

Free Trade Area of the Americas (FTAA)

2003 FTAA Ministerial Meeting: Americas Trade and Sustainable Development Forum

This report was prepared by the Center for International Sustainable Development Law at the request of the Department of Foreign Affairs and International Trade on the Americas Trade and Sustainable Development Forum (ATSDF), a civil society event that took place on the margins of the 8th FTAA Ministerial Meeting in Miami (November 2003).

1. ATSDF Report Overview

What are the 'sustainable developments' in recent FTAA negotiations? Sustainable development is a goal of the FTAA as a treaty, and also an overall goal for the Summit of the Americas process. How is this new FTAA law developing? Are current negotiations coherent with the goal of sustainable development? In particular, debates on newer issues like investment, competition, intellectual property rights, services, trade and environment, trade and human rights and civil society participation have the potential to either further or hinder the FTAA in achieving its goal of sustainable development. Can the FTAA negotiations take environmental and social concerns into account, as well as economic ones? What was the tone of the debate among civil society groups on this issue, at the recent Americas Trade and Sustainable Development Forum held parallel to the meeting of FTAA Ministers in Miami, Florida in November, 2003? What were the strengths and weaknesses of the Forum, and what kinds of outcomes resulted from this event?

Sustainable Developments in the FTAA: The Debate

The 2001 Quebec City Summit of the Americas Declaration, and the 2001 Quito FTAA Ministers Declaration, explicitly reaffirm a commitment to the objective of sustainable development. They state that economic, social and environmental policies must be mutually supportive.

But how does this objective affect the FTAA negotiations? How do the areas of intersection between international economic, environmental and development/human rights law translate into concrete treaty provisions and results? What are the views of civil society groups, academics and other experts?

In the past two years, 34 governments from across the Americas have been negotiating in different areas of economic law crucial for sustainable development. Outcomes of FTAA negotiations in areas such as intellectual property rights, services liberalisation, investment law, competition law, market access, agriculture, and dispute settlement will be important for legal practitioners, decision-makers and academics alike. Has integration taken place, or are future conflicts with human rights or environmental law likely? What are the views of civil society groups working on issues related to the FTAA agenda?

The Americas Trade and Sustainable Development Forum: The Report

This report offers a preliminary academic / civil society perspective on the Americas Trade and Sustainable Development Forum, primarily for the Canadian public. It aims to give an overview and an analysis of the discussions that took place at the ATSDF, including the issue of creating a civil society committee within the institutional architecture of the FTAA, based on CISDL attendance at selected sessions and collaboration with other participants as appropriate to elicit views on the results of the three-day event. The report also includes a brief assessment of the format and structure of the event, with recommendations for improvement where these might be useful to future organisers of such Forums. After a brief executive summary, the first section of this report describes the format and structure of the event, then concentrates on short reports to give the flavour of discussions in each 'thematic tent'. It then gives a perspective on the civil society meeting with trade ministers, and the Canadian meeting with the lead negotiator. In the second section, the report gives some ideas as to strengths and weaknesses of the event format and structure, and concludes with a perspective on its outcomes.

2. Detailed Report

2.1 The Americas Trade and Sustainable Development Forum

The Forum

The Free Trade Area of the Americas (FTAA) Ministerial Meeting took place on November 20, 2003, in Miami, Florida. The negotiations among the 34 FTAA nations to promote economic growth and development throughout the Western Hemisphere are scheduled to be completed by January 2005. Brazil and the United States are co-chairs of this final phase of negotiations. The Americas Business Forum (ABF) and the Americas Trade and Sustainable Development Forum (ATSDF), were organized respectively by business and non-governmental organizations, and held during the Trade Ministerial.

The CISDL participated in different sessions of the Americas Trade and Sustainable Development Forum (ATSDF). CISDL members also participated in open events organised for the FTAA Ministerial Meeting, the Americas Business Forum, other NGO activities outside the security perimeter, and a briefing session hosted by the Canadian government in Miami on November 19th, 2003. This report covers our view of the ATSDF activities, including the meeting with Trade Ministers and the Canadian briefing session.

The ATSDF was a two-day forum held parallel to the November 2003 meeting of Trade Ministers within the "security perimeter" – where informal dialogue and substantive exchanges could occur between civil society organizations and government officials working on the proposed Free Trade Area of the Americas (FTAA). ATSDF convened workshops, panels, roundtables and other activities within "thematic tents" for discussion of social, economic, political and practical concerns relating to trade liberalization in the Americas, and was designed to complement and build upon existing efforts within civil society relating to the FTAA and the Miami ministerial.

It was hoped that holding civil society activities within the security perimeter would facilitate interaction between workshop organizers, participants, and country delegates. FTAA parties, including FTAA negotiating group chairs, were encouraged to attend, and wherever possible, participate. Indeed, members of the Canadian, Dominican Republic, Chilean, Peruvian, U.S., Caribbean and other delegations were part of the discussions of the ATSDF.

The Themes

The ATSDF was organized around input from interested parties and civil society organizations from throughout the Americas, and consisted of a series of simultaneous "Thematic Tents," under which a broad range of activities were conducted by multiple institutional and expert participants from across the Americas.

Sessions within these 'tents' (actually, reserved seminar rooms in the Clarion and the Courtyard Marriott hotels where the event was held) took place over the 2-day period in a range of social, political, economic and practical themes related to trade. Each 'tent' was hosted by different organizations with expertise in that area to provide a logical, cohesive, constructive, and substantive treatment of the theme. Based on the principal issues emerging from civil society during recent years, and input received from interested organizations, thematic 'tent' issues included:

1. Trade, democracy, and human rights
2. Trade and environment
3. Trade, public participation and access
4. Trade and smaller economies
5. Trade and transparency
6. Trade and sustainable livelihoods
7. Trade, investment and the FTAA
8. Trade and agriculture
9. Trade, knowledge and intellectual property rights

Within each tent, interested organizations held panels, roundtables, presentations, debates, and other sessions to advance the state of understanding and promote progress in addressing issues of concern relating to the FTAA. Many of the discussions went beyond rhetoric and advanced dialogue on the issues in a way that allowed constructive and meaningful input to trade negotiators and decision-makers. The results of the series of activities under each 'tent' will be compiled, reported and published as a principal outcome of the ATSDF.

