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WORKING PAPER

Beyond the Barricades: An Americas Trade and Sustainable Development Agenda

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Preface

By Oscar Arias, former President of Costa Rica and Nobel Peace Prize Winner, Arias Foundation[1]

Sincere reflection and discussion is required for the Western Hemisphere Summit process to be able to achieve its goals. Leaders in the fields of business and sustainable development need more opportunities to come together in one room. For far too long, many have believed economic interests and environmental interests to be intrinsically opposed. The world is slowly waking from this out-dated belief, coming to recognize that both commerce and the conservation of natural resources are actually just means, rather than ends unto themselves. The common aim of their different labours is human well-being.

We all wish to see a world where jobs replace unemployment, where clean air replaces pollution, where families can afford to buy decent homes and children can enjoy forests and fields and learn about the great diversity of life on this planet – rather than its extinction. We all want to see an end to climate change, not because we believe high temperatures to be intrinsically bad, but because—among other things—climate change is exacerbating natural disasters, resulting in more illness, injury, and death, especially in the developing world. We all want to see an end to poverty, not because money is good in itself, but because we know in our hearts that something is wrong, when we see the massive scale of human suffering resulting from crushing poverty and underdevelopment, in so many places of the world. We need more people to care about the present and the future of our fellow human beings, and those who already do, must be commended for this.

There is a pressing need to examine the areas where the business and environmental spheres intersect, and propose a vision for human well-being which encompasses both economic development and responsible use of resources. The human development paradigm has much to offer here. Critique is also needed – certain policies contribute both to poverty and environmental degradation, while corrective steps are possible for the governments of our hemisphere.

In both the economic and environmental sciences, we are familiar with the language of crisis. Those active on behalf of the global environment have been calling upon the rest of us to recognize the crisis of our planet's health for decades, and the world is just beginning to listen. In economics, we speak of financial crises, and we have seen entire economies and currencies collapse. But the world is suffering from crises more subtle, and these bear closer examination. It is a development crisis when nearly a billion and a half people have no access to clean water, and a billion live in miserably substandard housing.[2] It is a leadership crisis when we allow wealth to be concentrated in fewer and fewer hands, so that the world's three richest people have assets that exceed the combined gross domestic product of the poorest forty-three countries.[3] It is a spiritual crisis when—as Gandhi said—many people are so poor that they only see God in the

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[1] In 1988, Dr. Arias furthered his vision of democracy and non-violence by founding the Arias Foundation for Peace and Human Progress. The mission of the Foundation is to promote just and peaceful societies in Central America and other regions. The Foundation's continuing work is divided among three active and expanding programs: The Centre for Human Progress, the Centre for Peace and Reconciliation, and the Centre for Organized Participation. *Available online:http://www.arias.or.cr*

[2] Report of the World Summit of Sustainable Development, Johannesburg, South Africa, 26 Aug - 4 Sept 2002, A/CONF.199/20; UNDP, *Human Development Report: Deepening democracy in a fragmented world* (New York: UNDP, 2002).

[3] UNDP, ibid.

form of bread, and when other individuals seem only to have faith in a capricious 'invisible hand' that guides the free market. It is a moral crisis when 40,000 children die each day from malnutrition and disease.[4] And it is a democratic crisis when 1.3 billion people live on an income of less than one dollar per day and are effectively excluded from public decision-making because of the wrenching poverty in which they live.[5]

How do we face these crises? How do we confront these challenges? Certainly, the business community seeks to promote economic growth, which over the long term can alleviate some of these problems, if effectively managed. If we addressed the issues of deforestation, greenhouse gas emissions, and over-cultivation seriously, we would also make some headway. What is most essential, in any of our efforts, is that we remember to place people at the center of our planning. It will do us no good whatsoever to protect trees if people continue to starve, and it will be completely unproductive to unleash the power of globalized trade if all of the benefits go to a lucky few. Given the fact that 80% of the world's population lives in the developing world, and that that number will have risen to 87% by the year 2050,[6] we would do well to check every corporate and government action against how it affects the world's poor. If we do so, and allow our reflection to lead us to radically different actions, then the crises may abate.

Development is important. We have many phrases and buzzwords in this field, and each has different connotations. The phrase "sustainable development" for most people immediately brings to mind concerns about the natural environment and the importance of using natural resources wisely. At the same time, the concept of "development" on its own most often suggests economic growth. When we speak of the developing world, it is understood that we are speaking of countries which are economically poor. Development, for better or worse, also calls to mind the construction of factories, as well as business and tourist facilities. In short, when we think of development, we think of money and infrastructure.

But where are the people in development? In 1968, Robert Kennedy warned us that we cannot rely on the amount of the Gross National Product (GNP) to tell the story of human well-being. He said, "Our gross national product . . . counts air pollution and cigarette advertising, and ambulances to clear our highways of carnage. It counts special locks for our doors and the jails for those who break them. It counts the destruction of our redwoods and the loss of our natural wonder in chaotic sprawl. It counts napalm and the cost of a nuclear warhead, and armored cars for police who fight riots in our streets. . . . Yet the gross national product does not allow for the health of our children, the quality of their education, or the joy of their play. It does not include the beauty of our poetry or the strength of our marriages; the intelligence of our public debate or the integrity of our public officials. It measures neither our wit nor our courage; neither our wisdom nor our learning; neither our compassion nor our devotion to our country; it measures everything, in short, except that which makes life worthwhile."[7]

This insightful comment was offered more than three decades ago, but still rings true to us today. We recognize the truth of Kennedy's remarks when we see that Kuwait, for example, has a Gross Domestic Product (GDP) per capita that is higher than that of the United Kingdom, and yet thirty-five percent of its children are not enrolled in primary

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4 WHO/WFP, *Food Aid for Health and Development* (WHO, 1997), at 4.
5 UNDP, *supra* note 2.
6 *Ibid.*.
7 R. Kennedy, Address, University of Kansa, Lawrence Kansas (18 March 1968).

school.[8] GNP and GDP cannot measure what is most important, yet we continue to use these numbers, too often, as the guiding principle for development decisions. However, many have come to the realization that true development takes into account not only the quantity, but the quality of economic growth, and how that growth is distributed. These people recognize that real development puts people at the center. Economic growth is not an end in itself, but rather a means. The final end of any type of structure, organization, or policy, must be the well-being of individual human beings. Losing sight of people in development planning is missing the forest for the trees.

True development is human development, and this places people at the center of planning and implementation. The late Mahbub ul Haq, was the brilliant pioneer of the human development school of thought. In his book "Reflections on Human Development," he has this to say: "The objective of development is to create an enabling environment for people to enjoy long, healthy, and creative lives."[9] In other words, the real goal of development is increasing the choices people have to improve their lives. It is not just about giving the poor a richer country to live in, but rather to ensure the health, education, and employment that provide legitimate choices—real freedom—to those who are now subject to the suffering involved in living in underdeveloped countries.

Despite our recognition of this common goal, perhaps the biggest mistake made by development decision-makers, even the most well-meaning, is to make plans and carry them out without ever consulting the people that will be affected by those decisions. Again, to quote Mahbub ul Haq, "It is ironic to declare human beings the ultimate objective of economic planning and then to deny them full participation in planning for themselves."[10]

The insightful comments in this book remind decision-makers not to lose sight of the forest for the trees. We must not get so caught up in debates about theories and models of development that we forget to ask peoples how such plans are going to affect their families and their livelihoods. Better yet, we must include communities in the formulation of the plans from the very beginning stages. Many state that development and the strengthening of democracy go hand in hand. I believe that effective and sustainable development and strong democracy can reinforce each other. However, this will only happen if the development itself is carried out in a democratic fashion. Ineffective plans made by indifferent bureaucracies will do nothing to strengthen people's faith in democratic government, or to improve the quality of their lives.

Keeping in mind the importance of community participation and democratic process in development, it is essential to underscore one particular theme, and that is the active participation of women in these processes.[11] It is not a coincidence that the countries with the highest levels of human development are also closest to offering equal opportunity and gender equity in their societies. Perhaps no society has yet reached the fullness of equality that most of us hold as an ideal, because though we speak about the

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[8] UNDP, *supra* note 2.
[9] Mahbub ul Haq, *Reflections on Human Development* (Oxford: Oxford University Press, 1995)
[10] *Ibid.*
[11] *The Arias Foundation's Center for Human Progress is working to change this state of affairs in Central America. The Center has several projects, which are aimed at studying rural women's access to such resources as land, training, work, and credit, and to advocate for women's rights to these resources where they are being denied. The Center also works with development organizations to incorporate a gender focus in development projects and to try to ensure that women hold some of the decision-making power in these projects. Available online:http://www.arias.or.cr*

importance of equal opportunities for women and men, we continue to commit the same errors: we exclude women from positions of power, give them no voice in community decisions, and cling to stereotypes and prejudices so deeply ingrained in us that we do not even realize we have them. In many parts of the world, education is still a boys-only affair.

We will never succeed in advancing the health, education, and livelihoods of our poorest communities, if we exclude half of the community from the process. In fact, even more than half of the picture would be missing. There is a saying that if you educate a man, you educate a man, but if you educate a woman, you educate a family. It is time for all policies, but perhaps development policy in particular, to take into account the role of women and families.

A sustainable development agenda does require resources. But we have many choices in terms of where we find these resources, and what we do with the resources we have. Aside from the fact that the global military forces are the largest polluters on earth, there is an inextricable link between military spending and poverty. The world too often neglects to consider this link.

Much as development needs to be seen as human development, security needs to be seen as human security. Sadly, most people still equate security with armed guards and military strength, and the idea of "national security" is used to justify spending huge amounts of money on unnecessary weapons systems, in the developed and developing worlds alike. A change in perspective is sorely needed. Human security goes far beyond a concern with weapons and fortifications – it is a concern with human life and well-being. It is the notion that all people are entitled to live in countries where not only the borders are secure, but their health and livelihoods are secure as well. Human security takes note of the fact that half of the population in some countries lives in slums, while members of the military ride air-conditioned jeeps in parades that are offensive to human dignity. If we truly worked for the security of human lives, we would not need to worry about the security of borders.

Governments should begin to reduce their military spending and divert the money saved into health care and education, in order to increase human development, and therefore human security. Elevated levels of military spending are the best way to perpetuate poverty in the developing world. Poverty not only engenders violence, but poverty *is* violence. In a world where resources are abundant but poorly distributed, poverty should not exist.

Yet the leaders of some of the world's poorest countries, those entrusted with and most responsible for the well-being of the poor, are committing an unspeakable crime by making the size of their militaries a higher priority than the well-being of their people. The United Nations Human Development Program reports each country's military expenditure as a percentage of its gross domestic product, in order to give a picture of the relative priority of military spending in its economy. The same is done for education and health care. These numbers are extremely telling, in terms of the connection between military spending and human development, or the lack thereof. The twenty countries with the highest human development indices spend an average of 3.5 times more on education than on their militaries, and four times more on health than on their

militaries.[12] The results are evident; these are the countries with the highest life expectancies, literacy rates, and GDP per capita.

Many Latin American and Caribbean governments are still spending too little on health and education and too much on weapons and soldiers. The governments of poor countries must be held accountable for making human development a high priority, and not draining resources from it in order to increase military power. At the same time, it is incumbent upon the developed world to examine its own policies in this area. The world is too small, and its history too complex, for any of today's wealthy countries to claim no responsibility for the poor outside its borders. We all have ethical responsibilities towards our fellow human beings, and ethically, the industrialized countries have a very poor record when it comes to selling arms to countries too impoverished to afford them and to governments too likely to use them for repression and abuse of human rights.[13]

In the Americas today, it is worthwhile to speak of ideals. As leaders and citizens of countries who speak different languages, eat different foods, profit from different types of businesses, and experience different climates, what unites the Western Hemisphere if it is not common ideals?

This book debates how to turn our ideals into realities. Among its pages, you may find views that are very far apart indeed, yet I would ask that the reader keep in view that which is held in common, and value the work which proceeds towards harmonizing the different ways of getting there. Though we may find ourselves miles apart, we should recall that a journey of a thousand miles begins with a single step. We must take that step, in courage and in faith, with the hope that we will be met by a corresponding step on the other side.

As you read this book, whether you are scholars, decision-makers, professionals or interested citizens, please keep in mind the type of world we are all striving to create. We seek a world with more solidarity and less individualism, more honesty and less hypocrisy, more transparency and less corruption, more faith and less cynicism, more compassion and less selfishness. In short, a world with more love. My fellow Nobel Laureate Elie Wiesel once said that the opposite of love is not hate, it is indifference.[14] By our concern for this hemisphere, and the work we continue to do to eliminate poverty and stimulate economic growth, to halt environmental degradation and promote responsible use of resources, I know that many have not given in to the danger of indifference. I beg all who read this book never to give into indifference, and I invite you to renew your commitment to using your work to improve the quality of life on this planet.

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[12] UNDP, *supra* note 2.

[13] In 1998 the industrialized countries of the world sold 65% of their conventional weapons to developing countries. Ironically, eighty percent of all conventional weapons were sold by the five permanent members of the U.N. Security Council. If these countries are to legitimately claim that they are active on behalf of the security of the world, then they need to change their definition of security. Selling arms does not produce security, it produces greater violence and greater fear, while robbing resources from the hungry, the sick, the uneducated, and the unemployed. By pushing investment in military security rather than in human security, the great democracies and economies are collectively doling out a slap in the face to the world's poor, and enriching themselves in the process.

[14] Elie Wiesel quoted in U.S. News and World Report (New York, Oct. 27, 1986).

Introduction

Governments of the Western Hemisphere plan to conclude a Free Trade Area of the Americas (FTAA) agreement by January 2005. This FTAA will be the world's largest trade grouping, with over 800 million people and nearly a third of world's economic output.

The present initiative for closer cooperation in the Americas was crystallized at the Miami Summit of the Americas in 1994. Along with democracy, trade liberalisation and sustainable development were adopted as the main thrust of hemispheric integration, as reflected in the first headline of the Miami Declaration of principles: *Partnership for Development and Prosperity: Democracy, Free Trade and Sustainable Development in the Americas*. Parallel processes were established to implement trade liberalisation and sustainable development. The first one set the above-noted goal to create a FTAA by 2005 for which negotiations formally began in 1998 at the Santiago Summit of the Americas. A second initiative was to hold a hemispheric Summit on sustainable development in Bolivia in 1996 to follow up on the 1992 UN Conference on Environment and Development in Rio de Janeiro. This established a blueprint for sustainable development in the Americas.

Launched on two parallel tracks in 1994, the sustainable development and trade liberalisation processes did not really come together again in the following years, creating a fundamental disconnect between environmental, social and trade policy in the hemisphere.

The time has come to build a synergetic relationship between these two pillars of hemispheric integration. Hemispheric Summits are key mechanisms to integrate trade, social and environmental policy into a coherent system. By developing such an integrated approach, the Summit of the Americas process could eventually break the *Seattle syndrome*, which seems to have plagued all recent discussions on these issues.

At the Third Summit of the Americas in Quebec City, Canada from the 20-22 April, 2001, heads of state from 34 North, Central, and South American and Caribbean countries reaffirmed their political commitment to strengthening hemispheric relations in a number of areas, including environment, development and democracy.

Beyond the barricades of Quebec City and other trade decision making forums, a new constructive agenda is being debated and developed on trade and sustainability in the Americas. This book reflects the diversity of perspectives, and the richness of expertise on environment and development in the Western Hemisphere. The first chapter lays a foundation for the debate, by teasing out some of the threads in a hemispheric trade and sustainability agenda, and weaving them together. The second chapter offers diverse perspectives, and lessons learned, on integration and sustainable development from four sub-regions of the Americas. These views draw on practical, concrete examples of key issues, and provide the tone of the debates.

Two procedural issues are extremely important for a trade and sustainability agenda in the Americas: how to ensure the highest level of civil society participation possible in the debates and how to finance such an agenda. The third chapter of the book, on civil society participation, presents recommendations based on experiences at domestic, hemispheric and sub-regional levels, and also expresses NGO concerns with the FTAA

negotiations. The fourth chapter addresses issues of financing and investment focussing on how to finance sustainable development in the Americas, and how new investment law and policy in the Americas can support sustainable development.

Certain thematic agenda items are then addressed, regarding possibilities for increased hemispheric cooperation and specific links between trade and sustainable development debates. The fifth chapter raises sustainability related questions regarding agricultural policy, trade in genetically modified organisms, consumer protection and biosafety, and suggests elements of regional cooperation on these issues. The sixth chapter, on hemispheric policy related to intellectual property rights (IPR) and biodiversity, addresses the potential for intellectual property rights systems to protect indigenous knowledge, and cultural and biological diversity, and provides a case study, from Costa Rica, on how IPR laws can be used to protect biodiversity. The seventh chapter, on sustainable water management in the Americas, draws on experiences from Colombia and Trinidad and Tobago to lay out ideas for a future cooperation agenda. The eighth chapter, on mining and stakeholder participation, covers environmental, and social issues related to more sustainable mining and minerals development in the Americas and presents experiences from Chile with impact assessment, as well as the experiences of a company, Placer Dome, which operates in the region. The ninth chapter, on climate change policy in the Americas, explains the importance of resolving this major global challenge from the perspective of Antigua and Barbuda, a small Caribbean island, and gives examples of solutions being developed in Argentina and Brazil for implementation of the Kyoto Protocol.

Although it would be impossible to bring together all these diverse perspectives and contributions in one unified recommendation, a concluding chapter develops ideas for certain concrete next steps in a hemispheric trade and sustainability agenda for the Americas. It makes recommendations for an environmental cooperation mechanism for the Americas, as well as raising questions regarding a strengthened social development cooperation agenda, and brings forward proposals for a more socially and environmentally sustainable FTAA. This chapter requests the creation of a permanent Americas Trade and Sustainable Development Forum to continue these debates, and ensure that the policy recommendations developed in these valuable exchanges can reach the ears of policy-makers on all levels of our new Americas community.

1. A Hemispheric Trade and Sustainability Agenda?

By Marie-Claire Cordonier Segger[15]

"Our goal is to achieve sustainable development throughout the Hemisphere."
- Third Summit of the Americas Declaration, Quebec City, April 22, 2001.

This book is premised on the belief that it is possible to address environmental considerations and social progress in the context of trade liberalization. Economic integration, coupled with effective social and environmental laws, policies and management systems, can have a positive impact on ecosystems and societies. Integration is about solidarity, and cooperation. Greater cooperation can help to allocate resources more efficiently and conserve shared ecological systems, promote economic growth, and increase quality of life.

In short, trade liberalization, environmental protection and social development can, and should be, mutually supportive. If this 'mutual support' can be achieved, it can significantly improve the prospects for greater sustainability in the Americas. Such sustainability is desperately needed. The Western Hemisphere is still the region of the greatest inequity in the world, natural resources are being needlessly squandered, and contamination continues to undermine the very foundations of the region's communities and ecosystems. At the Quebec City 2001 Summit of the Americas, Owen Arthur, Prime Minister of Barbados, recognised that poverty had undermined his people's confidence in the future. "They tend to see the dark side of globalisation and trade liberalisation," he said. "They dread the coming of a 'new world' dominated by an impersonal technology and an even more impersonal market."[16] Mexican President Vicente Fox said that unless poverty and inequality were reduced, democracy could not be strengthened. Echoing Fox's statement, US President George W. Bush stated that trade liberalisation was the "best weapon against tyranny and poverty."[17]

This book argues that innovative, constructive new law and policy options can be identified, to influence the investments and other actions of governments and other actors participating in the Summits of the Americas. These options are needed to build new institutions, and shape the work of existing ones over the next decades, as the countries of this region draw closer together and seek to ensure that their joint economic programme is socially and environmentally sustainable.

Global debates have recognized and reinforced the importance of such policies. The 2001 WTO Doha Declaration gave forceful expression to the importance of mutually supportive policies. Governments stated their conviction that "…the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development

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[15] Marie-Claire Cordonier Segger is Director of the Centre for International Sustainable Development Law, and Manager of the IISD / UNEP Americas Portfolio. She has authored several books on sustainable development law and policy in the Americas.
[16] ICTSD, "Hemispheric Leaders Agree to Americas Free Trade by 2005" (2001) 5:15 Bridges Weekly Trade News Digest.
[17] *Ibid.*

can and must be mutually supportive."[18] The UN Conference on Environment and Development in Rio de Janeiro in 1992 and the 2002 World Summit on Sustainable Development (WSSD) in Johannesburg also highlighted this linkage. Specifically, in the WSSD Plan of Implementation, leaders from over 140 countries agreed to "continue to enhance the mutual supportiveness of trade, environment and development with a view to achieving sustainable development..."[19] They also emphasized the need to facilitate the implementation of Agenda 21 and the outcomes of the Summit "through the regional commissions and other regional and sub-regional institutions and bodies."[20]

On a hemispheric level, governments have committed to take into account, in the FTAA context, "the broad social and economic agenda contained in the Miami, Santiago and Quebec City Declarations and Plans of Action with a view to contributing to raising living standards, increasing employment, improving the working conditions of all people in the Americas, improving the levels of health and education and better protecting the environment."[21] Indeed, in the Miami Summit of the Americas, leaders acknowledged in their Declaration of Principles that "social progress and economic prosperity can be sustained only if our people live in a healthy environment and our ecosystems and natural resources are managed carefully and responsibly."[22]

At their Seventh Meeting in Quito, Ecuador, on November 1st, 2002, Ministers of Trade of the Hemisphere reiterated that one of their general objectives "is to strive to make trade liberalization and environmental policies in the Americas mutually supportive, taking into account work undertaken by the World Trade Organization and other international organizations, and to promote sustainable development in the Hemisphere."[23] They also recognized "the importance of strengthening throughout the Hemisphere, national actions and cooperation in order to ensure that the benefits of trade liberalization, the protection of the environment, and human health are mutually supportive."[24]

In Montreal, right before the 2001 Quebec City Summit of the Americas, environment Ministers from across the western hemisphere met for the first time. They declared their intention to "maximize the potential for mutually supportive policies regarding economic integration and environmental protection."[25]

The commitments to sustainable development in the Americas have become gradually stronger, at least in the Declarations that give policy guidance to the hemispheric process.

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[18] Ministerial Declaration, WTO Fourth Ministerial Conference, Doha, Qatar, November 14, 2001, at para 6.
[19] Plan of Implementation of the World Summit on Sustainable Development, World Summit on Sustainable Development, Johannesburg, South Africa, August 26-September 4, 2002, at para 97.
[20] *Ibid.* at para 158.
[21] Ministerial Declaration of Quito, Seventh Meeting of Ministers of Trade of the Hemisphere, Quito, Ecuador, November 1, 2002, at para 2.
[22] Declaration of Principles, First Summit of the Americas, Miami, Florida, December 9-11, 1994, at para 20.
[23] Ministerial Declaration of Quito, *supra* note 23, at para 7.
[24] *Ibid.,* at para 8.
[25] They also declared that "[s]trengthening environmental management systems in our countries starting with improved knowledge, appropriate tools and incentives and better partnerships, is of the utmost importance." They stated their intention "to work, in particular, to ensure that the process of economic integration supports our ability to adopt and maintain environmental policy measures to achieve high levels of environmental protection." See Ministerial Communiqué, First Meeting of Ministers of Environment of the Americas, Montreal, Canada, March 29-30, 2001.

The Quebec City Declaration stated clearly: "Our goal is to achieve sustainable development throughout the Hemisphere."

The Declaration recognised both environmental and social elements of the integration process. Governments "acknowledge[d] the challenge of environmental management in the Hemisphere," and committed "to strengthen environmental protection and sustainable use of natural resources with a view to ensuring a balance among economic development, social development and the protection of the environment, as these are interdependent and mutually reinforcing." They also committed to "promote compliance with internationally recognized core labor standards as embodied in the International Labor Organization (ILO) Declaration on Fundamental Principles and Rights at Work and its Follow-up adopted in 1998" and to advance their "commitment to create greater employment opportunities, improve the skills of workers and improve working conditions throughout the Hemisphere…" They recognized that "[d]emocracy and economic and social development are interdependent and mutually reinforcing as fundamental conditions to combat poverty and inequality" and they committed to "spare no effort to free our fellow citizens from the dehumanizing conditions of extreme poverty."[26]

But are all these commitments only good words? Or will they be backed by deeds - coordinated, cooperative hemispheric action? And what will be the role of all these diverse, chaotic actors, in this integration process?

The Quebec City Plan of Action confirms several significant environmental, labour and anti-poverty targets and initiatives in the hemispheric context. But it is clear that renewed efforts will have to be made to meet the hemispheric commitment to "international development goals, especially the reduction by 50% by the year 2015 of the proportion of people living in extreme poverty."[27] Likewise, emerging processes such as the Health and Environment Ministers of the Americas, are useful in their own rights. However, as recognized recently by the Government of Canada in the FTAA Trade Negotiations Committee "they do not represent in themselves a comprehensive response to the environmental goals FTAA participants have set for themselves in the FTAA context. Other options will need to be explored in order to translate the commitment for mutually supportive trade and environment policies into reality."[28]

Where are these new policy options going to come from? Some will be generated by government experts.[29] Others must come from civil society, including academic experts, business leaders and non-governmental organizations (NGOs). But it seems that a zero-sum relationship has gradually developed between a growing part of civil society and trade and economic international forums and processes since the Seattle events. Can this be changed? What is the role for civil society in the integration process?

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[26] Third Summit of the Americas Declaration, Quebec City, April 22, 2001.
[27] *Ibid.*
[28] Canadian Statement to the FTAA TNC, July 2003.
[29] See, e.g. L. Togiero de Almeida, ed. 2001, *Trade and Environment: A Positive Agenda for Sustainable Development*, Preliminary Document for the XIII Meeting with the Latin American and Caribbean Environment Ministers (Brasilia: Brazilian Ministry of Environment, Secretariat of Policies for Sustainable Development, 2001).

In Quebec City, heads of state from all 34 countries stated that they "welcome and value the contributions of civil society…" They affirmed that "openness and transparency are vital to building public awareness and legitimacy…" and called upon "all citizens of the Americas to contribute to the Summit process."[30]

This invitation was reiterated in Buenos Aires, where trade ministers reaffirmed their "commitment to the principle of transparency in the FTAA process and recognize[d] the need for increasing participation of the different sectors of civil society in the hemispheric initiative."[31] They stated that they were "grateful for the contributions made by civil society in this stage of the negotiations of the FTAA" and urged "civil society to continue to make its contributions in a constructive manner on trade-related issues of relevance to the FTAA."[32]

In Quito, they also went further, recognizing the need to "enhance and sustain participation of the different sectors of civil society in the hemispheric initiative."[33] They also recognized specific contributions of civil society in meetings associated with the hemispheric process, and instructed the FTAA Committee of Government Representatives for the Participation of Civil Society to foster a process of increasing and sustained communication with civil society, giving it specific tools to undertake renewed efforts in this area.

This book argues that the Summit of the Americas process presents a unique regional forum to break the *Seattle Syndrome* and recommends that trade, social, and environmental policy be integrated into a coherent and integrated strategy, with full participation of civil society.

Public support for trade liberalisation, particularly in the United States, has been hanging in the balance since the Seattle events. By addressing trade and sustainability issues, and opening meaningful channels for civil society participation, the FTAA could start delivering its fruits to more than 800 million citizens.

This social and environmental *early-harvest* has the potential to end the zero-sum relationship which is gradually developing between a growing part of civil society and trade and economic international forums and processes.

One deed has already made a significant impact on the hemispheric debates. At the Buenos Aires trade ministerial, in an unprecedented move, Ministers released the draft text of the FTAA, revealing the direction of the negotiations and opening the debate to civil society commentary and advice. And in Quito, Ministers released the second draft of the FTAA text, permitting comparative analysis, which might demonstrate areas where progress had been made and generate further recommendations. This momentum should not be lost.

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[30] Third Summit of the Americas Declaration, Quebec City, *supra* note 28.
[31] Ministerial Declaration of Buenos Aires, Sixth Meeting of Ministers of Trade of the Hemisphere, Buenos Aires, Argentina April 7, 2001, para. 24.
[32] *Ibid.*
[33] Ministerial Declaration of Quito, *supra* note 23. , at paras 29 - 35.

The Quebec City Symposium sent a clear signal that the time has come to move beyond zero-sum thinking in trade and environment policy, by announcing the intention of the countries of the Americas to address these questions through cooperation channels rather than through sanctions or protectionism. By heeding these signals, the Americas Summit process would do much to improve economic, social and environmental policy in the years ahead.

This book calls countries of the hemisphere to address the sustainability issues that are related to the FTAA by making a strong commitment toward the implementation of an integrated strategy in the field of trade and environment – a hemispheric trade and sustainability agenda.

The strategy rests on three pillars:

First, it is necessary to build an environmentally and socially sound FTAA. This can be done through the incorporation of specific environmental and social development provisions in the text of the Agreement.

Second, it is necessary to strengthen environmental cooperation in the Americas and social cooperation to meet inter-American human rights commitment, especially in trade-sensitive or trade-related sectors. This can be done by setting binding commitments in these areas, and institutions, with maximum possible civil society involvement, to ensure these commitments are implemented.

Third, it is necessary to open a solid forum for hemispheric dialogues with experts, academics and other civil society representatives, through participatory mechanisms that provide support for informed, constructive input.

These proposals do not need to stay at the level of an abstract strategy. New policies and instruments are needed, and new proposals are vital, and indeed, should be very welcome. A new hemispheric trade and sustainability agenda is required, one that seeks to identify and develop constructive policy options that can benefit trade liberalisation, social development, and the protection of the environment. Such an agenda must focus on key areas for hemispheric sustainable development policy action, proposing ways and means to strengthen existing hemispheric institutions or create new ones. It will propose the use of new instruments, such as sustainability impact assessments on national, sub-regional or hemispheric levels, which could aid in this process. The new agenda will consider the potential for a hemispheric environmental cooperation mechanism, to design and implement a new strategy on these issues in the Americas,[34] and make proposals for further cooperation.

Above all, it is clear that one step is needed right away: to develop and sustain interest in a constructive hemispheric trade and sustainability agenda, a bridging mechanism needs

[34] It suggests that special attention can be given to the lessons learned, and key future roles of sub-regional institutions such as the North American Commission for Environmental Cooperation, the Central American Environment and Development Commission, the Andean Committee of Environmental Authorities and the Mercosur Framework Environmental Agreement, as well as models in the Canada – Chile Environmental Side Agreement, the Canada – Costa Rica Environmental Side Agreement and the US – Chile Environmental Side Agreement.

to be created. This mechanism must move beyond *ad hoc* meetings parallel to Summits or Ministerials, and *one-off* consultations. It must provide an inclusive forum for real dialogue between the trade, social and environmental communities, with links to governments, civil society experts and relevant intergovernmental agencies.[35] And it must conduct the innovative policy research, analysis and capacity building that is vitally necessary in the Western Hemisphere on these issues - building hemispheric networks of inquiry and knowledge, and finally real communities of practice, on sustainable development in the Americas.

[35] Examples include the Organization of American States, the Inter-American Development Bank and the Economic Commission for Latin America and the Caribbean, United Nations Environment Programme regional offices for Latin America and the Caribbean and North America, the International Labour Organisation Americas Office, the FTAA Trade Negotiations Committee and various environmental cooperation processes in the Americas such as the HEMA.

3. A Diverse Americas Sustainable Development Agenda

3.1 Trade and Environment: A Historic Challenge Toward Sustainable Development

By Luis A. Niño G[36]

Sustainable development is not an end in itself, but rather a process. Quick and simple solutions do not exist, either for the concept of sustainability, or for political implementation options. Many challenges remain.

Why is the concept of sustainable development and its linkage to trade so important for the Americas today? Elements of human aspiration for a better future include prosperity, social wellbeing and a healthy environment. The path to reach these goals can be traced through our discussions and policies as these are transformed into human aspirations.

We live in an era of great change: from unprecedented globalization to unprecedented access to information. Democracy and political freedoms have flourished on all continents, including in countries where these did not exist before. Economic freedom continues to take root and economies are increasingly cemented in the strength of the global market. International capital flows and foreign investment from developing countries have rapidly multiplied, making international assistance for development seem relatively insignificant. The number of civil society groups participating in public activity has steadily increased. Simultaneously, our generation has produced the greatest biological and chemical changes to the planet in the history of humanity. The atmosphere is changing and the greenhouse effect has increased, the forests are being destroyed, species, oceans and lands are in danger, while every year millions of tons of toxic substances are released into the atmosphere. Solutions to these problems will only be possible when the interaction of the forces that created them is understood and revealed.

If these changes create uncertainty and problems for our future, they also represent a great opportunity for us, a great challenge. If we rise to the challenge of this change, and recognise learn to address and manage the overlap and combination of economic, environmental and social problems, we will be capable of creating a better life for our children and ourselves.

The linkage, that is, the relationship between trade and sustainable development, is perhaps the most complex and difficult policy intersections in current international economic relations. It is one of the greatest new challenges confronting the international community today. This is not a common daily theme, but still one we have to face for

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other policies to become coherent. For many years, and due to a type of ignorance, this issue has been put on the sidelines, although it forms an integral part of the development of national and foreign policy.

Several factors are involved in the decision making process of establishing the foreign policy and international position of a country. In the case of the relationship between international trade and the environment, this process can be quite complex. There is no one common theme, nor is there a set of inter-related themes. Rather, various dimensions of the relationship transcend natural boundaries of issues and fields of policy. Consequently, the problems are even more difficult to diagnose, and corresponding courses of action even more challenging to identify. Linkages take place in both directions - from trade to the environment (as in the case of multilateral environmental accords that use trade measures to achieve their purposes) and from environment back to trade (as in the case of trade rules which are found to encourage increased impacts on the environment).

This is a most complex issue, and it will continue to have relevance in international forums for the next years. Its relevance is supported by the fact that, within the framework of discussion of the Free Trade Area of the Americas, this issue has been discussed with great caution, and the creation of mechanisms that can resolve it has been avoided.

The relationship between trade and environment concerns both developing countries and developed countries in general, and in particular, those of the Americas. The direction that action can take, leading to unilateralism rather than multilateral solution-seeking, causes concern in many countries. These concerns are justified and their motives are simple: the enormous quantity of natural and financial resources that are at play. Entire economies depend on the clear understanding of this necessary connection. To a lesser extent, the need to maintain a dynamic relationship between trade and environment has always existed, essentially so that international trade would not negatively affect health and the environment. Within the spectrum of trade and the environment, this concern has been tempered by the use of universal rather than distinct principles or mechanisms. Such principles can prevent disputes and the negative impacts that can otherwise occur from gains in growth resulting from increased international trade of goods.

Concerns have been manifested in a unilateral, not multilateral way. Each time, to a major or minor degree, countries have established their own parameters for the relationship between trade and environment. Each society faces distinct local, national and even regional conditions, and their view on the trade and environment link depends, to a certain extent, on the progress they have achieved in addressing inter-related environmental and social factors, and also their level of economic growth and international trade. Due to these differences, each country has different values that guide their conduct in the international scene. When these values differ, results can be paradoxical**:** in some cases, countries negotiate with other countries, in others unilateral solutions impose the values of one upon others.

In the formal institutional multilateral sphere, we can affirm without a doubt, few compromises have been developed between differing views on trade and environment, although the issues were debated for some time in the GATT, and continue to be debated today in the WTO. Indeed, a working group on Environmental Measures and International Trade was created in 1971, with the responsibility of producing a document that GATT would be taken to the United Nations Conference on the Human Environment held in 1972 (the predecessor of the United Nations Conference on the Environment and Development, the Earth Summit, the Rio Conference of 1992). However, it was not this group, but rather the very secretariat of the GATT that ultimately produced the document, entitled "Industrial Pollution Control and International Trade"[37]. In the 1990 Ministerial Conference in Brussels, interest from developing countries was awakened and they attempted to call upon this group and solicit a response from OECD countries that had held joint meetings between Trade and Environment Ministers. This was due to interest that had fuelled the preparation of the United Nations Conference on Environment and Development in Rio, in 1992. This time an attempt was made to find a solution.

But what repercussions did the Rio Conference have?

It can be said, very little, since the focus of negotiations in the relevant working groups were basically trade-oriented. A very broad mandate was developed to link environment and development. For this reason, many concepts were connected and a principle came to be defined, the 12th principle of the Rio Declaration on Environment and Development that signals: "Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade." Furthermore, trade and environmental policies were held to be "mutually supportive".

The successful performance of the environment and economy depends on how they are governed. This also presents an opportunity to improve efficiency. In the last decades, for example, the quality of environmental components has been transformed into a factor of major importance in competitive terms for industries. Some of the best companies set out to produce products of optimal and environmentally friendly quality as a goal. The most sceptical believed that this was not a practical goal since it implied excessive costs. However, the opposite was held true. The majority of companies that have adopted this goal of high environmental quality have not only improved their products and level of client satisfaction, but have also reduced their costs, as has been demonstrated by various panellists through out this two day seminar. The same has happened with waste. Industries produce waste that contaminates the air, water and soils and it is precisely this waste that results in an inefficient system. The goal of zero waste production can be an instrument of multiple uses that saves money and spurs efficiency and environmental progress. When industries take the initiative to address environmental problems, the results are more efficient. Prevention is less costly than clean-up, efficiency is better than imposed controls, and flexibility is more effective than mandated obligations. For example, cleaning up water and land from toxic waste produced during the last 50 years cost the United States 500,000 million dollars. Prevention of this

[37] (Doc.L/3538).

pollution through practical methods to reduce production of waste or through reduced use of toxic substances, would have cost merely 10% of this amount.

There are also political considerations in this area. If large and medium businesses don't act voluntarily to take their own steps to control pollution, the moment will come when the public demands that the government intervene in a drastic and strict way. This could give way to regulations that are neither efficient nor convenient for the private sector. For this reason, private business should take the initiative, acting voluntarily and maintaining a dialogue with the government on the most appropriate ways to control pollution and the environment.

However, there is another important element that comes into play, both nationally and internationally. This is none other than the ever-increasing public awareness of environmental issues, which has come to be considered a new dimension in the international treatment of the diverse themes aired in international relations. A new attitude is reflected in political standpoints, especially in societies of developed countries, through different mechanisms such as the diverse pressure groups (civil society, NGOs, political parties). To this extent, the decision making process of a significant proportion of developing countries is influenced by this growing public conscience more so than in developed countries. This participation solidifies the position of those countries in international fora and is an extremely important factor that must taken into account and analyzed in detail. The intersectoral aspects which have been the agenda of this symposium have deepened and recommendations have emanated for the Third Summit of the Americas.

On the other hand, the interaction between environment and development has been legitimized. This is possibly the greatest product of the 1992 Rio Earth Summit. After almost nine years of discussion, through both major or minor steps, all themes related to environment and development have been linked, allowing for the introduction and the discovery of a new concept, with a new development schema: Sustainable Development. This framework was further developed in the relevant chapters of the World Summit for Sustainable Development 2002 Johannesburg Plan of Implementation.

The expression of this commitment is reflected in the concrete statements that the international community has declared by consensus with respect to environment and development themes. Principles have been established and in establishing these principles, norms have been generated. These do not have a binding nature from the legal standpoint, that is, they are not legally binding for states. However, they do have a very important moral quality, and this is what will permit different development strategies, based on distinct values, to be transformed and guided by a distinct and unique concept. The FTAA represents a great opportunity in this respect.

The relationship between international trade and the environment is going through a process of legitimization - there are no principles, rather, there are hints of principles, inklings of the concessions and compromises. It is a process that is just beginning, a process in which each one of us has a sense of responsibility for past generations (who showed us the way) and for future generations (to whom we leave our legacy).

In this analysis, various approaches can be distinguished from the theme as taken from a unilateral standpoint. If an analysis were conducted of the manner in which a developed country addresses the relationship between environment and development, we would realize that various views and policies exist:

- The first of these is the strictly environmental vision (through which a state incorporates standards to preserve the local and national environment into its trade legislation, and their restrictions on trade are purely secondary or incidental effects).
- The second is the international extension of the first - that is to say, the extraterritorial application of these norms that can affect trade as a consequence of their enforcement.
- The third is no longer an environmental, but rather a more commercial strategy (in this case, trade concerns dominate environmental policies when these come into conflict, but the environment is still used as a pretext to establish restrictions on international trade)
- We could add a fourth, where commercial criteria have precedence and are upheld over all environmental criteria.

Determining what criteria we are facing in a given situation is complicated, because it is difficult to specify if unilateral norms are being applied for commercial or environmental reasons. One can hypothesize, but it is difficult to demonstrate what the reasons behind these norms are and thus, if it is an environmental or commercial enforcement measure. However, in all cases, one of the two will be pre-eminent when a country decides to adopt a position that affects its international or bilateral trade. There is an additional problem that affects the application of supposed environmental restrictions even more and that is that there is a benefit from a kind of automatic acceptance in public opinion that is very difficult to ignore. This situation is stimulating the imposition of unilateral measures on the basis of any of the previously defined criteria. Without a doubt, this fact has constituted a good platform for the imposition of unilateral criteria or norms.

The first reaction of a developing country is to reject the imposition of unilaterally established criteria or norms, as precisely these norms have not been discussed nor universally approved in any international fora. And it is not only difficult but unacceptable that such norms be established on the basis of a supposed environmental concern. This has been creating a much more elaborate trade protection model than we have been accustomed to, in the past. All this generates a very complex situation thatwe have very little chance of overcoming unless a solid capacity for a national response exists or unless it surfaces through a multilateral route. If the case allows, it can be taken to an international forum such as the WTO. There, it may be proven that supposedly environmental criteria are in reality tied to trade, to a new model, a new very sophisticated system of international trade restrictions. Otherwise, such a situation is extremely difficult to prove.

If this is the case, then, a type of international pseudo-anarchy exists which must be transformed. From this the international community must discuss and then profoundly and extensively analyze what principles ought to govern the relationship between trade

and environment. That is, what norms ought to be internationally applied? If this is not undertaken, there will be a highly contradictory process at the international level and an aggravation of international conflicts (blocks, situations that can endanger regional and even international security) producing a new focus on security - environmental safety?[38]

The lack of agreement on universally accepted and applied norms as well as the popularization of unilateral environmental measures – either well-grounded or not, or even pseudo environmental, places the establishment of the objective of a post-ideological society in danger. This is from the post cold war society and it is another level that sustainable development might reach. This is the main objective that reorients the basic approach of establishing a better balance among international economic relations and which has been one of the United Nations' objectives for the past fifty years along with the maintenance of peace and international security. That is to say, the attempt to raise the levels of development of the enormous majority of the member countries resolved through the establishment of new models of production and consumption, a new lifestyle - sustainable development.

The establishment of voluntary norms that countries can apply or not according to their legislation should be added, at least theoretically, to this complex and elusive scenario. However, when this romanticism is taken to practice, we face another reality. Such is the case of norms produced from the reflections of a scarce number of countries in a private organization, which qualifies more as a club, namely, the International Standards Organization (ISO). We are all familiar with the ISO 9000 norms, but are we familiar with the scope of the new norms for environmental management - the ISO 14,000? In the interests of good economic performance of businesses and the maintenance of external trade relations I hope this will not be the current case. We are facing other consequences - if we do not adapt our business, even if it is to maintain competitiveness in international trade, we will be excluded from the markets. These norms have been classified by international experts as excessive, as they not only regulate the final product but the methods and processes of production of the product.

It is precisely through dialogue within the framework of the Summit of the Americas, and particularly the FTAA process, that these foundations should be created. These solid foundations are what the hemisphere needs. A new negotiating group or committee in charge of trade and environment is needed urgently. Furthermore, this new mechanism ought to be the common denominator for the current themes of discussion. The Americas ought to be a good example. We have common platforms, a common interest, but without clear and defined political will it will be impossible to fully reach the 2005 goal with all the work accomplished. It will be too late when we realize the error committed and the negotiations process will be delayed further. And if we do go ahead, may we do so with a great sense of responsibility – with the responsibility that characterizes the people of the Americas.

[38] The concept of food security has been analyzed by authors such as Thomas Homer-Dixon, Jessica T. Matthews, Arthur Westing, Richard Ullman, Marvin Soroos, Paul Stares, Maddock Rowland, Nana Poku, David Graham, Norman Myers, James Davis, M. Jane Davis, Sverre Lodgaard, Donald Kennedy, Terry Terriff, W. Harriet Crichley, Luis A. Niño G. y Eric Damenmeir.

We are facing a new challenge and a new goal that we must confront with firmness and pursue with clarity, and a lucid view of the future scenario. The relationship between trade and environment is an historical challenge towards sustainable development. There is a need to unite our best efforts, for I am still convinced that together we can succeed. After all, there is only one planet, and the future of humanity is at stake.

3.2 A View from Argentina

By Carlos M. González Guerrico.[39]

For various reasons related to changing historical circumstances (political, social, and economic) undergone by Argentina in recent decades, the environment has not been a top priority, and is still not a priority today.

Argentina has created environmental policy bodies and has passed environmental legislation since the first international environmental conference in Stockholm in 1972, but has had different levels of success when it comes to implementation. It can be said that presently, the level of enforcement of environmental legislation is relatively low for a country with medium/high economic income and development.

Echoing from the Rio conference of 1992 and from constitutional reform in 1994, Argentina has incorporated environmental concerns into its constitutional rights and guarantees and has enshrined the concept of sustainable development in Article 41. It is this reform which establishes that the state dictates the "minimum budget" for environmental quality in the whole country, while the provinces reserve the authority to set their own norms, which can surpass, but never undercut, the "minimum budget." Up until now, the state has still not explicitly established these so-called "minimum budgets", even when regulation by the federal government of certain activities can be considered part of the requirements of the cited article 41.[40]

On other the hand, some provinces have advanced further in their environmental legislation, which creates a capacity problem, such that national, provincial and municipal legislation overlaps in a disorderly and even contradictory way. It can be said that the situation as it stands is a long way away from being an effective and adequate legal framework to encourage sustainable development in our country.

The Mercosur discussions (Argentina, Brazil, Paraguay and Uruguay), the heart of the integration agreement of the southern region, have not received much attention in dealing with the environmental issue. The strong trade disputes between the main members (Argentina and Brazil) have left practically all environmental issues aside. To such extent, many negotiations have finally been signed in Florianopolis, Brazil (13/03/01). The Framework Agreement on the Environment that was believed to hold

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[39] *Carlos M. González Guerrico is a member of the Enviornmental Studies Committee, Argentine Council for International Relations (CARI).*

[40] Constitution of the Argentine Nation;; M. Conte Grand y F. Iribarren, *Institutional Documents: Ecology and Sustainable Development.* (Buenos Aires: Novum Millenium Foundation, Institute of Environment, 2001).

major importance within the normative pyramid of the Treaty was negotiated as a Protocol to the Treaty of Asuncion, and was ultimately signed as an agreement. This agreement is a mere letter of intention, where the parties - pardon the redundancy - agree that they don't agree on anything concrete, except to make their best efforts to one day agree on something, since the terms don't exist yet. All of this translates into the lack of a common environmental policy.[41]

Faced with the speed at which the FTAA is advancing and fulfilling its objectives, it is recognized that it will be necessary to send a big player to the negotiating table to make the process dynamic. Due to substantial asymmetries, it is very different when developed countries like USA and Canada, which have a coherent environmental policy and legislation that is well enforced, demand similar measures of their future partners so as to not obstruct trade with tariff restrictions.

Despite everything, an improved attitude on the part of the Argentine state can be observed in partnering with the private sector - the sector that really works in pursuit of these principles, particularly through certain NGO's and companies.

There are also worthy examples among what is referred to as the 'third sector' or the social sector. The serious efforts of NGOs are achieving very positive results in our society, bringing about visionary change little by little.

The efforts of the Environment and Natural Resource Foundation (FARN), now in it's forth year, is developing programs in co-operation with many other institutions. This is how the annual Colloquiums have been developed from which important recommendations have emerged for authorities in countless areas related to trade and sustainable development of our country.[42] It is also important to note the Sustainable Buenos Aires Program, from which detailed working papers on air, noise and visual pollution, to name only a few, have resulted.

Other NGOs that bring their vision to the trade and sustainable development discussion undoubtedly exist. They are leading the charge in this area and are bringing about the changes that are being felt throughout the country.

On the business side, there is the Argentine Business Council for Sustainable Development (CEADS) a national organization that forms part of the WBCSD.[43] This business organization has representation drawn from major Argentine companies which, following global trends, are concerned to some degree about the sustainable development of our country, not only with respect to the environment, but also with a marked social interest. In this context, it is possible to note that in recent years, free public activities from the Nation's Ministry of Natural Resources and Sustainable

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41 Argentine Council for International Relations -CARI-, Work Documents N°: 47, Backgrounder on the FTAA, December 2000; Results of the workshop on "The concrete impediments for sustainable development", Buenos Aires, April 23-24, 1998, FUCEMA - IUCN- Los Algarrobos Civil Association.

42 FARN, Colloquims, Proposals for sustainable development public policies Coloquios, Propuestas de Políticas Públicas para el Desarrollo Sustentable

43 Argentine Business Council for Sustainable Development – CEADS – Ecoefficiency and Corporate Social Responsibility, 1999 and case studies, 2000.

Development in conjunction with the Argentine Industrial Union (UIA) and other organizations - including those from the third sector, have been successfully executed. These activities promote the advantages of clean production and rationed use of energy. Today, it is more evident than ever that fundamental change in social attitudes is going to be achieved through business.

Although it is at an embryonic stage, a key initiative in development on this front cannot go unmentioned: the Association of Businesses of the city of Buenos Aires for Sustainable Development. This project has arisen with the support of a group of noted industrialists. Due to the historical and cultural importance of the city, the success of this initiative could produce a domino effect in different regions of the country.

With respect to environmental management, and more specifically to the ISO 14,000 standards, it is the big Argentine companies - especially those that belong to the industrial and petroleum sector, that have begun to certify through ISO 14,000, demanding certification from their suppliers and member businesses. Today there are 114 such certified businesses in Argentina that can count on the benefits of such practices.[44]

Other cases exist, such as the Perez Companc Group that revealed its conclusions in a workshop held last March at the Argentine Standardization Institute (IRAM) co-organized with FARN, where it was affirmed that better management generally translates into a reduction in costs, among other advantages.[45] This important Argentine Business Group was the first in the world in the area of petroleum and gas to be certified and has currently converted these norms into binding obligations at the internal level.

On the other hand, multinational corporations also belong to this still "select" group. They bring with their business the environmental sensibilities of their home country. These can produce a domino effect in the Argentine business world that is still hesitant to adopt improved management measures in investments that could be very beneficial.

From this standpoint, it would be desirable for environmental management systems that can bring new business opportunities and lower costs of production to be adopted by all companies in the country and the world.

Even so, given the fact that such measures are voluntary, it is understood that at least in today's Argentina, their use is not deepening and spreading, even though the international situation increasingly demands fulfillment of environmental norms.

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[44] FARN-IRAM Workshop, 15/03/01, "Civil society participation in the revision of ISO 14.001 environmental management norms", Framework document and conclusions; Results of the workshop on "The concrete impediments for sustainable development" Buenos Aires, April 23-24, 1998, FUCEMA – IUCN- Los Algarrobos Civil Association. .

[45] FARN-IRAM Workshop, 15/03/01, "Civil society participation in the revision of ISO 14.001 environmental management norms" Framework document and conclusions. Also see FARN, Colloquims and proposals for sustainable development public policies; Argentine Business Council for Sustainable Development – CEADS – Ecoefficiency and Coroporate Social Responsibility, 1999 and Case Studies, 2000.

The difficulties of the legal framework in Argentina and its previously mentioned poor enforcement, implies that even the big business groups in our country are cautious at the moment of making strategic decisions and advance warily. Their fear is that the rest of the companies (basically small and medium sized businesses - PYMES) will not convert, that is to say, will not implement any type of environmental management or certification system, and will continue to use anachronistic production processes with polluting technology. For these businesses this situation is still seen as a competitive advantage and the transfer of costs is something they cannot give themselves the luxury of affronting.

For these reasons sustainable development that drives technology transfer policies through credits and/or fiscal incentives, allowing businesses to produce technological change without major obstacles, ought to be promoted.

Of course, many arguments in favour of environmentally-friendly business management exist. A successful case of transfer in one sector of Argentina to keep in mind is organic production, which has had significant growth (approximately 90% of what is produced is sold in the external market) and utilizes a good state certification system.

Finally, with respect to FTAA, the following should be emphasized:

1) The impressive cultural and technological gap that exists in this area among the primary members of the FTAA and the neediest countries of the Americas will inevitably provoke differences and asymmetries that ought to be taken into consideration as soon as possible in order to reach January 2005 with a realistic possibility of integrating such contrasting realities in a satisfactory way.
2) Only effective financial and technological aid – perhaps channeled through NGO's with a solid track record and sufficient capacity to develop the necessary processes to implement these measures, will allow these differences to be balanced. As it is ignorance that is the major source of inequality, such aid ought to be under conditions by which education and capacity-building processes minimize this gap and forms a strategic trade alliance in reasonable and equitable terms. For this to happen, critical points must be identified that affect the relationship between trade and environment with a preventative approach - developing policies and mechanisms of prevention, consultation and management, stimulating the participation of NGO's and universities in defining themselves.
3) Acceptance and respect for the richness originating from diversity ought to be the guiding rule when making fair decisions.

Now, allow us a few moments to think about the world in which we live and the start of a new century, a new millennium.

Globalization becomes part of our reality more every day and reveals the problems and solutions that emerge throughout the world. Today, dynamic changes, unimaginable even at the middle of this century, go farther than the limits imposed by rigid criteria. What's most fascinating is that we are only at the beginning of the process, at a moment in

which humanity is becoming aware that environmental problems do not have borders. Therefore harmonized, dynamic, and flexible solutions must be sought.

We live in an era of crisis, and just as in all other crises, we face an opportunity, where new rules that are adapted to the new realities must be defined.

In this panorama, the paradigm of sustainable development appears as a light to show the path to a better world. As humanity has only recently become aware of the problems that it laments, the concept of sustainable development seems not to be so clearly defined, but is a principle that we should work on and expand, permanently revising it in accordance with the realities and needs we perceive.

We are in an era of utopias, an era of dreams that can become reality.

Take, for example, the conclusions of an article from the ICTSD Bridges Journal.

> "…The need to confront critical situations can transform into an incentive for change... a crisis...can...transform into an opportunity for certain industries. Upon discovering the benefits that result from improving the current methods of production and investing in new and clean processes, taking advantage of all the most efficient resources, thus closing the cycle of production, and competing with lower prices and better quality in those vulnerable markets where the elasticity of the prices is high…The crisis will not last forever, but the impacts of the reactions that arise in our countries can have a long-term vision. The impoverishment of the population, the growing inequalities in the distribution of income, the weakening of political institutions and...the irrational exploitation of natural resources and the neglect of environmental quality are difficult wounds to heal. Set against structural conditions that, for the present, are beyond each of our nations, we must be conscious that we can intervene with intelligence to stop or reverse causal chains such as the ones we have mentioned. It is a road that deserves careful consideration".[46] (translation)

In the face of the continued advance of globalization, it is very important for the countries of the region to make demands upon multilateral integration agreements such as the FTAA, which ought to continue to be developed without hesitation, keeping in mind its strategic importance. As such, contributions like those described above are very healthy for our country and the region.

To this end, it is imperative that the conclusions and recommendations generated by this agenda be integrated and that the necessary actions be taken in order to put it into practice.

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[46] BRIDGES (ICTSD)N°: 4, February/March 1999, entitled: A Critical Triangle: Financial Crisis, International Trade and Sustainable Development.

3.3 A View from the Caribbean

By Walter Francois[47]

This article presents the perspective of one small Caribbean developing State, St. Lucia, which is one of a chain of islands washed by the Caribbean Sea. This sea is a source of food for us, and its waters act as a critical input for our trade in tourism services, a major contributor to the economies of these islands. Preserving our environment therefore rates as a top priority for our economic needs – indeed, for our very physical survival.

As we contemplate the possible consequences of rising sea levels, predicted to be one of the dire consequences of climate change, certain recent statistical data becomes very relevant. "Global energy use has increased nearly 70 percent since 1971, and is projected to increase at more than 12 percent annually over the next 15 years. This will raise greenhouse gas emissions by 50 per cent over current levels unless a concerted effort is made to increase energy efficiency and move away from today's heavily reliance on fossil fuel. The aquatic environment and its productivity are on the decline. Some 58 per cent of the world's coral reefs and 34 per cent of all fish species are currently at risk from human activities. Most oceans are already over-fished with declining yields."[48]

Borders are an invention of man; a device to carve out territorial patches for ourselves. However, the environment does not respect such demarcations. There remains no alternative but for man to collectively accept global responsibility for managing the environment which supports his very existence, or to suffer the inevitable consequences of his lack of wisdom in failing to do so.

This, quite simply, is the raison d'etre of the Americas trade and sustainability debate. It is an opportunity to bring collective wisdom to bear on an issue that will determine what the future has in store for all of us. It is an opportunity for persuading people who apparently hesitate to conceive the importance of this issue.There are still some people who fail to see that it is in the interests of their own survival to follow the path of environmental conservation and sustainable development, and to curtail existing activities, which exacerbate the problem.

The concept of allocating a central role to a 'sustainable approach' in the formulation of social and development policy probably owes its origin to the profound impact of the 1972 United Nations Conference on the Human Environment.[49] At this conference, the importance of the environment to national development interests was stressed, leading steps to be taken at both national and international levels that emphasized this theme.

As a result of the principles laid out at the Stockholm Conference, several international environment-related instruments and treaties have been adopted including:
- The 1982 United Nations Convention on the Law of the Sea

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[47] *Hon. Dr. Walter Francois is Minister of Planning, Development, Environment and Housing, Saint Lucia.*
[48] WRI, UNEP, UNDP, World Bank, *World Resources, 1998-99: A guide to the global environment* (Oxford: Oxford University Press, 1998).
[49] Stockholm Declaration on the Human Environment, UN Doc. A/CONF.48/14, 16 June 1972, reprinted in 11 ILM 1416.

- The 1983 Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, better known as the Cartagena Convention, with, in particular, its Protocol dealing with Oil Spills and the Protocol Concerning Specially Protected Areas and Wild Life in the Caribbean, more popularly known as the SPAW Protocol;
- The 1992 United Nations Conference on Environment and Development, and its related Rio Declaration and Agenda 21;
- The 1994 United Nations Conference on the Sustainable Development of Small island States, and the related SIDS Programme of Action;
- The 1996 Summit of the Americas on Sustainable Development, held in Santa Cruz de la Sierra, Bolivia, and the resulting Santa Cruz Plan of Action.

There are many more initiatives relevant to Caribbean environmental concerns. Indeed, there is a virtual proliferation of regional and international treaties addressing various elements of the global environmental agenda. This is significant to our discourse in some important aspects.

Firstly, it is becoming recognized that an ever-increasing number of concerns can only be effectively addressed through international cooperation. In many instances, parallel revolutions in research and technology have served to encourage this development, so that today, the scope of treaty making spans most fields of human endeavour. Areas falling into this ever-widening multilateral coverage include human rights, international trade, the environment, sustainable development, genetics and governance. In addition, the boundaries of these areas are in continuous retreat, as new aspects become the object of focused concern, requiring that their far-reaching global implications be dealt with, within a global context.

A second significant development has been the emergence of rules for application at the national level to govern areas that were hitherto regarded as being within the exclusive purview of sovereign states. Moreover, in the application of such rules, there are increasing possibilities of sanctions being invoked in cases of non-compliance. In this category are treaties incorporating provisions related to governance, international trade policy and environmental standards.

It was against this developing background that Caribbean Countries, in preparing for the United Nations General Assembly Special Session on small island developing states (SIDS), presented the following proposal to that forum:

"UNGASS is called upon to recognise the limitations faced by SIDS in the exercise of their global citizenship in the context to; *inter alia*, their limited participation in the negotiation of international instruments and in their implementation and enforcement (*sic*). UNGASS is therefore urged to call upon the relevant international agencies and bodies to facilitate all appropriate means of assistance of SIDS, to enhance qualitatively, their participation in the negotiation of international treaties and to develop the legislation necessary to implement and enforce these for sustainable development."[50]

[50] United Nations General Assembly Special Session on Sustainable Development in Small Island Developing States, Proposal of the Caribbean Countries (1996).

