001).

The inclusion of the investor-state process makes a mockery of the rhetoric in Quebec City that the FTAA will enhance democracy in the hemisphere. This mechanism is the single most potent tool for narrow corporate interests to challenge and overturn democratically enacted development, environmental protection, and social policies. If the promises our leaders made in Quebec City are to mean anything, they must direct their negotiators to immediately eliminate this undemocratic, deregulatory mechanism from further consideration in the FTAA negotiations.

The draft text demonstrates that despite years of objections, criticisms, and a growing body of problematic investment cases under NAFTA, the FTAA negotiators are unwilling or unable to look for creative new approaches that would better balance the legitimate concerns of investors and the broad public and democratic interest in setting national development and social policies. Under NAFTA's deeply flawed arbitration process, the "judges" are chosen by the parties, are not subject to standard judicial ethics rules, and are unaccountable for their actions. The public is excluded from the proceedings. There is no appellate body to ensure that mistakes in legal interpretations are corrected.[17] The fact that these tribunals are asked to decide issues of Constitutional importance should disturb all citizens.

The draft text clearly indicates that corporate investors will be able to proceed directly to these international arbitration mechanisms, by-passing national judicial processes merely by waiving their right to do so. Why are the democracies of the Americas so afraid to trust their own judicial processes? Surely a system that required exhaustion of national remedies backed by the option of a state-to-state international mechanism for those few cases that national legal systems fail to resolve would provide a more balanced alternative.

Inclusion of the investor-state mechanism in the FTAA represents a further step in a long-term strategy by multinational corporations and the governments acting on their behalf to fundamentally alter the nature of international law—converting it from a compact among nation states to a system in which corporate actors, but not citizens, are granted preferential treatment. This radical reshaping of the international landscape has been advanced through a series of bilateral investment agreements, the NAFTA, and the failed attempt to globalize this powerful tool in the MAI. Now it appears in the draft FTAA and must be resisted.

2. Expropriation and Minimum Standard of Treatment

One of the most controversial aspects of NAFTA's Chapter 11 is its extremely broad definition of expropriation. Traditionally, expropriation has meant the taking of property without the owners' consent for a public purpose (such as when a government takes possession of land to build a public road). Domestic law rightly provides strong provisions for prompt and fair compensation in such extraordinary cases. However, in addition to this type of direct

[17] A Canadian court partially set aside the arbitral award in the Metalclad case (see The United Mexican States v. Metalclad Corporation, 2001 BCSC 664, May 2, 2001). This decision shows how limited are the available options to annul or review arbitration awards. Such reviews are very narrow. Generally, the court cannot consider new evidence or whether legal errors were made, but only more fundamental problems such as fraud or excess of jurisdiction. Consequently, these review mechanisms provide a check in only the most egregious cases and do not ensure the development of consistent and coherent legal principles.

expropriation, NAFTA also requires compensation for indirect expropriation as well as measures "tantamount to" expropriation. This wording has allowed foreign corporations and individual investors to sue over any governmental act that may diminish their profits.

The draft FTAA text presents four alternative proposals on expropriation and compensation, but each defines expropriation just as broadly as in the NAFTA text.

There are only a few minor differences. Under NAFTA Article 1110, direct or indirect "expropriations" and "measures tantamount to expropriation" can only be taken for a public purpose, on a non-discriminatory basis, in accordance with due process of law and the NAFTA obligations regarding fair treatment, and on payment of compensation. One proposal in the FTAA text suggests that these also be allowed for "reasons of public order [and] [or] social interest." Another suggests that expropriation be allowed when the measures are provided for in the governments' Political Constitutions.

None of these wording changes address the fundamental problems with NAFTA's expropriation provisions. NAFTA investors and some investor-state panels have given a meaning to expropriation that goes far beyond that under the domestic law of any of the three NAFTA parties. Generally, under domestic laws, public interest regulations that restrict the use of property (such as zoning or the creation of parks as in the Metalclad case) or that adversely affect an investors' assets (such as banning a hazardous substance as in the MMT and MTBE cases) have not been considered compensable expropriations. While property interests may be adversely affected by certain government regulations, these property interests are weighed and balanced against other legitimate interests in deciding whether compensation should be paid.

In a democratic society, such complex and controversial matters must be decided by elected legislatures and domestic courts. In a letter released at the Quebec Summit, the U.S. business community brazenly endorsed investment protections in the FTAA modeled on the NAFTA to include "protection of assets from direct or indirect expropriation, to include protection from regulations that diminish the value of investor's assets." These corporations' view of the NAFTA expropriation provisions amount to a constitutional coup d'etat to protect investors against so-called regulatory takings, a doctrine that has been repeatedly rejected in democratic debate and under domestic law. Citizens and governments throughout the hemisphere must work to ensure that this dangerous doctrine is not entrenched in the FTAA and to eliminate it from the NAFTA investment chapter.

While NAFTA rules concerning expropriation have understandably provoked consternation and attracted considerable notoriety, another investor right is also highly problematic. This is the right to a minimum standard of treatment which is set out in Article 1105 of NAFTA and included in the draft FTAA investment text in Article 6 on "Fair and Equitable Treatment.

Canada has proposed two new articles on "Fair and Equitable Treatment in the second draft of the FTAA investment chapter, which they say could ameliorate the corrosive influence of this provision on public policy and law. The two new articles in the 1 November 2002 draft repeat language from an Interpretive Note on NAFTA signed by Mexico, Canada and the United States

in July 2001. This note does not amend NAFTA and therefore does not have the same legal standing as the original Article on minimum standards of treatment.

However, both the Interpretive Note and the new Article 6.2 proposed in the FTAA say that fair and equitable treatment does not require "treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." In addition, the new Article 6.3 says that, "A determination that there has been a breach of another provision of the Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article."

It is impossible to say if this kind of amendment would effectively limit the use of minimum standards of treatment to extend the scope of the "investor-state" clause. We will only know after lawyers have explored this issue in courts. It is dangerous to think that the use of this kind of amendment that does not change the essence of the investor-state mechanism will resolve the problem.

This discipline established by the right to minimum standards of treatment in NAFTA has already been applied broadly. Indeed, a breach of Article 1105 was found in each of the three NAFTA cases that have found in favour of foreign investors—Metalclad, S.D. Myers and most recently Pope and Talbot. In Pope and Talbot the panel found that it was Canada's only offense. The broad and open-ended language of this provision seems to lend itself readily to the subjective, glib and critical judgements that trade dispute bodies have consistently resorted to whenever they perceive that governments have interfered with investor rights.

The vague and general obligation imposed by this provision is particularly chilling of government policy and regulatory initiative because its ill-defined boundaries make charting a safe course through the shoals of international trade disciplines much more difficult. However the most problematic feature of this obligation is that it is being used to dramatically expand the ambit of investor-state claims.

This is because under NAFTA, the unilateral right of foreign investors to sue was to have been contained, at least to some degree. While claims can be made for alleged violations of all NAFTA investment rules, the rest of the agreement (with two minor exceptions) is off limits to foreign investor-initiated disputes.[18]

But in the Metalclad case, the tribunal found Mexico liable for violating 1105 because its regulatory regime wasn't transparent enough. But the transparency provisions of NAFTA have nothing to do with its investment provisions, and reside elsewhere in the agreement. In other words, the tribunal used 1105 as the device for importing into the orbit of foreign investor claims substantive obligations that should have simply been beyond the reach of such claims. However, in its recent review of the Metalclad case, the Supreme Court of British Columbia disagreed with the tribunal decision to incorporate NAFTA's transparency provisions into Article 1105 and partially set aside the tribunal's ruling. The Court's ruling however has no binding effect on

[18] Article 1116 of NAFTA allows investors to submit claims regarding breaches of two provisions in Chapter 15 on Competition Policy, Monopolies and State Enterprises.

subsequent NAFTA tribunals and thus does not foreclose this broad avenue for expanding the scope of investor protections.

For example, now United Parcel Service of America is making a similar argument to challenge public postal services in Canada. It is attempting to claim damages which it says arose from Canada Post's failure to comply with a provision that is outside NAFTA investment rules and should for that reason not be subject to such claims.[19] Its argument turns on Article 1105. If UPS wins, foreign investors would have the right to enforce many more provisions of NAFTA, or by logical extension, of the WTO agreements as well. If this comes to pass, instead of dozens of foreign investor claims there are likely to be hundreds.

3. Capital Controls

The draft draft suggests that the FTAA would go further than NAFTA to prevent governments from using capital controls to promote financial stability. This directly contradicts the position of the Hemispheric Social Alliance, as well as an increasing number of finance officials.

In our *Alternatives for the Americas*, the Hemispheric Social Alliance states "Governments should have the power to … avoid the destabilizing effect of simultaneous and massive withdrawals of fly-by-night portfolio capital by requiring that portfolio investments or investments in the financial market remain in place for a minimum period. One way to achieve this goal is to require that a portion of portfolio investments (e.g., 20-to-30%) be deposited for a time (e.g., one year) with the central bank."

This recommendation describes the type of capital controls used successfully by Chile (known as the *encaje*) between 1991 and 1998 to stabilize its financial accounts. Mexico's 1994-95 financial crisis was deeper and more severe than it might have been because Mexico was prevented by NAFTA from imposing capital controls. Article 9 of the draft FTAA Investment Chapter, even more clearly than Article 1109 of NAFTA, would prevent sovereign states from using this type of capital controls.

Although various wordings of Article 9 are still in brackets, the essence of the Article is to require that each country permit freely **and without delay** all transfers of investment capital, broadly defined. The draft FTAA Article 9 goes farther than NAFTA Article 1109 by explicitly including "contributions to capital" and "royalties, fees and any other payment related to intellectual property … rights … and royalties … derived from exploiting natural resources" among the kinds of transfers that must be permitted.

The only relevant exception is the still bracketed Article 9.9 which allows countries to **temporarily** limit transfers in cases of "exceptional" or "grave" or "severe" balance of payments difficulties. The terms "exceptional" or "grave" or "severe" are not defined in the draft.

One version of the bracketed text says such measures would be "pursuant to internationally accepted criteria." Another version refers to "the provisions contained in this agreement relating

[19] UPS has argued that Canada, by violating Article 1502 (3)(c) and (d) (on monopolies and state enterprises) has failed to meet the Chapter 11 obligation on Minimum Standard of Treatment.

to the Balance of Payments," implying that there will be another Article elsewhere. This is the case with NAFTA where the Investment Chapter does not refer to temporary controls in the event of a balance of payments crisis. Instead, NAFTA Article 2104 in the Chapter on Exceptions deals at length with the topic saying that countries must submit any current account exchange restrictions to the International Monetary Fund and adopt the economic adjustment measures agreed upon with the IMF. These orthodox Structural Adjustment Programs invariably involve severe austerity measures that disproportionately punish the poor.

In stark contrast to the draft FTAA investment chapter's prohibition on capital controls, Finance Ministers are beginning to recognize that capital controls can be useful tools in combating international financial crises. Canada's former Finance Minister has called for the introduction of an Emergency Standstill Clause which would allow countries to suspend payments in crisis situations while they negotiate debt write-downs and reschedulings with their creditors. In 1999 IMF staff submitted a report on experiences with the use of capital controls which found that controls used by Chile, Brazil and Colombia had been useful and that Malaysia's emergency capital outflow controls had given the country breathing space to address its macroeconomic imbalances. Recently, the IMF supported the use of capital controls in Tunisia and Russia, at least for limited periods. Thus even as finance officials are starting to recognize the legitimacy of capital controls, the FTAA would prevent their use.

4. National Treatment

"National treatment" is one of the proposed FTAA's core obligations. It means that governments must treat foreign investors and investments at least as favorably as domestic investors and investments.

For most of the post-war period, national treatment in trade agreements simply meant that once foreign goods entered a country they should be treated no less favorably than domestically produced goods. NAFTA was the first treaty to apply national treatment to investment, broadly defined. This dramatically increased the scope and impact of this now extremely powerful obligation.

The draft FTAA chapter text on Investment contains almost the same wording as in Chapter 11 of NAFTA on National Treatment: '**[**1. Each Party shall accord to the investors of another Party and to the investments of investors of another Party treatment no less favorable than that it accords [in like circumstances] to its own investors and to the investments of those investors [with respect to the establishment, acquisition, expansion, management, conduct, operation, sale or other disposition of investments].**]" (NAFTA text underlined).**

Nearly every successful economy developed by opening gradually and selectively to foreign investment. In our "Alternatives for the Americas," the Hemispheric Social Alliance states that governments should have the power to:

- " implement viable national development policies appropriate to their peoples' goals, while remaining open to the world economy;

- encourage productive investments that increase links between the local and the national economy and screen out investments that make no net contribution to development;

- make foreign investment play an active role in the creation of macroeconomic conditions for development;

- protect small, local, family and community enterprises from unfair foreign competition; and

- allow for legal measures that preserve public or state ownership in some sectors (e.g. petroleum); exclusive national ownership in other sectors (e.g. broadcasting); and obligatory national participation in the ownership of other sectors (e.g. finance)."

Applying national treatment indiscriminately to the vast new area of investment would interfere unacceptably with the ability of countries throughout the hemisphere to orient investment to serve these development goals.

Like other trade treaties, the proposed FTAA text would permit members of regional economic integration agreements, such as the NAFTA or Mercosur, to *liberalize further* than under the FTAA. Article 4 (Exceptions to National Treatment and Most Favored Nation) would allow governments to grant more favorable treatment as part of present or future agreements relating to free-trade areas, customs unions, common market, economic or monetary unions and similar institutions. In other words, the FTAA would set a floor for regional liberalization initiatives throughout the hemisphere.

Like NAFTA, the draft FTAA investment chapter is a top-down agreement, meaning that all measures and sectors are assumed to be covered unless they are explicitly excluded. Also like NAFTA, the FTAA would restrict measures taken by all levels of government—national, state, provincial and local.

The introduction to the draft chapter identifies reservations and exceptions as a key element in the next phase of negotiations. "The issues of reservations and exceptions were discussed by the NGIN [Negotiating Group on Investment] and initial proposals are included in the draft text. The precise modalities and procedures for negotiations will be determined by the Group as soon as possible within the next negotiating phase."

Unlike NAFTA, the draft FTAA text now includes some general exceptions, for example to "protect public morality; prevent crime and maintain public order; or to protect human, animal and plant life (Article 12, General Exceptions and reservations)." But even if these general exceptions survive, similarly worded exceptions applying to other parts of the NAFTA and to the WTO agreements have been interpreted very restrictively.

The FTAA would therefore compel governments to rely almost exclusively on reservations—or country-specific exceptions—to protect otherwise inconsistent measures or important areas of policy flexibility. Under Article 12 of the proposed text, governments would be given a one-time opportunity to exempt existing non-conforming measures from the national treatment obligation by listing them in a special annex. The onus is on every government to identify its

non-conforming measures and to negotiate protection for them. Any non-conforming measure that is not listed would be lost.

Dispute settlement panels are obliged to interpret reservations narrowly. The FTAA text allows reservations only to four specific articles (national treatment, most-favored nation, performance requirements and senior management and boards of directors). As in NAFTA, measures which might be inconsistent with other articles, such as the controversial expropriation article, cannot be reserved. The FTAA text does not say whether governments will be able to protect only existing measures, or whether they will have the ability to preserve their flexibility to adopt new measures in certain sectors. Such "unbound reservations," for example to protect future policy flexibility in sensitive sectors such as health, education and social services, are certain to be a contentious issue.

The prospects for obtaining effective reservations (country-specific exceptions) to national treatment is further limited by the total lack of consultations in most countries between government negotiators and social and producer organizations and the public in general. At the moment, there is no public debate nor any available information on which reservations are being put forward by national governments. In most countries, even parliamentarians and local and state governments have been largely excluded from the process.

5. Performance Requirements

The term "performance requirements" refers to conditions imposed on investors to maximize the social, economic and environmental benefits of the investment. NAFTA established a broad prohibition on the use of such requirements, based on the argument that they are "market-distorting." Thus, for example, the Mexican government is prohibited from demanding that the thousands of foreign-owned "maquiladora" factories along the U.S.-Mexico border use a certain level of domestic inputs in order to ensure a multiplier effect on the rest of the economy. In 2000, the Mexican government reported that domestic content of maquiladora production was only 3.5 percent.

NAFTA's ban on performance requirements conflicts with the position of the Hemispheric Social Alliance document "Alternatives for the Americas," which states that governments should have the option of using performance requirements as part of their process of development planning and to support social and environmental goals.

Specifically, NAFTA prohibits seven types of performance requirements. These are repeated nearly verbatim in the draft FTAA text and include:

- to export a given type or level or percentage of goods or services;
- to achieve a given level or percentage of domestic content;
- to purchase, use or accord a preference to goods produced or services provided in its territory or to purchase goods from producers or persons or services from service providers in its territory;
- to relate in any way the volume or value of imports to the volume or value of exports, or to the amount of foreign exchange inflows;

- to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- to transfer a particular technology, production process or other proprietary knowledge to a person in its territory (except when the requirement is imposed or the commitment is enforced by a court, administrative tribunal or competent authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement);
- to act as the exclusive supplier of the goods that it produces or the services that it provides to a specific regional or to the world market.

There is one potential significant difference between the NAFTA language on performance requirements and that in the draft FTAA text. NAFTA's bans on these requirements apply to both foreign and domestic investors. By contrast, Article 1 (Scope of Application) of the FTAA draft suggests that the prohibition on such requirements would only apply to foreign investors ("all investments of the investors of any *Party* ***in the territory of another Party***.") This language is less intrusive than that in NAFTA because it would not affect governments' power to apply performance requirements on domestic firms. At the same time, this double standard could create even more advantages for multinational firms over local ones.

However, the language in Article 1 appears to conflict with the proposed language under Article 7 (Performance Requirements), which repeats the NAFTA language virtually verbatim and makes no distinction between foreign or domestic investors. This provision states that **[**1. [No Party may impose or enforce any of the following requirements or [enforce any] commitments [or undertaking],] [in connection with the establishment, acquisition, expansion, administration, management, conduct [or operation] [, operation, sale or other disposition] of an investment of an investor of a Party] [or of a non Party] [in connection with any investment of an investor of any Party] in its territory**:] (NAFTA's text underlined)**.

Thus, the question of whether the FTAA would ban performance requirements on both foreign and domestic firms appears to be unresolved.

As in NAFTA, the FTAA text would allow governments to require investments to use technology that meets "generally applicable" health, environmental or safety requirements. However, there is no reference to mechanisms for verifying compliance or for applying sanctions to firms that do not observe such a requirement. Under this proposal, governments would not be allowed to demand that firms introduce more advanced or job-creating technologies.

The positions proposed in the draft text on performance requirements make it clear that policies that are needed to ensure that countries and communities may benefit directly from foreign investment are at odds with the profit maximization spirit of the FTAA. Essential tools for national or local economic and social development are therefore banned on foreign direct investment. These prohibitions are inconsistent not only with fostering sovereign economic and social development, but also with the overall capacity of local authorities to promote the well being of their populations, and therefore a threat to democratic forms of policy making.

There is an alternative proposal presented in this section that would require that parties be simply required to abide by the WTO's Trade-Related Investment Measures (TRIMs) and any subsequent development of those measures. TRIMs has a narrower scope than NAFTA's investment rules. On performance requirements, it bans those that are inconsistent with WTO rules on national treatment and quantitative restrictions, but, for example, it does not pertain to requirements for technology transfer. The proposal to use the WTO as the model for the FTAA on performance requirements conflicts with the position of the U.S. government and it is unclear how much support it enjoys from other negotiators.