The Hosts and Participants

The ATSDF was convened by the United States Trade Representative, and co-hosted by a core organizing and sponsoring group of non-governmental organizations from several countries throughout the Americas with experience and expertise in coordinating civil society involvement at FTAA Ministerial and in the Summit of the Americas. The hosts

of the ATSDF included the [Tulane Institute for Environmental Law and Policy](#), [PARTICIPA](#), the [North-South Center of the University of Miami](#), the [Institute for International Sustainable Development \(IISD\)](#), the [Facultad Latinoamericana de Ciencias Sociales \(FLACSO\)](#), the [Centro Ecuatoriano de Derecho Ambiental \(CEDA\)](#), the [Carnegie Endowment for International Peace](#), and the [Canadian Foundation for the Americas \(FOCAL\)](#). The hosts of the specific thematic tents also included: [Transparency International](#), the [National Coalition on Caribbean Affairs \(NCOCA\)](#), the [Partners of the Americas](#), the [Institute for Agriculture and Trade Policy \(IATP\)](#), the [International Centre for Trade and Sustainable Development \(ICTSD\)](#), the [Inter-American Democracy Network](#), the [Center for International Environmental Law \(CIEL\)](#) and the [Caribbean Policy Development Centre \(CPDC\)](#).

The [Centre for International Sustainable Development Law](#) gave presentations, made interventions, received reports or participated in the sessions on Trade, democracy, and human rights; Trade and environment; Trade, public participation and access; Trade, investment and the FTAA; Trade and services; and Trade, knowledge and intellectual property rights. CISDL also received reports from the sessions on Trade and Smaller Economies and on Trade and Agriculture. With the IISD, the CISDL also released the final working draft of a new book on 'Social Rules and Sustainability in the Americas,' the third in a series of three volumes developed as part of a project on trade rules and sustainable development in the Americas, and hosted a meeting of partners from across the Americas for a project to assess hemispheric institutional capacity and develop sustainable development related capacity building materials.

Approximately 300 participants, from 28 countries and representing 128 organizations, gathered for two days of discussions in the Americas Trade and Sustainable Development Forum. It was not a goal of the Forum to produce any kind of final consensus report, but a final publication will be prepared based on the papers that were delivered, and the debates held, in the different thematic 'tents'. A meeting also took place between civil society organizations and the Trade Ministers, as is detailed later in this report.

The Canadian Briefing Session

On November 19th, in the early afternoon, there was a briefing session for Canadian business forum representatives and Canadian civil society organisations. The session was organised by the Canadian delegation to the FTAA Ministerial and chaired by M. Claude Carrière, lead negotiator for Canada in the FTAA. After a short report on the status of the negotiations, a lively question and answer session followed, with comments ranging from questions as to the specific status of the negotiations with respect to labour, environment, civil society participation, agriculture or investment, to more general questions as to the process of the FTAA negotiations, its evolving scope and goals. In the view of the CISDL, the briefing session achieved its goal -- to give the Canadian civil society organisations and business representatives an inside view on the perspective of the Canadian delegation in the negotiations. The answers to questions were frank, detailed and demonstrated the high expertise of the Canadian team. Members of the Canadian delegation, especially M. Claude Carrière, were extremely informative, transparent and forthcoming, especially considering the state of FTAA negotiations in that moment.

In future events, such sessions could be built upon and improved. First, it would be constructive if the LAC partner organisations of Canadian civil society organisations could be invited to participate. This could serve the Canadians present as they would have the benefit of diverse views, and also help to share the way these sessions are done, perhaps generating interest for other countries to offer similar meetings. Second, it would be excellent if the head of the Delegation, in this instance the Minister of Trade, could have been present for part of the questions and answers, as has become traditional in WTO meetings with civil society. Often, questions raised by Canadian civil society and business representatives are more concerned with overall policy directions, and these sorts of questions should be normally addressed to the political representative. Third, it could be interesting, should time allow in future meetings, to start the session off with a speaker from civil society and one from business, to brief each other on the progress of each others events. This might also have helped to generate a dynamic that was less 'question and answer' and more 'sharing information from different perspectives' – considering the high level of expertise and commitment in the room, such a dynamic could be positive.

2.2 The Thematic 'Tents'

Most of the substantive debates and discussions of the ATSDF took place in Thematic Tents, organized by different coordinators. What follows is an informal overview of some of these debates, which aims simply to give a flavour of the debates that took place.

Trade and Environment

The first session of the Trade and Environment 'tent' focused on environmental assessment and trade, with presentations from academic and inter-governmental organisations working on environmental impact assessment of trade liberalisation processes. The discussions compared the methods, challenges and a rich diversity of different experiences with environmental and sustainability reviews of trade policies. Several critiques were raised about current methods, including the costs, the fact that many can be northern driven, and the need to ensure that procedures were accessible and open, rather than expert-driven. The second session continued where the first discussions had left off, focusing on recent experiences with new methods: sustainability assessment, ecosystem assessment and benchmarking social rules and sustainability in the Americas through use of principles-based analysis. Participants discussed the extension of impact assessment analysis to the social dimension, and how to include diverse human elements in environmental reviews. According to the International Centre for Trade and Sustainable Development (ICTSD), in order to assess the potential social and environmental implications of the FTAA, governments and non-governmental organisations have been advocating for the more widespread use of sustainability assessments of the agreement. Analyses are underway in several countries, including Chile and the US. Canada already published their initial environmental impact assessment, which was done prior to the FTAA negotiations conclusion. However, the ICTSD argues that many LAC studies (or those done in LAC by others) exclusively use an ex-post approach (examining past experiences to draw lessons for future policy)