SIDS identified and made these most pressing issues known. But the stark reality is that our needs, concerns and fears continue to be sacrificed on the altar of the special interests of more developed countries in an approach to international sustainable development cooperation which, while described as one of partnership, continues to divide on the basis of narrow self interests. The debates surrounding ratification of the Kyoto Protocol on climate change are a case in point.

The Organisation of Eastern Caribbean States (OECS), as an economic grouping of seven of the smallest states in the Eastern and Northern Caribbean, decided to address matters in our own way. With the kind assistance of the Government of Canada, we developed and launched the St George's Declaration of Principles for Environmental Sustainability in the OECS on 10th April 2001. These Principles embrace in a spirit of cooperation and mutual support our sustainable development agendas. They speak to both national and common issues, and we are currently examining the possibility of making this a legally binding agreement. We view the Principles as a mechanism to overcome shortcomings at the international level. These shortcomings contribute to the fact that our particular needs are not adequately addressed - including the need to counter threats to our sustainable development policies and threats emanating from the actions of others.

At the national level, Saint Lucia, cognisant of the real and immediate threat to us that climate change poses, is in the final stages of developing a national policy on adaptation. Our contribution to the alleviation of climate change may be regarded as miniscule, but conscious of the risk for us and of our wider global responsibilities, we are taking steps for mitigation. We have finalized a Sustainable Energy Plan, which seeks to reduce our dependence on fossil fuels to the minimum possible level.

In addition to these two initiatives mentioned, a number of integration institutions have been established within the Caribbean, which will serve to assist in addressing the most pressing sustainable development issues. These include CARICOM, the Association of Caribbean States, the Caribbean Environmental Health Institute, the Caribbean Association of Industry and Commerce, and the OECS. These institutions work assiduously within their limited capacities to provide the policy guidance and support services necessary to enable the governments of the region to pursue their development agenda. Their collective guidance will serve as a useful vehicle in formulating trade, development and environmental strategies.

In terms of international trade negotiations, when the Uruguay Round and the WTO were brought into being, Ministers decided to commence an in depth work programme on trade and environment in view of the relationship which was apparent between trade and the environment for sustainable development. The WTO Committee on Trade and the Environment (CTE) was established. It reported on its work to the Ministerial Conference in Singapore, and observed that while the WTO objective was to build a constructive relationship between trade and environmental concerns, developing national environmental policies should be best left to national governments, and that the CTE

could address related issues within regional and multilateral environmental agencies where appropriate.[51] St. Lucia is in entire agreement with this approach and this is the path that we have followed. We however remain watchful for attempts to encroach on these clear-cut principles by including unwarranted rules and regulations within the negotiating process, which, despite their disguise, are patently revealed as barriers to trade which disadvantage developing countries. We will actively resist any such devices.

The difficulties which we share with developing countries, and more so as a SIDS, would seem to demand that environment and trade regimes respond by extending Special and Differential Treatment (SDT), appropriate to the capacity for such countries to participate in these arrangements. This does not mean that SDTs should provide a haven for the continuation of protection. However, adjustments will be required for full participation within the FTAA. For countries such as ours, these will be significant and will require considerable reform of our economic structures. This will take time, resources and technical assistance, and the SDTs should be directed towards these ends.

With regards to the environment, it is possible to advance a notion, which despite its extremely controversial nature, we should at least explore. In property law, there is a principle that speaks to the right of an individual to enjoy his property without undue interference by his neighbours. Under this principle, issues of pollution, right of access, hindrances to the ability to enjoy, etc. are addressed. In this context, the space above Saint Lucia, for example, particularly the atmosphere that supports life, is fundamentally the property of those who choose to reside in Saint Lucia. As such, any action by any person or state that diminishes the ability of those persons to enjoy that space is an infringement of his most basic right. This is delving into the realm of international law, which is not my field. But it seems only just that countries should not have the freedom to take unreasonable domestic actions where these unduly affect the rights of others to a safe environment. There are a number of international treaties that address similar issues. However, it is clear that there is sufficient in this idea to distinguish it from those agreements, which deal with more focused issues, to merit further investigation. An appropriate body should be constituted to examine the merit of this idea, with the view to proposing an appropriate framework within which a principle can be further expounded.

3.4 Lessons Learned from the North American Experience

By Janine Ferretti[52]

In the first years of a new century and a new millennium, we find ourselves in the midst of a global revolution in the way we relate to each other across national boundaries—as nations, as regions, as economies and as individuals.

[51] Report of the CTE, WT/CTE/1 (12 November 1996).

[52] *Former Executive Director of the North American Commission for Environmental Cooperation, and current director of the Inter-American Development Bank Environment Unit.*

Indeed, the advance of communications, manufacturing and other technologies, paired with the astonishing mobility of capital in restructured world markets signals globalization as the reigning paradigm of the new century. To some, globalization means new prosperity and greater security through a more interdependent and cooperating global economy.

Others, however, note that as the world economy expands, environmental change is also accelerating, as once isolated or hard-to-get resources are subject to truly "global" demand. Many countries still do not have adequate environmental infrastructure to conserve non-replenishable resources, and some fear that much can be lost while we wait for higher income levels to augment resources for poor countries.

In short, a growing number of people wonder whether globalization will work hand-in-hand with sustainable development, or will instead "elbow it off the block."

In North America, the North American Free Trade Agreement (NAFTA) has brought a greater economic integration to Canada, Mexico, and the United States, which ironically has allowed us all to begin to see the environmental connections among our three countries which have always been there: the fragile ties of shared migratory species and ecosystems, transboundary air- and watersheds, and the efficiency of prevailing wind and air currents in carrying pollutants great distances through the atmosphere.

It has also created awareness that economic integration and interdependence have also made us more vulnerable to some of the environmental problems, with which we have been struggling for a long time. For example, the population of the US/Mexico border area has expanded since the NAFTA was signed. This has brought increased pressure on air, water, and wildlife in the area.

Examples such as these have fuelled public concern about pursuing free trade. Such concerns generated the debates and demonstrations in Seattle at the WTO Ministerial in 1999 and in Quebec City at the 2001 Summit of the Americas. While free trade and greater economic integration have brought benefits, there is a lack of institutional capacity at the global and hemispheric levels to deal with the environmental dimensions related to trade, as well as the social and labor issues. Trade policy—once the arcane realm of experts alone—is being dragged from the shadows into the light by a citizenry ever more concerned about the community-level implications of trade policy.

These environmental concerns are not new to North America. They were raised in the context of the negotiations leading to the North American Free Trade Agreement. As a result of those negotiations, seven years ago Canada, Mexico and the United States took a bold step to link the environment and trade agendas. This was partly in response to disagreements within civil society over the relationship between trade and environment, and over the implications of NAFTA for the environment.[53]

The environmental side agreement to NAFTA established the North American Commission for Environmental Cooperation (CEC). It is entrusted to support

[53] C. Deere and D. Esty, *Greening the Americas: NAFTA's Lessons for Hemispheric Trade* (Cambridge: MIT Press, 2002).

environmental cooperation among Canada, United States and Mexico while they pursue economic integration through NAFTA.

Through the side agreement, the Parties targeted three overriding issues in linking freer trade with environmental protection:
- The policy and scientific dimensions must be regionally examined, leading to coordinated responses to environmental concerns;
- There must be effective enforcement of environmental laws; and
- The public must be able to be involved in a transparent mechanism for holding governments accountable if they fail in their duties to enforce their environmental laws.

North America, in some ways, is a test case as to whether economic prosperity through trade can be achieved without environmental deterioration; in fact, whether environmental quality can even be improved with free trade. While it may be still too soon to come with definitive conclusions about the success of the NAFTA model, it is possible to identify key lessons from the North American experience in integrating trade and environment.

At the heart of this organization is the question: what are the environmental consequences of free trade? With the help of many, CEC developed a methodology for assessing the impacts of NAFTA on the environment. In 2001, and again in 2003, CEC convened a symposium on the question and received some very interesting and diverse answers.[54] In some sectors, there was very little evidence to suggest that there were problems. In others, evidence suggested that free trade in North America was having adverse effects on the environment. While there was plenty of room for disagreement and debate, CEC learned how important it is to engage people, and how valuable it is that they develop concrete analysis and information. With such participation, it is possible to move away from abstract discussion to more inclusive and concrete involvement. This not only helps develop a more informed community but also contributes to a better understanding of the complex linkages of trade and environment, and helps identify where problems can emerge so that they can actually be addressed.

The CEC is also learning that there are important opportunities where trade and environmental policies can be coordinated to yield economic and environmental benefits. Why not harness the power of the very market we have created through free trade to help protect the environment and improve the livelihood of people?

In North America, the CEC has been looking to see how this can be done through the export of shade coffee grown in Mexico and "green" electricity produced by sustainable means.[55] This can allow coffee drinkers across North America to access coffee grown in the shade of the Mexican forest canopy, as an alternative to coffee grown in open fields where a forest once stood, with high levels of chemical inputs. Trade in shade-grown

[54] CEC Symposium on understanding the linkages between trade and the Environment, Washington D.C., October 11-12, 2000.
[55] CEC Secretariat, *Lessons Learned From The Work of the CEC on Environmental Goods and Services*, (Background Note for JPAC Public Meeting Guadalajara, Jalisco, Mexico, 28 June 2001).

coffee can mean that forests may remain intact as home to a diversity of birds, animals and other life, and rural communities in coffee-producing regions can generate badly needed income to improve the quality of life of their peoples. As the North American region experiences the reality of an increasingly integrated electricity market, the opportunities grow for selling and purchasing electricity generated by more environmentally sound means. The CEC's Secretariat has asked an expert advisory board to examine what policy directions are necessary to ensure that a new electricity market promotes sustainable development and generates both environmental and economic benefits.

What lessons have been learned from this experience? The advisory board has found that private sector investment and participation in green markets, improving the understanding of consumer demand for green goods and services, as well as tools for capitalizing on that demand, and increasing understanding of the environmental underpinnings of green markets are essential for these programmes to work.

Another important lesson is that progress on the environment agenda can only be gained by true partnerships with civil society. As such, transparency and public participation are core values that are now reflected both in the design and operation of the CEC's Secretariat. The Joint Public Advisory Committee (JPAC)—made up of individuals representing NGOs, business and academia from the three countries— provides important feedback and advice to the CEC Council. In addition, the CEC encourages governments to establish national advisory committees on matters related to the agreement. Canada, Mexico, and the US each have advisory committees, reflecting the interests and concerns of civil society in each country.

The three countries established perhaps one of the most innovative mechanisms of any international environmental organization in terms of transparency by having the CEC review complaints of inadequate environmental enforcement by a NAFTA party. While independent review is a familiar element in several international human rights agreements and organizations, it is a unique element in an international environmental agreement.

Article 14 of the North American Agreement on Environmental Cooperation enables any member of the public to act as a whistle-blower in calling attention to situations where governments may not be enforcing their environmental laws effectively. This tool allows the public to request that the CEC develop a factual record on alleged non-enforcement of environmental law. While this procedure has no legal consequences, it does employ the power of "sunshine" to make the governments more accountable to citizens for their performance in enforcement and compliance. This should be of interest not only to members of the public but also to governments and industry, too. A level playing field, with vigorously enforced environmental standards, is essential to an integrated North American market.

Altogether, the citizen submission process, along with the active involvement of public advisory committees and other efforts being undertaken to make environmental information more accessible to the public, all contribute directly to promoting and strengthening democracy in North America.

There is another key conclusion from the CEC's work. Investments in capacity building and infrastructure are essential for environmental protection. In developing and applying a methodology for assessing environmental impacts of NAFTA, it has become clear that investment in high levels of environmental protection and effective enforcement of environmental laws will enable countries to come to terms with many of the environmental challenges raised by liberalized trade.

The CEC has undertaken efforts to strengthen the capacities of government, business and NGOs. Mexico, for example, has made enormous strides in establishing programs in chemical management and pollution prevention. But without adequate resources and investments in capacity building and infrastructure necessary for environmental protection, participation in international environmental cooperation can get transformed from an enabling tool to a perceived burden. There is a tremendous need to find innovative ways of providing those resources.

There is also a final lesson. An integrated economy makes environmental cooperation absolutely essential. For example, it is estimated that there are approximately 80,000 chemicals in commerce, with 1,000 or so new chemicals entering the North American market each year.[56] Many of these chemicals move across the borders of our three countries, either intentionally as products or wastes, or unintentionally as pollutants in air and water. Pollutants can travel thousands of miles through the atmosphere. Working together to reduce problem pollutants is one of the major activities of the three countries. Action plans for reduction or phase-out of chemicals have been developed for DDT, chlordane, PCBs and mercury. Already, as a result of these efforts, DDT and chlordane are no longer used in North America, making North America a leader in implementing the soon-to-be-signed international agreement on persistent organic pollutants.[57] Other action plans are beginning to be developed for hexachlorobenzene, furans, and dioxins; and lindane and lead are being considered as possible candidates for concerted reduction action.

It is in the interests of everyone to know about the sources of these substances. The CEC's pollutant release and transfer register has become an important right to know tool for the citizens of each of the three countries. Not only has the CEC helped Mexico in its process of developing its domestic pollutant release and transfer register program, it has compiled and compared data on sources and volumes of specific pollutants that are harmful to people and the environment. This report, *Taking Stock,* has been published annually and provides interesting and valuable insights into trends on pollutant releases and transfers. It is breaking new ground in providing people with valuable information on the regional level.

While progress has been made in implementing North American environmental commitments made in the context of NAFTA, challenges still remain. One is Chapter 11, the investor-state dispute mechanism under NAFTA, which allows foreign investors to initiate actions against their host governments. Several challenges under Chapter 11 have focused on environmental decisions made by governments. The public has expressed

[56] CEC Chemicals, online: www.cec.org
[57] CEC Chemicals, online: www.cec.org

concerns that the process of resolving those disputes remains opaque to civil society. According to these concerns, such provisions were designed to ensure security and predictability for investors, but can create uncertainty and unpredictability for environmental regulators.[58] A second challenge is to ensure that the citizen submission process continues to develop into a meaningful and useful tool for the public in helping to promote effective enforcement of domestic environmental laws. Perhaps the largest challenge is directing some of the financial resources gained from increased liberalized trade to environmental infrastructure and domestic programs that support environmental protection and sustainable development. Without this, addressing the environmental dimensions of free trade will be difficult.

To conclude, the North American experience shows that information and analysis, transparency and public participation, and cooperation are indispensable elements of an effective strategy to address the environmental dimensions of liberalized trade.

4. Civil Society Participation

4.1 Initiatives for Civil Society Dialogue in International Trade Negotiations

By Alicia Frohmann[59]

The Political Framework

Throughout the nineties in Chile, there were different governmental initiatives for dialogue with civil society. However, it was the government of President Ricardo Lagos that finally gave explicit directions, in 2000, for the creation of channels of dialogue and participation for the establishment and implementation of state policies.

The government aspires to adequately address the concerns of the whole of civil society, through the development of mechanisms of permanent consultation with distinct social and economic actors. Listening to a diversity and plurality of visions and interests, above and beyond the representation by individual groups, is of interest. The nature of these mechanisms of consultation ought to be directed towards the specific activities of the

[58] H. Mann & K. von Moltke, *Private Rights, Public Problems: A guide to NAFTA's controversial chapter on investor rights* (Winnipeg: IISD, 2001).
[59] *Alicia Frohmann is the Chilean director of the FTAA Committee of Governmental Representatives on Civil Society Participation.*

distinct bodies of the state. In some cases, such as international economic negotiations, the consultation mechanisms can include various public organisms that coordinate to determine and deliver policies.

International Trade Negotiations

In recent years, international economic negotiations have especially prompted the interests of Chilean citizens due to: the incidence of commercial exchange of the national product (almost 50% of the total); the active international economic negotiations policies of the last decade; and concerns that all social and economic sectors attain the benefits of Chile's dynamic international economic position/insertion.

Different groups in society have manifested their interest in expressing their points of view with respect to negotiation themes that eventually will affect their areas of economic, political, and social interest.

Dialogue with Distinct Sectors of Society

Dialogue with the private sector

The General Office for International Economic Affairs (DIRECON), which coordinates international economic negotiations in Chile, has always maintained a wide and open dialogue with businesses and trade unions linked with international trade. A wide spectrum of business (generally large and medium sized) has been consulted through its trade union associations, every time the negotiation of a trade agreement that involves tariff reductions has been proposed. In this way, interest from businesses that want to protect their economic interests has been gathered.

Chile – Canada Agreements

Cooperative environmental and labour agreements between Chile and Canada were accorded parallel to the Free Trade Agreements between both countries in 1996. These agreements involve citizen participation for overseeing the fulfillment of pertinent legislation in each part and also for co-operative tasks and reciprocal information. These agreements represent a very successful experience.

In the middle of 1999, a large gathering was held for the trade unions that brought in professionals to discuss some provisions of the FTA regarding services with Canada. The gathering of groups was very positive, and ever since regular contact has been maintained with the professional associates.

Civil Society-Government Dialogue on the FTAA

Between 1999 and 2001, the government of Chile has actively participated in the FTAA Committee for Civil Society, supporting the importance of participation processes and transparency in trade negotiations in accordance with the instructions of the Ministers in the FTAA ministerial meetings in San Jose and Toronto. The work of this FTAA Committee is novel and of interest to Chile as it is the first time that circumstances of

this nature have existed in a trade negotiation of such importance. It constitutes an important precedent for how civil society can participate in multilateral negotiations.

In 1999, the government of Chile announced the first meeting of the FTAA Civil Society Committee by means of letters directed to different institutions and non-governmental organizations, as well as through the media and electronic WebPages. On this first occasion the response from Chilean organizations was quite limited.

In 2000, with President Lagos' government in place, and with a new emphasis on the need for dialogue with civil society at all levels of government, the FTAA Committee meeting was strengthened through a greater number of advertisements in the newspapers, public activities by the authorities, distribution of information on the FTAA negotiations process, and joint initiatives with sectors interested in civil society.

A seminar organized by the Alliance for Fair and Responsible Trade was sponsored where the negotiators made a presentation on the objectives and parameters of negotiations on themes such as public purchases, market access, services and investment, while welcoming commentary and responding to questions from the audience.

After the seminar, the Alliance produced a document that summarized the presentations of the negotiators and discussants. The Alliance created a matrix with the various positions related to the themes discussed and the corresponding recommendations. This matrix is available on the Alliance's webpage <http:www.comerciojusto.terra.cl>.

This strategy of major diffusion and distribution of specific information about the negotiations resulted in an excellent response from Chilean organizations at the second meeting of the FTAA Civil Society Committee. More than a third of all the submissions to the FTAA were from Chile, the 26 contributions represent efforts from a great diversity of organizations, with different points of view, but with a common desire to contribute the debate and to the reflections on civil society participation in trade negotiations.

The Chilean government backed the collection of contributions from the hemisphere with great interest, and proceeded to circulate them among the participating negotiators of the FTAA.

Other Negotiations

In the case of the trade negotiations between Chile and the United States initiated at the end of 2000, the government created rounds of permanent contact and informative meetings with all sectors: business, workers, academics, and non governmental organizations.

Similarly, letters and media advisories, comments and contributions from the various sectors of Chilean society (academics, professional associations, workers, consumer,

women, regional organizations, environmentalists, indigenous peoples, among others) were solicited.

In this same way, seminars with many of these sectors are being held, both in the capital as well as distinct regions of the country, in an effort to deliver information and collect concerns from all sectors of society.

In other negotiations undertaken by Chile (Mercosur, European Union, EFTA, Korea) there have also been permanent links with distinct sectors regarding the objectives and progress of the negotiations.

4.2 Civil Society Campaign against the Imposition of NAFTA in the Americas

By Sarah Larrain[60]

The Free Trade Area of the Americas (FTAA) agreements do not appear to be negotiated for the people. Worse, the process of negotiation is perceived to be going backwards, and many are concerned due to imbalances in power, which have resulted in greater influence economic sectors. From this perspective, relations between many civil society groups are worsening in this debate, not improving. The FTAA has generated concern among members of civil society, as they feel they are increasingly excluded from the process of negotiation. With civil society groups kept outside the agenda, it is not necessary for the FTAA to strategise or compromise with them. The structure for participation itself seems discouraging, whereby it seems the only mechanism for involvement is through letter-writing.

Why is participation of civil society important? It is important for legitimacy. It is important as a guarantee of the implementation of sustainable development and because Ministers seem to be closed in their own systems. It is important because civil society has experience with negotiation and can make a valuable contribution. It is also important because depending on the inputs – the stakes and the players, broader national interests such as social and labour issues, shared ecosystems, and democratic cooperation are either included in the agenda, or not.

Participation of civil society in the FTAA is not impossible. Mechanisms have been tested to facilitate such participation. For example, many different steps can be taken to ensure timely and comprehensive transparency and access to information. Formal mechanisms can be developed at the national and hemispheric level to facilitate civil society participation. Civil society can be involved in developing a participation strategy that ought to be implemented in the FTAA. Coordination amongst NGOs in the process of the Americas is needed and a defined role for civil society in the Economic and Social Council (ECOSOC) must be guaranteed. However, there are both negative

[60] *Sarah Larrain is the coordinator of Chile Sustentable, a Chilean Project of the Instituto de Ecologia Politica (IEP).*

and positive implications for civil society in future negotiations. Joint work is what is really needed.

During the last decade, transnational corporations have used international trade negotiations to increase their profit margins at the cost of public interests. The implementation of the North American Free Trade Agreement (NAFTA) in 1994 and the establishment of the World Trade Organization (WTO) in 1995 - as a result of the Uruguay Round of the GATT, were introduced as a way of generating global prosperity. However, the results have demonstrated that this is a trade model driven by the private sector and it has provoked a deterioration of labour rights and environmental norms; a worsening of health and public security; an increasing exploitation of the environment and natural resources; a loss of food safety; a drop in salaries; reduction in unionized employment and labour flexibility as well as growing poverty and economic inequality. Added to this has been a proliferation of the financial crisis (such as that of the Mexican peso); a tendency towards privatization and consequently, a lack of access to essential services such as medical attention, education, and potable water for many citizens; and a loss of democratic spaces and responsibility for decision making.

Now, through the FTAA, 34 chiefs of state and trade ministers from all the nations of the Americas (except Cuba) are considering expanding this failed model of increasing privatization and deregulation until it spreads throughout the hemisphere. The current FTAA proposal contains provisions that are more problematic than NAFTA, the WTO, and the failed Multilateral Agreement on Investment (MAI). These provisions would decrease the possibility of states to implement policies in the public interest and increase private control on supposedly democratic processes at the cost of the citizens of the Americas and the Caribbean. The proposal calls for attempts to:

- Establish rules for the liberalization of investment giving corporations the right to sue governments for loss of commercial gains generated as a result of democratic decisions in favour of the people. These law suits can result in millions of dollars in fines that citizens would have to pay to the corporations through taxes.
- Eliminate country's right to protect their economy from the inflow of speculative capital investments to avoid financial crisis.
- Establish a conflict resolution process driven by secret international trade tribunals, beyond national jurisdictions, which would allow governments and foreign corporations to stay out of courts and national legal systems.
- Grant multinational corporations new rights and tools to ignore government norms for health, food safety, public security, and labour and environmental protection and evade the laws that impede corporations from polluting the communities in which they operate.
- Promote deregulation and privatization of the services sector in the negotiations, which can pressure governments to deregulate essential public services for the well being of the population.

The FTAA negotiations have been undertaken behind closed doors. With the exception of business groups that have acted in unofficial gatherings that serve as consultative

business meetings for the Trade Negotiating Committee, few people outside of the negotiating groups have seen the draft text and the related documents. Until now, only one out of the 34 governments has published the text that contains their own recommendations to be included in the final agreement. The majority of parliamentarians have been denied access to the information, or have not even been informed that these negotiations are underway.

Despite the lack of transparency and democratic process in the negotiations, governments have continued the process, and seek to sign the FTAA before the end of 2005. They are further considering authorizing certain chapters of the agreement to enter into force much earlier than that date - causing upheaval throughout the region, as this causes parliamentarians to change laws and national regulations originally implemented to favour public interests to instead serve the trade priorities of corporations. While civil society has attempted to express its opinions and concerns before the negotiating teams of various governments, there is still no proof that these concerns have been heard or incorporated into the negotiations.

Many organisations have signed onto a campaign process which will strictly monitor the participation of their governments in this process, to ensure that the current FTAA negotiations, based on the NAFTA, MAI, and WTO models do not continue. In particular, these organisations seek to prevent components of the corporate defined trade system, such as the following, to appear in the FTAA. Their mandate is based on the following points of common concern:

1. *No new instrument to strengthen corporate power*: They oppose all language that approximates the style of NAFTA's Chapter 11 on Investment permitting legal cases against governments to be initiated by corporations. This NAFTA mechanism allows corporations to sue governments in closed, anti-democratic trade tribunals for decreasing their expectations of future gains, *according to national regulations*. Under NAFTA rules, this mechanism has been used to attack important national policies for environmental protection, health, and public security. In fact, each time corporations have referred to the tribunals using this chapter of NAFTA, the results have been in favour of corporations and not in the public interest. As a result of the indictments of these trade tribunals, the countries have had to pay fines to corporations using citizen's funds. If governments decide to maintain the enforcement of public interest laws, they will have to keep paying corporations.

2. *Protect basic social rights and needs in the Americas*: They oppose that basic social needs and rights be subordinate to the rules defined by corporate interests and present in the current FTAA proposals. Critical areas for human and environmental well-being such as basic social services, water, health, food and security, cannot be subordinated to trade agreements. The focus on lucrative trade in these areas has already generated a tendency in favour of transgenic organisms, against ancient forests, increasing the traffic of prohibited products and an aggressive market for tobacco.

3. *The services needed for survival*: Services needed for survival, such as health, education, energy, and other basic services should not be subjected to trade rules. National laws

for consumer health and safety, the environment, labour and the laws that regulate the service sector and that do not differentiate national suppliers from foreign ones, must be kept out of trade agreements. In the Americas and the Caribbean, the structural adjustment programs that imply privatization and deregulation of essential public services, as promoted by the International Monetary Fund and the World Bank, have already produced a serious decrease in public access to medical attention, schools and potable water. The current FTAA proposals, if accepted, will forever consolidate this danger, impeding governments from reverting privatization of services in the future, even though its negative effects are proven.

4. *No to patent protectionism*: Seeds and medicine are human not commercial needs. There is no basis for including protection of intellectual property in a trade agreement. Further, intellectual property policies should allow governments to limit patent protection to defend public health, especially patents on life forms and essential medicine. The patenting of life forms, including micro-organisms must be prohibited in all national and international regimes. Current intellectual property rules such as the World Trade Organization's TRIPS agreement, and the rules included in Chapter 17 of NAFTA on Intellectual Property, impede public access to essential medicines and other goods; promote the appropriation of life forms and traditional knowledge; affect biodiversity and impede the poorest countries from increasing their levels of economic and social well being.

5. *Food is a human right, not merchandise*: Trade regimes should not threaten a country's right to establish or maintain policies to safeguard small agricultural producers, rural economies and food safety.

6. *Control of natural resources*: Citizens and governments – and not transnational corporations, should have the right to make decisions about the use and protection of natural resources. Policies on the use of natural resources should maintain a balance between the social benefits of preservation, job creation and economic development. Therefore, international trade rules such as those included in NAFTA, which allow transnational corporations to surpass the controls or regulations of countries for oil and gas reserves, forests, rivers and other natural resources, are unacceptable.

7. *Stop current dangers*: NAFTA and the WTO contain rules that subordinate national regulations and environmental, agricultural, health and employment protections. These rules work against the public interest and should not be included in future international trade agreements. Furthermore, these trade agreements should not subordinate Multilateral Environmental Agreements, health, development, human rights, indigenous rights and food security, nor rights for women, labour and animal protection.

8. *Protect women, minorities, and indigenous populations*: Measures such as those found in NAFTA that do not allow special and differential treatment for women, minorities and indigenous populations should not exist in a fair and just international agreement. The groups involved it the campaign consider threats to the sovereign right of States to determine their own social priorities - such as offering preferential

credit conditions for the most disenfranchised sectors of the population, damaging and offensive. To them, such measures are in blatant contradiction to international Human Rights agreements, and the Conventions concerning Indigenous and Tribal Peoples (OIT), particularly 169.

9. *Promote development and control corporate power*: International trade agreements should not limit government capacity to ensure that foreign investment benefit citizens. The FTAA should not impede governments' use of policies as instruments to promote equitable and sustainable development, such as limiting foreign capital in certain sectors, gearing investment to technology transfer and the reinvestment of profits, or limiting the purchase of agricultural lands or real estate.

10. *Defend the Americas from speculation*: In order to prevent the proliferation of financial crises, countries must maintain their authority to take measures against speculative investment. The NAFTA investment rules, present in the FTAA proposal, perpetuate an erroneous path as they prohibit governments from establishing these elementary protection measures.

The organisations involved in this campaign have agreed to commit to fighting against the commercial model of globalization embodied in the FTAA, which places multinational interests before the common good of the people. They seek to promote new alternatives of integration for the Americas and Caribbean, based on democratic and transparent principles, sustainable and equitable development, and protection in the public interest before corporate profit.

4.3 Inter-American Strategy for Public Participation: A Way Forward

By Zoila Giron[61]

What is the significance of civil society involvement in trade negotiations, from the hemispheric-regional perspective? Since Rio in 1992, most international and regional agreements addressing sustainable development emphasize the need to balance between social, economic and environmental activities. Civil society involvement is the cornerstone for reaching that balance.

The heads of state and government declared, at the 1994 Miami Summit of the Americas, that the Americas are a community of democratic societies that are united in pursuing prosperity through open markets, hemispheric integration and sustainable development. The Declaration also stated that free trade and increased economic integration are key factors for sustainable development. These commitments permeate the entire Summit of the Americas process, with the recognition that this process must remain relevant and responsive to the real concerns of the citizens of the hemisphere. The Summit process is designed to set out a vision and mandate for practical initiatives that will strengthen national and hemispheric institutions in support of shared values and collective undertakings.

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Achieving sustainable development has become an explicit concern of the countries of the Americas. As the first region to prepare a blueprint on sustainable development within the framework of the global agreements reached at UNCED in 1992, the Western Hemisphere has taken a leadership role in this respect. The Declaration of Santa Cruz de la Sierra again made the link between trade and sustainable development when governments pledged to… "[r]einforce the mutually supportive relationship between trade and the environment by acting to conserve the environment, while safeguarding an open, equitable, and nondiscriminatory multilateral trade system."[62]

Participation of all sectors of society is also a constant in the Summit of the Americas process. In the Santiago Summit Declaration the leaders stated that…. "The FTAA negotiating process will be transparent, and take into account the differences in the levels of development and size of the economies in the Americas, in order to create the opportunities for the full participation by all countries." They stated: "We encourage all segments of civil society to participate in and contribute to the process in a constructive manner, through our respective mechanisms of dialogue and consultation and by presenting their views through the mechanism created in the FTAA negotiating process. We believe that economic integration, investment, and free trade are key factors for raising standards of living, improving the working conditions of the people of the Americas and better protecting the environment. These issues will be taken into account as we proceed with the economic integration process in the Americas."[63]

But it is important to move from 'words to deeds.' At the regional level, several mechanisms, to ensure civil society participation in decision-making processes are being developed. In particular, the Organization of American States (OAS) responded to a specific mandate of the Bolivia Summit that called for the development of the Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development (ISP).

What is the Inter-American Strategy for Public Participation?

The ISP is a unique mechanism developed with the close collaboration of governments and civil society throughout the Americas. It is a framework for increasing public involvement in decision making for sustainable development in the countries of the Americas. The ISP has been approved by the 34 OAS member states. The two documents approved by OAS Political Bodies are the *Policy Framework* and the *Recommendations for Action.*

The Policy Framework lays out a series of guiding principles which structure the activities of the strategy itself, and can also serve as a framework for government or civil society programmes to implement the strategy. These principles are:

[62] Ministerial Declaration of Santa Cruz de la Sierra, Hemispheric Summit on Sustainable Development, Santa Cruz de la Sierra, Bolivia, December 8, 1996, para. 10(a).
[63] Santiago Summit Declaration, Second Summit of the Americas, Santiago, Chile, April 19, 1998.

1. *Proactivity*. Governments and civil society take initiatives to enrich the process of decision-making.
2. *Inclusiveness*. Full participation of all interested parties, including the private sector and vulnerable and traditionally marginalized groups.
3. *Shared Responsibility*. Governments and civil society must share the commitments, burdens, and benefits of development.
4. *Openness throughout the Process*. Decision-making process should include continuous participation at all phases.
5. *Access*. Citizens must have timely access at various levels of government to information, to the political process, and to the justice system.
6. *Transparency*. Productive relationships between civil society and government require that both be more accountable and transparent.
7. *Respect for Public Input*. Contributions deriving from the implementation of various mechanisms for participation are evaluated, analyzed and given proper consideration in a timely manner.[64]

The Recommendations for Action lay out a series of initiatives, which were identified in the strategy to increase public involvement in decision making for sustainable development. These include:

1. *Information and Communication*. Create formal and informal communication mechanisms to encourage information sharing, collaboration, and cooperation within and among civil society groups, within and between levels of government, and between all levels of government and civil society.
2. *Legal Frameworks*. Create, expand, and implement legal and regulatory frameworks that ensure the participation of civil society in sustainable development decisions.
3. *Institutional Procedures and Structures*. Develop and support institutional structures, policies, and procedures that promote and facilitate, within all levels of government and civil society, interaction in sustainable development decisions.
4. *Education and Training*. Develop and strengthen the capacity of individuals to participate in sustainable development decision-making with an increased base of knowledge.
5. *Funding for Participation*. Procure and expand financial resources to initiate, strengthen, and/or continue participatory practices.
6. *Opportunities and Mechanisms for Public Participation*. Create, strengthen, and support formal and informal opportunities and mechanisms for public participation in which sustainable development activities are discussed and decided upon.[65]

Important benefits accrue from increased civil society participation in sustainable development decision making. First, participation can introduce a broader range of ideas in decision making. It promotes the development of alternative solutions. In addition, greater levels of participation involve all interested parties in the scrutiny of development problems, and serve to reduce the potential for serious conflicts. They also increase the

[64] OAS, *Inter-American Strategy for the Promotion of Public Participation in Decision-making for Sustainable Development*(Washington: OAS, 2001). Available online: http://www.ispnet.org/ISPpubl/EngPolicyFramew.pdf.
[65] *Ibid.* Annex: Recommendations for Action. Available online: http://www.ispnet.org/ISPpubl/EngRecomend.pdf..

likelihood of improved and lasting solutions. Finally, they can provide opportunities for cooperation and coordination between government and civil society.

The primary goal of the ISP is to "promote transparent, effective, and responsible public participation in decision-making and in the formulation, adoption and implementation of policies for sustainable development in Latin America and the Caribbean."[66] Several aspects of this goal provide models for future hemispheric openness instruments. First, ISP has sought internal transparency by actively soliciting input from ISP project members and stakeholders.[67] Second, the strategy is pitched to address the various relevant levels. While most obligations fall at the national level,[68] at the regional level consultation processes, such as regular dialogues between government and civil society, are also provided at high-level meetings convened by the OAS. Third, ISP uses case studies and concrete examples to facilitate accessibility. ISP has established public participation demonstration sites in the Portland Bight, Jamaica; the Gulf of Honduras; (transboundary: Honduras, Belize and Guatemala); and the Bay of Ferrol in Chimbote, Peru. Fourth, ISP takes legal frameworks into account through a legal inventory and case studies. The inventory provides the first empirical assessment of participation provisions in environmental law in the Americas, while case studies offer more complete pictures of how these laws function (or fail to function) in practice. Fifth, to share data, an information network is contemplated. Indeed, a pilot regional network has been developed for disseminating information about public participation approaches in biodiversity and international waters programs. Finally, the strategy includes components on technical assistance and training, which provides for these needs in the region. Having just completed the development phase, the ISP is now launching its efforts, and should provide useful results.

Use, by governments and civil society organisations, of the Inter-American Strategy for Public Participation framework, can contribute to foster transparency and participation in the FTAA process. It can contribute to develop trust among governments on public participation processes. It can also foster adoption of an incremental approach to trade negotiations, helping to build valuable consensus on environmental issues. The strategy supports building on existing initiatives and mechanisms at the national, sub-regional and regional levels. It can make links to environmental agreements already committed to by governments of the region. It can also address the region's inherent obstacles to sustainable development through improved allocation of resources, technology transfer and capacity building. Finally, it can stimulate debates, discussion and analysis around

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67 The Project Advisory Committee (PAC) has provided ongoing guidance and advice and facilitated input from government and civil society, including the private sector, labour women, indigenous populations, and other ethnic minorities.

68 The ISP seeks to 1) promote the exchange of experiences and information between government representatives and groups in civil society for the formulation, implementation, and improvement of sustainable development policies and programs; 2) develop legal and institutional mechanisms for enabling broad participation in decisions of broad public concern; 3) facilitate access to and a flow of information among the relevant actors; 4) develop training programs to improve technical and administrative capacities so that citizens and organizations my contribute to sustainable development policies and decisions; 5) support the integration and strengthening of national sustainable development councils; and 6) develop national consultation processes to ensure that civil society may play an important role in sustainable development.

trade and environment-sustainable development linkages to eliminate misconceptions and build consensus.

The most important question, in this process, is how to strengthen hemispheric cooperation. The elements of a real partnership of the Americas for Sustainable Development have been set in place, and are proceeding to be developed, step-by-step. The Americas was the first and only region to hold a specialized presidential summit on sustainable development – the 1996 Bolivia Summit on Sustainable Development - and the OAS and other regional bodies, through a unique consultation process, have made substantial contributions to the implementation of the Rio Declaration and Agenda 21 and to the World Summit on Sustainable Development. There is a further need for a ministerial-level inter-sectoral forum to address relevant issues on sustainable development and to promote implementation of action in these areas. A permanent process, supported by appropriate follow-up mechanisms and resources, with the full participation of civil society through the framework of the ISP, is needed to generate and sustain this momentum.

4.4 Sustainability Smoke Signals? Strengthening Public Participation, Access to Information and Access to Justice in Americas Regimes

By Marie-Claire Cordonier Segger[69] and Jorge Cabrera.[70]

This article is based on a fundamental assumption: public involvement, supported by transparent and participatory processes, leads to better decision-making. When international processes are based on more diverse exchanges of expertise, knowledge and information, they can result in higher quality decisions, more effective domestic implementation of the law, and broader support for the measures in question. Indeed, they can even help to ensure that economic, environmental and social policies are more mutually supportive. But how does one achieve this 'public participation' and what have been lessons learned to date globally, or in the Americas?

Public involvement, supported by citizen rights of access to information, and to justice are the key elements to effective participation.[71] Legal instruments are needed to facilitate

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[71] This is particularly evident in the thinking behind the 1998 *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, 25 June 1998, 38 I.L.M. 517, online: http://www.unece.org/env/pp. The *Aarhus Convention* is one of the first binding international instruments to recognize "the right of every person of present and future generations to live in an environment adequate to his or health and well- being" and has developed the principle of public participation significantly. This regional convention is open to participation by members or consultative members of the United Nations Economic Commission for Europe (UNECE) - including North America and the former Soviet States of Central Asia. It applies not just to transboundary but to national activities, and an annex lists the activities and installations in respect of which public participation provisions apply, including refineries, power stations, nuclear reactors and installations, smelters, chemical plants, mines and waste management installations.

the participation of diverse public and civil society voices to go beyond passive consultations into engagement. Access to information depends on transparency and the active dissemination of knowledge and analysis, rather than simply data. Access to justice, often the most difficult of these three 'conditions', refers to civil society participation in dispute settlement, for example, through the submission of *amicus curiae* briefs, or the initiation of citizen reviews.

On the international level, trade, environment and social development law-making processes are all beginning to adapt to the need to facilitate greater participation. But progress has been faster in some areas than in others. Current trade and environment debates in the Americas offer several good case studies, and an important conclusion: public participation is often earned, rather than granted.[72] In this article, a few case studies are drawn from global and sub-regional law-making examples in the area of sustainable development. These offer lessons for future developments in both policy domains, as well as ideas for ways that civil society involvement can help these areas of law and policy to become mutually supportive.

Civil society participation is not a new or revolutionary idea in the Americas. Indeed, inter-American events were among the first efforts of some governments to officially include certain sectors of civil society, such as private enterprise, in multilateral conferences.[73] However, international trade debates have traditionally been relatively closed. Governments have often perceived themselves as defending dispersed consumer interests by making tariff reduction commitments that go against particular private interests (and are often vulnerable to political pressures from particular industries which favour protectionist policies). Legitimate fears have existed in the trade community – namely, that if these domestic 'special interests' gain too great a voice in processes that were meant to remain isolated and free from political pressure, it would be impossible to reduce tariffs at all, and comparative advantages would be lost.[74]

However, trade rule-making has now expanded far beyond tariff reduction, into new areas such as intellectual property rights, investment, services and subsidies. These areas of public policy need to be debated publicly before they are negotiated. In this respect, a distinction is needed between public interest organizations (and civil society experts) and private 'vested interests' (disguised or overt protectionists). The cooperation of the former group is essential for a trade agreement to succeed in a democratic and participatory society. These 'public interest' organizations are often not defending private economic interests, but representing public policy concerns.

There are many ways to ensure that open public debates can take place on important policy issues in the context of a trade negotiation. In this regard, the decision of trade ministers in Quito, Ecuador, to release the second draft text of the Free Trade Area of the Americas (FTAA), offers potential for greatly increased transparency and better

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[72] See e.g. M-C. Cordonier Segger et al., *Trade Rules and Sustainability in the Americas* (Winnipeg: IISD / UNEP, 2000) and *Ecological Rules and Sustainability in the Americas* (Winnipeg: IISD / UNEP, 2002).

[73] See S. Charnovitz, "Two Centuries of Participation: NGOs and International Conferences" (1997) 18:2 *Michigan Journal of International Law*, 183.

[74] See R.C. Murillos, *Trade And Environment, Opening the Dialogue*, (San Jose: Costa Rica, 1998).

informed decision-making.[75] Other examples, from economic, labour and environmental aspects of global or regional cooperation processes, can also provide useful lessons.

Openness Is Still Sketchy in Americas Trade Regimes

All countries of the Americas are members of the World Trade Organisation (WTO), which is still seen to 'set the trends' in many areas of trade law and policy making. In the WTO itself, there has been a slow, 'cautious but steady' movement toward more consultation with civil society.[76] The WTO Policy on Release of Documents is one example of this new attitude. This policy has changed from a blanket prohibition against dissemination unless unanimously requested, to a presumption that a document will automatically be released unless a WTO member actually requests that it remain confidential. In an even more dramatic movement, certain WTO members have even begun to undertake *ex-ante* national environmental impact assessments of trade negotiations, and have included public consultation phases in these processes.[77]

There have also been changes to the WTO dispute settlement procedures. Two small procedural steps have generated initial hope for higher quality civil society involvement. First, in cases where scientific assessment is uncertain and public health or environmental measures are being reviewed, there is recognition that international trade lawyers alone may not be best placed to resolve the issues.[78] For example, in the *EC – Asbestos case*, a WTO Panel established an eleven-step procedure to consult with individual scientific experts.[79] This new consultation process was built step by step, and is not controversial.[80] In addition, there is pressure to go further. The WTO dispute settlement mechanism has attempted to accept *amicus curiae* briefs from NGOs and others.[81] For example, again in the *EC – Asbestos* case, the Appellate Body took it upon itself to issue an Additional

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[75] See FTAA Second Draft Text, FTAA.TNC/w/133/Rev.2, 1 November 2002. Available online: http://www.ftaa-alca.org/ftaadraft02/eng/draft_e.asp.

[76] This movement is demonstrated by measures taken to increase participation, and access to information. For example, the WTO Secretariat initiative now organizes an annual Symposium for non-governmental organizations and member states, coordinates a calendar of parallel events in WTO Ministers meetings, and places greater emphasis on communication with the public and others. WTO members have also undertaken efforts to secure increasing transparency in national trade policy-making processes, through the establishment of national public consultations and advisory boards, as well as by inviting NGO advisors on their national delegations.

[77] See for instance, Government of Canada, *Canada's Environmental Assessment Framework for Trade Negotiations* . Available online: http://www.dfait-maeci.gc.ca/tna-nac/backgrounder-en.asp.

[78] See e.g. D. Wirth, *The Role of Science in the Uruguay Round and NAFTA Trade Disciplines,* Environment and Trade Series 8 (Geneva: UNEP, 1994).

[79] International organizations and institutions such as the World Health Organization (WHO), the International Labour Organization (ILO), the International Programme on Chemical Safety (IPCS), the International Agency for Research on Cancer (IARC) and the International Organization for Standardization (ISO) helped the WTO panel and the parties to the dispute in identifying the experts. See *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 12 March 2001, at para. 5.1. The EC requested the Panel to consult a technical expert group but the Panel decided that individual experts were more appropriate. See para. 5.19.

[80] The Appellate Body has stated that "as long as [they] act consistently with the provisions of the DSU and the covered agreements, [they] have the authority to decide whether or not to accept and consider any information that [they] believe is pertinent and useful in an appeal." See *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 20 September, 1999, at para 106-7. *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, 8 November 2000, , at para 39.

[81] See D. Esty, "The World Trade Organisation's Legitimacy Crisis" (2001) 1:1 World Trade Review, 7 – 22.

Working Procedure[82] whereby, "in the interest of fairness and orderly procedure in the conduct" of the appeal, "any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body" was invited to apply to do so.[83] Up to this point, independent *amicus* briefs, if these were not included with the submissions of a Party or a third party, had never before been taken into account.[84] Though the attempt was blunted in the end and none of the briefs were formally accepted,[85] it sent encouraging signals at the global level.

On a sub-regional level in the Americas, there are other examples of non-governmental participation in trade agreements and dispute settlement. Where the trade liberalisation processes are part of a broader integration project, many civil society participation mechanisms, ranging from social forums to socio-labour advisory commissions, can and have been established to allow citizens a voice in the broader project, though the trade decision-making itself often remains relatively closed. Mechanisms are also provided for access to justice. For instance, private citizens now have access to appeal with the Andean Court of Justice,[86] and the Andean Community, according to Decision 285 of the Cartagena Agreement Commission, allows companies, through member countries, to request that a board appointed by the Community apply measures to prevent or correct damage to production or exports caused by business practices that restrict free competition within the sub-region.[87]

In the NAFTA context, there is very little openness in the trade bodies themselves, *per se*. However, recent petitions by the Canadian International Institute for Sustainable Development (IISD) to a tribunal established under NAFTA Chapter 11 on an investment dispute, and others in the *Methanex case,* have led to openness towards the presentation of *amicus curia* briefs.[88]

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[82] *Communication from the Appellate Body,* WT/DS135/9, 8 November 2000. See also G. Marceau and P. Pedersen, "Is the WTO Open and Transparent?" (1999) 33:1 Journal of World Trade 5-49; D. Esty, "Non-Governmental Organisations at the World Trade Organisation: Cooperation, Competition, or Exclusion" (1998) 1:1 Journal of International Economic Law, 123.

[83] *Communication from the Appellate Body, ibid*. See *EC - Asbestos*, above, at paras. 54 - 57.

[84] It should be noted that, relying in part on conclusions of the Appellate Body, a North American Free Trade Agreement tribunal has recognised that there is legitimate public interest arising out of certain subject matter. The tribunal also found that its dispute settlement mechanism "could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive." See In the Matter of an Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, *Methanex Corporation* v. *United States of America,* Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amicus Curiae', 15 January 2001, at para 49, available at http://www.iisd.org/investment_regime.htm.

[85] ICTSD, "*Amicus* Brief Storm Highlights WTO's Unease with External Transparency" (2000) 4:9 *Bridges Between Trade and Sustainable Development*.

[86] See, e.g. Rico Fontera, V. "La Comunidad Andina y los procesos de integracion regional : aspectos politicos y economicos", in eds. ALOP / CEFIR / CLAEH, *Participacion de la Sociedad Civil en los Procesos de Integracion* (Montevideo : ALOP / CEFIR / CLAEH, 1998) at 139 - 163

[87] Commission of the Cartagena Agreement, 1991, in UNCTAD, World Investment Report 1997, "Transnational corporations, market structure and competition policy" (New York and Geneva: UNCTAD, 1997), at 222.

[88] A North American Free Trade Agreement arbitral tribunal has recognised that there is legitimate public interest arising out of certain subject matter. The tribunal also found that its dispute settlement mechanism "could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive." See In the Matter of an Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, *Methanex Corporation* v. *United States of America,* Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amicus Curiae', 15 January 2001, at para 49, available at http://www.iisd.org/investment_regime.htm

In South America, Mercosur, through its political and social integration structures, provides access via an economic and social advisory council that receives information from labour, business and consumer representatives. Experts from civil society attend relevant meetings of the technical subcommittees, and present their recommendations, and a socio-labour Commission created by Mercosur includes tri-partite representation from industry, government and labour unions.[89]

On the hemispheric level, considerable will exists on paper for increased openness, and mechanisms have been established to this effect. First, as mentioned above, the decision of trade ministers in 2001 in Buenos Aires, Argentina, and again in 2002 in Quito, Ecuador, to release the FTAA draft texts, offers potential for greatly increased transparency and access to information. Second, in terms of institutional participation mechanisms, the Committee of Government Representatives for the Participation of Civil Society (a committee of the FTAA negotiations that was established in the 1998 San Jose meeting of Americas trade ministers) began with a limited submissions process. Indeed, detractors even dubbed the Committee a 'civil society mail-box.' However, civil society groups organised themselves, requesting spaces to participate and working hard in the intervals to generate and debate hemispheric recommendations. Finally, after sincere requests at a Trade and Environment Forum at the 2002 meeting of Americas trade ministers,[90] at Quito, specific measures were put in place. The Committee was directed to increase its efforts toward transparency. [91] It is now embarking on a programme of proactive steps to inspire greater public dialogue, undertake more comprehensive information disclosure and communication policies, and establish links to the work of other FTAA negotiating committees. Though intervenor funding mechanisms are not yet available to ensure the participation of under-represented groups, social and environmental issues are not yet a specific item for consideration by the committee and specific forums for their dialogues are only just beginning to be opened, some progress has been made. Measurable operational procedures now need to be generated, to indicate how civil-society concerns will be addressed in the FTAA and its institutions.

As such, with regard to the recent evolution of trade regimes in the Americas, three general observations can be made. First - it is possible. Trade regimes can include provisions to encourage and support openness. Second - it is difficult, for very real reasons, and processes to ensure openness are still on the very cutting edge of international trade negotiations.[92] A third general conclusion is that it's necessary. While

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[89] See F. Pena, "La experiencia del Mercosur" in *Participacion de la sociedad civil en los procesos de integracion: Seminario* (Montevideo: ALOP / CEFIR / CLAEH, 1998). See also J. Grandi and L. Bizzozero, "Hacia una sociedad civil del Mercosur: viejos y nuevos actors en el tejido subregional" in *Participacion de la sociedad civil en los procesos de integracion: Seminario, ibid.*. See also, H. Maletta, "Pobreza, Empleo e Integracion Regional en el Marco Macroeconomico Latinoamericano," in ALOP / CEFIR, CLAEH, *La Situación Social en los Países del MERCOSUR* (Montevideo: ALOP / CEFIR / CLAEH, 1998).

[90] See Statement of CEDA – FFLA – IISD Civil Society Trade and Environmental Forum, presented to the trade ministers of the Americas in Quito, Ecuador, November 30, 2002. Available online:http://www.ceda.org.ec.

[91] Ministerial Declaration of Quito, Seventh Meeting of Ministers of Trade of the Hemisphere, Quito, Ecuador, November 1, 2002, at paras 29 - 35.

[92] On a continuum, these measures seem to range from easier to more difficult. Provisions to ensure transparency are more straightforward in most cases, facilitated by policies to make documents available on websites, or release documents on demand. Mechanisms to ensure greater degrees of public participation are harder to arrange, requiring considerable attention to the differences between resources of one set of groups (say, northern NGOs) to another

opening these processes requires pressure, political will and constant scrutiny, as well as earnest efforts from civil society to build their own expertise and offer constructive proposals, these are arguably some of the only mechanisms by which a trade treaty will gain enough public acceptance to become law in many democracies today.

Openness Is Gaining Ground in Americas Environmental Regimes:

Environmental regimes have proved policy innovators in terms of public participation, access to information and access to justice.

In particular, certain multilateral environmental accords (MEAs) have been ratified by almost all countries in the Americas. Three MEAs provide particularly interesting illustrations.

First, the *Basel Convention*, ratified by 21 countries in the Americas, is designed to address problems regarding the transboundary movement of hazardous wastes. As the importation of hazardous waste can directly affect communities, instruments for openness exist in the Convention.[93] The 2001 *Protocol on Liability and Compensation to the Basel Convention* also provides examples of innovative mechanisms for openness in an environmental agreement.[94] The United National Economic Commission for Latin America and the Caribbean (CEPAL) has initiated a regional process of consultations for a sub-regional accord on the transportation and disposal of hazardous wastes, delineated by the Basel Convention. The proposal has the potential to address *de facto* barriers to effective participation, by establishing a regional network of centres for capacity building and technology transfer on these issues.

Second, most countries of the Americas have ratified the 1992 *Convention on Biological Diversity* (CBD), with the notable exception of the United States. The CBD exists for the conservation and sustainable use of biological diversity and the fair and equitable sharing of the benefits that derive from access to genetic resources. It provides for the transfer of appropriate technology, access to genetic resources (in accordance with other rights), and appropriate levels of financing. CBD mechanisms to facilitate public access to information include a clearinghouse and other means to provide for public participation

(southern indigenous peoples), as well as appropriate processes to facilitate actual consultation and engagement. Finally, provisions to ensure access to justice in trade agreements are the most difficult to secure.

[93] In Article 15, the *Basel Convention* grants direct access with observer status to negotiating sessions and Conferences of the Parties (COP), for any national or international organization, governmental or non-governmental, with competence in the field of hazardous wastes. Article 16 also grants groups the right to provide information to the secretariat to be transmitted to the Members. These measures are only partially successful, as lack of intervenor funding means that civil society representation is generally dominated by business lobby groups, their detractors from large international NGOs, and NGOs from OECD countries. In the Convention itself, the third aspect, access to justice, is left mainly to mechanisms provided by national authorities.

[94] The objective of promoting internal transparency is recognized in various provisions (Article 3.6(b) and Article 10.2), in particular through the obligation to inform the Secretariat of implementation measures. By publishing any non-restricted reports, the Secretariat also informs citizens. But the most interesting aspect of the Protocol is its provisions for access to justice. The Protocol establishes that exporting states will hold civil responsibility for damages caused by the transport or disposal of hazardous wastes. Under certain conditions, it even grants redress by holding individuals liable for damages. There is the possibility for private citizens and legal entities to seek reparation, within a ten-year prescription period, with tribunals empowered to adjudicate cases.

and exchange of information with the general public.[95] In addition, in negotiations of the Working Group on indigenous knowledge (Article 8(j) and related provisions), different resolutions of the Conference of the Parties have called to include indigenous peoples representatives in the governmental delegations..

Third, most countries in the Americas have ratified the United Nations Framework Convention on Climate Change (FCCC), although its *Kyoto Protocol* was still not yet in force in July 2003. The FCCC has a series of provisions to facilitate access to information, and several public participation mechanisms.[96] The private sector, non-governmental organisations and the scientific community participated in Kyoto Protocol negotiations, making interventions on the floor of the Conferences of the Parties. In situations where governments found themselves paralysed, these partners and several inter-governmental agencies, such as the World Bank, proved their value by advancing the goals of the Protocol .

Hemispheric organisations, like the OAS, can provide institutional support to implement otherwise forgotten commitments for participation. This depends upon their mandate from governments, and the dedication of staff members and experts. The *1996 Santa Cruz Summit Declaration* affirmed the need for full integration of civil society in sustainable development programs.[97] Coordinated by the Environment and Sustainable Development Unit of the OAS, the Inter-American Strategy for Public Participation provides one hemispheric example of an open and transparent process to implement this mandate,[98] as is described elsewhere in this book.

However, some of the best models of innovative mechanisms for increased transparency and public participation are found in the sub-regional environmental accords (REAs) to which many countries in the Americas are accountable. Three examples in particular come to mind.

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[95] While Article 17 of the CBD mandates that the parties will facilitate the exchange of information, it does not clearly state whether this exchange is restricted to government agencies, or if it also includes the general public. There is an accountability system, outlined in Article 26, which requires periodic reports from parties to the COP, but no direct duty to ensure general public access to these reports. Article 23.5 opens space for non-governmental organizations to participate in the CBD. In addition, the secretariat plays a key role by reaching out to public and civil society actors. It ensures that in practice, the regime remains open and informative. Indeed, it has inspired and supported the establishment of hemispheric biodiversity scientific networks and clearinghouses. In an innovation at Article 10, mechanisms of public participation are also opened to industry sectors and indigenous peoples groups, recognizing the need for close collaboration in decision making-processes. The importance of industry participation is also highlighted in Article 16, which refers to the transfer of new technologies for biodiversity conservation. Indigenous peoples' involvement is seen as crucial in the implementation of *in situ* conservation mechanisms and benefit sharing, and this is noted in Article 8.

[96] At the international level, the right to access information is exercised through the obligation of the parties to present reports made public by the Conference of the Parties and the Secretary. In practice, debates can still be limited to state parties and certain international organizations with the resources to follow debates. At the national level, the FCCC also provides access to information to individuals regarding climate change and its effects, though this is more limited. Finally, in terms of access to justice in cases of environmental disputes, individuals or NGOs, or even state parties, have not gained a mechanism, which permits claims. As such, the FCCC addresses the principle of openness, but in a limited manner.

[97] The Declaration proclaims that the signatories "will support and encourage, as a basic requirement for sustainable development, broad participation by civil society in the decision-making process, including policies and programs, and their design, implementation and evaluation." Available online:http://www.ispnet.org andhttp://www.oas.org/usde/News/news7.htm.

[98] Available online:http://www.oas.org/usde/isp.htm.

First, the North American Agreement on Environmental Cooperation (NAAEC) is a particularly good model for openness in a regional environmental agreement, testing various innovative mechanisms with some degree of success, which has granted it some legitimacy in the eyes of North American civil society organisations.[99] One of the most innovative mechanisms is the provision for a fact-finding record to be undertaken, even if solicited by civil society groups.[100]

Second, the Central American Convention for the Environment (CACE), which created the Central American Commission for Environment and Development (CCAD), among its objectives considers the promotion of descentralised, democratic and participatory environmental management [101] Indeed, treaties facilitated by this body, such as the new *Central American Forest Convention,* provide for public participation, including for local communities, workers, businesses and indigenous peoples, in the planning, implementation and assessment of national forest policies enacted in compliance with the Convention.[102] The Central American Convention on Biodiversity also provides for public participation in biodiversity management.[103]

Finally, the Caribbean Community is far ahead in its formal mechanisms for civil society participation. In 1997, a *Civil Society Charter* recognized the need for participation for a wide range of actors.[104] A range of issues deemed critical to the future development of the Caribbean Community is also discussed through the Caribbean Community (CARICOM) Forum. Some of the proposed issues relate to: the reform of the region's education system and its relationship to employment, productivity and technology acquisition; recapturing/retaining migrating skills; promoting instruments at the regional and national level to facilitate domestic savings; and focusing on the Caribbean as a 'zone of peace' as part of a 'New Model of Economic Development' for the Caribbean.[105]

At the bilateral level, there are also two new examples worth consideration as models for hemispheric accords. Parallel to the Free Trade Agreement between Canada and Costa Rica, the Environmental Cooperation Agreement agreed by these two states recognizes the relevance of transparency and public participation in the development of

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[99] The preamble of the Agreement recognises the importance of civil society participation in the conservation, protection and improvement of the environment. Regarding access to the information process, the agreement establishes a series of provisions related to the general public's access to information at all levels. According to Article 2, the parties should periodically produce reports about the state of the environment that have to be made public and administrative and legal procedures are contemplated to guarantee access. Similar provisions are in place regarding public participation, such as in Article 9, which mandates that the Council hold public meetings in all its ordinary sessions and consult with NGOs, including independent experts, in decision making processes.