6. Definition of Investment

Talks within the FTAA investment negotiating group regarding the definition of investment are more than a semantic exercise. In this section, negotiators will define what and who will enjoy the sweeping protections that are laid out in the rest of the chapter.

The current draft text contains eight alternative bracketed definitions of investment. There appears to be considerable agreement that the scope of the definition should be very broad, although there are some notable areas of apparent contention.

Each definition specifies the scope of what investment means, followed by an indicative list of what this would include (but not be limited to). The first of the eight definitions essentially replicates the NAFTA language defining investment. There are a few very minor changes in terminology, but these do not seem to affect the interpretation. It is worth noting that the NAFTA definition of investment itself is very broad, covering virtually all types of ownership interests, either direct or indirect, actual or contingent. One NAFTA Chapter 11 ruling also extended the scope of the definition to include market share and access to markets, whether or not the investor has a physical presence. This case involved a U.S. firm, S.D. Myers, that intended to transport PCB waste from Canada to its disposal facility in the United States, but was hindered by a Canadian export ban.

However, it appears that the FTAA definitions attempt to go even further than the NAFTA in several ways. Most of the definitions begin with language such as "every kind of asset and rights of any nature" or "every asset owned or controlled, directly or indirectly" that would cover any type of conceivable investment. This framing language is not in the NAFTA definition of Investment.

Six of the definitions include intellectual property rights. It is possible that IPRs are also covered by the NAFTA definition of investment, but this has not been tested. The proposals for the FTAA appear to be designed to make coverage of intellectual property rights explicit.

The FTAA draft also has proposals that move beyond the treatment of property in the NAFTA. The NAFTA specifies as investment real estate and property "used for the purpose of economic benefit or other business purposes." Some FTAA proposals drop this qualification, while others keep it, suggesting that this point is contentious. One proposal explicitly excludes from the definition investments "not acquired in the expectation or used for the purpose of economic benefit or other business purposes."

The extent to which the FTAA Investment chapter would cover speculative activity is also contentious. One proposal includes "futures, options and other derivatives" as FTAA investments, something that is not in the NAFTA. It is not hard to imagine future actions by governments that would affect the valuation of a derivatives contract, so this proposal is both sweeping and dangerous. A "counter-proposal" would exclude "stocks or shares (portfolio investment) . . . acquired for speculative purposes and held for a short-term" but does not explicitly mention derivatives.

The FTAA draft contains proposals that extend the definition of investment to (in one example among many) "concessions, licenses, authorizations, permits, and similar rights conferred pursuant to applicable domestic law." This would mean that if a government revoked a license for whatever reason, it would be subject to challenge under the investor-state dispute settlement process.

One proposal in the FTAA draft would extend coverage to "turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts". This goes beyond the NAFTA clarification that does not include as investment "commercial contracts for the sale of goods and services." Other FTAA proposals contain the NAFTA clarification.

Finally, it is worth noting that many of these contentious provisions mentioned that go beyond NAFTA replicate wording from the definitions agreed to in the MAI (with the exception of the proposal on derivatives).

CONCLUSION

The draft of the FTAA Investment chapter reveals that the general thrust of negotiations has been towards creating a set of rules in which NAFTA's controversial Chapter 11 is the floor for investor rights in the hemisphere. In some cases, proposals seek to extend these rights in ways that further threaten the ability of governments to protect people, communities, and the environment. The experience of NAFTA in Mexico shows how trade and investment treaties and agreements of this type impose a model that does not allow for sustainable economic growth and poses a disturbing challenge to democratic processes, national sovereignty and local development.

The most positive revelation in the document are the hundreds of brackets. These show that although the negotiators appear to be going in the wrong direction, virtually none of their proposals are yet written in stone. In a recent briefing, the chief U.S. negotiator clarified that **governments still have the opportunity to table new positions beyond those in the current draft.** Therefore, it is not too late for civil society organizations to raise concerns about the investment aspects of the FTAA and to demand a different approach. However, if these concerns and the broader public interest continue to be ignored by negotiators, citizens and civil society organizations throughout the hemisphere will have no choice but to mobilize hemispherically against this unbalanced and unjust investment treaty.

DRIVING THE PUBLIC INTEREST OUT OF PUBLIC PROCUREMENT: THE FTAA DRAFT CHAPTER ON GOVERNMENT PROCUREMENT

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INTRODUCTION

Local, state, provincial, and national governments use procurement rules to serve important public policy aims such as consumer protection, economic development, environmental protection, public health and safety, the regulation of anti-competitive practices, gender and racial equity, social justice, and respect for human rights and workers' rights. Current trade rules governing procurement practices in the North American Free Trade Agreement (NAFTA) and the plurilateral Agreement on Government Procurement (GPA) at the World Trade Organization[20] undermine the ability of governments to enact and enforce procurement rules that are related to these important policy goals. An FTAA that does nothing more than reproduce the NAFTA/GPA model throughout the hemisphere will pose a serious threat to the responsible and socially just procurement policies that the Hemispheric Social Alliance and its member organizations support.

The *Alternatives for the Americas* document addresses government procurement policies in its chapter on the Role of the State:

> Nothing in an international agreement should constitute a renunciation or reduction of the state's ability to meet the economic and social demands of its citizens. This principle must take precedence if the state's capacity to meet these demands is diminished by such agreements. .... Government purchasing and public works contracts have a significant influence in some productive sectors. They are carried out with taxpayers' money and should therefore continue to be instruments of economic policy for national development.

Unfortunately, the FTAA Negotiating Group on Government Procurement has rejected these principles by basing its draft chapter largely on the procurement provisions of existing international trade agreements such as the GPA and NAFTA. These agreements do not just require transparency in government procurement regulations, but restrict the public policy aims that may be met through procurement practices at the national and sub-national level. While negotiators claim that these rules are necessary to separate procurement practices from political favoritism and corruption, the rules they have drafted go far beyond that desirable goal to bar the use of almost any non-commercial criteria in procurement decisions.

The draft text reveals a number of areas where negotiators continue to disagree. Brackets in the draft text mark language that has not been agreed to by all of the negotiating parties, and the entire FTAA government procurement chapter is bracketed to varying degrees. While most of

[20] Canada and the U.S. are the only countries in the Americas that are party to the GPA, and the U.S., Mexico and Canada are parties to NAFTA. Canada and Costa Rica, and Canada and Chile, are also parties to international procurement provisions through their respective bilateral free trade agreements (both based on NAFTA).

these brackets reflect only minor drafting differences, some of which have been resolved between the first and second drafts of the procurement chapter, a few brackets contain text that directly and substantively contradicts other draft provisions. These contradictions may be difficult to resolve, but the draft FTAA text contains only a few such clear manifestations of disagreement with the existing NAFTA and GPA models. The FTAA Negotiating Group on Government Procurement appears to be headed towards replicating the flawed NAFTA/GPA model, with only minor modifications if any.

This review of the draft FTAA chapter on government procurement finds:

- The broad scope of the chapter's coverage would bring government contracts for goods and services under scrutiny;

- The chapter's rules on national treatment, most favored nation treatment, and technical specifications and supplier qualifications could subject a broad array of important procurement rules related to economic and social development, and the protection of human rights, workers' rights and the environment, to challenge; and

- Major areas of disagreement appear to persist regarding how to treat procurement by sub-national government entities and whether (and how) to exclude areas of traditional government authority such as social services and education.

ANALYSIS OF DRAFT TEXT

1. Scope and Exceptions

FTAA procurement rules could apply to a broad range of procurement activities. In Article II of the second draft dated November 1, 2002, the agreement would cover "Laws, regulations, procedures and practices" governing procurement. This is almost identical to Article I of the GPA, which states that the Agreement "applies to any law, regulation, procedure, or practice regarding any procurement." Like NAFTA and the GPA, the FTAA draft contains provisions that would cover the procurement of both goods and services, the treatment that governments accord to suppliers and to the products they offer, and even the treatment accorded to domestic suppliers that are wholly or partially owned by foreign investors. This is an important feature, because it brings a much broader range of procurement activities under the scrutiny of FTAA rules. For example, procurement of any of the following goods or services by the Brazilian government would have to comply with FTAA rules:

- school buses made in Mexico and sold to the Brazilian government;
- a tax auditing service performed for the Brazilian government over the internet by a company in Costa Rica; and
- construction services provided for the Brazilian government by a subsidiary of a U.S. company established in Brazil.

In addition to covering a broad range of procurement activities at the national level, FTAA provisions could discipline how state, provincial, and municipal governments procure goods and services. Annex VII.1 in the first draft text proposes that sub-national governments and public

enterprises be covered by procurement rules.[21] Negotiators appear to disagree whether government entities covered by the Agreement should be listed using the "positive list" or "negative list" method. The positive list method requires each country to list those entities, at the national and sub-national level, that are bound by the agreement, while the negative list method automatically binds all government entities unless a government explicitly excludes them from the agreement. While either method could theoretically result in the same number of entities being bound to the agreement, the positive list method forces governments to think carefully about which entities they will list, and may help alert civil society groups and local government officials when a government entity has been bound to the agreement. The GPA and NAFTA both employ a positive list method, so a shift to the negative list method in the FTAA could potentially subject far more procurement practices to international discipline.

Some government contracts may not be covered by the FTAA. First, as in NAFTA and the GPA, all contracts might have to exceed a threshold value to be covered. An annex on thresholds is mentioned in Article VII of the second draft text, but no draft of this annex is available. Second, when countries sign the agreement (and when, in federal systems, states consent with their federal government to be bound), they will probably be able to exempt certain procurement practices from the FTAA's coverage. Annex X.1 of the first draft text lists possible country-specific exceptions, including procurement for the military or national police and public concessions. These kinds of exceptions are common under NAFTA and the GPA: under these agreements the U.S. filed exemptions for defense contracts, state purchases of certain kinds of steel, automobiles, and coal, and procurement preferences for minorities, women, and veterans.

Third, a number of the FTAA negotiators have also proposed including more general exceptions in the FTAA, which would take the burden off individual countries to bargain for the right to preserve important procurement programs one by one. In Article VII(3) of the second draft text, negotiators have proposed that a number of public services and functions be generally exempt from the FTAA procurement chapter, including: cross-border financial services; law enforcement; social readaptation services; unemployment pension or insurance; social security; welfare; public education, instruction, and training; child care, child healthcare, child protection and children's services; health and protection; forms of government assistance, including subsidies, grants, loans, equity, insurance, guarantees, and in-kind contributions; government concessions; government services for which a fee is charged; procurement financed by international organizations or bilateral aid, and procurement by embassies and consulates; procurement intended to stimulate small and medium enterprises in small and less developed countries; depository and financial services; hiring of public employees; purchases of art and fresh produce; and any measure adopted with respect to Aboriginal peoples. Article IX goes on to list general exceptions commonly included in most trade agreements, including: procurement linked to defense, national security, public order, natural disasters and other emergencies involving the protection of health and the environment; measures necessary to protect public morals, order and safety, human, animal and plant health and life, intellectual property; and measures relating to goods or services of handicapped persons, philanthropic institutions, and prison labor. Article IX includes the usual language requiring that such exceptions not be applied to distort trade.

[21] While these annexes are still referred to in the second draft of the text, no second draft of the annexes is available on the FTAA website. Thus this paper continues to rely on the annexes included in the release of the first draft text.

The list of exceptions for different procurement activities in Article VII will probably be a contentious area of negotiation, and the sheer breadth of important public policy areas touched upon reveals just how much the proposed procurement disciplines could impact traditional state functions. Many of the procurement measures listed in this Article are not explicitly listed as general exceptions to NAFTA and the GPA.[22] And since very few disputes have been brought under these agreements, it is difficult to say with certainty that NAFTA and the GPA have directly undermined all of the public services and policies listed above. Governments that have proposed general exceptions for these measures in the FTAA thus probably face arguments from opposing governments that these exceptions are both unprecedented and unnecessary. The following analysis of the rest of the draft FTAA text shows that such exceptions are certainly justified, and trade unions and other civil society groups should aggressively lobby their governments not to create an FTAA that lacks these basic safeguards.

2. National Treatment and Most Favored Nation Treatment

Article III of the second draft FTAA text contains provisions on national treatment and most favored nation treatment that are virtually identical to NAFTA and GPA provisions. The most favored nation treatment rule, called MFN for short, guarantees that every country is entitled to the best of the treatment that other countries get. This rule prevents governments from enacting procurement rules that, for example, forbid buying goods or services from firms that do business in countries with egregious human rights or labor rights records. If this rule had been in place in the 1980's and South Africa had been a member of a procurement agreement like the GPA or NAFTA, many of the anti-apartheid sanctions enacted by states and localities in the U.S. would have been in direct violation of the treaty.

But MFN does not just prohibit procurement policies that single out particular countries for sanctions. MFN also prohibits procurement policies that, while not intended to discriminate against any specific country, have a discriminatory effect. Thus a government that refused to purchase from a company that profits from doing business in any apartheid regime would violate MFN just as surely as the state that intended to sanction only South Africa.

Like MFN, national treatment is based on the principle of non-discrimination. Under this rule, governments must grant foreign suppliers treatment no less favorable than that accorded to their domestic suppliers. Domestic companies that are owned by foreign investors are likewise entitled to non-discriminatory treatment. Also like MFN, national treatment prohibits rules with discriminatory effects as well as rules with discriminatory intent.

National treatment ensures that foreign suppliers get the best of the treatment afforded to domestic companies – even if some domestic companies are afforded better treatment for legitimate social equity and economic development purposes. For example, the U.S. gives preferences in procurement to companies that are owned by women, minorities, and disabled

[22] NAFTA and the GPA do both contain general exceptions for measures related to national security, public morals, order or safety, human, animal or plant life or health, intellectual property, and handicapped persons, philanthropic institutions and prison labor.

veterans. Governments also often give preferences to small businesses or businesses from economically depressed areas.

Finally, many governments have rules favoring procurement from domestic suppliers, at least for certain kinds of products and services. Governments also use offsets in their procurement policies to encourage local development, improve the balance-of-payments by requiring suppliers to use a minimum level of domestic content, or to require technology transfer, a minimum level of investment, or exports. These policies not only violate the principle of national treatment, but are so common that they are explicitly prohibited in the GPA, NAFTA, and in the draft FTAA. While the *Alternatives* document recognizes that offset procurement policies should be administered fairly and openly, it also emphasizes that these policies can be an important tool for local economic development and therefore should not be subject to a blanket prohibition in the FTAA.

The *Alternatives* document favors the maintenance of such procurement policies, defending purchasing criteria that require "national content for the good or service involving some degree of integration into the domestic productive economy," and stating, "Government procurement should also be used to protect and benefit groups affected by discrimination and marginalization, such as certain ethnic groups, cooperatives or producers in particularly depressed regions or those with high levels of extreme poverty." These kinds of preferences violate the national treatment rule, because they benefit domestic suppliers (even if it is just a subset of these suppliers) and thus disadvantage foreign suppliers. Individual governments reserved some of these preferences from the coverage of the GPA and NAFTA when they signed these agreements, but they created only a limited general exception for these kinds of preferences. General exceptions for some, but not all, of these preferences have also been proposed in the FTAA, and whether such preferences will be exempt from FTAA rules will be an important subject for negotiation.

3. Technical Specifications and Supplier Qualifications

The rules on technical specifications and supplier qualifications may do the most to limit government procurement policies. These rules go beyond the principle of non-discrimination found in MFN and national treatment rules to limit what technical specifications and qualifications requirements governments can apply to suppliers of public goods and services, even where all domestic and foreign suppliers are treated exactly the same. Article XX(2)(e) of the second draft of the FTAA procurement chapter states that governments shall not impose supplier qualifications that constitute "an unnecessary barrier … to participation in government procurement." Article XX(6)(a) of the FTAA draft text states that supplier qualifications must be "limited to those that are essential to ensure a potential supplier ['s] … abilities to fulfill the requirements and technical specifications of the contract procurement in question." Similarly, Article XXI of the draft states that technical specifications must not create "unnecessary obstacles to trade" and must be based primarily "on the performance requirements of the product or service … rather than on design and descriptive characteristics." In other words, states may not refuse to accept a bid from a foreign supplier or refuse to buy an imported good or service because they fail to meet criteria which are not "necessary" to ensure product performance or

"essential" to guarantee supplier capability. All of this language is nearly identical to similar rules in NAFTA and the GPA

Quite a number of domestic procurement policies may run afoul of this strict test. For example, in the United States more than 40 cities, counties, and states have enacted procurement ordinances which require that any goods or services bought by the city, county, or state be produced by workers that are paid a living wage. This rule ensures that businesses that receive government contracts pay their workers a wage that can actually support working families. In addition, some cities and public universities in the U.S. have decided not to buy or license any goods made under sweatshop conditions.

Living wage standards and anti-sweatshop codes are forms of technical specifications and supplier qualifications that are important to working families. Domestic businesses may complain that it is difficult to satisfy these procurement policies, but once a law is passed they must comply or lose government contracts. If the FTAA goes into force as currently drafted, foreign suppliers will have another choice open to them. They can refuse to meet such specifications and qualifications and then get their home country to file a complaint under the FTAA, arguing that living wage standards and anti-sweatshop codes create an "unnecessary" obstacle to trade and are not "essential" to ensure supplier capability.

The U.S. government has already started tailoring its procurement policies to meet the technical specifications part of this rule. For example, in 1999 the federal government decided not to buy goods made by forced child labor. Even though this policy is completely non-discriminatory on its face, the order creating the policy states that it does not apply to products from any of the countries that signed the GPA or NAFTA.[23] The administration realized that if the new procurement rule resulted in even one company from one NAFTA or GPA member losing a U.S. procurement contract, the company could argue that the rule violated the treaty because restricting the use of forced child labor is not "necessary" for product quality.

While the U.S. government is editing its own policies to comply with the GPA and NAFTA, the European Union and Japan have already lodged complaints against the U.S. under the supplier qualifications rule of the GPA. Massachusetts passed a law in 1996 that essentially stopped the state from buying goods or services from any company that does business in Burma, a country where basic human rights and labor standards are routinely violated. The law applies equally to U.S. and foreign companies. The EU and Japan complain that this supplier qualification violates the GPA, not because it is discriminatory,[24] but because it is not "essential" to ensure that suppliers can fulfill contract obligations. This case has now become moot because the U.S. Supreme Court ruled that the Massachusetts law violates the U.S. Constitution,[25] but many

[23] See Executive Order no. 13126, June 12, 1999. Section 5(b)(1) of the order contains the exemption for GPA and NAFTA countries.

[24] The dispute is not about any discriminatory treatment of Burma itself, since Burma, though a WTO member, has not signed on to the GPA.

[25] The main constitutional issue in this case was whether the federal foreign affairs power and foreign commerce power preclude local procurement laws that target specific countries. The Supreme Court's ruling in this case does not automatically invalidate most other living wage laws and anti-sweatshop codes, leaving a wide array of constitutional procurement measures vulnerable to attack under the GPA.

domestic procurement laws that are fully constitutional could also be challenged using these same arguments.

The following are some examples of U.S. federal, state, and local procurement rules that could be challenged under the FTAA if it remains based on the GPA and NAFTA:

- Laws that provide aid to employees and unions in bidding for public contracts, and laws that require favorable consideration of such in-house bids;
- Project labor agreements that require fair treatment of workers and their unions in order to avoid labor disputes in public works projects;
- Costing requirements that require private bidders to provide substantial savings over public providers in order to get a public contract, but do not allow savings due to lower wages or benefits to be factored in;
- Rules that prohibit contractors that have violated environmental, labor, or other laws from bidding on public contracts;
- Laws that prohibit the contracting out of a service where the likely outcome would be the creation of a private monopoly; and
- Regulations that favor the procurement of goods that contain a certain percentage of recycled material or have other environmental value.