instead of also using an ex-ante approach (using the proposed policy as the starting point and projecting scenarios forward). Furthermore, participants were concerned that experiences from other free trade agreements are not taken into consideration in the assessments, and that the assessments focus too narrowly on the environmental effects of trade in goods and services, leaving out for example the potential effects of liberalisation in the agricultural sector on the environment, or the social aspects of potential impacts. In spite of these concerns, there was much hope expressed, and interest raised, about impact assessment methods and experiences to date. Participants did desire that LAC governments, and others, could start to use the methods and especially results of current and future studies more extensively, to iron out problems and inform policy-making.

The third session focused on institutional mechanisms for environmental cooperation in the FTAA, and considered different sub-regional experiences with environmental cooperation, then also discussed the objectives, scope and mechanisms for an Americas-wide cooperation on sustainable development issues parallel to the trade agreements. Then, a Special Joint Session was held with the Participation and Access Tent, where discussion focused on the best type of public participation mechanism for an Americas Environment Accord, its goals and objectives. The roundtable identified different elements of such a mechanism. Many participants felt that while such a mechanism would depend on the final shape of an FTAA environmental chapter or accord, should contain clear provisions for accountable, transparent and institutionalised cooperation, should serve to ensure access to (and analysis of) comparative information and citizen assessment, and should provide avenues for appeals and channelling of civil society concerns, as well as capacity building for civil society on trade and environment issues. Sanctions were not supported, but it was felt that to be taken seriously, such a mechanism would need to be more than a 'talk-shop' or 'advisory group' alone. Rather, environmental concerns addressed to the mechanism should be provided with a solid, public response and consequences for countries. Representatives from Chile, Canada, the Dominican Republic, the U.S.A. and several Caribbean governments participated in these discussions. After the joint session, there was an Environmental Tent Cocktail, where several new books related to trade and sustainable development issues were launched by participants. It became clear, in the launching event, that there was considerable expertise building within civil society and academia in this area. The next session was a joint breakfast with the Transparency, Public Participation and Access tent, and with the Trade and Environment tent, where priority ideas on institutional mechanisms for cooperation and capacity building for the environment were presented. A lively discussion ensued, with different views being presented on whether an FTAA environment chapter was needed, or other institutional models of cooperation, and how these could be done in a way to best support greater cooperation and capacity building.

The Trade and Environment tent also held a joint session with the Trade, Knowledge and Intellectual Property Rights tent, on intellectual property rights and biodiversity, which focused on the obligations of governments under the Biodiversity Convention to share the benefits of genetic resources and respect traditional knowledge, and the challenges that free trade might present to compliance with these obligations. Participants argued that unless careful provisions were made in this area, the FTAA could prove negative for

sustainable development. There were concerns that IPRs could not properly account for collective property rights over culture, traditional knowledge or sacred processes, that IPRs might make it harder to preserve and use heritage seeds and biodiversity, and that IPRs might protect the rights of bio-pirates rather than encouraging the sharing of benefits (by not including disclosures of origins within mandatory patent information). Many felt that IPRs should not be part of the FTAA. The next session focused on services liberalisation, and environmental goods and services, with presentations of specific sectoral case studies. There was also a discussion of subsidies, which focused on fisheries subsidies and other unsustainable subsidies, and how removal of ‘perverse subsidies’ might produce a win-win-win result for the environment, social justice and trade. The last substantive session, jointly organised with the Trade and Agriculture tent, focused on trade, agriculture and genetically engineered crops, with concerns being expressed for biosafety and sanitary and phytosanitary standards in the context of trade liberalisation. A wrap-up session was also held, concluding with certain general recommendations from participants and organisers. Though specific conclusions were difficult after such an intensive two days of presentations, participants felt that trade and environment issues had to be addressed in the FTAA. This needs to be done, they felt, through specific provisions where the FTAA chapters had potential environmental impacts (such as investment, IPRs or procurement) or opportunities (such as environmental services or subsidies). LAC-focused and driven sustainability impact assessment was one way, especially if it included social dimensions, to better analyse and take into account these impacts and formulate such provisions. Many participants felt this needs to be done through development of a hemispheric institutional cooperation mechanism for environment and sustainable development issues, though they recognised that both trust and adequate resources would be necessary, as well as an open process that included civil society, to get an environment chapter or accord that was meaningful and provided value-added.

Trade, Public Participation and Access

The first activity of the Trade, Public Participation and Access tent was a special Joint Session with the Public Participation and Access, Democracy and Human Rights, and Corruption and Transparency tents. Participants in the session. Participants focused on whether there were ways to seek legitimacy for the FTAA, and how governments could take into account concerns for transparency, participation and human rights. They were very critical of the current FTAA negotiations process, but also made suggestions for ways to improve the negotiations and the national formulation of trade policy.

The three tents then broke into separate sessions on each theme, and the Participation and Access tent considered mechanisms for participation in the FTAA and experiences to date. It reviewed existing models for public participation mechanisms in current trade regimes and in negotiations, and presentations were made on different sub-regional and hemispheric trade negotiations. Participants also compared the arrangements made for civil society participation in recent WTO negotiations to the level of openness in the FTAA negotiations. It was argued that at present, while the FTAA Draft Text release was a good first step, many did not have the technical expertise to read and understand it. Many felt that more efforts are needed, particularly in LAC countries, to improve access

to information and transparency, and to inform the public about potential consequences of their countries positions in the negotiations. Some participants also felt that it was incumbent on civil society organisations, with support from foundations or other sources, to form partnerships and jointly analyse the FTAA Drafts, increasing their own capacity for analysis and meaningful participation. In the afternoon, a second session focused on lessons learned and potential models for the FTAA, with a constructive focus on how to best integrate citizens into the trade decision-making process. The North American Commission for Environmental Cooperation Joint Public Advisory Council and Article 14 Factual Report process, the Mercosur process with their technical working group pre-meetings, and the Andean Community's social participation mechanisms were all of interest as examples, as were other models. It was recognised that national level transparency and openness are a first step toward greater participation in sub-regional, hemispheric and global trade negotiations, but also that the attitude of forums and institutions serving trade negotiations had a significant effect on the openness of each process. The final session for the day was a Special Joint Session with Trade and Environment Tent on Integrating Citizens into Trade Institutions, as mentioned above.