[100] G. Alanis, "Public Participation within NAFTA's Environmental Agreement: The Mexican Experience" in J. Kirton and V. Maclaren, eds. *Linking Trade, Environment and Social Cohesion: NAFTA Experiences, Global Challenges* (Burlington: Ashgate, 2002).

[101] Article 2(h). See the text of the Convention in the web page of the Central American Commission for Environment and Development, at http://www.ccad.org.

[102] See Article 5.

[103] See Article 35, among others.

[104] This Charter is now being revisited by the CARICOM, to strengthen existing mechanisms of consultation between government and civil society. They plan that new mechanisms will be identified and seek a commitment to ongoing collaboration at national and regional levels.

[105] For more information, see the CARICOM website at www.caricom.org, and the CARICOM see also the Charter of Civil Society for the Caribbean Community at, www.caricom.org/chartercivilsoc.html.

environmental laws and policies. The promotion of public participation in the process of development environmental laws is one of the stated objectives.[106] The Agreement addresses public participation and access to justice for violations of environmental laws, such as: the right of citizens to request authorities to seek potential violations of environmental laws;[107] the development of cooperation programs which may involve the public and experts;[108] the right of any citizen or NGO to request information from any Party on the effective implementation of environmental law in its territory and the duty to respond to the request made, including the public availability of a summary of the question and the response;[109] the appointment of focal point for communications between any Party and the public on matters related to the implementation of the cooperation agreement;[110] and the development of mechanisms to inform the public of activities carried out under the agreement and to involve the public in such activities.[111]

The Free Trade Agreement between Chile and the United States presents a complementary model under its Chapter 19 on the Environment, which establishes an Environmental Affairs Council. According to the Agreement, the Council shall ensure a process for promoting public participation in its work and shall seek opportunities for the public to participate in the development and implementation of environmental activities.[112] Each Party shall provide receipt and consideration of public communications on matters related to the Chapter and shall make available to the other Party, and its public, all the communications it receives and shall review them in accordance with its domestic procedures.[113] In addition, each Party may also convene or consult an advisory committee to advise on the implementation of the Chapter.Each committee comprises members of its public (representatives of business and NGOs).[114] Also under the procedural matters, access to justice is provided, for violation of environmental laws.[115]

In summary, four general points can be made regarding the role of civil society in Americas environmental regimes. First, they are natural. Most environmental regimes appear to contain provisions for civil society participation, and this is not considered abnormal in the *modus operandi* of the accord negotiation or implementation. Second, they are growing. In particular, there appears to be high public interest, recognition on the parts of governments and other actors of the value of civil society roles, and provisions for adequate participation and information. Still, these processes appear to have few provisions for access to justice, which is still the most challenging of the goals involved in ensuring an open system. Third, they are not perfect. Public participation mechanisms in the Americas, whether at global, regional or sub-regional levels, still face the critique that they are too expensive, un-coordinated, under-resourced and chaotic. Finally, one leading question must be asked - where is the link between environmental and economic

[106] Environmental Cooperation Agreement between Canada and Costa Rica, Article 1. (d).
[107] See Article 5.
[108] See Article 8.
[109] See Article 9.
[110] See Article 10.
[111] See Article 11.
[112] See *US- Chile Trade Agreement*, Article 19.3.
[113] See Article 19.4.1.
[114] See Article 19.4.3.
[115] See Article 19.8.

decisions? It is not clear that environmental regimes have any influence on economic decisions.

The Need for Further Progress

In the FTAA, as mentioned above, certain steps have been taken to ensure greater openness. First, through the Committee of Government Representatives for the Participation of Civil Society, governments have ensured a formally recognized channel for civil society recommendations. Second, through the unprecedented release of the FTAA draft texts, governments have sent a strong signal that serious expert analysis and commentary is welcome, and have provided an avenue for civil society organisations to read and consider the implications of the text during the negotiations themselves. But finally, upon careful study of the text, it becomes clear that in certain instances, especially the draft provisions in Chapter 3 on Investment (particularly at Article 17 on transparency), and Chapter 6 on dispute settlement, the FTAA does not necessarily contemplate greater levels of openness. Indeed, at present the draft states instead that "Non-governmental participation in the dispute settlement system in this Chapter shall not be permitted." These provisions, taken together, present a mixed message.

For further progress, there is a need to strengthen openness in the FTAA. This can be done through three main recommendations. First, support is needed to develop civil society capacity to intervene regarding both the FTAA 'mail-box' and its future, and in the negotiations of the FTAA draft text (especially with respect to the Investment and Dispute Settlement Mechanism Chapters). Civil society organizations need to work closely with their governments, informing them of the benefits of participation and making the broader public aware of their positions on these issues. Second, there is a need to create a regular forum for FTAA sustainable development related dialogue between civil society, business and governments, to break myths and begin to build a community of hemispheric actors. Third, there is still a need for civil society organizations involved in the debates to keep up pressure and a constructive presence, and to continue to address NGO priorities in other hemispheric, sub-regional and national spaces.

One further concrete proposal that is becoming more popular in the Americas is that regarding the use of 'sustainability impact assessments' (SIAs). SIAs can be conducted *ex-ante* (prior to the conclusion of the FTAA agreement), with public participation. SIA analysis can also identify useful parallel measures for trade policy, help develop proposals for liberalization sequencing options which can mitigate or lower any negative environmental or social effects, and strengthen the sustainable development benefits of liberalization. As mentioned above, Canada and other leaders have launched processes to conduct preliminary, participatory sustainability reviews of the proposed FTAA. Coordinated approaches must now be sought for each sub-region. This could be done with support from the Inter-American Development Bank (IDB), Economic Commission for Latin America and the Caribbean (ECLAC) and OAS, regional institutions, which provided in-depth analysis of the region's trade structures prior to the launch of the FTAA. In particular, SIA research can focus on the specific environmental or social implications of each of the nine FTAA negotiating groups (including agriculture, investment, market access, intellectual property, services and other issues). The SIAs can

compile comparative data and develop a matrix that builds upon recent work at the United Nations Environment Programme (UNEP), the Organization for Economic Cooperation and Development (OECD), various national governments, the North American Commission for Environmental Cooperation, as well as work by NGOs and research organizations. Civil society organizations can participate as partners in all aspects of the sustainability reviews, and their ongoing or future efforts to carry out such reviews in the context of the FTAA should be supported.

It is essential to build a strong hemispheric civil society voice with the capacity to participate effectively in shaping trade and integration policy. Two sets of concerns exist on a hemispheric level in this respect. First, it is feared that civil society voices are of uneven strength in the FTAA process, and that increased openness might lead to unbalanced participation from some countries. When the participation of civil society exclusively reflects social and ecological concerns of the more developed partners, civil society participation might simply be used as a tool to fight so-called social / ecological dumping by less developed partners, instead of promoting their sustainable development needs. Second, while opportunities can be created by accords or mandated by governments, it is the responsibility of civil society and other groups to take them up. Often, these groups and marginalized communities lack the very capacity, analysis and resources to take advantage of spaces for dialogue. This leaves formal channels under-utilized, particularly in environmental regimes. In addition, disparities in regional and sub-regional representation could hinder the development of inclusive processes on the hemispheric level.

So what future policy options are available? Three specific recommendations can be made to further strengthen civil society participation in the Americas integration debates. First, civil society 'sustainable development meetings' and other mechanisms are developing to parallel the FTAA Trade Ministerial meetings. With this kind of new energy, the integration process in the Americas has much greater chances of obtaining the support and participation of the broader public, but more is needed. A civil society charter, supported by implementation mechanisms, could be developed, and official spaces granted for participation. Second, under auspices of leading institutions, experts networks are being created in order to foment the exchange of information, participation and cooperation between different regional actors on trade and sustainable development issues. A centre or institution could be created with a mandate to undertake capacity building, increase information analysis and flow, and provide technical support on hemispheric sustainable development issues. Policy and grant-makers would need to support the creation of such a non-advocacy mechanism that can facilitate comprehensive policy dialogues among the different interests, sub-regional perspectives and sectors. Finally, the intricacies of the new arrangement with 34 countries on very different levels of development promise interesting policy debates if the FTAA follows the dominant trend, and recognises sustainable development as one of its goals. A place must be opened for a broad dialogue on hemispheric integration issues, with technical support from other inter-governmental organizations (IGOs).[116] Civil society groups

[116] In partnership with the existing Hemispheric Working Group on Trade and the Environment, a Standing Conference or some kind of Hemispheric Public Advisory Committee could be constituted, which would provide a place for dialogue between senior officials from governments, regional and hemispheric institutions, and the NGOs, academic institutions and private sector voices. It must be legitimate, non-bureaucratic and inclusive. It should aim at

should seek to establish a forum where links between the three pillars of sustainable development (environmental protection, economic development and social development) can be addressed together. With such an effort, greater openness in hemispheric trade, social development and environmental policy debates can help to ensure that hemispheric integration fosters, rather than frustrates sustainable development.

5. Financing and Investment

5.1 Investing in the Environment of the Americas

By Carolyn Deere[117]

How should environmental protection and cooperation in the Americas, in the context of regional economic integration and rapid structural economic changes stimulated by trade, investment and related policy changes, be financed?

Resource constraints are a major challenge for efforts to: advance environmental protection; strengthen environmental and economic decision-making; and foster environmental cooperation and more effective policy design, implementation and compliance. Governments, advocates, and businesses all confront limits. These are often based on inadequate data and information, limited human capacity and expertise, low political commitment and poor technology, many of which are interlinked problems, and all of which relate to lacks of resources. For hemispheric economic integration to help achieve healthier economies, people and environments, governments, businesses and civil society across the region need to invest in the environment. They will need to invest in regional and sub-regional environmental cooperation, in national environmental protection efforts and in local environmental efforts. They will also need to reduce and better manage investment trends that stimulate activities that are environmentally harmful.

Inadequate Investment in Latin American Environmental Protection

The environment in all countries of the Americas suffers from inadequate investment in its protection. Governments across the region focus their economic strategies on maximizing growth without adequate consideration of other social development and sustainability priorities. There is inadequate environmental infrastructure to address pollution control, natural resource management and wilderness preservation needs. Many

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building consensus on a focused trade and sustainability agenda that would be built upon hemispheric trade and environmental policy frameworks. Its activities would include information sharing, networking, policy analysis and outreach, and terms of reference could be elaborated in cooperation with leading actors in the debates.

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countries in the region have good environmental laws, but they are not adequately enforced.[118] Even the more prosperous national environmental agencies, such as those in Mexico and Argentina, lack the resources to adequately enforce environmental regulation.[119]

In South America, for example, 54 percent of frontier forests are threatened by logging and the actual area covered by forests has declined by more than half a percentage point annually from 1990 to 1995.[120] In Central America, the state of forests is even more alarming. Eighty-seven percent of the region's remaining frontier forests are under threat, and there is loss of an average of 1.26 percent of its forests annually, making it the world's most rapidly deforesting region.[121] This type of environmental degradation has significant human health and economic costs. Seventy-eight million people in Latin America lack access to safe water and 117 million, about one out of every four people, lack sufficient sanitation services.[122] Lack of environmental services is a key reason for the rise and spread of epidemics such as cholera and dengue fever.

A range of initiatives and proposals exist to advance environmental objectives at the sub-regional and regional levels. These efforts include sectoral initiatives (e.g., mining sector); resource specific initiatives (e.g. forests); pollutant specific initiatives (e.g., sulphur dioxide emissions); and process specific initiatives (e.g., right to know). Alongside these efforts are instruments to promote environmental cooperation among governments and among non-governmental organizations, businesses, and local communities. There have also been efforts to forge broad-ranging regional environmental agreements, not just to facilitate environmental cooperation, but also to advance specific environmental objectives. The 1996 Summit of the Americas on Sustainable Development in Santa Cruz de la Sierra in Bolivia developed a comprehensive agenda for the region, proposing initiatives on health, education, agriculture, forestry, sustainable cities and communities, water resources and coastal areas, energy and minerals. The Santa Cruz proposals emphasized the importance of technical assistance, capacity building and information sharing and the collaboration of the World Bank and Organization of American States in implementing the agreement.

Unfortunately, however, few of the ambitious objectives were realized, in large part due to a lack of financial and technological resources. Inadequate coordination among international institutions has lead to confusion in developing countries and "donor fatigue."[123]

Investing in the Environment

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[118] E. Sherwin and J. Audley *An Environmental Partnership for the Americas: Parallel Negotiations, Technical Assistance and the Greening of the FTAA* (Washington D.C.: Carnegie Endowment for International Peace, 2001).

[119] Contreras, R. "Profile of Environmental Management in Argentina and Brazil" (Ottawa: Environment Canada, 1999).

[120] UNEP, *Global Environmental Outlook – Latin American and the Caribbean* (Mexico: UNEP, 2000) .

[121] *Ibid.*

[122] *Ibid.*

[123] For example, the Special Multilateral Fund of the Inter-American Council for Integral Development, the principal source for technical cooperation grants in the OAS, only collects $US 8-9 million a year from member countries to accomplish this enormous mandate.

Potential sources for investment in environmental protection and cooperation can be organized into four major categories. First, public resources can be harnessed. Second, private resources can be harnessed. Third, environmental business can be stimulated. Fourth, negative externalities of investment can be corrected, and fifth, negative investment trends can be reduced or reversed.

Harnessing public resources

Overseas development assistance (ODA) is an important component of the framework for financing the sustainable development agreed to at the 1992 Earth Summit. Chapter 33 of Agenda 21 sets out this agreed framework and estimates the total annual costs of its implementation at U.S. 125 billion dollars of external resources, with ODA being the main source. Unfortunately, subsequent to the Earth Summit, ODA declined as a percentage of GNP in OECD countries, especially for Latin America.[124] Instead, private capital—foreign direct investment and foreign portfolio investment—have become the dominant source of capital for many developing countries. However, these private flows are concentrated in only a handful of important emerging economies and in particular sectors. They are rarely channeled toward environmental purposes, and many come with negative environmental side-effects.

Many developing countries have increased, albeit gradually and slowly, their investments in the social and environmental sectors. A major proportion of financial resources to invest in the region's environment must be generated from domestic public sources—the Rio Summit estimated that some U.S. 500 billion dollars would need to be generated in developing countries to implement its agenda.[125] This demands the political commitment of governments to promote the environment as a national priority and to integrate environmental objectives throughout national policy agendas. Unless, environmental protection is clearly articulated as a national priority, there is little chance of an increased flow and consistency of financial resources for the environment. Generating financial resources for the environment will require more than simply a budget allocation to an environment ministry. Cooperation between finance and environmental ministries, among others, and the integration of environmental finance into mainstream public finance will be vital for the design and implementation of new enabling fiscal mechanisms to help finance sustainable development agendas. There are two particular areas that warrant attention.

First, environmental taxes, user fees and charges present unique opportunities as instruments. There has been some encouraging experience in Latin American and Caribbean countries (LAC) with the use of conventional taxation to achieve

[124] The ODA target set out in Rio was 0.7 percent of GNP, but most countries linger far below that.

[125] Assessing trends in domestic resource mobilization for sustainable development is complicated by conceptual problems related to defining and identifying sustainable development expenditures and by the lack of comparative national data on public and private sector expenditures disaggregated by social and environmental activities. These conclusions are based in the Reports and Proceedings of the Fourth and Fifth Expert Group Meeting on Finance for Sustainable Development convened by UN/DESA in Santiago and Kenya respectively

environmental ends.[126] In some countries, revenues from state value-added taxes are distributed according to environmental criteria. Increased use of *environmental* taxes and charges on investments and activities that have negative impacts or on services that consume environmental resources can help raise revenue at the national and local levels for environmental sanitation infrastructure and local environmental management institutional development, provided that they are carefully designed. It can also help to integrate environmental dimensions into traditional fiscal policy.[127] Some countries have introduced systems of payments for watershed protection, access to national parks, the use of natural resources or other environmental services, and for different types of pollution caused to the environment.

There are also opportunities for environmental investment mechanisms linked to property taxes. In Colombia, a percentage of property taxes is set aside in municipalities for expenditures by regional environmental agencies. This has proven to be the most significant and stable source of environmental development financing in that country.[128] And in Costa Rica, a five-cent tax on each liter of gasoline has been used to finance reforestation, forest management, and protection activities. Much of the experience to date with environmental taxation has been on the pollution and industry fronts, but more could be done on taxing resource extraction, such as use of water or deforestation. The key constraint facing greater use of environmental taxes is that mainstream public finance agencies have limited experience in dealing with the introduction of taxes related to environment, and most environmentalists lack taxation policy background.

Finally, user fees are an important, if often controversial, tool for governments to have in a policy toolkit. At present, only a small fraction of the costs of irrigation water and industrial energy is being paid by its users in the business sector. This often results in waste and lack of efficiency in the ways that these resources are used. As argued by Panayotou, full-cost pricing of the public goods and services provided by the environment is beneficial because it reduces the burden on the state budget from the deficits of public utilities that do not fully recover their costs. It also reduces the need for additional capital to expand supply systems. Full-cost pricing can result in a financial surplus that could be used to finance environmental improvements. Finally, full-cost pricing sends the correct signals to the market and therefore helps conserve natural resources to mitigate the damage. On the non-biological side, full-cost pricing of the provision of energy can have tremendous impacts on energy efficiency.[129]

Tax incentives can be effective at promoting environmental investment among small and medium-sized enterprises (SMEs) whose characteristics, cost structures and technical support needs mean that they respond better to promotional strategies than to the

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[126] R. Seroa da Motta, J. Ruitenbeek, and R. Huber, "Applying Economic Instruments for Environmental Management in the Context of Institutional Fragility: The Case of Latin America and the Caribbean" in J. Holst, P. Koudal and J. Vincent, eds., *Finance for Sustainable Development: The Road Ahead* (New York: United Nations DPCSD, 1997).

[127] See OECD (Organization for Economic Cooperation and Development), *Environmental Policy: Economic Instruments* (Paris: OECD, 1997). See also OECD , *Development Cooperation Report* (Paris: OECD, 1999).

[128] R. Bayon, *Financing Biodiversity Conservation: A Framework and Approach* (Gland: IUCN – The World Conservation Union, 2001).

[129] T. Panayotou, *Financing Mechanisms for Environmental Investments and Sustainable Development,* Paper No. 15. Environmental Economics Series (Nairobi: UNEP Environment and Economics Unit, 1994).

imposition of charges or taxes.[130] Institutional changes in developing countries such as decentralization and devolution of taxing power to local governments have created opportunities for sub-national governments to access the international capital market without relying on central government guarantees.

Another potential source of public investment for environmental cooperation is international public resources and institutions. Five such mechanisms can be highlighted.

First, bilateral arrangements remain important. ODA is still an important source of environmental finance for developing countries and should be increased. Some governments have also successfully negotiated debt for nature swaps, which in turn have increased resources available for the environment.[131]

Second, international taxation can be used. At the international level, several proposals exist to help generate greater resources available for investment in the global environment. The proposal for a so-called "Tobin Tax" on foreign exchange transactions has gained momentum. Proposals have also been put forward for similar international taxation schemes that levy taxes on international air transportation, carbon emissions and/or trade. While the revenue gained from any of these could be dedicated to green infrastructure only the carbon tax was proposed specifically with environmental objectives in mind. The Tobin Tax, on the other hand, was originally proposed as a tool for helping manage financial flows rather than to generate resources. Growing political interest in the Tobin Tax has helped to stimulate a lively discussion about how international taxation might be administered in ways that would not undermine the tax-raising role that is currently exclusive to sovereign governments.

Third, through technology transfers, support can be obtained. Most international environmental and economic agreements impose a series of obligations on developed countries to promote financing and technology transfer to developing countries. Little effort has been made to operationalize this important source of resources for the environment. This must be made an urgent priority.

Fourth, most environmental institutions and agreements have financial mechanisms. Multilateral sources of financial resources dedicated to the environment include the Global Environmental Facility Green (GEF) and the Multilateral Fund of the Montreal Protocol. In the context of international environmental conventions such as climate change, biodiversity and desertification, the GEF was established to forge international cooperation and to finance actions to address four critical issues to the global environment: biodiversity loss, climate change, degradation of international waters, land degradation and ozone depletion.[132] The North American Fund for Environmental

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[130] A. Barcena, *Financing Sustainable Development in Latin America* (Santiago: CEPAL, 2001).

[131] For instance, see the Tropical Forest Conservation Act and the Enterprise for the Americas Initiative.

[132] Launched in 1991 to provide additional incremental funding for investments that have global environmental benefits, GEF has provided to developing countries approximately 4.75 billion US dollars between 1991 and 1998. GEF's financial instruments include a UNDP-GEF Small Grants Program that focuses on community-based activities mostly implemented through NGOs. Over 500 grants of up to $US 50,000 have been provided to date. See GEF *Early Impacts, Promising Futures*, Special Edition, Annual Report (Washington, D.C.: GEF, 1998). See also GEF, *Experience with Conservation Trust Funds*, Evaluation Report No.1-99 (Washington, D.C.: GEF, January 1999); GEF, "When is Conservation Best Served by a Trust Fund?," *GEF Lessons Notes No. 5* (Washington D.C.: GEF, January 1999); GEF,

Cooperation (NAFEC) also provides small grants for environmental purposes. In what may actually be an application of full-cost pricing at the global scale, the signing of various international environmental conventions and discussions about flexible mechanisms for the implementation (e.g. joint implementation and the Clean Development Mechanism in the case of the Climate Change Convention) have generated new financial opportunities for environmental protection.[133] The issue of joint implementation of conventions other than the climate change convention might be further explored while recognizing the common but differentiated responsibilities of developed and developing countries.

Fifth, multilateral and regional development banks are logical sources of financing for the environment in the Americas. To date, however, their performance has been sorely lacking. In 1999, for example, the Inter-American Development Bank (IDB) spent about 95 percent (92 percent in 1998) of its environment-related loans on projects that deal with the urban environment, pollution control, and natural disasters and only a very small percentage on natural resources management. Since grant and concessionary resources are scarce, financing natural resource conservation can often be difficult as it is hard to see how many initiatives will be able to pay for themselves in the long run, or generate resources to pay back loans.

Harnessing Private Sources of Funds

Private funds can be a vital source of financing for governments, but more specifically for NGOs and businesses engaged in specific environmental projects, implementing environmental policies, policy advocacy and legal action. A critical stimulant for environmental protection is the existence of active, adequately resourced, environmental organizations that can participate in an informed manner in local environmental decision-making and monitoring, legal and policy advocacy and in local environmental projects. Several potential sources of private funds are available for such activities.

Building Strategic Focus in a Conservation Trust Fund," *GEF Lessons Notes No. 6* (Washington D.C.: GEF, February 1999); GEF, "The Mexican Nature Conservation Fund," *GEF Lessons Notes No. 7* (Washington D.C.: GEF April 1999); and
GEF, *Experience with Conservation Trust Funds* (Washington, D.C.: GEF, 1999).

[133] The on-going climate negotiations have introduced the promise of some new approaches to financing sustainable development. The Kyoto Protocol's Clean Development Mechanism (CDM) holds out some potential to help increase financial flows to developing countries for cleaner development, carbon sequestration and environmental protection. A good example of both user fees and carbon sequestration, Costa Rica has initiated a program to compensate forest owners (private as well as public) for the services the forests provide. The government serves as a clearing-house, collecting money from the beneficiaries of the goods and services provided by the country's forests (services that include carbon sequestration, watershed protection, ecotourism and scenic values). They then distribute the money collected to the forest owners/managers, public (such as the National Park System) or private (small landholders). Though complex, the system provides a mechanism for small, private landholders that protect their forests to benefit from more sustainable forms of revenue generation (carbon sequestration and taxes on petrol). The World Bank has established a Prototype Carbon Fund (PCF), obtaining funds from industrialized countries and the private sector to invest in emission reductions for economies in transition and developing countries.

First, national environmental funds can be created.[134] Several Latin American countries are enjoying success with the establishment of national environmental funds (EFs). These funds take many different forms, generating revenue from a range of sources including, pollution charges, non-compliance fines, and earmarked state and international grants and allocations and debt-for-nature swaps. National environmental funds are far more than simple repositories of revenues. They represent new ways of distributing money for environmental protection to interested sectors of society, NGOs, community groups or private businesses. EFs vary greatly in their objectives, governance structure, sources of finance and the activities they finance. In fact, differences among environmental funds depend on the needs and desires of the governments of the institutions that set them up. Some EFs are capitalized through grants from multilateral institutions such as the Global Environment Facility (GEF), some are financed through loans, others through debt-for-nature swaps, and still others by governments using tax revenues, user charges on water, proceeds from the privatization of state industries (Ecuador), or petrol taxes (Costa Rica).[135]

On a national level, there are various examples of the use of environmental tax revenues. In Belize, the government has introduced a conservation tax on foreign tourists who visit Belize to enjoy the natural beauty of the country's forests, beaches and coral reefs. The proceeds from this tax are channeled into a conservation trust fund - the Protected Areas Conservation Trust - that finances the country's system of national parks and the conservation of Belize's natural resources.

There are three main types of EFs:
- Strategy funds: with a mandate to support a full range of activities included in national environmental plans or strategies, for example, the National Environment Fund (FONAMA) in Bolivia.
- Park Funds: that support the conservation of protected areas - either specific parks or national protected areas, such as the Fund for Natural Areas Protected by the States (PROFONANPE) in Peru and the Jamaica National Parks Trust.
- Grant Funds: that make grants to others—typically NGOs and community groups—for conservation and/or sustainable development projects. The Fund for the Americas in Chile, for example, includes strengthening civil society organizations and expanding understanding of environmental issues among its objectives.[136]

EFs manage their monies in one of three ways. First, through endowments, which invest their capital and use only income from those activities to finance activities. Second,

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[134] Much of the information in this article is taken from R. Bayon & C. Deere, "Financing Biodiversity Conservation: The Potential of Environmental Funds" (Presented by IUCN at a workshop on Financial Innovations for Biodiversity, Bratislava, Slovakia, 1-3 May 1998); and R. Bayon, *et al.* "Environmental Funds: Lessons Learned and Future Prospects", above.

[135] C. Tavera, P. Vasquez, and R. Norris, *Regional Consultation on National Environmental Funds in Latin America and the Caribbean: Final Report and Profiles of the Environmental Funds* (Bogota: ECOFONDO, 1996). See IDB, *Mexico: Investment Fund for Small Business in the Environmental Sector* (Washington, D.C.: IDB Multilateral Investment Fund - Interagency Planning Group, 1995). See also IPG, "Environmental Funds: A New Approach to Sustainable Development" (Report on a briefing, 26 April 1995); IUCN, TWN & WWF *Report on the First Global Forum on Environmental Funds* (Washington, D.C.: IUCN, 1994).

[136] See UNDP, "Strengthening the Capacities of National Environment Funds in Latin American and the Caribbean" (Report on the Regional Consultation on National Environmental Funds in Latin America and the Caribbean, Merida, Mexico, 1997).

through sinking funds, which are designed to disburse their entire principal and investment income over a fixed period of time (usually 6-15 years). Third, through revolving funds, which receive new resources on a regular basis (e.g. through proceeds of special taxes, fees or levies designated to pay for conservation programs), which replenish or augment the original capital of the fund and provide a continuing source of money for specific activities.

Environmental Funds may be publicly or privately financed, but are usually independent foundations, managed by mixed boards whose members represent both the private and public sectors. Experience to date indicates that the most successful funds are those that involve both governments and NGOs in their operation.

Private philanthropy, such as among the general public, in developed or developing countries, should not be underestimated as a source of funds for investment in the environment. Throughout the Americas, the public displays a willingness to pay for environmental protection when opportunities are provided. Membership contributions and annual giving commitments of private individuals is one source of funds. Fundraising targeted to specific causes—such as the protection of coral reefs, an island, or particular flora and fauna—can be very successful. The potential for this kind of charitable giving to make a major contribution to the environment in the Americas will increase, particularly as countries develop more substantive urban middle classes.

More institutionalized philanthropic activity is also on the rise in the Americas. A number of large U.S. and Canadian foundations have active grant-making programs focused on the environment in the Americas or on specific sectoral concerns (such as fisheries management) that arise in the region. To date, they have proven particularly valuable as funding sources for non-governmental organizations (NGOs), community-based organizations, advocates and researchers active in the region. The Macarthur Foundation, for example, has supported a regional network of environmental law organizations in the Americas. Foundations have also made grants to support initiatives such as environmental funds and to support dialogues among NGOs and government on critical environmental issues. In the past decade, several private foundations—styled after U.S. style philanthropies—have emerged in Latin America. Tax incentives for such initiatives can be an important stimulus to such foundations. New philanthropists in the region are experimenting with several different models of philanthropy (from traditional foundations and community foundations to "venture philanthropy".)

The significance of international NGOs as potential sources of funds for environmental protection and cooperation in the region ought not to be overlooked.[137] While these organizations often implement their own work agendas, many of them work closely with partners in the region to learn about creative ideas, and develop this work collaboratively. Beyond contributing their own staff and financial resources, some international NGOs, such as the Nature Conservancy, have been actively engaged in partnerships with and on

[137] The World Wildlife Fund (WWF), the World Conservation Union (IUCN), Swedish Nature Conservation Society, Royal Society for the Protection of Birds and Conservation International are just some organizations that have considerable environmental investments in the region. See R. Bayon, J.S. Lovink, and W.J. Veening, *Financing Biodiversity Conservation* (Washington, D.C.: IDB, 2000); and Birdlife International, *New and Additional? – Financial Resources for Biodiversity Conservation in Developing Countries, 1987 – 1994* (London: Birdlife International, 1996).

behalf of Latin American organizations in the process of negotiating for debt for nature swaps, accessing GEF funds and establishing environmental funds.

Correcting Negative Investment trends and Externalities

Increasing attention has been paid to the importance of preventing environmental damage and correcting negative investment trends, as a necessary complement to efforts to increase investment in pro-environment activities. To reduce negative investment trends and externalities, while generating revenue for the environment, governments use mechanisms such as fines on pollution and other undesirable activities, tradable permits to pollute or tradable resource quotas, and deposit refund schemes.[138] One of the easiest ways for governments to help finance environmental improvements is to prevent activities and policies that contribute to environmental damage. Several of these mechanisms are described in more detail below.

Removing environmentally harmful subsidies

Government subsidies (such as price supports for final goods and tax rebates for key inputs) to certain industries and activities can foster the over-use of inputs.[139] The removal of subsidies is extremely difficult politically. In effect, the subsidies create economic rents, which become an economic asset for their recipients. Moreover, the competition for these rents can promote corruption. On the other hand, some subsidies may be critical to the economic welfare and livelihoods of some communities, unable to compete effectively in the market place without subsidies, or unable to afford to buy certain commodities at market prices. In addition, there are some subsidies that governments put in place to promote improved environmental management by contributing toward the cost.

While one of the main goals of many subsidies is the protection of the poor, in many cases this is not achieved in practice. Examples include the subsidization of water, agricultural inputs and housing.[140] This recognized, the way to fix something is not to break it further. Subsidy reforms need to be accompanied by measures that address their social implications for the poor. In some cases, compensation of those who lose from reform must be considered. More work must be done to determine how governments can ensure that explicit subsidies are not simply replaced with hidden subsidies. In most instances, a gradual approach is likely to be most appropriate. Governments need to

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[138] See T. Panayotou, *above*. See also J. McNeely, "Achieving Financial Sustainability in Biodiversity Conservation Programs" in *Investing in Biodiversity Conservation,* Technical Paper ENV-111 (Washington, D.C.: IDB, 1997); T. Panayotou, *Economic Instruments for Environmental Management and Sustainable Development.* Paper No. 16, Environmental Economics Series (Nairobi: UNEP Environment and Economics Unit, 1994); A. Markandya, "Economic Instruments: Acceleration the Move from Concepts to Practical Application" in J. Holst, *et al.*, eds., *above*; D. Pearce, *et al.* "Replicating Innovative National Financial Mechanisms for Sustainable Development" in J. Holst, *et al.*, eds., *ibid.*;T. Panayotou, "Taking Stock of Trends in Sustainable Development Financing since Rio" in J. Holst, *et al.*, eds., *ibid.*; R. Seroa da Motta, *et al.*, *above,* and A. Markandya, "Applying Economic Instruments for Environmental Management in the Context of Institutional Fragility: The Case of Latin America and the Caribbean" in J. Holst, *et al.*, eds., *ibid.*

[139] J. Pieters, "Subsidies and the Environment: On How Subsidies and Tax Incentives may Affect Production Decisions and the Environment" in J. Holst, *et al.*, eds., *ibid.*

[140] *Ibid.*

carefully measure the efficiency of subsidies in reaching their stated goals, and consider the range of other socio-economic issues at stake (e.g., who is bearing the cost of subsidies).

Environmental fines

According to recent studies,[141] environmental fines have an enormous potential as sources of revenue. In LAC, examples of the use of fines to raise revenue for environmental activities include water pollution fines in Brazil and Colombia and air pollution fines in most countries of the region).[142] In Brazil, the new National Environmental Law has set up a mechanism whereby the National Environmental Fund gets a portion of the environmental fines collected in the country. By ensuring that the revenue generated by pollution fines is used to finance projects that help conserve the environment, fines can yield a double benefit for biodiversity conservation.

Tradable permits and extraction quotas

Tradable permits differ from fines in that they set an upper limit on a certain activity and use the market to achieve the environmental objective in the most effective way possible. An example of a system of tradable permits is the one currently in place in the United States to reduce air pollution (particularly in terms of sulphur dioxide). Under this system, polluters are given "permits to pollute." If they go beyond the pollution levels for which they have permits, they are fined. The system allows those who under-pollute (by investing in reduction technology or cleaner coal, for example) to sell their excess permits to over-polluters. This can create a strong incentive for pollution abatement. Permits (this time on resource extraction) have also been used to limit the use of water resources (in Chile) and to minimize the impact of industrial activities on fisheries (in New Zealand).

Permit systems can reduce compliance costs considerably, and are often more effective at reducing pollution than more command-and-control oriented mechanisms. However, this only applies when pollution legislation is effectively enforced, and fines are higher than incentives to pollute.[143] Additionally, if permits are initially auctioned off to polluters, they can raise a modest amount of revenue that can be used to protect the environment.

Deposit refund schemes and environmental performance bonds

Deposit refund schemes are pollution bonds are forms of liability insurance imposed on companies or individuals by a government. In the more familiar form of a deposit refund scheme, a small surcharge is added to every glass bottle or aluminum can sold. If and when consumers recycle the container, the surcharge (the deposit) is returned to them. Such systems can also be used to mitigate damage at a much larger scale as is the

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141 T. Panayotou, *above*. See also R. Lopez, *Financing Sustainability in Latin America and the Caribbean: Toward an Action Program* (Washington D.C.: IDB - Environmental Protection Division, 1994) and R. Lopez, *Demand-based Mechanisms to Finance the "Green" Environment in Latin America* in J. Holst, *et al.*, eds., *ibid.* .

142 R. Seroa da Motta, *et al.,* above.

143 A. Markandya, above; D. Pearce, *et al., above*; T. Panayotou, above.

case, for instance, in systems where mining companies are forced to take out "environmental bonds" when they are awarded a concession. If the government concludes that the mineral extraction is done without major damage to the environment, the "bond" or deposit is returned to the company.[144] However, if the government's assessment is that the mining activity has caused a certain amount of damage to the environment, the "bond" money is used to pay for fines and remediation.

These systems aim to shift responsibility for controlling pollution or environmental damage to individual producers or consumers who are charged in advance for the potential damage, as well as for monitoring and enforcement.[145] This can help internalize the true costs of environmental degradation into the economic calculations of consumers and companies when they undertake potentially harmful resource use or extraction.

Environmental Protection as Business

An increasing number of business leaders in the Americas recognize that the environment presents important commercial opportunities for the private sector and viable business prospects (e.g., rapid growth of eco-tourism). In the Americas, particular attention ought to be paid to the environmental potential of small and medium-sized businesses as these play a significant role in the economy. There are a number of general activities that governments and others can undertake to support investment in the creation and development of businesses with environmental objectives/products and/or which produce in an environmentally sound manner. For instance, most biodiversity-based businesses will need to develop business plans and build their entrepreneurial skills. Recognizing the need for capacity building and training, the BioTrade Initiative promoted by UNCTAD, with support of the Convention on Biological Diversity (CBD) Secretariat and other organizations, represents an integrated approach to stimulating investment and trade in biological resources. Governments and companies could also work with NGOs in the region to raise awareness about environmentally sustainable trade opportunities and provide technical and financial assistance to enable companies to meet international standards and achieve competitive status in international markets. Specific initiatives to promote the transfer of environmentally-sound technologies (such as pollution control and renewable energy products and processes) should also be prioritized.

Credit and loans to "Green Business"

Financial instruments that can provide lines of credit or special interest rates for investments and activities with positive environmental externalities are the complement to charges and taxes on negative ones. They can, for example, be used to stimulate and promote investment in cleaner production technologies, environmental infrastructure and technical training, conservation and environmental rehabilitation activities, and pollution prevention technologies. Credits to green business can come in several forms and from a range of actors.

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[144] D. Pearce, *et al.*, above.
[145] T. Panayotou, above.

First, there is the potential for the provision of incentives through tax credits to individuals and industries that protect the environment. In LAC, most countries offer some form of tax incentives for investment in pollution abatement and clean technology. Green Funds in the Netherlands[146] and the Green Protocol in Brazil are examples of how tax incentives can encourage private investment in biodiversity conservation. Several Latin American countries have used tax credits to stimulate reforestation. For example, in Costa Rica the government has instituted a transferable tax credit. This credit applies to landowners who keep forests on their lands or plant native species. Because the credit tends to benefit wealthy landowners with large tax burdens, the system allows small landholders who reforest or plant native species to sell their credits to those with higher tax burdens.[147]

Export credits can also be used to stimulate the development of environmentally friendly businesses in LAC. Traditional export credit is usually provided by the export/import banks of developed countries to promote the sale of that country's goods and services and, in so doing, create jobs. Following the lead provided by national export credit agencies, the multilateral development banks have used export credit agencies and multilateral development banks have also used export credit to stimulate trade in developing countries. Just as export credit can be used to create jobs at home or as incentives for international trade, it could conceivably be used to further stimulate the development of biodiversity-based businesses. However, if it is to work properly as an incentive to these sorts of businesses, it will need to be provided with preferential and concessionary rates.

There are a number of ways that national, regional or multilateral agencies could encourage the development of green export credits. For example, a system could be designed to complement existing export financing instruments offered by agencies such as the Latin American Export Bank. They might include pre-export facilities such as working capital guarantees and renewable insurance policies for short-term export credit sales and post-export facilities dedicated to financing and protecting receivables and extending credit terms to foreign buyers.

Other potential instruments are special lines of credit (preferably at concessionary rates) made available to small-and-medium-scale enterprises in industries that are good for the environment. This form of "green credit" can help create an environment in which environmentally responsible (and commercially viable) businesses can serve as models and attract larger private capital flows. The GEF Small and Medium Enterprises Program, managed by the International Finance Corporation (IFC), was created to stimulate greater small-and-medium-scale enterprise involvement in addressing the

[146] Another useful example of "green credit" comes from the Netherlands. As of 1995, the Government of the Netherlands agreed to provide tax exemption for money invested through so-called "Green Funds" which offer loans to approved environmental projects. Following the enactment of this law, a number of major Dutch banks began offering tax-exempt Green Funds to their customers. The case of the Netherlands is still unique, but it shows that by providing tax incentives, governments can play a leading role in stimulating green credit.

[147] See T. Panayotou, above, and T. Panayotou, above.

GEF's biodiversity and greenhouse gas mitigation objectives.[148] Projects supported under this initiative are in the areas of renewable energy, energy efficiency, sustainable forestry, sustainable agriculture and ecotourism.

Guarantees for green business

Another mechanism for supporting environmentally friendly businesses in LAC is through guarantees. Internationally, there is a well-established system for providing guarantees against a variety business risks.[149] A guarantee is essentially a form of insurance coverage against some of the risks that businesses face. Guarantees generally come in two forms:
- Guarantees against commercial risk, which cover businesses against events such as non-fulfillment of contracts and nonpayment of loans, among other things.
- Guarantees against political risks, which cover businesses against events like wars, civil disturbances, devaluations and the expropriation of goods.

Guarantees have traditionally been used by developed countries to encourage the export of their goods and services and by multilateral banks to stimulate investment in developing countries. Without them, many businesses now operating in developing countries would find the risks of working there too overwhelming. In a similar way, guarantees could be used to alleviate the risks (both commercial and political) of environmental businesses.

Promising biodiversity-based enterprises have, in the past, been turned down by financial institutions because they were unable to offer guarantees when applying for a loan. The International Finance Corporation (IFC)-financed Hungary Energy Efficiency Co-financing Fund is a useful illustration in this context because it provides partial credit guarantees and long-term co-financing support to address similar financial constraints.

The U.S. Environmental Protection Agency (EPA) has proposed a number of guarantee mechanisms that enhance the availability of credit for the environmental activities of municipalities in the United States. Generally, these guarantees are used to finance environmental infrastructure (i.e. wastewater treatment plans and solid waste facilities) and not to support activities directly related to biodiversity conservation, but there is no reason why these mechanisms cannot be applied to biodiversity-based businesses. An interesting characteristic of the EPA's approach to guarantees is that they are used to help environmental projects obtain money through capital markets, namely through the issuance of bonds. In the United States there are numerous examples of the use of public money (from the federal government) to allow state and local governments with

[148] M.C. Rubino, *Biodiversity and Business in Latin America* (Washington, D.C.: International Finance Corporation, forthcoming). See also R. Rosenberg, ed. *Environmentally Sound Trade Expansion in the Americas: A Hemispheric Dialogue* (Miami: North-South Centre-University of Miami, 2000).
[149] That system includes agencies such as U.S. Overseas Private Investment Corporation (OPIC), the U.S. Export/Import Bank (ExIm), the World Bank's Multilateral Investment Guarantee Agency (MIGA), as well as many of the export credit agencies of developed countries.

poor credit ratings (or no credit ratings) to access capital for environmental projects.[150] Although most of the experience in using these sorts of guarantees has been in the United States, the mechanism is applicable in LAC and elsewhere.

Guarantee instruments tend to be project oriented, but they can also be used to encourage the formation of venture capital funds. These programs have mainly been tested in Europe,[151] but might also offer an interesting model for LAC.

An example of the use of guarantee instruments to encourage environmental activities is the case of two guarantees provided by the World Bank's Multilateral Investment Guarantee Agency (MIGA). In 1995, MIGA supported the construction and operation of a 1.3km aerial tram, a restaurant, and a visitor research center located on a 338 hectare site bordering Braulio Carrillo National Park in Costa Rica (50 km North of San Jose). MIGA issued guarantee contracts covering foreign investment in Dosel S.A., a special purpose company set up to run the Rain Forest Aerial Tram (RFAT). One contract guarantees the equity invested by Conservation Tourism, Ltd., of the United States against currency transfer risk; the other guarantee contract covers Bank of Nova Scotia's (Canada) non-shareholder loan to Dosel against transfer restriction, expropriation, and war and civil disturbance. The project is structured to preserve Costa Rica's rain forest and ensure that its economic use is environmentally sensitive. Furthermore, Dosel hopes to work closely with the government to reduce illegal hunting activities in the area. Because of its commitment to the environment, the project has been named a "National Resource" by the President of Costa Rica.[152] In addition to making significant efforts to minimize adverse impacts on the environment, the company allocates resources for research and educational purposes.

Although guarantees are a promising tool for stimulating environmental businesses, they can also carry considerable financial risk. An institution providing guarantees needs to ensure that it has enough capital to cover the guarantee should it be called upon to do so. Still, this is an obstacle that can be surmounted through adequate planning. It is also an area in which MIGA, the Overseas Private Investment Corporation (OPIC) and even the Multilateral Investment Fund (MIF), institutions that are used providing guarantees to businesses, have considerable expertise.

Market Access and certification schemes

If developing country markets are to benefit from the promised markets in developed countries for goods and services produced in an environmentally sound way, they will require access to additional investment and environmental technologies. Businesses in

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[150] Using only one type of credit enhancement, the so-called "State Revolving Fund (SRF) Bond Leveraging," more than 21 U.S. States had, up until 1995, used money provided to them by the federal government for wastewater treatment to leverage a total of $US 5.4 billion in additional money for their environmental projects. (EPA, 1997).

[151] In 1996, the Dutch Government approved the POPM (Particuliere Ontwikkelings- en Participatienmaatschappijen) mechanism, which provides guarantees to risk-bearing investments in developing countries by qualified Private Development and Venture Capital companies based in the Netherlands. Investments are approved by the Netherlands Investment Bank for Developing Countries (NIO) according to socioeconomic criteria that include job creation and the environment. These investments can in principle be coupled to political risk insurance that may be available from the Dutch Credit Insurance Company (NCM), as well funding that may be secured from the Green Fund (NIO, 1996).

[152] More information available online: www.rainforesttram.com.

developing countries need to be able to meet the range of regulatory (e.g., environmental, sanitary and phytosanitary standards) for access to developing countries. One proposal for helping to finance the development of the necessary regulatory infrastructure for this is for a small portion of regional trade revenues to be dedicated to a regional "green infrastructure fund". Companies in the Americas are also taking a growing interest in various kinds of certification schemes. Key examples from the Americas include "eco-labeled" timber and organic products. Eco-labels inform consumers about environmentally friendly qualities of the products and production methods. Because such products can sometimes be sold for a premium, eco-labels can improve the profitability and incentives for businesses to invest in environmentally sound production and processing methods. From small farmer cooperatives to corporations active at the regional level, an increasing number of enterprises have calculated that participation in environmental certification schemes can increase their profitability and provide them access to lucrative niche markets. Governments can facilitate this by strengthening national systems for environmental certification, accreditation and quality management. Participation by Latin American companies in ISO14000 certification has increased over the past several years. Eco-labels, such as those of the Marine Stewardship Council (identifies and labels fish from sustainable fisheries) and the Forest Stewardship Council (eco-labels sustainable forest products) show some promise.

Venture capital for green businesses

Another way of addressing the special needs of environmental businesses is through equity or quasi-equity investments via dedicated venture capital funds or sectoral investment funds.[153] Like traditional venture capital funds, these tools are designed to provide capital in return for equity or quasi-equity positions in promising environmental businesses. While green venture capital funds can be high-risk/high-return operations, they can also serve to provide much needed capital (as well as business expertise) to small, biodiversity-based start-ups.

Two examples of recent initiatives that are designed to use investments in equity or quasi-equity to stimulate the conservation and sustainable use of biodiversity are the MIF/The Nature Conservancy (TNC) EcoEnterprises Fund[154] and the Terra Capital

[153] M. Asad, "Innovative Financial Instruments for Global Environmental Management". (Initial draft of a paper presented at a meeting of the World Bank Group on Financial Mechanisms for the Environment, 1997).

[154] A green venture capital fund for Latin America was created in 1998 by The Nature Conservancy and the Multi-lateral Investment Fund of the IDB. The fund, know as the EcoEnterprises Fund (or Fondo EcoEmpresas), is a $US 10 million operation designed to provide venture capital and technical support to environmentally responsible business projects in Latin America and the Caribbean . It will help achieve two crucial goals: spurring the growth of environmentally and socially responsible small-and medium sized companies, and generating revenue for biodiversity conservation and enhance the long-term sustainability of nonprofit environmental organizations in Latin American and the Caribbean. Target sectors include alternative agriculture, including organic foods, apiculture and aquaculture, sustainable forestry, non-timber forest products and nature tourism. The fund has two components: a $US 6.5 million venture fund to invest in enterprises at all stages of development and a $US 3.5 million technical assistance fund to provide business advisory services to help them succeed. The Nature Conservancy serves as fund manager. The EcoEnterprises Fund plans to provide equity and loans to enterprises undertaken by private businesses in cooperation with local non-profit institutions. Over a 10-year period, the fund expects to provide between $US 50,000 and $US 800,000 (with an average of $US 150,000) to as many as 25 ventures in the fields indicated above. Revenues generated by the ventures will contribute to the long-term financial sustainability of the participating environmental organizations and demonstrate ways to integrate economic growth and environmental protection.

Fund.[155] These will face similar challenges. Notably, they will need to find businesses that combine financial profitability with environmental protection. Depending on their success and profitability, they may help stimulate other such undertakings in the region. The two initiatives are also mutually supporting.

Securitization

One of the newest, most controversial and perhaps most interesting developments in the world of international finance is "securitization". Simply defined, securitization is a process whereby an asset, debt, obligation or aggregation of these is turned into a marketable security (a stock or a bond). In most cases, however, the term is used to refer to the aggregation of instruments (loans or mortgages) into a negotiable security. In other words, a securitization of loans happens when creditor pools a series of loans and uses these assets to issue a bond that can be traded in the capital markets.[156]

The capital markets have years of experience in the use of these asset-backed securities. In the first such deal, which was negotiated in 1997, the British rock star David Bowie sold $US 55 million worth of bonds backed by his anticipated royalties as securities. In the same vein, why should anticipated revenues from national parks, water user fees, or from bioprospecting not also be securitized in particular countries? The problem with this idea may be that since park revenues and income from water user fees and bioprospecting are small or hard to anticipate, the bonds may not generate sufficient financing to offset the transaction costs. Despite these potential pitfalls, the concept of securitization as a means of financing biodiversity conservation warrants further analysis.

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[155] In late 1998, a consortium made up of the Environmental Enterprises Assistance Fund (EEAF), a Brazilian Bank (Banco Axial) and Sustainable Development Inc. (SDI), working with the World Bank's International Finance Corporation (IFC), announced that they had secured the capital necessary to establish a private, for-profit, environmental venture capital fund for Latin America called the "Terra Capital Fund". The fund obtained money from a variety of sources, private and multilateral (including from the IDB through the MIF as well as from the Swiss Government), in order to invest in small, private businesses that meet as set of environmental criteria for biodiversity funding. In addition, Terra Capital received a $US5 million grant from the GEF. The fund will invest in mostly small-to-medium-sized companies, providing funds for start-up and expansion, anticipating the use of proceeds for restructuring, modernization, acquisition, new products development and similar activities. Investment must comply with the environmental criteria, established by its Biodiversity Advisory Board. The Fund will make minority investments that range from the equivalent of $US500,000 to a maximum of 15% of the Fund's total committed capital. See Terra Capital Fund, *Terra Capital Fund: Confidential Business Plan for a Biodiversity Investment Fund for Latin America* (Washington, D.C.: International Finance Corporation, Banco Axial, Sustainable Development, Inc. and the Environmental Enterprises Assistance Fund, 1997); IFC, *Latin America Terra Capital Fund: Project Document* (Washington, D.C.: International Finance Corporation, 1997); and K. Keipi, "Strengths and Limitations of Environmental and Forestry Funds" in *Workshop on Sector Support to National Forest Programs - 25-29 August 1999* (Helsinki: National Board of Forestry and Parks, 1999).

[156] The aggregation of assets into one negotiable security is a common transaction in financial markets. It is done regularly as a way of spreading risk and encouraging investment in pools of companies that would otherwise not appeal to certain investors. It is what happens in some mutual funds that buy stocks in a range of companies and then emit a "security" or stock in the mutual fund. A variation of this is to strategically group high-risk profiles. Using these techniques for biodiversity-based businesses would only require that techniques commonly used in capital markets should be applied to these particular kinds of companies.

Harnessing Positive International Environmental Flows and Rejecting Destructive Ones

Developing countries that are receiving substantial private flows need to harness these to promote sustainable development. Flows should not go only to short-term unsustainable economic growth. Developing countries that hope to be recipients of sustainable private flows face the challenge of creating economic and political environments that are attractive to foreign private investors. Environmental foreign direct investment (FDI), such as investment in cleaner production technologies, is generally not considered attractive by foreign investors. At the same time, the preference of foreign investors for resource extractive investments tends to compromise sustainable development goals, even though these investments can bring much needed capital to poor countries. But FDI that is made in the absence of effective environmental policy regimes can result in pollution problems and other forms of environmental degradation. This is a particular risk in countries experiencing large FDI flows that overwhelm the regulatory capacity of environmental authorities. Although some foreign investors may act out of enlightened self-interest to minimize the environmental impacts of their activities and ensure the welfare of their workforces and neighbouring communities, this is no substitute for effective national social and environmental policies and regulations.

Home-country governments might, as one option, consider making risk guarantees for FDI conditional on sound environmental management by investors. Regional and sub-regional trade agreements could also provide legal incentives and regulations for foreign investment. Trade and investment rules can be framed to encourage investors to work with local governments, communities, and groups to promote sustainable management of natural resources, pollution and surrounding ecosystems.[157] Investment provisions of trade agreements should also stipulate a series of base-line environmental requirements (for example, using already-established World Bank standards) that must be met by foreign investors in all projects.

Governments across the Americas need access to better information about the potential impacts of foreign private flows upon sustainability. International organizations could assist national governments in the development and implementation of 'green' accounts, which provide essential information on the degree to which public and private investments offset the depletion and degradation of natural resources and enhance human capital. This is of particular importance in South America, since the trend has been toward specialization in natural-resource intensive industries, such as copper, iron and steel, petrochemical products, non-ferrous minerals and pulp and paper.[158] With greater information in place, governments will be able to ensure that short-term commercial motivations do not undermine sustainable development goals. In particular, there is a need for investment in research to help on a number of fronts.

First, research is needed to determine the relationship between foreign investment and sustainable development. This would help to identify which types of foreign investment

[157] M-C. Cordonier Segger *et al.*, *Trade Rules and Sustainability in the Americas*, above.
[158] E. Petkova and P. Veit, *Environmental Accountability beyond the Nation-State: The Implications of the Aarhus Convention* (World Resources Institute, 2000).

contribute most significantly to sustainable development and determine which policy levers should be used to increase the compatibility of foreign investment with sustainable development. Second, research is needed to calculate the magnitudes, and costs of unsustainable subsidies should be improved to provide additional political support for their continued reduction as well as insight into the effect of subsidy removal on the poor. Third, research is needed to prepare cost-benefit analysis of green budget reforms. Fourth, policy options are needed to promote the mobilization of private foreign and domestic capital for investment in sustainable development, particularly designing strategies to attract increased flows of private foreign capital to least developed countries. Fifth, an effective strategy is needed to increase ODA and to address the issue of external debt, particularly where the need to service debt, puts additional economic pressure on natural resource extraction. Finally, efforts are needed to monitor the environmental performance of foreign investors in different sectors, in particular, the resource-using sector.

This article has illustrated the many channels that governments, businesses and NGOs in the region can pursue to increase investment in environmental protection in the Americas. Concerted focus is required to ensure that adequate resources are available for environmental infrastructure at the local, provincial/state, and national levels across the hemisphere. Each country in the Americas needs to have the capacity to design and implement strategies for sustaining its own natural resources and controlling pollution at levels that match the society's own chosen levels of protection.

In addition, this article has argued that regional environmental cooperation itself will require adequate financial resources. Specific environmental finance and cooperation initiatives and institutions are necessary counterparts to the commitments being made for deeper economic integration. Most of the existing proposals for enhanced regional environmental cooperation emphasize the importance of building on and networking existing national and regional institutions, rather than building a separate set of environmental institutions.

A primary function for regional environmental cooperation, however, ought to be to help facilitate the task of financing environmental protection and a regional environmental infrastructure. Many potential private and public sector-led possibilities exist. For any of these to be practical and accessible for developing country governments, they need to be better coordinated and information more readily available. As economic integration proceeds, technical expertise, advice and financial resources must be made available.

5.2 The FTAA in the Graveyard of Economic Negotiations

By Konrad von Moltke[159]

Investment agreements are the graveyard of economic negotiators. Consider the evidence: The investment chapter may yet be the death of negotiations for a Free Trade

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Area of the Americas (FTAA). Its terms not only have to be agreed by governments; they must be ratified by the respective parliaments, with each country holding an effective power of veto.

The UN Center for Transnational Corporation (UNCTNC) attempted to negotiate a binding Code of Conduct for Transnational Corporations.[160] This resulted in deadlock and UNTNC was shut down for its pains. Considering its results, it is hard to argue with the draconian punishment.

Chapter 11 of the North American Free Trade Agreement (NAFTA) deals with investment. It began to generate problems immediately after it came into force. The parties have already once tried to fix one aspect of Chapter 11,[161] but in truth there is not a single provision of that agreement that is not currently subject to challenge. The negotiators have egg all over their faces, but some of them are making a fine living arguing about how to fix their handiwork.

Negotiations for the Multilateral Agreement on Investment (MAI), modeled on NAFTA Chapter 11, collapsed after environmentalists and others dragged it into the public eye and numerous other interests discovered how much they disliked it.[162] In the end a long-running dispute between the French film industry and the Motion Picture Association of the United States caused its failure. This result, itself hardly an endorsement of NAFTA, will probably be seen as the beginning of the end for the "Washington Consensus,"[163] the facile combination of liberalization and macro-economic discipline that was supposed to provide the framework for globalization. The Organization for Economic Cooperation and Development (OECD), which only hosted negotiators who were unwilling to trust its institutions, is still smarting from the experience. The Member States of the European Union, the principal proponents of the MAI and largely responsible for the negotiations, have lost control of the investment agenda to the Commission of the European Community.

Almost the only stand-alone investment agreements to have been successfully concluded are the host of bilateral investment agreements (BITs) that have proliferated, generally involving a developed country that was able to impose its will on some developing country hoping to attract more investment. Yet there is not a shred of evidence that these more than 2000 agreements, have had any measurable impact on investment flows. Indeed, the three developing countries that attract most foreign direct investment – Brazil, China, and Mexico—include two that have few investment agreements with OECD countries; indeed, Brazil has none. Mexico is a special case, but much of the increase in investment after NAFTA entered into force came from non-NAFTA countries whose investors did not benefit from the provisions of NAFTA Chapter 11.

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[160] K. von Moltke, *An International Investment Regime? Issues of Sustainablity* (Winnipeg: IISD, 2000).

[161] *Notes of Interpretation of Certain Chapter 11 Provisions* (NAFTA Free Trade Commission, July 31, 2001). See also Canada Department of Foreign Affairs and International Trade, "Pettigrew Welcomes NAFTA Commission's Initiatives to Clarify Chapter 11 Provisions" Press Release No. 116 (August 1, 2001); and see H. Mann & K. von Moltke, above.

[162] OECD, *Ministerial Statement on the Multilateral Agreement on Investment* (Paris: OECD, 28 April 1998).

[163] See, e.g., P. Kuczynski and J. Williamson, eds., *After the Washington Consensus: Restarting Growth and Reform in Latin America* (Washington, DC: Institute for International Economics (IIE), 2003).

The arbitration procedures, used by all investment agreements without exception, are by now a public scandal: three arbitrators picked by a process that gives complainants leverage over the choice of their "judges" to adjudicate matters that affect the public good. The arbitration agreements fail to establish an adequate legal framework to ensure legitimacy. There is no accountability. And when it comes to transparency, the practices of arbitration would have done the Central Committee of the Communist Party of the now-defunct Union of Socialist Republics proud.

All investment agreements follow the same pattern. They use institutions of non-discrimination that have worked well in the trade regime to create a structure that claims to ensure that foreign investors are treated like domestic investors. In practice, this privileges foreign investors (who have recourse to international arbitration that circumvents domestic courts) while pretending to give them equal status; a clever sleight of hand.

Given this record, why would anybody want to negotiate an investment agreement? Presumably because it continues to look like "the next thing" in international economic negotiations. Also, why is there no evidence that negotiators are learning from experience? Presumably because the critics came from outside the club and it was hard to accept that they might have been right. Yet by now even economists from the World Bank and the Kiel Institute for International Economists recognize that the case for these investment agreements is weak.

The FTAA negotiations on investment remain shrouded in a cloud of obfuscation. The interim negotiating report was indeed published at the time of the Quebec Summit, but it was so seriously out of touch with changed realities following the collapse of the MAI that it was strange to contemplate. The negotiators had been given a mandate that still reflected the unbridled optimism of the MAI process, namely that investment was the next thing and that the negotiators knew what an investment agreement needed to contain. Since then, however, the MAI failed and a host of problems have cropped up with respect to the model on which the FTAA mandate was predicated: NAFTA Chapter XI. Yet the negotiators were still pursuing their original mandate, which was known to be out of date. So the report represented a plaintive request for further guidance. That guidance has not yet been forthcoming—or at least nothing has been said in public about it.