Many FTAA members maintain similar laws that are designed to promote public employment, guard against irresponsible privatization schemes, or protect the environment.

While FTAA procurement rules will not necessarily require governments to privatize state enterprises and public services, they will govern how governments involve the private sector in these operations by barring any requirements that favor domestic suppliers or create an unnecessary trade barrier. Yet the only language on privatization that has been proposed in the FTAA (in Article XXXIII of the second draft chapter) does not specifically address how these rules will affect the kinds of procurement measures listed above.[26] And there is still no consensus regarding the general exceptions that have been put forward for essential public services and public employment. If no strong safeguards are included in the FTAA, governments' ability to integrate effective protections for consumers, workers, and the environment into their policies for contracting with private entities will be seriously limited by FTAA rules.

The Hemispheric Social Alliance has called on governments to create and maintain exactly the kinds of public interest procurement policies that are threatened by the FTAA rules on technical specifications and supplier qualifications. The *Alternatives* document states: "Criteria for competition need not be based exclusively on price and quality, but may also include the following: … Kinds of technology used and their environmental effects … Transfer of technology … Number of jobs created and wages paid … Special safeguards to support medium, small and micro domestic enterprises." If the FTAA enters into force with the current rules on

[26] The article states that the FTAA rules shall not prohibit privatization, and that FTAA rules on procurement do not have to be followed by state enterprises that have already been privatized (because they are private parties). But these exceptions do not help governments that are trying to balance public and private provision of a service by putting limits on contractors through the procurement process.

technical specifications and supplier qualifications intact, these procurement policies and many others throughout the hemisphere could be challenged.

4. Developing Countries

Unlike NAFTA, both the GPA and the draft FTAA contain some provisions on special and differential treatment for developing countries. The GPA requires parties to "take into account" the needs of developing countries, and allows developing countries to negotiate limited exclusions to the GPA for procurement measures such as offsets and preferences for certain domestic sectors or regions. These special exceptions must be periodically reviewed, and developed countries are encouraged to provide technical assistance to developing countries so they may fully implement the Agreement. The provisions on special and differential treatment for developing countries in the second draft of the FTAA procurement chapter are limited to Article VII(3)(h) of the second draft, which proposes allowing exceptions to the agreement generally for procurement in small and less-developed countries to promote small and medium enterprises; Article XVII(5), which proposes that countries allow a minimum time period for bids in order to allow suppliers from small and economies to compete; and forms of technical assistance to small and developing economies is proposed in Article XXIX.

Inclusion of these provisions in the final FTAA would be step forward from NAFTA for developing countries in the hemisphere. But the current provisions in the FTAA draft are so minimal in comparison to the binding FTAA rules on non-discrimination, technical specifications, and supplier qualifications, that they would not necessarily guarantee that developing countries can maintain procurement policies that effectively promote economic development once the FTAA goes into effect. Small and developing economies that want to negotiate specific exceptions to the procurement rules in the FTAA may be able to do so in the Annexes to the agreement, but developed countries are not required to take these countries' special needs into account as they are under the GPA.

5. Transparency and Procedural Guarantees

The draft FTAA text, like NAFTA and the GPA, contains very detailed rules on the transparency of procurement rules and procedures; tendering procedures; supplier registration; the submission, receipt, opening, evaluation, and awarding of contracts; the publication of awards; and domestic review and appeal procedures. The *Alternatives* document agrees that transparency is an important goal in procurement, stating, "Government procurement of goods and services should be subject to open and transparent competition to avoid corrupt practices in their allocation …" But the document also emphasizes that exceptions to wide-open commercial competition may be needed in certain circumstances, especially to implement some of the substantive procurement policies the *Alternatives* document supports. For example, the *Alternatives* document describes the content and operation of a procurement regime designed to promote economic development:

> Countries may establish lists of high-priority suppliers whose development they consider strategic for reasons of national development (such as the development of appropriate technology, spin-off effects on other economic sectors or the number of jobs they generate or on the achievement of gender or racial equity)

> and give them priority over foreign suppliers. To ensure that the priority given to nationals does not protect inefficiencies or place an excessive burden on public resources, suppliers should be required to offer bids within a certain percentage of competing foreign bids, comply with other criteria of the tendering process, and receive privileged status for a limited time. These preferential terms will be negotiated in conjunction with the supports necessary to bring the domestic suppliers up to the international competitive standard within a set timeframe.

Such a rule would violate the FTAA both because the substance of the rule denies national treatment and could be characterized as an offset, and because the procedures used to execute the rule violate competitive bidding requirements. While the procedural requirements of the FTAA may not in and of themselves pose a major threat to socially just procurement policies, in combination with the FTAA rules limiting the substance of domestic procurement policies these requirements will ensure that governments cannot steer procurement decisions away from purely commercial considerations in order satisfy public policy priorities.

6. Dispute Resolution

If a government violates the substantive or procedural requirements of the FTAA it can be subject to state-to-state dispute resolution under the FTAA. Disputes would be resolved in accordance with the chapter on dispute resolution that governs the entire FTAA. The draft chapter on government procurement lays out detailed procedural guarantees that governments must provide private suppliers at the national level, but it does not oblige suppliers to exhaust these procedures before lobbying their home government to bring the matter to international dispute resolution. This is in direct contradiction to the *Alternatives* document, which states, "Disputes over government procurement should be … dealt with first by mechanisms within a country, and proceed only to international arbitration after recourse to national processes has been exhausted." The draft FTAA would thus require governments to overhaul their entire procurement apparatus for the benefit of foreign suppliers, and then give those suppliers the right to shop between national and international fora to resolve procurement disputes.

CONCLUSION

The draft FTAA chapter on government procurement draws heavily on NAFTA and the GPA, with very few substantive differences. It appears that many negotiators have accepted the basic premise of NAFTA and the GPA that public procurement policies should be based primarily on commercial criteria, and should not be a means for furthering a state's social or economic policies. This premise is exactly the opposite of the general principle embraced by the *Alternatives for the Americas* document: namely, that state action should serve the social and economic needs of the people as a whole, and not be unduly constrained in order to serve the needs of international capital.

While accepting a fundamentally anti-social, anti-statist view of government procurement, the draft FTAA also reveals that governments feel somewhat nervous about subjecting all of their operations to international procurement disciplines. Many of the functions that have been proposed as general exceptions to the FTAA – from national defense to public education, from

resource concessions to public employment, and from social security to minority preferences – are quintessentially traditional state functions. The tension evident in the draft text reveals both the extent to which expanded international trade rules have already begun to encroach upon traditionally domestic policy areas, and an emerging discomfort with the inability of these new rules to respond appropriately to the needs of ordinary people and the popular demands of democratic societies. If trade unions and civil society groups in the Americas hope to preserve and expand the role of the state in promoting economic development and social justice, the on-going FTAA negotiations must be a major focus of their efforts.

SHOULD WE PHASE OUT GOVERNMENT SUPPORT FOR FARMS AND INDUSTRIES? COMMENTS ON SUBSIDY REGULATIONS IN THE FTAA

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INTRODUCTION

Subsidies are addressed in several different parts of the FTAA Draft Agreement (2001).[27] The Chapter on "Subsidies, Anti-Dumping and Countervailing Duties" is primarily concerned with the rules of procedures and the types evidence that can be used in enforcement actions where violations of these rules have been alleged. The FTAA Subsidies draft draws on and endorses, in large part, the WTO "Agreement on Subsidies and Countervailing Measures" (1994).[28]

Subsidies are also addressed in the draft FTAA Chapter on Agriculture, and are also referenced in the Chapter on Government Procurement. Subsidies to domestic industries are treated differently than in agricultural sectors under the current WTO and draft FTAA agreements. Finally, it is important to note that none of the draft FTAA text on these topics has been finalized (e.g. all the text is bracketed). Many sections of each of these chapters contain multiple bracketed proposals on each issue, each of which has vastly different implications for rules regarding that particular topic. For instance, one element in the draft FTAA Chapter on Agriculture would agree in future negotiations to seek an "overall limit" on all types of subsidies in that sector; alternative wording is also proposed that would seek the "elimination" of these subsidies.[29]

The FTAA/WTO approach to subsidies is on a belief that markets can be relied upon to deliver the highest rates of growth for all societies, and the best possible outcomes for all members of society in the long run. These rules also reflect the view that small and shrinking governments are best, in part because they will have the smallest role in regulating private markets. In addition, these agreements reflect beliefs that: 1) export-led growth is the best path to development, and that 2) more trade, in and of itself, is a good thing. In other words, market-based policies (neoliberalism) represent the best hope for rapid growth in the North and the South. Their formulation seems to be 'subsidies reduce trade flows, so, this must be a bad thing'.

The *Alternatives for the Americas* document proposes some basic principles of development that highlight the flaws of the WTO/FTAA approach to subsidies:

[27] FTAA Draft Agreement, 2001. FTAA.TNC/w/133/Rev.1, July 3. Available from the ALCA/FTAA website: http://www.alca-ftaa.org/.
[28] WTO, 2001. WTO Agreement, Appendix 1, "Multilateral Agreements on Trade in Goods." Available from the WTO website: http://www.wto.org/english/docs_e/legal_e/legal_e.htm.
[29] FTAA Draft Agreement, Chapter on Agriculture, section 13.2.2, at 1.10.

> Trade and investment should not be ends in themselves, but rather the instruments for achieving just and sustainable development…Central goals of these policies should be to promote economic sovereignty, social welfare, and reduced inequality at all levels.[30]

Local, state and federal subsidy and industrial policies have played key roles in the development of agriculture and industry in the North and the South. For example, one of the most important institutions in the history of U.S. development was the development and funding of the U.S. agricultural extension service and its related system of state agricultural colleges. Not only did these systems play key roles in revolutionizing productivity in agriculture and releasing millions of workers for industrial development in the cities over the last century, they also created a foundation for the system of public higher education, which has played key roles in increasing supplies of college educated workers and feeding flows of technological innovations in a wide range of industries in the post-war era. Now, the U.S. and its NAFTA partners seek to greatly reduce or outlaw these important institutions for all nations and workers in the hemisphere. NAFTA has already demonstrated the failures of WTO/FTAA model[31], and the proposed changes in the new WTO subsidies system in the FTAA will only make it harder for all members to achieve "just and sustainable development" in the future.

ANALYSIS OF DRAFT TEXT

1. CHAPTER ON SUBSIDIES, DUMPING AND COUNTERVAILING DUTIES

WTO Subsidy Agreement creates three categories of subsidies. The first (the so called "red light" variety) are flatly prohibited. These include, for example, market distorting measures such as those based on export performance or use of domestic content for firms who that want to invest directly in new factories in any participating country. Green light (permitted) subsidies include support from R&D and "pre-competitive development activity.[32]" The final group is the Amber category, which are "actionable subsidies." This group includes a wide array of subsidies that could result in the imposition of Countervailing Duties (essentially, tariffs on particular goods for one or more countries). Subsidies in this area are actionable if they negatively affect (injure) industries in another signatory/participating country in the FTAA.

This section will briefly review some of the major procedural issues raised by this chapter.[33] But first, some background information is necessary.

In the United States, Subsidy and Antidumping cases proceed in two separate, independent steps. The U.S. International Trade Commission (an independent government agency) determines, first on a provisional and later on a final basis, whether the domestic producers of the like product have been injured, or are threatened with injury, by reason of dumped or subsidized imports.

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[30] Hemispheric Social Alliance (HSA), 2001. *Alternatives for the Americas*, Discussion Draft #3. April. At 4. Available from HSA website: http://www.asc-hsa.org.

[31] See, for example, Bruce Campbell, Jeff Faux, Carlos Salas, and Robert Scott, "NAFTA at Seven: Its Impact on Workers in All Three Nations." Washington, D.C. : Economic Policy Institute. April. Available from the EPI website: http://www.epinet.org/.

[32] WTO 2001. Summary at 1.

[33] Based on a preliminary, non-technical review of this chapter. Further legal analysis of the text of this draft is needed as a next step in the HSA review process.

The Commission also has the authority to set temporary (only under extraordinary circumstances) and final dumping margins. The U.S. Department of Commerce (a Cabinet/Ministerial-level agency) conducts an independent analysis of the extent of dumping and/or subsidies for each country and/or producer named in the complaint.

Definition of Injury.[34]

There are at least three significant changes proposed in the process described above, in this draft chapter. First, under current U.S. law, plaintiffs (domestic producers) must demonstrate that dumping or subsidies are a *"significant"* cause of injuries. The proposed draft requires that it must be demonstrated that "dumping [or subsidies] … [was/were] the principal or dominant cause of injury to the domestic industry."[35]

This change greatly weakens the chances that domestic producers in any country will be able to prove injury and obtain relief from illegal subsidies. The *Alternatives* document proposes new dispute resolution systems that would emphasized greatly increased use of open, transparent negotiations to resolve subsidy and dumping (and other trade) dispute. Under that proposal, there is a strong likelihood that disputes would be resolved without the imposition of duties, or the withdrawal of treaty benefits (e.g. tariff cuts in affected industries). Duties and other trade remedies would be used only rarely, after all other means had been exhausted to resolve each dispute.[36]

The proposed changes in the FTAA would reduce pressures of plaintiffs and defendant (firms and countries) to settle antidumping and subsidy cases. Therefore, pressures leading to these cases would remain unresolved leading to increased risks of the imposition of more severe trade restrictions and retaliatory treaty violations.

Elimination Of Antidumping Measures When Reciprocal Free Trade Has Been Established In Any Sector.

This Chapter proposes that the use of antidumping measures be eliminated when tariffs have reached zero in any sector(s). This is a substantial expansion of the treatment of these fair trade issues under NAFTA and the WTO. These laws still apply to trading partners within NAFTA, although the number and breadth of exclusions has been expanded. If these laws are eliminated, then pressures to repeal the agreement or use other available trade remedy (such as escape clause mechanisms) will increase dramatically if the number of fair trade infractions maintained or increased in the future. Again, in the absence of a new approach to dispute resolution (as outlined in the *Alternatives* chapter on this topic), the elimination of antidumping (and countervailing duties remedies, if included) is simply likely to suppress but not eliminate

[34] Note that there are a number of other technical issues (such as restrictions on prehearing contract between plaintiffs and all government officials who would be involved with adjudicating the case; such restrictions would be likely to increase the number of frivoulous antidumpting and subsidy complaints) in this chapter that merit further review and discussion.
[35] FTAA Draft Subsidies Chapter (July 2001), section 3.5 at 5.6. First bracket (only) in the original.
[36] See HSA *Alternatives* chapter on "Dispute Resolution."

pressures to resolve trade disputes in a confrontational manner, if mediation-oriented systems were not available.

2. Implications of the FTAA Subsidy Proposals for Agricultural Development[37]

The draft FTAA Chapter on Agriculture proposes to greatly reduce or eliminate most or all agricultural subsidies, as mentioned above. The recent passage of the U.S. farm bill, which included authorization of up to $268 billion in farm subsidies over the next decade has prompted widespread protests, especially from development economists and groups like Oxfam[38] which claim that these mammoth subsidies are to blame for falling farm prices and incomes around the world, especially in poorer developing countries.

Good vs. Bad Subsidies.

These claims ignore several important facts. First, some subsidies are good, and others are bad, from the perspective of all farmers. For example, subsidies to help revive rural communities and retrain farm workers for other jobs, and to sustain the incomes of small- and medium-sized family farms may be generate great social benefits, with little impact on food production or world prices. On the other hand, price-based subsidies present several problems: First, they often end up subsidizing rich landowners and agribusinesses that have the fewest needs for such public support. Second, they can encourage excess production and suppress global commodity prices.

In addition, price supports are also distributed in a highly unfair way in the U.S. According to one recent estimate, 10% of farmers get two thirds of the benefits under the farm bill. In essence, both the farm bill and free trade (as presently structured) both deliver the vast majority of their benefits to the wealthy and to agri-business corporations. In this sense, both approaches are consistent

Subsidies and Overproduction.

It is also important to confront assertions that vast agricultural subsidies are primarily responsibly for falling farm prices and excess global production. There are a number of other factors involved. For example, farm prices are closely related to the U.S. dollar, since many commodities are priced in dollars. As the U.S. dollar gained nearly 50% in value between 1995 and early 2000, farm prices plummeted. The technical reasons for this link are somewhat complex, but the intuitive connection is quite clear based on these data alone.[39] This analysis

[37] See also the separate HSA critique of the draft FTAA chapter on agriculture. This section restricts its attention to subsidies, and related economic problems.

[38] See, for example, Watkins, Kevin (2002) Cultivating Poverty: The Impact of US Cotton Subsidies on Africa. Oxfam America. www.oxfam.org/eng/pdfs/pp02095/_cotton.pdf.

[39] The basic problem is that the demand for food is highly inelastic (insensitive to changes in prices). So, as U.S. dollars became more expensive after 1995, demand for farm commodities fell rapidly. Hence, the prices U.S. farmers received for their products, which are set on world markets, fell rapidly. This greatly increased the need for subsidies in the United States, as farm incomes plummeted.

also highlights the importance of addressing exchange rate imbalances in new trade agreements, an issue that has received little attention in either the draft FTAA or HSA Alternatives documents.

For these reasons, we should be careful to identify which subsidies provide the biggest social benefits, and help manage markets so as to help sustain the "Right to Food Security" proposed in the Alternatives chapter on Agriculture (at 56). General proposals to phase out or eliminate all subsidies are only designed to accelerate corporate-backed takeovers of farming, the destruction of rural communities and the displacement of rural communities. Specific problems in the draft FTAA Agriculture Chapter, and comparisons with specific provisions in the *Alternatives* document follow.

Proposals to Reduce or Eliminate Agricultural Subsidies.

One of the most disturbing elements in the FTAA draft on agriculture proposes (in future WTO negotiations) to achieve [the [maximum possible reduction or] elimination of production and trade distorting domestic support including support for 'production limiting' or 'blue box" programs.[40] These programs would make it difficult or impossible to regulate or limit excess production in the agricultural sectors of most or all participating countries in future WTO subsidy agreements.

In addition several sections of the draft FTAA present alternative proposals to reduce or eliminate some or all agricultural subsidies (red, amber and green), as noted above.[41] Another alternative would require a review of the criteria for the "green [box]" category of permissible subsidies.[42]

The final approach more narrowly proposes to eliminate only the so-called "Aggregate Measures of Support (AMS)," which includes only red and amber box subsidies.[43] This would constitute a much more desirable approach to regulating subsidies on the FTAA.

If the value of the dollar is substantial reduced, against all of our major trading partners, then U.S. commodity prices will increase again, and the need for subsidies through various farm programs ("loan rates" for various crops, crop insurance, farm income supports and so forth) will fall rapidly. At the same time the competitiveness of U.S. farm exports will rise rapidly, while it will become more difficult for other countries (e.g. Brazil and Argentina) to export their products to these same markets. So, reducing subsidies is not the best or only solution to global farm price and income problems.

A number of other problems and policy decisions have also contributed to excess production around the world. These include the passage of the 1996 Freedom to Farm Act in the United States (known by some farmers as "freedom to fail"), which eliminated land set aside programs and resulted in an increase of farmland in use of about 20 million acres, and also programs sponsored by the IMF, World Bank and many others that have encouraged many countries to expand production of basic commodities such as corn and soybeans. See Robert Scott, "Exported to Death," EPI, 1999 (and 2001 update), and also recent op-eds on subsidies by Daryll Ray at the Ag Policy Center: www.agpolicy.org.

[40] See FTAA Draft Agreement, Chapter on Agriculture, section 13.2.1, at 1.10. Bracketing in the original. Note that small countries could be excluded from this section, as per additional bracketed text.