In the morning, there was a discussion of Priority Ideas on Institutional Mechanisms for Cooperation and Capacity Building for Environment, jointly with the Trade and Environment tent, also as mentioned above. Then a Plenary Session took place with the Participation and Access, Democracy and Human Rights, and Transparency and Corruption tents, reporting the results and priorities from Day One sessions. Each session had reached different conclusions, mainly critical of the present process, and so working groups were formed to develop recommendations for alternatives on priority issues. The participants divided into four working groups, to generate recommendations on issues such as principles for participation, the institutional structure of a consultative committee for civil society in the FTAA, and provisions for transparency. Participants applauded the Chilean governments proposal for a civil society consultative committee, but made proposals for ways that such a mechanism could be linked to the Americas Trade and Sustainable Development Forum and other broader processes, requested gender, regional and sectoral diversity, and encouraged financial resources and a commitment to a permanent and institutionalized role for CSOs in the planning and implementation of Summits of the Americas with an opportunity for productive engagement at the Monterrey Summit in 2004 and the Summit to be hosted by Argentina in 2005. They came together in plenary to discuss the results of their debates, and recommendations were formulated for the Ministers.

A Final Plenary was held, focused on the question 'Where do we go from here?', which led to plans for future FTAA Ministerial meetings and Summit meetings, where a small presentation was made on a special meeting of civil society representatives to prepare for the Special Summit of the Americas in Monterrey, Mexico, which was taking place the week after the ATSDF in Mexico, hosted by a coalition of civil society organisations, the OAS and the Mexican government.

Trade, Democracy, and Human Rights

The Trade, Democracy and Human Rights tent began with a joint debate that combined participants and speakers from the Public Participation and Access, and the Corruption and Transparency tent. The first discussion focused on whether the FTAA could or should be considered legitimate, and how this legitimacy could be gained. In the second workshop, discussions focused on trade and national sovereignty, with presentations from Doctors Without Borders, the Centre for Policy Analysis on Trade and Health, and the FAVACA. In important areas of public policy, such as health services, the participants concluded, there are issues which should not be considered under only the economic lens.

The third session focused on trade and poverty, where concerns were raised as to whether trade could address unequal divisions between the rich and poor, and how the benefits of trade could lead to poverty eradication. The fourth session focused on trade and democratic governance, and focused on how legitimate trade policy-making should be done. Concerns were expressed with the perilous condition of democracy in many parts of the Americas, and the current model of semi-closed door negotiations. The next session was a joint breakfast with the Transparency, Public Participation and Access tent, as mentioned above. The fourth panel was also a joint session with the Public Participation and Access, and Corruption and Transparency tents, which focused on reporting back results from the first days, then discussing alternatives and building consensus around the most important aspects, as mentioned above, and the final joint plenary followed.

Trade, Corruption and Transparency

Many of the events of the trade, corruption and transparency tent were held in common with either the Trade, Democracy and Human Rights tent or the Public Participation and Access tent, as mentioned above. However, a specific session was held by the participants to examine issues of transparency in government procurement, and the draft Procurement Chapter of the FTAA. The discussions covered the value of transparency provisions to limit corruption in government contracting processes. They identified procurement legislation, practices and supportive institutional and civic mechanisms as the single most important priority in the effort to curb corruption. They stated that transparency requirements in the FTAA Procurement Chapter should have the broadest application at all governmental levels and to all goods and services with exclusions for contracts below certain thresholds kept to a minimum.

They argued that the essential transparency elements described below include: adequate notice of opportunities; objective technical specifications and evaluation criteria, access to information at all stages; public opening of bids, publication of awards; professional standards and training; impartial challenge procedures; criminalization of the offer, acceptance or solicitation of bribes during the procurement process; and sanctions for non-compliance by officials and bidders. They also called upon governments to encourage the private sector to apply anti-bribery policies, enforce internal controls and provide training throughout their organizations. In the general joint plenary discussion, some participants raised the issue that social and environmental linkages between pre and

post-award procurement contracts should not be threatened by transparency requirements but rather, strengthened, and that further research was needed in this area. Participants also called for immediate ratification of the 1996 Inter-American Convention Against Corruption by any countries of the hemisphere which had not yet done so, and the implementation of specific measures for capacity building and enforcement.

Trade and Smaller Economies

The Trade and Smaller Economies tent held a series of focused sessions, on issues facing the Caribbean Region in the FTAA negotiations, the need for special and differential treatment, access to agriculture and non-agricultural markets and other matters, services for smaller economies, and prospects for the Caribbean region within the FTAA. The tent produced a statement which gives a good flavour of their discussions. It recognizes that access to markets is important, but also calls for protective mechanisms to be built-in for small economies. It suggests that the FTAA should address a developmental program that targets poverty reduction, commit that all parties will honour the ILO core labour Conventions, consider the development of a “Potential Impact Index” to measure the vulnerabilities of small economies to trade liberalization, and support the restructuring of Caribbean economies for the production of higher value added exports. It also states that funding should be provided for research and development as part of the proposed structural convergence fund. It recognizes the need for enhanced infrastructure support to improve the ability of small economies to accommodate increased investments. It also calls for special funding for programs impacting HIV/AIDS for the entire Caribbean.