Since the Quebec Summit, there have been further developments in relation to investment agreements. The World Bank and the prestigious Kiel Institute for Global Economic Research in Germany published reports that question the supposed rationale for international investment agreements: namely that they lead to improved allocation of capital and to increased flows to developing countries in particular.[164] The two propositions are largely congruent since the lack of investment in most developing countries represents one of the most obvious failures of global capital markets.

[164] Ibid. See also P. Nunnenkamp, "Why the Case for a Multilateral Agreement on Investment Is Weak" (Institute for World Economics, Kiel Discussion Papers 400, Kiel, March 2003).

It is unclear what the FTAA negotiations can contribute to the international investment debate. Many developed countries have engaged in a frenzy of bilateral investment negotiations, presumably in an attempt to achieve indirectly what was impossible in a multilateral approach. The FTAA could serve as another piece in this mosaic—but that assumes that the overall goal, a multilateral agreement on investment, is desirable and achievable; a proposition that appears increasingly dubious.

5.3 From Protest to Proposal: Options for an Americas Investment Regime?"

By Marie-Claire Cordonier Segger[165]

The Free Trade Area of the Americas (FTAA) negotiation seeks to develop mutually supportive trade, environment, and social rules for a new 'regional' market. This FTAA is being negotiated by 34 governments in the context of a broader Summit of the Americas process, which aims among other goals, to advance sustainable development. The 2001 Summit of the Americas in Quebec City reminded policy-makers of their mandate to bring these streams together, recognising sustainable development as a goal of the integration process.[166] But can we get there from here? If so, how? Is an Americas agreement on investment part of the package?

One key issue at the intersection of economic and environmental law is the structure of new provisions to facilitate investments at a hemispheric level. International investment, like international trade, is one of the primary modes by which capital moves across borders and through regions of the world. Though many countries in the hemisphere are probably most interested in gaining increased market access, the significant benefit of the FTAA for others, especially the industrialised economies, is thought to be new provisions to facilitate more secure, stable and predictable conditions for foreign direct investment.[167]

Proponents argue that there are broad policy reasons to support a consistent, balanced foreign investment law regime for the Americas. They observe that existing systems could be described as chaotic, at best. As such, they suggest that a single hemispheric regime, with one set of internationally accorded rules that incorporates this multi-layered system of guarantees, might render current complexities more manageable for all.[168] The underlying idea is that such a regime could make investment more efficient and easier in all countries, encouraging more significant flows of resources to the different countries

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[165] Marie-Claire Cordonier Segger wrote this paper in her capacity as director of the Centre for International Sustainable Development Law, based at the McGill Faculty of Law in Montreal, Canada. She would also like to acknowledge the advice of Monica Araya, Director of the Sustainable Americas Project at the Yale Centre for Environmental Law and Policy, and the guidance of Prof. Armand de Mestral of the McGill Faculty of Law.

[166] Third Summit of the Americas Declaration, above.

[167] See e.g. J.M. Salazar-Xirinachs and M. Robert, *Toward Free Trade in the Americas* (Washington, D.C.: Brookings Institution Press / OAS, 2003).

[168] See also the documents available online:http://www.oas.org, especially, M. Robert, *Multilateral and Regional Investment Rules: What Comes Next?* (Washington D.C.: OAS, March 2001). For an example of analysis built on this implicit assumption, see L. Rojas-Suarez, *Toward a Sustainable FTAA: Does Latin America meet the necessary financial preconditions?* (Washington, DC: IIE, 2002).

of the Americas.[169] In theory, these would include the smaller economies that need resources for development. These smaller economies are the most disadvantaged and excluded in the current investment regime.

Indeed, foreign investment is subject to the domestic laws of each state, which in turn are, in theory, regulated by hundreds of treaties, most of them bilateral.[170] In the Americas, more than eighty bilateral investment treaties (BITs), each with differing terms and standards, have been negotiated in the place of one international investment treaty.[171] In recent years, negotiations have accelerated greatly, especially in regional constellations among developing states.[172] A mesh of sub-regional accords, particularly once agreements are negotiated among sub-regions, could simply add to the complexity faced by a potential investor.

Others point out that increased investment flows will not automatically support sustainable development. They argue that, as revealed by the debates surrounding a multilateral agreement on investment (MAI) in the 1990s,[173] investment facilitation itself is a debated policy in the public mind of many countries today. They observe that existing BIT negotiations are not between parties of equal weight, and few could be described as enshrining balanced, sustainable development-oriented, cooperative regimes, which reflect the long-term interests of both states involved.[174] As such, the precedents are not particularly inspiring. These commentators hold that there is no good case for an FTAA investment agreement, at all.[175]

A well-informed, constructive civil society movement is developing in the Americas, parallel to (and sometimes overlapping with) the ever-stronger 'protest voice.' Trade ministers have established a technical Committee of Government Representatives for the Participation of Civil Society in the FTAA, charged with facilitating greater transparency and public participation in rule-making.[176] In addition, after pressure from civil society for increased transparency in the FTAA, draft negotiating texts have been released to the

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[169] See e.g. R. Echandi, "Bringing Investment to the Aegis of the Multilateral Trading System: Steps Taken in the Context of the FTAA Negotiation Group on Investment" in M. Bronckers & R. Quick, eds., *New Directions in International Economic Law: Essays in Honour of John H. Jackson*, (Kluwer, 2000), at 391-413

[170] See K. J. Vandevelde, "The Political Economy of a Bilateral Investment Treaty" (1998) 92 Am. J. Int'l L. 621, 632; See generally Emmanuel Gaillard, "The International Centre for Settlement of Investment Disputes" New York Law Journal, (2 April 1998)

[171] J. W. Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries" (1990) 24 Int'l Law at 655, 657.

[172] Major regional investment treaties are under negotiation or have recently been concluded by the Association of South East Asian Nations (ASEAN), in Sub-Saharan Africa, and in Central Asia. For a broader discussion of BITs, see UNCTAD, *World Investment Report 1999: Foreign Direct Investment and the Challenge of Development* (Geneva: UNCTAD, 1999) at 121-26.

[173] G. Kelly, "Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations" (2001) Colum. J. Transnat'l L. 483.

[174] In some cases BITs simply secure one particular type of stability for one sector of industry, and in others they grant sweeping concessions, guarantees or advantages. Spurred in part by the BIT regimes' inadequacies, there are also certain sub-regional investment treaties. These build in part upon common BIT provisions. See J.W. Salacuse, above, at 675. Indeed, one of the most significant regional accords based on a BIT is the Chapter 11 of *North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States*, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 605. See also "International Agreements: Canada, Mercosur Sign Arrangement to Eliminate Trade, Investment Barriers" (June 24, 1998) 15 Int'l Trade Rep. (BNA) 1109.

[175] See, e.g., K. von Moltke, in this volume.

[176] See Ministerial Declaration of San Jose, above.

public.[177] These texts are available for study by academics and non-government organizations (NGOs), including industry and investor associations and civil society groups.

Such study is not just generating protests, but also proposals. Some civil society actors and expert institutions suggest that for any new hemispheric economic agreement to be "mutually supportive" with environmental regulations, and for potential conflicts to be avoided or resolved effectively, environmental protection and liberalization objectives need to be addressed together in investment law.[178] These scholars suggest that for the FTAA to support sustainable development, it must make provision for the particular problems that occur at the intersection of investment law and environmental concerns. Any new hemispheric regime, particularly if modelled on current BITs, would require very careful negotiation and a system of solid supporting institutions. Arguably, such a system would ensure easier participation or redress for the public as well, if the new rules were balanced and accessible. For the Americas, reaching this delicate balance depends on government and investor willingness to consider new provisions in the FTAA.

This article focuses on two issues in particular. First, there is a need for a high standard of transparency, both as this applies for the benefit of investors *vis-à-vis* regulatory processes (and dispute settlement when these appear to go awry), and also as it applies to civil society participation in decision-making (and dispute settlement when this appears to challenge matters of public interest). Second, the scope of expropriation provisions, including the definition of measures tantamount to expropriation, particularly as this applies to so-called 'regulatory takings', is very important. The article will suggest that new institutions, including dispute settlement mechanisms, are needed to cope with investment and environment regime overlap as part of building a sustainable FTAA. Balanced investment provisions with high political support will be critical for mutually supportive economic law and sustainable development in the Western Hemisphere, and to convince the myriad of actors to support a new hemispheric process.[179]

The FTAA Investment and Sustainable Development Nexus

The proposed FTAA comprises over 776 million potential consumers from countries, with a combined 1997 GDP of $US8.5 trillion. In 1996, total trade among the potential members of the FTAA was over $US 2.4 trillion, which is over 22 percent of world trade. According to estimates, if current trends continue, the Western Hemisphere will be the world's largest market with more than 850 million consumers buying $US 13 trillion in goods and services within only a few years.[180] Although uneven distribution of flows

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[177] OAS, Office of the Assistant Secretary General & OAS Trade Unit, *The FTAA in the Americas* (December 1996), online: FTAA, <www.oas.org>.

[178] See P. Johnson, D. Runnalls & E. Leff, *Building A Triple-Win Scenario* (Montreal, Hemispheric Trade and Sustainability Symposium, 2001). See also M-C. Cordonier Segger, *et al.*, above; H. Mann and M. Araya, "An Investment Regime for the Americas: Challenges and Opportunities for Sustainability" (New Haven: Yale Center for Environmental Law and Policy, 2001), available online: http://www2.cid.harvard.edu/cidtrade/Issues/araya.pdf.

[179] D. Lopez, "Dispute Resolution Under a Free Trade Area of the Americas: The Shape of Things to Come" (Spring/Summer, 1997) Free Trade in the Western Hemisphere Symposium *28 U. Miami Inter-Am. L. Rev. 597*.

[180] D. M. Gilmore, "Free Trade Area Of The Americas: Is It Desirable?" (Winter, 2000) 31 U. Miami Inter-Am. L. Rev. 383. See *Integration and Trade in the Americas, A Preliminary Estimate of 1997 Trade, Periodic Not*e (Washington: IDB, 1997) at 2. See R. J. Ahearn, *Hemispheric Trade: Status, Hurdles, and Opposition* (Washington, Congressional Research Service,

means that more than 80% was concentrated in only four economies - Brazil, Mexico, Argentina and Chile[181] - foreign direct investment (FDI) flows to Latin America and the Caribbean (LAC) also increased dramatically in the 1990s, reaching a new record level of $US 90 billion in 1999.

As such, the FTAA is a significant economic project.[182] Government negotiators are aware of the present level of legal complexity and overlap in the Americas. The FTAA is aimed to be quite comprehensive, covering nine chapters corresponding to nine FTAA negotiating groups. These negotiations are gradually outlining a new hemispheric trade, law in areas as diverse as intellectual property rights, market access, services, agriculture, subsidies, competition law and government procurement. The negotiations also aim to set in place a regime for trade dispute settlement between states. The recent 2002 FTAA Draft Text, at Chapter 3, outlines a proposed investment agreement, including a new dispute settlement tribunal process to give recourse to investors against states.

However, it is important to keep in mind that the FTAA is also a significant political project. This means that at least three key factors must be taken into account.

First, there is significant political concern as to inequalities of bargaining power, especially in a region where the countries have such diverse economies in terms of scale and sheer size.[183] Free trade arrangements involving large and small economies are not uncommon, however, and asymmetric reciprocal arrangements can bear significant benefits for the least developed countries within them.[184] As such, asymmetric agreements are feasible - while it is too early to tell, they could even be a positive development for the hemisphere.

Second, in terms of procedure, a special political context exists in connection with advancing FTAA negotiations, where parallel hemispheric environment and development measures might be welcomed as part of the package. The developed economies in the hemisphere will find it extremely difficult to sign a new trade or investment agreement if

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1997) at 1. See also A. Moss & S. Lande, "A Critical Year For Hemispheric Free Trade: Can Countries Agree On A Blueprint?" (Spring/Summer, 1997) Free Trade In The Western Hemisphere Symposium 28 U. Miami Inter-Am. L. Rev. 507.

[181] UNCTAD, *World Investment Report* (Geneva: UNCTAD, 2000). See also Organization for Economic Cooperation and Development, *Financial Markets Trends 46* (Paris: OECD, June 2000).

[182] Ministerial Declaration of San Jose, above. See also "Challenge to Americas Trade Pact is to Define Approach, Official Says" (29 May 1996) 13 Int'l Trade Rep. (BNA) 893. The routes to an FTAA most commonly discussed are: hemispheric negotiations wherein each country is represented individually; country-by-country accession to a preexisting trading group until such time as all American nations are included; or the formation of several regional trading blocs that later are linked together via bloc-to-bloc negotiations. See "FTAA Working Groups Prepare for Vice- Ministerial in Bogota" (6 December 1995) 12 Int'l Trade Rep. (BNA) 2011; "Officials Expect FTAA Liberalization to be Less Than NAFTA, MERCOSUR Levels" (October 4, 1995) 12 Int'l Trade Rep. (BNA) 1641. These various paths are not entirely mutually exclusive. It is possible that the path actually taken to an FTAA will involve some combination of individual representation, accession, and bloc building.

[183] "The Americas Drift Towards Free Trade" (8 July 1995) *The Economist* 35.

[184] The Mercosur, the second largest regional trade arrangement in the hemisphere, consists of two large and two relatively small economies. Bolivia, one of the smallest economies of the Americas, is currently completing negotiations with the Mercosur as a whole. Mexico is a full-fledged NAFTA member with the USA and Canada. Chile and Costa Rica each have a bi-lateral trade agreement with Canada – an economy ten and fifty times their sizes, respectively. See "Chile-Canada FTA Differs From NAFTA, but Could Aid Chilean Accession" (27 Nov. 1996) *Inside NAFTA* 1, at 21. See also "MERCOSUR, Andean Group Make Little Headway towards South American FTA", *ibid.* at 1.

this lacks provisions for the environment,[185] and many developing countries want increased support for sustainable development. As such, there is a special opportunity to move forward with new, innovative policy proposals with relation to trade and investment, an opportunity to try to develop hemispheric trade and investment agreements that support sustainable development.

Third, the 34 FTAA negotiators are already linked by a complex web of occasionally ineffectual, but historically important inter-governmental organizations and legal instruments. Any proposals for cooperation, on investment, environment or development, will not be starting from scratch, and cannot expect to create scratch, then start, either. For example, governments in the Americas are parties to many bi-lateral trade and investment agreements in the Western Hemisphere. They are also almost all part of the Inter-American Convention on International Commercial Arbitration, members of a hemispheric Human Rights Court,[186] and members of the World Trade Organization (WTO) with its Agreement on Trade Related Investment Measures.[187]

Much existing academic debate perceives the FTAA as some form of NAFTA-accession and remains myopically focused on the NAFTA or the WTO as the context of the FTAA.[188] But in practice, the FTAA is not actually about accession to NAFTA, nor is it a hemispheric WTO. Rather, it is being deliberately[189] built upon advances achieved in *five* sub-regional trade agreements; the Southern Common Market (*Mercosur*), the Andean Community (*CAN*), the Caribbean Community (CARICOM), the Central American Common Market (*MCCA*), as well as NAFTA.

Most of these have some form of investment regime worthy of consideration.[190] Institutional arrangements vary greatly. In terms of mechanisms to encourage investment, options range from agreements which simply provide compiled sub-regional data on

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185 See K. G. Hall, "Gephardt Lashes Out at Trade-Talks Agenda; Lack of Environment, Labor Linkages Assailed" (18 March, 1998) J. Com., 3A.

186 The Inter-American Court of Human Rights is comprised of seven judges nominated and elected by the nations that are parties to the American Convention on Human Rights. They serve for six-year terms, with the possibility of re-election for an additional six-year term. While the court has a permanent seat in Costa Rica, most members of the Court are resident in Costa Rica only during those periods when hearings or other business of the Court requires it. See T. E. Burgenthal, "The Inter-American Court of Human Rights" (1982) 76 Am. J. Int'l L. 231.

187 Inaugurated on January 1, 1995, the WTO consists of over 120-member countries and is responsible for implementing and enforcing numerous multilateral trade agreements including the General Agreement on Tariffs and Trade ("GATT"), the General Agreement on Trade in Services ("GATS"), and the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs").

188 A. M. de Aguinis, "Can MERCOSUR Accede to NAFTA? A Legal Perspective" (1995) 10 Conn. J. Int'l L. 597, 609. See also "Officials Expect FTAA Liberalization to be Less Than NAFTA, MERCOSUR Levels" (Oct. 4, 1995) 12 Int'l Trade Rep. (BNA) 1641, 1642. See also K. W. Abbott & G. W. Bowman "Economic Integration in the Americas: A Work in Progress" (1994) 14 NW. J. Int'l L. & Bus. 493, 513-14; F. J. Garcia, "NAFTA and the Creation of the FTAA: A Critique of Piecemeal Accession" (1995) 35 Va. J. Int'l L. 539; S. Weintraub, "The NAFTA and Developing Countries" in R. S. Belous & J. Lemco, eds., *NAFTA as a Model of Development* (Chicago: Institute for International Economics, 1995) at 77, 81-83.

189 The FTAA "will build on existing subregional and bilateral arrangements in order to broaden and deepen hemispheric economic integration and to bring the agreements together". See the Denver Ministerial Declaration, Summit of the Americas Trade Ministerial, Denver, Colorado, June 30, 1995, para. 2.

190 OAS Trade Unit, *Inventory of Dispute Settlement Mechanisms, Procedures and Legal Texts Established in Existing Trade and Integration Agreements, Treaties and Arrangements in the Hemisphere and in the WTO*, FTAA.ngds/w/08/rev.4, (Washington D.C.: OAS, 1999).

investment conditions, to those which grant investors the right to challenge non-compliant Parties in closed-door tribunals. [191]

These institutions, and treaties, might provide useful examples of conflict prevention instruments. Conflicts between public and private priorities can and do arise at the intersection of economic policy and the environment. For example, investors seek to obtain compensation for the impact of purported environmental regulations, when these have the effect of completely depriving them of the value of their investments. In another example, civil society groups uncover non-enforcement of environmental laws in a free trade agreement member country, and become concerned that this will cause a competitive disadvantage for clean industry or the known lower standard could attract dirty ones. Bearing in mind the political nature of the FTAA, these types of conflicts are important, and if possible, should be prevented.

For the different sized economies to join in one regional accord under these conditions, a stable system of rules must be negotiated which balances between private rights and public policy. Basic access to information about what is being negotiated, for all those concerned, constitutes an important first step. It is in this context of debate, tension and complexity that governments of the Americas have embarked upon a historic project - to negotiate a free trade area for the Western Hemisphere.

More Sustainable Investment Treaties?

According to their proponents, investment agreements are usually intended to facilitate and safeguard foreign direct investments.[192] They thus contain a mix of obligations and rights for both firms and governments to be included in a new international regime. These agreements typically include provisions such as: the right of entry, with sectoral exceptions; the fair and equitable treatment of investors by host governments; the host government's obligation to provide investors with national treatment and most favoured nation treatment; the right of investors to transfer payments internationally, with limitations that can be imposed by host governments in some circumstances; the right of investors to compensation for losses from armed conflict or internal disorder; the right of host governments to expropriate foreign investors' property, with an obligation to provide compensation to investors; the subrogation of compensated investors' claims to their home governments; and the settlement of disputes through international arbitration.[193] Developed countries, on behalf of their investors, also seek the right to transfer funds and profits freely across international borders at a market exchange rate. They seek to limit the freedom of host states to impose "performance requirements" on

[191] F. J. Garcia, "Americas Agreements-An Interim Stage in Building the Free Trade Area of the Americas" (1996) 35 Colum. J. Transnat'l L. at 63, 67-68.
[192] C. Fred Bergsten & Edward M. Graham, "Needed: New International Rules for Foreign Direct Investment" (1992) 7 Int'l Trade J. 15, at 29. See also D. Julius, "International Direct Investment: Strengthening the Policy Regime" in P.B. Kenen, ed., *Managing the World Economy* (Washington, DC: Institute for International Economics, 1994), 269, at 276; U.N. Transnt'l Corps. and Mgmt Div., *World Investment Report 14* (Washington D.C.: World Bank, 1992).
[193] T.L. Brewer "International Investment Dispute Settlement Procedures: The Evolving Regime For Foreign Direct Investment" (Spring 1995) 26:3 *Law and Policy in International Business,* .

investors, such as restrictions on imports, export requirements, or requirements to use local materials or employ local workers.

In such a list, detractors argue, one finds many rights and guarantees for investors, but few obligations.[194] Clearly, as investors are a dispersed group of potential economic partners, rather than signatories of the treaty, they cannot, as such, take up direct obligations themselves. However, the concern about these accords is the degree of flexibility for the governments (including at the municipal level) and the public interest that governments are elected to defend. Why would developing country governments enter into such accords, which appear mainly to guarantee rights for investors?[195] Obviously, because they hope to secure much needed foreign investment, to generate wealth and lead to development for their countries.[196]

According to proponents, the goal of an investment treaty is normally to ensure that investors from the state parties are treated as well as those from other states. There are two common standards normally employed to accomplish this goal.[197] First, most investment accords provide for "national treatment," which means that investors from the other party will be treated at least as favourably as their domestic competitors.[198] Second, agreements often provide for "most-favoured-nation ('MFN') treatment," which means that investors from the other party will be treated as favourably as investors from any other state.[199]

As such, these proponents point out that investment treaties set mechanisms or institutions in place to guarantee implementation of the treaty.[200] The provisions of investment accords concerning dispute settlement are widely considered to be among the most important means for prospective host governments to provide investors with an attractive investment climate. Disputes between investors and host governments can easily become disputes between host and home governments. Consequently, investment accords commonly establish procedures for government-government dispute settlement through international arbitration. Time limits are imposed on various stages in both investor-government and government-government dispute settlement procedures.

Although investment agreements include both investor-government and government-government dispute settlement mechanisms, they are focused mostly on the relationships - and hence potential disputes - between investors and host governments, and the term, "investment dispute" is in fact often used to refer specifically to this category of

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194 K. von Moltke, *An International Investment Regime? Issues of Sustainability,* above. See also L. Zarsky, "Investment Rules after Doha: A Time to Sow?" (November 29, 2001) *Foreign Policy In Focus*, available online: http://www.fpif.org/commentary/0111wto.html.

195 The evolution of the political position of developing states on foreign investment is beyond the scope of this paper. There are a number of complex factors involved. See A.T. Guzman, "Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" (1998) 38 Va. J. Int'l L. 639, 648-51.

196 See e.g. H. Mann and M. Araya, above.

197 R. Dolzer & M. Stevens, (1995) 100 *Bilateral Investment Treaties,* 63, at 63-66. A majority of BITs employ a combination of both standards. *Ibid.* at 65.

198 *Ibid.* at 63.

199 *Ibid.* at 65.

200 See A.R. Parra, *Applicable Substantive Law in ICSID Arbitrations Initiated under Investment Treaties*, Address Before the Seventeenth ICC Court/AAA/ICSID Colloquium on International Arbitration (Washington: ICSID, Nov 10, 2000).

disputes.[201] While some treaties provide for arbitration through other institutions, [202] many investment accords provide that arbitration will take place through the International Center for the Settlement of Investment Disputes (ICSID). There are now over 100 contracting parties to ICSID, and this includes many Latin American countries that became signatories in the early 1990s.[203]

The FTAA Investment Negotiations

As mentioned above, a distinct negotiating group has been set in place, with a mandate to examine the creation of a new investment regime for the FTAA.[204] In San Jose, Costa Rica, in 1998, at the meeting of Trade Ministers which designed the negotiating agenda for the FTAA, governments committed to *"establish a fair and transparent legal framework to promote investment through the creation of a stable and predictable environment that protects the investor, his investment and related flows, without creating obstacles to investments from outside the hemisphere."*[205] Proposals for a new hemispheric investment agreement are included in the draft FTAA text at Chapter 3, and will surely build on existing processes.

Three clusters of issues usually define investment negotiations:

- Basic definitions, national treatment, MFN treatment, fair and equitable treatment.
- Scope of application, key personnel, transfers, performance requirements.
- Expropriation and compensation, compensation for losses, general exceptions and reservations, and dispute settlement.

Within this framework, two particular issues stand out as important to sustainable international investment law for the Americas, the issues of transparency and of expropriation.

Transparency

The legal concept of transparency cuts both ways with regard to sustainable investment law and policy. Transparency can mean the obligation of the state toward the investor, with regard to their regulatory requirements and decision-making processes (for permits, licenses and other aspects of operating), as well as tax provisions, securities commissions, comportment in the case of a dispute and other circumstances. The normal standard for an investor granted by a host state, guaranteed in an investment treaty, is 'fair and equitable treatment.' This means that even in situations whereby all investors are being treated the same (domestic, investors from other states, and the investor from the party in question), the state takes on the obligation to ensure that the investor is treated fairly and equitably, which is an objective test. This includes the requirement that the state publish or otherwise notify the investor of new regulations or other measures which

[201] I. Pogany, "Bilateral Investment Treaties: Some Recent Examples" (1987) 2 ICSID Rev. Foreign Inv. L.J. 457, 467; See also S.K. Gudgeon, "Arbitration Provisions of U.S. Bilateral Investment Treaties" in S.G. Rubin & R.W. Nelson, *International Investment Disputes: Avoidance And Settlement* , Studies in Transnational Policy No. 20 (West Information, 1985) 41.
[202] R.H. Smith, "An Inside View of the ICC Court" (1994) 10 Arb. Int'l 53.
[203] J. Paulsson, "ICSID's Achievements and Prospects" (1991) 6 ICSID Rev. Foreign Inv. L.J. at 380, 382.
[204] "FTAA Ministers Agree to Establish a Dispute Settlement Working Group" (Mar. 27, 1996) 13 Int'l Trade Rep. at 510.
[205] Ministerial Declaration of San Jose, above.

might affect their investment (transparency), as well as due process in drafting new laws, etc. If the standard of treatment were too favourable, some civil society groups have argued that this would allow investors to sue for damages whenever their ability to profit from their investment is affected by new laws, essentially transferring most of the risks (and costs of insurance) onto governments. This will be addressed below.

Transparency can also mean an obligation for the investor and the state, to provide information and participation for civil society, communities or citizens groups, particularly when decisions will affect the interests of these groups. As shown in the *Aarhus Convention*, three key aspects of openness are access to information, access to mechanisms for civil society participation, and access to justice. These procedural guarantees have also been recently proposed as a principle of international law related to sustainable development by the International Law Association.[206] Indeed, it has been convincingly argued that public involvement generated through transparent and participatory processes means higher quality, more diverse exchanges of expertise, data and ideas leading to better informed decisions, more effective domestic implementation, and broader legitimacy in trade and environment decision-making.[207] Civil society organizations have taken a special interest in the intersection between investment and environment issues in the Americas, due to their experience in prior sub-regional or global negotiations.

The decision to release the draft text of the FTAA has generated greatly increased transparency. However, the FTAA process to date is only beginning to take civil society into account. This reticence should come as no surprise. International trade debates are usually closed, as certain decisions run against the interests of industries that depend on protectionist policies. Fears existed in the trade community of 'protectionist special interests' gaining too great a voice in the processes, which were meant to remain 'isolated and free from political pressure.'[208] Today, a distinction is made between public interest organizations or civil society, and the private vested interests or protectionist groups. The cooperation of the first is essential for a trade agreement to succeed in a democratic and participatory society. Traditionally, such participation, including access to information and to justice, has been facilitated by municipal, state, national or even international regulations.

As will be discussed below, in some circumstances investors could also incur this obligation, particularly if they are involved in self-monitoring, or guaranteed recourse to international dispute settlement procedures normally reserved for states. If a private company (particularly one based in another country and hence less accessible to citizens) is involved in monitoring their own compliance to public interest laws, or has the right to present claims before a tribunal where they can challenge regulations developed in the public interest, a strong argument can be advanced that the public, represented by civil society organizations or others, should have access to information provided by the

[206] ILA Declaration on the Principles of International Law Related to Sustainable Development, 6 April 2002, New Delhi, India. Available online: http://www.ila.org.
[207] IISD, *Principles for Trade and Sustainable Development* (Winnipeg: IISD, 1994) at 29.
[208] See C R. Murillo, above.

company, and the right to participate in the dispute settlement proceedings (at least as intervenors with the right to file *amicus curia* briefs).[209]

Expropriation

The second area of particular concern is the definition and scope of 'expropriation', particularly so-called 'regulatory takings'. Most investment treaties require prompt, adequate, and effective compensation for expropriated investments. Expropriation can be defined broadly or narrowly, depending on the treaty. This issue has been much debated in the United States, with several leading Supreme Court cases leading to a fairly broad definition of expropriation, whereby compensation is often due.[210] In international law, standards have also developed which set a (debated) norm for what constitutes an expropriation, and the nature of compensation due. [211] There is a fear that agreements which go beyond this standard, granting higher levels of protection to investors, might restrict a government's ability to regulate in areas of public policy, such as health, safety, human rights or environmental protection. These concerns have generated much controversy in the context of the NAFTA.[212]

International law has traditionally maintained an exception from the prohibition on uncompensated expropriation for non-discriminatory regulatory activities.[213] Principles established by the *Iran-United States Claims Tribunal*, the most extensive investor-state arbitration proceedings undertaken to date, include an exception from liability extended to non- discriminatory actions undertaken within the context of the taxation and police powers of the state.[214] Nevertheless, some argue that the rules distinguishing a compensable taking from non-compensable regulation remain unclear.[215] Absent clear discrimination or other abuses, it has been suggested that the distinction should be one

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[209] H. Mann & K. von Moltke, above.

210 The key issue of what constitutes a "taking" is widely debated in the U.S. in particular, where the full scope of the Firth Amendment Constitutional protection of private property remains unresolved. Most countries give public authorities, particularly local ones, wide latitude before recognising a "taking." In the U.S., this issue has continued to be widely debated, primarily due to their culturally and historically prescribed views on rights to private property. One of the factors that has made Chapter 11 particularly disconcerting to environment civil society groups, is the growing prospect that a fundamental question of U.S. constitutional law, one with enormous practical implications for all environmental regulators, may now be decided not through the development of domestic case law.

[211] There is a historical background to the debates. In 1973, developing states voted for Resolution 3171, which stated that "the principle of nationalization ... implies that each State is entitled to determine the amount of possible compensation and the mode of payment, and that any disputes ... should be settled in accordance with the national legislation of each State carrying out such measures." See G.A. Res. 3171, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9030 (1973). This rejection of international legal standards on compensation polarized the Assembly, and most developed states either abstained or voted against this particular paragraph of the resolution. See U.N. GAOR, 28th Sess., 2203rd mtg. at 12, U.N. Doc A/PV.2203 (1973). Those voting against the paragraph included the United States, Belgium, France, Germany (Federal Republic of), Italy, Japan, the Netherlands, Portugal, and the United Kingdom. The resolution as a whole was then approved by a vote of 108 to 1, the opposing vote being that of the United Kingdom, with sixteen abstentions, including the other developed states mentioned above. *Ibid.* at 13.

[212] L.J. Dhooge, "The Revenge of the Trail Smelter: Environmental Regulation as Expropriation Pursuant to the North American Free Trade Agreement" (Spring 2001) 38 Am. Bus. L.J. 475.

[213] See H. Mann & K. Moltke, above at 40.

[214] See G. Aldrich, "What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Claim Tribunal" (1994) 88 Am. J. Int'l L. at 585, 609.

[215] See H. Mann & K. von Moltke, above at 41.

of degree.[216] However, the use of this threshold test could cause legitimate public policy goals, such as measures for environmental or social protection, to become much more difficult to implement. If it is agreed that "[l]iability is not affected by the fact that the state has acted for legitimate economic or social reasons and in accordance with its laws,"[217] any state regulation that significantly interferes with an investment may constitute indirect expropriation or a measure tantamount to expropriation, regardless of its purpose.[218]

Civil society groups argue that the degree to which a purported regulatory measure interferes with the investment should not become the only relevant distinguishing factor between a taking and a legitimate regulation.[219] Legitimate, necessary environmental measures may interfere significantly with the operation of an investment, for example, through the suspension or termination of a method of production, or through withdrawal of rights to distribute and sell a specific product.[220] Too much focus upon the effects of the measure toward investors, with no inquiry into its stated purposes, could make it more likely that environmental regulations are considered expropriation.[221] Likewise, it has been suggested that if a measure is targeted or site specific, with a disparate impact upon a limited and readily ascertainable number of parties, it is also less likely to be recognised as legitimate.[222] Many environmental measures, particularly conservation decisions regarding a certain natural feature or endemic species, are by definition site-specific. This is the nature of the field, and even in the USA, it has been argued that such measures should not be automatically compensable for either domestic or foreign investors (particularly in situations where remediation is needed).

The underlying public policy concern is that in developing countries, where much new investment would come from abroad and health, safety or environmental regulations might be outdated or not yet exist, it would be hard to modernize the regulatory infrastructure without affecting a foreign investor's interests. Strict guarantees of high levels of monetary compensation would foreclose on regulatory options, making new environmental or social regulations too expensive for developing country governments. Yet these environmental or health laws might be necessary to ensure that increased investment flows lead to sustainable development rather than 'pollution havens' or short-term, high impact projects with few development benefits.

An over-broad definition of expropriation raises other sustainable development policy concerns. Civil society groups have raised concerns that these accords shift too many of the inherent risks of investment onto governments, and hence the public purse. Several arguments are advanced against such a shift. First, there is the burden of risk concern. This position holds that since investors will profit from the venture, reasonable risks should also belong to them. As the foreign investor is often the more experienced

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[216] See P. Comeaux & S. Kinsella, *Protecting Foreign Investment under International Law* (New York: Oceana, 1997) at 3-15. See also R. Dolzer, "Indirect Expropriation of Alien Property" (1986) 1 Foreign Inv. L.J. at 41, 58.
[217] See G. Aldrich, above. See also R. Dolzer & M. Stevens, above.
[218] See P. Comeaux & Kinsella, above, at 13-15.
[219] See H. Mann & K. von Moltke, above, at 41.
[220] *Ibid.*, at 42.
[221] *Ibid.*
[222] *I*bid.

partner in a joint venture, or the developer in a project, they are best placed to determine potential environmental limits, and either insure for them, or adjust to accommodate them.[223] Second, there is the polluter pays argument. Groups suggest that for governments to shoulder a disproportionate part of the burden of potential future losses amounts to a hidden subsidy. Since such a subsidy does not exist for more environmentally sound projects, the guarantee privileges more harmful industries, preventing the internalization of costs. This, groups argue, risks negative incentives over the long term, in violation of the polluter pays principle. Third, equity considerations have been raised. In certain situations, regulations provide significant benefits to the private sector. This is considered a windfall, and the profit goes to the investor. (Indeed, entire land speculation industries form around such occurrences). Just as private sector investors do not pay governments for benefits and increased values resulting from regulatory decisions,[224] neither should governments pay investors for costs of all regulatory decisions, which affect their investment. These are the sustainable development concerns often raised in the context of expropriation provisions in an investment accord.

Connected to this is the concept of 'MFN' guarantees. As mentioned above, this extends the most favourable of all advantages to the investors of member states. As such, any standards of treatment which already exist pursuant to particular piecemeal accords, even if these exceed the usual standard of treatment in international law, would through extension of 'MFN' status, arguably be gained by FTAA investors. While this is simply logical, ensuring equal competitive conditions and preventing 'sweetheart deals' from blocking others from a market, it means that negotiations involving 34 parties potentially hold much to gain for investors. Before proceeding with an examination of how these issues are currently, or might be, addressed in the FTAA, it is useful to consider other experiences of both limited and broad investment treaties and arrangements.

Models from Bi-lateral Investment Treaties (BITs)

Since the 1970s, large capital-exporting states have sought to protect their investors against certain policies in developing states through bilateral investment treaties ("BITs").[225] Even more recently, much has been made of BITs. One estimate tracks the number of such treaties increasing from 309 in 1988 to approximately 1850 at the end of

[223] Some of the environmental risks inherent in an investment project in North America might include, *inter alia,* endangered species being discovered on a property requiring special measures for conservation, projected contamination levels for a factory being found to increase the pollution in an area beyond tolerable limits, environmental flaws in project materials, such as the chemical composition of a new product, failure to secure community support for a high impact project in a sensitive area, etc.

[224] Such as new roads or electricity which raise the development value of property, or port facility development projects which facilitate greater industrial activity, or beachfront clean-up projects which result in increased tourism revenues.

[225] European states began concluding BITs with developing states in the 1960s, beginning with a BIT between West Germany and Pakistan in 1959. See J.W. Salacuse, above, at 657.

1999.[226] In a related study, it was observed that of the 1162 BITs signed as of 22 September 1997, 829 had been signed since 1990.[227] Two sets of examples of BITs in the Americas outline possible models for provisions on transparency and expropriation in existing BITs, and illustrate mechanisms to demonstrate sensitivity to environmental concerns.

US - Bolivia

The BIT between the United States of America and the Republic of Bolivia was negotiated on behalf of US mining companies, to protect their investments in the mineral rich Andean country. Bolivia, one of the poorest countries in Latin America, negotiated the accord with the USA, by far the richest. Commentators suggest that Bolivia essentially agreed to the terms dictated by the US State Department. A dispute between a US investor and the government of Bolivia was arbitrated under ICSID rules, in relation to government activities regarding water and sewer services concessions, and it would be interesting to see how this develops.[228]

In terms of transparency, the agreement offers extremely high guarantees for the investor. The standard of treatment due to investors in Article II(3) of the Agreement commits that the host state shall "at all times accord to covered investments fair and equitable treatment and *full protection and security*, and shall in no case accord treatment less favourable than that required by international law."[229] This wording implies that "fair and equitable treatment, and full protection and security" are to be seen as separate from, and to extend beyond, the treatment required by international law. On the other hand, transparency for the greater public, for example indigenous communities affected by the social or environmental impacts of mining operations, is not mentioned. There are no provisions for the public release of documents, or for community or stakeholder participation in investor-state tribunals.

In terms of expropriation, the BIT is extremely broad, and implies that essentially, any regulations that might affect the profits of an investor are considered "measures tantamount to expropriation". The BIT prohibits any type of interference "in the management or operation of an investment" and incorporates the "full protection and security" provision into its definition of the obligations due should some form of action be necessary. Any measure which appears to run against the granting of this full protection and security can be challenged in binding arbitration through an investor-state tribunal.[230] Such recourse is not available to either domestic industry nor, of course, civil society or community groups with concerns about the impacts of an investment project.

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[226] UNCTAD, *World Investment Report 2000: Cross-border Mergers and Acquisitions and Development* (Geneva: UNCTAD, 2000) at 6.

[227] *Status of Investment Treaties* (1997), 36 ILM 1404, 1404.

[228] *Aguas del Tunasi SA* v. *Bolivia*, Case No. ARB/02/3, Feb 25, 2002.

[229] *Treaty Between the Government of the United States of America and the Government of the Republic Of Bolivia Concerning the Encouragement and Reciprocal Protection of Investment*, 17 April 1998, online: <http://www.sice.oas.org/bits/Bolus1_e.asp> at II.3.

[230] *Ibid.* Indeed, Article III states that 1: "Neither Party shall expropriate or nationalize a covered investment either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a non discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II, paragraph 3."

Finally, perfunctory references are made to sustainable development concerns in the preamble of the agreement. The states acknowledge their agreement that "a stable framework for investment will maximize effective utilization of economic resources and improve living standards." The two signatories recognise that "the development of economic and business ties can promote respect for internationally recognized worker rights." And they agree that "these objectives can be achieved without relaxing health, safety and environmental measures of general application…" These references could arguably be used to show the purpose and intent of the treaty are in accordance with the Article 3(1) of the *Vienna Convention on the Law of Treaties*, if a social or environmental regulation is challenged by an investor and the case goes to binding arbitration through a dispute settlement panel. However, this treaty has clearly been designed to provide the highest possible level of protection to the investor, and it is unclear whether this argument would succeed.

Canada - Ecuador

The BIT between Canada and Ecuador presents an entirely different model. It specifically addresses sustainable development concerns, and appears to carefully provide for both transparency and a balancing between public and private rights. A dispute between Canadian investors and the Ecuadorian Government is pending through the ICSID procedures, regarding an oil expropriation contract.[231] The issues might have high pertinence to the rights of indigenous communities and to environmental protection.

This investment treaty contains specific provisions to encourage both aspects of transparency, and also makes specific exemptions for environmental measures.

In terms of transparency, the BIT provides that "each Contracting Party shall, to the extent practicable, ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Contracting Party to become acquainted with them." Rather than committing to the highest possible standard of treatment, it recognises that the parties will make their measures available to the extent practicable, which is a more reasonable burden for a developing country government to take on. In addition, depending on the definition of 'interest', a community might be able to use this accord to gain access to information from both governments concerning investments. While it does not appear to obligate investors to respond directly to such inquiries, nor to provide for stakeholder participation, the accord sets out expectations that it will be possible to know the operating conditions.

Paragraph 3 provides that "a) Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favorable than that required by international law." Paragraph 3 also states that "b) Neither Party shall in any way impair by unreasonable and discriminatory measures the management, conduct, operation, and sale or other disposition of covered investments." In addition, paragraph 2 provides that "[c]ompensation shall be paid without delay; be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken ("the date of expropriation"); and be fully realizable and freely transferable."

[231] *Repsol YPF Ecuador SA* v. *Empresa Estatal Petroleo del Ecuador (PetroEcuador)* Case No. ARB/01/10. 2001.

This BIT also contains a specific environmental provision, stating that "[n]othing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns." The provision of consistency with the agreement is further defined with the restriction that the "measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment." These provisions may be noted with careful, considered approval from a sustainable development perspective. This BIT does provide a specific exemption for environmental measures, and these appear broadly defined. There is no requirement to prove that the environmental measure is, as will be explained later, 'necessary' to achieve its purpose (a tough standard to meet with regard to environmental problems). *Prima facie*, then, the treaty excludes new regulations from challenge under the treaty. As such, an investor whose activities were limited by environmental measures, which affected the value of the investment, would not be able to sue to prevent the measure from being adopted, maintained or enforced. However, as described above, the concern with regards to investment treaties is not, actually, about direct use of the agreement or the binding arbitration to 'strike down' or 'prevent' environmental measures. Rather, civil society groups have raised the concern that the expense associated with compensation for all such measures, and constant defence of regulatory decisions in front of a tribunal, might prevent governments from enacting the measures in the first place.

Indeed, with regard to expropriation, the BIT provides that "investments or returns of investors of either party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation except for a public purpose, under due process of law, in a non-discriminatory manner and against *prompt, adequate and effective compensation*." [232] Such 'adequate' compensation is further defined.[233]

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[232] *Agreement Between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments,* 28 April, 1996, online**:** http://www.sice.oas.org/bits/caecu1_e.asp Specifically, Article VIII on Expropriation provides at 1: "Investments or returns of investors of either Contracting Party shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party, except for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation. Such compensation shall be based on the genuine value of the investment or returns expropriated immediately before the expropriation or at the time the proposed expropriation became public knowledge, whichever is the earlier, shall be payable from the date of expropriation at a normal commercial rate of interest, shall be paid without delay and shall be effectively realizable and freely transferable." Then at 2, Article VIII states: "The investor affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of its case and of the valuation of its investment or returns in accordance with the principles set out in this Article." Article XVI on Transparency provides at 1: "The Contracting Parties shall, within a two year period after the entry into force of this Agreement, exchange letters listing, to the extent possible, any existing measures that do not conform to the obligations in subparagraph (3)(a) of Article II, Article IV or paragraphs (1) and (2) of Article V." In addition, it states at 2: "Each Contracting Party shall, to the extent practicable, ensure that its laws, regulations, procedures, and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and the other Contracting Party to become acquainted with them." Finally, Article XVII on Application and General Exceptions provides at 1: "This Agreement shall apply to any investment made by an investor of one Contracting Party in the territory of the other Contracting Party before or after the entry into force of this Agreement." And Article XVII states at 2: "Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns." And it continues at 3. "Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not

However, unlike the US – Bolivia accord, this construction does not imply that the BIT is committing to a standard of treatment above and beyond the normal expectations for compensation in international law. Such a commitment to adequate compensation based on the genuine value of the investment also implies that a measure would have to completely prevent all use of the investment before it would become eligible.

In addition, it could be argued in an arbitration that the specific exemptions for an environmental measure should be set off against the compensation provision, so that it would not have the indirect effect of forcing the government to back down on its measure rather than pay high costs. Just as the effect of the environmental measure might be taken into account at the level of analysis of the need for compensation for expropriation, so could the effect of an excessively broad definition of expropriation, such as preventing environmental measures. As the need for a public purpose is recognised in the definition provided, it seems unlikely that an argument will be made that this aspect is not relevant in recognising the validity of such a measure. This recognised, the BIT still does not contain obligations for transparency on the part of the investors, only rights for recourse, and there is little implication that civil society groups will be able to gain access to the binding dispute settlement mechanisms.

Lessons Learned

From this brief consideration of two bi-lateral investment treaties, three observations can be made with reference to lessons for the FTAA. In the structure of such small accords, almost any treaty provisions desired by the parties can be included. The parties have clearly used this latitude to advantage - in one case to ensure that the highest possible level of obligations are taken on by the host government, and in the second to ensure that environmental exemptions are specifically included, allaying civil society concerns. In large negotiations such as the FTAA, the burden of getting agreement on specific issues not directly associated with investment policy *per se* becomes much greater. The second observation is that neither accord seems to contain many obligations for the investors. They are worded differently, but both are essentially guarantees for the northern investors that they will be treated well in the Latin American country. This bears noting, for those who might hope that the FTAA would contain provisions to encourage ethical investment, or other incentives for environmental and social value. Finally, with regards to transparency, it is clear that these accords do nothing to ensure public access to information, even when disputes might easily address issues of great concern to certain community groups. It would be most helpful to see how the issues raised in the pending disputes were addressed by the tribunals in each case, for example. However, the ICSID procedures are completely closed, and there is little material for analysis. While this is

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constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures: a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; b) necessary to protect human, animal or plant life or health; or c) relating to the conservation of living or non-living exhaustible natural resources."

[233] Such compensation shall be based on the genuine value of the investment or returns expropriated immediately before the expropriation or at the time the proposed expropriation became public knowledge, whichever is the earlier, shall be payable from the date of expropriation at a normal commercial rate of interest, shall be paid without delay and shall be effectively realizable and freely transferable.

surely of help to the investor, it arguably goes against the expectations in today's world for access to information and public accountability.

A More Sustainable Hemispheric Investment Regime?

The Investment Chapter of the FTAA is important. Along with provisions on market-access, investment is one of the most significant elements of the process, and presents an opportunity for more sustainable rule-making. Due to the politics mentioned above, and the increasing concern of civil society and other experts, it could be also be a 'deal-breaker.' How to move forward is therefore a key question.

One option, for groups that have expressed extreme trepidation regarding the present directions of negotiations on investment, is to lobby for its complete exclusion from the negotiations. Domestic and international investment law, these experts contend, are completely different games than trade, and cannot be addressed with the same tools. Persuasive arguments have been made in this respect, and are gaining currency in many quarters.

A second option is to negotiate an FTAA Chapter 3 with very restricted provisions, based on the WTO TRIMs Agreement. Given the recent failure of the MAI in the OECD, and the fact that the FTAA comprises 32 developing countries and only 2 developed countries, perhaps a 'WTO TRIMs' style agreement presents the achievable minimum baseline for negotiations. In such a scenario, transparency provisions will be assured, with benefits for both investors and civil society, but broad, expansive promises of compensation covering measures tantamount to expropriation including a 'regulatory takings' oriented provision would be avoided. This is one possibility, and would surely be acceptable to civil society groups. However, it is hard to see the value added from this style of agreement, particularly given the potential mandate for investment negotiations in the WTO. The key tool seems to be the investor-state dispute settlement mechanism. A 'WTO TRIMs' style agreement would not encompass such innovations. It seems almost like '*throwing the baby out with the bathwater.*' Such a mechanism does not seem impossible to realise in the hemispheric context, and could help to increase investor confidence, and hence investment flows, to Latin America and the Caribbean. Surely it is possible to address the civil society concerns, but still attempt a slightly more ambitious project than the under-whelming, minimalist WTO TRIMs approach.

As such, a third option becomes more attractive. The FTAA Chapter 3 could build on more innovative models from within the Americas. There are proposals, and policy options, to be considered. The investment provisions of NAFTA and the BITs present one model for the FTAA Chapter 3.[234] While, as the NAFTA Chapter 11 debates

[234] Although innovations from the other sub-regional accords such as the Andean Community (CAN) might be considered, it does not seem realistic to expect the high levels of investor obligation which were unenforceable then. These policies would be even less realistic in the present political and economic context of liberalization, especially given the present negotiating mandate to facilitate foreign investment.

illustrate, there are risks inherent with the NAFTA / BITs approach, there are also significant benefits for the internationalist concerned about the ability of developing countries to attract investment. Constructive solutions are available for addressing the environment and investment law interface. The challenges encountered in the NAFTA Chapter 11 experience can be anticipated and prevented, simply by confirming and building upon the principles in the recent NAFTA Trade Ministers Note of Clarification. Policies and options based on certain highly progressive BITs, such as the Ecuador – Canada Investment Treaty, also provide models for more expansive built-in textual mechanisms to avoid conflicts between investment and environmental objectives. Such an FTAA Draft Text would need to provide guarantees that new investor-state provisions will not impair government's ability to legislate and regulate in the public interest. As such, the treaty language would avoid the uncertainties that have confronted regulators with respect to NAFTA Chapter 11. Of course, these guarantees should not come at the expense of investors seeking compensation from truly discriminatory measures. But the two sets of interests are not impossible to reconcile. The goals of transparency and predictability for investors and civil society alike can be achieved if the FTAA Chapter 3 provides procedural and substantive certainty for the interests of both.

This third option depends on the *demandeurs*. These include developing countries seeking to secure steadier investment flows, developed country governments who seek a *quid pro quo* in exchange for market access, and especially, the investors themselves, who seek stability and guarantees. These actors must open dialogue with sustainable development experts and members of civil society, and seek ways to improve the proposals on the table, before it is too late.

One thing is certain. The way that the negotiations are structured will have a significant impact on their results. To achieve the balance sought, debates are needed within the trade negotiations, but also outside them. Governments will need to establish parallel environmental co-operation mechanisms to strengthen the benefits of investment for the environment, and to identify and mitigate potential impacts of liberalization. This will not be done overnight.

And while it is essential to build a strong hemispheric civil society voice with the capacity to participate effectively in shaping trade and integration policy, such 'civil society' involvement must be done sensitively, and accountably. At present, it is feared that civil society voices are of uneven strength in the FTAA process, and that increased openness might lead to unbalanced participation from some countries. If the participation of civil society exclusively reflects social and ecological concerns of the more developed partners, developing countries may fear that civil society may become a tool of richer governments, rather than as a means for working to promote sustainable development needs. In addition, while transparency can be mandated in agreements, it is still the responsibility of civil society and other groups to use opportunities for participation. Often, these groups and marginalized communities lack the very capacity, analysis and resources to take advantage of opportunities for dialogue. This leaves formal channels under-utilized, particularly in environmental regimes, and leads to disparities in regional and sub-regional representation, which could hinder the development of effective processes on the hemispheric level. Both of these issues need to be resolved as part of efforts to open dialogue on sustainable investment rules in the Americas.

As such, while conclusions at the present stage in FTAA negotiations would be premature, it can be suggested that specific recommendations can be made to move the debates forward for disputes at the nexus of trade and environment. The FTAA is, perhaps, a worthy project, but in the current political climate, it is subject to a legacy of mistrust and concern generated by its precedents - the "*Seattle Syndrome*". If the right institutions can be put in place to resolve conflicts between international investment and environmental law, the FTAA and the entire Americas integration process has better possibilities to foster, rather than frustrating, sustainable development.

6. Trade and Biosafety

6.1 **The Biosafety Protocol: An Opportunity for Americas Collaboration**

Rodrigo Artunduaga

How does trade liberalization provide new opportunities to address biosafety issues in the Americas? Which international provisions are needed to support win-win relationships between international trade and sustainable development in the agricultural sector? How can environmental cooperation regimes be strengthened to address inherent challenges of safe release and Advanced Informed Agreement at the global level? And are there potential regional agendas?

An Overview of the Cartagena Protocol

In general, 'biosafety' refers to efforts to ensure safety in using, transporting, transferring, handling, releasing and disposing of genetically modified organisms when they are considered potentially capable of affecting human, animal or plant health, or the environment. Currently, fifty-two countries worldwide have specific biosafety regulations. However, only eleven countries in Latin America and the Caribbean (LAC) have similar legal biosafety safeguards.[235]

The Cartagena Protocol on Biosafety (the Protocol) to the 1992 Convention on Biological Diversity (CBD) was adopted on 29 January 2000, in Montreal, Canada, by more than 130 countries that are parties to the CBD. It entered into force in September 2003. Because the U.S. Senate has not ratified the underlying CBD, that state is not a party to the Protocol

The Protocol is the first international treaty that explicitly addresses both environment and trade since the establishment of the World Trade Organization (WTO). It is also an important signpost on the road to good environmental and health regulation in the globalized world. It provides a framework for addressing environmental impacts of genetically engineered products that cross international borders.

The Protocol addresses a major area of concern that was not resolved by the parent CBD — the transboundary movement, transit, handling and use of genetic engineered "living modified organisms" (LMOs). In recent years, this issue has gained new prominence and controversy, as LMOs have become widely used as agricultural crops, and have become the focus of concern by trading partners and citizens around the world. While LMOs are widely used for crops in the US, Canada and Argentina, citizens and governments in many countries, particularly in Europe, have questioned the environmental and health safety of such products, and have rejected them in the marketplace.

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[235] See E. Alarcon, L.G. Gonzales & J. Carls, "Situación institucional de los recursos fitogenéticos en América Latina y el Caribe» Serie de documentos de discusión No. 6 (Quito: IICA-GTZ, 1997). See also ICA, *Los elementos centrales de la negociación del Protocolo de Bioseguridad* (Bogota : Instituto Colombiano Agropecuario ICA, 1999).

The Protocol incorporates a number of principles that are still under development and in the process of being defined. These include some controversial concepts such as the precautionary approach, which that was established as a guiding tenet of the CBD. It refers to Principle 15 of the non-binding Rio Declaration, which states that:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

In general, most interpretations agree that the precautionary approach urges policymakers to err on the side of caution in the face of scientific uncertainty. Environmentalists, particularly in Europe, consider this approach to be a valid policy option in the face of incomplete or inadequate scientific knowledge about health or environment impacts. Defenders of the application of this approach maintain that it is only "a temporary mechanism" that gives time for scientific inquiry. Policymakers in Europe recognize, as do those in the United States, the need for an assessment of risks based on accepted scientific facts. However, critics worry that elevating the precautionary approach to the level of a 'political principle' may create false public expectations for absolute safety and the demand for zero environmental risks. At worst, some critics maintain, the precautionary approach can easily be used as a form of disguised protectionism.

Current language in the Protocol leaves the development of procedures for trade and/or entry decisions subject to further refinement by the CBD's Conference of Parties. Presently, few countries agree on just what the precautionary approach is. Analysts believe that future refinements may be affected by this lack of accepted disciplines to guide the uniform application of the precautionary approach. The current situation has enticed international bodies, like the European Union (EU), the Codex Alimentarius Commission, and the Organization for Economic Cooperation and Development (OECD) to offer comprehensive views on the subject in hopes of setting a world standard for the application of the principle in the trade of genetically modified organisms (GMOs).[236]

The Protocol also calls for "Advance Informed Agreements" (AIAs) between exporting and importing countries regarding first shipments of a LMOs and labelling of subsequent shipments, and the establishment of a Biosafety Clearing-house as a means to share scientific, technical, environmental, and legal information on LMOs.

Other potentially controversial provisions still subject to further negotiation will require mandatory labelling of bulk commodities, or could call for environmental studies, and may establish compulsory product information and disclosure procedures. In general,

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[236] See UNEP / CBD / BSWG, *Biosafety: A Report to the Panel of Experts on Biosafety, Cairo, Egypt* (Nairobi: UNEP, 1995) See also, Instituto Sinchi, *Son las plantas transgénicas una amenaza a la biodiversidad?* (Leticia, Amazonas: Instituto Sinchi, 1995); And see UNEP/CBD/BSWG, Reports and documents related to the Biosafety Working Groups meetings (available online: www.biodiv.org). UNDP *Human Development Report 1999: Globalization with a human face* (New York: UNDP, 1999); and UNESCO, *World Science Report* (Paris: Elsevier, 1998).

provisions in the Protocol are likely to shape market rules and impact in biotechnology trade.

Framing the Cartagena Protocol on Biosafety

Analysts agree that, while the Protocol is a substantially complete document, the pact delays final negotiations on a number of controversial issues for up to 4 years after its adoption. For example, the door has been left open for parties to revise or strengthen rules for "contained use LMOs" that are not likely to propagate in the environment (i.e., bulk commodities.) GMO exporter countries are expected to oppose any move to increase documentation and notification requirements for bulk commodities, arguing that the cost of segregation and identity preservation (i.e., tracing a GMO product from the farm to the consumer's table) could lead to irreparable harm to biotechnology trade.

Several important aspects of current provisions have been left for future negotiations, such as:
- how to apply the "precautionary approach" to the Protocol;
- how to develop rules to integrate the Protocol with other trade agreements, such as the WTO, into a "mutually supportive" framework; and
- how to develop rules and procedures based on international law that would establish liability and redress for damages resulting from the movement of GMO (these are to be finalized within 4 years).

Key Provisions and Related Issues

Advance Informed Agreements

The Protocol establishes the use of 'Advance Informed Agreements' between the importing and exporting parties that cover the first transboundary movement of any GMO. The purpose of AIAs is to ensure that recipient countries have the opportunity to assess environmental risks associated with the importation of biotechnology products. The Protocol creates a procedure that requires exporters to seek consent from importers before the first shipment of a GMO is introduced into the environment (it applies to seeds for planting, fish for field release, and micro-organisms for environmental bioremediation). The receiving country's decision may be to permit the import; permit it only with conditions; prohibit it; or request further information prior to making a decision. In addition, Article 11 of the Protocol requires that bulk shipments of GMO commodities that are to be used as food, feed, or for processing must be accompanied by declarations stating that such shipments "*May Contain*" LMOs and are "*Not intended for intentional introduction into the environment.*"[237]

Two categories of GMOs are recognized according to their intended use: LMOs for "contained" or "direct" use (i.e., food, feed, or for processing) that require minimal biosafety precautions; and LMOs for "intentional introduction" to the environment (i.e., agricultural seeds and other propagation materials, and live fish), which require more stringent biosafety procedures. LMOs unlikely to cause adverse effects on biological

diversity, and those intended for contained use (i.e., feed, food, or processing) can be exempted from the application of AIA procedures. Human pharmaceutical products produced through biotechnology are excluded from this agreement if they are "addressed" by other international agreements or bodies.[238]

Biosafety Clearing-House

Article 20 of the Protocol establishes the Biosafety Clearing-house (BCH), which will be used as the mechanism to share scientific, environmental, and legal information on LMOs. Countries will post decisions on individual transfers of LMOs as well as: non-confidential information relevant to the implementation of the Protocol; existing domestic laws; information required by countries for the AIA procedure; bilateral, regional and multilateral agreements; summaries of risk assessments of LMOs generated by domestic regulatory processes (including those regarding products of LMOs); and more general scientific information which may assist the parties.[239]

Confidential Information

Confidential information received under Protocol procedures must be protected by importing and exporting parties. Two critical issues were taken into account in the minds of negotiators in establishing the Protocol:

1. How to adequately balance the rights of parties to access and use relevant information about traded LMOs
2. How to protect the intellectual property rights of owners of biotechnology products.

Articles 20(3) and 21 of the Protocol address the protection of confidential and proprietary information by making both trading parties responsible for protecting confidential information received under AIA requirements in the Protocol.