[41] See FTAA Draft Agreement, Chapter on Agriculture, section 13.2.2, at 1.10. In this section (13.2), the parties would only agree to work together toward a future agreement at the WTO that would achieve this goal.

[42] *Ibid.* section 13.2.3, at 1.10.

[43] *Ibid.* section 13.2.3.2, at 1.11.

These measures raise several concerns, especially when contrasted with the HSA *Alternatives* principal that agricultural policies should "promote economic sovereignty, social welfare, and reduced inequality at all levels." One of the core problems with all three of these approaches is that they envision a greatly reduced role for government in the management of agricultural production, which would greatly reduce its ability to achieve social goals.

These models assume that market forces will rapidly transform and coraporatize farming in large parts of the many FTAA countries. The market-led (neoliberal) model then assumes that rapid growth in agricultural production and exports will accelerate the growth of GDP and incomes in these countries.

A core problem with this approach is that its success depends on continued growth in demand for agricultural commodities. While the demand for some commodities (i.e. soybeans) has soared in the past decade, the demand for other products (such as wheat) has remained flat or declined. Soybeans have simply been substituted for corn in meat production in many regions, because beans yield much more rapid weight gain per pound than equivalent amounts of corn in animal feed applications. This type of substitution between commodities should not be confused with overall demand growth. Although overall population, and therefore food demand, has been growing over the long term, the rates of growth of food production have tended to outstrip food demand, so the prices of basic farm commodities have declined steadily for many decades.[44]

The alternatives model for agricultural envisions a full and complex role for the use of subsidies in rural sectors in both the North and the South. This analysis has shown that the draft FTAA contains many significant flaws. Farm workers, NGOs and others concerned with rural development should demonstrate publicly and privately to their governments that the draft FTAA agricultural and subsidies agreements are not in their interests, and note that its time to engage in real considerations of proposals such as those outlined in the HSA *Alternatives* report.

3. Implications of the FTAA Subsidy Proposals for Industrial Development and Support of Essential Public Services

Since the FTAA subsidies proposal basically adopts the WTO subsidies code, albeit with some significant procedural changes, as noted above, it doesn't introduce new challenges in these sectors. Subsidies are treated much more harshly in agriculture than in other industries in the draft FTAA chapters. The basic problem is that recent GATT and WTO agreements (including the subsidy agreement) have made it increasingly difficult for states to develop effective industrial policy programs, despite the fact that many subsidies are still allowed within the WTO's green and amber subsidy box system.

There are two key problems. The first relates to resources. The U.S. has a relatively small public sector, relative to many other developed countries. Europe, for example, has much deeper

[44] The structural trend of gradually falling commodity prices over the last century, or more, should not be confused with the drastic drop in U.S. and world commodity prices, which is, to some extent a short-run cyclical problem. This problem has also been exacerbated by the adoption and proliferation of "freedom to fail" type farm policies in many countries in the 1990s.

pockets when it comes to subsidizing major new projects (e.g. the new Airbus super transport). Canada is finding it increasingly difficult to sustain its public sector in the wake of NAFTA.[45] Other countries in the hemisphere find it increasingly difficult to compete with the public resources that are available for subsidies in the United States.

The second problem is that National Treatment and Most Favored Nation "equity" standards within the WTO make it increasingly difficult to support the development of new products and processes within any particular home country.[46]

Subsidies and the Role of the State.

Two issues in the draft chapter on Public Procurement will also affect the process of economic development throughout the region. First, this chapter requires state owned firms to be operated on strictly commercial grounds. This means that they cannot be operated in such a way as to meet non-market social needs. For example, public water, power and sewage systems are essential to industrial development. Due to small scale of operations, institutional problems, and/or the need to subsidize some low-income users, the prices charged for these services may limit the competitiveness of local producers in other sectors. In these cases, subsidies would be limited or prohibited by both the subsidies and government procurement chapters of the FTAA draft.

Finally, the FTAA Procurement draft requires that 1) national treatment be applied faithfully in contracting process; and 2) that contracts are to be based strictly commercial terms. National treatment means that governments must make all bidding processes completely open to both domestic and foreign firms, and must not discriminate against the latter. The HSA *Alternatives* proposal would allow governments to favor selected domestic suppliers for a limited time. Furthermore, such suppliers could be given contracts as long as their bids were within a certain maximum percentage of the best commercial price, for limited periods of time.

Governments in the U.S., and many other countries, have used procurement to support, encourage the development of many different types of firms, ranging from minority vendors (many of who had often been discriminated against in the past) to military contractors.[47] In effect, such contracts provide subsidies to favored firms whenever their contract price is higher than the best available commercial contract. Activists would be well advised to closely monitor the development of these two issues. These issues are also covered in more detail in the HSA analysis of the draft FTAA procurement and investment chapters.

CONCLUSIONS

The proposed draft of the FTAA subsidies chapters, and the treatment of subsidies in other chapters, represents a tremendous threat to the development of effective responses to

[45] See Bruce Campbell's paper in "NAFTA at 7."
[46] See also "Driving the Public Interest out of Procurement: The FTAA Draft Chapter on Government Procurement."
[47] Note that military contracts are usually exempt from coverage by the WTO, FTAA and other procurement agreements. This example is cited for illustration purposes only.

globalization. If these proposals are adopted, and especially if some of the more restrictive variations that could emerge from the current bracketed draft are finalized, then it would be even more difficult to challenge the present process of globalization in the future than it is now.

Instead of aggressively restricting the rights of governments to subsidize agriculture, industry, and public enterprises, our governments should be working on new ways to secure and develop their sovereign rights to control the terms of development and growth in these sectors. The FTAA approach is a one-size-fits-all nightmare that fails to reflect the great diversity of peoples, economies, institutions and resources that exists within the western hemisphere.

Developing countries, in particular, should be careful about falling into a moldering flytrap that offer the dream that by giving in to demands to adopt the no-subsidies approach they can expand their access to U.S. markets. The United States has distinctly unpromising growth prospects for potential exporters: the market is rapidly approaching limits to its capacity to finance ever-larger trade deficits. The subsidy-cutting strategy also goes too far in ruling out-of-bounds economic strategies that many developing nations have found useful (including the United States).

COMPETITION POLICY IN THE SECOND FTAA DRAFT

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Introduction

The purpose of this chapter is to avoid monopolistic practices. While we can agree with this goal in general terms, the problem is subtler. Behind this acceptable objective hides a vision of the world and the economy in which competition becomes absolute, a supreme good. In the international context of great disparities among countries, as well as in the size and power of these countries' companies, competition taken to an extreme simply allows the big fish to eat the small one. Furthermore, the chapter focuses more on public companies than private ones.

Another one of this chapter's objectives, also along these lines, is opening greater access to other countries' markets. To the extent that non-competitive practices and policies are blocked, larger companies will have greater access to markets. Yet this is probably due to many medium-sized and small businesses being removed from their domestic markets. It is about avoiding monopolies, but deregulating and favoring the most open competition possible results in the actual competition occurring among various large companies, while those that are left out for lack of competitiveness are the small and medium-sized national companies. In the best of cases there will not be monopolies but the competition will be among nearly all mega corporations.

The heart of this chapter is legislation that places the highest value on market competition and the reduction of state intervention in the economy to being the principal guardian of the sacrosanct laws of mercantilist competition, as well as the creation of a national agency with some level of autonomy to ensure compliance with these measures.

Chapter has nine sections or areas, but we will focus on the six that are substantive. The other three are much less important: commitments regarding technical assistance, certain measures or transition periods (it is only affirmed that these will be agreed upon), and guaranteeing the confidentiality of some information.

The analysis of what is written in the draft will be preceded by in-depth analysis of the chapter's intentions or objectives and its relationship or complement to other chapters.

On the other hand it is important to emphasize that this is a second draft in which there are still many brackets or areas of debate. We will focus on the central ideas or tendencies, as discussing each variable of the bracketed text would make the analysis very tedious and perhaps lose the fundamental idea.

To avoid complicating the analysis, we will only make comparisons between the first and second draft in crucial points and using footnotes in most cases.[48] It is worth clarifying that in general, the changes in the chapter's second draft reflect some governments' opposition to the extreme pretensions (we presume those of the United States) expressed in the first draft. At the same

[48] The Hemispheric Social Alliance's analysis of the FTAA first draft can be seen in The FTAA Unveiled: A Citizens' Analysis of the Official FTAA Negotiations. Edited by Hemispheric Social Alliance 2002.

time, these governments' positions surely reflect the growing opposition by social movements at the national as well as hemispheric level. It is clear that the growing opposition is making an impression.

Emphasizing that the second draft is not as bad as the first does not imply in any way that the chapter's current form is acceptable. Certainly this second version eliminates aspects that intended to explain every last detail and limit even further nation-states' possibilities, but nothing that has disappeared modifies the basic thrust of the chapter, which is unacceptable to the Hemispheric Social Alliance. If we mention that the second draft is not as bad as the first it is only to illustrate that the social struggle we have sustained is having an effect; but our struggle is not to modify the FTAA but to prevent it from being signed or approved. For the Hemispheric Social Alliance, it is not a matter of changing or taking out this or that phrase or article, our alternative proposal is exactly the opposite of what the mere existence of this chapter of the FTAA expresses: competition is not what is most important, the economy should be regulated in the interests of the well-being of the majority of the population.

We are in agreement with avoiding private monopolies, but public ones cannot be treated in the same manner, in no way should the economy be left solely to market forces, which is what the FTAA seeks. The economy should be regulated in function of objectives of sustainability, distribution of wealth and social justice. Not every monopoly is bad; there are some public monopolies that can be justified based on social reasons or due to sovereignty. For example, in Mexico and Venezuela, petroleum is national property and is therefore managed by a company that belongs to the state. There is no reason to have various petroleum companies in competition with each other. If petroleum belongs to a nation its use should benefit everyone (which does not happen in these countries, but that's another matter). As we will see, the FTAA tolerates the existence of some state-owned enterprises, including state monopolies such as the case of the petroleum companies, but it denaturalizes them by requiring them to behave following mercantilist criteria. Oddly enough, the FTAA justifies the existence of private monopolies when these are based on intellectual property rights without making amends, nor does it intend to limit their rights.

As we have said on numerous occasions, when we say no to the FTAA we do not seek national economies isolated from world dynamics, we are not against integration; but we are against free trade that is nothing more than freedom for the big guy to eat the little guy. We seek to prevent the FTAA, which is an agreement of subordination, and then negotiate agreements of true integration based on the interests of the people that don't mean leaving our economy and our future to solely to the dynamics of the market. We aspire to international rules that create viable national projects of sustainable and just development for the people and not in the free market and super-rights of the large corporations that intend to legalize the FTAA.

Underlying Significance of the Chapter

This chapter requires legislation and commits the nation-state to take action to avoid anti-competitive practices, not just for private businesses, but also and perhaps primarily for public ones.

The chapter about competition policy expresses in operative and concrete terms, the legal regulations based on the theory underpinning this type of free trade agreement.

The obligations that are intended to be entered into in this chapter complete the limitations placed on nation-states' possibilities for guiding the economy in function of a national plan for sustainable development with the distribution of wealth. It intends, although obviously in the negotiations it is not completely achieved, that the laws of the market and competition be absolute, eliminating anything that could interfere or limit them. As Dr. Herminio Blanco, current advisor in Central America for the free trade agreement negotiation with the United States and formerly the principal NAFTA negotiator said, "the best national plan is to not have a national plan and let the market create the best country possible."

The analysis of other chapters of this draft of the FTAA illustrate the super-rights of large corporations: National Treatment of foreign merchandise and services, foreign investors and their investments; opening and free circulation of all types of goods and services (including health and education); total protection of the so-called intellectual property rights (ownership of knowledge). As we see in the chapter on investment, the FTAA even gives large foreign businesses the right to sue nation-states in the international arena for any measure that diminishes their appetite for profit. As if this wasn't enough, the obligations in this chapter intend to reduce the nation-state's role in the economy to that of a guardian of the laws of the market, which is to say, to prevent any intervention that distorts market forces.

But what are these forces and the absolute laws of the market? Well, the market is the law of the jungle in which only the strongest survive. It's paradoxical, it is intended to avoid monopolies, but probably what happens is that the competition is concentrated among nearly all large companies and perhaps even large foreign companies. The State can continue legislating. Yet it cannot do so to avoid the injustices of the market, but rather to avoid anything that disrupts the sacrosanct law of supply and demand, which is to say that each party is left to their own luck. Henceforth the State will not regulate the market but rather deregulate it.

The special focus of this chapter is public enterprises. If the FTAA and this chapter in particular are approved, especially some of its articles and brackets, the fundamental nature of public companies will be altered in the future. The FTAA does not prohibit the existence of public companies, but it will subject them to the logic of the market, denaturalizing and adulterating them, making them operate as if they were private, with the only difference being that the owner is the government. We have fought against the privatization of businesses and social services, but if this chapter is approved, public companies will lose their entire social meaning their possibility of leveraging national development or providing the mainstay of sovereignty. This is intended to cancel out the triumphs of the social movement that in some countries have managed to prevent privatization. It is useless to have saved them from privatization fever if, with this FTAA chapter, their functions are adulterated.

As you can see, the FTAA is much more than opening borders for the free circulation of merchandise. It is not just about allowing foreign merchandise to enter without barriers. It intends in principal that every good or service be subject to competition (of course this is an aspiration that is only partially detailed in the negotiations) and to avoid that the State and public

companies distort the market or become unfair competition that limits the capacity for expansion and profit of private companies.

Currently, there are areas that are partially outside the market, for example health and public education. These are conceived as rights and therefore the State provides them to those who do not have the resources to acquire them in the market. In the FTAA the trade of services is liberalized, without explicitly excluding services that are in reality basic rights such as health, education or water. In this chapter, when they refer to public companies or to monopolies, no distinction is regarding companies that provide basic services, which means they should be subjected to competition and guided by business criteria. (The possibility remains that they will be excluded given that the exceptions have not been negotiated or at least they are not in this draft text).

What is outlined above is at the heart of the FTAA, but it is especially expressed in this chapter about competition policy, complemented by the chapter on government purchasing. Analysis of its different articles follows.

1. National Legislation on Competition

This would require having national or sub-regional laws (convened in sub-regional agreements) and implementing actions to avoid practices contrary to competition, both public and private. Even though the explicit statement regarding equal treatment of private and public practices is in brackets, the chapter as a whole indicates that this is the dominant tendency.

Article 1.1 puts forward the objective: adopt or maintain measures at a national or sub-regional level (when there are sub-regional agreements) to prohibit both private and public practices that impede competition.

Article 1.2 affirms that each party agrees to access, on a non-discriminatory basis, to natural or legal persons of any of the parties to the mechanisms and procedures of dispute resolution foreseen in the national legislation on competition. This does not preclude that in some areas there will be supranational dispute resolution mechanisms as we will see in section 5 will be analyzed later, further on.[49]

Article 1.3 accepts the possibility that there will exceptions in the coverage of the rules of competition, but that these should be transparent and revised periodically by the body that pronounced them to evaluate whether it makes sense to keep them. It is also necessary to notify a committee provisioned in Article 3.5 of any new or amplified exception. It expressly intends to prohibit that the exceptions include exportation boards. Does this mean, for example that in Mexico PEMEX or the Venezuelan petroleum company should be subjected to competition?

[49] In the first draft some brackets that no longer appear intended to go even further. Article 1.2.4 stated that the application of the rules to prevent or correct behaviors with trans border impact "could be the responsibility of the authorities of the party (country) affected, of the party in which the practice originates or of both". That is to say that it intended for the rules, even though they were national, to be applied from the affected country. In the second draft the formerly bracketed statements disappear to simply state that foreigners should have access to the national mechanisms for dispute resolution in the area of competition policy.

Does this mean that there could be other companies that export Mexican or Venezuelan petroleum?

The exceptions and exclusions for each country do not appear to be negotiated yet and the scope or gravity of what could eventually be agreed upon will not be clear until the exceptions are negotiated for each country.

Article 1.4 details the characteristics and content that the national or sub-regional laws ought to have. In essence the national laws should adapt to the commitments acquired under the FTAA and not the reverse.

This is an imposition on the legislative branch. This is especially important in some countries. For example, in Mexico the FTAA would only be ratified by the Senate of the Republic (the Upper Chamber), while the laws that could be changed are also under the domain of the House of Representatives. In this case we would have only one Chamber approving an agreement that imposes limitations on the powers and domain of the other. Once approved, the agreements are supreme law and, as they lack the participation of the Chamber of Deputies in their ratification, they would impose the obligation to change, in a sense, the laws regarding jurisdiction. Again in this country, as in almost all others, international agreements have a value similar to that of the Constitution, but the difference is that, unlike constitutional reforms, these agreements do not have to be ratified by the legislatures of the sub-federal or sub-central levels of government. In other words, the federal government is compromising the other powers of the State.

Among the anti-competitive practices, there are some that are good to impede, but there are other particularly unacceptable restrictions based on the perspective of preserving the government's ability to carry out a national development plan, or for developing countries to protect the prices of certain raw materials or non-renewable resources.

It intends to prohibit anti-competitive practices in such general terms that they become dangerous. For example, it pretends to expressly prohibit practices that imply limiting production. This could be positive when mechanisms that maintain high prices are used to gain usury profits; but in general the article does not allow for the exclusion of other cases in which it is to guarantee minimum income or fair prices for small producers, as could be the case with coffee; or to assure reasonable prices for certain abundant raw materials in underdeveloped countries, where due to over-saturation of the world market, prices are depressed below the costs of production in these countries. Nor does it expressly exclude that which could limit production for environmental reasons or for conservation of non-renewable resources.

Based on the context of this paragraph, which discusses national laws and the authority in charge of overseeing their application, which is also national, it does not appear to be directed at avoiding international agreements that orchestrate production quotas to maintain good prices; rather it is expressed almost like a general principal which is why it becomes dangerous.

Articles 1.5 and 1.6 oblige guarantees of non-discriminatory, transparent treatment and due process; and also that, in accordance with its national or sub-regional legal framework, prior to

the imposition of any sanction the affected party should be heard and "the penalty be subject to independent review."

The guarantee (articles 1.2, 1.5, and 1.6) of non-discrimination, transparency and due process in administrative and judicial processes and in the adoption of policies and measures in favor of competition, when joined with the principal of "National Treatment" which cuts across the entire Agreement, impedes any type of regulation specific to foreign companies. It requires equal treatment of the unequal.

2. Regulatory Policies and Practices

Beginning with the introduction of this section there is emphasis that anti-competitive practices may originate in policies, regulatory practices, administrative measures, public monopolies, and government assistance. It is therefore clear that the chapter is intended to establish limits on nation-states' possibilities for defining policies and regulating economic activity. It can establish policies and regulations, but to promote competition, not to prevent that this competition among the unequal result in the destruction of the greater part of the national productive capacity of less developed countries.

Article 2.1 implies three commitments in national definitions of competition policies and regulatory practices:

a) That they be consistent with the Hemispheric Agreement.
b) That they be regulated in order to promote competition. This implies that the regulations and policies should not be to avoid distortions and injustices of the market itself. The chapter as a whole implies that competition should be promoted even if this competition is unfair due to the inequalities among countries.
c) Prevent that they limit [in an unreasonable manner] access to the market. It is significant that the bracketed note refers to the intent to avoid *unreasonable* limitations to market access. There are therefore proposals that intend that limitations be absolute and others that are nuanced and seek to prohibit only unreasonable limitations to market access.

Behind these three apparently simple commitments is an enormous straightjacket with regard to nation-states' abilities to regulate and establish policies consistent with an agreed upon plan for national sustainable development with the distribution of wealth.