With regard to services liberalization, their report points out, smaller economies should not be required to liberalize their services at the same rate and pace as other more developed FTAA members and sectors such as health, education, water and port services should not be subject to liberalization. Also, in order to provide for cultural diversity, recommends that the audio-visual sector and media and broadcasting services be exempted from liberalization. It supports the retention of subsidies by small and vulnerable economies as long as subsidies are maintained by developed countries. Their report also argues that smaller economies should not be required to undertake commitments in respect of government procurement, investment competition policy, and intellectual property rights which go beyond limited measures on transparency. Their report supports the development of dispute settlement mechanisms but cautions that such a mechanism should only be on a state by state basis, and be simple and accessible to smaller economies. They conclude with the expectation that with respect to the Caribbean, these issues will continue to be addressed and supported on a regional basis.

Trade, Investment and the FTAA

The Trade, Investment and the FTAA tent held a series of panels and workshops which served to highlight ongoing research and analysis on global, bi-lateral and regional investment policy. The first session focused on whether there was an economic case for investment agreements. The second surveyed sustainable development experiences with existing investment disciplines, for example, in the NAFTA Chapter 11 and bi-lateral investment treaties (BITs) and distilled concerns that have emerged. The third focused on

specific experiences of developing countries with BITs and Investment Contracts, in an exchange with lawyers from developing countries that have been subject to disputes. The next focused on the impacts of investment agreements on policy space for sustainable development, and considered whether investment agreements curtail this space. In this session, a series of case studies were presented from different sectors such as electricity, tobacco, and environmental management of water and mining. The final two sessions focused on the current text of the FTAA Investment Chapter, considered the prospects for an investment agreement in the FTAA and the impacts of the Cancun WTO Ministerial outcomes, and generated ideas on what an investment agreement might look like if it were specifically geared to foster sustainable development.

They produced a summary of their discussions. The summary states that with regard to the economics of foreign investment, foreign direct investment (FDI) has the potential to increase well being by fostering economic development through transfer of technology and know-how, increased employment, and increased aggregate incomes. However, according to World Bank and UNCTAD studies there is no evidence that *investment agreements help to attract FDI*. Rather, existing evidence indicates that investment agreements do not attract FDI. In fact, decisions on FDI are influenced by issues such as proximity to the home state, macroeconomic stability, size of domestic markets, physical infrastructure, qualified labor and other variables. It also points out that in any case, what is important for sustainable development is not the quantity of investment, but its *quality*. Much of Latin America's investment over the past decade has in fact simply displaced domestic investment, has reduced domestic capacity to innovate and has had serious environmental side effects. The summary also states that with regard to investment rules, investment disciplines have clear public interest implications, which distinguish these issues from private commercial transactions. Investment disciplines also have the potential to undermine legitimate laws and regulations protecting health, safety, the environment, and other issues crucial to making development sustainable. And investors are increasingly utilizing investment rules to challenge such public interest regulatory frameworks. It observes that the special protection regime for foreign investment discriminates against local investors by affording foreign investors greater rights and a preferential competitive advantage. It also states that investment rules are uni-directional and unbalanced because they only establish rights for investors, but no corresponding obligations requiring responsible conduct to ensure sustainable development.

Finally, with regard to investor-state arbitration, the summary states that investment arbitration imposes huge transaction costs on respondent governments. (A typical case costs in excess of a million dollars, and some governments have already spent millions of dollars defending their cases). It also points out that investment arbitration imposes huge potential liability on respondent governments. It argues that that investment disputes are decided not by a standing and impartial court, but by practicing commercial lawyers whose independence is not guaranteed, undermines the legitimacy of the proceedings and decisions. It suggests that a mechanism for reviewing arbitration awards would improve their quality and reduce the potential for contradictory decisions. It also suggests that greater transparency in dispute settlement is required in light of the public interest nature of the issues adjudicated in these investment arbitrations. Open hearings and the

opportunity to present amicus curiae briefs as a matter of right are a step in this direction, as exemplified by the Chile-U.S. FTA, but are not sufficient. It states that investment arbitration has the potential to undermine the institutional development of the local judiciary, as investors are allowed to deviate from the rule requiring exhaustion of local remedies.

Trade and Agriculture

The Trade and Agriculture tent held a series of workshops and panels, focused on important issues such as agricultural subsidies and dumping, perspectives from different sub-regions, environmental impacts of agricultural subsidies, northern and southern perspectives on fair trade alternatives, and genetically engineered crops and trade (held in cooperation with the Trade and Environment tent). They produced a [statement](#) summarizing their discussions. The statement is clear that participants found existing agricultural trade policies have failed to promote sustainable, viable agriculture in either developed or developing countries, with particularly dire consequences for the rural poor in the developing world. It argues that FTAA proposals to date represent a continuation of these failed policies, and are therefore unacceptable. It recommends that trade rules should be developed which grant all countries the right to develop their own agricultural and food policies, including the right to manage both production and inventories. The statement also recommends that these rules should grant countries the right to protect themselves from dumping of agricultural commodities at below the cost of production, prohibit dumping by any country into international markets, provide farmers with a fair prices and consumers with a safe, secure and affordable food supply that is environmentally sustainable, and reduce the anti-competitive market distortions caused by disproportionate market power of agribusiness cartels.

It also states that specifically, with regard to subsidies and dumping, developed countries are exporting agricultural products at prices below the costs of production, a form of dumping, and that in some cases, Northern agricultural subsidies contribute to agricultural dumping. It finds that for many crops, dumping is not the result of subsidies but of policies in the North that encourage chronic overproduction, and recognizes that ending Northern subsidies will not by itself raise farm prices or end dumping for most crops. Rather, it recommends that putting an end to agricultural dumping should be the highest and most immediate priority for fairer trade rules.