Formal procedures and measures regarding intellectual property protection will also be developed by the Conference of Parties within 2 years.[240] However, some controversy exists because the Protocol does not prescribe explicit liabilities for failures to protect intellectual property. Some critics sought clear-cut mechanisms in the Protocol to sanction failures to protect confidential information.[241]

Relationship of the Protocol to Other Agreements

One of the most contentious issues faced by negotiators was to establish how the Protocol's measures would relate to other bilateral or international trade agreements, notably those under the WTO. The issue became important after the 1997 Biosafety Working Group meeting in Montreal, as certain GMO exporter countries insisted on the

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[239] Cartagena Protocol on Biosafety, Art.20
[240] See UNEP / CBD / BSWG, above; Instituto Sinchi, above.
[241] See ICA, above.

need for consistency between the Protocol and WTO agreements such as the Sanitary Phytosanitary-Standards (SPS) accord. The key question revolved around how to reconcile differing perspectives in environmental protection philosophies between advocates of the precautionary approach and those countries where environmental protection systems stress the use of the best available scientific evidence and risk assessment.

The Cartagena Protocol contains provisions suggesting that it must be consistent with WTO law. Some analysts interpret this "savings clause" to mean that trade disputes originating from the Protocol's implementation could be handled through existing mechanisms - such as the WTO dispute settlement agreements and its appellate review bodies - while others are inclined to stress that the Protocol is not subordinated to any agreement, and do not necessarily extend the "savings clause" to future agreements or to existing ones, which do not adhere to the Protocol.

Notification/Labelling

The Protocol establishes mandatory entry notifications by exporting countries to the competent national authority in importing countries about trade of non-exempted LMOs. A key feature of the Protocol is the requirement in Article 18 for bulk shipments of GMO commodities to be accompanied by documentation stating that such shipments *"May Contain"* LMOs, and that they are *"Not intended for intentional introduction into the environment."* This applies only to LMOs intended for food, feed, or processing (e.g., corn or soybeans).

Impacts on Trade

Analysts agree that the future impact of the Protocol on trade is difficult to assess because so many key aspects are still to be decided. Also, the current climate of controversy surrounding trade in agricultural LMOs in many countries, especially in Europe, further complicates assessments of trade implications. Some analysts have stated that the new rules will make it easier to harness the promise of biotechnology without unduly disrupting world food trade. Others, have viewed the accord with scepticism, and have charged that many of its provisions will harm biotechnology trade by opening a potential "flood gate" to restrictive and costly labelling and documentation requirements for goods.

Socio-economic considerations

In response to Southern concerns regarding the impacts of LMOs on communities, and potential agricultural dislocation, the Article 26 of the Protocol allows countries to incorporate socio-economic considerations in decision-making, *"especially with regard to the value of biological diversity to indigenous and local communities"*, but only *"consistent with their international obligations."* This wording leaves unresolved the compatibility of such criteria with the WTO agreements.

Liability and Redress

The question of liability and redress for damage from LMO trade will be subject to further negotiations, to be completed within four years.[242] This appeared a disappointing result, as for many (but not all) countries from Latin America, a liability regime was a priority. They argued that liability provisions should be strict, as there was significant potential for negative impacts on southern agriculture from LMOs, should these be released in an unsafe way into the environment, particularly since LMOs are often tested in developing countries.[243]

Complementary Instruments

The Protocol addresses environmental and human health safeguards concerning LMOs produced by modern biotechnology. It plays an important role in protecting resources for food and agriculture, while allowing for their sustainable use, development of international trade, and their commercialization. Existing instruments in the field of food and agriculture that deal directly or indirectly with biosafety related issues need to be taken into account in the regime:
- The International Plant Protection Convention whose main purpose, as stated in its Article 1, is *"securing common and effective action to prevent the spread and introduction of pests of plants and plant products, and to promote appropriate measures for their control;"*
- The Commission on Genetic Resources for Food and Agriculture whose mandate covers all genetic resources that pertain to food and agriculture; and
- The *Codex Alimentarius* whose objectives are to ensure consumer health and fair practices in the food trade.

A Regional Framework for Biosafety Capacity Building?

There is a significant opportunity for regional cooperation in this area, cooperation that meets social priorities, such as food security and the protection of health, as well as environmental concerns. The multi-lateral framework of the Protocol provides an internationally agreed set of priorities, and a series of specific arrangements for cooperation. But capacity building initiatives will be essential to help countries of the Americas participate fully in implementation of the Protocol. An example of how this could be done is a $US 39 million project funded by the Global Environment Facility that UNEP will implement over the next 3½ years. This project will help 100 countries prepare their National Biosafety Frameworks and will facilitate the exchange of experiences and best practices amongst developing countries and countries with economies in transition, including through a series of global and regional workshops.

The design and implementation of a hemispheric framework for biosafety capacity building could present an opportunity for trade-related sustainable development collaboration. Countries of the Americas are in a strategic position for ensuring global food security. They include three of the 12 global centers of origin of crops of major socioeconomic importance, and are home to enormous reserves of biodiversity.[244]

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[242] Cartagena Protocol, Article 27.
[243] See E. Alarcon, L.G. Gonzales & J. Carls, above. See also ICA, above.
[244] J. Leon, *Botanica de los cultivos Tropicales* (San Jose, Costa Rica: IICA, 1987).

Approximately 90% of the planet's biodiversity is concentrated primarily in 18 countries, nine of which are in the Western Hemisphere.[245] According to some theories, agricultural practice began about 7000 to 10,000 years ago in different parts of the hemisphere, where three centers of plant domestication have been recognized: Mesoamerica, the Andes and the Amazon.[246] More than 45 groups of cultivated species originated in the Andean region, 12 were domesticated in the Amazon and 100 were domesticated in Mesoamerica.[247]

Humanity once used about 5000 of the 250,000 existing plant species. Today, no more than 500 have real economic importance, and only 15 are responsible for the production of about 80% of the calories produced by modern cultivars. In this regard, the Americas stand out for the many crops they have contributed to world agriculture.[248]

To conclude, there are two opportunities for hemispheric cooperation in the area of trade and biosafety.

First, a regional biosafety capacity building program should be established, and other activities can also be undertaken to implement the Protocol. It is clear that the region must develop and perfect existing regulatory instruments in compliance with international agreements, in order to prevent or minimize possible risks derived from the use and handling of transgenic products. To do this, competent national institutions will need to develop institutional capacities in order to manage and evaluate field trials, and labelling, segregation and other measures may need to be set in place. Only then will countries of the Americas be able to safely take full advantage of transgenic crops capable of enhancing agricultural production and improving food security.

Second, regional understandings can be developed on the relationship between the trade provisions in the Cartagena Protocol, and the FTAA. The Protocol provides the legal framework for international trade in GMOs to take place, at least among parties, although its relationship with the WTO and other trade arrangements is still a matter of debate. The Protocol gives a rather large discretionary power to importing countries about the goods they are willing to import. However, the manner of regulation of international trade in GMOs will likely have an impact, which goes beyond this. If the WTO system, or the FTAA for instance, can provide a more flexible interpretation of the precautionary approach, the same flexible interpretation will probably apply in other fields, such as trade in conventional agricultural products. If, due to the economic interest involved, an earnest effort is made to clarify the relationship between the trade rules included in the Cartagena Protocol and those emerging from specific trade agreements such as the FTAA, the same approach will likely apply to other multilateral agreements containing trade rules.

6.2 Biosafety, Consumer Protection and International Trade

[245] See UNEP/CBD/BSWG, above. See UNDP, above and UNESCO, above.
[246] See E. Alarcon, L.G. Gonzales, & J. Carls, above.
[247] See UNEP/CBD/BSWG, above. See also UNDP, above; and UNESCO, above.
[248] See UNEP/CBD/BSWG, above. See UNDP, *ibid.* and UNESCO, *ibid.*

Roxana Salazar[249]

Biotechnology provides a powerful means to modify existing agricultural plants and animals. Proponents of agricultural biotechnology insist that it will bring a broad range of benefits to society. Scientists and advocates of this technology foresee various positive contributions from this technology. They argue that it will reduce pressure on over-utilised and degraded soils and arable lands, decreasing the need to expand the agricultural frontier to areas such as fragile ecosystems; that less crops will be lost to pests and weeds; that agricultural products will be able to contain better nutritional value; and that there will be reduced use of energy and of chemical pesticides.

However, modern agricultural biotechnology also presents unprecedented risks to human health and the environment, raises serious ethical questions, and may have significant international implications. Creating laws and policies that adequately address these issues is, therefore, one of the most challenging regulatory tasks facing governments today.

The environmental and health risks associated with biotechnology are recognized in the 1992 United Nations Convention on Biological Diversity (CBD), an international convention signed by over 160 nations, which is designed to protect the broad range of living organisms and ecosystems which sustain our planet. Specifically, Article 8(g) of the CBD stipulates that each contracting party must:

Establish or maintain a means to regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity, taking also into account the risks to human health.

Many countries implemented internal legislation even before the CBD entered into force. The CBD's Cartagena Protocol on Biosafety has set down new rules for the international community, and these will be binding for countries enacting national laws. The following article tries to piece together, from a critical perspective, the institutional and legal puzzle in the Americas on these issues.

Concerns Related to Modern Biotechnology

There are serious environmental, health, socio-economic and ethical concerns related to the development and use of genetically engineered, or genetically modified (GM) organisms, in particular for food crops.

Environmental Concerns

It is a major challenge for scientists to identify the precise nature of potential environmental risks posed by GM crops. Different GM crops may present different risks, depending on a wide variety of factors including the characteristics of the crops and the location in which they are tested or grown commercially. Margaret Mellon and Jane

[249] Dr. Roxana Salazar is a senior Costa Rican lawyer with the AMBIO Foundation, San Jose, Costa Rica.

Rissler, from the Union of Concerned Scientists, recently outlined two of the most significant and well-understood categories of environmental risk.[250] These are first, the environmental risks related to GM plants themselves, and second, the risks associated with the movement of transgenes (foreign genes spliced into plants) into other plants, including other species of plants.[251]

Health Concerns

Proponents of biotechnology maintain that GM crops are not substantively different from conventional food products and that they should, therefore, be regulated in the same manner. Several recent scientific studies suggest, however, that a more precautionary approach to regulating GM crops may be necessary as these crops may pose unique and substantial health risks. In February 1999, for example, the first evidence of the potential for GM food to cause health damage emerged. Dr. Arpad Pusztai, an internationally respected senior scientist at the Rowett Research Institute in Scotland, presented evidence that rats fed with GM potatoes modified to express snowdrop lectin experienced shunted growth, damaged immune systems, and damage to several major organs. In contrast, unmodified potatoes had a much milder effect on the rats. From this evidence, Pusztai tentatively attributed the adverse responses to the transgenes in the GM potatoes.[252] Dr. Stanley Ewen, a consulting histopathologist at the University of Aberdeen Medical School, furthered Pusztai's studies and found even more disturbing results. Ewen found that the adverse health effects from the GM potatoes may not have come from the lectin transgenes, but from the promoter genes (derived from cauliflower mosaic virus, CaMV), which were used to drive the expression of the transgene within the GM potatoes. The CaMV promoter has been widely used in making GM tomatoes, corn and soybean cultivars, which are already in the marketplace.[253]

Socio-Economic Considerations

Multinational biotechnology companies are rapidly developing GM agricultural products for international markets. They maintain that these products will help to address food shortage problems in developing countries. Monsanto, for instance, suggests that biotechnology can contribute to higher productivity and efficiency on the farm, thereby increasing food supply and helping to solve the world hunger crisis.[254]

The suggestion that GM crops can alleviate world hunger by increasing food production is, however, quite problematic. As the Union of Concerned Scientists explains, there are many complex reasons for food shortages, including lack of income to buy food, trade

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[250] J. Rissler& M. Mellon, *The Ecological Risks of Engineered Crops* (Cambridge, MA: The MIT Press, 1996).
[251] For a more detailed discussion of these categories, see ibid and also J. Rissler & M. Mellon, *Perils Amidst the Promise: Ecological Risks of Transgenic Crops in a Global Market*, (Union of Concerned Scientists, December 1993).
[252] "Biotech: The Pendulum Swings Back" (May 6, 1999) 649 Rachel's Environment and Health Weekly, at 2. Pusztai's results sparked a storm of criticism from proponents of GMOs and Pusztai was forced to resign from the Institute. He was, however, exonerated when an international group of 22 scientists attacked the behaviour of the Institute and re-affirmed the scientific soundness of Pusztai's conclusions.
[253] A. Clark, "Genetic Engineering in Field Crops: Ethics and Academia" (Presented to the Annual Meeting of the Saskatchewan Institute of Agrologists, April 1999).
[254] See, for example, Monsanto's advertising campaign, "Let the Harvest Begin".

and land-use policies that disadvantage farmers in the developing world, and lack of appropriate inputs such as fertilizer.[255] GM crops may do little to alleviate hunger until these political and economic problems are addressed.[256] In fact, GM crops may actually worsen the plight of third world farmers, for several reasons.

Many critics of GM argue that genetically modified products are unlikely to benefit resource-poor farmers because these products are too expensive. Biotechnology companies need to sell their products at premium prices in order to cover their high research and development costs.[257] Hybrid seeds typically cost three times as much as traditional seeds and patented GM seeds can cost up to five times more than regular seeds. Moreover, new genetically engineered seeds often require high-quality soils, large investments in machinery and fertilizer, and increased use of chemicals and water.[258] In short, *"these products are of virtually no value to hungry farmers...who cannot afford the products of traditional technology, much less these expensive genetically engineered products."*[259]

These costs may also be compounded by patent fees. Many biotechnology companies place patents on GM products, which prohibit farmers and other individuals from using these products unless they pay royalties. Agracetus Inc. (a subsidiary of W.R. Grace and Co.) has, for instance, received a patent for genetically engineered cotton that will give the company monopoly control over all transgenic cotton plants and seeds until the year 2008.[260] Such a patent gives Agracetus the right to decide when and if it chooses to license its technology and under what conditions. Cotton is a self-pollinating crop and farmers in many parts of the world save seeds from their harvest to re-plant. Under industrial patent law, however, it is illegal for farmers to save seeds from transgenic cotton plants without payment of royalties to the patent owner. The company has similar patent applications pending in countries such as Brazil, China and India.[261]

Premium prices, technology fees and royalties may make GM crops too expensive for small, resource-poor farmers. Moreover, these crops may be impractical for small farmers in developing countries. Critics of GM products argue that if these crops were meant to feed the hungry, they would have special characteristics to help poorer farmers, such as the ability to grow on marginal soil, or to produce more high-quality protein, with increased yields and without expensive inputs. Certainly, some of these crops do. But as Mark Winfield, Research Director at the Canadian Institute for Environmental Law and Policy explains, *"the two leading applications of GE crops in North America, herbicide tolerance and pest resistance, are simply not relevant to the challenges facing the world's foods supply, particularly in the developing south."*[262]

Instead, most of the GMOs in development are intended to mainly serve large farming operations in developed countries and wealthy producers in less developed regions.

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[255] Union of Concerned Scientists, "Biotechnology and the World Food Supply", online: ttp://www.ucsusa.org/agriculture/index.html.
[256] *Ibid.*
[257] *Ibid.*
[258] "Against the Grain" Rachel's Environment and Health Weekly (February 11, 1999), online: http://www.rachel.org.
[259] Union of Concerned Scientists, above.
[260] U.S. Patent No. 5,159,135, October 27, 1992.
[261] RAFI Communique, "Control of Cotton: The Patenting of Transgenic Cotton", July/August 1993..
[262] M. Winfield, "Agricultural Biotechnology and Sustainable Development" (Notes for presentation, June 1997).

Monsanto, for example, recently announced that it will spend $US 550 million in Brazil to build a factory to produce Roundup pesticide for use in Roundup Ready soybeans. It is unlikely that this factory will benefit the poor, though, as "most rural Brazilians are subsistence farmers who do not grow soybeans", but will only serve wealthy farmers serving export markets.[263]

Control over the Agricultural Sector

The development and sale of GM agricultural products gives the biotechnology industry increasing control over farmers and the food production process. Many small and medium-sized farming operations are concerned that biotechnology will further centralize power over agricultural production into the hands of a few large multinational companies. They worry that as agricultural biotechnology companies develop interlinked products, such as herbicides and herbicide tolerant seeds, farmers will become dependent on their products, increasing the ability of these companies to gain control over the food production process.[264]

Control over production is, in fact, the goal of many biotechnology companies. As the Vice-President of the American biotechnology company, Calgene, has stated: *"Our objective is to control production with our partners from the production of foundation seed to the sale of the oil to our customers. We want complete control...The way you capture value added is selling oil -- value-added oil at a premium to customers, period. So we and our partners will maintain complete control of the process."*[265]

Consolidation of the agricultural biotechnology industry is happening at a rapid rate. For instance, according to a recent article in *The Economist*, DuPont, one of America's leading producers of chemical pesticides, has recently announced its purchase of Pioneer HiBred, the world's largest seed company.[266] The two companies have had a long-standing joint venture in the production of GE grains. Monsanto has also been rapidly taking over seed companies. The company has, in fact, paid over $US 8 billion in the past four years to buy companies such as Delta and Pine Land, and Holden Seeds, putting it in command of roughly 80% of American cotton-seed production.[267]

Social and Ethical Issues

Genetic engineering raises many significant ethical concerns and questions. These issues cannot be extensively explored within the scope of this article, but should be briefly raised.

First, there are major ethical concerns regarding the impact that this technology may have on the health and welfare of animals. Some societies and individuals see plants and animals as utilitarian objects that can be legitimately modified and manipulated for

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[263] As noted in A. Clark, "Debunking the Myths of Genetic Engineering in Field Crops" (Presented to Alternatives, Kitchener, Ontario, 2 March 1999), online: http://www.plant.uoguelph.ca/research/homepages/eclark/myths.htm.
[264] "In the Mill," The Economist, (March 20, 1999), 64-65.
[265] B. Kneen, *From Land to Mouth: Understanding the food system* (Toronto: NC Press, 1995), at 140.
[266] "In the Mill", above.
[267] *Ibid.*

human purposes. To others, though, plants and animals are culturally and/or religiously significant beings evoking respect. These groups see the manipulation of the genetic material of other species as a violation of species integrity and the laws of nature, and fundamentally disagree with many applications of modern biotechnology for reasons of dignity and respect for other species.

Genetic engineering also raises serious ethical concerns about the patenting of living organisms. In 1980, the United States Supreme Court granted the first patent on a life form.[268] Since then, patents have been granted on plant and animal strains, as well as on individual genes. To others, though, the patenting of life is profoundly unethical. As one critic noted, *"I never imagined that people would patent plants and animals. It's fundamentally immoral... [it] violates the integrity of life itself, and our deepest sense of morality."*[269] Patenting life forms also raises questions regarding intellectual property rights. Genetic material, such as plants used in traditional society for medicinal purposes, are now being collected from indigenous peoples by multinational biotechnology companies. This activity raises many complex issues, such as how and if consent to use these materials should be obtained, who owns such material and knowledge, and if and how indigenous societies should receive royalties from any GM products discovered in this way.[270]

Several other ethical questions often raised concerning modern biotechnology include who owns genetic information, is ownership of genetic material a right, and what are the implications of this kind of ownership. In addition, others ask whether there is truly a need for GM food. Still others ask whether animals should be used in genetic experimentation, and whether, when a plant receives an animal gene, vegetarians should have a right to be informed. Who will pay for failed technology, and who is responsible or liable for potential adverse environmental or health reactions? Finally, many have asked whether societies truly believe that private companies, like insurance companies, should have access to genetic information? Although these questions are difficult to answer, open discussion of the ethical issues regarding genetic engineering should be encouraged and supported by governments, and should take place openly in courts. Until recently, however, ethical concerns were ignored by many governments. Governments should facilitate open debates in society around these issues, and demonstrate a willingness to act on the consensus that develops.

The Cartagena Protocol on Biosafety, Consumers Protection, and Trade Agreements[271]

The development of the Protocol was mandated in the CBD, which was adopted at the 1992 Rio Earth Summit. The drafters of the Convention were conscious of the looming commercialisation of GM crops, fish, animals and micro-organisms, and the potential threat that this could pose to the environment and human health. The actual

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[268] A. Clark, above, at 7.
[269] I. Acosta, President of the Guaymi General Congress, as quoted in B. Mausberg, M. Press-Merkur, & P. Coutinho, *The Citizen's Guide to Biotechnology* (Toronto: CIELAP, 1995), at 37.
[270] M. Press-Merkur,& M. Winfield, *Enabling Biotechnology? An analysis of the report of the Biotechnology Council of Ontario* (Toronto: CIELAP, 1995).
[271] This section was co-authored by Roxana Salazar and Marie-Claire Cordonier Segger.

negotiations on the Protocol began in July 1996, and after six negotiating sessions, were to have been concluded at an Extra-Ordinary Conference of the Parties to the Convention in Cartagena, Colombia in February 2000.

However, discussions collapsed in the face of intense opposition from a group of six countries called the 'Miami Group' – five of which are leaders in the FTAA (Canada, the United States, Australia, Uruguay, Chile and Argentina). The Miami Group emerged from the Cartagena meeting with two major objectives with respect to the Protocol. First, they wanted exemptions from the rules established through the Protocol for transboundary movements of modified organisms that are commodities for use in food, feed or processing. Second, they wanted the rules of the Protocol to be subordinated to the WTO international trade rules, to prevent the Protocol from being used to justify 'disguised protectionism.' These countries had invested heavily in agricultural biotechnology, and wanted to ensure that the Protocol did not permit countries to refuse imports of genetically engineered foods and other products except in accordance with WTO rules. Negotiations were eventually concluded in February 2000 in Montreal.

The final text does not really settle the question of how the Protocol relates to the WTO and other international agreements. In fact, it appears to be a conflict postponed, rather than avoided. The question of primacy of one set of rules over another is only important if the two sets of rules conflict, however. In the case of a conflict between the WTO and a multilateral environmental agreement (MEA), one of the most important issues is in which forum the dispute would be heard. On the face of it, there seems to be no direct conflict between WTO rules and the Protocol's provisions. In fact, the wording of the two preambular passages would suggest that both the WTO rules and the Protocol have to be read as mutually supportive and not conflicting. But this point becomes more contentious, and important, in the context of the Protocol's precautionary and labelling provisions.

Labelling

The main conflict between the Biosafety Protocol and WTO rules may arise from attempts, by governments, to apply precautionary or consumer information restrictions to GM foods. Presently under the Protocol, governments can only require a label that says a product "*may contain*" living modified organisms intended for direct use as food or feed, or for processing (LMO-FFPs), and it does not address other GM labelling requirements. However, in many countries, consumers want to be informed if products *do* contain LMOs. Those who are concerned about health risks, have particular allergies, or do not support the development of this technology, want their governments to respect their right to know what is in their food. However, a law requiring labels containing such information could be found inconsistent with international trade law, especially the WTO Agreements.

First of all, GM producers claim that GM foods and non-GM foods are *"like products"*. In a way, for the normal consumer in the market, it is almost impossible to determine the difference between and GM tomato and a traditional one. To determine if products are sufficiently similar to be considered 'like', international trade law considers different

factors, including the physical characteristics of the product and consumer tastes and preferences. In the *Japan - Alcohol case*, different liquors were considered 'like', as consumers bought them inter-changeably, though their physical characteristics were quite distinct. But in the *EC – Asbestos case*, carcinogenic white chrysotile asbestos was considered not to be a 'like-product' with non-asbestos substitutes, due to the health risks associated with asbestos, which were taken into account in considering the physical characteristics. A WTO Panel might rule either way, but in the current environment, it could find that GM food and normal food are alike.

In this case, any labelling or other requirements that mean a different sort of treatment for GM products may violate GATT, Article III, which commits countries not to pass laws that will discriminate between 'like products.' In such a case, the measure would need to seek justification in one of the exceptions. GATT, Article XX (b) may provide a ground for defence, as it creates an exception for laws necessary for the protection of human, plant or animal health, but the burden of proof, in an area where science is still very uncertain, will fall on the government seeking to defend the environmental measures in direct violation of the precautionary principle.

Even should a labelling measure pass muster this way, it would still face challenges in either the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) or the Agreement on Technical Barriers to Trade (TBT). According to these instruments, such measures should only be taken after a risk assessment with sufficient scientific evidence supporting it. In the *EC – Growth Hormones case*, it became clear that the SPS Agreement only has a little space for precautionary measures. In the recent *Japan – Apples case*, a fairly high bar was confirmed for sufficient scientific evidence, and specific requirements were detailed for risk assessments. While the Cartagena Protocol provides more detailed criteria, it is not clear that it can help in the matter. Although, based on the *US – Shrimp /Turtle cases*, the WTO panels will show deference to measures taken in compliance with multilateral environmental agreements, such as the CBD, such respect is mainly valid when an agreement exists between parties to the CBD. A challenge could be brought by a non-party. Furthermore, the Protocol, in its current form, may even work to declare the measure unjustifiable as it does not provide for such labelling.

As such, it is possible that any compulsory labelling scheme for LMO-FFPs would be found inconsistent with trade rules. This would run contrary to the precautionary principle, and also violate consumers' right to know what is in their food.

Consumers' Right to Know

Genetic modification has important implications in the spheres of health policy, the environment, ethics, religious beliefs and the economy. Consumers have the right to full information on the safety of the technology, and should be able to identify the products whose genetic structure has been altered. The consumer's right to know has been recognised on a regional and global level, notably by the UN General Assembly when it adopted the Guidelines for Consumer Protection. Article 3 of the Guidelines cites one of the legitimate needs that they are intended to meet as being the *"access of consumers to adequate information to enable them to make informed choices according to individual wishes and needs."*

Information should be readily available to consumers. This includes full disclosure of all aspects of the safety evaluation of GM foods, as well as clear and truthful labelling of any approved products that come onto the market, particularly when there is uncertainty about the risks. GM foodstuffs have, in many countries, reached the market unlabelled, though surveys have shown there is a strong consumer demand for full labelling of such products. Labelling would give those consumers who wish to buy or to avoid genetically altered food the information that they need to do so. With proper labelling, consumers are able to decide for themselves whether to buy products created as a result of this new technology and accept the uncertain risks.

Supportiveness

There are not always conflicts between the international trade rules and the Cartagena Protocol. These can also be mutually supportive. For instance, the Protocol complements the SPS Agreement rules in relation to the precautionary approach in the following ways:[272]
- The SPS does not spell out exactly what a risk assessment entails, but the Protocol does so, in detail, in Annex II.
- The SPS mentions risk assessment but not risk management. The Protocol (in Articles 15 and 16) makes it clear that both exercises are necessary, defining the former as the gathering of the data, and the latter as the building of a regulatory regime based on that data. The Protocol further sets out certain guidance in creating such a regulatory regime; for example, asking Parties to try to ensure that any LMO should undergo an appropriate period of observation commensurate with its life-cycle or generation time before it is put to its intended use.
- The Protocol explicitly requests Parties to take into account socio-economic considerations in making their decisions, whereas the SPS says nothing on the subject.
- The Protocol is specific about the process for review of decisions in the light of new evidence (Article 12), while the SPS is ambiguous about how to treat measures adopted provisionally in the face of uncertainty.
- The provisions in Article 15 of the Protocol go some distance toward laying the onus on the exporter to establish the harmless nature of the LMO in question. Paragraphs 2 and 3 state that the party of import may require the exporter to carry out the risk assessment, and it may require the notifying party to foot the bill. Again, on this issue, the SPS is silent.

The significance of the Protocol's precautionary provisions seems to be that they fill in some of the gaps in the SPS Agreement. They enrich the SPS by adding details that help implement the precautionary principle in the context of LMOs.[273] Even though the Protocol does not require a risk assessment for LMO-FFPs prior to importation, countries can require it. Even more, if the assessment is not completely concluding, they can rely on the precautionary principle to enact legislation. This is different from the labelling requirements, since the Protocol clearly precludes labelling stating that the products contain LMOs.

[272] Stas, Writer, at 9.
[273] *Ibid.*

The *Codex Alimentarius* and Consumers

The Eleventh Session of the Conference of the FAO in 1961 and the Sixteenth World Health Assembly in 1963 both adopted resolutions to establish the *Codex Alimentarius* Commission. The Commission was created with the primary task of establishing scientific standards on food safety. It meets every two years, alternately at FAO headquarters in Rome and at WHO headquarters in Geneva. Plenary sessions are attended by as many as 500 people. Representation at sessions is on a country basis. National delegations are led by senior officials appointed by their governments. Delegations may, and often do, include representatives of industry, consumers' organizations and academic institutes. Countries that are not yet members of the Commission sometimes attend in an observer capacity.

A number of international governmental organizations and international NGOs also attend in an observer capacity. Although they are "observers", the tradition of the *Codex Alimentarius* Commission allows such organizations to put forward their points of view at every stage except in the final decision, which is the exclusive prerogative of Member Governments. To facilitate continuous contact with member countries, the Commission, in collaboration with national governments, has established country *Codex Contact Points* and many member countries have *National Codex Committees* to coordinate activities nationally.

Importance to International Trade

The *Codex Alimentarius* has relevance to the international food trade. With respect to the ever-increasing global market, in particular, the advantages of having universally uniform food standards for the protection of consumers are self-evident. It is not surprising, therefore, that the WTO SPS and TBT Agreements both encourage the international harmonization of food standards. A product of the Uruguay Round of multinational trade negotiations, the SPS Agreement cites *Codex* standards, guidelines and recommendations as the preferred international measures for facilitating international trade in food. As such, *Codex* standards have become the benchmarks against which national food measures and regulations are evaluated within the legal parameters of the Uruguay Round Agreements.

Participation

Since its beginning, the Commission has welcomed the participation of consumers, whose organizations have been represented at its sessions since 1965. The involvement of consumers in the Commission's work has been the subject of explicit discussions within the organization. Consumers' participation in decision-making in relation to food standards and the Joint FAO/WHO Food Standards Programme, for instance, was an item on the agenda of the 20th Session of the *Codex Alimentarius* Commission, where it was agreed that it is necessary to continue working in close cooperation with consumers' organizations.

The highest priority of the *Codex Alimentarius* Commission, as stated in Article 1 of its statutes, is to protect the health of consumers and ensure fair practices in the food trade.

Other UN bodies have also recognized the importance of consumer protection, and in 1985 a UN General Assembly resolution gave rise to the *Guidelines for Consumer Protection*, published in 1986. These guidelines identify food as one of three priority areas that are of essential concern to the health of consumers, and the document specifically identifies the *Codex Alimentarius* as the reference point for consumer protection with regard to food.

While open to participation from all governments, few developing countries can afford to monitor the Codex process closely, and meetings are generally dominated by developed countries — especially North American and European, whose national delegations tend to push a "commercial agenda," says Sri Ram Khanna of India's VOICE consumer group. Last year, Consumers International protested the "unacceptable influence of business interests" following revelations that a US consultant to the Codex committee assessing Bovine Somatotropin (BST) safety had passed confidential documents to Monsanto, the company that sells the controversial bovine milk hormone.

Industry voices predominate over public interest groups. A 1993 analysis of Codex representation found that 49% of the accredited US delegates were from industry, 44% of the Japanese, 31% of the British and 61% of the Swiss.[274] Nearly all industry representatives came from large global corporations: small businesses and farmers were virtually absent. Just 0.4% of the total delegates came from consumer and public interest groups. Codex has since taken steps to increase consumer participation, but the balance remains skewed.

Conclusions

The Cartagena Protocol on Biosafety is a significant step forward. It contains some important victories for many developing countries, and for civil society. These include the absence of a WTO override clause, and the inclusion of references to the precautionary principle as a basis for decision-making, including with respect to commodities.

However, the Protocol also suffers from some significant ambiguities and weaknesses. For example, a clause was included so that socio-economic impacts (with specific reference to impacts on indigenous peoples) could be considered when deciding whether an import will be allowed or not. However, it is limited to risk management, and is subject to other international obligations, which may limit its utility in relation to the WTO. Provision was not made for a social or cultural impact assessment regarding the introduction of an LMO, or the consequences of such impacts for the conservation and sustainable use of biological diversity. Finally, certain provisions of the Protocol also put the consumer's right to know at risk.

Ways must be found to enable the public to participate in decision-making about genetically engineered foods. Such activities are very clearly necessary in the Americas. With five of the six members of the 'Miami Group' leading the FTAA, any biosafety provisions proposed for the FTAA must be analysed very carefully. Of course, not all the potential human health or environmental problems will occur. But some may. Not

[274] Codex Alimentarius, available online: www.fao.org

enough research has been done to identify the highest priorities; a cautious and above all, independent, examination is needed.[275] It is clear that consumer lawyers and international society still have much homework to do.

6.3 The Cartagena Protocol, GMOs and Agriculture: Safe Release and Trade

Kristin Dawkins

Risk and Liability in GMO Trade

Trade liberalization opens borders to more and more products with less and less government oversight. However, as demonstrated by the spread of hoof-and-mouth disease, free trade is not always the best policy. Some degree of oversight and some controls on the movement of goods are warranted.

The world community has already agreed that some degree of oversight and control on the movement of genetically modified organisms (GMOs) is needed. The Cartagena Protocol on Biosafety, which will enter into force in September, 2003, gives nations the right to limit imports of GMOs on the basis of the precautionary principle, although a loophole makes importing countries responsible for monitoring the Internet to anticipate potential GMO imports.

The Protocol's reference to the precautionary principle is significant, given that the health and environmental impacts of GMOs are uncertain. Insurance companies treat risks with unknown consequences as potentially catastrophic. Unfortunately, the Protocol's negotiators failed to finalize terms for liability and compensation if the premature spread of this experimental technology results in actual damage.

Meanwhile, the United States is exporting a variety of genetically engineered corn that has not been approved for human consumption. StarLink was grown in 1998 on about 10,000 acres in the US, some 250,000 acres in 1999, and more than 350,000 acres in 2000. Who will pay for the costs to farmers, country elevators, distributors, food processors, retailers, exporters, and overseas entities in the corn-products food chain, to rid the global food supply of this potential allergen? Patent-holder Aventis is absorbing millions of dollars of these costs in the US.

Is the US responsible for its StarLink exports? Under customary international environmental law, states have a duty to ensure their actions (or those of legal persons located in their territory) do not cause harm in other states, and the right to seek compensation from another state responsible for any damages – whether to persons, property, the environment, or economy.

[275] L. Harvey, "Human Health and GMOs (September – December 2000) 25 Ecology and Farming 10.

It is imperative that negotiations advance swiftly on a liability and compensation regime for GMOs. How best to implement the Cartagena Protocol? A regional agreement is one appropriate response to risks that can move from plant to plant, field to field, and ecosystem to ecosystem.

Already, we have enforceable liability treaties governing oil pollution, nuclear material, space objects and hazardous waste. Perhaps the best features of these treaties could be adopted to protect importing countries from the imported risks of GMOs. Ultimately, the food security of the Americas continents, and the Earth, is at stake. Recent events provide evidence of the risks associated with the absence of such liability mechanisms.

The StarLink Scandal

Shortly after the conclusion of Biosafety negotiations, the infamous StarLink problem unfolded. This variety of genetically-engineered corn has not been approved by the United States for human consumption. It contains the *Bacillus thuringiensis* subspecies *tolworthi* Cry9C protein and the DNA necessary to produce this protein. There is evidence that Cry9C is heat stable and resistant to degradation in gastric juice, the two most important indicators of allergenicity. [276]

However, the patent-holder Aventis CropScience was allowed to sell its corn to farmers. It was grown commercially, harvested and commingled with the rest of the United States's corn crop. On 18 September 2000, a coalition of non-governmental groups known as "Genetic Engineering Food Alert" announced the detection of StarLink in corn taco shells sold on grocery shelves in the US. This finding was subsequently confirmed by testing done by food processing companies and the US Environmental Protection Agency.

Nonetheless, on 26 October 2000, the US Department of Agriculture approved StarLink for export. In so doing, the USDA also attempted to shift the liability, notifying exporters that *"they have responsibility to take all appropriate measures to ensure that this product is used only for approved purposes."*[277] Since then, the StarLink protein has been found through independent DNA testing in a variety of consumer products in the US as well as in Japan and South Korea. Because the US commodities system has few provisions to keep bulk grains separated, it is likely to be found in any country that imports corn from the US.

The situation opens markets for non-StarLink producers, an opportunity that other agricultural countries are striving to fulfill. The EU has not purchased corn from the US in the past two years, to avoid all genetically engineered varieties. Japan, which usually buys about 30 percent of US corn exports worth some $US 1.5 billion, has asked the US to ensure that shipments do not include StarLink.[278] And many Japanese companies are looking elsewhere – to China, South Africa and Argentina – for supplies, even at a

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[277] See "Starlink (TM) Export Ban Lifted (For Livestock Feed And Non-Food Industrial Uses)", Agnet (October 27, 2000), online: http://131.104.232.9/agnet/2000/10-2000/ag-10-27-00-01.txt

[278] Japan Asks U.S. Not To Export Corn With Starlink, in *ibid.*

premium price. The US has sent trade delegations around the world to try to calm importers' concerns about contamination.

Domestically, the presence of StarLink in U.S. processed foods and corn exports has raised huge liability issues. The US Food and Drug Administration has posted a recall on 297 brand-name corn products while the US Department of Agriculture announced a buyback program of StarLink from U.S. farmers, to be reimbursed by Aventis.[279] Efforts to segregate StarLink after co-mingling are expected to cost between $US 100 million and $US 1 billion.[280] However, the buy-back does not address all the costs incurred by elevators, distributors, food processors and retailers, nor the losses in farmers' markets and reputation due to the contamination, to say nothing of liability claims resulting from contamination of non-StarLink farms due to cross-pollination, or lawsuits arising from allergenic reactions to StarLink. Attorneys in the US are preparing for massive liability litigation, as affected parties sue each other seeking recovery for their damages.

International Legal Issues

Access to compensation may become important in other countries where efforts to identify and segregate StarLink corn from corn destined for human consumption will become extremely costly. Under customary international law, states have the right to seek compensation from another state responsible for the damages – whether to persons, property, the environment, or economic. [281] While states have shown themselves, over time, to be reluctant to invoke international liability claims against other states, there have been cases in which compensation has been negotiated "without reference to legal liability" (such as when the US paid Japan $US 2 million as compensation for injuries caused by nuclear testing in the Marshall Islands). Countries also have the right to impose civil liability on private actors – such as Aventis – in their own courts or in the courts of the country where the act was done.

This would seem to indicate that the US Government is liable for what could be characterized as reckless and negligent failure to ensure the segregation of corn it has not approved for human consumption – because it could cause allergies – from corn that is destined for human use.

Negligence is bad enough. But there may also be a valid claim based on intentional harm. Once the contamination was discovered (not by government inspectors, but by non-governmental organizations opposed to genetically-engineered foods), the US

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[279] See C. Raghavan, "Call for Ban on Import of US GM Corn" (Third World Network), online: http://www.twnside.org.sg/title/corn.htm.

[281] States have a duty under customary international law to ensure their actions do not cause harm in other states. Evidence of its status as a customary norm is found in the 1941 "Trail Smelter" arbitration. The principle is further elaborated in the 1972 Stockholm Declaration and the 1992 Rio Declaration, as well as several rulings of the International Court of Justice (ICJ). In 1996, the ICJ issued an advisory opinion regarding the legality of nuclear weapons noting that: *"the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or areas beyond national control is now a part of the corpus of international law relating to the environment."* See *Legality of the Threat or Use of Nuclear Weapons* (Request by the General Assembly), [1996] I.C.J. Rep. 226 1t 241-242, 35 I.L.M. 809 and 1345.

Department of Agriculture moved to get rid of the unwanted product by officially approving StarLink for export – placing the burden on importing countries to object to StarLink imports and to test their current supplies. Meanwhile, efforts are underway to gain approval for StarLink as a human food in the US. The US may hope these actions will be construed by the courts as immunization from liability; could they not also be construed as wilful and intentional disregard for public health and international law?

It would be interesting to learn what the International Court of Justice (ICJ) might think about the United States' StarLink-related acts of both omission and commission. The ICJ could become involved in two ways.

First, inter-governmental bodies authorized by the United Nations Charter can ask the ICJ to render an advisory opinion on relevant legal matters. For example, the World Health Organization or the United Nations' food safety body, known as the *Codex Alimentarius* Commission, could ask the ICJ for an advisory opinion on the legality of exporting a potential allergen banned in the country of origin. But human health is not the only consideration. All corn cross-pollinates freely. Any StarLink grain that may be planted rather than eaten could result in genetic drift, affecting related varieties of plants and adjacent ecosystems – a matter of particular concern to those regions that are centers of diversity for maize. The Conference of the Parties to the Convention on Biological Diversity could test whether it qualifies as an "authorized" body under the UN system, and ask for an ICJ advisory opinion on the environmental issues.

Secondly, Article 27 of the Convention on Biological Diversity (CBD) stipulates that disputes that cannot be settled otherwise may be submitted to the ICJ. A dispute could easily arise, if parties choose not to import co-mingled US corn or seek compensation and redress from the US if they already have inadvertently done so. Although the US is not party to the CBD, it is a signatory, which establishes an obligation on the US to not undermine the objectives of the CBD. In such a case, the ICJ could be asked to settle the matter judiciously.

Of course, any decision of the ICJ might not be taken seriously nor respected by the US, which does not accept ICJ jurisdiction.

Potential for a Global or Regional Liability Regime

Numerous international agreements have been negotiated to deal with liability and compensation that may be caused by risky business. For example, in the case of oil pollution at sea, liability rests with the private sector, backed up by an international oil pollution compensation fund. In the case of nuclear damage, the duty to compensate rests on the operator of the nuclear installation, exonerating all other parties who may have been involved in the development of this high-risk form of energy.

The Convention on International Liability for Damage Caused by Space Objects places the liability on states, but only for personal injury and not damage to or loss of property. Under the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal (Basel Protocol), the liability lies with the carrier, shipper, or other party found to be at fault. Where fault

cannot be proved, strict liability is placed on the exporter for transportation incidents or on the disposer should damages occur after receipt. All potentially liable parties are required to carry insurance, bonds, or other financial guarantees covering liability in advance.

Do any of these models properly allocate the liability for environmental, human health or socio-economic damage that may be caused by GMOs? In cases in which signatories properly implement the Biosafety Protocol and damage results nonetheless, there may be one answer. What about cases in which signatories may not properly follow the global biosafety rules? And what about cases involving non-parties?

Ironically, it may be the private sector that cannot wait for the Cartagena Protocol's liability negotiations to reach fruition. Because the technology is so new, there is no way as yet to properly evaluate the risks so, in effect, the consequences for insurers range anywhere from near zero to near catastrophic levels. Insurance companies in most markets are covering these unknown risks under existing liability policies and are thus over-exposed. Insurance companies find that genetic engineering is changing the risk profiles of the pharmaceuticals, agricultural and nutritional sectors permanently, without it being possible to predict the risk potential. In this case, the decisive factor is not whether it is dangerous, but rather how dangerous it is perceived to be.

As the months march by, the perceived risk seems to be growing. Not only the EU and Japan, but also Korea, Australia, New Zealand, Brazil, Egypt, Sri Lanka and China have joined the list of countries regulating GMOs to one degree or another. Thanks to the StarLink fiasco, the U.S. has difficulty maintaining that its regulatory system is adequate. Soon, the biotech industry itself may opt for a coordinated international system rather than trying to find its way through a maze of varied national regulations. A regional approach might provide opportunities to move forward.

GMO Commodities Regulation and GMO-Free Markets

Clearly, the US is unsettled by the impact of multiple import restrictions on its agricultural exports. The US has again raised the subject of GMOs in recent negotiations to reform the WTO Agreement on Agriculture. Other less familiar settings for international deal-making have also put the issue of GMOs on their agendas. For example, the *Codex Alimentarius* Commission, which once set guidelines and provided technical assistance on food safety, but was anointed by the WTO in 1995 as the presumptive standard-setting body – has set up an "ad hoc Intergovernmental Task Force on Foods Derived from Biotechnologies." The FAO's Commission on Genetic Resources for Food and Agriculture has established another intergovernmental group to develop a "Code of Conduct on Biotechnology" and the Trans-Atlantic Economic Partnership is set up to devise executive level "Mutual Recognition Agreements" to harmonise US and EU regulations, bypassing the normal regulatory processes of each country. With ever-greater public awareness in both the US-EU and a continuing intercontinental trade war, including US threats to dispute European regulations governing GMOs at the WTO, a pre-emptive Multilateral Recognition Agreement on GMOs seems unlikely for now. But the over-riding issue – how to harmonize multiple

national policies and international agreements covering genetic engineering – is unresolved.

At its most fundamental level, the debate over genetic engineering reflects the wider public debates over globalization and global governance. There is a growing sense that not only the WTO, but also all of the entrenched bureaucracy of corporate globalization, is vulnerable to citizen action. In many countries, citizens are becoming more aware, more alarmed and more organized in their objections to GMOs. In response, companies are taking steps to develop GMO-free products including Gerber's and Heinz' baby foods, McDonald's and Burger King's potatoes, Frito-Lay, Seagram's liquor, and all of Novartis' food products. Many supermarkets in Europe are advertising their own brands GMO-free products. ADM is offering premiums to farmers that can supply the company with GMO-free corn. More and more farmers are opting to plant non-GMO seeds.

Last year, the world's first global class action suit was filed in US federal court against Monsanto and other agribusiness corporations on behalf of all farmers everywhere. [282] The suit contends that Monsanto hastened the introduction of genetically engineered organisms into markets without sufficiently assessing environmental or human health impacts, and that the corporations deliberately sought to create a cartel in order to monopolize the global corn and soybean markets. The suit is brought by a coalition of prominent law firms specializing in antitrust litigation on a contingency basis (they will only be paid if they win). A victory would hold Monsanto and the other companies liable for environmental damages, negative consequences to public health, and any costs incurred by farmers around the world resulting from genetic contamination.

Food Security in the 21st Century

The experience with StarLink suggests it would be prudent to establish an independent, equitable liability regime for GMOs immediately. Existing international law provides scope for states to seek compensation and otherwise defend themselves from StarLink contamination and resulting economic dislocation, but it is less likely, in practice, to be used.

It will likely be years before the parties to the Cartagena Protocol on Biosafety negotiate a liability regime. It is possible that a regional approach to liability could be achieved somewhat sooner, given the immediacy of the challenge. Many GMOs are self-replicating, and can spread quickly across significant geographic distances. In the 2001 seed stock, US officials and seed company representatives were dismayed to find the StarLink protein in non-StarLink seed corn – and they still are unsure how the contamination occurred. Mexico, a center of origin for maize meaning its wild and cultivated stocks are used to replenish the maize gene pool, is particularly vulnerable due to its large quantity of corn imports from the US as well as its geophysical proximity.

Ultimately, the issue coalesces around global food security concerns. While the industry promotes genetic engineering as the solution to hunger, others believe it presents threats

[282] See *Higginbotham et. al.* v, *Monsanto Company*, Civil No. 1:99cv03337 (CK-K) Civil No. 1:99cv03337 (CK-K) (US District Court for the District of Columbia).

to agro-biodiversity and the planet's capacity to regenerate life. For one thing, there is little convergence between the destination of export crops in the global marketplace and areas where people are suffering from malnutrition. Less than 0.3% of total corn exports from the United States, for example, went to the 25 countries listed by the FAO as the world's most severely undernourished. [283] Then again, a diversified production system based on locally adapted seeds and integrated cropping is likelier to feed the world of the 21st century.

After the floods in Southern Africa in 2000, a group of scientists from the region, including plant breeders, geneticists, and biotechnology experts, issued a public letter dated March 2000 in which they requested relief organizations *not* to send genetically engineered or patented seed. Instead, they urged the international community to *"support efforts to reconstitute locally adapted planting material and quality seed material/varieties, like indigenous land races or farmers' varieties appropriate to the various ecosystems."* [284] They insisted that this solution is best not only for the immediate regeneration of production systems after the severe flooding, but also for the medium and long term. In every case, they emphasized that farmers know how to use locally adapted seed; they don't need cash or chemicals to use them; and they can be re-sown and spread readily for continual adaptation under local conditions.

Recently, the FAO published a document affirming this point of view: *"Conventional systems of production have generated high environmental costs in many cases, and their reliance upon externally supplied inputs creates barriers to access amongst the poorest segments of the population… Organic agricultural production based upon cheap, locally available materials and technologies provides an important alternative in the search for an environmentally sound and equitable solution to the problem of food security."* [285]

Which approach will prevail? Back in 1997, US Secretary of Agriculture Dan Glickman described biotechnology and the patenting of life as *"the Battle Royale of 21st century agriculture."* [286] Clearly, the Battle Royale of the 21st century is not over yet. It will be important that the negotiators of the "Free Trade Area of the Americas" find careful ways to handle food safety, GMOs and patented seeds. Their decisions will decisively influence food security, biological diversity and the future of humankind.

7. Intellectual Property Rights and Biodiversity

7.1 Biodiversity, indigenous knowledge and intellectual property rights

[283] See "Feeding the World: Battle of 21st Century agriculture" (ASEED Europe), online: http://www.aseed.net/un-corporated/un-reader-ge.htm#top

[284] See "Open Letter from the Southern African region addressed to regional and international bodies in disaster relief and developmental assistance", online: http://home.snafu.de/usp/SeedLett.htm.

[285] See D. Brough, "FAO says Organic Farming can Reduce Hunger" (GRID-Arendal News, March 6, 2001).

[286] K. Dawkins, ""Biotech - From Seattle to Montreal and Beyond: The Battle Royale of the 21st Century" (February 2000), online: http://www.biotech-info.net/developments.html.

By Mindahi Bastida Munoz

The Americas is moving quickly towards trade liberalization, building a new regime founded upon the Free Trade Area of the Americas (FTAA), within the broader context of a series of Americas Summits. This process could be described as an Americas integration process, which relates to building stronger Inter-American cooperation for four interrelated goals: to preserve and strengthen the community of democracies of the Americas; to promote prosperity through economic integration and free trade; to eradicate poverty and discrimination in the Hemisphere; and fourth, to guarantee sustainable development and conserve the natural environment for future generations.[287]

It seems that the second goal, of promoting prosperity, has a real agenda supported by governments of the region, through the ongoing process of FTAA. Indeed, nine negotiating groups appear to be moving forward on agendas related to: market access; investment; services; government procurement; dispute settlement; agriculture; intellectual property rights; subsidies, anti-dumping and countervailing duties; and competition policy.

But as these negotiations progress, with a vast dedication of government resources and energy, it seems that the hemispheric trade liberalization has become the first priority, leaving out the other goals that originally balanced this framework. In particular, efforts to guarantee sustainable development (the fourth goal) in the region seem to be failing. There is little real follow-up to the ambitious agenda launched in the 1996 Bolivia Summit of the Americas on Sustainable Development. With regards to the other two goals, no special forum has been dedicated to negotiations aimed at strengthening democracies in the region, or Agreements of the Americas with binding commitments on the eradication of poverty and discrimination. Under these circumstances, the Americas integration process seems jeopardized by progress on trade liberalization while sustainability is still far from being realised.

Biodiversity, indigenous knowledge and intellectual property rights

Biodiversity, indigenous knowledge and intellectual property rights are three intertwined components of a broader regime that has yet to be recognized and broadly debated in the Americas. How can trade liberalization provide new opportunities for indigenous communities in the conservation of biodiversity and the recognition of traditional knowledge in the Americas? How can trade-related aspects of intellectual property rights (TRIPs) and other dispositions really support indigenous peoples´ traditional knowledge in a new paradigm? How can trade, environment and social regimes be reinforced to achieve sustainability in the Americas, specifically to achieve the acknowledgement of traditional knowledge (TK) as the basis of local sustainability in indigenous territory? What is the role of trade liberalization in this respect?

The rich mega-biodiversity of the region is intricately dependent upon, and interpreted by, the complex and ancestral indigenous knowledge of the Americas. The modern logic of intellectual property rights (IPRs) is one instrument for protection of this vulnerable

[287] Miami Declaration of Principles, above.

relationship – or a tool for its destruction. IPRs are part of the framework of trade negotiations, and depend on a paradigm, which assigns economic values to biodiversity and indigenous knowledge, especially when these resources are to be used to promote trade and investment policy goals.

The most serious problems arise when biodiversity and indigenous knowledge are removed, without permission, from their original territories and from their countries of origin. This can be done for purposes of creating gene banks *ex situ*, and subsequently patented, leading to genetic erosion without care for cultural disintegration or the degradation of the original biodiversity and genetic resources.

Biodiversity in the Americas

Twelve countries in the world are considered mega-diverse, together containing between 60% and 70% of the total biodiversity in the planet. Six of them (50%) are found in the Western Hemisphere. South America has three times more mega-diverse countries than Africa, Oceania and Asia, some say that it holds 35% of the biodiversity of the world. In this context, biodiversity implies variability of all biological entities manifested by genes, species, ecosystems and related cultures, and the relationships among and between them.

For the market, the rich biodiversity in the region becomes important in order to own, control and sell genetic resources for commercial food, farming and health uses. Such exploitation threatens the biodiversity of the region. Genetically modified organisms (GMOs), generated through the use of modern biotechnology, can disintegrate through genetic erosion (or mutation) and there is considerable uncertainty as to whether these can be safely released.

Very abrupt changes in ownership (or stewardship) patterns also generate increased concern. Investments and research are leading biodiversity exploitation to become dominated by private companies. For instance, seeds from main food crops are increasingly controlled by trans-national food companies. Private companies are motivated by profit, rather than by being responsible for human development and wellbeing. This worries communities, and even entire countries, which depend on these seeds and their produce for their basic food supply. In the health industry, similar stories are spreading. Pharmaceutical corporations invest in, and seek out, bioactive components from plants and animals, which have potential economic revenues. These plants often come from those mega-diverse countries, where most of the surviving indigenous peoples in the Americas are living.

Indigenous Peoples

In the Western Hemisphere, indigenous peoples are a very important component of the region. In Paraguay, Guatemala, Bolivia and Peru, they are the majority of the population. In most of the countries of the hemisphere, they still exist, specifically, in those mega-diverse countries. The TK that indigenous peoples have developed over the course of the millennia, and still hold, has a fundamental role in the conservation and sustainable use of biodiversity. Where these peoples live in good health, harmonized

ecosystems often still exist, and this maintains cultural diversity with its associated knowledge of the flora, fauna and ancient interconnections.

Traditional knowledge over ecosystems, and specifically over medicinal plants and animals, represents increasingly important economic opportunities, especially in international trade and investment. Also, TK can be used to identify and develop organic food resources, as well as healthy remedies, helping to reduce or even eradicate poverty. When levels of TK erode, local ecosystems seem to deteriorate more quickly. Due to globalization, many indigenous communities are becoming subsumed into broader general society. Pharmaceutical companies and others are concerned about this: they would lose the opportunity to have direct information about medicinal plants, animals and even human genes, from those whose diversity carries special resistance or susceptibility to specific diseases. Gene and health multinationals can potentially save millions of dollars and many years of research by using first hand information – which is not only provided through words, or oral histories, but in genetic language as well.

Intellectual Property Rights

The concept of intellectual property rights exists in the international law system to protect diverse forms of intellectual production in any field. It is almost a form of individual economic rights which seeks to reward innovators and ensure that investments continue to generate new inventions. TRIPs are governed by the WTO system.

The implementation of TRIPs in the Americas has generated intense controversy among indigenous peoples. Most IPR systems based on TRIPs do not work in favour of, nor protect, the integrity of indigenous cultures. Furthermore, many feel that existing intellectual property laws are promoting trade law, but ignoring indigenous peoples' own religious, moral and cultural laws in relation to secrecy, respect for the sacred and the communal cosmo-vision. The theft of this knowledge has serious impacts on the identities, integrity and culture of indigenous peoples, if international and domestic laws only recognise IPRs and not community rights. Such provisions and instruments appear unwilling to recognise the existence of these rights, though the systems of exploitation they implement risk marginalizing and even destroying collective rights. This state of affairs is breaking down the communities that generate and keep the knowledge.

Even the Convention on Biological Diversity (CBD), managed by the United Nations Environment Programme, grants only weak recognition to their cultural and intellectual property at Article 8(j). In practice, TRIPs seems only to acknowledge private rights. The *sui generis* system does not protect the existing indigenous peoples´ customary laws. This system only refers to access and benefit sharing, and not to the capacity building of indigenous peoples, nor to the protection of their TK and other forms of accessing their natural resources: plants, animals and soil, and derived composites. In this respect, some experts encourage communities to protect their TK quickly, before others do in a way that will erode their capacity forever. Some countries in the hemisphere are taking legislative measures in order to protect the TK of indigenous peoples. These are the members of the Andean Community, Brasil, Costa Rica and Panama. Peru, in particular,

is leading this work, putting laws and systems in place to ensure the protection of TK with participation of traditional communities.

Countries, at the national level, should also introduce specific recognition systems for indigenous communities, such as collective property and original rights and ownership of their territories. Indigenous peoples own the genetic resources from their territories and the related knowledge over biodiversity. This knowledge – including genetic resources – is available worldwide, but it is not free of cost: it has economic values, and the accessibility to the associated resources needs a specific regime. And *sui generis* modalities are not enough for indigenous peoples, as these are subject to the whims and political trends of leaders, where progress of decades can be lost through the prejudices of one brief historical moment. It becomes compulsory to protect traditional knowledge through international law, using legal tools and instruments. A specific hemispheric protection system, or a series of mechanisms, must be put in place which empowers the collective rights of indigenous peoples. These mechanisms must be recognised in international legal regimes acknowledged by WTO, perhaps through protection and recognition of the system in the developing CBD regimes.

Reflections

What is sustainable trade? In the end, it is trade that takes into account the other priorities of the hemispheric integration process – poverty eradication, sustainable development, democracy. And there are ways to do this. I would propose that a forum be opened for research, dialogue with indigenous peoples, and analysis, to discuss potential for a hemispheric instrument to govern traditional knowledge over biodiversity as the intellectual property of indigenous peoples. This is just an idea, for one way forward, a manner to achieve a part of all three of the other goals, and generate increased prosperity for one of the most discriminated-against and marginalised groups in the Americas.

Indeed, if the Miami Summit goals for sustainable development, strengthening democracies and eradicating poverty had their own negotiations, proceeding with as much vigour and investment as the trade negotiations have done, this proposal would already be on the table. The hemispheric integration goals will not be realised simply by generating economic integration and a free trade agreement. There must be sustained and serious follow-up on all 65 initiatives mentioned in the Bolivia Summit of the Americas for sustainable development. More questions should come forth when a real integration process of the Americas is empowered, which shall happen when decision-makers start to address the interconnections of biodiversity, indigenous knowledge and intellectual property rights. Harmonic development is the proposal from indigenous peoples, which goes beyond sustainable development.

7.2 Indigenous Peoples, Biological Diversity and Cultural Diversity

By Alavaro Soto

One of the main challenges in defining and addressing environmental issues is the persistent myth that these are simply matters best left to biological scientists. When the "ecosystem" concept was first coined, it was perceived as a holistic system in which intricately interrelated constitutent parts of a living system were conceived. However, human beings seemed to be excluded from this system. The concern then, as today, centered around and emphasized on the conservation of "nature" without the recognition that human beings are an integral part of nature and depend on it to survive.

Anthropological interest in human cultures placed little emphasis on the environment with which humans interacted, and as a result, environmental issues were neglected to the point that, with the exception of some authors such as Lesley White, little was mentionned in classical anthropological literature about the close relationship between the environment and the life systems of human beings. It was almost as if cultures developed as kinds of different human groups, and not as a response to the environment that surrounded them.

But who are the indigenous peoples?

The literature refers to indigenous cultures as if they are only native communities that were found, for example, in America at the time of the arrival of the first Europeans. However, the concept is actually broader because human "cultures" are all "indigenous" since they all originated in natural habitats, starting from settlements that developed strategies to adapt and survive a particular environment. Those human groups that were unable to do so, whose environment changed too rapidly, simply did not survive.

A "culture" therefore, is the result of the interaction of human beings with their specific environment. This is why there are many cultures, because there are many different environments.

The individuals that belong to a specific culture have specific knowledge about their environment and about how to take advantage of it to survive. That is, knowledge about the utility of biotic and abiotic elements which form the natural systems with which they interact. This knowledge, as is obvious, is different for each culture. In the process of interaction with nature, human groups develop a collection of technologies, economic systems, beliefs, myths, legal systems, norms, etc. that are part of the cultural diversity that exists on the planet. Each human group thereby developed its own indigenous strategies to survive and these form part of its own cultural heritage. The inhabitants of developed countries have established patent rights on much of their knowledge. The problem lies in how to protect those rights and knowledge that are part of other cultures.