2.2 Monopolies [legal or designated]

The problem begins with the definition of monopoly, which is stated in **Article 2.7**: Entity [private or state], including a consortium or government body, which in any relevant party's (country's) market has been designated as sole provider or buyer of a good or service, [but does not include an entity which has been granted exclusive intellectual property rights derived solely from award of such rights]." Defined in this way, for example, the businesses in Mexico that operate under constitutional mandate with regard to goods that are national property or reserved exclusively for the State would be monopolies; on the other hand businesses whose monopoly is based on intellectual property rights is expressly excluded. This is to say that a public company that has exclusivity based on an asset originating from a good that is national property can

continue to exist but will be subjected to anti-trust laws, while a company that operates as a monopoly based on the concession of a patent will not be subject to this legislation.

The definition of government monopoly refers to property monopoly or one under the control of one of the party's governments or of another monopoly of this type. It is interesting that in the brackets they intend to include companies at the sub-federal or sub-central levels, which in many cases would mean a violation of federalism given that the federal or central government cannot commit to what is beyond its jurisdiction. In Mexico public companies that are created by constitutional mandate are not property of the government (the government only operates them) but rather of the nation and they are based on the principal that the good they manage is national property. The Mexican Constitution expressly does not consider such businesses as monopolies subject to competition and anti-monopoly laws (even though in the secondary laws after NAFTA they have been subject to such laws in practice).

Article 2.2.1 states that nothing in the Agreement should be interpreted to prevent designation, authorization or maintenance of a monopoly, but in fact the brackets delimit this statement when indicating that "in the measure in which they are subject to national or sub-regional rules on promotion and protection of competition" and subsequent points also limit this possibility. Let's remember that even though the laws of promotion and defense of competition will be national, they will be adapted to conform to the FTAA.

It is paradoxical. It permits public monopolies, but to "promote and defend competition." It refers to monopolies in general and therefore does not distinguish between public and private ones. We insist that a public monopoly cannot be given the same treatment as a private one. As we will see further on, public companies are allowed, including monopolies, but they are subjected to such measures as to denaturalize them, forcing them to function as if they were private. Generally, a monopoly is exactly the opposite. If national sovereignty, sustainability or social justice justify a public company monopoly, it is not precisely in order to promote competition. Curiously, in the case of private businesses, monopolies are justified when they are based on intellectual-property rights. Does this promote competition? Of course not.

Article 2.2.2 proposes that when a monopoly is designated or authorized the parties (countries) are obliged to try to introduce into their operations conditions that minimize or eliminate the cancellation or reduction of the benefits to the other party (country).

Above each country's sovereign capacity to maintain or "designate" monopolies, private or public, as recognized in the first paragraph, is the FTAA. It formally recognizes the sovereignty of each country, but then limits sovereignty to what is agreed to in the FTAA and does not diminish the rights that the FTAA grants to foreigners.

Article 2.2.3 compels each Country guarantee through regulatory control, administrative supervision and other measures that these public or private monopolies:

a) When exercising regulatory, administrative or other functions they have been delegated, act in such a way so as not to be incompatible with this chapter and even (according to

another bracket) with all of the Agreement, or in another bracket explicitly with the chapters on Public Sector Purchasing and Market Access.

b) Act solely according to commercial considerations and without prejudice regarding what is stated in the chapters on Public Sector Purchasing, Market Access, Investment and Services (or in a bracket in the FTAA as a whole) in the buying and selling of the monopolized good, except when relating to one of the terms of its designation that is not compatible with subsections c) and d).

c) Subsection c) refers to granting non-discriminatory treatment to investors, foreign goods and services in the buying or selling of the monopolized merchandise or service. It is worth noting that a bracket at the end of this clause expressly affirms that it does not consider price fixing in different geographic markets within the same country incompatible with this non-discriminatory treatment when these differences are based on "normal commercial considerations" such as the supply and demand in these markets. It seems to me that this practice, which is considered normal and allowed, is not justified, at least in general terms. It opens cases in which it is justified given that it implies large investments for few buyers, but it can not be justified in general terms.

d) Not to use its monopolistic position to undertake anti-competitive practices outside the monopolized market which was authorized and which affect investors, services or merchandise from another country, or practices a discriminatory supply of the monopolized merchandise or services or that grants cross-subsidies. Why only when it affects investors, merchandise or services from another country?

In another part of this same subsection d) a bracket is added that to the letter says: [The differences in the fixing of prices between types of clients or between related and unrelated companies, and cross-subsidies, are not in themselves incompatible with this disposition; rather they are subject to this clause when the monopolized company uses them as instruments of anti-competitive behavior.] I believe that this is almost always part of anti-competitive behavior of the company benefited by low prices, although this may be difficult to show. As proposed in this way I believe it leaves open a wide margin to hide unfair competition.

In its subsection b), article 2.2.3 forces even public companies to act "only according to commercial considerations." Later (section 2.7 of definitions) the concept of "commercial considerations" is defined "…conforming with normal business practices undertaken by private businesses, companies that make up this industry." It speaks in general terms, without distinguishing if they are service businesses, or even they mean essential services that should be considered rights rather than merchandise. It could not be clearer, it is unacceptable that the role of the public company be different than that of the private and that not everything can be considered fundamentally as merchandise. For example, should a public company that provides potable water services be guided solely by commercial considerations, despite the fact that the United Nations just declared access to potable water a human right?

Furthermore, using the definition of "normal business practices" leaves things in ambiguity. What practices are referred to, what type of company or business is taken as the prototype? The transnationals, as they operate in our countries? Hence they are practices that should be proscribed.

Article 2.2.4 clarifies that article 2.2.3 does not apply to government purchases for public use with no commercial purpose and that are not to be utilized in the production of merchandise or payment of services for commercial sale.

2.4 State Companies

Again the problem originates from the definition of State companies itself. The definition only stresses that the owner or controller be a country. Even worse than the definition of a government monopoly which refers to government property. The strategic public companies in Latin America and the Caribbean are not property of the government but rather of the nation.

The orientation is clear from the way things are named. It does not say public companies but rather State companies, nor does it say public monopolies but rather government monopolies (see definitions in article 2.7). For the FTAA the difference is solely a question of who has the property or the control. It does not assume that the public company (which is not the same as state or government) is different because of its role in the economy and not just for who is the owner.

Article 2.4.1 affirms that nothing in the FTAA "will be interpreted to impede that a party (country) maintain or establish State companies" of course just following comes the bracket in which it is noted "in the measure which they are subject to national or sub-regional rules of promotion and defense of competition."

Moreover, **Article 2.4.2** forces each of the parties (countries) to assure that all state companies act in compliance with the obligations in the chapter on investment, services, financial services, government purchasing (or in another bracket, simply says with provisions of the FTAA). One bracket notes that this applies only when these companies are exercising regulatory or administrative functions or they been delegated other government functions.

Article 2.4.3 stresses that the State companies should guarantee the granting of non-discriminatory treatment of foreign investment and investors and in a bracket explicitly states that it should abide by the dispositions in the chapter on Services, Investment and Public Procurement, among others.

In short, the FTAA concedes that public companies will continue to exist, but it limits their possibilities for action, as we have said it fundamentally alters their nature to subject them to competition and purely commercial criteria. Furthermore, there is no distinction or exclusion regarding these obligations in the case of companies that provision basic services that are associated with human rights.

2.5 State Aids

This simply marks the commitment, in some undetermined period, to negotiate treatment for state aid that could limit or distort competition and that could affect trade among countries.

The tendency is very clear. There is detailed discussion of measures to impede anticompetitive practices, and the fundamental issue of subsides that result in unfair trade, as is the case with many agricultural goods. At least in this draft, this issue is left for later, perhaps with good intentions.

2.6 Inter-governmental Agreements

This simply affirms that the provisions in this chapter will not apply to inter-governmental agreements signed by or among the Parties (countries).

This section did not exist in the first draft. It is likely that its purpose it to protect against the case that some countries in the hemisphere manage to achieve deeper agreements. It is likely that this was a point introduced by the United States since it was obligated to give in on some of its aspirations that were in the first draft text and that it hopes that the deeper agreements it has achieved or might achieve with some countries in the hemisphere (NAFTA, the US-Chile FTA, and the FTA with Central America) prevail. In reality, the first draft went far beyond NAFTA, and the second draft is much more similar to NAFTA, but it is clear that the United States seeks to go beyond that accord and that it plans to do so in the bilateral agreements.

3. Institutional Dispositions

Three institutional issues are discussed.

a) To establish or maintain a national or sub-regional authority. There still many minor brackets in the wording, but they basically affirm that: it would have the responsibility to apply measures in defense of competition, with resources, power and reasonable autonomy even against other national or sub-regional governments, and, according to one bracket, it would have jurisdiction over practices in its territory with cross-border repercussions.[50]

[50] There have been several changes between the first and second drafts, some of which are somewhat important. The first draft proposed more functions for the Authority on competition. It discusses its having the capacity to impose sanctions (3.2.6); and even have cross-border practices, although according to another bracket, it clarifies that this means practices carried out in its territory (3.2.3); that its resolutions could be reviewed in an independent legal process (3.3); to issue recommendations when public agencies and entities implement acts that are related to free competition (3.4 a); to make non-binding declarations related to the impacts on competition of any regulation or practice. The brackets on this point indicate that there is no agreement on whether it would makes pronouncements on any country's practices, but in any case, we should remember that it is non-binding. All of these issues disappear in the second draft.

Perhaps the most delicate point in the first draft was 3.2.6 (which disappeared as such in the second draft). It proposed that the authority would have the capacity to "investigate and sanction anti-competitive practices" and in a bracket specified [including those in regulated sectors]. If we recall that the competition Authority would have certain autonomy and that another country's Authority could ask it to act (something that was maintained in the

It is important to highlight that the discussion is around national authorities, unless there is some sub-regional agreement.

The delicate point is "reasonable autonomy". What would be the limits of that autonomy? Does this refer to autonomy from the Executive Branch or also from Congress? Any authority should be accountable to authorities, but it seems likely that they would not be elected and therefore autonomous, so they could become agencies that are not accountable to anyone, and that no one controls them, that they would be guided by a law and nothing more. The Mexican experience with the Competition Commission created after NAFTA is that this commission has a great deal of power. For example, it can decide on or authorize mergers. In the case of the two biggest Mexican banks, it decided, without possibility of appeals, to prohibit their merger. The result was that both of them were bought by foreign banks. For the sake of maintaining competition, there are now practically no banks with majority Mexican ownership. This autonomy is dangerous, since it is given to non-elected authorities without any democratic body to control them.

The fact that the authority would be national resolves the problem of sovereignty, but probably in practice the nation-states would not have enough power to control the monopolistic practices of transnational corporations. This tendency would reinforced, since to the commitments that could be made in the investment chapter would weaken nation-states' in dealing with the super-rights to be granted to large foreign investors. The nation-states would be unable, for example, to insist on performance requirements on those companies, to implement effective policies that would favor the integration of national production linkages, etc. National Treatment would require them to treat unequal parties equally, which would result in the competition promoted in this chapter being a very savage competition to the detriment of the majority of national companies. The concept of indirect expropriation and investor-state dispute resolution mechanisms would leave nation-states with very few possibilities to confront the large multinational corporations.

A deeper analysis of this point will only be possible once there are proposals on the powers, functions and degree of autonomy that this authority would have.

b) It would establish a committee[51] made up of representatives of each country or sub-regional entities with functions including monitoring, promoting cooperation, coordination of technical assistance, communications among the parties, formulating

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second draft) and, that it could pressure for competition even with other national or sub-regional authorities. This could result in the case of it intervening to force competition in sectors that the nation-state has decided to keep outside of the sphere of mercantilist competition.

The second draft is more general. The first draft dedicated 13 paragraphs to the point on the competition authority and the second draft only one paragraph. It is probably leaving the design of such an authority to national discussions.

[51] The second draft is clearer and more innocuous on this issue. Two alternatives on its functions that appeared in the first draft have dis appeared. In reality, it combines the two and removes the brackets that discussed if this would be a committee of representatives or a committee of experts.

non-confidential recommendations, and leading and establishing a plan to carry out reviews in conformity with the "Review of Competition Policy" mechanism. There is a very important bracket that proposes the following functions.

This committee would function by consensus and, unless decided to the contrary, its reports would be public. The committee would establish its own practices and procedures.

It is problematic that the committee can decide whether or not to publish its reports. All reports should be public. In any case, a law on the right to information could regulate this point.

c) **Mechanism to review Competition policy**[52]

This periodic review would include the implementation of the dispositions in this chapter, laws, policies and compliance activities in the legislation. The results of the review are not binding and would not prejudice possible disputes.

The brackets show that there is still not total agreement on whether the review would be done by "the Parties" or "each Party". This discussion that seems semantic is clarified to be based on paragraph 3.5.3, where contrasting brackets confirm that the review would be done by the Party being reviewed or by experts authorized by the FTAA commission.

Obviously, the delicate point is who would carry out this review, since it would include national laws and public policies. It would be very dangerous to have it done by "experts" designated by a super-national body, but at least it is clear in the draft that the results would not be binding.

Although the results of such a review would not be binding, they could establish a supranational oversight agency on national policies. It is also curious that they would review laws, policies and actions by governments and public monopolies. What about the private companies that are not subject to review? They would only be reviewed by the national bodies.

4. Mechanisms for cooperation and information sharing

Cooperation is generally a positive issue. The stipulations on information sharing, mutual legal assistance and joint investigations could have positive implications. Without the assistance of agencies such as the U.S. Federal Trade Commission (FTC), it would be, in the best of cases, difficult or, in the worst cases, impossible for the competition authorities in another country to discover the existence of anticompetitive activities by large U.S. or Canadian companies in poor

[52] As for the Review Mechanism on Competition policies, the significant change is that in the first draft its was clear that each country would carry out the review (3.7.3), and now in the second draft there is discussion on whether each country or experts authorized by the FTAA Commission would carry out the review (3.5.3). On the other hand, the first draft included in this periodic review the activities of public monopolies and companies, and now in the second draft this is not specifically stated. The second draft include a bracket that would make it explicit that the results of such a review would not prejudice any disputes that could arise.

countries without significant resources. The large and powerful multinational companies are disproportionately located in the United States or Canada.

The obligations on this issue are the following:

The obligation to notify when the application of one country's competition legislation could affect important interests in another country, except when the notification affects important interests of the Party applying the legislation. That is to say, the obligation is very relative.

To take other countries' interests into consideration in applying the legislation. Now it seems that the nation-state should watch that it not affect other countries.

One country can ask the Authority of another to investigate anti-competitive practices in its territory with extraterritorial impacts, and that it apply appropriate measures in that regard.

Information exchange and mutual legal assistance

Joint investigations on anticompetitive practices. This could be a tricky point. Does it refer to cooperating or to carrying out joint investigations, which could imply that one country's authorities investigate in ours?

5. Consultations and dispute resolution[53]

There are very few agreements on this point. Practically the only agreement is that each Party (country) accepts consultations by another Party on any issue derived from this chapter.

There is still no agreement on the dispute resolution mechanism, and the draft text proposes three alternatives with substantial differences. All three propose that it be the general dispute resolution mechanism in the FTAA. The differences are on the issues subject to that mechanism.

The first option proposes that it be the general FTAA dispute resolution mechanism, but it expressly forbids that mechanism being used to question one country's administrative or legal decisions on its competition legislation. There is a bracket that adds the exclusion of competition policies. That is to say, there are some who propose that the policies are subject to supranational disputes.

The second option excludes everything except issues related to public monopolies and companies and refers not to the General Dispute Resolution Mechanism, but instead to the controversial investor-state mechanism. Everything else would only be subject to consultations (Article 5.1) or to the Mechanism to Review Competition Policies, which is not binding (Article 3.5).

[53] There are no big differences on this point between the two drafts. The second draft continues without any agreements, and Alternative B in the first draft has two different versions in the second draft.

We should point out that the NAFTA investor-state mechanism is perhaps the most questioned issue in that agreement. The FTAA not only doesn't rethink the mechanism, it extends it to other issues.

The third option only covers the issue of public monopolies and companies, but it refers to the General Dispute Resolution Mechanism.

This is a tricky point. It deals with a supranational mechanism on the economic actions of the nation-state, which one would assume is sovereign. In reality it is a very limited mechanism, and the current discussion always excludes legal or administrative decisions, but all of the options include disputes on the actions of public monopolies and companies. The first option only excludes competition policies in a bracket.

6. Technical Assistance

Cooperation to strengthen countries' institutional capacity to formulate laws and policies that favor competition.

There is no discussion, however, of the more developed countries providing funding to the less developed countries for this institutional strengthening.

7. Transition period or measures

This section proposes that there be an agreement on a schedule for the application of the disposition in this chapter, taking into account differences in development, the size of the economy, and the situation of countries that do not have competition laws. An interesting point is added in brackets: [the Parties' vulnerability].

8. Confidentiality

There is too much insistence on confidentiality. In general this refers to each country's laws. The problem that should be discussed are the varying degrees of the right to information in each of our countries.

9. Definitions

The relevant definitions are not in this section but rather in the corresponding article discussed above.

Conclusions

A crucial problem that runs throughout the chapter is that it treats private and public companies as the same thing. It does not accept that they have substantially different roles. For the sake of promoting competition as an almost absolute value, they tend to convert the economic role of the state into that of being a guardian against anything disturbing the market.

Another basic problem is that it speaks of companies and monopolies in general without distinguishing service companies. There are services that are considered to be rights, and therefore the state should have the responsibility to that everyone has access to them, even for those who do not have the money to buy them in the market. This is the case with education and health care, and also potable water, which the United Nations has declared is a universal human right. Would public companies that provide these services to satisfy basic rights have to be guided by purely commercial criteria? The current state of the text would indicate that that is the case, unless they are expressly excluded as permitted in Article 1.3, but these exclusions seem not to have been negotiated yet.

It is important to note that this chapter of the FTAA is mainly oriented to limiting the abilities of states to act in the economic sphere. It includes a general section on monopolies that includes both public and private companies, although in reality it mainly refers to public monopolies or those designated (contracted) by the state to private companies. There is also a section on state-owned enterprises, however, there is no special section to prohibit such practices by private companies, which, while not absolute monopolies, do nearly completely dominate the market.

Certainly, Article 1 on competition legislation and in particular, point 1.4 prohibit such practices by large private companies, but it is clear that the majority of the chapter seems to be especially dedicated to what the state and non-private companies can do: legislate; determine policies; monitor state enterprises so that they follow pro-competitive practices and are guided by commercial criteria, monitor or regulate monopoly concessions. Where are the obligations for the large private companies (national or foreign) that clearly have an enormous weight in our economies? It is because of that that we assert that this chapter on competition policy should be called the chapter on the role of the state. In reality, this chapter, together with other chapters, especially the chapter on investment, defines what the state can and cannot do on economic issues. Together with the chapter on Government Procurement, this is intended to define what a public company can be, to such a degree that in reality it loses its essential or historical sense and converts them into government owned property that must act like private companies according to purely commercial criteria.

If this chapter and the FTAA as a whole were approved, they would exceedingly limit the abilities of nation-states to define and promote a national development plan, and the public companies that are not privatized would be distorted so that they act by purely commercial criteria.

ANALYSIS OF THE FREE TRADE AREA OF THE AMERICAS ON INTELLECTUAL PROPERTY RIGHTS

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Introduction

In theory, Intellectual Property Rights should balance the interests of inventors, artists and other creators of socially useful goods for social interests. However, the recent wave of trade agreements generally favors commercial activity over the public interest and over sustainable development in the countries of the South.