With regard to the environment, the statement recognizes that current agriculture and trade policies externalize many environmental costs, such as pesticide pollution. It argues that the FTAA, as proposed, would continue to externalize these costs with severe environmental impacts throughout the hemisphere, and states that any future trade agreement should include mechanisms to assess, avoid, and mitigate these environmental impacts.

Finally, with regard to genetically modified crops, the statement argues that given the strong concern about the health, environmental, and socio-economic risks associated with the introduction of GMOs in agriculture, the precautionary principle should be the accepted basis for decisions about GMO cultivation and imports. It argues that any trade

agreement must recognize the right of countries to implement precautionary policies regarding the cultivation or importation of GMOs. It also notes that the Cartagena Protocol on Biosafety is an important new international agreement, and represents the broadest consensus to date on GMOs, finding that its provisions should therefore take precedence over trade agreements. The participants therefore opposed the proposed strengthening of the SPS Agreement that is reflected in the FTAA negotiation text, which would further restrict the rights of countries to implement the precautionary principle. They stated that consumers must have the right to choose whether they are willing to consume GM products, and governments must have the right to protect their consumers from the potential health threats posed by GM products.

Trade, Knowledge and Intellectual Property Rights

The Trade, Knowledge and Intellectual Property Rights (IPRs) tent held a series of workshops focused on specific problems with relation to intellectual property rights and the FTAA. The first session outlined a development perspective on the IPRs Chapter of the FTAA. The second one focused on health issues related to the FTAA, and access to medicines. The third session focused on agriculture, food and IPRs in the FTAA, raising issues related to food security. In a joint session with the Trade and Environment tent, as mentioned above, the next panel looked at synergies between the Biodiversity Convention and IPRs. Another panel also considered issues related to knowledge and IPRs, especially access to information, copyright and related rights provisions in the proposed FTAA. The final substantive session concluded with an examination of systemic and rules issues in IPRs, considering non-violation, dispute settlement provisions and technology transfer. The tent wrapped up with a plenary session which resulted in a [joint statement](#) to be made to the Minister's meeting.

In this statement, participants made it clear that most felt that there should not be a IPRs chapter in the FTAA. They suggested that any future IP negotiations should take place in a suitable worldwide forum, such as the WTO. Some of their reasons for such a general admonition were that the TRIPs Agreement has not been implemented by many developing and least developed countries, though new standards were already being sought, and that there was a high cost of implementation for new (in most cases TRIPS plus obligations). Participants felt that in the case of the IPR chapter of the FTAA, the costs might be higher than the potential benefits for developing countries and consumers in the Americas. Also, they identified a lack of effective assistance to address asymmetries in the technological field, and argued that there is a reduction of the knowledge and information currently existing in the public domain to the detriment of consumers and users. They also stated that no TRIPS-plus provisions should be included in current international trade negotiations. They argued that a regime is needed which provides better balance between public and private interests, allowing, for example, the full implementation of TRIPS Articles 7 and 8. For added illustration, the participants noted that some of the TRIPS plus provisions proposed in the FTAA draft chapter on IPRs include deletion of the exceptions to patentability; limitations of measures that countries can undertake to address public health issues (i.e. limitations to compulsory licensing); longer periods of protection for copyrights (from 50 to 95 years of protection plus the life of the author); and reduction of flexibilities to choose the most convenient

system to protect plant varieties. Their statement called for a moratorium on bilateral/regional IP negotiations, stating that countries should refrain from pressuring others to increase IP protection in a bilateral/regional or multi-lateral forum, and that international IP agreements should respect the Universal Declaration of Human Rights (especially Articles 19 and 27).

Participants also agreed on a series of principles and concerns that they felt should be taken into consideration in any multilateral, regional or bilateral negotiations involving knowledge resources. First, flexibilities to address public interest concerns including health, environment, nutrition, food security, education that are already included in national patent laws and copyrights laws should be protected. Second, IP proposals in the current FTAA text limit generic competition, the most powerful force for reducing drug prices. Generic competition has reduced the price of AIDS drugs by more than 98%. To participants, this was a matter of life and death, and they argued that countries must prioritise public health over private commercial interests and fully implement the Doha Declaration on TRIPS and Public Health. Third, flexibilities should be maintained to choose and use the most convenient system to protect plant varieties whether through patents or a *sui generis* system.

Fourth, the Convention on Biological Diversity and the new FAO International Treaty on Plant Genetic Resources for Food and Agriculture principles, together with adequate legal mechanisms for assuring legal access to and benefit sharing from genetic resources, must be directly incorporated in any international IPR treaty as well as national laws. Fifth, any international IP agreements need to provide for and fully develop protection of traditional knowledge and folklore. Sixth, meaningful mechanisms are needed to regulate abuse of rights, and competition policy should be developed to remedy failures linked to IP. Seventh, with respect to copyright policy, trade agreements in general should be pro-competitive, promote innovation, respect personal privacy and reasonable private copying rights, ensure access to essential learning tools, and not undermine the efforts of developing countries to bridge the knowledge gap. Eighth, open and free software development models should be encouraged, and nations should retain flexibility and sovereignty over setting limitations and exceptions to exclusive rights. Ninth, effective ways for facilitating technology transfer should be included and new mechanisms for stimulating needs-driven health R&D should be explored, in this instance, technology transfer should not be confused with technical cooperation. Tenth, special and differential treatment must be incorporated and enhanced for developing countries. Eleventh and finally, non-violation actions that are currently included in the text of the chapter of dispute settlement should not be allowed with respect to IPRs.