Particularly during the processes of change, or of so-called "development", some cultures of the planet began to separate themselves from the direct contact with nature from which they originated, and due to technology, believed that the natural environment provided an inexhaustible source of economic resources. This is how their economic systems were constructed, based on a concept of large-scale production which involved an enormous use of natural resources from the surrounding environment. These cultures

that called themselves "civilizations", and which occupy what today is called a "developed world" have found that their lifestyles cannot sustain themselves without serious harm to our planet's nature, which can seriously endanger the very subsistence of these civilizations, and which now must revert to the traditional knowledge and the talents of other communities to ensure greater chances of survival.

Therefore, we have in the modern world, two principles that affect the survival of the planet - high rates of consumption in developed countries that surpass the capacity offered by the environment, and
- limits on the supply of renewable and non-renewable resources offered by the global environment.

In the face of this state of affairs, it is necessary to understand that other cultures of the planet have developed survival strategies that can be valuable options for the world of the future.

And in the end, how many fit?

The carrying capacity of a given environment, that is, the maximum level of human population that can be sustained in a given ecosystem, is not a fixed and universal number. Rather, it depends on how the ecosystem is used as well as the cultural way a specific group interacts with it. Therefore, if the number of inhabitants that wanted to be sustained in a given ecosystem were increased there would be two ways to accomplish this. First, develop technologies that allow us to obtain more goods derived from the environment without destroying it or, second, modify the cultural patterns of interaction with the environment to increase its carrying capacity.

It is this second strategy where knowledge of other cultures can be key. This knowledge not only refers to technological issues or to properties of nature, but to other aspects of culture such as ethics.

Unfortunately, until now most of the emphasis has been directed to the first strategy, that of developing technologies to allow us to obtain more from the environment, while there has been less focus on the strategy of modifying the behaviour of those who co-exist in a given ecosystem.

Within the realm of new technologies, for example, alternatives in the field of biotechnology have been developed that involve very sophisticated processes of genetic modification of nature's organisms. These genetically modified organisms have been introduced into the market with the hope that the agricultural sector can increase its productivity per cultivated unit and grow certain kinds of plants that can be cultivated in previously unsuitable environments.

The benefits of this particular strategy seem to be in maximizing production by overcoming the barriers that nature imposes for plants and animals to be confined to a specific environment.

If it is the case that human beings have broken these barriers through the accumulation of cultural knowledge that allows them to survive in almost any environment on the planet and also in extraterrestrial environments, then efforts to intervene with the genetic structure of living organisms has its dangers and ought to be viewed with caution. We run the risk of contaminating native species from parts of the planet with high biodiversity, which are centers of origin for species of high consumption by the population, such as beans, maize, tomatoes, yucca, cocoa etc. There is also the risk of reducing the comparative advantage that some regions of the planet have due to climatic and geographic conditions, causing economic damage to these regions in the trade of their goods.

Biological diversity, cultural diversity and the trade of nations.

Some regions of the earth are highly dependent on trade in agricultural products, in many cases these products are profitable due to geographical conditions that are optimal for their production. Trade in these products is often affected by artificial mechanisms that determine their prices. Some of these mechanisms are political in that they seek to protect sources of employment in other parts of the world. If geographic barriers of production are broken through genetic modification, the regions dependent on trade of these products will surely be affected.

On the other hand, genetically modified organisms may erode species that are valuable for certain cultures' consumption, or may be modified in a way that might insult traditional users by imposing the consumption of products not accepted by traditions and customs. A classic example of this is that of modified maize, which was rejected by some inhabitants of Latin America because its characteristics did not make it desirable nor suitable to make tortillas, according to the cultures of the region.

We don't all want the same things.

One of the most frequent assumptions in international fora where trade and environment themes are discussed is that all the communities of the earth have the same aspirations.

This phenomenon probably occurs as a result of the very conceptual focus by which humans are understood not to have major importance within the concept of environment, but rather are seen as a generic element apart from nature which is entitled to use or manipulate it for its own benefit. As previously stated, many types of environments exist on the planet and therefore many types of cultures exist as well, all of them distinctive.

To assume that all of humanity, as a homogeneous group, has the exact same aspirations as the inhabitants of the developed world is a common error known as ethnocentrism and is rooted in an ancestral perception that "others" are inferior or mistaken.

Hunger seems to be what guides relations between the most and least powerful, without recognizing that others may not consider the environment as a mere object of trade, or that their ethics may imply a different relationship with nature.

The most helpful way to establish principles and norms for international trade is the acceptance of "the other". This would involve the sincere acceptance that the communities of the region that are not part of the developed world perhaps are not the same in all their aspirations and the assurance that in fora where community relations are discussed with regard to trade in products and other aspects of culture including ethics, the thoughts of these communities be incorporated in the policies and mechanisms that are established to regulate these relations.

Trade as an alternative

Properly regulated and ethically conceived trade relations can represent important opportunities that can benefit the communities that they affect. The "entrenched capacity", that is, the particular knowledge of a given culture and the talents that emerge from it are valued as an aggregate value in the market. The manual capacity to create very sophisticated artisan crafts, for example, cannot be the object of patents since it is something that is inherent in the person and in the cultural conditions into which they were born. However, the product of this inherent ability can be promoted in the markets of major economic potential to adequately compensate the producer.

The fact that in trade currently, more value is placed on a factory product than on an artisan product implies an erroneous concept that traditional knowledge and abilities do not have much value. There are several ways to value knowledge and abilities. The market for artisan textiles can provide incentives if the clothes-makers are employed for their very exclusive and sophisticated designs. It is also possible to encourage high technology crafts, if the artisans are willing to manufacture industrial product parts in addition to their traditional crafts. For example, carpenter artisans from indigenous American groups could work on very detailed plans using fine woods from tropical forests to make parts for the aeronautic industry (such as tables and cabin panels for executive planes, or structural elements of the planning, or also parts for recreational boat factories such as shanks of sailboats or parts for the hull).

In many regions in Latin America, there are important naval craftsman industries. The boats that they produce are the result of traditional knowledge that has existed since the time of the Conquest when the Spanish taught them how to build ships. These industries would be capable of producing very sophisticated yachts with a high aggregate value.

This type of alternative for interregional artisan trade has the advantage of using "entrenched capacity" and at the same time protects ecosystems since over-consumption is limited by production costs and degree of sophistication.

The perception that artisan crafts are only elements of low cost and price in the market, whose trade brings little economic benefit, is not true if one focuses on traditional manufacture.

In order to generate a sustainable development model it is very important then to value the markets of these alternatives so that development can be conceived as something profitable that does not necessarily have to be tied to heavy industry.

Trade in biodiversity

Much has been discussed in the area of trade to do with the inconveniences and benefits of trade in biodiversity. However it is rarely understood that biodiversity has been traded for a long time, perhaps since the beginning of time. The problem lies in what is considered biodiversity. It is commonly thought that biodiversity is only exotic products of tropical regions of some South American countries. It is true that there is great biodiversity in these countries (and much of it is legally or illegally traded anyways) but biodiversity exists in all parts of the world.

The problem therefore, is really in regulating this trade. One of the most extreme examples of what happens with respect to the trade of biodiversity, which for one reason or another, justified or not, is not regulated, is what happens with the cocaine trade. It was converted into an illegal market that fell into bad hands and that today is transforming into a serious threat for the social, economic, and political viability of Columbia. It has negatively affected practically the entire commercial trade context and the security of the hemisphere. On the other hand, the regulated trade in coffee, another product of biodiversity, formed the basis for the economic consolidation and development of this country.

Nonetheless, it is a fact that the regions with the highest biodiversity in the American continent are in danger. Everyday the vegetative cover of the tropical forests decreases. The statistical analysis shows that if actions are not taken immediately, we will have a real crisis with respect to the disappearance of forests and the resultant negative climatic effects by the middle of the century.

It is therefore necessary to act rapidly and develop solutions that provide economic incentives for conservation.

The Summit of the Americas that was held in Bolivia in 1996, established the Inter American Biodiversity Information Network (IABIN). Many important institutions and organizations of the continent are members of it. This network must be developed so that information about biodiversity on our continent allows us to control and foresee harmful impacts as well as to regulate and standardize its trade and seek alternatives, for example, in the field of ecotourism. Experience shows that these types of networks must be self-financing in order for them to be enduring. One potential solution could be to support such initiatives from funds derived from external debt swaps.

An agreement on legislation, intellectual property rights and community rights between the different players is necessary in order for trade in the elements of biodiversity to be viable. It is important to investigate the local legislation and above all make the countries understand that the worst thing is to do nothing and that it is not realistic to attempt to impede trade.

International trade, urban migration and alternative education.

Education models that are implemented in the countries in the south continent are focused on generating models of development that we know are not viable. We are generating a large quantity of specialists and professionals that can not find a field of application for their knowledge. Many of them have emigrated from the *campesino* zones in search of better opportunities in the city through education. Some abandon their traditional knowledge and deny their own abilities and talents to force themselves to learn techniques and concepts that will not serve them well. The result is an uncontrolled increase in urban zones of Latin America replete with people with academic titles but frustrated and with no work. Some decide to change countries.

What to do?

One of the results of the educational models that we currently use is the loss of traditional knowledge. This immediately falls back on the economic alternatives of the population. It is very important then, to establish the mechanisms of communications - media and web systems, whereby rural populations can be informed of the utility and economic value of native species and the potential commercial alternatives for the objects they can manufacture by taking advantage of their own skills and talents. The link between supply and demand is missing. Those that have the knowledge or skills cannot contact those who can use them, and they are often unaware that the supply even exists. The most important thing is understanding that we must develop different alternatives for people. The Latin American culture values cooperation and we must take advantage of this cultural element.

One possible alternative could be to provide incentives for artisan schools, real universities for traditional knowledge where the skills of the population are valued. These "Universities of Traditional Knowledge" could be set up as social businesses managed and operated by the communities, and apart from strengthening local culture, would self-finance with products that would allow the populations connected to them to benefit economically from their work and knowledge.

The populations that do preserve their traditional knowledge and skills are generally rural. They live in close contact with the natural habitat that gave rise to their culture and as a result when they do emigrate to the cities they suffer great problems in adapting and in the degradation of their values and lifestyles. This leads to social dissatisfaction and to all types of conflicts. In this light, international finance and trade mechanisms to promote educational alternatives that avoid the eradication of populations from their values, traditions and lifestyles, are particularly desirable.

In summary, to form a Hemispheric System of Sustainable Trade, the following principles are particularly important:

- Learn, understand, and accept the differences that exist as a result of cultural diversity among the different regions of the continent.
- Establish a hemispheric agreement of clear and equitable norms that regulate the exchange of goods, as much for biodiversity as for those goods that are the result of traditional knowledge, skills and talents.
- Consolidate the Inter American Biodiversity Information Network (IABIN) to serve as a vehicle for hemispheric information that can prevent the genetic deterioration or loss of biological diversity, which proposes and fulfills an hemispheric consensus on alternatives and norms for trade, and explores other economically sustainable and profitable forms of conservation.
- Seek financing mechanisms to promote the efforts of traditional knowledge businesses that are self-sufficient, operated by the communities themselves and economically profitable.

7.3 Bioprospecting Partnership in Practice: Biodiversity Development for Biotechnology under the Biodiversity Convention

Jorge Cabrera[288]

The importance of biotechnology for food, agriculture, human health, environmental protection, etc, has been outlined by diverse studies and emphasized by entities such as the Food and Agriculture Organization of the United Nations and the United Nations Environment Programme. At the same time, the access and acquisition of these technologies result especially complex due to their proprietary character, basically because of the existence of intellectual property rights such as patents and plant breeder's rights. In the great majority of cases, big transnational firms are the owners of these rights due to their financial capacity to destine important resources to the research and development of new products and biotechnological processes[289].

In order to close this gap between those who have the control of these technologies and those who need them, especially developing countries, many different schemes have been essayed to facilitate the access and transfer of biotechnology, but mostly in the agricultural field. One of the most well-known to date has been the programme of the

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[289] In many occasions conflicts have even arisen because of patents granted to different firms which overlap or because the utilization of a product or process leads to confrontation with different patent holders, for example, for technology used, promoters, etc.

International Service for the Acquisitions of Agrobiotechnologies (ISAA), which is limited to the agricultural field.[290]

Another interesting option on this subject has taken place in Costa Rica, via the negotiations undertaken by the National Biodiversity Institute (INBio). Through agreements on access and supply of biodiversity (samples and extracts), important technology has been acquired (not all cases involve biotechnology) that has helped to consolidate a minimum infrastructure which allows the adding of value and the discovery of new intelligent uses for genetic resources. As a private, of public interest and non-profit institution, INBio has generated an important experience on the subject of sharing the benefits derived from the access to genetic resources since the signature of the Merck and C. Agreement in 1991.

This experience results illustrative of the manner in which the objectives of the Convention on Biological Diversity relative to the sharing of the benefits derived from access to genetic resources, including transference of technology, can truly be applied. In general, it shows the importance of collaborative agreements which allow our countries to access the technology and know-how necessary to add value to the elements of biodiversity and in this manner, contribute to their conservation and sustainable use, thereby improving the quality of life of the habitants.

Experience of the INBio

The National Biodiversity Institute (INBio) was created in 1989 as a non-governmental, non-profit association for private founding members and it has been declared of public good. Its mission is to promote a new awareness of the value of biodiversity, and thereby achieve its conservation and use it to improve the quality of life.

In 1991, INBio developed the concept and practice of "bioprospecting" as one of the answers to the need of using, in a sustainable way, Costa Rican biodiversity to benefit society. This concept continues gaining acceptance in government, scientific, academic and managerial circles, and it refers to the systematic search of new sources of chemical compounds, genes, proteins, microorganisms and other products that possess a current economic value or potential and can be found in our natural biological wealth. The use of the biodiversity presents opportunities and challenges to promote and to organize the infrastructure investments and human resources that add value and contribute to its conservation.

INBio has a formal Agreement with the Ministry of the Environment and Energy (MEE), which allows carrying out specific activities of the national inventory and of use of the biodiversity in the government's protected areas. INBio develops biodiversity prospecting actively in the protected wild areas of the country under that agreement, with the participation of the national and international academic and private sector. Research is carried out in collaboration with investigation centers, universities and national and

[290] Krattiger, Anatole, An Overview of ISAAA from 1992 to 2000, ISAAA Briefs No 19, Ithaca, New York, 2000.

international private companies, by means of investigation agreements that include key elements, such as:

- Access: limited in time and quantity
- Equity and compensation: Research budget, Benefit sharing (royalties and milestone, etc) ,Technology Transfer, Training
- Non-destructive activities
- Up front payment for conservation

The agreements specify that 10% of the research budgets and 50% of the future royalties are donated to the Ministry of the Environment and Energy (MEE) to be reinvested in conservation. The research budget supports the scientific infrastructure in the country, as well as activities of added value aimed to conservation and sustainable use of the biodiversity. Up to now no royalties have been paid or any product has reached the market but there are some products under development, especially related to ornamental and herbal areas.

What follows is a brief summary of the most significant investigation agreements:

Research Collaboration Agreements with the Industry:

INBio-Merck Agreement: Search of sustainable uses of the Costa Rican biodiversity.
This was the first agreement signed with a commercial company (October of 1991) for the search of sustainable uses of the Costa Rican biodiversity with potential for the pharmaceutical industry and veterinary science.[291] It was renewed in 1994, 1996 and 1998; in similar terms. The agreement comprised the study of a limited number of extracts of plants, insects and environmental samples for the elaboration of extracts to determine its potential use. The agreement has allowed INBio to have access to technology, team and training.

Chemical prospecting in a Costa Rican Conservation Area:
This project began in 1993 and it finished in September of 1999. It is one of the five International Groups of Cooperation in Biodiversity (ICBG´s) of the world financed by the National Institutions of Health (NIH) of United States. It was located in the Guanacaste Conservation Area and was carried out in collaboration with the University of Costa Rica, the University of Cornell and Bristol Myers Squibb. Its objectives were the incorporation of the tropical insects in the processes of search of new pharmaceutical products and to increase the capacity of the human resource in the fields of the ecology, the taxonomy and the ecochemistry.

INBio-Givaudan Roure Agreement: Fragrances and aromas
As a result of the constant search of new options, in 1995 INBio began in association with the company Givaudan-Roure a phase of exploration of potential fragrances and aromas from our biodiversity. The aromas and the fragrances were taken directly of the air of the forest that is in contact with fragrant objects. The objective was to determine

[291] Gámez, Rodrigo, y Sittenfeld, Ana, Biodiversity Prospecting in INBio, en Biodiversity Prospecting, Reid et al (ed). World Resources Institute, 1993.

the feasibility of new products from volatile compounds of the Costa Rican biodiversity and the technology transfer in this area. A royalty rate was established. This agreement concluded its activities in Costa Rica by the middle of 1998.[292]

INBio-BTG-Ecos La Pacífica Agreement
In the agricultural area, INBio seeks to integrate the result of the bioprospecting activity with the economic development of the country. This process began with the signature of the INBio-British Technology Group (BTG) Agreement in 1992, that allowed INBio to begin the investigation, characterization and production of a product with nematicidal activity (DMDP) coming from a tree of the Costa Rican dry tropical forest.[293] In parallel, investigations have been developed jointly with the corporation Ecos La Pacífica, aiming to determine the growing conditions of the species and the production of the DMDP, as well as the effectiveness of this nematicide in tropical crops. The greenhouse and field trials for began in 1999 and they continue being carried out to date with very satisfactory results. BTG has paid an small amount of money to both INBio and Ecos due to the licensing of a patent related to the DMDP use.

INBio-Diversa Agreement: Search for enzymes from extremophilic organisms with application on Chemical Industry.
For the exploration of new enzymes in aquatic or terrestrial microorganisms of the Costa Rican biodiversity under extreme conditions, INBio signed a research agreement with the DIVERSA biotechnical industry in 1995 and renewed it in 1998 and in 2002. It involves the gathering of bacteria in different Conservation Areas of our country that will be studied for the identification and the isolation of new useful enzymes in the industry. The agreement also guarantees the training of Costa Rican scientists in collection methods, isolation and molecular biology, specifically in cloning and characterization of genes associated to enzymes. A third negotiation is currently being carried out.

INBio-INDENA S.P.A. Agreement: Search for compounds with antimicrobial and antiviral activity.
With the objective of obtaining compounds with antimicrobial potential to be used as active ingredients in cosmetics, INBio and the phytopharmaceutical company INDENA, with headquarters in Milan, Italy, signed an collaboration agreement in 1996, with a second phase that started in 2000. Extracts selected of plants are evaluated in bioassays to determine their antimicrobial activity. The final process is carried out in INDENA.

INBio-Phytera Inc. Agreement
Traditionally drugs have been developed starting from extracts of leaves, roots, bark and other parts of the plants. Today, with the advances in the biotechnology, they can be derived cultivations of cells starting from extremely small samples and to induce the production of a diversity of chemical substances in these cultivations, higher than when the original plant is used. In 1998 INBio signed an Agreement with this company, which was executed until the year 2000.

INBio- Eli Lilly Agreement: Search for new compounds

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[292] Mateo, Nicolás, Bioprospecting and conservation in Costa Rica, Responding to Bioprospecting, Hanne Svarstad y otros (eds), Oslo, 2000.
[293] Tamayo, Giselle, Gamez, Rodrigo y Guevara , Lorena: Biodiversity prospecting in INBio, forthcoming 2003.

This project started in 1999 and it concluded in the year 2000. It was carried out with the pharmaceutical company Eli Lilly and Co. and its objective was the search of botanical compounds with pharmaceutical application.

INBio-Akkadix Corporation Agreement: Search for compounds with nematicidal activity.
This project was carried out with the company Akkadix Corporation and was carried out from 1999 to 2001. Its main objective was the search of alternatives for the control of nematodes.

Agreements with Academia

There are also, agreements of academic investigation with national and international universities. These agreements vary considerably in their focus but all they are guided toward the solution of problems and the search of knowledge and products.

INBio-University of Strathclyde Agreement

This agreement allows the access to new technologies and methodologies, as well as the interaction, through the University of Strathclyde, with the Japanese private sector. INBio provides a limited number of extracts of plants to also be evaluated during a time limited by several industries of that country. This agreement was developed from 1997 to 2000.

INBio-University of Massachussets Agreement: Search for potential insecticides

Through a collaboration with the University of Massachusetts in U.S.A. thanks to the support of the National Institutes of Health (NIH), we carried out a research looking for compounds with insecticidal activity.

This investigation began in October of 1995 and it concluded in 1998. Its objective was the realization of enzymatic bioassays of extracts coming from plants, insects, bryophytes and mollusks.

INBio- University of Guelph Agreement: Development of New Technologies for Medicines based on Plants, an International Interdisciplinary initiative

This agreement is carried out with the University of Guelph. It was signed in the year 2000 and it will extend until the year 2003. Their main objective is the search of new pharmaceutical products through technical such as cultivation of tissues from plants.

Other Agreements

Validation of promising plants

This project was financed by CR-USA Foundation. It contemplated 3 sub-projects that sought information to improve the quality of life of the Costa Rican. In collaboration with the CIDPA (Center for Research and Diagnosis in Parasitologia of the University of

Costa Rica) two plants were studied to isolate active components against malaria. This investigation provided continuity to the most excellent results in the ICBG project.

Also, in collaboration with the UME (Unit of Electronic Microscopy), LEBI (Laboratory of Biological Assays) and the National Children's Hospital, those plants were validated traditionally for the gastritis treatment by their activity anti-helicobacter pylori. Finally some species were validated by their alkaloid content to explore their economic feasibility.

The Chagas Project

INBio jointly with EARTH, the National University of Costa Rica and other Latin American institutions of Brazil, Mexico, Chile, Argentina, Uruguay and the NASA of United States, are part of "The ChagaSpace Project", an investigation proposal that would help to look for solution to one of the most serious problems in public health of Latin America: the Chagas disease or American Tripanosomiasis. INBio carried out some search activities on plants with inhibitory activity of the disease in 1997. In the year 2001 the United States of America Congress approved a fund dedicated to finance this project again, which has allowed to re-instate the bioassays.

INBio-IADB Agreement: Program from Support of the Development of the Use of the Biodiversity by Small Enterprises

In February of 1999, INBio signed and agreement with the Inter-American Development Bank with the purpose of formalizing the terms of the grant of a non reimbursable technical cooperation, to support the development of the use of the biodiversity by small companies. In the first phase of the project, 6 projects have been approved, as follows:

1. Agrobiot S.A.: Propagation of Costa Rican tropical plants to be commercialized as eco-educational souvenirs
2. Laboratorios Lisan S.A.: Pharmaceutical products based on medicinal plants
3. La Gavilana: Development of a model of eco-friendly practices for vanilla production
4. Industrias Caraito S.A.: Generation of added value on the Carao agro-industry
5. Bougainvillea S.A.: Research for development and production of a Biocide from Quassia amara wood;
6. Follajes Ticos S.A.: Ornamental plants native from the forest and with possibilities to be successfully commercialized.

These and other contract relationships have provided great benefits of the following type:

- Monetary benefits through direct payments.
- Payment for supplied samples.
- Covering research budgets.
- Transfer of important technology which has enabled the development of the infrastructure at the Institute (biotechnology lab, etc.), which can be used for the investigation and generation of their own products.
- Training of the scientists and experts in state-of-the-art technology.

- Negotiation experience and knowledge of the market and the probabilities of searching for intellectual uses for biodiversity resources.
- Supporting of conservation through payments made to the Ministry of the Environment for the strengthening of the National System of Conservation Areas.
- Transfer of equipment to other institutions, such as to the University of Costa Rica.
- Future royalties and milestone payments to be shared 50:50 with the Ministry of the Environment.
- Establishment of national capabilities for assessing value of biodiversity resources.

The significance of the contract approach must not be underestimated. There is thus an element of contractual agreement involved. In fact, studies carried out to date on benefit sharing for the use of the knowledge, the different joint initiatives such as the Cooperative Biodiversity Groups, etc, all are based on contractual arrangements.

The four following table summarise the main collaborative agreements, benefits and research results.

Table 1. Most significant Research Collaborative Agreements with Industry and Academia in the period of 1991-2002

Industry or Academic partner	**Natural resources accessed or main goal**	**Application fields**	**Research activities in Costa Rica**
Cornell University	INBio's capacity building	Chemical Prospecting	1990-1992
Merck & Co	Plants, insects, micro organisms	Human health and veterinary	1991-1999
British Technology Group	DMDP, compound with nematocidal activity*	Agriculture	1992-present
ECOS	*Lonchocarpus felipei*, source of DMDP*	Agriculture	1993-present
Cornell University and NIH	Insects	Human health	1993-1999
Bristol Myers & Squibb	Insects	Human health	1994-1998
Givaudan Roure	Plants	Fragrances and essences	1995-1998
University of Massachusetts	Plants and insects	Insecticidal components	1995-1998
Diversa	DNA from Bacteria	Enzymes of industrial applications	1995-present
INDENA SPA	Plants*	Human health	1996-present
Phytera Inc.	Plants	Human health	1998-2000

Strathclyde University	Plants	Human health	1997-2000
Eli Lilly	Plants	Human health and agriculture	1999-2000
Akkadix Corporation	Bacteria	Nematocidal proteins	1999-2001
Follajes Ticos	Plants	Ornamental applications	2000-present
La Gavilana S.A.	*Trichoderma* spp *	Ecological control of pathogens of *Vanilla*	2000-present
Laboratorios Lisan S.A.	None*	Production of standardized phytopharmaceuticals	2000-present
Bouganvillea S.A.	None*	Production of standardized biopesticide	2000-present
Agrobiot S.A.	Plants*	Ornamental applications	2000-present
Guelph University	Plants*	Agriculture and Conservation purposes	2000-present
Florida Ice & Farm	None*	Technical and scientific support	2001-present
ChagasSpaceProgram	Plants, fungi*	Chagas disease	2001-present
SACRO	Plants*	Ornamental applications	2002-

- These agreements involve a significant component of technical and scientific support from INBio. Source, Tamayo et al.[294]

Table 2. Monetary and Non Monetary Benefits of Bioprospecting.

Monetary Benefits
*** 100 % of research budgets**
*** Technology transfer and infrastructure**
*** Up front payments for Conservation**
*** Significant contribution for GCA and Universities**
*** Milestone and royalty payments to be shared with MINAE**
Non Monetary Benefits
*** Trained human resources**
*** Empowerment of human resources**
*** Negotiations expertise developed**
*** Market Information**
*** Improvement of local legislation on conservation issues**

Table 3. Outputs generated since 1992 as a result of RCA with INBio. Source, Tamayo et al 2003

Project	Initiate	Output*

[294] Tamayo, Giselle, Gamez, Rodrigo y Guevara , Lorena: Biodiversity prospecting in INBio, forthcoming 2003.

	d	
Merck & Co.	**1992**	**27 patents**
BTG/ECOS	**1992**	**DMDP on its way to commercialisation**
NCI	**1999**	**Secondary screening for anti- cancer compounds**
Givaudan Roure	**1995**	**None yet**
INDENA	**1996**	**2 compounds with significant anti-bacterial activity**
Diversa	**1998**	**2 potential products at initial stages / Publication underway**
Phytera Inc.	**1998**	**None yet**
Eli Lilly & Co.	**1999**	**None yet**
Akkadix	**1999**	**52 bacterial strains with nematocidal activity**
CR-USA	**1999**	**1 compound with significant anti-malarial activity**
LISAN	**2000**	**2 phytopharmaceuticals in the process**
Caraito	**2000**	**None yet**
Follajes ticos	**2000**	**None yet**
Bougainville a	**2001**	**None yet**
La Gavilana	**2001**	**None yet**
Agrobiot	**2001**	**None yet**
SACRO	**2002**	**None yet**

Source: Tamayo et al, 2003.[295]

The following table enumerates de contributions by the INBio derived from the bioprospecting agreements that the Institute has signed.

Contribution to Biodiversity Conservation in Costa Rica and to Universities:	**1993***	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**	**Total**
Ministry of Environment and Energy (MINAE) by 10%	110,040	43,400	66,670	51,092	95,196	24,160	38,793	82,797	512,148
Conservation Areas (Development of Bioprospecting Research)	86102	203,135	153,555	192,035	126,243	29,579	0	0	790,649
Costa Rican Public Universities	460,409	126,006	46,962	31,265	34,694	14,186	7,123	4,083	724,728
Other groups in INBio	228,161	92,830	118,292	172,591	129,008	0	0	0	740,882

[295] Tamayo, Giselle, Gamez, Rodrigo y Guevara , Lorena: Biodiversity prospecting in INBio, forthcoming 2003.

Total	**884,712**	**465,371**	**385,479**	**446,983**	**385,141**	**67,925**	**45,916**	**86,880**	**2,768,407**
***Estimated amounts since 1991**									

Lessons Learned

The data presented above lead to the following conclusions, which can be summarised as follows:

A. There must be a clear institutional policy for the criteria demanded in prospecting contract negotiations. In INBio's case, they are transfer of technology, royalties, limited quantity and time access, limited exclusiveness, not causing a negative impact on the biodiversity, and direct payment for conservation. For INBio this policy has led to the stipulation of minimum requirements for initiating negotiations, and these requirements have resulted in the rejection of some requests; for example, very low royalties; lack of will to grant training, etc. The institutional policy provides greater transparency and certainty for future negotiations. These same policies must be taken into consideration when the local communities and indigenous peoples, such as the Kuna's in Panama, adopt legal outlines in the contractual arrangements entered into by them, and should include other relevant ideas such as those related to the impossibility of patenting certain elements, licensing instead of a complete transfer and other issues.[296]

B. Existence of a national scientific capabilities, and consequently, the possibilities of adding value to biodiversity elements, increase the negotiating strengths and benefit sharing which are to be stipulated in contract agreements. As we previously mentioned, the need to grant an aggregated value to material, extracts, etc., is crucial if one wishes to be more that just a simple genetic resource provider. In this sense, the development of important human, technical and infrastructure capacities, through laboratories, equipment, etc., together with the institution's prestige, have permitted better negotiation conditions.

The existence of traditional knowledge that can be involved in operations - which has not happened in the specific case of INBio- implies a greater scientific capacity and, consequently leads to better compensation conditions.

C. Knowledge of operational norms as well as of changes and transformations taking place in the bogusness sector, and of the scientific and technological progresses that underlie these transformations helps in defining access and benefit sharing mechanisms. It is essential to possess knowledge of how different markets operate and of the access and the benefit sharing practices that already exist in these markets. Since they vary from sector to sector for example the economic dynamics of the markets in the nutraceuticals,

[296] Cabrera Medaglia, Jorge, Contratos Internacionales de Uso de Diversidad Biológica. Una nueva forma de cooperación Norte-Sur, Revista de Relaciones Internacionales 56-57. Escuela de Relaciones Internacionales de la Universidad Nacional, Primer y Segundo Semestre de 1997, Heredia.

ornamental plants, crop protection, cosmetics, pharmaceuticals are complex and different.[297]. This knowledge is needed to correctly negotiate royalties and other payment terms. How can we otherwise know if a percentage is low or high? It is crucial to be informed on the operational aspects of these markets. For example, when INBio began negotiating new compensation forms, such as advance payments or payments on reaching predefined milestones,[298] it was of vital importance to know the approximate amounts the industry was likely to pay in order to negotiate appropriately. Otherwise, one can be requesting terms, which are either completely off the market, or accepting some which are not adequate.

D. Internal capacity for negotiations, which includes adequate legal and counseling skills relating to the main commercial and environmental law aspects. Possibly, one of the key facts understood by the Institute is to know that negotiations involve a scientific aspect (of crucial importance to define key areas of interest such as a product, etc.), a commercial aspect, a negotiation aspect, and the respective legal aspects. These latter comprise not only the national trade law, but also the international environment law, conflict resolution, and intellectual property. For these reasons, the creation of interdisciplinary teams is crucial.[299] At the same time the need for such a team is one of the most important criticisms to the contractual mechanisms. Solutions such as facilitators or others that pretend to "level the negotiation power" have been proposed.[300] Unfortunately, when one speaks of benefit sharing, and as long as no appropriate multilateral mechanisms exist, the contractual systems are inevitable. The absence of this interdisciplinary team is equivalent to keeping one of the parties at a disadvantage particularly if we consider that pharmaceutical companies possess enormous legal and negotiation capabilities.

E. Innovation and creativity capabilities for obtaining compensations. An ample spectrum of potential benefits exists. In the past, interesting benefit sharing formulas, other than the traditional ones, were developed through the appropriate use of negotiations, and include for example fees for visiting gene banks having collected material, etc. The contractual path fortunately permits parties to adapt themselves to the situation in each concrete case, and from there proceed to stipulate new clauses and dispositions.

F. Understanding in key subjects such as: rights on intellectual property; importance of warranties on legality; clauses on ways to estimate benefits (net, gross, etc.); requirements and restrictions on third party transference of the material (including subsidiaries, etc.), and the obligations of such parties; precision of the key definitions provided they condition and outline other important obligations (products, extracts, material, chemical entity, etc.); precision of the property and ownership (IPR and others) of the research results, and joint relationships, etc.; confidentiality clauses in the

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297 Ten Kate and Laird, Sara. The commercial use of biodiversity. Access to genetic resources and benefit-sharing, Earthscan, London, 1999.

298 Krattiger, Anatole, An Overview of ISAAA from 1992 to 2000, ISAAA Briefs No 19, Ithaca, New York, 2000.

299 Sittenfeld, Ana y Lovejoy, Anne, Biodiversity Prospecting frameworks: the INBio experience in Costa Rica, en : Protection of global biodiversity, Coverging Strategies, L.D. Guruswamy and J.A. McNeely (eds), Duke Press University. Durham and London, 1998

300 Chaytor Beatriz et al (2000), Exploring the creation of a mediation mechanism, May 2000

agreements and how to balance the same in relation to the need for transparency in the terms of the agreement; termination of the obligations and the definition of the survivor of some obligations and rights (e.g. royalty, confidentiality, etc);conflict resolutions.

In the negotiated agreements, the complexity of the same has been made clear, and this is related to sub-clause D. For example, what outcomes give rise to benefit sharing, such as royalties, will depend on the nature of the definitions, such as product, extract, entity, etc. A more comprehensive definition gives rise to a better position. Likewise, delimiting the areas or sectors where the samples can be used, the net sales, and what is possible to exclude from them, are only examples of some aspects that must be specified, etc. Likewise, the procedures and rights in the case of joint and individual inventions are of interest (preference and acquisition rights, etc.), as well as the conditions for the transfer of material to third parties (under the same terms as the main agreement, need of consent or information, transference to third parties so that certain services can be performed, etc.).

G. Proactive focus according to institutional policies. There is no need to remain inactive while waiting for companies to knock on the door seeking negotiation. An active approach on negotiations according even to the institution's own outlined policy that permits an understanding of national and local requirements, has resulted in important benefits. The existence of a Business Development Office at INBio, with a highly qualified expert staff; attending seminars and activities with the industry; the distribution or sharing of information and material, and direct contacts, all enable an answer to be given, to a larger or smaller extent, to institutional challenges. The current policy is based on the idea that it is not enough to wait to be contacted, or be available at the behest of the company but to have and maintain one's own approach.

H. Understanding of national and local needs in terms of technology, training, and joint research. There is need for striking international strategic alliances. Even when an institution or community could possess adequate resources to face a concrete demand, knowing the national situation and the strategic needs will permit them to reach better agreements and fulfill a mission which transcends the mere satisfaction of the institution's interests. It will permit the prospecting to work in benefit of society as a whole and demonstrate that it is possible to improve the life quality of the same.

I. Macro policies and legal, institutional and political support. It has been pointed out that confronted with prospecting, the so called macro policies have to exist,[301] that is to say, that clear rules on aspects related to what has been called the bioprospecting framework, which imply biodiversity inventories, information systems, business development, and access to technology, have to exist. One of the causes of the Costa Rican success is due, not only to the existence of institutions that have experience in negotiation, but also to the set of policies and actions that revolve around the same, such as a current biodiversity inventory which has been rated as successful and which enables us to know what we possess as the first step in the quest for making intelligent uses of

[301] Sittenfeld, Ana y Lovejoy, Anne, Biodiversity Prospecting frameworks: the INBio experience in Costa Rica, en : Protection of global biodiversity, Coverging Strategies, L.D. Guruswamy and J.A. McNeely (eds), Duke Press University. Durham and London, 1998

this resource; the existence of a National Conservation Area System that assures the availability of resources; the possibility of future supplies and provisions; mechanisms that contribute to the conservation of the biodiversity, as part of the contractual systems, etc. At the same time, the possibility of possessing adequate instruments for the management of information, systems of land and property ownership, etc., contribute, jointly with the existing scientific capacity, to the creation of a favorable environment for bioprospecting and make possible the negotiation and attraction of joint enterprises.

To this must be added other elements, such as the existence of trustworthy partners, one of the most relevant aspects in joint undertakings.[302] Lastly, one of the crucial topics of these times has been the constant denouncement of the business community, due to the uncertainty that these new access rules are generating, mainly in terms of who is the competent authority, the steps that are to be taken, the way in which to secure prior informed consent, etc. The emergence of these new regimes, together with the fact that the intention is to essentially control genetic information, its flow, supply and reception, a topic where little national, regional and international experience exists, has been a cause of concern due to the possibilities of contravening legal provisions. That has led to establish, as a policy, the inclusion of clauses related to the need of fulfilling local regulations, to demonstrate the contracting parties' right to fulfill their obligations pursuant to national laws, to present the appropriate permits and licenses, etc. In some cases, this topic has represented important discussions and analysis in agreements to be negotiated. At an international level, various bio-prospecting agreements around the world are being the target of complaints, claims and lawsuits, precisely due to the lack of legal certainty, and this has created problems, discrepancies, and it favors very little the carrying out of activities and joint ventures[303]

Conclusions

The Costa Rican case has shown interesting individual features that make it worthy of mention, although it does not necessarily constitute an example to be followed in other nations. Peculiar circumstances of the national reality,[304] the size of the country, the structure of the central government, its political, educational, and social situation, etc., have led to the establishment of important conditions of its own. It is an example of a nation that decided to take a road instead of continuing to discuss the difficulties that exist to travel on it. From this perspective, the practical experiences in access and benefit sharing that are embodied in contracts and collaboration treaties with the public and private sectors at the national and international levels; the creation of a Law of Biodiversity that seeks to answer the challenges made by the Convention; the regulation

[302] Sittenfeld, Ana y Lovejoy, Anne, Biodiversity Prospecting frameworks: the INBio experience in Costa Rica, en : Protection of global biodiversity, Coverging Strategies, L.D. Guruswamy and J.A. McNeely (eds), Duke Press University. Durham and London, 1998

[303] For example, complaints regarding the Agreement between Diversa and the Autonomous University of Mexico; between this company and Yellowstone Park, this last one recently solved in favor of the park; complaints on the agreement signed between the Venezuelan Ministry of the Environment and the Federal University of Zurich, which involves a traditional knowledge of the Yanomamis, etc.).

[304] Mateo, Nicolás, Wild Biodiversity: the last frontier? The case of Costa Rica, en The Place of Agricultural Research, Bonte Sheridan, Christian y otro (ed), ISNAR, 1996.

of general sui generis systems principles; etc., are all elements that enable concrete proposals for generating a debate.

Possibly, this is the most valuable aspect of this experience.

8. Sustainable Water Management

8.1 Drinking Water and Sanitation in Latin America and the Caribbean: A General Assessment

Malcolm C. Mercer & Karel Mayrand

Latin America is one of the most urbanised regions of the world. Currently, drinking water and sanitation infrastructure is either non-existent or in bad shape in large areas of many Latin American cities, with only 10% of wastewater being currently treated in the region. It is estimated that 85% of the region's population will be urbanised in 2025, thereby putting extra pressure on these already insufficient infrastructures. Clearly this constitutes a regional challenge for environment and development. The situation in the Caribbean, though very different, is nonetheless extreme, with highly concentrated populations on small island states that have limited water resources and, in many cases, infrastructure as bad as, or worse than that in many parts of Latin America.

The Free Trade Area of the Americas (FTAA), with an accompanying environmental cooperation package, could provide opportunities to develop infrastructure, build capacity in Latin American and Caribbean cities and governments, and transfer technologies at better costs to developing countries. This article explores urban water and sanitation issues and tries to identify general approaches and policy options that could support a new drinking water and sanitation agenda for the Americas.

Assessing Infrastructure Needs in Latin America and the Caribbean

In order to understand the challenges of drinking water and sanitation in Latin America and the Caribbean, it is necessary to assess needs for water infrastructure in the hemisphere. This first means assessing the proportion of Latin America and the Caribbean's population that is lacking services. In addition, this means identifying significant regional differences. Furthermore, it would be extremely useful to assess the value of the markets for drinking water and sanitation services in the hemisphere, and their expected rate of growth over the next 10-15 years. These figures would highlight the general economic challenges that have to be faced when addressing urban water infrastructures in Latin America and the Caribbean.

Needs should not only be assessed in terms of economic resources and infrastructure, but also in terms of institutional capacity, regulatory frameworks, and water policies to be developed and implemented. The needs of local communities should also be addressed, through an analysis of the current extent of public participation in water management and the impediments to optimising this level. Last but not least, the degree to which the needs of ecosystems are being integrated into water policy should be assessed, with

observations on how frameworks to assess the value of services provided by ecosystems can be implemented.

For all these challenges, appropriate policies have to be put into place, and priority intervention points need to be defined. This analysis can rely on lessons learned from past experiences, and any positive experiences in the region.

Assessing the impacts of the lack of infrastructure and poorly planned infrastructure development

Defects in basic water services and infrastructure can have dramatic impact on human health, on watersheds and ecosystems. The impact of gaps in basic infrastructure in Latin American and Caribbean cities needs to be assessed. The impact of inadequate infrastructure and regulatory frameworks on human health must also be assessed. More precisely, appropriate policies and infrastructure should be identified to prevent or attenuate epidemics and other incidents involving water-borne diseases.

The impact of the lack of sanitation infrastructure on ecosystems also needs to be assessed. This may involve developing tools to value environmental and economic losses associated with urban pollution. In addition, methodologies to assess the economic cost of human health problems and environmental deterioration associated with untreated wastewater could be developed. This could open the door for an internalisation of these costs in decision-making processes related to urban development and water resource management.

On the other hand, it would be necessary to assess potential problems in moving toward universal access to water supply and sanitation services. For example, economic barriers to implementation of such social services due to poverty and inequitable distribution of wealth are to be expected in many regions and communities. Moreover, infrastructure development can generate environmental impacts that must be mitigated or avoided while providing increased water services to the human population. The key to avoid these problems would be to develop models and standards for water resource decision-making that can be adapted to the disparate social, economic and environmental circumstances of every part of the hemisphere.

Assessing the Potential Impacts of Hemispheric Trade

Trade policy may constitute a major engine for economic growth and development in all parts of the hemisphere. At the same time, trade regimes have deep structural impacts (that can be potentially negative as well as positive) on general economic and development policies in almost every country of the hemisphere. As such, trade policy can become a primary tool to support sustainable development, if appropriately oriented. This is especially true in the field of water infrastructure and environmental technologies, two sectors where trade and investment have been increasing significantly over the last decade.

In this context, it would be useful to identify which trade provisions could support investment and technology transfers in urban water infrastructure, and which difficulties

are faced by exporters and importers in the water infrastructure sector. In addition, the conditions under which trade in drinking water distribution and management services can generate optimal outcomes should be assessed, in comparison with possible alternative models of investment in urban infrastructure that could be supported by the FTAA. Moreover, there is a need to assess current investment models and to identify alternatives to the current hegemony of multinationals based in France or Britain, especially in providing drinking water services to small and medium-sized cities.

The FTAA and accompanying hemispheric policies could specifically support raising the level of environmental regulation and standards for drinking water and sewage effluent. There is a need to identify provisions and safeguards, which could be incorporated in the FTAA to contribute to raising standards, attracting investment in this sector, and lowering the cost of environmental technologies. In addition specific provisions of the FTAA could favour cost internalisation in economic policy, especially as it relates to water resources. In the absence of such provisions, the FTAA could induce potential negative dynamics in water technologies and services. Measures to mitigate these negative impacts must be developed and implemented.

Assessing the role of environmental cooperation in the development of water infrastructure

Environmental cooperation in the Americas is only embryonic. NAFTA's experience shows that a trade agreement cannot deliver its environmental promise without a significant environmental package of policies that has equal force of law, is based on equal economic incentives, and that interacts with trade policy in a synergetic relationship, rather than as a subservient component of trade policy. The possible creation of a new hemispheric free trade area in 2005 creates a real need for the development of a trade-related environmental cooperation agenda.[305] Improved water resource management and the protection of ecosystems must be central parts of this agenda.

There is a need to identify elements of an environmental package that could be attached to the FTAA to support improved water management throughout the hemisphere. More specifically, hemispheric environmental cooperation could support training and capacity building, and the strengthening of regulatory regimes in Latin America and the Caribbean. In addition, methodologies for cost internalisation and assessing the value of services provided by ecosystems could be developed and shared throughout the hemisphere. Key hemispheric experiences in the field of integrated basin level water management and participatory mechanisms could also be shared and adapted to the different contexts and needs of other communities.

In the field of urban infrastructure, hemispheric cooperation could contribute to training and capacity building in small and medium-sized cities that want to improve their infrastructure. Hemispheric environmental cooperation could also address the issue of financing for the development of water infrastructure. More specifically, it could support the development of the necessary frameworks to provide sufficient guarantees to attract

[305] Cordonier Segger et al., *Ecological Rules and Sustainability in the Americas,* above.

investment in water infrastructure projects. In addition, support could be provided to municipalities when they negotiate contracts with water infrastructure multinationals.

Finally, the hemisphere is characterised by a very fragmented institutional framework. Networks, international institutions, business associations, financing institutions, and non-governmental organisations all have a role to play in strengthening environmental cooperation in the Americas. There is a need for networks development and improved cooperation among actors in this field.

8.2 Social Vision of Sustainable Water Management – A Colombian Case Study

Adam Rankin

Water is both a fundamental right and collective heritage; it is inherent to the preservation of nature and local people's livelihoods. Equitable and safe access to water resources in satisfactory conditions of quality, quantity and natural variability, is therefore vital to the sustenance of ecosystems and cultures. Water management policies should be clearly recognised as an issue of social and environmental justice and as an entrusted collective responsibility of government, private sectors and local communities.

This article highlights some of the key issues for achieving sustainable water management in Latin America, giving particular emphasis to the viewpoints and challenges faced by marginalised sectors of society (e.g. youth, women, urban poor, micro-enterprises) and traditional communities (e.g. ethnic groups, small-hold farmers, fishing populations). It also tries to address the myth of public participation and describes the obstacles, which hinder social groups to exercise truly active roles in water management. Finally, the article takes a look at some of the implications of hemispheric cooperation in environmental services and technologies, with a view to define priority areas of support that are required to ensure social and ecological security in the water sector. Although the article addresses problems and opportunities that prevail in the South, the observations and recommendations also bear a message for water management in the North.

Ecological Debt and Environmental Services

Before discussing in more detail the implications of trade in environmental technologies and services in the water sector, we must come to terms with some of the stark realities of Latin American countries. Foremost, we cannot obscure the fact that the continuing drive for technological and economic development, within a framework of trade globalisation, has not been capable of guaranteeing water security for local populations. Development projects more than often have shown to both worsen existing socio-economic inequalities in society and produce adverse impacts to the natural environment.

From this standpoint, social and environmental movements are calling for indemnification of this accumulated 'ecological debt', represented in the historical destruction of cultural and ecological heritage in the South, as well as recognition of the illegitimacy of external financial debt. Those who abuse the biosphere, transgress

ecological limits and enforce unsustainable patterns of resource extraction should be held accountable for their actions.

From the perspective of water management, it is apparent that many Latin American river basins clearly reflect the distribution of power and the dominant socio-economic trends in society. More than often an authoritative minority overexploit water resources, while marginalised and impoverished people, especially traditional rural and indigenous communities, are the first victims of water ecosystem deterioration.

In this line of discussion, it is important to point out another recent trend in international summits and forums, which refer to the role of water, biodiversity and natural resources in general, in the provision of environmental services. Here we should recognise that local communities that live in close interaction with their natural surroundings, have long understood the generosity of ecosystems to sustain their livelihoods.

What is new in these political dialogues is that environmental services are given an economic value and are entering evermore as another component of the global market. This position has serious pitfalls, and could clearly accentuate the privatisation and inequitable distribution of natural resources in the South. In relation to water management, this concept has led to the view that one does not necessarily have access to water by right, but by what one is willing to pay, or by the degree of 'value-added' economic benefit of a particular water use. Ironically, policy makers have scarcely focused on providing incentives to local communities that protect essential water producing ecosystems for urban and industrial users.

Water Conflicts in the Colombian Context

The fragility and increasing deterioration of water resources in Colombia is everyday more evident. After being considered as one of the top five countries abundant in water production, today the nation figures in the 15th to 20th position.[306] Although Colombia is often regarded as privileged in water resources in comparison with other nations (geoclimatic conditions represent an annual precipitation of 3,000 mm), these figures hide many of the true realities. For example, the hydrographic Magdalena - Cauca region produces 10% of the nation's water balance, but supports 70% of the Colombian population. [307] Other recent studies show that only 46% of the population is being supplied with potable water of acceptable quality. [308] It is evident that increasing socio-economic, environmental and political conflicts will furthermore aggravate this situation.

Economic development models and urban centred policy orientation have increasingly driven water management in Colombia (as in other neighbouring Latin American countries) towards privatisation, export-oriented strategies and infrastructure intensive projects. This focus has failed to protect the fundamental ecological functions of aquatic

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306 Censat "Agua Viva" - Embajada De Los Piases Bajos - IUCN, *Memorias IV conferencia latinoamericana de páramos y bosques de niebla* (Bogotá: IUCN, 2000); IUCN - WWC, *Vision for water and nature: a world strategy for conservation and sustainable management of water resources in the 21st century* (Hague: IUCN/WWC, 2000); Ministerio De Salud (Colombia), *II Inventario Nacional de Calidad del Agua* (Bogotá: Ministerio De Salud, 1998).

307 *Ibid.*

308 *Ibid.*

systems and has generated a chain of enduring socio-cultural impacts in local populations. The following case studies demonstrate the scale and magnitude of this situation:

The Flower Growing Industry

The flower-growing industry, with its main centre of development in the savannah plains of Bogotá, is frequently highlighted by the national government as a demonstrative industrial sector in Colombia. In fact, flower production represents one of the top five product exports, with annual sales of US$600 million, 85% of which are in the United States.[309] However, hidden behind these 'cold' economic figures are the grave impacts caused in water ecosystems, as well as the related health problems in predominately women workers. Water consumption in flower production is estimated at 200 - 300 m^3/hectare/week, frequently depleting precious groundwater reserves at the detriment of the basic needs of local communities. Moreover, the industry widely employs toxic pesticides such as aldicarb, dichlorvos and methavin, classified internationally as having high risks to human health and the environment.[310]

Hydroelectricity

The Urra I hydroelectric dam, constructed and financed by a multilateral consortium, is located 30 km south of Tierra Alta (Córdoba) and forms part of the Sinú river catchment.[311] The dam flood area is calculated at 7,400 hectares. The total estimated cost of the project is $US800 million , with an effective project life of only 20 years according to independent experts. Additional to this absurd economic picture, are the irreversible impacts caused to strategic tropical forest ecosystems, the habitat loss of important fish species, the disruption of traditional fishing economies, the intensification of the regional armed conflict and the violation of cultural and territorial rights of the Embera-Katio indigenous population.[312]

Oil Production

Barrancabermeja is the oil production capital of Colombia, located on the river Magdalena and surrounded by a natural system of marshlands that constitute a vital biodiversity reserve. These wetlands have been chronically affected by oil spills and wastewater discharges during more than 80 years of oil production in the region. [313] On the 7th of May 1999, one of the most serious recent incidents occurred when the Llanito 18 oil well over-pressured, releasing 250 barrels of crude oil over an area of 17

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309 Ministerio De Salud (Colombia), above.

310 Universidad Nacional - CENSAT - FENSUAGRO, *Estudio geográfico ambiental de la floricultura en Madrid (Cundinamarca)*, (Bogotá: Universidad Nacional - CENSAT - FENSUAGRO, 1996).

311 Departamento Nacional de Planeación, *Encuentro: la dimensión social del agua*, Cali: Departamento Nacional de Planeación, 1996;

312 Organización Nacional Indígena de Colombia (ONIC) - NIZKOR, *El desarrollo globalizador y los pueblos indígenas de Colombia* (Bogotá: Organización Nacional Indígena de Colombia (ONIC) – NIZKOR, 1999); ITEM - ILSA - RED BANCOS, *Agua pasó por aquí : experiencias sociales de manejo sostenible, una alternativa a la privatización* (Bogotá: ITEM - ILSA - RED BANCOS, 1999).

313 CENSAT "AGUA VIVA", *Ruiría : el grito del petróleo* (Bogotá: CENSAT, 2001); ITEM - ILSA - RED BANCOS, *ibid.*

hectares.[314] Oil contamination have put local flora and fauna at serious risk and the oil companies have been negligent in so-called 'clean-up' operations. Local fishing communities have calculated that the natural recuperation of the area will take more than 50 years.

Urban Water Supply

For more than five years, local peasant communities and environmentalists have been campaigning against the construction of a new water supply project for the metropolitan area of Bucaramanga (Santander). The water supply plan conceives an infrastructure intensive dam and tunnel scheme that will seriously affect highly fragile cloud-mountain-forest ecosystems. Total investment for this project is estimated at $US200 million , and it will also signify multinational privatisation of water services, increased public water tariffs and provide benefits in particular to construction industries and landowners that seek to increase city urbanisation at all cost. [315]

Coca Crop Eradication

The coca crop eradication plan in the Putumayo region of Colombia represents a severe threat to indigenous peoples and ecosystems. The $US1.3 billion aid programme for combating drug-trafficking has to-date largely involved indiscriminate aerial spraying of large areas of tropical forest with Roundup Ultra herbicide.[316] Eye-witness reports have denounced the poisoning of local food crops, water contamination, destruction of native vegetation and related health problems in local and indigenous populations, particularly children. [317]

Fluvial Transport

A growing concern in Colombia is the tendency to privatise large river stretches for fluvial transport schemes, since government sectors and foreign investors perceive them as 'strategic' to further trade liberalisation. Proposed navigational projects include: Orinoco - river Meta, the Atlantic-Pacific canal interconnection and La Plata - Amazonas - Putumayo.[318] The consequent social and environmental impacts at regional, national and international levels are generally unknown, project expectations alone have generated a wave of violence and internal displacements in various regions.

Determining Factors in Water Conflicts

This brief panorama of water conflicts in Colombia is sufficient to highlight a series of recurring and interrelating factors that directly threaten the integrity of water ecosystems, as well as the cultural and social identity of local communities that directly depend on

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[314] CENSAT "AGUA VIVA", *ibid.*; Friends of the Earth International, *Towards sustainable economies: Challenging neoliberal economic globalisation* (Amsterdam: FOEI, 2000).
[315] CENSAT "AGUA VIVA", *ibid.*
[316] Organización Nacional Indígena De Colombia (ONIC) - NIZKOR, above.
[317] *Ibid.*
[318] Departamento Nacional De Planeación, above; International Rivers Network (IRN), *Guardianes de los ríos : guía para activistas* (Berkeley: IRN, 2000).

them for common property resources. Among these determining factors we can highlight the following:
- The conception of 'development' in strictly economic terms, where social equality and environmental sustainability issues are virtually ignored.
- The primacy of private and 'national interests' of an elite minority over and above the collective needs and rights of local populations.
- A political ruling class that has successively shown to be inefficient, over-centralised, unethical and blind to social and environmental violations.
- The rising indicators of social and economic injustice, which constitute the real causes of the impoverishment of ecosystems and cultures.
- Trade globalisation models that only serve to increase the levels of ecological debt of Southern nations.
- Insufficient opportunities for active and meaningful participation of local actors in policy-making, in particular marginalised sectors of society.
- An apparent ignorance and loss of pertinence with the enormous wealth of cultural and biological diversity in tropical countries.
- Increasing urbanisation that tends to physically and socially distance rural and urban people, creating ecological and political catastrophes.

Towards a Social Vision of Water Management

Constructing viable alternatives to counteract the growing wave of negative impacts that threaten the water security of local communities has been the topic of many regional, national and international forums. In consequence, a wide range of non-governmental organisations (NGOs), grass-root organisations, donor agencies and environmental bodies around the planet are advocating that a series of guiding principles to be included in water policies.[319] This framework for social and environmental change generates a series of recommendations:
- The overriding primary goal of water management should be to safeguard the vitality and diversity of ecosystems, while at the same time to enhance the livelihoods and quality of life of local people who directly depend on them for common property resources.
- Empowering of local actors through effective participation and social water management schemes that embody traditional knowledge and forms of organisation, as well as locally developed technologies.
- The urgency of horizontal and democratic means of dialogue between genders, cultures and social classes, aimed at the construction of sustainable water management processes.
- Building of open, accountable and representative authorities that are both responsive to the needs of local communities and capable of resolving water issues from a holistic and interdisciplinary approach.
- Rejection of all government and multilateral involvement in destructive intervention schemes that directly affect the integrity of water ecosystems to nurture cultures and biodiversity.

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[319] Acción Ecológica - Ecuador, "Ecological debt" (Quito: Acción Ecológica - Ecuador, undated); Both Ends, *Towards people oriented river basin management: an NGO vision* (Amsterdam: Both Ends, March 2000); CENSAT "AGUA VIVA" - Embajada De Los Piases Bajos - IUCN, above; Departamento Nacional de Planeación, above; Friends of the Earth International, above; International Rivers Network, above; IUCN - WWC, above; Tribunal Centroamericano del Agua, *Declaración centroamericana del agua*,(Costa Rica: Tribunal Centroamericano del Agua, 1999).

- Fostering of applied research and traditional knowledge exchange, to better understand and strengthen the role of local peoples in the management and conservation of water ecosystems.
- The need for long-term investment programmes and incentive schemes directed at the protection and restoration of ecologically strategic ecosystems, in particular those in serious danger from climate change.
- Implementation of innovative educational and awareness-raising programmes that can foster attitudes, beliefs and fundamental values related to equitable and sustainable use of water resources.
- Establishing of up-to-date knowledge and information sharing networks on the state of water resources, which allow both social actors and regional institutions to take opportune and effective decisions.

Appropriate Technologies and Water Policies

Above, a series of dominant conflicts and challenges are highlighted. These are central to sustainable water management in Latin American countries. In considering the implications of trade liberalisation and hemispherical cooperation in water technology and services, we must bear this panorama clearly in mind. It is also important to reflect foremost on questions that permit a more holistic understanding of the situation, that is to say, an in-depth analysis of the socio-economic contexts and political frameworks that have given origin to the grave ecological and social problems that characterise water management in Latin American societies today.

This reflection should lead us to fundamental and radical changes in the way we propose to face this water crisis. It should guide us to alternatives and solutions where local communities are the principal actors in cooperative water management schemes. It implies that urban and rural populations should be able to jointly carry forward effective and equitable water sanitation programmes, based on their interrelated social and ecological dynamics. It also signifies that attention should be placed on preventing contamination at its source, as well as strengthening schemes that promote the social production and sustainable use of water.

It follows, that when we refer to the development of appropriate water technologies, this implies technologies that facilitate the distribution of social and environmental benefits while minimising negative impacts. This is a scientific problem, but moreover a political one; in other words, technological development in the water sector should allow us to advance towards a humanitarian society that guarantees truly sustainable conditions of equilibrium with our natural and social surroundings. It is therefore not only sufficient to think of improvements in water infrastructure and services; in proposing real and lasting change, we must come to terms with the type of society that we are currently living in and the one that we aspire for our children to collectively inherit.

More efforts should be focused on strengthening sustainable community-based projects that provide innovative alternatives to conventional water management thinking, for example: enhancing and conserving water producing ecosystems, civil society natural reserves, rainwater harvesting and distribution, agro-ecological farming techniques,

associative water supply and eco-sanitation schemes, rational water use and recycling technologies, etc.