The twenty year monopolies granted to patent owners constitutes and obstacle to technology transfer from the countries of the North to the countries of the South. They also create obstacles to access to production methods that are less harmful to the environment, whether due to the reduction in the use of raw materials inputs or in toxic wastes.

Another result of this imbalance is the lack of resources for scientific research and the development of new products better adapted to the needs and conditions in the countries of the South.

This analysis of the intellectual-property rights chapter of the FTAA does not include all the potential impacts. For example, it still lacks an analysis of the impacts on culture and artists and other cultural workers. However, we present two issues in which the rules on intellectual-property rights have profound impacts. First, we discuss the issue of life forms. Later, we analyze how the chapter would affect patented medicines.

Both parts of this analysis show the lack of balance between the public interest and the interests of private companies in the treatment of patents under the Trade Related Investment Provisions (TRIPs) in the WTO and its parallel provisions in the NAFTA and the draft FTAA. **The TRIPs provisions grant patent owners twenty-year monopolies. These monopolies not only allow transnational agroindustrial and pharmaceutical companies to dominate the sale and purchase of their patented products. In many cases, they also convert into private property what should be public, i.e., available for everyone's well being.**

Part One: The FTAA and Life Forms

According to many people, the act of patenting living beings and matter contradicts nature: biologically; ethically; morally; and spiritually. First, living beings reproduce by themselves everywhere. The idea that a human being or a corporation controls the natural reproduction of a plant, animal or microorganism species or variety is an insult to the planet's history. Second, among the requirements for obtaining a patent, one must demonstrate "invention", but no human being or corporation can claim that they have invented life. Of course they can announce new

scientific discoveries or come to know the many forms of life in greater depth, but they cannot invent it. Religious people would say that only God creates life.

However, the current patent system, based on the industrial development system, has been broadened to apply industrial uses to biodiversity. Starting in the 1980s in the United States, various judges have permitted individuals and corporations to claim patents on microorganisms, plants and animals that they have technically manipulated to behave in some particular way. With the act of achieving some biological result, the judges declared that there had been an "invention" and gave the "inventors" the right to control all use of this kind of life form for many years. Over the decades, the judges continued to expand this abuse of the patent system, permitting control by monopolies for very long periods of time. These periods reached 20 years by the end of the century, even on varieties of plants that had been reproduced by traditional methods for many generations. Some patents on human life forms have been approved, with and without those persons' approval. In some cases, the abuse was undeniable and the patents were revoked after a political and legal fight.

In addition to privatizing living matter through patents, large agricultural, chemical and pharmaceutical companies also hope to control knowledge on the use of plants and other life forms. Traditional knowledge is based on thousands of years of human wisdom on diverse varieties, where they are found, how to conserve them and biologically improve them within complex ecosystems. The discovery and monopolization of this knowledge could bring enormous profits to these corporations.

Economically and socially, the extension of the patent system to living beings has intensified the exploitation of Southern peoples' natural resources for the profit of Northern companies, exporting genetic resources just like wood, mining, fish, cacao, café and other tropical products – this could even be compared to the human slavery that continues to exist to this day. That is to say, biological matter is extracted in its natural location, with or without the permission of those who have cared for it and utilized it for centuries, so that it can be taken to laboratories or corporate centers or equally rapacious universities, where it is manipulated a bit so that they can pretend to have discovered some new characteristic or use. Generally, biological matter and traditional knowledge are found in tropical countries where biodiversity flourishes, while the laboratories and experimental fields are located in the United States, Japan or Europe.

With genetic engineering, it has become much easier to pretend that the use of a new technique results in new characteristics and uses. With the patent in hand, the corporation or university dominates all use of the living matter, charging money to others who want to use it and criminalizing those who use it without official permission. In the United States, for example, more than four hundred farmers must defend themselves against the Monsanto company, which accuses them of robbing ADM of its property after the wind and bees carried it from one field to another. According to critics of patents on life, the true robbery happened when the Monsanto researchers took the original matter from nature to the laboratory. This practice is known by the name "biopiracy".

There are three sections of the draft text related to the use and control of living matters. Below we discuss the different options presented by various countries on three issues:

A. Patents;
B. Traditional knowledge and access to genetic resources; and
C. Plant varieties

A. Patents

The debate on patents on life is so controversial that the draft text contains six different proposals promoted by different groups of countries.

1. One proposal would directly adopt everything related to living matter in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) of the World Trade Organization (WTO), subject to revision 5 years after enforcement of the FTAA.

2. The second repeats the basic language and conditions found in the TRIPs on living matter, so it is essentially equal toe the first option but more explicit.

3. The third option recognizes the heated debate and would definitely exclude from patenting plant varieties and species and on the act of biological reproduction. This means, however, that it would permit patents on microorganisms and all genetically modified organisms. It also recognizes the problem of "inventing" life and proposes a list of ten categories of discovery or technology that cannot be called "inventions".

4. The fourth option repeats many of the basic words and conditions in the TRIPs regarding living matter, like the second option, but it clarifies some important details. For example, it defines that an "invention" is not a discovery and that it must be different from what is already known, although that knowledge is not in writing, and affirms that living matter as such is found in nature and is not an invention. Of course, this would permit patenting any genetically modified organism. An interesting detail found in this proposal would allow a country to prohibit a patent when necessary to protect domestic nutrition.

5. The fifth is a mix of the previous options, with some variations in details. For example, it only mentions six categories of human acts that cannot be called "inventions" instead of ten, and that the "previous knowledge" does not have to be from an expert but could also be from a normal person. This proposal devotes special attention to the protection of microorganisms, mentioning commitments under the Convention on Biological Diversity.

6. The sixth option is a mixture. The most interesting aspect of this proposal is that it would require documentation in every new patent request and clarifying that patent requests should reference the content of prior patents or patent applications. That is to say, each petition would have to demonstrate that the "invention" is new, and would therefore create a record of progress of the innovation. The worst aspect of this proposal is that it would require the adoption of the UPOV, an international agreement that requires patents or other official certificates, privatizing plan varieties that have been professionally improved.

Traditional Knowledge And Access To Genetic Resources

There are three proposals that specifically refer to plants and commercial plant breeders

1. The first proposal repeats the TRIPs clause that requires that every country protect plant breeders' monopoly rights, through patents or other sui generic systems, affirming that the UPOV would be considered an efficient "sui generic" system for this purpose. It includes many details, adding powers to countries to advance the hemispheric intellectual property or agricultural production system.
2. The second proposal briefly clarifies some aspects of registration to recognize "breeders' rights" – basically the UPOV conditions.
3. The third proposal specifically details the many conditions related to the "breeders' rights" system. For example, it would ensure that breeders can monopolize the use of registered plant species for 15 to 25 years. However, this proposal would allow a country to limit the breeder's right if there was a national security crisis or to advance the public interest. It would also permit a country to promote botanical research and technology transfer, in spite of the breeder's rights.

Conclusions of Part One on Living Matter

None of these proposals is based on the social principles that supposedly direct the theory of intellectual property, which is to ensure a balance between the interests of inventors and those of society in general, much less on the principles in our platform *Alternatives for the Americas*. Our platform would prohibit patents on all forms of life and would give priority to human rights, peoples' rights and countries' sovereign rights over the trade rights of breeders or other private interests on genetic resources and collective knowledge accumulated over the centuries.

To the contrary, every proposal in the draft text assumes that there are legitimate "inventors" of various forms of life, and presumes their right to privatize them through some intellectual property system. This privatization of knowledge and resources itself limits the rights of countries, their citizens, and indigenous or local communities to prevent it or to manage it according to their own development plan.

In several proposals, there is an attempt to recognize these peoples' importance, but none substantially protects their "a priori" rights against the expropriation of their knowledge and genetic resources, or to benefit the country or private commerce.

While there are many explicit references to the WTO TRIPs agreement, which defends commercial interests, it barely mentions the Convention on Biological Diversity, and it completely ignores other international social agreements such as the Universal Declaration of Human Rights and the International Treaty on Phylogenetic Resources for Food and Agriculture.

In the end, the draft FTAA text continues the trend toward privatization, globalization and liberalization to benefit the commercial sector without considering the social impacts.

Part Two: The FTAA and Medicines

The FTAA negotiations are meant to be "fully consistent" with agreements already reached under the World Trade Organization. Unfortunately this means that FTAA negotiators do not question elements of the WTO's TRIPS (Trade-Related Intellectual Property) agreement. TRIPS already grants twenty year patents to pharmaceutical companies allowing them to charge much higher prices for brand-name pharmaceuticals than the vast majority of the population of Southern countries can afford.

Our common platform *Alternatives for the Americas* challenges the TRIPs code by demanding the strengthening of measures that could counteract this monopoly power and lead to lower prices for patent medicines including the use of compulsory licenses, parallel imports, and provisions for non-commercial public use that could facilitate better access to generic medicines at much lower prices.

The Doha Ministerial Declaration on TRIPS and Public Health signed in Qatar in March of 2001 marked an important step forward. The Declaration, signed by 142 Trade Ministers from WTO member countries, established the principle that public health should have priority over commercial interests. However, as shall be seen below, some of the measures proposed for the intellectual property rights chapter of the FTAA by the USA violate both the spirit and the letter of the Doha Declaration.

The AIDS Crisis and TRIPS

The publicity generated by the AIDS crisis raised the profile of the Doha Declaration on TRIPS and Public Health far beyond any media attention given to the debate on intellectual property rights within the FTAA.

The large transnational pharmaceutical corporations (popularly known as "Big Pharma") have endured unfavorable publicity due to the high cost of the medicines they produce for treating AIDS patients.

Presently antiretroviral medicines for people with AIDS in the United States cost between US$10,000 and $15,000 a year for each patient. It is obvious that the vast majority of the 1.8 million persons with AIDS who live in Latin America or the Caribbean cannot pay such high prices. To avoid more bad publicity the pharmaceutical industry has offered to sell the same medicines to African countries for around US$1,000 a year which they say is their cost of production. According to Doctors Without Borders generic drug producers already produce the same antiretroviral treatments for US$300 per person per year.

The debate on access to medicines in this hemisphere often highlights the very successful Brazilian program which provides medicines free of charge to every person suffering from AIDS. It is estimated that almost 100,000 persons have taken advantage of this program and that it has notably reduced AIDS related deaths and the number of new infections. Brazil is able to finance this program because it produces generic copies of patented medicines at lower prices.

Compulsory Licensing

Compulsory licensing is a measure for introducing competition into pharmaceutical markets in order to lower prices. Compulsory licenses do not eliminate patent rights but they do oblige patent owners to allow other producers of generic medicines the right to make copies in return for payment of royalties. Generic medicines usually sell at much lower prices than their brand-name equivalents.

In theory Article 31 of the TRIPs code allows the use of compulsory licences provided that certain conditions are met. The Doha Declaration confirmed that "Each member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted."

However, in practice Southern countries have been reluctant to issue them. The *2001 Human Development Report* for the United Nations Development Program notes that, "Not one compulsory license had been issued south of the equator. Why? Pressure from Europe and the United States makes many developing countries fear that they will lose foreign direct investment if they legislate for or use compulsory licenses. In addition, attempts to use such licenses could result in long, expensive litigation against the pharmaceutical industry" such as occurred in South Africa in 2001.

Upon studying the text of TRIPS Article 31 one understands why attempts to use compulsory licenses might lead to long and expensive litigation. The pharmaceutical industry has a reputation for undertaking expensive court challenges. The TRIPS code lists several conditions that must be fulfilled before the granting of a compulsory license, including obligations to first try to negotiate a commercial license, to produce “predominantly” for the domestic market and to pay “adequate” remuneration to the patent owner subject to judicial review. Many terms are not defined within the TRIPS code. How large a market share qualifies as “predominant” or how much remuneration is “adequate” is not spelled out within the TRIPS agreement, thus opening the door to prolonged litigation.

Given the complexity of these rules the UNDP recommends the use of "alternative legislative models to avoid the emphasis on litigation and to create provisions suited to the needs of developing countries."

The FTAA draft does not include an effort to create new rules for the use of compulsory licenses but rather an acceptance of the rights granted to patent owners under TRIPs.

In addition to this general defense of TRIPs there are other proposals that correspond to the negotiating agenda announced by the office of the United States Trade Representative.

Although the Doha Declaration reaffirms the rights of countries to grant compulsory licenses for any reason, the US proposals in the FTAA draft try to restrict their use to only four circumstances - cases of national emergencies; other circumstances of extreme urgency; cases of non-commercial public use or as a remedy for practices that a judicial process has determined to

be anti-competitive. In short, the US proposals try to limit the use of compulsory licenses to use by the public sector.

If these proposals are accepted sales of generic medicines by private companies to the public as a means of introducing competition into pharmaceutical markets and thereby lowering prices would not be permitted.

These US proposals go against the spirit and the letter of the Doha Declaration. They constitute a "TRIPs plus" program which means they would provide even more protection for the transnational pharmaceutical corporations than the TRIPS agreement by itself.

Parallel Importing

Parallel importing refers to the importation of a patented good without the patent owner's consent. The TRIPS code allows parallel imports from other countries.

The Doha Declaration reiterated a country's rights to use parallel imports, technically known as the "exhaustion" of property rights. However, there are concerns that the US may push for limitations on parallel imports in the FTAA as US attempts to limit parallel imports have become a contentious issue in negotiations for a bilateral US-Singapore Free Trade Agreement.

Production Anticipating the Expiration of a Patent

Acting on behalf of its large Pharmaceutical corporations, the United States won a dispute within the WTO against the practice of a Canadian generic manufacturer that was producing stockpiles of generic versions of patented medicines in anticipation of the expiry of the patent. A bracketed article within the draft FTAA appears to be an effort to allow this practice.

Compulsory Licenses in Cases of Failure to Work a Patent

Brazilian law says that a company can lose a patent right it holds if it does not "work" it, that is, produce the product within Brazil. This law was the subject of a WTO dispute between Brazil and the United States defending the interests of the giant pharmaceutical companies. On June 25, 2001, the US and Brazil agreed to end the case "without prejudice" which means that the United States reserves the right to reopen the case if Brazil ever grants a compulsory licence under this law. Big Pharma wanted to avoid the bad publicity they received from this case but at the same time did not want to grant Brazil the right to demand that patents must be worked within Brazil.

A bracketed article in the FTAA draft appears to be an effort to introduce the right to demand that a patent be worked within 3 or 4 years of its approval.

The U.S. Agenda at the Service of the Pharmaceutical Corporations

Above we have already discussed the most dangerous proposal from the United States, the attempt to restrict the use of compulsory licenses to only four circumstances - cases of national emergencies; other circumstances of extreme urgency; cases of non-commercial public use or as

a remedy for practices that a judicial process has determined to be anti-competitive. This would exclude the granting of compulsory licenses to private generic manufacturers as a standard tool of public policy to make medicines affordable.

In addition, declarations from the office of the US Trade Representative and the FTAA draft contain three other proposals that would modify the rights that now exist under TRIPS into a "TRIPS plus" regime:

First, a US proposal for prolonging patents in order to compensate owners for delays in the granting of patents. If this proposal is accepted the period of monopoly will be prolonged despite the fact that the 20 year period patents are in force already takes into account the possibility of delays.

Second, there is a proposal that would require health authorities responsible for overseeing the quality of medicines to notify patent owners of the identity of any firm that applies to sell a generic version of a patented medication. This would give agencies that should be concerned exclusively with drug quality and safety an additional task watching out for the rights of patent holders.

Third, there is another US demand in the draft that would protect the information that a pharmaceutical company gathers to ensure the safety of its products for the exclusive use of patent owners. This would cause another difficulty for generic producers who would then have to duplicate all the costly safety tests made by the patent owner instead of only having to show the bioequivalence of their products.

Conclusion

There are three tendencies in the FTAA draft on intellectual property rights. The dominant tendency is to reproduce the rules that already exist under TRIPS that serve the interests of the transnational pharmaceutical corporations more than the peoples of the Americas.

Another minor tendency would make certain small changes which would open up a little the opportunities for producing generic medicines. But these changes do not challenge the essence of the TRIPS code.

The third tendency and the most dangerous one is the "TRIPS plus" agenda backed by Big Pharma and the United States that would increase even further protection for patents owned by the pharmaceutical corporations. The danger is that the United States intends to use the FTAA to diminish the few rights that peoples retain under TRIPS, violating the spirit and the letter of the Doha Declaration on TRIPS and Public Health.

CRITIQUE OF FTAA DRAFT AGREEMENT CHAPTER ON DISPUTE SETTLEMENT

Terry Collingsworth, International Labor Rights Fund/ART

Introduction

The inclusion of substantive social standards is essential if future trade agreements are to serve as engines of positive social change, such as poverty reduction and environmental sustainability. However, such social clauses are of no use without a dispute resolution mechanism that can adequately enforce such standards. Unfortunately, the few existing mechanisms, such as the labor and environmental side agreements to the North American Free Trade Agreement, have provoked dialogue but have been ultimately insufficient to protect or improve workers' rights. Yet other dispute resolutions mechanisms, such as the one contained in the U.S.-Jordan Free Trade Agreement, are state-to-state, therefore prohibiting direct input from workers, unions or civil society in general.

Based on our observation and experience, workers' rights standards simply will not observed unless civil society has both access and a voice in the resolution of trade and investment disputes. Indeed, many have criticized the dispute resolution procedures under Chapter 11 of NAFTA as secretive and undemocratic. Indeed, the tribunal provides none of the due process or openness guarantees afforded in national courts. Rather, such investor-to-state cases are heard in international arbitration bodies sponsored by the World Bank or the United Nations, which are closed to public participation. Without the concerns of civil society represented at these tribunals, the impact of any ruling on labor and the environment are given little, if any, consideration.

The draft Chapter on Dispute Settlement contained in the FTAA suffers from the Agreement's overall problem, namely that it is not transparent and fails to address non-commercial issues between the participating countries. Thus, regardless of the extent of the harm suffered by an individual, a trade union, an environmental organization or any other civil society participant, resulting from a particular trade practice, such entities have absolutely no remedy under the dispute resolution mechanisms for lack of a substantive right to enforce. Moreover, the available remedies are extremely limited. Finally, only member countries to the FTAA, not individual corporations, can be held liable for violations of the Agreement.

Given these general criticisms, the discussion will now focus on the most objectionable provision of the chapter and offer alternatives from the *Alternatives for the Americas* document.

Limitation on Complaining Party

Under the current FTAA draft, only National Parties to the Agreement can invoke the Dispute Settlement Process. Whether the dispute is being handled informally, or though a formal complaint process, there is no provision to allow any of the generally recognized civil society participants to have a voice in what issues are subject to dispute. This obviously is an insult to the concept of allowing greater participation of civil society in the overall FTAA process.

Furthermore, because many governments in the Americas are either undemocratic or unwilling act to protect peoples' interests over commercial interests, one cannot to assume that national governments will adequately represent the interests of their people.

The *Alternatives for the Americas* document made it a very high priority to allow civil society to participate in trade disputes at all levels. For example, communities that have been adversely affected by pollution or other environmental side affects of trade or investment policy should be able to participate in or initiate a dispute on environmental compliance. This approach would further encourage the creation of representative groups who can speak for their communities. The development of these groups will be facilitated by the prospect that their voices will have an important and concrete impact.

Only National Parties Can be the Subject of a Complaint.

The FTAA draft also restricts the subject of disputes to National Parties. Thus, if a major multinational is responsible for a violation of a provision of the FTAA, it cannot be the subject of a complaint. This has several serious negative effects, including that obvious consequence that corporations will act with impunity (as they frequently do under the NAFTA side-agreements), because they do not face direct liability. Moreover, many developing countries will be reluctant to pressure foreign investors to comply with the requirements of the Agreement.