The ICTSD, one of the organizers of this session, commented that participants had proposed that the FTAA negotiations on IPRs should be supportive of negotiations undertaken in multilateral fora, including the Convention on Biological Diversity, the WTO, WIPO, FAO and others. And they pointed out that on a positive note, participants in the discussions had highlighted that a range of countries in the Americas have advanced national IPR legislation supporting biodiversity conservation and protecting traditional knowledge. The IUCN noted that the FTAA negotiations "can help trigger

innovative thinking that can assist in breaking the stalemates that currently plague the negotiations at the global level".

Trade and Sustainable Livelihoods

The Sustainable Livelihoods tent held three sessions. One focused specifically on integration and migration issues, with concerns being expressed for the rights of migrant workers and immigrant rights in the context of closer economic integration, and ideas being proposed for ways that the FTAA could result in facilitation of the movement of natural persons in the Americas. A second workshop focused on labour issues and trade agreements, where studies were presented revealing very difficult conditions and lack of access to basic core labour rights in the America, the widening gap between the rich and poor, and showing that alone, trade agreements would not necessarily bring about better labour standards. The third session focused on the experience in the NAFTA, and presented lessons from Mexico for the Western Hemisphere. Studies by experts groups and think tanks argued that NAFTA had not necessarily improved working conditions, equity or access to fundamental social rights for working people in Mexico, particularly among the poorer groups. The civil society organisations and academics which made these arguments were profoundly disappointed with the NAFTA, as they had hoped that increases in economic development and growth would also result in reduction of poverty in Mexico, and better working conditions. They expressed concern that the FTAA, if it followed the same model, might not help to improve the standard of living or quality of life for most people in the Western Hemisphere, and demanded a clear, coherent, adequately resourced social aspect to the hemispheric cooperation agenda to balance (and help ease adjustments to) a liberal trade regime.

2.3 The Meeting with Trade Ministers

The Meeting with Ministers

A meeting also took place between civil society organizations and the Trade Ministers, in the late afternoon of November 19, 2003. The meeting was designed for substantive discussion among the participants, as opposed to the Americas Business Forum tradition of making speeches to the ministers, and previous trade-related forums where civil society representatives have simply made one-way presentations to ministers. To accommodate overflow, there was a closed-circuit television and a video in order to allow a broader public audience for the civil society roundtable discussion with ministers. A recording of the meeting is available online on the Miami FTAA 2003 website of the [United States Trade Representative](#).

The session began with brief welcoming statements by the chairs of the FTAA from Brazil and the United States, and then three civil society leaders, each from different sub-regions, made a quick statement to open the discussions. The resulting conversation, chaired by an independent moderator (Miami Herald columnist Andre Oppenheimer), was frank and open. Trade Ministers from Paraguay, Brazil, Mexico, the United States, Ecuador and Bolivia were among those who made interventions, leading to an exchange of views on different concerns with the FTAA negotiations which emerged from the

thematic 'tents', and diverse civil society proposals. A brief summary of the discussions by representatives from the U.S. and Brazil closed the meeting. The meeting was viewed as constructive by many of the organizations that participated. They felt that there had been a frank and open exchange of views, that the moderator had permitted space for all those present to express their concerns, and were pleased with the responses to their interventions by different ministers. They were especially pleased with the implication that such a session could become a permanent part of FTAA ministerial meeting procedure. Indeed, the meeting appears to have been highly successful in many ways, allowing a real dialogue at the highest political level among the civil society organisations that were present and the Ministers. The only critique appeared to be that concluding remarks might be more representative of the actual discussion, next time. However, representatives from many civil society organizations that were only permitted to watch on closed-circuit television were quite disappointed. They could not see why others from the Forum had not been allowed in the room during the session, as there appeared to be space for them, and they also questioned the 'selection process', supposedly done by 'tent' or thematic area, stating that it was non-transparent and nonrepresentative. In further meetings such as this one, the format of a moderator, and open exchange on views expressed in each thematic group, is a good one. However, the meeting should be opened to all civil society organisations (that are willing to remain 'civil') to attend as audience, especially after they had travelled such a long way to be there in person, and the moderator might even try to take questions from the floor (posed to either civil society representatives or government ministers) at the end. In addition, the selection process in each 'tent' or 'thematic group' should be clearly defined and consistently followed.

The FTAA Ministers officially acknowledged this exchange by including a reference to this meeting in the 2003 Miami Declaration of: "26. We appreciate the views that various sectors of civil society have provided us in the last year and a half and especially in parallel to the Mexico and San Salvador Vice Ministerial meetings. We appreciate the recommendations made by the Eighth Americas Business Forum and the First Americas Trade and Sustainable Development Forum, organized with a broad representation of civil society, and with whom we met here in Miami, Florida. We encourage the holding of similar events organized parallel to all Ministerial and Vice Ministerial meetings and recommend that they include broad representation from civil society. We also take note of the regional seminar on the FTAA held by the Andean Community in Lima, Peru. The views expressed at these events constitute a valuable contribution to the negotiations, and we urge civil society to continue to make contributions in a constructive manner."

3. Commentary for Future Forums

3.1 Successes of the ATSDF

The Americas Trade and Sustainable Development Forum had set certain goals. They wanted to open a space for informal dialogue and substantive exchanges between civil society organizations and government officials working on the proposed Free Trade Area of the Americas (FTAA). They wanted to stimulate discussion of social, economic, environmental, political and practical concerns relating to trade liberalization in the

Americas. They sought to complement and build upon existing efforts within civil society relating to the FTAA. They also hoped that by holding civil society activities within the security perimeter, it would facilitate interaction between workshop organizers, participants, and country delegates. To a large part, these goals were more or less achieved. In particular, three main strengths of the Forum can be noted:

- **Substantive Sustainable Development Analysis of the FTAA:** The ATSDF hosted many solid, substantive debates on social, economic, environmental, political and practical concerns relating to trade liberalization in the Americas. Though quality was uneven from session to session and tent to tent, in general these exchanges were able to share substantive analysis based on evidence and studies, thoughtful critique and constructive proposals related specifically to key issues in the FTAA related to sustainable development. While all groups had different opinions and views on the FTAA, the level of substantive and constructive exchange demonstrated the level of expertise that is growing in the Americas on these issues.
- **Constructive Dialogue Between Civil Society Organizations and Governments:** The ATSDF opened a legitimate, accessible and constructive dialogue between the academic experts and civil society organizations that chose to participate in the Forum, and country delegates and officials (including Ministers) that are leading the FTAA negotiations. While not all sessions were well attended by members of national delegations, and not all civil society organizations chose to participate in the Forum, real exchanges of views were possible between those present, and this led to better understanding of concerns and proposals from all sides of the debate.
- **Trade and Sustainable Development Awareness:** The original conceptual framework for discussions, based on 'sustainable development,' provided an inclusive and multi-disciplinary, multi-sectoral theme for the Forum as a whole. Rather than focusing simply on environment, or simply on social or economic concerns, sustainable development law and policy conceives of an openness to the areas of intersection between the three fields, where local, national and regional culture, politics and history can be exchanged and combined to create a common discourse. ATSDF built on and strengthened awareness about trade and sustainable development issues among officials, civil society participants and the media. Often, it appears that human rights, environment and other sectors of civil society are locked in their own 'moral silos,' without opportunities to share their views or build partnerships across sectors. 'Joint sessions' and the cross-attendance of different 'tents' made possible by holding the Forum provided a mechanism to encourage greater awareness and education across different sectors of civil society and different academic disciplines.

3.2 Areas for Improvement

The Americas Trade and Sustainable Development Forum also faced many challenges, and different aspects could be improved in future events of this sort. In particular, three points can be noted:

- **Practical Access Concerns:** Riot police, a tight security presence and defensive fortifications, as well as problems of coordination, often prevented delegates from the FTAA Ministerial, the Americas Business Forum and the Americas Trade and Sustainable Development Forum from moving between their different areas or meeting each other and led to a tense atmosphere for the Forum in general.. This is symptomatic of a greater need for engagements, constructive collaboration and openness among all three sectors, especially many governments.
- **Governance, Engagement and Inclusion:** The ATSDF saw good participation from different sub-regions of the Americas, a solid achievement for which organizers can be congratulated, and in general, coordination and leadership of most tents was gender and region-balanced. A good first step has been taken. But as the ATSDF develops, it still has work to do to become more inclusive, to involve broader networks of civil society organizations and academic institutions, and to ensure that the organizing structure is more transparent and better governed for all participating organizations and views. Otherwise, the quality of the discussions in different tents of the ATSDF will continue to vary considerably, leading to lack of intellectual legitimacy, and worse, the quality of participation in the initiative itself will continue to be questioned by organisations that feel their views are not taken into account, leading to lack of public legitimacy. These are serious challenges, and each ATSDF will find different ways to meet them.
- **Actual Recognition of Sustainable Development Issues in the FTAA Process:** The level of recognition of sustainable development in the official ministerial text, reflected the disappointing results of the FTAA Ministerial itself. With relation to sustainable development, the final Ministerial text was worse than the limited recognition of these issues achieved in the text of the 2001 Quito Ministerial Declaration, and all other Ministerial Declarations. For example, the environment hardly features in the Declaration despite concerns raised, in particular by environmental groups regarding the potential environmental effects of the agreement. A forward-thinking proposal advanced by many governments, including Canada, and taken under consideration then vetoed in the final hours of the negotiations, read: [23. Recognising the importance of sustainable development and the observance and promotion of internationally-recognised core labor standards, we direct the co-chairs to convene a consultative group in labor and the environment. This group will discuss and develop options on how to address labor and environment in the FTAA, taking into account related activities under the Summit of the Americas, and report back to the eighteenth meeting of the TNC for its decision on how to proceed.] This type of direction, offered by Ministers, could have provided an official forum for discussions on many of the issues of concern to the participants of the FTAA Ministerial, and it was unfortunate that it was not possible in this meeting. However, such results were probably a result of the overall negotiating dynamic at this stage of the FTAA discussions, rather than a real reflection of the lack of effort from civil society to make their views known.

3.3 Outcomes and Future Directions

The Americas Trade and Sustainable Development Forum provided an opportunity for diverse civil society organisations and government officials from across the Western Hemisphere to meet, debate different views with regards to the FTAA and sustainable development concerns. The Forum was part of a process of engagement, analysis and capacity-building, a long trajectory of government and civil society events parallel to Americas trade negotiations. This trajectory includes the conference on trade and environment organised by the government of Costa Rica parallel to the 1998 San Jose Trade Ministerial, the "Peoples Summits of the Americas" organised parallel to the 1998 Santiago Summit of the Americas and the 1999 Toronto Trade Ministerial Hemispheric, the Hemispheric Trade and Sustainability Forum organised parallel to the 2001 Quebec City Summit of the Americas, and the Trade and Environment Workshops and other civil society activities organised parallel to the 2002 Quito Trade Ministerial.

It was not able to completely reform the FTAA, nor to generate one single, unified view on behalf of all diverse members and experts from civil society. In the end, it was a two-day forum held parallel to the November 2003 meeting of Trade Ministers within the "security perimeter" -- where informal dialogue and substantive exchanges took place between civil society organizations and government officials working on the proposed Free Trade Area of the Americas (FTAA). Through diverse workshops, panels, roundtables and other activities on key issues relating to trade liberalization in the Americas, it served, in the end, to complement and build upon existing efforts within civil society relating to the FTAA and the Miami ministerial. New partnerships were built between different organisations from across the Americas, future projects were planned, discussed and agreed upon, and new hemispheric initiatives and perspectives were developed. And the participants were officially recognised, thanked for their efforts at dialogue, and invited back.