In this sense, trade in environmental services and technologies must seek to break the enduring ties of financial and technological dependence. The liberation of Latin American societies depends on the ability to develop innovative and locally orientated alternatives based on traditional and scientific knowledge, as well as region-specific geo-climatic and cultural conditions. Traditional communities and marginalised sectors of society must have the right to strengthen protection of their natural environment, to promote sustainable economic activity that provides collective benefit; and to exert control over their local and shared water resources. We cannot expect our societies to think globally while they are suffering locally.

8.3 Making Water Supply Available to the Excluded: A Trinidad and Tobago Case Study

Lester H. Forde Ph.D.

Trinidad and Tobago, a small island developing state in the Caribbean shares several things with other developing countries and is significantly different in other respects. With respect to water supply and sanitation, the level of coverage is very good but the general high degree of coverage masks chronic supply shortages and interruptions. The country has utilised many different strategies to deal with this problem and a brief historical recap is necessary.

In the 1960's, as the nationalist fervour arising out of the Bandung Conference sped throughout developing countries, Trinidad achieved political independence from its colonial master Britain. The period leading up to independence when the country moved from colony to internal self-government saw institutional change with respect to water supply and sanitation.

Several separate water providers were merged into a single entity and sewerage, which, up until then, was the responsibility of the Ministry of Health, was brought into the fold to create the Water and Sewerage Authority of Trinidad and Tobago (WASA).[320] This Statutory Authority was modelled on the British Water Authorities. Water tariffs were low and sectoral improvements were limited to major water supply schemes for meeting supply deficits and to an island-wide sewerage project which resulted in the construction of a centralised wastewater collection and treatment facilities in the then three major urban areas. By the 1970s the poor service levels were a major embarrassment for the government and a crisis was avoided only as a result of the large increase in oil prices in 1974.

Trinidad is a geological extension of Venezuela and is also an oil producer. These increased revenues from oil were used for infrastructure improvements. The country

[320] WSSCC, *Vision 21: Water for People.* A Shared Vision for Hygiene, Sanitation and Water Supply, (Geneva: WSSCC, 2000.) See also, WSSCC, *Vision 21 Regional Report for the Caribbean* (Port of Spain: WSSCC, 1999).

then embarked on what at the time was the largest single water project in the region: the $US125 million Caroni-Arena Water Project that produced some 272760 m3 of water per day. However, a reduction in the domestic water supply deficit did not materialize because industrialisation downstream of the petroleum sector required considerable quantities of water. The discovery of large quantities of natural gas and the new gas-based downstream industries, methanol, urea etc, also required large volumes of water as an input to their production processes. Consequently the water supply situation was further aggravated.

The general economic good times resulted in an explosion in housing construction. The proximity to North America also contributed to the development of North American tastes. These same favourable circumstances created a rapid increase in foreign travel, which allowed people to experience developed country standards of living, and also heightened their socio-economic expectations. All of this conspired to place additional pressure on water supplies and generated increasing quantities of wastewater. There was an increasing tendency towards constructing housing estates to house the middle-class and this concentrated housing pattern not only contributed to an increase in the supply deficit but also resulted in a proliferation of package wastewater treatment plants to treat the wastewater generated. [321] Most of these plants are now malfunctioning and constitute a public health time bomb of immense proportions.

Water Infrastructure Privatisation: A Critical Assessment

By the 1990s, water supply had again become a major political embarrassment and the government sought to deal with this major source of disaffection. The country had already approached the International Monetarty Fund (IMF) to deal with the economic stagnation caused by the decline in oil prices. The World Bank agreed to a loan with the condition that the state should divest its interests in the utilities and seek a partner from the private sector. At that time this was the generic prescription offered by the Bank to provide good health to ailing water utilities in developing countries. Accepting this advice, Trinidad and Tobago embarked on the road toward privatisation. Severn Trent Water of the United Kingdom in a joint venture with George Wimpey Limited was awarded a management contract to rescue The Water and Sewerage Authority. The original plan was to follow this three-year agreement with a long-term contract, which would involve complete divestment.

The short-term contract ended in April 1999 and the government opted not to go into a long-term contract with the joint venture of Severn Trent-Wimpey (now Tarmac). Locals who had been exposed to three years of foreign management expertise were now managing the Authority. The benefits from the foreign managers were mixed. Chronic cash flow problems were eliminated and money was available to refurbish or replace plant and equipment. Private Sector Participation (PSP) resulted in revenue collection and service improvements and since it ended there has been some backsliding in terms of service levels. The Authority has just begun to repay loans, which were accessed to finance the three years of PSP (or the "Interim Operating Agreement" as it was euphemistically called). As a result, there are reports of cash flow problems reminiscent

[321] *Vision 21 Regional Report for the Caribbean*, above.

of how the Authority operated in the pre-PSP era. The government has signaled that full divestment is a real option.

Wastage and lack of accountability at WASA are direct outcomes of the privatisation paradigm. When this paradigm was introduced to developing countries it was expected that as they invested heavily in replacing old pipelines and other new capital projects, the reduction in unaccounted for water and the new business climate would eliminate all of the utility's problems. Accompanying this was the strict admonition that this strong capital infusion was to be accompanied by radical surgery to reduce personnel to fit some magical staff to customer ratio determined by the international lending institutions. In the end, the best post-operative care was to define the core business of the utility and contract out the rest of the activities.

This treatment regime ignored the simple fact that by virtue of the specific nature of the business and their long experience, WASA's staff was the best to perform this work. As a result of outsourcing of repair work in Britain, the experience of WASA's private partner had become so limited to the extent that when a major large pipeline was damaged it took almost six weeks to repair it since the foreign managers had never worked on this size of pipeline and were unwilling to admit to this. The exodus of expertise from the Authority aggravated the situation. Many of these persons left because they feared the outcome of the PSP, while others were induced to take voluntary separation from the Authority and set up their own small businesses. They were promised that any work outsourced would be given to them preferentially. This pipeline rupture interrupted supply to the country's largest industrial estate and was the major driver for the decision to construct a desalination plant to provide water to the estate.

The infusion of capital by borrowing was so excessive that WASA did not have sufficient in-house capacity to execute projects. Borrowed money lay idle, as it could not be used fast enough. Engineering capacity in the country was exhausted and foreign consultants were engaged to perform the most basic of tasks. The PSP triggered a wild grab for contracts and some of these were not needed. The foreign partner in Trinidad's PSP claimed that locally manufactured plastic pipe was not up to standard although these companies supplied the local and regional markets for many years. They recommended that WASA purchase pipes from the UK using one of their companies as a supplier, which a foreign consultant from the UK involved in pipeline design under the same World Bank Water Project later said was unnecessary.

The unkindest cut in this PSP debacle was the design and construction of an expansion to the largest water treatment plant in the country even though during its seventeen years of operation not once was the originally designed output level realised in the middle of the dry season.[322] This information was widely known by local water sector specialists. There is a debate at present as to what return period should have been used in the design. The business climate in the privatisation model in Trinidad was colonial and did not support local manufacturing and technical expertise.

The Self-Help Model of Services Development

[322] *Ibid.* See also WSSCC, above.

In the 1960s requests for water supply improvements were generally first directed to political representatives, and thus were highly politicised. The responses were generally *pro forma*, taking note of the request and then promising that as soon as funds were made available, the Authority would consider the request. It was not uncommon for more than ten years to elapse before a request bore fruit. Some requests took so long that the requests were made in the mod-1960s and the projects were executed in the 1990s. The low level of funding of these projects was a reflection of several factors including lack of funds, absence of planning and the moribund politics of a political party which had been in power for too long.

However, both external and internal politics conspired to change all of this. The external driver was the exchange of ideas between developing countries when Trinidadians were exposed to methods of community development from Asia and Africa. Economist and other social scientists dominated the planning and development agenda and they saw that there were examples in the developing world where mobilisation of community savings had been used for infrastructural improvements at the village level. The two major ethnic communities in Trinidad comprising persons of East Indian and African origin, resorted to those methods of community cooperation such as gayap, sou-sou and lend-hand which had been used at the village level in their ancestral lands and which were modified by time with the Trinidadian experience. Success stories of community projects in India and Ghana in particular were used as examples because both countries were flagships for socialist development and ethnic solidarity.

The internal drivers were sheer frustration with the slow pace of change, repeated violations of the political compact with their leaders and the increasing influence of imported radical politics, both ideological and tactical, such as socialism and black power. Someone suggested, maybe as a challenge to a particular strident request, that water supply infrastructure improvements could occur if the beneficiary community contributed some of the material and most if not all of the labour for the project.

WASA was very uncooperative towards self-help projects because the Authority had an in-house Construction Section, which was responsible for all new pipe laying. The operation of this programme was also based on political patronage. There were opportunities for persons to enrich themselves in procuring equipment and materials together with the control of recruitment of unskilled labour and the consequential overtime payments. All of these were inducements to resist the encroachment of the self-help project method. However, the projects continued as one of the political arms of the Community Development Division and continued alongside the Authority's water mains extension projects. WASA provided surveys and engineering drawings and supervised the construction of the project. The Authority also made the connection to the existing water distribution system, disinfected the new pipeline and put it into service.

In addition to the issue of encroachment on their responsibility, WASA also objected because these early projects supplied water to communities where standpipe service was provided and the Authority derived minimal financial benefit from making this service available because of the very low standpipe tariff. Although these charges were low, they were difficult to collect and wastage of water after completion of a project was common.

Many projects were located in areas where normal methods of censure could not be applied and the Authority felt that it was not in control. Additionally, the extension of service to these areas replaced supplying water by tankers, a process which was open to corruption and favouritism by the tanker operators.

In 1986, the National Alliance for Reconstruction Party was elected by a landslide to form the new government replacing the previous party, which had ruled uninterrupted from 1956. This party was a merger of several major parties all of whom separately had been involved in land tenure and settlement issues. The union of these parties had synergy in terms of attitudes towards land settlement issues since they were all committed to land development which used cooperatives as the engine for people acquiring land for housing. It was no surprise when self-help became an important part of the development strategy that this government adopted. In 1987, an Act of Parliament incorporated the National Commission for Self-Help (NCSH) of Trinidad and Tobago as a company with the responsibility to carry out self-help projects in the twin island republic. [323] The institutional arrangement that facilitated self-help had been converted into a non-profit state-owned company.

During the period of 1987 to 1997, the Government of Trinidad and Tobago provided operating funds. An average of $3 million TT per annum were allocated to the Commission in the national budget. [324]

In 1997, the Government of Trinidad and Tobago obtained a loan from the Inter-American Development Bank. The loan was used to create the Community Development Fund, which provides funding to communities to alleviate poverty. Of these funds, $US 49 million is available to the NCSH and it has received $US 27 million of the total available. The funds are controlled by the Ministry of Planning and Development and are disbursed by the Ministry of Finance on requests from the NCSH via their line Ministry. In 2000-2001, the NCSH requested $11 million TT and received $4 million. For the period 2001-2001 the NCSH applied for $9 million TT. In addition, the NCSH also received $4 million TT from the Public Sector Investment Programme (PSIP), which is the Government's engine for development.

The NCSH started off mainly assisting communities with water supply and now provides assistance with roads, surface water drainage, retaining walls, electricity supply and bridges. Funding is also provided for recreational and sporting facilities and community structures. Recently, the NCSH became involved in constructing a shelter for individuals who are destitute or are old age pensioners (65 years plus) to a maximum contribution of $ TT 10,000.00 from the NCSH.[325] The NCSH also works on community projects of service organisations such as the Rotary Clubs or other charitable bodies.

In 2000, the NCSH completed 22 water projects at a total cost of $ TT 2,202,797.30 with the NCSH contributing about 42% of the money. The final total project cost was about 50% less than the estimate, which was given by WASA. Almost 5000 people have

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[324] *Vision 21 Regional Report for the Caribbean*, *ibid.*

benefited from self-help water projects. Unit costs are generally less than $US 300 per meter of pipe installed. Unlike the NCSH, WASA has a lot of money, spending $US 53 million in 2000 for pipeline construction. In that year, $US 8.2 million was spent on pipeline replacement and extension[326] In-house projects executed by WASA's staff are cheaper than those, which have been contracted out, and some of these unit costs are comparable to the figures for the NCSH. There are some projects where the unit costs are also high, but no one at WASA noticed this. (Indeed, even the differences were not noted until the issue was raised by others).

Of course, project costs reflect terrain and topography, which influence the number of air valves or other appurtenances or whether the pipeline is installed in the verge or in the roadway. In the latter case, the road restoration costs, which are included, will vary depending on the type of road, which would have been disturbed to install the pipe. What is clear, however, is that the NCSH is making a difference in providing water supply expansion at a lower cost than WASA. Interestingly, there is not a single sanitation component in either WASA or NCSH projects, even though direct supplies of water to houses in Trinidad generally means that flush toilets are installed.

The Self-Help Model: A Critical Assessment

The self-help model in Trinidad and Tobago has been a vehicle for empowering many communities and improving their quality of life. Many of these projects are located in rural areas where farming is the major source of livelihood, therefore, providing potable water also means that both people and livestock have benefited. The self-help model is a relevant and useful strategy to provide access to safe drinking water to the un-served in Trinidad and Tobago. The process, however, is far from perfect and needs to improve in order to effectively manage a large amount of funds in the future.

The NCSH needs to do several things in order to move forward. These include the following, but the list is not exhaustive:
- The NCSH needs to be depoliticised and not view itself as an extension of the ruling party's political strategy. This is particularly important since not all local government bodies are controlled by the ruling party and in fact at least two, which are opposition-controlled, refuse to be involved with self-help projects.
- The NCSH must recruit professional and sub-professional technical staff so that more serious technical decisions can be made in-house instead of relying on WASA for this service.
- The NCSH needs to attract more partners in order to carry out its projects. These could include local corporate entities and foreign donors including non-governmental organisations.
- Advocacy needs to be increased beyond using political platforms to showcase completed projects, which bolster the government's image.
- There is a need for complete documentation of lessons learned from all projects including those, which did not quite meet expectations.
- The self-help process needs to be decentralised in a meaningful way into the local government structure. It is important that integration occurs in government-controlled

[326] *Vision 21 Regional Report for the Caribbean*, above.

local authorities. Even in these cases, it depends on personalities rather than the process. Therefore, a politically neutral process is required.
- As WASA acquires a fixed asset and new customers when a project is made operational, it should be required to pay into a fund a declining portion of the first five years of projected revenue for any project. This fund could be used to help those communities who require help and cannot contribute their share of the cost.
- Each water project must be required to have a wastewater disposal component as a condition of approval because providing water generates wastewater, which must be disposed of.

Community-Based Infrastructure Development and Hemispheric Cooperation

The NCSH model shows that there can be different ways of doing things and that indigenous solutions can be sustainable. The NCSH provides services to rural communities, which are not high on WASA's list of priorities. These are small and remote markets and their lack of services was not particularly attended to during the PSP although $US 600 million was spent by WASA during that period. In order for governments to sustain this alternate paradigm, which provides water services to the un-served, additional resources must be made available to institutions such as the NCSH.

Hemispheric co-operation can support this approach by first compiling a dossier of similar approaches in the region and convening a regional meeting to look at the results. The focus should be on how to improve the method. Regional and international organisations should advocate for self-help as a way of expanding coverage. Development at the lowest possible level is a major pillar of integrated water resources management (IWRM).[327] When communities are the drivers of the development engine, IWRM will be given a serious boost. International organisations have a significant voice in advocating particular solutions. Regional institutions and attitudes often treat community approaches as quaint and consider them to be limited in terms of providing solutions. They are often not considered as a preferred approach to development. Leadership in the hemisphere should mobilise resources to support such community-based developments.

8.4 Potable Water and Basic Health

By Guillermo A. Constain

More than a billion people in the world today consume non-drinkable water, and another 2.4 billion – 40% of humanity – lack adequate health services. Almost three and a half million human beings, the majority of them children under 5 years of age, die each year from water related illnesses – of which over a million result from malaria. In the majority of cases, these are preventable deaths. It is for these reasons that unsanitary water is the primary cause of death and sickness, directly and indirectly, in the world.

[327] *Vision 21 Regional Report for the Caribbean*, *ibid.*; WSSCC, above.

Warnings have been tabled regarding so-called "global thirst", the impact of forest degradation, climate change and the greenhouse effect, water wars and so many other themes that gravitate under our blue skies. This chapter focuses on the investments, management efforts and rationality required to address this challenge as much in large urban systems as in rural zones and small towns.

In the large urban systems, problems primarily center on the lack of resources, but general corruption and administrative inefficiency make any expansion project unaffordable. Companies are politicized, have extremely high labour burdens and additional costs due to bad lending services. This is causing a general discontentment and has, on occasion, induced violent reactions from inhabitants who have to put up with it. This situation could be deconstructed in order to give way to a real policy of contract that would make the market more transparent. This is an effort which demands great pragmatism and minimal ideological rancour in order to reform the disorderly and chaotic evolution of things in these areas.

This problem requires a real geopolitical perspective, working towards the creation of a multilateral arbitration system – one that can match the same power as the multinational corporations that dominate the water sector. Such a system would facilitate the harmonization of business contracts with countries from the south continent, such that acquisitions in Ecuador would benefit from the same contract and the same norms as those developed in Columbia or Brazil, and of course the same prices. It is hoped this will ensure 'fair play' that would eliminate inevitable abuses from sophisticated corporations or corrupt civil servants for example, chauvinistic tactics from populist governments or extremist groups that have no contact with reality.

Such a system could lead to the creation of a mechanism to internationalize conflicts and define a common jurisprudence while applying uniform systems and terms in contracts, that is, the same rules of the game for equal relationships and the same multilateral arbitration system. In principle, this system could well be the Inter American Development Bank (IADB) of which all the countries of the southern region are members. Together with the World Bank, the IADB would be asked to disclose complete information so that all relevant actors would know the limits and goals, including the conditions of the market and terms of negotiations, in other parts of the world.

This new climate of rationality would allow harmonization of other conditions of the market: with unions, other suppliers and users of the services, etc. With the assurance of fair play, viable businesses are more appealing to the capital market in that the profitability of investment is ensured without paying for the costs of corruption and inefficiencies, nor searching for co-financing from different sources, including the internal generation of resources to finance the expansion and improvement of the service system.

The case of rural communities and intermediate/medium-sized cities is different however, and is surrounded by paradoxes. An enormous amount of fixed investment has not been taken advantage of, and there are state investments that do not function

due to a complete lack of managerial vision in the operation and maintenance of the systems.

To the case of Colombia provides an illustrative example that can be useful for countries in the Americas. The superintendents of public services indicate that only 10% of the eighty water treatment plants that exist in Columbia function. Programs to create service lending businesses that are self-sustaining and competitive, do not appear to be present. There is little organization: non-potable water is provided to communities, at an extremely high risk for the development of illness and disease among the population. Not only does this situation risk death, but it also risks considerable misery due to not being able to enjoy life.

In fact, as time passes, water treatment practices and methods have accumulated without a coherent foundation and such methods have never fulfilled their economic and social productivity, be it due to an erroneous interpretation of its design or for the very limitations of the means to maintain them which have been neglected. They are nonetheless, important amortized investments which, with a dose of reality, investment and leadership, may serve as a good base to sustain a program which offers potable water and a service decent enough to the population to justify the charging of tariffs. Tariffs today are symbolic, but in their turn there will be an economic and social return to justify the new investments. The problem is more institutional than financial: a family pays only a dollar monthly for an inefficient service, while spending thirty times more on purchasing bottled water, the majority of which is of very bad quality.

The quality of water offered is the most important aspect of a system's financing which is what justifies the chargeable tariffs. The treatment of water and disinfection has strategic priority for the purpose of justifying any complimentary financial operation.

The proposal consists of rapidly remodelling existing facilities and integrating already developed technology through compact elements that complement it. Thus, the expansions use compact industrially produced plants and utilize equipment that produces the ingredients for disinfection on site - such as hydrochloric sodium from salt, which radically simplifies the operation and achieves a substantial decrease in operational costs. The price of acquisition is a fraction of that of conventional plants due to being industrially produced which renders the immediate design, construction and set up times much shorter.

Furthermore, this industrial solution has the advantage of minimizing the conflict of responsibilities that generally stands between engineering design and that of construction – each blames the other for the problems encountered. As in the industrialized solutions, design is incorporated in the equipment for which the responsibility shared. Thus, taking advantage of the fact that production of the materials on site achieves a clear reduction in operations costs.

Therefore, to rationalize a process that begins with few resources compared to the requirements, the variables that determine its cost must be reconciled by seeking fast and cheap solutions, such as appropriate technologies to produce immediate impacts. To do this, the initiation of a program which remodels any additional facilities available for

chlorine production plants is proposed, thereby achieving the minimum of what is required in the manuals that the system recognizes, the most elemental of the treatments being chlorination.

In this way, reaching the quality levels required to initiate a system of tariff charges for water would be achieved very rapidly.

However, one must also ask where the resources to advance the practices and acquisitions required to make it function properly would come from. This raises the issue of resources. In the connection between northern technology and the needs of the south, further questions are raised concerning debt relief and debt equity swaps – whose new conditionalities are totally in harmony with the characteristics of this model.

Treatment systems simply do not exist in Colombia. The Colombian Minister of Environment asserts that 95% of municipalities instead dispose of all their wastes in oceans, lagoons and rivers. In the model proposed above, projects would use compact plants, focusing on a commitment to efficient operation and maintenance, with an emphasis on disinfection through the application of chlorine produced on the site with electric plants. In fact, in developed countries chlorine production technology has already been developed on site and in harmony with the norms that accept a 30-40% removal rate if the discharge is chlorinated and meets the norms of bacterial content. These plants permit such a significant reduction in operational costs that they make these propositions (postulates) viable. And these are valuably decentralized solutions.

9. Mining and Stakeholder Participation

9.1 Mining and Stakeholders Involvement: Addressing Social Sustainability Challenges

Cristina Echavarria, David Brooks, and Gordon Peeling[328]

The Challenges of Stakeholders' Involvement

It is a significant challenge to bring mining within an operational framework for sustainable and equitable development. The challenge does not, for the most part, stem from the need to reconcile naive interpretations of sustainable development with the use of non-renewable resources. Rather, it stems from the need to make mining compatible with social goals such as human rights, good governance, and community stability. In the hemispheric context, these goals have been recently recognised by the assembled Mining Ministers of the Americas, as well as by the leaders of the Western Hemisphere. The last quarter of the 20th century saw environmental protection become an imperative for the

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mining industry. The industry, or at least large parts of it, responded well enough that it is now possible to speak of environmentally sustainable mining. The first quarter of the 21st century is likely to see an equal or even stronger imperative toward socially sustainable mining. Just as with environmental imperatives, social imperatives will be many and varied. The broad goal may be a sustainable and equitable mining industry, but that term conflates a huge range of challenges, among them:
- producing and facilitating access to information for participatory decision-making;
- providing analyses of trade-offs with and alternatives to mineral development;
- developing transparent and reliable social evaluation and monitoring systems;
- making lasting partnerships among corporations, communities and governments, as well as with the wide range of civil society organizations;
- designing and applying culturally sensitive mechanisms for conflict resolution over natural resources in indigenous territories;
- developing and implementing mine closure and rehabilitation practices compatible with the needs and objectives of nearby communities;
- making artisanal and small-scale mining sustainable in every sense of the word, which implies a focus on the miners and their families;
- assisting local governments to build capacity to deal with the multiple challenges of mineral development.

If those tasks are to be taken seriously, the very first step is the need to identify, legitimate and give wide latitude to all stakeholders - and that is why stakeholder involvement is the focus of this article. In the absence of active and knowledgeable stakeholders from all sectors of society, mining will not be compatible with social development; hence, it will not contribute to sustainable development and trade, and over the long run, it will not be politically sustainable.

The key point is that the contribution of mining to sustainable and equitable development will depend not only on the capacity and performance of the mining companies but also on the capacity and performance of other key stakeholders - local, regional and national governments; labour unions; non-governmental organizations in mining regions and elsewhere; and, advocacy groups that oppose mining at the local or global levels. The key challenge - for both the industry and for civil society - is to effect complete and respectful communication and engagement, and to see this engagement as one of the main engines required for moving towards more equitable and sustainable development of mining regions. Economically productive mines providing employment are no longer enough, not even if they are as environmentally sensitive as possible and not even if the companies build local health clinics and schools. This is a challenge for all stakeholders, but it falls most heavily on the mining industry and on central governments.

Greater stakeholder involvement is not easy. Even if stakeholder involvement is recognized as a necessary part of the political process, the urgency to obtain needed foreign direct investment and to generate jobs can mean that individuals and governments are forced to make decisions before trade-offs are fully analysed or understood. In many places in the developing world, decision-making takes place under the pressure of social unrest, economic globalization and structural adjustment. Just as developing countries are restricted in their development options by a non-level global

market and playing field, so do local communities find their needs and priorities mandated by central governments. As a result, the strategic importance of bio-diversity may be minimised, the rights and integrity of local communities over-ridden, public health hazards ignored, and the diversified livelihoods of rural dwellers undermined. Such conditions encourage creation of a veil of participation without permitting the time or the analysis necessary for meaningful public consultation or participation. Decision-making in such a context is, at a minimum, unsustainable, and, at worst, when people feel sufficiently ill-used, can turn to violence as a last resort. Under the right conditions, the entire national economy can be disrupted.

Addressing the Cultural and Social Differences of Isolated Communities

The foregoing problems come together most strongly when the expansion of mining takes corporations - whether private or public entities - to areas previously isolated from mainstream development processes. Many of these areas coincide with territories traditionally occupied or used by indigenous and other traditional rural peoples. In the worst cases, their rights and cultural integrity may be deemed contrary to the national interest. At best, the local communities will not have much, if any, freedom of choice to reject mining. Moreover, in the Americas, these areas are typically characterised by cultural and biological diversity and by fragile ecosystems (be it desert, mountain, tropical forest).

Social and cultural issues will not be easily distinguishable from environmental issues; the environment is the resource base upon which local peoples's typically meagre but sustainable livelihoods depend, and around which cultural and social norms have emerged. Basic public services are commonly either lacking or deficient. Ironically, the presence of government is typically very weak, yet great expectations are likely to be placed on mining companies, even during early exploration, to deliver these almost as a surrogate for government. The promise of "development," as communicated by government and by industry, creates the scenario in the early stages of mining, but all too often this development excludes the more vulnerable groups and communities from its benefits.

The mining industry finds itself today at a fork in the road. One fork follows the worn path in which mining goes on with sometimes better, sometimes worse relationships with local people, but no real stakeholder participation in decisions. The other fork follows the barely trodden path in which stakeholders other than industry and national governments play significant roles in all decisions, including whether to mine. Our assumption is that the mining industry will choose the fork that leads to wider and deeper stakeholder involvement. It is the correct choice, but a very difficult one. Certainly, the past is not a good guide to the future. Worse yet, we do not know what the guide should be, or how useful any general guide can be when applied to conditions in specific mining regions. What we do know is that the promise of "development" is no longer enough to ensure access to resources on the part of corporations and governments. Putting forward a corporate or government development scenario only multiplies the questions: "Development" according to whose definition of quality of life and well-being? Development for whom? On (or under) whose land, or with what water? And, perhaps most importantly: Who is going to make those decisions, and by

what processes? One can accept that trust and respect are the necessary ethical bases for meaningful participation in decision-making processes, yet be uncertain how to achieve them.

The challenge of social sustainability for mining is far more daunting than that of environmental sustainability. An sustainability impact assessment (SIA) is a much more complex document than an environmental impact assessment (EIA); it is much less easy to generalize from one site to another, and it will be far harder to define "success." Indeed, uncertainty is probably the appropriate stance, at least at this stage, as we seek to establish "dialogues of knowledges" between mainstream scientific knowledge and traditional experiential knowledge, and between globally sensitive corporate profit-and-loss statements and locally sensitive communal social contracts. Strangely, some forms and level of conflict may be evidence of success, not failure. It is an enigmatic and troubling situation indeed, but one that the mining industry cannot ignore. The alternative may put rock in the box in the short term, but it is not sustainable in the long one.

9.2 Mining and Stakeholder Involvement: Rhetoric or Reality? A Chilean Case Study

By Hernán Blanco and Nicola Borregaard[329]

In the Americas today, there needs to be serious reflection on the relationship between trade, mining and stakeholder involvement. This article focuses on identifying possible opportunities for trade liberalization to contribute to environmentally and socially better mining. The question is difficult because the link between trade policies, mining production and performance is not as direct as some might think.

In Chile, decisions on production and environmental protection in mining have not been *directly* related to specific trade liberalization initiatives. Instead, the unilateral opening of the foreign investment regime, modifications to the mining code (giving more guarantees to mining companies), internal corporate environmental policies and management systems, recent environmental legislation, and mineral prices seem to have been fundamental factors in mining development and performance over the last 15 years. Neither recent trade and investment agreements nor environmental cooperation agreements have considered explicit provisions regarding mining and the environment.

There are, however, other *indirect* links between trade, mining and the environment. These links are expressed in international, mainly mining-related, forums like: international minerals study groups (particularly the International Copper Study Groupsponsored by governments); specific international standards, conventions and treaties, like the Basel Convention and ISO 14000; and recent global initiatives, such as the Mining, Minerals and Sustainable Development Project, within the Global Mining Initiative (sponsored by industry).

[329] *Hernán Blanco is a researcher, and Nicola Borregaard the executive director, of RIDES, a sustainable development institute in Chile.*

After presenting basic background information, this article briefly reviews some relevant aspects of the context of mining in Chile, and then analyzes part of the recent experience on mining and stakeholder involvement. Mining today is an extremely globalized activity, but the environmental and social issues related to mining are, at least at the level of production of minerals, of a local nature. This dichotomy makes the involvement of all relevant stakeholders an urgent and difficult task. The article ends with some suggestions and thoughts about the possible link between trade and the environmental and social performance of mining.

Mining: A Global Activity with Mainly Local Effects

Mining is a global activity with mainly local effects. Mining in Chile has been historically important. Chile exported an average of US$6.9863 billion of metals, mainly copper, per year during the period 1995-99 (over 40 percent of Chilean exports). Over 95 percent of total Chilean copper production is exported. During the last decade, the mining sector has contributed 8.5 percent of the country's annual Gross Domestic Product (GDP). The foreign investment flow into the mining sector between 1974 and 1999 reached US$ 14.723 billion, equivalent to 36.2 percent of the total Foreign Direct Investment (FDI) in Chile in this period (US$40.66 billion), thus maintaining its position as the sector with the highest contribution and greatest attraction for foreign investment. In the years 1989 and 1994 mining attracted 72 and 70 percent, respectively, of Chilean FDI. In the four northern regions, out of thirteen in Chile, mining is the main source of growth and income, while quality of life is publicly recognized as poor.

Among the main challenges to sustainability are:
- historical, current and future problems associated with the abandonment of mines and mining facilities;
- water access, use and conflict with other water-demanding sectors;
- some limited problems and threats to biodiversity in the fragile *altiplano* environment; and;
- economic, social and cultural development in the mining regions both during and beyond the life times of the mines.[330]

To analyze stakeholder involvement, particularly of local interest groups, it is necessary to focus on the social and cultural characteristics of the mining regions in Chile.

Participation and the "Camp Culture"[331]

In the region of Antofagasta - the most important mining region in Chile - as in all other regions in the country, the historical influence of political centralization has implied, at the local community level, a culture of dependence on decisions made by the central

[330] There are other issues, such us air contamination due to smelters, which are being addressed and enforced through regulations and standards.
[331] This section is based, to a great extent, on the partial results of the project "Sustainability Fund for the Antofagasta Region", funded by UNEP.

powers. However, unlike other regions, for Antofagasta's population this political centralist dependence has been strengthened by the further dependence on a single production sector: the mining sector. No other region in Chile depends to such a high degree on a single production sector. As mining has often meant locating workers to remote areas, the industry has taken on the responsibility for housing requirements, including building complete mining towns. The responsibilities of running the towns and providing education and health services has historically been given to the mining companies. The reliance of a large percentage of the people in the region on the mining sector, and the development of the "camp culture", has meant the region has a different social structure and different social involvement patterns from other regions in the country.

The mining companies have always provided for their employees, and, for many of them, leaving the "protection" of the company is very hard. Taking responsibility and being involved in local community concerns is a big jump from everything being taken care of by the company. In the last ten years, with new mines being opened, there has been a change in company policies, and a change in the method of helping the miners and their families. There has been an attempt to "wean" the employees away from their dependency.

Even though there has been a change from housing all miners in the same area or building a mine town, nevertheless, workers from one mine tend to have a strong identity with their mine and their fellow workers, and many of their social activities will be with the people from their mine. This is possibly the explanation behind the observation that there is a lack of interest in participating in neighbourhood committees. Scarcely four percent of the population of Antofagasta is registered in neighbourhood committees, compared to 10 percent nationally, and 15 percent in some other areas. [332] In reality this is not an indication of a group of people who do not care about their environment or who do not want to contribute to the community. It reflects the strong identities that people have with their particular mine and group of workers. All these aspects add to the feeling that the old "camp culture" still exists. Furthermore, it seems in Antofagasta and Calama (130,000 inhabitants) that there is the perception — particularly among the managerial personnel that come from other regions — that this is the place they live at the moment and earn money, but it is not the place they intend to remain.

Stakeholder Involvement – Recent Experiences

There are formal (or statutory) and informal opportunities for public participation and stakeholder involvement in environmental decision making in Chile. The former are defined in the environmental framework law and are mainly related to the environmental impact assessments (EIA) of new projects. The latter are associated with the different forms in which companies and communities interrelate on a more permanent basis. A third possibility for stakeholder involvement has been the international forums related to mining and sustainable development.

[332] CIPMA, *Confronting Sustainability in the Mining Sector –*
What Role For A Sustainability Fund? (Santiago: CIPMA, October 2000).

In Chile, there are very few channels for formal public participation, apart from through political elections. Although extremely limited, the EIA system offers an opportunity for participation. The law states that a environmental impact study, developed by a proponent and submitted to the environmental authority, is of public access, and that organizations and affected citizens can review the study and send written observations to the authority. The authority, according to the law, should consider public observations in its final decision. This procedure is far away from stakeholder *involvement*, which refers to enabling citizens to commence and take responsibility for a specific process. The approach in the EIA system is, therefore, more consultative than engaging in nature, and hence involvement is quite limited.

The EIA system has been an important milestone in the way decisions, particularly those with environmental implications, are made in Chile. It has also raised the expectations for public participation in other arenas and beyond decisions for new projects. One important lesson from the experience has been the fact that participative procedures for managing the relationship between companies and communities are badly needed, as well as for designing and implementing policies, plans and programs.

The mining sector, with its explosive growth in the mid-1980s, when the EIA system did not exist, contributed significantly to EIA development and practice. The difficult social and cultural context in which mining is developed has also forced the sector to go beyond formal methods of participation, to become more directly involved with the communities.

A recent interesting experience is the set up of cooperation initiatives between companies, local government and communities, for instance for the joint monitoring of specific environmental components. Mining companies, apart from their direct contribution in terms of employment and taxes, are now contributing to the communities in different indirect ways. It is increasingly apparent that the development of mining areas, particularly in the Antofagasta Region, and the quality of life for the inhabitants, has been enhanced by the voluntary contributions, support and help provided not only by the mining companies directly, but also by the workers who have formed innumerable help groups. This help is not always in the form of monetary donations but on many occasions it is a donation of time or expertise. Additionally mining companies have been active in contributing to specific educational or health cooperation initiatives.

In the Region of Antofagasta there is one Foundation, *Fundación Escondida*, that was created by a mining company in order to systematically confront social aspects, and to create funds to make contributions to the local community that would last beyond the life of the company's mining operation. The Foundation has concentrated its work on three areas: education; health; and technology. It is working to provide minors and adults with the necessary technical training for working in trades, and in technical and business activities; to establish, maintain and fund medical and educational facilities; to develop technological research for the development of natural resources; and to make positive, long-lasting impacts on the standard of living of communities in the region.

There are a number of interesting elements in the idea of the Foundation. It is a decentralized body from the company that created it (its board includes representatives

from the community), its funding priorities are identified by the community itself, and it will continue working after the company is gone.

Stakeholders' Involvement at the International Level

Another level of stakeholder involvement in the mining sector is at the international level. As mentioned above, there are many forums related to mining and sustainable development, including the International Copper Study Group (sponsored by governments), international standards such as ISO 14000, and mechanisms under the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal. Although in some of these forums there is some sort of participation from non-governmental organizations (NGOs), it seems that much has still to be done to achieve wider involvement from NGOs, particularly from mining communities.

An interesting initiative in this latter sense is the Mining, Minerals and Sustainable Development (MMSD) project.[333] Originally an industry initiative, now this project is also sponsored by non-industry organizations. Its goal is to look to the ways in which mining can better contribute to the transition to sustainable development. The project is being carried out in six regions of the world: Latin America, North America, Europe, Australia, South East Asia, and South Africa. The project is directed by the International Institute for Environment and Development (IIED) in London. It has in each of the regions, a partner organization or group of organizations that are working mainly in two related areas: research and stakeholder involvement. In Latin America, the partner organizations are the Mining Policy Research Initiative (MPRI) and the Environmental Research and Planning Center – Chile (CIPMA).[334] The research and stakeholder involvement process in Latin America is implemented through partner organizations in the most important mining countries and will be coordinated and integrated by MPRI and CIPMA.

The road ahead

The road to more and better stakeholder involvement in mining is not an easy one. The context - historical, political, economic, social, cultural and environmental - is particularly complex. There are many dilemmas to face.

For companies, these dilemmas include:
- how to contribute to the education and well being of the community, without taking a paternalistic approach;
- how to overcome the prevailing feeling in the communities that the companies provide for *everything,* without generating frustration and opposition; and
- how to change the perception of a number of stakeholders, particularly community leaders, that mining does not leave anything after it is gone, without generating false expectations.

For government and companies, these dilemmas include:

[333] For more information on the project, see online: http://www.iied.org/mmsd.
[334]For information on MPRI, see online: http://www.iipm-mpri.org/?lang=eng. For information on CIPMA, see online: http://www.cipma.cl/english/index_eng.htm.

- how to overcome the historical centralization in the way decisions are made, without challenging the power of central authorities; and
- how to benefit from good initiatives from single companies towards stakeholder involvement and sustainability (such as the establishment of Fundación Escondida), without missing the opportunity of profiting from potential synergies that the coordination among companies and with local governments might offer.

Communities, on the other hand, need to create a sense of belonging. People need to look beyond their own mining companies and get organized, informed and participate in the context of their cities. The quality of life in the mining cities - regarded as very poor, particularly by people that come from other regions to work in mining - will probably not improve automatically by the initiatives of single mining companies. There is a need to coordinate the different efforts and take advantage of possible synergies.

Companies, communities and local governments need to establish and maintain sound relationships based on mutual trust. Companies are, in a way, responsible for building a bridge between their globalized world where they do business and local communities, where most of the effects stay. They should make efforts in getting to know their communities, informing them in timely and in culturally appropriate ways through two way communication processes, and involving them in relevant decisions.

Although it is doubtful that future trade or investment agreements will directly address mining and its performance, the liberalization process may broaden the objectives of mining companies to consider sustainability goals and concerns in general. In the meantime, other international forums have to offer avenues for sharing experiences and, for example, designing and promoting codes of practice, standards and certification procedures.

9.3 Placer Dome's Sustainable Mining Policy

By Rick Killam[335]

In the context of the regional trade and sustainability agenda, there is space for progress on the concerns of mining and stakeholder involvement. How can trade liberalisation, as it pertains to mining, provide more consultative, safer and environmentally sound opportunities; support win-win relationships with regard to community involvement and the life cycles of metals; and strengthen environmental co-operation regimes to address environmental and social challenges?

The roles and responsibilities of mining companies are not often approached from the perspective of international trade. Many are fascinated by the developments and sometimes the controversy that surrounds trade liberalisation. However, the day-to-day reality of living and working in Latin America normally addresses sustainable development issues from a corporate policy perspective, rather than from the

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macroscopic perspective of nations as they seek to find the balance between the economic, social and environmental terms of a free trade agreement.

Placer Dome is a Canadian mining company that currently operates 15 mines in Australia, Canada, Chile, Papua New Guinea, South Africa and the United States. Its principal products are gold, silver and copper.[336] In 1998, Placer Dome adopted its Sustainability Policy.[337] The policy recognises that mining cannot occur without an impact upon the surrounding natural environment and communities and also recognises that responsible mine operators must strive to limit negative environmental and social impacts.

In adopting the Sustainability Policy, Placer Dome did not expect to fully satisfy all stakeholders. However, it has established the objective to develop a commonality of vision to support honest dialog and co-operation with stakeholders. Placer Dome understands the need for a "social license to operate" and as a company, knows that performance will influence the ability to access land for exploration, and to permit, develop and operate mines. While mines are temporary and ore bodies are eventually depleted, companies need to demonstrate that that they have the opportunity to contribute to sustainable economic and social development while ensuring that sites are restored to a state that is compatible with a healthy environment.

The Policy has a global scope but must be implemented locally. Trade issues do not necessarily bear upon its application in a direct sense. Rather, the company's activity and responsibility might better demonstrate the benefits that can be derived with liberalised trade.

In Chile and elsewhere, international mining investment by responsible companies provides for the introduction of state-of-the-art technology that has been developed to meet the environmental standards and operating efficiencies dictated by global competition and the standards of the international community. At Placer Dome's Zaldivar Mine in the 2nd Region of northern Chile, state-of-the-art solvent extraction and electrowinning technology is used to produce 99.99% pure copper using a hydrometallurgical process that eliminates the contaminating emissions of traditional smelting processes. The transfer of clean technology yields an inherent efficiency and internalises environmental control. Such advanced technology also provides capacity-building opportunities for the professional staff and the workforce. It fosters the development of networks of expertise that transcends international boundaries. This expanded capacity and knowledge is portable and it can be applied to other economic development opportunities.

On the other hand, trade liberalisation can also provide the opportunity to introduce technology and greater capacity to assist the local community in more direct ways. At the Placer Dome Las Cristinas Project in Venezuela, a program has been underway for several years to enable an artisanal mining community to operate in a more organised manner that has created greater operating efficiency and a reduced impact upon the

[336] For information on Placer Dome, see online: http://www.placerdome,com.
[337] For information on Placer Dome's Sustainability Policy, see online: http://www.placerdome.com/sustainability.

environment. The miners have formed four legally registered associations and agreements have been negotiated between the parties regarding their respective rights and responsibilities. The miners receive engineering and geological support from the company as well as basic training in accounting, administration and first aid. An exploration program has been ongoing, and a mercury-free process plant is now operating. As a result, this mining community has developed new skills that allow residents to better manage their lives while also reducing their impact on the environment.

Openness and equity are the foundations of sustainable relationships. Constructed prior to the adoption of Chile's 1994 Basic Environmental Law, the La Coipa and Zaldivar Mines like other similar developments of that period submitted voluntary environmental impact assessments (EIAs) to the authorities. In the absence of a regulatory requirement, the Chilean policy required that Placer Dome meet its own corporate criteria and the best international practices. The regulatory environment has, of course, evolved in Chile with an Environmental Impact Assessment Regulation now in place and further regulatory statutes being developed for industrial effluents, hazardous wastes and mine closure. The requirement of public participation has been incorporated into the EIA Regulation. The processes to fulfil its intent are now evolving as project proponents and communities learn and gain confidence in the value of this more transparent relationship.

As an industry, it is easy to say 'we want to be good neighbours.' However, to achieve this, the company must know its neighbours and this requires a proactive commitment that seeks to engage with the community, the authorities and other stakeholders. Mining executives are often expatriates, and even just bridging the cultural gap can be uncomfortable. In turn, the relationship between the national mining industry and their stakeholder communities also requires a paradigm shift with new and unfamiliar approaches to old relationships. It is possible to be optimistic, however, that the strengthening democratic institutions in Chile will be reflected by the public participation process and vice-versa.

Several initiatives presently underway are seeking to address the social and environmental challenges of mining and to facilitate the exchange of information, ideas and concerns between the mining industry and its stakeholders. At a global level, there is the Global Mining Initiative that includes its multi-regional, Mining, Metals and Sustainable Development stakeholder consultation process. [338] Within Latin America and the Caribbean, the International Development Research Centre's (IDRC) Mining Policy Research Initiative is sponsoring investigations to facilitate the understanding and resolution of equity issues.[339] In Chile, a Framework Agreement on Clean Technology has been recently signed between the Government and the Chilean Mining Council (the "Consejo Minero") to foster co-operative and voluntary programs to address a number of mining environmental priorities. [340]

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[338] For more information on the project, see online: http://www.iied.org/mmsd.
[339] For information on MPRI, see online: http://www.iipm-mpri.org/?lang=eng.
[340] For information on the Chilean Mining Council, see online: http://www.consejominero.cl/html/english/conozcanos_quees.php.

To succeed, all of these programs must be inclusive, not exclusive. They must base themselves on the principles of openness and equity. They must recognise the precautionary principle but be founded upon good science. Where subsidiarity will promote credibility, it must be incorporated to respond locally while thinking globally.

In conclusion, certain suggestions can be contributed to the debates defining policy options for mining and sustainable development.

First, the mining industry must have clear rules for doing business and established dispute resolution mechanisms. The industry is risk-averse and will always prefer to invest where risk is understood and manageable.

Second, gradual and continuous improvement must be recognised in order to allow the hesitant to become engaged and to be able to manage change.

Finally, companies are participating, along with many others, in a process that demands patience. In their exuberance, sustainable development professionals can easily accelerate the discussion beyond the comfort zone of some of the stakeholders. Without the participation, consensus and commitment of all the actors, the best of intentions will be frustrated. Those who care about sustainable development must not allow that to happen.

10. Progress on Climate Change Policy in the Americas?

10. 1 Global Climate Change and the Caribbean

By Lionel Hurst[341]

This article will focus on a set of very ambitious questions. What are the recent results of existing partnerships and initiatives for hemispheric sustainable development? How can key institutions collaborate to advance sustainability? What are the priority issues and concerns in the hemispheric integration process? These questions, addressed by a citizen from a very small Caribbean island-state (Antigua and Barbuda), take a new meaning. Yet Antigua and Barbuda is a sovereign state, the sovereign equal of Canada or the United States. The country has, for 20 years, been a member of the United Nations; with a seat at the table of the Organization of American States; and a Prime Minister present at the Quebec City Summit of the Americas, participating in the Americas Summit process as one of thirty-four elected Heads of State. This article focuses on one priority issue or concern that has multiple adverse implications for the entire hemisphere.

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Global Climate Change and the Americas: Energy

The most pressing, long-term issue of sustainability, which concerns the Caribbean, is global climate change. The 500-year-old civilization created by our forebears after 1492 (American civilization) is hurtling down a dead-end at such velocity that unless it takes immediate steps to lessen its reliance on energy from fossil fuels, it will demolish the most vulnerable, tiny states in this hemisphere before it destroys itself, like every other human civilization which came before. Energy is a key priority issue.

Each year, Western Europe and North America dump more than 15 billion tons of carbon dioxide and other greenhouse gases into the earth's skies, deliberately. The countries have a policy to make skies into a waste disposal site. By engaging in this reckless behaviour, they are altering, maybe forever, the beneficent climate, which has allowed civilization to emerge.

American civilization is the most inventive and creative ever, in the short history of the human race. This planet has been in existence for 3,500,000,000 years. Human beings have been on this planet for about one million years. Civilization, as it is known, emerged only 10,000 years ago when earth's beastly climate went into a slumber. Today, humanity is poking that beast.

Most of the conveniences and comforts which people enjoy are inventions of the past century. The automobile, the airplane, the telephone, refrigeration, central heating and air conditioning, the computer, universal health coverage, viagra . . . these are all very recent inventions of the 20th century and they all require tremendous amounts of energy in order for their systems to work.

Most people in the Americas have no idea how electricity is generated. Because electricity generating plants are far removed from cities and human populations, civilization also suffers from a disconnect, believing that no responsibility is borne for degrading the environment, endangering the lives of many innocent people and future generations, and for overseeing the death each year of thousands of species of plants and animals which are even unknown to humans.

The recent decision by the United States President to boycott a multilateral instrument which was negotiated in good faith, is worrisome - in part because there is so little outcry. The United Nations Framework Convention on Climate Change and its Kyoto Protocol are intended as first steps towards the successful management of this hemispheric and global challenge.

The harm to the environment in the Caribbean as a result of the abandonment of the goals of this treaty is real and not immediately reversible. Sea-level rise, extreme weather events like hurricanes, droughts, and floods, exact a toll which Caribbean islands have not agreed to pay.

The Quebec Summit Declaration asserts that leaders recognize the importance of energy to the region's prosperity, to an improved quality of life, and to environmental well-being. The leaders committed to fostering energy integration, enhancing its regularity

framework, while promoting sustainable development. However, renewable energy received short shrift. The Declaration carved out a special place for the Organization of American States (OAS); however, leaders failed to provide that institution with the resources which it needs to fulfill its many mandates and made it difficult to foster the collaboration required to ensure success of the very mandates which leaders handed to it.

The OAS and Sustainability

The key institution in this hemisphere, responsible for advancing sustainability, is the OAS, founded in 1948. [342] Canada remained outside of the OAS until the Soviet Union collapsed and the Cold War was at an end. The Canadians used to view the OAS as a kind of multilateral tool, which a certain southern neighbour freely manipulated to achieve its own policy ambitions. Canada remained outside of the OAS for 43 years, until 1991. Today, Canada plays a very important leadership role within the OAS and the hemisphere. Canada's mere presence in the OAS has strengthened, even emboldened, the roles which the very small states can and do play in that hemispheric institution.

One of the most far-reaching proposals put forward by Canada was the creation, within the OAS Committee system, of a Committee on Hemispheric Security. The Council of Ambassadors at the OAS, the Permanent Council, had three Committees before Canada joined. When this behemoth to the north, free from any history of interference or intervention in the internal affairs of any American State, proposed that security be an area for special treatment within the OAS, it won overwhelming support from the membership. Overwhelming is not unanimous.

Yet, Canada won the unanimous support of the countries of the Caribbean for this initiative. Bear in mind that beginning in 1965, the first English-speaking country of the Caribbean joined the OAS. By 1983, eleven others had so done. Caribbean countries now number 15 out of 35 members of the OAS. Cuba, the largest of Caribbean island states, has been suspended for three decades but remains a member. Canada, the Central Americans, and the hemisphere's smallest countries make up nearly two-thirds of the membership of the OAS.

Recent Results of Partnerships and Initiatives

Within the Committee on Hemispheric Security, Caribbean countries have begun to define security as multi-dimensional, and encompassing traditional notions of security as well as new threats to sovereignty, which are no less deadly than an invading army. Climate Change, which generates sea-level rise and an increase in the intensity and ferocity of hurricanes, is one such issue, which we have brought to the OAS. It is a security challenge to which there is no military solution. HIV/AIDS is another.

Collaboration is necessary to find solutions, between the OAS and the World Bank, the United Nations Environmental Programme (UNEP), the Caribbean Community and

[342] For more information on the OAS, see online: http://www.oas.org.

Common Market (CARICOM), and the University of the West Indies, among others. Together, these institutions will be able to find ways to build defenses against the new dangers, which threaten to undo all present efforts to achieve sustainable development.

Conclusion

Sustainability in the hemisphere is achievable. Every problem or challenge faced by American civilization today can be overcome. Financial resources, human talent, and political will, when applied frontally, succeed. American civilization can thrive and flourish beyond this generation's time horizon. A summit is a great means for trying to do just that, and the leaders and countries involved are to be congratulated for helping to make the future more certain.

10. 2 Implementation of the Kyoto Protocol: The Cases of Argentina and Brazil

By Frederic Patelin

This article reviews the Argentinean and Brazilian positions on the United Nations Convention on Climate Change and the Kyoto Protocol, more specifically, projects eligible to inclusion under Kyoto's flexible mechanisms.

Climate change is held to be one of the most serious threats to the Earth's environmental sustainability, to human health and well-being and to global economics. It is a complex subject in that it touches upon elements from science and economics to politics and law.

As international lawyers working specifically in the Mercosur countries, we have been asked to discuss the following topic: "What is the position of Argentina and Brazil on the United Nations Convention on Climate Change and the Kyoto Protocol, and more specifically, what projects are eligible to becoming part of the said Kyoto's flexible mechanisms". We will limit ourselves to the legal aspects of that question.

First, we will analyse I) Argentina's and Brazil's position on the UN Framework Convention on Climate Change (herein after FCCC) and the Kyoto Protocol (herein after KP) on the basis of the different sources available to us. We will then discuss II) the opportunities present in both countries deriving from the Kyoto flexible mechanisms and in particular, the clean development mechanisms (CDM).

Before we address these two questions, let us briefly present the evolution of these two international norms, FCCC and KP, as well as the functioning of the different flexible mechanisms.

First, let us remember the goal of the Framework Convention on Climate Change concluded in Rio de Janeiro (Brazil) in 1992, the objective of the Convention is to stabilize the concentrations of Green House Gazes (GHG) at a level that would prevent human activities from "dangerously interfering" with the climatic system.

All countries that have ratified the Convention are engaged to develop a "national Communication" which includes an inventory of GHG emissions emanating from activities in the industry and energy sectors, from soils and forest exploitation, from agricultural activities, as well as from domestic and industrial waste treatment. This Communication also includes precautions to be taken to respect the FCCC.

The FCCC came into force on the 21 of March 1994, 90 days after the reception of the 50th ratification. It has received, to this day, 186 instruments of ratification, acceptation, approbation and accession.

In December 1997, in Kyoto (Japan) the States have agreed to a protocol, under the FCCC, named Kyoto Protocol.

Up until today, several countries have signed the Protocol but a majority of countries are waiting to see the conclusion of the negotiations around operational details before they engage in ratification or non-ratification. To come into force, the protocol must be ratified by 55 signatory parties to the FCCC, notably the industrialised countries – also known as the Annex I[343] parties – representing at least 55% of the total emissions of carbon dioxide as of the year 1990. So far, only 30 parties[344] have ratified the juridical instrument which means that the emissions objectives for the majority of Annex 1 countries have not yet come into force.

The objective of the Kyoto Protocol is to engage industrialised and developing countries towards a market economy[345], to realise quantifiable objectives (in terms of carbon dioxide levels) in decreasing their GHG emissions. More precisely, these countries are engaged to reduce their global emissions of six GHGs to levels lower by at least 5% than those in 1990 during the five year period of 2008 to 2012. This engagement amounts to an assortment of different objectives for each country.

On side with these obligatory and strictly quantified engagements undertaken by Annex 1 countries, the Kyoto Protocol has incorporated the possibility for these countries to resort to three flexible mechanisms[346] to help attain their national objectives:

1. Joint implementation (JI) [347]
2. Clean development mechanisms (CDM) [348]
3. International emissions trading (IET) between Annex 1 countries which will start in 2008[349].

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[343] Annexe I. : Annex to the FCCC that lists the countries (or parties) which have to bring back their emissions level to those prior to the 1990 GHG levels. This list regroups most of the OECD countries and a series of European countries with varying economies.

[344] These 30 countries are developing countries.

[345] Annexe B countries : this annex the quantified emission limitation or reduction commitment for each country for the 2008-2012 period, expressed in 1990 emission percentage.

[346] It is important to underline the different nature of these three instruments of flexibility. Anglo-Saxons authors make a distinction between a "closed" system of exchange (*closed market*) associating countries linked by constraining quantified objectives (Annexe I countries), which applies to joint implementation and international emissions trading; and a system open to all parties to the Convention (*open trading)* such as the Clean Development mechanism.

[347] Article 6 of the Kyoto Protocol.

[348] Article 12 of the Kyoto Protocol.

[349] Article 16 of the Kyoto Protocol.

1. Joint Implementation

Article 6 of the Kyoto protocol describes joint implementation between Annex 1 countries in these words:

> " For the purpose of meeting its commitments under Article 3, any Party included in Annex 1 may transfer to, or acquire from, any other such party emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy… ".

Under this disposition, joint implementation should only be effective as of 2008. However, a pilot phase - excluding any credit attribution - has been launched at the COP reunion in Berlin in 1995 to test the concept.

A re-interpretation of the joint implementation concept at COP Berlin has permitted Annex 1 country enterprises to finance projects in developing countries; these enterprises then reserve the right to the future credits, and in so doing, contribute to sustainable development of the receiving countries.

During this pilot phase, several industrialised countries[350] have implemented national programs to encourage the realisation of joint implementation projects and to benefit from emissions credits that complement their own reduction efforts. In addition to States, environmental NGOs[351] and the private sector[352] have equally engaged in joint implementation projects.

At this point, the objective for the participating corporations is not only to prepare for a future possibility of rendering their emissions quota more flexible, but also to master an instrument that they judge is adapted to their expectations, notably regarding perspectives of implementation on new markets, the development of partnerships or the publicity resulting from such projects in the domain of environment and development.

2. Clean Development Mechanisms

Article 12 of the Kyoto Protocol establishes a clean development mechanism which objective is to

> " assist Parties not included in Annex 1 in achieving sustainable development and in contributing to the ultimate objective of the Convention and to assist Parties included in Annex 1 in achieving compliance with their quantified emission limitation and reduction commitments… ".

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[350] Notably the United-States, Norway and the Netherlands.

[351] The Nature Conservancy, National Fish and Wildlife Foundation, etc.

[352] For now the main enterprises engaged in joint implementation projects are linked to the energy sector, whether it be power companies such as Wisconsin Elec. Power. Co. or Dutch Electricity Generating Board, - who are some of the greatest producers of GHG who are trying to anticipate instauration of constraining regulations on their emissions level- ; or developers of equipment for the production of renewable energy.

This mechanism thus allows:

- The Parties not in Annex 1 and that are not yet engaged in quantified reductions of GHG to benefit from activities executed within their territories which will translate into certified emissions reduction.
- The Annex 1 parties to use the certified emissions reduction thus obtained to fulfill their engagement.

The CDM follows a logic of compensation, which supposes that the credited emissions reductions are real, quantifiable and link to a specific operation.

Operations put in place within the CDM framework will allow countries to obtain certified emissions reductions between 2000 and the beginning of the engagement period in 2008.

Financial levy will be conducted on CDM financed activities to coffer - on the one hand, administrative expenses (notably those linked to the implementation of a control mechanism) and on the other hand, to finance adaptation measures in the countries not in Annex 1 that are most vulnerable to climatic changes.

Carbon Sinks: A controversial topic

Another disputed question is whether, within the CDM, only projects reducing GHG emissions will be credited or if projects which remove existing or future carbon dioxide from the atmosphere, such as reforestation, should also be included.

Although joint implementation within the Annex 1 countries, as mentioned in Article 6 of the Protocol, includes " any such projects provides a reduction in emissions by sources, or an enhancement of removals by sinks…", the inclusions of sequestration projects is an ongoing debate within the CDM framework. Indeed, the option is not expressly mentioned in Article 12, which only talks about "emissions reduction". It is completely silent on the option of using carbon sinks. A strict interpretation of Article 12 can thus, lead to exclude carbon sequestration from the field of CDMs. However, the question has not yet been settled.

It is appropriate to note that, during the pilot phase, joint activities of carbon sequestration have been registered.

Consequently, it is certain that carbon sinks implemented in developing countries will be included in the Kyoto flexible mechanisms, either as joint implementation or as clean

development mechanisms, in the hypothesis that a larger interpretation is given to Article 12.

3. International Emissions Trading

Article 17 of the Kyoto protocol defines exchange of negotiable emissions permits between states:

> "The Conference of the parties shall define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading. The Parties included in Annex B may participate in emissions trading for the purpose of fulfilling their commitments under Article 3. Any such trading shall be supplemental to domestic actions for the purpose of meeting quantified emission limitation and reduction commitments under that Article."

Guidelines for the implementation of Article 17 have not yet been established. The possibility for States engaged in a quantitative reduction to exchange permits creates a certain flexibility and may allow for a more efficient economy. Actual negotiations are crystallized on the right of each mechanism (Certified Emissions Reduction Units, Certified Emissions Reduction and Emissions Rights) to be part of an exchange between parties.

Beyond the actual indecisiveness of the norms governing the flexible mechanisms, we consider that the devices they implement represent an inescapable opportunity for the private sector to engage in GHG emissions reduction, which will soon become an imperative, while contributing to sustainable development.