The *Alternatives for the Americas* document identified that a significant aspect of the enforcement mechanism must be to require private parties, particularly multinational companies, to comply with the standards. Many of the FTAA provisions will rely upon private enforcement under national laws. However, multinational companies often exercise undue influence at a national level based on implicit threats to relocate to avoid regulation. One method of achieving compliance at the national level is to have better enforcement of national laws. However, that process must be supplemented with the creation of a super-national mechanism through which companies may be held to the social standards within the trade agreement area in order to remove incentives to play one country off another. Under such a mechanism, an interested party could bring a complaint against a corporation for specific violations of a social standard. Of course, interested parties would also be able to bring complaints against countries for systemic violations of social standards that transcend the individual enterprise.

Remedies do not Address Effectively the Harm That has Occurred.

The draft FTAA, like NAFTA, provides a complainant with very weak remedies. For example, Articles 46 & 47 of the Chapter on Dispute Settlement merely provide that a country may temporarily suspend benefits to another country if that government failed to comply with a decision in favor of the complaining country. In rare cases, benefits may continue to be suspended if the failure to comply with the decision caused material injury to the complaining country. This framework fails to redress injuries to individuals and communities that will never be specifically remedied. Furthermore, the Agreement fails to allow for penalties against private firms if they are responsible for the violation.

The *Alternatives for the Americas* document recognized that a critical aspect of the process of enforcement and the imposition of penalties for non-compliance is to institute a democratic and open process that yields predictable and consistent results that also are tailored to remedy the harm that occurred. This includes allowing the remedy to be directed against a specific company that committed the violation.

The Arbiters of FTAA Disputes are Likely to be Elite and Unrepresentative.

The FTAA draft describes several possible decision-making bodies, including a "Conciliation Commission," a "Neutral Panel" and an "Appellate Body." The terms of reference for these various options are very much like the secret tribunals of the WTO. For example, there are requirements that the individuals have specific technical expertise, but there are no requirement that they to understand the social context of the issues. Moreover, in all cases, the parties to the dispute select the individuals who may comprise the panel.

The *Alternatives for the Americas* document acknowledged that a trade agreement must provide for some tribunal to resolve disputes. The real concern, however, is to make these enforcement proceedings fully transparent. Thus would include a written public record of all proceedings, open hearings and, as noted earlier, a provision allowing all stakeholders to have standing to participate in the process, including having a voice in resolution of the dispute. If a group of "experts" decides the dispute without a frame of reference as to the impact on the community, commercial interests will always prevail over community interests.

Conclusion

The FTAA draft does not reflect in any meaningful way that the governments negotiating it respect at all the concerns expressed by civil society. The governments want to duplicate the WTO and have trade, and its impact on communities, governed by commercial interests. The most glaring concern at this early stage is the lack of substantive rights to address social issues. Even if the dispute settlement chapter was perfect, and it is far from it, it will do working people and the environment little good if there is no regulation that addresses exploitation of workers or despoiling the environment.

ANALYSIS OF FTAA TEXT FROM A GENDER PERSPECTIVE

Marceline White, Women's EDGE/ART

While trade could lift women and their families out of poverty, to date, too many women are being left behind. The current proposals in the Free Trade Area of the Americas (FTAA) do not ensure that trade acts as a tool to achieve gender-equity, social justice, and sustainable development, rather; they codify the increasing dominance of corporate-led free trade, which places profits and economic growth above basic human needs. The negotiations to create the FTAA have been preceded by economic reforms and structural adjustment policies that were mandated by the World Bank (WB) and International Monetary Fund (IMF). These reforms include privatization of companies, of health, education, and children's services, as well as reductions in government budgets for the provision of social services, the deregulation of labor markets and other policies. These WB and IMF policies laid the groundwork for the free trade policies being negotiated in the FTAA to flourish, often at the expense of women, children, and other vulnerable populations.

Trade negotiators who have been proposing new rules and disciplines for FTAA agreement have thus far ignored the potential effects of trade liberalization on women living in poverty in the hemisphere. However, the FTAA is based upon the North American Free Trade Agreement (NAFTA), which has, in many cases, demonstrably worsened the living and working standards of women in the region. By failing to incorporate an analysis of how the FTAA may affect women and men differently, the recently released text is likely to increase many women's workloads and deepen their indigence throughout the hemisphere.

Gender and Trade

According to the United Nations, women constitute more than 70% of the world's poorest citizens. Women are disproportionately poor due to social and cultural discrimination, which limits their access to education, technological training, credit, and land. In addition, women are not hired for many jobs for which they qualify; they are considered "secondary" wage earners, often earning lower wages than men for the same or similar types of jobs, and are usually the last workers hired and the first fired. Finally, women still do the bulk of "reproductive" work--caring for their families, preparing meals, and keeping the household clean and functioning. This invisible work means that women have less time to gain new job skills, to seek new jobs, or to simply relax and pursue leisure activities. This undervaluing of women's labor also translates into an inability to command equal wages for equal work. Finally, race, class, ethnicity, and geography also affect the ways in which women can (or cannot) participate in the local, national, or global economy.

In the Summit of the Americas workplan that came out of the meeting of heads of state in Quebec, Canada in April 2001, governments agreed to

> "integrate a gender perspective into the programs, actions and agendas of national and international events, to ensure that women's experiences and gender equality are an

integral dimension of the design, implementation and evaluation of government and inter-American policies and programs in all spheres;[54]."

Although governments have committed to integrating gender and women clearly have a large stake in the outcome of trade talks, to date, trade negotiators have ignored women's specific needs and concerns when devising new agreements. Similarly, in the Alternatives for the Americas, the Hemispheric Social Alliance proposes " a gender impact assessment of trade policy on women. " However, thus far, no trade negotiators have studied how new trade rules might affect women living in poverty differently than men. Promoting trade models that do not reflect women's lives means that these models may exacerbate gender inequalities. For example, these trade policies may promote cash crops that are solely grown by men or create investment opportunities for multinational corporations that hire women workers for low-paid, precarious jobs. Consequently, the FTAA agreement is likely both to widen the gender gap between men and women and to increase poverty and exclusion for many women in the Americas

Overview of the FTAA Text and Goal of this Analysis

This analysis examines the first draft text of the FTAA negotiations. Within the text there are many areas where negotiators continue to disagree. Text language that has not been agreed to by all parties is placed in brackets and each of the chapters that is discussed below contains numerous brackets; some of which reveal minor differences between countries, others which highlight different ideas and competing proposals about how to negotiate trade liberalization in that sector.

This gender analysis of the FTAA text is intended to both amplify and complement the other existing analyses. Rather than reiterating all of the potential concerns that are embedded in the agriculture, services, investment, procurement, and IPR negotiations, this section highlights those provisions that may have a differential (and often negative) impact on women as well as on development concerns. By illuminating the gender and development consequences of the FTAA text, activists and policymakers can have a more robust analysis of the text that includes the concerns of poor women and their communities.

The following sections highlight the potential consequences of the FTAA text for women's status and development concerns in the region. Although much of the text is bracketed, the overall direction of the chapters and the types of proposals listed indicate an attempt to further entrench a neoliberal model of trade that prizes corporate growth over sustainable development with gender-equity.

Key Points

- The agriculture text of the FTAA promotes growing cash crops over domestic staple foods and may make imported food cheaper than locally grown food. This could harm small farmers. Cash crop farms hire rural women to grow products for export for little pay and with few safety precautions.

[54] Summit of the Americas Workplan, April 2001, page 35.

- The services sector could open up government provided services such as health care, education, and water to private corporations. Women employed in these sectors may lose their jobs and women consumers may find that they cannot afford health care, education, or water when it is priced to make a profit.
- The intellectual property rights section may make it more difficult for governments to supply needy patients with lower-cost generic drugs. This section may also enable corporations to patent traditional plants and to copy traditional artistic designs and compete with local artisans.
- The procurement section could outlaw local laws that encourage government purchasing of goods or services from women and minority-owned businesses, or that encourage government purchases of fairly traded products.
- The investment section may ban a country's ability to demand that foreign investors include a certain percentage of domestic content, transfer technology from developed to developing countries, or purchase inputs from local suppliers.

Agriculture

The FTAA agriculture rules are based upon the World Trade Organization's (WTO) Agreement on Agriculture (AoA). The goals are to promote "a fair and market-oriented agricultural trading system." Food security (meaning the ability to meet one's basic dietary needs) is not a goal of the AoA. Export-oriented agriculture preferences the growth of cash crops for export over the growth of crops for domestic consumption. To promote export-oriented agriculture, governments often cut subsidies to farmers that grow traditional crops. At the same time, the reduction of tariffs often makes it cheaper to import lower-cost fruits and vegetables that compete with the domestic products. For example, in Guyana, fruit juice from France and Thailand have now displaced domestically produced juices[55]. One result of the AoA is increased consolidation of farms, often at the expense of small farmers and their communities.

Trade agreements have made it easier for multi-national corporations to invest money in non-traditional agricultural exports such as flowers. At the same time, trade agreements were making it more expensive to run small, family farms because subsidies for farmers have been cut. As a result, many rural families began to look for other work to supplement the income from the farm and make ends meet. In Colombia and other countries in Latin America, many rural women found work in multi-national corporations tending and cutting flowers for export. Colombia is the second largest source of flower exports in the world. One out of every two flowers sold in the U.S. originates in Colombia where more than 80,000 women work in greenhouses earning less than $4 per day. The flower plantations use harsh pesticides and rarely provide safety gloves or other safety equipment for workers. National health and safety regulations are rarely followed on these plantations. Women, because of their reproductive capacity, have more fat cells in their bodies than men. Some analysts believe that because of this, they retain pesticides in bodies longer. Medical surveys have shown that flower workers have illnesses ranging such as nausea, asthma, rashes, headaches, and miscarriages. The costs of flora culture has affected the entire

[55] Food and Agriculture Organization (FAO), Commodities and Trade Division "Agriculture, Trade, and Food Security Issues and Options in the WTO Negotiations from the Perspective of Developing Countries" http://www.fao.org

rural community. Environmentally, the flower boom has huge costs as well. The water table has been shrinking rapidly as it has been depleted to grow flowers and now water has to be imported from Bogota. Moreover, high levels of toxins have been found in the groundwater.

Services

The scope of the services chapter is exceptionally broad with proposed language that would apply to "all measures …in all sectors and in all different modes of supply, including those stemming from delivery of commercial services by the public sector at the national, federal, regional or local levels, as well as those stemming from bodies in the exercise of powers delegated by the national, federal, regional, or local government[56]."

This language represents a tremendous expansion of what is defined as a service and would include all levels of government. A measure refers to any provision whether it be a decree, law, regulation, rule, procedure, or decision that has an effect on trade in services. This too, represents a very broad view of what types of domestic laws would be subject to scrutiny as a barrier to trade. The text also states that although countries can regulate and introduce new regulations in pursuit of domestic policy goals, the measures cannot be more burdensome than necessary, the scope of the regulations should be limited to what is necessary to achieve the goal, and the regulations should be aimed at using market mechanisms to achieve their objectives.

The rules that apply to services in the hemisphere are based on the rules being negotiated in the World Trade Organization (WTO). FTAA members will abide by most favored nation (MFN), national treatment (NT), and market access provisions. MFN means that governments must provide equal treatment to all foreign service suppliers. National treatment means that a government must provide foreign service suppliers with treatment that is at least as good as that accorded domestic suppliers. Market access rules prohibit governments from restricting the number and size of service suppliers and the quantity or value of services provided in their territory. Once a sector is opened, governments will not be able to retroactively limit the size and number of operators in a sector. Moreover, the market access language on government regulations means that rules designed to achieve social, health, or environmental objectives may be ruled a barrier to trade if they are not necessary to provide the service.

The scope and the rules in the FTAA services text may make access to affordable health care, education and clean water, which many believe is a basic human right, impossible. In the FTAA, government provided and subsidized sectors such as health care and education could be subject to MFN and NT rules. Subsidies may be seen as a barrier to trade because the cost of providing these services is partially absorbed by the government which, in effect, lowers the cost to the public. In effect, the FTAA services chapter may transform healthcare, education, and water into "commodities" to be sold at market. While there was a proposal by MERCOSUR to protect subsidies for services with social benefits, it is unlikely that other countries will support this proposal. The U.S.-based corporations see Latin America and the Caribbean as potential targets for U.S.-style managed health care and corporate-run schools.

[56] FTAA Services Chapter, Article 1: Scope [of Application], Section 1. 1 (version three), FTAA.TNC/w/133/Rev.1, July 3, 2001.

The transformation of these rights into commodities have particular implications for women as workers and as consumers. The public service sector has been associated with more highly skilled and waged jobs for women. Women have worked as nurses, doctors, administrators, teachers, and social workers. Although the USTR states that nothing in the FTAA mandates privatization, in fact, privatization of social services have already been required for many indebted countries through the IMF and the World Bank structural adjustment policies. For women, privatization has often had negative consequences. In 1991, after Nicaragua agreed to an IMF privatization plan, they laid off government workers particularly in the health and education fields. More than 70 percent of those laid off were women[57]. New jobs in the health care and education sector tend to command lower wages and increasingly casual, temporary or contractual labor with few benefits. (Public Services International, 1999)[58] New trends to liberalize the service sector will have devastating impacts on women.

The FTAA disregards where women are located in the labor market. Many women workers are employed in the communal, social, and personal services sector. When governments retract key social services, women are often the first fired. Moreover, women's workloads often increase to make up the difference. The FTAA ignores the cost of women's unpaid work—caring for family members, performing household chores, and preparing foods. When the government cuts funding for these services, women often spend more time shopping for cheaper items, cultivating home gardens to supplement store-bought food, caring for sick family members at home longer before taking them to the doctor, and walking rather than taking public transport[59]. Privatizing basic services has affected women consumers who cut back on doctor's visits, schooling or other basic needs if the cost becomes too great. Basic needs such as water may be privatized as part of the FTAA because the distribution of water counts as a service in the negotiating text. This may have serious health implications for women and children. In many countries, women and girls spend an estimated 40 billion hours every year hauling water from distant and frequently polluted sources. If the price of water is too high for poor families as a result of privatization, women may resort to either rationing water for their families or substituting unsanitary water for clean water when necessary. Unclean water is a leading cause of child mortality and illness in developing countries. Recent IMF-led water privatization in Cochabamba, Bolivia led a mother of five to choose between food and water when her water bill rose from $5 to $20 a month[60]. That $15 increase had previously been the means to feed her family for a week and a half. To pay her water bill, she had to reduce the amount spent on food and clothing for her family.

Intellectual Property Rights

The goal of the Intellectual Property Rights (IPR) chapter in the FTAA is to build on the foundation of the Trade Related Intellectual Property Rights (TRIPS) in the World Trade Organization (WTO) and to promote greater efficiency and transparency in IPR.

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[57] Wiegersma, Nan "State policy and the restructuring of women's industries in Nicaragua," in Aslanbeigui, Nahid, Steven Pressman, and Gale Summerfield Women in the Age of Economic Transformation, Routledge Press; New York, 1994.

[58] Public Services International, "The WTO and the General Agreement on Trade in Services: What is at stake for public health?," June 1999.

[59] Sparr, Pamela (Ed) "Mortgaging Women's Lives: Feminists Critiques of Structural Adjustment," Zed Books: London, 1994, page 26.

[60] Schultz, Jim "Bolivia's War on Water" The Democracy Center http://www.democracyctr.org

The fact that the chapter will build from TRIPS is troubling because the TRIPS agreement was the rationale that the U.S. (at the behest of pharmaceutical companies) used to try to prevent Brazil from using compulsory licensing and parallel importing to make HIV/AIDS medication more affordable. The TRIPS chapter has also been used to protect corporations rights to patent seeds even when the seeds have been used by indigenous groups for centuries. While some of these cases have been overturned, others are still being decided.

IPR issues affect women cultivators, craftswomen, and women with HIV/AIDS. The text proposes a number of ways that traditional knowledge might be protected including a sui generis system, a process based on the Convention on Biological Diversity (CBD) and through a system of registration, promotion, and marketing of collective IPR rights. However, it is not clear which, if any, of these proposals has the most support.

The systems that are being suggested are vaguely defined, difficult to implement, and fail to take into account the asymmetries between indigenous groups who are attempting to protect their cultural heritage and receive just compensation for their knowledge and corporations who are seeking to market the product. Another problem is that of defining who "owns" community based knowledge. Knowledge of certain plant uses, craft production, and traditional music or folklore are passed down from one generation to the next within a community. However, many indigenous communities are now scattered in different regions of a country and sometimes even in different countries. If a patent was granted broadly there may be problems ensuring equal payments to each group. However, if it were granted narrowly, one community would benefit at the expense of other groups who have the same knowledge[61]. There is no appropriate legal mechanism in IPR to date to protect significant designs and symbols that belong to entire indigenous cultures.

For craftswomen, the IPR text suggests that one person could patent a registered trademark (including geographical indications) for goods or services. This would give them exclusive rights to prevent all others not having the owner's consent from using similar indicators or words on their products. Certain types and styles of crafts are associated with particular locations. The rights conferred chapter seems to indicate that one person or a corporation could purchase the geographical indicator, thereby depriving local craftspeople from effectively marketing their products. Again, while it is possible that a local producer or community could use the patent to their advantage, it would require enormous financial resources to apply for the patent as well as knowledge of the legal system. Even if a local group did receive the patent, they would still have to be able to afford to hire lawyers to contest any infringement on their patent. Moreover, in many cases, a separate copyright must be applied for and registered for in each country in order to ensure the protection of a creation. This is a clear impediment for many struggling artisans.

Women handicraft producers who make and sell their textiles, jewelry, and ceramics locally and globally comprise 70 percent of craft-workers in Latin America.[62] In the U.S., Native American artisans and healers as well as traditional folk artisans may be affected because their design patterns and methods may not be able to be protected. Today, foreign fakes are believed to

[61] Gammage, Sarah, Helene Jorgensen, & Eugenia McGill " Trade Liberalization, Possible Gender Impacts, and Assessments," Women's EDGE, forthcoming.
[62] "The Craft of Sustainable Development," *Americas*, Washington: Organization of the American States, 1999.

account for as much as half of the market in Indian arts and crafts, worth $1 billion a year[63]. These sorts of losses are devastating to the Native American community which is the poorest minority group in the United States with more than 30 percent of the population living below the poverty line[64].

For women suffering with HIV/AIDS, access to essential medicines is often a matter of life and death. In Brazil, more than 200,000 people suffer from HIV/AIDs. At least 25,000 of those infected are women. The United States has used the WTO language on intellectual property rights to challenge Brazil's efforts to produce generic versions of patented AIDS medication at a lower price. The U.S. believed that Brazil's actions infringed on the patent rights of the pharmaceutical company. One problem with patents on medicines is that patent-holders can charge a monopolistic price for the 20 years that they retain their sole rights to the drug. Although the IPR text in the FTAA does state that patent rights can be waived for a national emergency, it is not certain that this language will be adopted.

The recent agreement on TRIPS and public health that came out of the WTO meeting in Doha, Qatar holds few benefit for countries like Brazil. Although countries have a little more leeway to produce generic equivalents of patented medicines and can import generic alternatives, there is no implementation mechanism to ensure that public health issues take precedence over economic arrangements. In addition, the U.S. has proposed granting a 10 year extension to least developed countries to come into compliance under TRIPS. Brazil and many countries in the region would not be eligible for this extension. Pricing medicine out of the reach of the poor has devastating health implications for the region.

Government Procurement

The FTAA procurement proposal does not make an exception for women-owned or minority-owned businesses. In the United States, many small, women-owned businesses have been able to benefit from government set-asides and incentives. These domestic rules encouraged federal government agencies to purchase a certain percentage of their goods or services from women-owned businesses, which have had less access to these contracts than male-owned businesses. In 1998, more than 50 percent of government contracts awarded to women-owned businesses went to small businesses owned by women of color. In the U.S. and other countries, women business owners will have a harder time competing for business.

The text does propose exceptions for small economies to use government procurement policies to stimulate small and medium enterprises. However, exceptions were also proposed for products made with prison labor so there is precedent within the document to carve-out a general exception for products or services provided by women and minority-owned businesses. It is a matter of political will that such an exception is not within the text.

In addition, in the *Qualifications* section, the text proposes that governments consider "the supplier's global business activities and experience." This phrase indicates that governments

[63] Fowler, Betsy "Intellectual Property Rights and the Native American Experience," Crafts News, Volume 12, Issue 48, Summer 2001, The Crafts Center.
[64] ibid

should award contracts to multi-national, global corporations rather than local suppliers (or at least preference these global companies over local ones). This phrase discriminates against national and local suppliers and specifically against women-owned companies because so few women have access to the credit, technology, and information to develop global companies. Although the text states that it wants the process to be open and competitive, yet the inclusion of these qualifications suggests that large companies should be given special considerations.

A law in Baltimore City, Maryland a city ordinance states that bidders on government contracts above $25,000 must partner or subcontract with women and/or minority-owned businesses in a percentage that equals or exceeds Baltimore's goal for women and/or minority-owned businesses. Other countries could challenge this ordinance as "an unnecessary obstacle to international trade." Similarly, ordinances that support the local government's purchase of fair trade coffee could be challenged on the same grounds.

Investment

Foreign investment has several implications for women in the Hemisphere. The rise in world trade relative to GDP is linked to the rise in foreign-owned production and distribution. Between 1985-1995, foreign investment increased over 400 percent worldwide.

The promotion of foreign investment is closely tied to the relaxation of labor standards in many countries. Many corporations that move to low income countries in the region exert pressure to lower labor standards rather than developing the human capabilities available in the region. To attract foreign investment and promote exports, countries in the Hemisphere have opened export-processing zones (EPZs), industrial areas where women gain jobs assembling garments or computer components for foreign markets. EPZs offer special incentives such as duty free imports of machinery, exemption of customs or sales tax, and preferential treatment with respect to national laws. The belief was that this strategy would provide new jobs and ensure more money flowed into the country from the EPZs. But in fact, little money stays in the country. A recent study of Central American maquilas found that less than 6 percent of materials for domestic production was made up of raw materials[65].

The investment text in the FTAA includes a section on performance requirements. There are several suggested proposals for how to deal with performance requirements but generally each prohibits linking foreign investment to requirements such as including a certain percentage of domestic content, transferring technology from developed to developing countries, or preferential purchasing. These restrictions prevent countries from requiring that some money remain in the country or that some technology is transferred to the host country. The FTAA text will create more jobs for indigent women but will not necessarily improve women's lives or bring more money that will remain in the host country.

While the EPZs do create new jobs for women, the jobs provide extremely low wages, long hours, and difficult work conditions. These workers earn as little as 56 - 77 cents an hour and

[65] Gammage, Sarah, Helene Jorgensen, & Eugenia McGill " Trade Liberalization, Possible Gender Impacts, and Assessments," Women's EDGE, forthcoming.

often work 50 - 80 hours a week.[66] Their wages often are not enough to provide food and shelter for a family. Women workers in many factories have reported physical abuse, sexual harassment and violence, and mandatory pregnancy testing as a condition for employment. Workers often cannot form unions to organize for their rights. Promotions to higher-skilled jobs are almost non-existent.

Yet, many women flocked to these jobs as a "survival mechanism" as families sought to gain new income when commodity prices fell as a result of trade liberalization in agriculture. In Latin America, women comprise 70-90 percent of workers in the EPZs.[67]

While global trade rules have created these new jobs for women, discrimination is now leading to job loss for women EPZ workers. As export production becomes more specialized (and better paying), there is an increased demand for men's labor. In Mexico, the proportion of female workers in export manufacturing fell from 77 percent in 1982 to 60 percent in 1990.[68] Without adequate training and support to upgrade women's skills, any benefits that women gain from this employment are short-lived.

Equally troubling, in the past, regional trade agreements tended to shift employment from one location to another. While corporations may see higher profits because they are paying lower wages, many women workers experience job loss, dislocation, and distress.

In 1995, Jamaica was the main exporter of underwear to the U.S. market, supplying 44 percent of U.S. undergarments. By November 1996, 22 months after NAFTA had taken effect, Jamaica's apparel exports to the U.S. declined by 12 percent while Mexico's share of the market grew by 40 percent. Recently, more than 250,000 Mexican workers (the majority of whom are women) have lost jobs in computer and apparel factories that are moving to Thailand and Vietnam where wages are as low as $15 per week[69].

Conclusion

The current trajectory of the FTAA may deepen gender discrimination and exacerbate existing inequalities between women and men. Yet, women throughout the hemisphere are decrying this model of free trade, and instead, promoting a model of fair trade. More than 45 women from across the region participated in the development of the "Gender chapter" of the Alternatives for the Americas which describes our shared vision for the Americas.

In addition to calling for a gender impact assessment of all trade agreements, women throughout the hemisphere also called for:

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[66] Figueroa, Hector "In the Name of Fashion: Exploitation in the Garment Industry," *NACLA* Vol. XXIX No. 4, 1996, page 39.
[67] Gereffi, Gary & Lynn Hempel "Latin America and the Global Economy: Running Faster to Stay in Place," *NACLA* Vol. XXIX No. 4, 1996, page 22
[68] Mehra, Rekha & Sarah Gammage "Trends, Countertrends, and Gaps in Women's Employment," *World Development* Vol. 27, No. 3, 1999 page 541.
[69] Jordan, Mary "Mexican Workers Pay for Success: With Labor Costs Rising, Factories Depart for Asia," Washington Post, June 20, 2002, page A01.

- The collection of gender-disaggregated data to form a baseline for analyses;
- The establishment of policies and programs to ensure that day-care is affordable, accessible, and safe;
- The development of laws, policies, and programs to remedy sexual harassment in the workplace, including holding foreign investors accountable to domestic laws on sexual harassment, sex and pregnancy discrimination, job and/or wage discrimination;
- Compensatory schemes, including retraining and capacity development, to support displaced workers; and
- Mechanisms to protect women's small businesses from the influx of cheap imports[70].

We believe that "Another Americas is Possible", one in which women will gain from an alternative, participatory economic model that prizes social development and gender equity.

[70] White, Marceline "Gender Chapter" of the Alternatives for the Americas, Karen Hansen-Kuhn (editor)

THE FTAA: UN UNSUSTAINABLE MODEL OF NEGOTIATIONS

Sergio Schlesigner, Red Brasileira pela Integracão dos Povos

The FTAA negotiations are being developed under the principle – or under the pretext – that liberalization of economic and financial relations will automatically result in economic growth for all parties. This growth, in turn, will ensure the necessary resources to promote economic and social welfare and preservation of the environment.

An agreement on integration in the Americas based on the objective of sustainability would necessarily start from sustainability plans constructed within each of the member countries. These plans, in turn, would result from a permanent dialogue among the many sectors of the societies involved, defining and integrating objectives and goals to achieve, among which, we would highlight the following:

- Preserve natural resources as part of the wealth and material basis of the reproduction of social life.
- Ensure that every human being has access to the resources necessary for a dignified life, in an equitable and fair manner.
- Establish for this end mechanisms to distribute wealth and income, which would simultaneously ensure the necessary resources to overcome misery and that would limit the unsustainable consumption patterns practices by the most favored sectors of the population.
- Ensure production practices that are compatible with these objectives, generating sufficient jobs, producing the goods and services necessary for good standards of living and promoting production methods that are more compatible with environmental protection.
- Promote states' capacities to articulate and implement policies that serve these objectives.
- Mobilize the necessary material and human resources for these objectives, directing the public and private investment necessary for this end.
- Ensure all peoples the right to preserve their values, customs, lifestyles and cultural identity;
- Formulate international policies that strengthen the capacity of each country to achieve national, regional and global sustainability, based on principles of cooperation and solidarity.

The analysis of each of the chapters under negotiation in the FTAA presented in this document demonstrates the unsustainability of the proposed accord. In the following analysis, we highlight additional issues extracted from a cross-cutting analysis of the issues addressed in the other chapters.

Environment

There is no body within the FTAA negotiating structure charged with dealing with the issue of the environment. The United States is the only country that has spoken favorably of the inclusion of this issue within the framework of the talks, proposing that, at least, there be a working group on the issue. The U.S. interest in the inclusion of environmental issues within the

FTAA negotiations pass by ecological concerns as such. And that is the reason for resistance by other countries to the inclusion of the issue in the negotiations.

In reality, the set of proposals made by the United States – as in the example of what happened in the NAFTA negotiations – essentially seeks to serve business interests. Latin American countries fear that the inclusion of environmental issue would allow the United States to proceed with its traditional tactic: proclaiming unrestricted liberalization of other countries, while imposing numerous non-tariff barriers on them. This is clearly the reason why the United States hopes to impose, within the FTAA, its own environmental patterns and standards, as well as mechanisms for trade sanctions.

We understand that the issue of the environment can not be dealt with in isolation, passing by the profound social, economic and cultural impacts that result from agreements like the FTAA and from international commercial and financial activities in general.

The environment is a vitally important issue, and, as we know, the enormous threats that we confront today are due to the impacts of economic and social patterns adopted to exploit it, especially those related to production and consumption. International trade and finance are precisely the tools that link production and consumption. Therefore, dealing with the environment in its broadest sense presupposes questioning the model of development.

Natural resource intensive goods

The chapters in the draft FTAA text on agriculture and market access, if implemented, could lead to a scenario in which competition for markets among the member countries would even further depress the prices of agricultural goods in the international market. In order to preserve incomes from exports, these countries would have to increase the volume of exports, multiplying the social and environmental impacts of agro-export activities, which generally means expansion of mono-crop agriculture and negative impacts for family farmers.

The chapter on agriculture involves an agreement that the peoples of the Americas hope should, in a centralized manner, coordinate initiatives and resources to combat hunger in the hemisphere, providing for this end adequate means of assistance and cooperation. The commitment to preserve family farms should be the first effective step in this direction.

Government procurement

Government procurement, as a significant part of a country's total consumption, has significant potential to promote production patterns that are compatible with sustainability. It can also stimulate regional and local development, serving to decentralize production and wealth. It can also favor sustainable practices in productive relations, as in the case of cooperatives, promoting the generation of more jobs and the economic viability of production. It should, therefore, be a sovereign tool for the promotion of public policies, to be utilized in a transparent manner at the service of social welfare.

The draft chapter proposes that government contracts could only insist on technical quality requirements for the final goods being purchased. This implies the renunciation of the many criteria required for sustainability, among which stand out: the capacity to generate jobs; the intensity of the environmental impacts; the social organization of production; stimulus to micro, small and medium-scale enterprises; among others. Under the proposals in the draft text, for example, governments could not differentiate and favor the purchase of products that utilize recycled raw materials, which would imply greater environmental impacts for that production.

Investment

Mechanisms to control international capital flows must be established, especially those related to speculative capital, which currently constitutes a rapid and devastating tool to transfer and concentrate wealth. Economic stability is an essential tool for sustainability and fair and equitable income distribution. Signing this agreement could submit indebted countries to the permanent threat of financial crises such as those suffered by Mexico, Argentina and Brazil in recent years.

Similarly, the accord would prohibit the member countries from exercising their legitimate right to impose social, labor and environmental performance requirements on international investment. The imposition of these requirements is a fundamental tool to condition the entry of capital and to serve each country's social objectives.

It would also prohibit nation-states from imposing conditions on foreign direct investment to utilize the most appropriate technical production patterns for each country. This could preserve the ability of multinational corporations to practice the most harmful practices, maintaining industrial production patterns with outdated technologies in developing countries that would expose local populations and workers to environmental risks that have long been prohibited in their countries of origin.

Tariff protection

Tariff and non-tariff barriers are legitimate tools to protect and stimulate local production. They should also fulfill the important role of dampening unsustainable production patterns. Scarce foreign exchange in less developed countries is often directed to superfluous consumption of luxury goods by the richest sectors. Every country should maintain the right and obligation to effectively tax this kind of consumption in order to favor lower-income people's access to the most essential resources.

The document also contains elements that would, in practice, make agreements such as the Mercosur unfeasible. This could also affect other future agreements that might focus on social and environmental objectives that are more important for our societies' interests. Among these, we would highlight the provisions that would impede country's entry into agreement that offer greater liberalization than that provided for in the FTAA.

Subsidies, anti-dumping and countervailing duties

Subsidies and fiscal incentives for production are essential tools to direct investment. They should be oriented to activities that allow a country to develop in a way that serves the population's essential necessities. The member countries in the FTAA will make commitments in the WTO and other multilateral bodies that imply giving up their sovereign right to utilize such subsidies, making the implementation of autonomous development programs difficult.

Within the FTAA, the discussion on subsidies, anti-dumping and countervailing duties on agriculture is especially important. The United States provides subsidies to its agricultural sector of such magnitude that no other country has the financial conditions to compete on anything like conditions of equality. For this reason, it is not in the U.S. interest to question this practice.

Governments in the other countries, representing the interests of agroexporter and counting on access to the U.S. market, prefer the interpretation that subsidies would be, more than anything else, an element that distorts prices of goods in international trade. They seek, therefore, the elimination of subsidies.

We believe that, given the importance of subsidies for economic and social concerns, as well as for food security, countries should maintain absolute autonomy in setting agricultural policies that strengthen and develop family farms. Country's autonomy to promote active development policies for key sectors must clearly be preserved. Toward this end, sovereignty over the utilization of direct or indirect subsidies must be preserved.

The elimination of government subsidies currently granted to activities linked to export production based on the intensive use of natural resources and energy is also a necessary condition for sustainability. Aluminum production is one such example.

Another issue under discussion in this chapter is dumping, which, in this case, refers to the practice of exporting goods at prices less than the cost of production, with the goal of eliminating competing businesses. The concern with so-called illegitimate comparative advantages includes a series of productive practices that often fail to respect minimum civilized standards: the use of child labor; inadequate labor standards; low wages; and other factors that make up what is called social dumping.

In general, less developed countries tend to resist the inclusion of clauses on environmental issue in trade negotiations. The main reason for this resistance is the justified fear that those tools would be utilized by developed countries as barriers to their exports. The lack of access to the necessary financial and technical resources to implement less polluting productive systems would also be a problem for these countries.

For these reasons, governments like Brazil insist on the establishment of more specific criteria for the application of anti-dumping measures, so that they are not utilized arbitrarily or for commercial defense in other countries.

On this issue, we believe that it is on our peoples' best interests to adopt anti-dumping mechanisms that would allow for rapid clarification of dumping cases, and the adoption of surcharges in those cases to compensate for damage to domestic production.

There should be special safeguards for family farming, given that sector's importance for sustainability. The safeguards should include mechanisms to protect family farms (tariffs, quotas) that could be utilized in cases of undesired surges in imports or sudden and harmful drops in domestic prices.

Investment and dispute resolution

The draft FTAA text on dispute resolution, is, in general terms, a faithful copy of the NAFTA chapter on that issue. There is no more eloquent description of the processes that result from the application of legal mechanisms formulated exclusively for the interests of multilateral corporations. They illustrate nation-states' loss of sovereignty versus the primacy given to the interests of large corporations, as those interests represent threats to the environment and public health.

In 1997, the Canadian government, facing the legal impossibility of directly promoting a veto, prohibited the import and transport of MMT, a gasoline additive produced by Ethyl, a U.S. company. The product had already been banned by the state of California, and also partially prohibited by the EPA, the official U.S. environmental protection agency, due to its proven harm to the environment and public health.

Based on the argument that the ban would cause it financial harm, as well as damage to its "reputation", Ethyl sued the Canadian government for US$251. The suit was based on the terms of the investment chapter of NAFTA, which provides companies in a member country that invest in another member country the right to sue for any loss to its investment caused by a measure "tantamount to expropriation". The agreement stipulates that such cases can be presented in special courts, closed to public observation or participation. The result of this action was an agreement through which the Canadian government, after paying Ethyl US$13 million, published a statement claiming that there was no evidence that MMT had toxic effects.

Public services

The commodification of public services is one of the gravest threats to sustainability in the draft FTAA text. The privatization, globalization and transformation of public services will be a factor that will limit universal access to essential services and natural resources. Under market conditions, access to public goods – such as drinkable water – will be conditioned on the consumer's purchasing power, without any social or environmental considerations.

If the FTAA were implemented along the lines described in this document, the state and society would lose the legal and institutional capacity to control unsustainable consumption of scarce resources that are essential to life, as well as the capacity to ensure that these resources are invested in the population's most vital needs.

The document also ignores consumers' right to choose. Under the agreement, countries take on all kinds of commitments to service providers but no commitment to their own citizens and consumers. The possibility of social controls on the provision of services is not even considered.

Intellectual property

An important issue related to intellectual property is less developed countries' access to production technologies that are more efficient and compatible with environmental protection, reduction in consumption of natural resources used as raw materials, cuts in wastes from industrial processes and from the characteristics of the final process.

Developed countries, as we know, have infinitely greater resources compared to other countries to develop such production technologies. This power, combined with the various provisions that, throughout the agreement, establish a practice of competition among unequal parties, will clearly further deepen the intolerable inequalities that currently exist. It is crucial, therefore, that the provisions in the agreement on intellectual property stimulate the broad dissemination of technologies that favor the population's well being. Controls on abusive profits made by patent owners is an essential condition for less developed countries and low-income sectors to access the benefits of scientific production.

Competition policies

Within the limits of the most unequal region in the planet, an agreement on competition should have as a primary consideration the protection of more fragile economies against competition by the developed country's big businesses. This unequal competition is already responsible, in fact, for the disappearance of various productive sectors in less developed countries, especially in the industrial sector.

The agreement should provide for the active role of governments so that they stimulate the establishment and development of sectors that promote the population's well being, producing on the local level the goods necessary for their basic needs, stimulating economical forms of sovereign, autonomous, and sustainable production. This would be the proper scenario for giving preference to commercial interests over principles of food security and sovereignty, as well as the right to health, education and other essential goods and services, over which mercantilist interests should not prevail.

The chapter would also be the proper setting to establish common standards that would lead to broad social controls over large transnational companies, whose current practices compromise local populations' living standards, and market operations in general. The exercise of monopoly and oligopoly power by private companies, as well as those companies' practice of seeking to increase profits through abusively high prices, should be banned. Likewise, the utilization of intellectual property rights in monopolistic form – with the application of abusive prices and social harm – should be prohibited.

The arguments in favor of free competition should not prevail over the need to protect strategic sectors in less developed countries. It was through government stimulus and active protection by

the state that developed countries acquired their current industrialization patterns. The continuity of this protection should be ensured, now under the optic of sustainability and social justice, instead of criteria of mere economic growth.

The text explicitly commits an outrage against the future right of a state to establish sustainable production and consumption patterns in its own territory, forbidding the possibility of establishing "the non-production or restrictions in the supply or demand of goods and services."

One example of this is the energy supply crisis that hit Brazil. The Brazilian government would not have the ability, under this provision, to impose restrictions on energy consumption in order to minimize the effects of the crisis, prioritizing consumption by essential sectors, since that would be considered a "restriction on demand".

For these same reasons, the utilization of non-renewable resources should not be given to criteria of supremacy, so that unsustainable consumption could be contained. Any government measures along these lines could be considered to be undesired restrictions on the sale of goods and raw materials.