I. The positions of Argentina and Brazil on the UNFCCC and the Kyoto Protocol

Before we discuss the official positions of Argentina and Brazil on the UNFCCC and the KP, we recall briefly that Argentina and Brazil are parties to the main international conventions on environmental law, notably:

(i) Vienna Convention for the Protection of the Ozone layer of 1985 and the Montreal protocol of 1987 ;
(ii) Convention on Biological Diversity of 1992 ;
(iii) The Convention to Combat Desertification of 1994 ;
(iv) Ramsar Convention on wetlands;
(v) CITES Convention on international trade of endangered species of wild fauna and flora.

Argentina and Brazil, as members of the UN, are involved in all the programs and negotiations set forward by this organisation regarding environmental law.

Moreover, Argentina and Brazil as member of the WTO are subjected to the environmental rules pursuant to the GATT (Art. VIII and XX).

Within the OECD, Argentina and Brazil, as Chile have adhered Declaration on International Investment and Multinational Enterprises of June 24th 1976, which has been adopted as a recommendation. The Annexe of this declaration formulates certain leading principles for multinational corporations concerning employment, competition, financing, taxation and environment.

In so doing, these States participate in the works of the International Investment and Multinational Enterprises Committee composed of corporation's representatives – *The Business and Industry Advisory Committee-* and employees – *Trade Union Advisory Committee-*.

We will briefly present the official positions of Argentina and Brazil on the UNFCCC and the Kyoto Protocol.

Argentina:

On June 12, 1992, Argentina signed the UNFCCC and ratified it on March 11, 1994. During the Conference of the Parties in Japan, 1997, which led to the signature of the Kyoto Protocol, Argentina had an important role in the negotiations as the Special Representative for International Questions on Environment of the Department of External Affairs had been one of its main promoters. On March 16, 1998, Argentina signed the Kyoto Protocol. During the COP 4 in Buenos Aires, 1998, Argentina engaged in the so-called "third way", that is to say it officially committed to lower the GHG growth curve, although it is neither part of the Annex 1 of the UNFCCC nor Annex B of the KP. However, Argentina posed two conditions to this voluntary commitment: access to all flexible mechanisms, including carbon sinks, and access for all the developing countries to these mechanisms. It seems that this intermediate position was not retained later on.

During COP 6 at the Hague in November 2000 (in which we participated as observers), Argentina manifested a shift such that, after having presented its commitment, it seemed to draw closer to the G77 (developing countries), along with other Latin American countries and in particular Brazil. Also, during the Latin American Countries and Caribbean Conference on Climate Change held in Montreal on March 29th and 30th 2001, Argentina promised to follow the negotiation process in favour of a quick ratification of the Kyoto Protocol.

Currently, Argentina wishes to support the negotiation process to favour a quick ratification but will further define its position following most notably the declaration from the United-States.

Brazil:

Brazil signed the FCCC on June 4th 1992 and ratified it on February 28th 1994. Brazil has adopted a determined position staked on measures that the international community should take regarding climate changes. Effectively, its situation as a developing country

with strong industrial and economic growth (the 8th industrial power in the world) have lead it, during the negotiations on the UNFCCC, to defend the interest of non-Annex 1 countries. This position has lead to the acceptation by the FCCC and the KP of the principle of "common but differentiated responsibility".[353] Even if Brazil has not committed to reducing GHG emissions, its energy matrix is relatively clean due to investments already made in this sector. There is a series of programs in place both at the Federal State level as well as at the level of different States member to the Federation, to improve energy efficiency and reforestation. The original position of Brazil was to create a Clean Development Fund financed by the contributions of Annex 1 countries that would not fulfill their emissions reduction engagement. This proposition has been refused and replaced by the creation of CDMs. The fact that there are no satisfying regulations of the CDMs has lead Brazil, contrary to Argentina, to refuse to officially register any such projects. However, Brazil maintains that CDMs must be implemented as soon as possible. Projects eligible to obtaining certification under CDM belong to the following sectors: renewable energy sources, energy efficiency, forestation and reforestation, waste management and agricultural projects. According to the consulted resources, Brazil considers maintaining the negotiation process on the FCCC and the Kyoto Protocol as one of its priorities. It is also committed to supporting the negotiation process towards a quick implementation of the Kyoto Protocol.

II.- Existing opportunities for Argentina and Brazil within the framework of the flexible mechanisms, particularly the clean development mechanisms

A.- Existing Argentine and Brazilian coercive legal dispositions regarding the environment

To our knowledge and contrary to European Community countries, there are no laws in place that fit with the framework of those agreements (such as eco-taxes systems which exist in certain OECD countries) in Argentina and Brazil. However, Argentina as well as Brazil, aware of the problems generated by lack of respect for the environment, have passed legislation in the classical domains of environmental protection.

These existing laws, statutes or edict will have to be considered in the implementation of any projects.

As is well known, access to the different existing regulations in Argentina and Brazil is not easy. This is because, first, the structure of these countries is federal, which gives competence to the states or provinces and municipalities and second, because, to this day, there exists no compilation of all the existing environmental laws in those countries.

Thus, while studying the feasibility of a project, it is important, with regards to the project's localisation, to also examine the specific national norms that may apply. These norms might indirectly constitute motivations or constraints on the project which is itself eligible to enter under the flexible mechanisms framework of the Kyoto Protocol.

[353] Article 3 of the FCCC.

In the considering the entry into force of the KP, there are several opportunities to explore within the CDM framework.

B. Existing Opportunities within the Kyoto Flexible Mechanisms Framework

Projects currently presented to the « *Oficina de Argentina de Implementación Conjunta* »

In Argentina, the « *Oficina de Argentina de Implementación Conjunta* » - National Office of Joint Implementation (hereinafter O.A.I.C) – was created by statute on June 23, 1998, in accord with the Kyoto Protocol's provisions, with the objective to approve or reject projects to be conducted under the Kyoto Flexible Mechanisms.

The projects presented[354] since 1998 have had different scopes : from forestry projects, to waste management through to renewable energy projects.

Within the Joint Implementation framework, 12 projects have been presented to the O.A.I.C., and 3 have been approved[355]. Meanwhile, of the Clean Development Mechanisms projects, less than 10 have been presented, and none have been accepted thus far.

This situation can be explained by the fact that the operational details of the Kyoto Protocol have not yet been precisely defined and that the benefits inherent in the CDM have not yet been clearly identified by the private sector.

It is important to note that it is possible to promote private projects that aim to reduce carbon emissions, by source reduction or sequestration, without going through the OAIC. It will be necessary to ensure, once the KP enters into force, that carbon credits generated by such projects not registered through the OAIC, are properly accounted for.

Four steps are required to be registered through the OAIC:

- analysis of the project's objective
- validation of the project within the criterion of the OAIC
- project execution and verification of net emissions with respect to basic references
- Final certification and granting of emission credits

These two last steps will be further refined once the KP enters into force.

Projects Presented in Brazil

[354] The projects destined to be implemented by Argentina are not all presented to the O.A.I.C. However, those that do not go through this National Commission process stand no chance of being recognised as flexible mechanisms and will not give rise to carbon credits once the KP is ratified.

[355] One forestry project (within the province of Salta), the second of waste management - to this day still not executed- and the third of efficient energy, approved and executed.

Proposition by the Brazilian private sector for 'Fast Track' certification.

While waiting for the final ratification of the KP, the Brazilian private sector has presented a proposition, currently under study by the government, to institute a national system of emissions reduction certification (ERC) of GHGs.

A financial national institution, playing an active role in social and economic development, would be responsible for the creation of a special fund destined to the acquisition and maintenance of a portfolio of the ERC granted following the implementation and realisation of a project in the country.

The unitary value of these ERCs is actually rather moderate due to the uncertainty linked to the effective application of the KP and the future existence (or lack thereof) of a market in which to trade such certificates. Currently, they are valued at between US $1 and $10 by ton of carbon.

The financial institution would conserve the ERC and would put them on sale once the CDM system has been properly put into place. Specialists have agreed to estimate the value of these ERC, once the KP is implemented, at between US $50 to $100.

Private Sector Projects in Brazil

Brazil, contrary to Argentina, has decided not to register the projects eligible to enter under the Kyoto Flexible Mechanisms. The initiator of such projects can only obtain a federal state declaration attesting to the certain scientific interest of their projects. The Brazilian private sector has shown initiative in anticipating the possibilities generated by the Climate Change negotiations. The vast number of projects being studied or executed with consideration to future GHG emissions reduction is an excellent illustration of that initiative and interest.

With information graciously provided by the Brazilian Department of Science and Technology, we have identified three groups of projects headed by private entities. On the one hand, there are pilot projects financed by big Brazilian enterprises in the industrial, energy and transportation domains; on the other hand, there is a series of smaller scale projects in the sectors of forestry and energy.

(i) Pilot Projects coordinated by the CEBDS ("*Conselho Empresarial Brasileiro para o Desenvolvimento Sustentable*").
(ii) Pilot studies within the framework of the Brazilian Federation of Industries of Sao Paulo.
(iii) Projects evaluated by the University of Sao Paulo and the University of Berkeley under the Aspen Forum of Brazil Commercial Chamber.

In the third case, it is a series of various projects proposed by different Brazilian sponsors that have been evaluated or are being evaluated by the above mentioned universities focusing on forestry and energy.

Each project relies on financial resources, economic profitability and the perspective of obtaining carbon credits specific to each project. This is an example of the great flexibility of the CDM.

The analysis of the projects includes an estimation of the reduction or absorption of carbon missions based on scientific criterion. For example, in efficient energy projects, the emissions reduction is calculated by the quantity of electricity saved once the project is fully operational.

With regards to the forestry sectors, carbon sequestration possibilities are multiple with plants, fruits, soil and compost. Evaluation of these projects is limited to the two first categories. Also, two main scenarios have been taken into account to calculate the quantity of carbon likely to being sequestered: i) a constant reforestation scenario and ii) a limited period of carbon sequestration due to the final utilisation without subsequent reforestation, which implies a liberation of carbon present in the atmosphere.

Regarding the value of Emissions Reduction Certificates (ERC), the scenarios studied supposed an entry into force of the KP in 2005, which would lead to a considerable increase in value. The three scenarios considered are : i) a price of US $10/tC in 2005 with an annual augmentation of 10% (low price), ii) the same base value with an annual augmentation of 15% (high price), and iii) a constant price of US $20/tC.

The financial sources of the projects are varied and depend on the different sponsors. The costs and gains are calculated with respect to the projections of each project. Revenues, independently of the sales perspective of the ERC, come from the sale of electricity to the industrial and public sectors in the case of electrical projects and from the sale of trees and their products in the case of forestry projects.

3.- Opportunities in Argentina and Brazil by sector of activity

Argentina and Brazil are implementing strategies to benefit from the opportunities that the market offers regarding flexible mechanisms.

There are several domains in which technological innovations and productive investments can be made which will generate significant benefits for regional economies and that can contribute to reduce the global impact of carbon emissions.

Argentina as well as Brazil offer enormous opportunities by their geographical extensions, the richness of their natural resources and the possibility still offered by the conversion of their economies. As such, they are an excellent place to implement the Kyoto Flexible Mechanisms, which can contribute to generating global environmental benefits and to consolidate the economic growth of these countries and further orient them towards sustainable development.

We will remind you that Argentina's GHGs emissions are low, less than 1% of the global emissions, due in part to usage of its clean natural resources such as natural gas and hydro-electric energy. In Brazil, although the recent growth of its industrial sector lead to increase carbon emissions, its participation to the global levels remains relatively low.

However, it is important to note that deforestation, as well as the agriculture and farming are responsible for an important part of the GHGs emissions of Brazil and Argentina.

Agriculture

Numerous agricultural projects can be proposed to reduce emissions and to improve efficiency in both countries. These include improvement of agricultural techniques to increase productivity of fields and cultures, prevention of deforestation, agro-silviculture, control and reduction of GHGs emissions in agriculture and farming, promotion of better usage of energy from agricultural wastes to substitute fossil fuels, better usage of fossil fuels, reduction of methane emissions, promotion of projects aiming to optimise agricultural production to contribute to the stabilisation of agricultural development and subsequent reduction in deforestation.

Silviculture

The forestry sector is a domain in which private and public sectors can equally implement beneficial projects for regional economies, anticipating international exigencies which will soon become mandatory internationally.

In this context, emissions reductions in soil sectors, changes in soil use and in forestry activity (commonly called Land Use - Land Use Change and Forestry LULUCF) are interesting options to compensate anthropogenic emissions of GHGs.

As such, several projects in the forestry sector can be proposed such as the restoration or increase of carbon absorption by biomass, the preservation of existing forests, the prevention of forest fires intentional or accidental, recycling of raw forest materials, the establishment of new protected natural reserves, conservation of biodiversity, better use of energy and forest waste for the substitution of fossil energy, etc.

Energy sector, energy efficiency and renewable energy

Innovation in alternative combustion and the search for non-conventional sources of production in the electricity sector are some of the areas within which the public and private sectors can also implement beneficial projects.

In the energy sector, investments have already been made in Argentina (one amounting to $ 120 million) during the privatisation wave of the 1990s.[356] Therefore, few GHGs are currently being emitted and minimal improvements can be proposed. The situation is quite different in Brazil, where a number of investments have been made in this sector, but where there is still room for great opportunities.

[356] Thermal energy

However, in the areas of energy efficiency[357] and renewable energy, the potential is very high. Like in the USA and Australia where Energy Saving Contracts (ESCO) are being developed, in Argentina private enterprises could optimise energetic consumption in gas, water or electricity (wind energy[358], solar energy and hydro-electric energy).

Waste management in Big Cities

The problem of domestic and industrial waste management in Latin American countries is common. In Argentina and Brazil there are a considerable number of illegal discharges which create serious sanitary and environmental problems. Projects of recuperation and waste selection, of recycling and adequate waste treatment techniques in this sector would contribute enormously to resolving this preoccupation which is a priority to the responsible municipal authorities.

Public transportations

There exist several options regarding emissions reduction in this sector in Argentina and Brazil.

In the urban region of Buenos Aires for example, a project to install natural gas engines would have a potential market of 15 000 buses. In Brazil, there is currently a project under study by the Universities of Sao Paolo and Berkeley within the Framework of the previously mentioned Aspen Forum, on the introduction of an ethanol-diesel mix fuel derived from sugar cane culture which could replace diesel engines of public buses in the city of Campo Grande, capital of the *Mato Grosso do Sul* State. This project is of great interest to the city's authorities.

« Carbon sinks » or sequestration projects

The inclusions of «carbon sinks », as opposed to emissions sources has raised some opposition[359].

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357 Energy efficiency means to optimise the consumption of energy.

358 Wind energy project in Patagonie. The only thing is that the production of energy is not constant because winds blow from October to March and this type of energy cannot be stored.

359 Effectively, sequestering carbon dioxide in the form of biomass is equivalent to reducing the amount of carbon stocked in the atmosphere but in no way resolves the problem of the rapid growth in emissions flux which feed in the atmospheric stock. From the prevention vantage point, the impact of these sequestration forestry projects is difficult to evaluate with certainty. Measuring the quantity of carbon stocked into a system is highly complex; moreover, it is extremely difficult to define a reliable reference, especially over a long term. Certainly, plants and soil can act as carbon sinks, but estimation science of carbon quantity sequestered is far from being sure.
Moreover, these projects often present a high risk of « escape » i.e. secondary effects that, outside of the zone of the project itself, can diminish the real impact. As such, the preservation for a determined zone does not guarantee that deforestation activity will not move to a neighbouring area.
Furthermore, to pretend to compensate GHGs emissions, a sequestration project should guarantee perennial stockage over very long periods of time, knowing that CO_2 remains in the atmosphere for several decades. Also, contribution of forestry sequestration projects to the development of host countries is questioned. To the extent where these projects are likely to increase competition of soil usage, they can bear negative impacts on biodiversity as well as on social levels. Finally, these projects would rarely present a real transfer in technology contrarily to other mechanisms. Also, for some, sequestration distant from the real goal of the KP which is to control GHGs emissions linked to fossil fuels consumption.

Some believe, the sequestration options, far from exempting efforts towards the control of emissions from fossil fuels consumption, can bring answers to the problem soil use changes which are the second source of anthropogenic gas emissions in the world, particularly in the developing countries. Moreover, technical problems linked with the evaluation of the impact of those projects could find technical answers just as satisfying as those developed for reduction projects. As well, competition for soil usage can be taken into account in the projects associating forestry and agriculture intensification. In those cases, the contribution of these projects to development, accompanied by real transfers of technology and know-how, is undeniable. Finally, multiple options are being explored within the framework of sustainable agro-forestry projects to limit recourse to the use of fossil fuels, notably by developing the wood-energy file.

At any rate, Parties must agree on compatible systems and establish a departure point in light of the measures of change having occurred regarding carbon emissions. Numerous projects of carbon sequestration in the sectors of soil usage, soil usage change and forestry activity, (what we have commonly called LULUCF- Land Use - Land Use Change and Forestry) have already been implemented to absorb and sequester atmospheric CO_2 and to obtain in return the right to maintain their emissions at a level superior to the KP constraints.

At this point we will give some examples. A foundation called FACE (« *Forest Absorbing Carbon dioxide Emission* ») has been created in 1990 by the four main electrical companies in Holland grouped under the Dutch Electricity Generating Board. FACE's objective is to compensate local carbon emissions by financing sequestration projects in third world countries notably in Latin America. Its most important program in terms of surface area is situated in Equator, initiated in 1993, the « *Programa Face de Reforestación* » (or « *Profafor* ») plans the planting of 5 000 hectares every year for 15 years, an accumulated objective of 75 000 hectares.

The electrical companies of the USA have been amongst the first to support the sequestration approach, which enabled them to "compensate" their exceeding GHGs emissions by vast forestation programs[360].

On this level, just like other transition countries (countries that are undergoing the process of transition to a market economy), Latin America imposes as an ideal location for "carbon sinks" creation [361].

[360] In September 1994, the USA and Costa-Rica signed a bilateral agreement of cooperation on joint implementation. Under this agreement, several sequestration projects were launched with the financial assistance of American electricity companies. The objective was to demonstrate that enforcement of « carbon sinks » was an efficient option to fix carbon in biomass in a perennial and measurable way, and to compensate for CO_2 emissions due to consumption of fossil fuels. In all, four carbon sinks have sequestered close to 50 millions tons of CO_2, compared with the 650 000 tons for the four projects of renewable energy. *Source : Department of Environmental and Territorial Planning.*

[361] Several Latin American countries have engaged in joint projects with the USA, Norway and the Netherlands: a total of 29 projects have been approved and their impact is estimated at : 155 millions tons of CO_2.

In Argentina as well as in Brazil, these sequestration projects present a promising alternative. It is incontestable that these countries possess advantages as receptive countries for investments under LULUCF or other forestry activity under the CDM.

In Argentina for example, with respect to forestation and counting the availability of land for reforestation, the potential is estimated at 15 million hectares, not counting original forests and other productions.

Annual revenues could reach approximately US $700 million, even without considering other possibilities such as native forest preservation, silviculture and forest protection in general.

In Brazil, there exist several « carbon sinks » implementation projects. Within the studies conducted by the Universities of Sao Paolo and Berkeley, we can mention the following ones:

- Rubber plantation of 1000 ha. in Para State, creating the possibility of commercialising latex four years after trees are planted for a period of at least 30 years, with an estimated carbon sequestration of 107 to 239 tons.
- Palm oil plantation of 5000 ha in the same state. In this case, the national demand and international growth for this product has been accounted for. The estimated carbon sequestration umbers vary between 504 and 507 tons.
- Plantation of *« babaçu »* of 100,000 ha in the state of Maranhao. In this case, it is a project joining the forestry sector and the energy sector since this species grows rapidly in deforested areas and produces fruit that can be used to make not only soaps and fibres, but can also be converted in high quality natural combustible material.

Finally, we would like to conclude the examples by mentioning a project in which we have been involved and that implements carbon sinks in Mato Grosso, by Peugeot S.A. and the National Forest Office.

These forestation or reforestation projects within the CDM can contribute to regional development. The granting of carbon credits for these sequestration projects can indeed help foster sustainable development through the reforestation of degraded lands, by creating employment in rural areas, by protecting biodiversity, by managing hydrographic basins and by controlling floods. These projects will help counter the trend in the developing countries of burning native forests to convert the land for agriculture or farming and will enable regions to preserve their native forest and use them sustainably.

Several sequestration projects could be seen in Argentina and Brazil such as restoration or increase of carbon absorption by biomass, prevention of deforestation, forestation of new lands, reforestation of road systems in urban areas and the creation of green spaces, etc[362].

However, some precautions must be taken before the implementation of any carbon sequestration projects. In this area, we are not yet able to establish an exhaustive list of

[362] Forestation project implemented in the Province of Corrientes by Shell.

the different constraints that must be taken into account however we can give some indicative examples.

The construction of carbon sinks will necessitate the assurance that a foreign society can indeed be owner of the land in question, it will be important to identify the conditions and modality of the acquisition of ownership, examine conditions of investment within the framework of exchanges, to evaluate tax constraints at the national and regional levels, to optimise the financial flux generated by direct investments on a legal and tax basis, the remuneration of the investment by the different contracts of technical assistance between partners and the persons receiving the services and finally to clearly identify the responsibility of each player.

These elements will have to be taken into account not only at the moment of implementation but also during the whole duration of the project. Argentina and Brazil have ratified a number of conventions, notably those aiming at avoiding double taxation and those relating to the protection and guarantee of international investments, those agreements ain at insuring that foreign enterprise will benefit from the existence of a legal security necessary to any projects of the described magnitude.

Conclusion:

Today, there is a growing awareness at the international level of the undeniable necessity to act on Climatic Change and to contribute to a global reduction of emissions of GHGs.

The essential difficulty resides in the implementation of a body of rules and principles to harmonise contradictions between our current interests and those of the future generations, and eventually harmonise the differences between the private sector and the States as well as the distinct priorities of industrialised and developing countries.

It seems difficult to find a consensus among the different players on the ways and the means to be used to resolve the question of global warming.

We can note however, that a number of countries have already adopted measures, such as tax measures, to encourage enterprises to participate to this collective effort of reducing GHGs.

Other countries have encouraged their enterprises to implement projects that fit within the Kyoto Flexible Mechanisms even though the KP has still not entered into force.

Argentina and Brazil are aware of the strategic role that they can play in the accomplishment of this common objective. The examples we have given show this spirit, that of liberal countries which pollute little and have an enormous potential.

Today, all these elements come together to support the call for agreement between the different players and to develop projects that GHGs emitting enterprise can implement. These enterprises, depending on their level of social ethic, can develop rapid and efficient means to reduce their emissions while contributing to sustainable development.

10. Conclusions

An Americas Trade and Sustainable Development Agenda

By Marie-Claire Cordonier Segger[363]

"We support… the FTAA…, which will most effectively foster economic growth, the reduction of poverty, development, and integration through trade liberalization, contributing to the achievement of the broad Summit objectives."
- Special Summit of the Americas Declaration, Monterrey, Mexico, January 13, 2004.

"Our goal is to achieve sustainable development throughout the Hemisphere."
- Summit of the Americas Declaration, Quebec City, Canada, April 22, 2001.

Governments of the Western Hemisphere plan to conclude a Free Trade Area of the Americas (FTAA) accord by 2005. If negotiations are successful, this FTAA will become the world's largest trading group, covering over 850 million people and nearly a third of world's economic output.[364] It is an important initiative, and could present either a barrier or a significant opportunity for sustainable development in the Americas.

The Americas region shares more than just a commitment to integration through trade liberalization – it shares serious common social and environmental development challenges.[365] According to the UN ECLAC, 44% of the inhabitants of Latin America and the Caribbean live in poverty (220 million people), and 20% live in extreme poverty. The World Bank attests that the richest 10% receive 48% of the region's income, while the poorest 10% earn only 1.6%. According to the United Nations Environment Programme, forests and other critical ecosystems continue to degrade at an unprecedented rate, arable land and freshwater supplies are diminishing, vulnerability to natural disaster increases, and unsustainable urban development and natural resource extraction practices are affecting the health and quality of life of millions in the Western Hemisphere. And the International Labour Organisation reports that 57 million people in Latin America and the Caribbean are unemployed or underemployed, with 80 million informal workers in the Americas.

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363 This article shares thoughts with a recent article by the author in the Fordham Journal of International Law, and with a policy paper that was first launched at the 2001 Quebec City Hemispheric Trade and Sustainability Symposium with Chairs David Runnalls (IISD), Pierre Marc Johnson, and Enrique Leff (UNEP), as part of a collaborative process with Marie-Claire Cordonier Segger and Karel Mayrand. It also draws on a policy paper developed by Members of the Hemispheric Working Group on Trade and Environment, Marie-Claire Cordonier Segger, Senior Manager, Americas Portfolio, IISD / UNEP in Canada, Nicola Borregaard, Executive Director of RIDES in Chile, Ana Karina González, Coordinator of Trade and Environment at CEMDA in Mexico, and Maria Leichner, Executive Director of Fundacion ECOS in the Mercosur. This policy paper, which proposes elements of a hemispheric environmental cooperation mechanism, was launched through a series of sub-regional and hemispheric policy dialogues throughout 2002 and has benefited from the views of many academic, civil society, government and business experts across the Americas. The project was made possible due to gracious financial support from the Government of Canada and the International Development Research Centre (IDRC).

364 J. M. Salazar Xirinachs and M. Robert (eds.) *Hacia el libre comercio en las Americas* (Washington: Brookings Institute / OAS, 2001).

365 OAS, *Advancing in the Americas: Progress and Challenges*, Summit Report 2001 – 2003 (Washington: OAS, 2004).

In this chapter, hemispheric integration and the concept of sustainable development law are briefly explained. Then, the progress of the FTAA negotiations are discussed from a sustainable development law perspective. In the second section, potential directions for FTAA chapters on environmental and social issues are examined, focusing especially on mechanisms for cooperation and dispute resolution. Institutional mechanisms for civil society participation are only briefly mentioned, as these issues are canvassed extensively elsewhere.[366] As a large part of social and environmental issues are not directly linked to trade and investment, this chapter will also briefly discuss the development of other, parallel forums for hemispheric cooperation on the environmental and social challenges of the western hemispheric. It will consider whether these forums are strong enough to address overlapping agendas, as well as the mechanisms for coordination between these forums and the trade liberalisation treaty process.

Then, in Section 3, to illustrate the more direct links between trade liberalisation, social and environmental law and policy in the Americas, potential social and environmental impacts and opportunities are briefly highlighted. The chapter focuses on several important areas of ongoing FTAA negotiations: subsidies, intellectual property rights, competition law, government procurement, services and market access. (The directions of agricultural liberalisation and investment, among others, are also crucial to sustainable development, but are too extensive to discuss here). Several FTAA negotiating groups appear to be responding to the sustainable development norm by developing provisions to address social and environmental concerns. The chapter then concludes with recommendations on a potential strategy for the FTAA to support sustainable development.

1.1 The Hemispheric Integration Process

The FTAA is part of a broader initiative for closer cooperation in the Americas which aims to address such challenges, one which crystallized at the Miami Summit of the Americas in 1994. Along with democracy, trade liberalisation and sustainable development were adopted as the main thrusts of hemispheric integration, as reflected in the Miami Declaration of Principles – the 'Partnership for Development and Prosperity: Democracy, Free Trade and Sustainable Development in the Americas.'[367]

Sustainable development has economic, social and environmental components. Countries increasingly perceive these as complementary international objectives rather than as unrelated or opposing disciplines. They appear in both binding 'hard law' treaties and international judgments of the region, and in the persuasive authority of 'soft law' declarations and state practice. In the 1994 Miami Summit, the heads of state acknowledged that "social progress and economic prosperity can be sustained only if our

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[366] See M.C. Cordonier Segger and J. Cabrera, "Green Smoke Signals: Public Participation in Americas Trade and Environment Regimes" in *Hemispheric Civil Society* (Montreal, McGill Centre for Developing-Area Studies, 2003). See also M. Rivas (CIECA), 'ALCA y participacion de la sociedad civil' in H. Blanco, M. Araya and C. Murillo (eds.), *ALCA y medio ambiente: Ideas desde Latinoamerica* (Santiago, Chile: CIPMA / GETS / CINPE, 2003); M. C. Cordonier Segger, N. Borregaard, M. Leichner and A. K. Gonzales "A New Mechanism for Hemispheric Cooperation on Environmental Sustainability and Trade" (2002) *Columbia Journal of Environmental Law* 27:2; and M.C. Cordonier Segger et al., *Social Rules and Sustainability in the Americas* (Winnipeg: IISD / OAS, 2004). And see various chapters in this volume.

[367] Declaration of Principles, First Summit of the Americas, Miami, Florida, December 9-11, 1994.

people live in a healthy environment and our ecosystems and natural resources are managed carefully and responsibly."[368] A special hemispheric Summit took place in Bolivia in 1996, as follow up to the 1992 UN Conference on Environment and Development in Rio de Janeiro.[369] The 1996 Santa Cruz de la Sierra Special Summit of the Americas established a blueprint for sustainable development. Leaders recognised the role that trade liberalisation can play in promoting growth, seeking to do it in a way that also strengthens hemispheric social development and environmental cooperation. The Santa Cruz Declaration stated that **"**¶d]evelopment strategies need to include sustainability as an essential requirement for the balanced, interdependent, and integral attainment of economic, social, and environmental goals."[370]

The commitment to sustainable development in the Americas, at least in the Declarations that give policy guidance to the hemispheric integration process, remains an overarching priority. The 2001 Quebec City Summit of the Americas Declaration states clearly that for heads of state, the "goal is to achieve sustainable development throughout the Hemisphere."[371]

The 2001 Quebec City Summit also recognised the need for equilibrium between the economic, social and environmental elements of the hemispheric integration process. Governments committed "to strengthen environmental protection and sustainable use of natural resources with a view to ensuring a balance among economic development, social development and the protection of the environment, as these are interdependent and mutually reinforcing."[372] In the accompanying Quebec City Plan of Action, they also committed to "[c]onsult and coordinate domestically and regionally, as appropriate, with the aim of ensuring that economic, social and environmental policies are *mutually supportive* and contribute to sustainable development, building on existing initiatives undertaken by relevant regional and international organizations."

After preliminary meetings of trade ministers, negotiations for new hemispheric trade rules were launched in the Santiago Summit of the Americas in 1998.[373] The instrument launching these negotiations committed to "take into account the broad social and economic agenda contained in the Miami Declaration of Principles and Plan of Action with a view to raising living standards, to improving the working conditions of all people in the Americas and protecting the environment."[374] All subsequent policy direction given by Ministers to the negotiators has contained similar hortatory language. Indeed,

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[368] Declaration of Principles, First Summit of the Americas, Miami, Florida, December 9-11, 1994, at para 20.
[369] M.C. Cordonier Segger et al., *Ecological Rules and Sustainability in the Americas* (Winnipeg: IISD / UNEP, 2002). Available in Spanish and English, at Publications, online: www.iisd.ca.
[370] Declaration of the Special Summit of the Americas on Sustainable Development, Santa Cruz de la Sierra, Bolivia, December 7-8, 1996. Online: http://www.oas.org/EN/PROG/BOLIVIA/summit.htm
[371] Declaration of the Third Summit of the Americas, Quebec City, April 22, 2001. Online: http://www.summit-americas.org/eng/quebec-summit1.htm
[372] Declaration of the Third Summit of the Americas, Quebec City, April 22, 2001. Online: http://www.summit-americas.org/eng/quebec-summit1.htm
[373] To date, a progression of trade ministerial meetings have taken place. These begun in Denver in 1995, and further events were held in Cartagena (1996), in Belo Horizonte (1997), in San Jose (1998), in Toronto (1999), in Buenos Aires (2001), in Quito (2002) and recently, in Miami (2003). See FTAA, available online: http://www.ftaa-alca.org/Minis_e.asp.
[374] Ministerial Declaration of San José, Summit of the Americas Fourth Trade Ministerial Meeting, San José, Costa Rica, March 19, 1998. Online: www.oas.org (date accessed: Dec 10, 2003).

the 2003 Miami FTAA 8th Ministerial Declaration "reiterate[s] that the negotiation of the FTAA will continue to take into account the broad social and economic agenda contained in the Miami, Santiago and Quebec City Declarations and Plans of Action with a view to contributing to raising living standards, increasing employment, improving the working conditions of all people in the Americas, strengthening social dialogue and social protection, improving the levels of health and education and better protecting the environment."[375] One deed has already made a significant impact in this regard. At the Buenos Aires trade ministerial, in an unprecedented move, Ministers released the draft text of the FTAA, revealing the direction of the negotiations and opening the debate to civil society commentary and advice. In Quito in 2002 and in Miami in 2003, Ministers released the second and third drafts of the FTAA texts, permitting comparative analysis, which might demonstrate areas where progress had been made and generate further recommendations.

Critics of the Free Trade Area of the Americas (FTAA) warn that as it is currently conceived, the agreement may have significant negative impacts on social and environmental sustainability.[376] How to ensure that economic policies such as the FTAA can best contribute to sustainable development? Could the FTAA accord be drafted to foster rather than frustrate sustainable development? If so, which substantive chapters of the FTAA, and which institutional arrangements, might best achieve this objective?

One of the premises of this article is that for sustainable development to be achieved, economic, social and environmental law and policy can and should be 'mutually supportive' in the Americas. For sustainable development, it is important to ensure these three sets of law and policy are not working at cross purposes. There is a need to ensure that hemispheric trade and investment, human rights and environmental cooperation processes can be, if not integrated, at least coherent.[377] This could happen in two ways. First, it is important to find ways to ensure that the FTAA itself, as a legally binding keystone of closer economic cooperation in the Americas, will not frustrate social and environmental goals. In other words, the FTAA should clearly support sustainable development in the Americas, in its institutions and its substantive provisions. It can contain provisions which link its economic deliverables to social and environmental results, and which ensure that in the interest of economic growth, it does not sacrifice environmental and social priorities. Second, it is also important for the legitimacy of the Summits process that one track of negotiations (such as trade and investment) not be perceived to be too far ahead of the others. In other words, it should be possible to demonstrate that environmental and social cooperation aspects of the Summit of the Americas process are also achieving substantive progress.

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[375] Ministerial Declaration of Miami, Summit of the Americas Eighth Trade Ministerial Meeting, Miami, USA, November 20, 2003. Online: http://www.ftaa-alca.org/Ministerials/Miami/declaration_e.asp (date accessed: Dec 10, 2003).

[376] See, e.g., Hemispheric Social Alliance, *The **FTAA** Exposed: A Citizens' **Critique** of the November 2002 Draft of the Free Trade Area of the Americas* January 2003, available online: www.asc-hsa.org. See also Citizens Trade Campaign, *Comments of the Citizens Trade Campaign to the Committee of Government Representatives on the Participation of Civil Society in the Free Trade Area of the Americas*, May 1, 2003, available online: http://www.citizenstrade.org/ftaa.php.

[377] For a survey of economic, environmental and social challenges in the Americas, and recommendations for ways to address them, see M.C. Cordonier Segger at al., *Trade Rules and Sustainability in the Americas* (Winnipeg: IISD, 1999), M.C. Cordonier Segger at al., *Ecological Rules and Sustainability in the Americas* (Winnipeg: IISD / UNEP, 2002), and M. C. Cordonier Segger et al., *Social Rules and Sustainability in the* Americas (Winnipeg: IISD / OAS, 2004).

1.2 Hemispheric Sustainable Development Law

In 2002, at the Johannesburg World Summit for Sustainable Development (WSSD), world leaders assumed "a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development - economic development, social development and environmental protection - at the local, national, regional and global levels."[378] Specifically, in the 2002 WSSD 'Johannesburg Plan of Implementation', over 140 countries agreed to "continue to enhance the mutual supportiveness of trade, environment and development with a view to achieving sustainable development..."[379] International law – its treaties, principles and institutions – is an essential part of this agenda. The need to develop international law on sustainable development was identified in 1992 in Chapter 38 of the *Agenda 21*. Governments committed to the "further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns."[380] Governments also recognized the "need to clarify and strengthen the relationship between existing international instruments or agreements in the field of environment and relevant social and economic agreements or instruments, taking into account the special needs of the developing countries…"[381]

So what is sustainable development law? It is the body of legal principles, treaties and instruments which govern the area of intersection between social, economic and environmental law.[382] At a minimum, coherence between these fields should be encouraged for sustainable development. Many national laws and judgments have fully acknowledged a connection between environmental protection, economic development and human rights.[383] But such linkages are also particularly important at international levels, where normal over-arching governance mechanisms that should serve to ensure legal coherence (such as high courts and parliaments) are still comparatively weak or non-

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[378] Declaration of the World Summit on Sustainable Development at para 5., in Report of the World Summit on Sustainable Development, A/CONF.199/20 Johannesburg, South Africa, August 26-September 4, 2002.

[379] Plan of Implementation of the World Summit on Sustainable Development at para 97., in Report of the World Summit on Sustainable Development, A/CONF.199/20 Johannesburg, South Africa, August 26-September 4, 2002.

[380] *Agenda 21*, Report of the UNCED, I (1992) UN Doc. A/CONF.151/26/Rev.1, (1992) 31 I.L.M. 874, at Chapter 38.

[381] *Agenda 21*, Report of the UNCED, I (1992) UN Doc. A/CONF.151/26/Rev.1, (1992) 31 I.L.M. 874, at Chapter 39.

[382] See M. C. Cordonier Segger, 'Significant Developments in Sustainable Development Law and Governance: A Proposal' *United Nations Natural Resources Forum,* NRF 28:1, February 2004. Sustainable development law is further defined in M.C. Cordonier Segger & A. Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford: OUP, 2004 - forthcoming). On the process of development of international law in this manner, see J. Brunnée & S.J. Toope "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39(1) Col. J. Trans'l. Law 19. See also V. Lowe, "The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?" in M. Byers, ed. *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford, OUP, 2000) at 214-215.

[383] For example, the Indian cases such as *Charan Lal Sadhu* v. *Union of India* AIR 1990 SC 1480 and *Koolwal* v. *Rajasthan* AIR 1998,
Raj.2, address environmental pollution as an issue affecting the human right to life. See also, for example, *Leatch v. National Parks and Wildlife Service and Shoalhaven City Council*, 81 LGERA 270 (1993) (NSW Land and Environment Court, Australia); *Vellore Citizens Welfare Forum v. Union of India [*1996] 5 SCC 647 (Supreme Court, India); *Balankulama v. The Secretary, Ministry of Industrial Development, SAER*, Vol 7(2) June 2000 (Supreme Court, Sri Lanka - Supreme Court of the Democratic Socialist Republic of Sri Lanka). And see *Minors Oposa* v. *Secretary of the Department of Environment and Natural Resources (DENR)*, 33 I.L.M. 173 (1994) (Philippines).

existent. Though the role of international law in sustainable development is still in process of definition,[384] much progress has been made in recent decades. Indeed, recent scholarship has identified a growing *corpus* of legal principles, treaties and instruments which integrate international environmental, social and economic law.[385]

Perhaps more explanation is helpful at this point. Sustainable development as a concept has been vague in the past.[386] This was perhaps deliberate, in order to ensure that it could be relevant in different local and global contexts, for many diverse cultures and regions. But it is my view that this vagueness has almost outlived its usefulness, particularly on the international level. Where consensus exists, defined by treaty, custom or other means, international principles, treaties and organizations have emerged to govern sustainable development cooperation between countries. One proposal has particular coherence in this regard. Perhaps sustainable development is not simply a *principle* of international law, itself. Rather, it has been convincingly argued that sustainable development is a normative concept operating in the interstices between primary norms when they overlap or conflict, such as the right to development, or the duty to protect the environment – an 'interstitial norm.'[387] Once they have been articulated, such interstitial norms operate as modifying norms, bearing upon the primary norms that surround them. They also have a broader significance as reconciling concepts, exercising great influence on the system of international law and governance in these areas.[388] If this is so, it is likely that this modifying norm is articulated in order to point negotiations, legal instruments and especially, dispute resolution regimes, towards a consistent, coherent approach which balances economic and social development, and environmental protection. The legal rules and principles which are influenced in such a way by the interstitial norm of sustainable development can, in effect, make up the body of what is now becoming known as 'sustainable development law.'

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[384] For a careful legal examination of the status of sustainable development in international law, see V. Lowe, "Sustainable Development and Unsustainable Arguments" in *International Law and Sustainable Development: Past Achievements and Future Challenges*, A. Boyle and D. Freestone, eds. (Oxford: OUP, 2001). See also P. Sands, "International Law in the Field of Sustainable Development: Emerging Legal Principles" in W. Lang, ed., *Sustainable Development and International Law* (Oxford: Oxford University Press, 1999); D. Ginthers, M. Denters and P. de Waart, eds., *Sustainable Development and Global Governance* (London: 1995); M. McGoldrick, "Sustainable Development: The Challenge to International Law" *Review of European Community and International Environmental Law*, 3 (1994) or P. Sands, "International Law in the Field of Sustainable Development" (1994) 65 Brit. Y.B. of Int'l L. 303.

[385] On the process of development of international law in this manner, see J. Brunnée & S.J. Toope "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39(1) Col. J. Trans'l. Law 19. See also V. Lowe, "The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?" in M. Byers, ed. *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford, OUP, 2000) at 214-215.

[386] One of the most compelling explanations for the early lack of clarity was presented by C. D. Stone, in "Deciphering Sustainable Development" (1994) 69 Chi.-Kent L. Rev. 977. "The term sustainable development is not merely vague - a masker of failed consensus - the way key terms in the U.S. Constitution are vague and require case by case elaboration. 'Sustainable development' functions to gloss over not only failed consensus, but a latent collision course. The chasm is less a failure of language ... than a poignant tussle between, roughly, Rich and Poor. The indigenous native who extinguishes a species for food is not trapped in orthodox semantics of conventional pre-materialist *homo economus* cost-benefit analysis. He is trapped in hunger (just as we, the rich, are so often trapped in moral blindness). There is no reason to suppose that killing off a species pains him less than it does us."

[387] V. Lowe, "The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?" in M. Byers, ed. *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford, OUP, 2000) at 214-215.

[388] V. Lowe, "The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?" in M. Byers, ed. *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford, OUP, 2000) at 214-215.

Is there a conflict between a description of sustainable development as an 'interstitial norm', a meta-principle which operates at the interstices between social, economic and environmental norms of international law, and sustainable development as an area of law? I do not believe that there is. Rather, it is a question of the stage of development of the regimes. Principle 4 of the 1992 Rio Declaration states that in "order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."[389] However, not all economic or social law requires environmental expertise, nor vice versa.[390] Sustainable development requires coherence between social, economic and environmental law, at the international level, not further confusion and complexity. Only certain instruments in each regime take into account the objectives or link with the others, in practice. At the area of intersection between these laws, where this interstitial norm is used most often (and is most necessary), a corpus of sustainable development law now exists. Sustainable development is both the concept used to mediate at the interstices of the three fields of law and their respective norms, and a general term for the law which has developed in this area of overlap.

International legal principles related to sustainable development have been defined. Myriad legal instruments have been developed to carry them forward. Recently, based on prior work by the United Nations Commission for Sustainable Development and other bodies,[391] the International Law Association *Committee on the Legal Aspects of Sustainable Development* has elaborated a set of 'Principles of International Law for Sustainable Development.[392] These are becoming part of the general body of international law.

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[389] *Rio Declaration on Environment and Development*, United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/6/Rev.1, (1992), reprinted in 31 I.L.M. 874 (1992) at Principle 4. See also the *Stockholm Declaration* (1972) at Principle 13.

[390] The important insight is that international sustainable development law is not about the environment alone. It is not another 'softer' word for international environmental law, and does not simply refer to environmental law for developing countries, either. While international environmental law is extremely important and must be strengthened, international sustainable development law directly addresses the key concept of "needs, in particular the essential needs of the world's poor, to whom overwhelming priority should be given" See G. H. Brundtland, *Our Common Future* (Oxford: OUP, 1987). As such, international environmental treaties are not the only locus where international sustainable development law must be practiced. Indeed, not all aspects of international environmental law are also international sustainable development law. For example, animal rights, the conservation of 'charismatic mega-fauna', and trans-boundary environmental disputes do not necessarily address sustainable development problems. See A. Boyle & D. Freestone, "Past Achievements and Future Challenges" in W. Lang (ed.) *Sustainable Development and International Law* (London: Dordrecht, 1995).

[391] In particular, see the *Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development* (UN Secretariat, September 1995), the International Law Association committee research seminar publications, including '*The Right to Development in International Law*' (1992), '*Sustainable Development and Good Governance*' (1995), and '*International Economic Law with a Human Face*' (1997); the UNEP *Position Papers on International Environmental Law Aimed at Sustainable Development*, UNEP (1997) and 2000 (Montevideo Programmes II and III); and the *Earth Charter* (2000).These also include, *inter alia*, a report by the *World Commission on Environment and Development Experts Group on Environmental Law* (1987), the *Rio Declaration* (1992), final documents of various large UN Conferences, including the 18th *UNGA Special Session on International Economic Co-operation* (1990), the Vienna *World Conference on Human Rights* (1993), the Cairo *UN Conference on Population and Development* (1994), the Beijing *UN Womens Conference* (1995), the Copenhagen *Social Summit* (1995), and the *Agenda for Development* by the UN Secretary General (1995). See also efforts by environmental law experts to clarify principles, such as *No. 31 Draft International Covenant on Environment and Development, Commission on Environmental Law of IUCN* - The World Conservation Union in cooperation with ICEL - International Council of Environmental Law, 1995. Second Edition: Updated Text, 2000 (IUCN Environmental Law and Policy Series).

[392] The principles were: the duty of states to ensure sustainable use of natural resources; the principle of equity and the eradication of poverty; the principle of common but differentiated obligations; the principle of the precautionary

However, much remains to be done. International law is not only about principles. It is also about regimes for cooperation - deliberately woven, financed and monitored by governments. And in Johannesburg, world leaders emphasized the need to facilitate the implementation of Agenda 21 and the outcomes of the World Summit for Sustainable Development "through the regional commissions and other regional and sub-regional institutions and bodies."[393]

Trade and investment can be powerful engines for regional economic growth and development. According to estimates from the United Nations Economic Commission for Latin America and the Caribbean (ECLAC), if current trends continue the Western Hemisphere will be the world's largest market, with more than 850 million consumers buying $13 trillion in goods and services.[394] It has a combined GDP of $9 trillion (US), representing 34.7 per cent of the world's GDP per capita and 29.6 per cent of its market, though it has only 13.13 per cent of the world's population. The economy of Latin America and the Caribbean grew by 1.5% in 2003, and is expected to grow by 3.5% in 2004. In 1996, total trade among the potential members of the FTAA was over $ 2.4 trillion, over 22 percent of world trade.

Trade rules can have deep structuring impacts on a country or a region's economic development. Debate over the positive or negative impacts of trade-induced economic growth on the environment and society is still ongoing.[395] Sectoral studies have shown that trade-induced growth can lead to increased depletion of natural resources, increased levels of pollution and related public health problems, and loss of habitat and species.[396] Human rights and social development advocates are also concerned that trade rules might erode hard-won social programs and human rights laws, without bringing clear benefits to the most vulnerable or poverty stricken communities.[397] On the other hand, trade holds the promise of increased prosperity and constitutes a powerful tool that can

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approach to human health, natural resources and ecosystems; the principle of public participation and access to information and justice; the principle of good governance; and the principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives. These proposed principles, taken together, provide considerable guidance for jurists seeking ways to balance conflicting or overlapping social, environmental and economic obligations. See "ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development" in Kluwer Academic Publishers *International Environmental Agreements: Politics, Law and Economics* 2, 2 2002, 209-216, available online: http://www.kluweronline.com/issn/1567-9764/current . And see N. Schrijver, and Weiss, F. *"Editorial"* in Kluwer Academic Publishers *International Environmental Agreements: Politics, Law and Economics* 2, 2 2002, 105 - 108, available online: http://www.kluweronline.com/issn/1567-9764/current. See also *Report of the Expert Group on Identification of Principles of International Law for Sustainable Development* (London: ILA, 1995), International Law Association (ILA), *Report of the Sixty-Second Conference* (Seoul: ILA, 1987) at 1-11, 409-87.

[393] Plan of Implementation of the World Summit on Sustainable Development at para 158, in Report of the World Summit on Sustainable Development, A/CONF.199/20 Johannesburg, South Africa, August 26-September 4, 2002.

[394] United Nations Economic Commission for Latin America and the Caribbean, *Equity, Development and Citizenship*, ECLAC 28th Session, Mexico City, Mexico, April 3-7, 2000.

[395] See, eg., Centre for International Sustainable Development Law, *Report on the Americas Trade and Sustainable Development Forum* (CISDL: Montreal, 2004). Available online: www.dfait-maeci.gc.ca.

[396] See M. C. Cordonier Segger, K. Mayrand and M. Leichner Reynal (eds.) Beyond the Barricades: An Americas Sustainability Agenda and the FTAA (Winnipeg: IISD / IUCN / UNEP, 2004). See also H. Blanco, M. Araya and C. Murillo, *ALCA y medio ambiente: Ideas desde Latinoamerica* (Santiago, Chile: CIPMA / GETS / CINPE, 2003). And see E. Leff and M. Bastida (eds.*) Comerico, medio ambiente y desarollo sustentable: Perspectivas de America Latina y el Caribe* (Mexico, D.F.: UNEP, 2001).

[397] See, e.g., J. E. Brenner, E. R. Shaffer and A. Yamin, *The FTAA: Health Hazard for the Americas?* Centre for Policy Analysis on Trade and Health (CPATH) Report from Hearing on Public Health Accountability in International Trade Agreements: Free Trade Area of the Americas, Miami, Florida, Nov. 19, 2003. Available online: www.cpath.org.

contribute significantly to sustainable development – especially through international cooperation.[398] There is a need to identify legal and policy options that are consistent with both trade liberalisation and sustainability. The use of incentives and economic instruments to promote sustainable development, along with a strong environmental and social cooperation agenda, could do much to assure higher a quality of life, health, employment and environmental protection in the Americas.

Regional economic agreements can integrate social and environmental concerns in different ways. Parties to such accords can establish parallel treaties on social and environmental cooperation; this is often done in simple free trade agreements. Examples will be provided below. They can also establish regional integration frameworks to provide links between separate economic, environmental and social cooperation instruments and institutions, either through regular reporting relations among parallel actors, or through an overall coordinating body. These will be explored below. Another approach, which has recently evolved, is that of including chapters on environmental and social issues in the body of the trade agreement, with access to equivalent dispute settlement provisions.[399] These will also be explored further below, in the context of potential models for the FTAA.

To become instruments of sustainable development law, regional trade and investment treaties and regimes can and should take social or environmental priorities into account, whether it is through parallel or integrated provisions. This policy coordination does not, of course, replace other regional instruments that provide frameworks for specialized cooperation to address particular social and environmental challenges. Indeed, existing international principles, treaties and institutions in all fields - social, economic and environmental law - should be taken into account when developing regional sustainable development proposals in the FTAA, to avoid duplication. But governments of the Americas are coming under increasing pressure to address sustainable development issues specifically, during their negotiations of trade law.

And as such, a significant opportunity has emerged for sustainable development in the context of the FTAA treaty regime itself. This can be done through two principal strategies. First, the parties can ensure that new institutional mechanisms are set in place to pursue proactive environmental and social cooperation agendas as they relate to hemispheric integration. Second, parties to an eventual FTAA can consider the sustainable development implications of each aspect of the substantive trade negotiations agenda, and ensure that potential impacts are minimized or mitigated, while potential opportunities for 'triple-wins' (on economic, environmental and social results) are maximized. This article will address each in turn.

2. Sustainable Development in the Free Trade Area of the Americas (FTAA)

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[398] J. M. Salazar Xirinachs and M. Robert (eds.) *Hacia el libre comercio en las Americas* (Washington: Brookings Institute / OAS, 2001).

[399] See M. C. Cordonier Segger et al., *Social Rules and Sustainability in the* Americas (Winnipeg: IISD / OAS, 2004). See also A. Ciudad Reynaud, *Labour Standards and the Integration Process in the Americas (Geneva: ILO, 2001).* And see D. Martinez, V. Tokman and J. Wurgaft, *Las Dimensiones Laborales de la Integracion Economica en America Latina y el Caribe: Working Paper No. 8 (Geneva: ILO, 1995).*

As mentioned above, governments have reaffirmed, in the FTAA context, "the broad social and economic agenda contained in the Miami, Santiago and Quebec City Declarations and Plans of Action with a view to contributing to raising living standards, increasing employment, improving the working conditions of all people in the Americas, improving the levels of health and education and better protecting the environment."[400] And at their Seventh Meeting in Quito, Ecuador in 2002, trade ministers re-iterated that one of their general objectives "is to strive to make trade liberalization and environmental policies in the Americas mutually supportive, taking into account work undertaken by the World Trade Organization and other international organizations, and to promote sustainable development in the Hemisphere."[401] They also recognized "the importance of strengthening throughout the Hemisphere, national actions and cooperation in order to ensure that the benefits of trade liberalization, the protection of the environment, and human health are mutually supportive."[402]

However, FTAA negotiations have faced challenges in addressing contentious environmental and social policy aspects of the trade rules. This situation has much to do with fears, mostly in Latin America, that environmental or social provisions in the FTAA will be used by Canada and the United States to justify protectionist measures. Also, it is feared that higher environmental or labour standards and regulations will undermine the competitiveness of Latin America and Caribbean (LAC) businesses. Finally, there is a fear of unilateral US human rights or environment-related trade sanctions (as experienced by Mexico and other countries in the GATT/WTO system in the 1990s). This remains a powerful psychological hurdle to be removed if the FTAA is to address sustainable development issues.

These fears will need to be overcome if progress in this area is to be achieved. First, parties to the FTAA will need to provide guarantees that social or environmental provisions will not be used to disguise protectionism, while at the same time not permitting public interest measures to become vulnerable within the FTAA.. Second, in instances where competitiveness concerns can be demonstrated through quantitative studies, larger economies may have to 'trade' market access and other benefits for recognition of standards.

In the long term, better environmental and social conditions should benefit everyone in the Western Hemisphere, especially the economies where poverty is most degrading and persistent. Hemispheric financial mechanisms may also be needed to improve standards, so that already disadvantaged economies do not find themselves further marginalised by new social or environmental restrictions to trade. And reliable *mutually supportive* hemispheric trade, human rights and environmental rules (and a strong dispute settlement mechanism) are the very instruments that can best control unilateral impositions.

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[400] Ministerial Declaration of Quito, Seventh Meeting of Ministers of Trade of the Hemisphere, Quito, Ecuador, November 1, 2002, at para 2.
[401] Ministerial Declaration of Quito, *ibid*, at para 7.
[402] *Ibid.,* at para 8.

The next section briefly reviews existing experiences in the Americas, especially at the sub-regional levels, in order to identify new environmental and social law and policy options for an Americas trade and sustainable development agenda.[403] Such provisions can support trade liberalisation, social development and environmental protection.

2.1 A Review of Existing Approaches

The FTAA is not being negotiated in a legal vacuum. The current hemispheric process can be viewed from different perspectives. Traditional international relations theory divides the Western Hemisphere into sharply defined breaks between North and Latin America (with an addition of 'the Caribbean' in *voce sotto*). Academic and economic debates sometimes appear to perceive the FTAA as another form of NAFTA-accession,[404] or focus overmuch on costs and benefits of liberalisation in the FTAA as opposed to the WTO (as though one had to choose between the regional and global cooperation).[405]

However, in practice, the FTAA is being deliberately[406] built upon advances achieved in *five* sub-regional trade agreements; the Southern Common Market (*Mercosur*), the Andean Community (*CAN*), the Caribbean Community (CARICOM), the Central American Common Market (*MCCA*), as well as the North American Free Trade Agreement (NAFTA).[407] And each of these sub-regional arrangements addresses the links between social, environmental and economic law and policy in different ways.[408]

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[403] For further elaboration of this analysis, see M. C. Cordonier Segger, K. Mayrand and M. Leichner Reynal (eds.) *Beyond the Barricades: An Americas Sustainability Agenda and the FTAA* (Winnipeg: IISD / IUCN / UNEP, 2004). See also E. Leff and M. Bastida (eds.) *Comerico, medio ambiente y desarollo sustentable: Perspectivas de America Latina y el Caribe* (Mexico, D.F.: UNEP, 2001). And see H. Blanco, M. Araya and C. Murillo, *ALCA y medio ambiente: Ideas desde Latinoamerica* (Santiago, Chile: CIPMA / GETS / CINPE, 2003). And see Centre for International Sustainable Development Law, *Report on the Americas Trade and Sustainable Development Forum* (CISDL: Montreal, 2004). Available online: www.dfait-maeci.gc.ca.

[404] A. M. de Aguinis, "Can MERCOSUR Accede to NAFTA? A Legal Perspective" (1995) 10 Conn. J. Int'l L. 597, 609. See also C. Deere & D. Esty (eds.) *Greening the Americas: NAFTA's Lessons for Hemispheric Trade* (Cambridge, MA: MIT Press, 2002); K. W. Abbott & G. W. Bowman "Economic Integration in the Americas: A Work in Progress" (1994) 14 NW. J. Int'l L. & Bus. 493, 513-14; F. J. Garcia, "NAFTA and the Creation of the FTAA: A Critique of Piecemeal Accession" (1995) 35 Va. J. Int'l L. 539; and S. Weintraub, "The NAFTA and Developing Countries" in R. S. Belous & J. Lemco (eds.) *NAFTA as a Model of Development* (Chicago: IIE, 1995) at 77, 81-83.

[405] See, e.g. C. A. R. Paranhos, "Regional and Inter-regional Trade and Environment Issues in Latin America" in P. Konz (ed.) *Trade, Environment and Sustainable Development: Views from Sub-Saharan Africa and Latin America* (Geneva: UNU / ICTSD, 2000). As pointed out in a recent WTO study on regionalism and the world trading system, the GATT rules on customs unions and free-trade areas reflect the desire to provide for such agreements while at the same time ensuring their compatibility with the multilateral trading system and the trade interests of third countries. Other provisions that apply to non-reciprocal unilateral preferential schemes in favour of developing countries and to agreements among developing countries are to be found in Part IV of GATT and in the 1979 enabling clause. See World Trade Organization, *Regionalism and the world trading system* (Geneva: WTO, 1995); and GATT, *Decision on differential and more favourable treatment, reciprocity and fuller participation of developing countries* (Geneva: GATT, 1979).

[406] See Ministerial Declaration of San José, Summit of the Americas Fourth Trade Ministerial Meeting, San José, Costa Rica, March 19, 1998, where it states that the FTAA "will build on existing subregional and bilateral arrangements in order to broaden and deepen hemispheric economic integration and to bring the agreements together." Available online: www.oas.org (date accessed: Dec 10, 2003).

[407] Chief among the active RTAs include the Andean Community (CAN), *Agreement on Andean Subregional Integration*, May 26, 1969, B.D.I.E.L. S. Zamora & R. A. Brand (eds.) 1990 at 597 [hereinafter 'The Treaty of Cartagena'], consisting of Colombia, Venezuela, Bolivia, Ecuador and Peru; the Caribbean Common Market (CARICOM), created through an *Annex to the Treaty Establishing the Caribbean Community*, July 4, 1973, B.D.I.E.L. S. Zamora & R. A. Brand (eds.) 1990 at 660 [hereinafter CARICOM Treaty], consisting of the English speaking countries of the Caribbean, and itself part of the larger Caribbean Community created by the *Treaty Establishing the Caribbean Community*, July 4, 1973, B.D.I.E.L. S. Zamora & R. A. Brand (eds.) 1990 at 647 [hereinafter Caribbean Community Treaty]; the Central American Common Market (CACM), *General Treaty on Central American Economic Integration*, Dec. 13, 1960, B.D.I.E.L. S.

The economies of the Americas are also connected by a complex web of standards, rules, schedules and responsibilities, including WTO memberships, the ongoing process of liberalization under the Latin American Integration Agreement (LAIA),[409] and hundreds of evolving trade and investment accords.[410] Several of the newer bi-lateral agreements also offer interesting models for ways that future free trade accords may address social and environmental issues.[411]

As such, existing sub-regional and bi-lateral models provide a useful starting point for analysis of potential trade provisions for the Americas.[412] They present diverse and often innovative policy solutions, which have been designed for the conditions and problems of the region. Each mechanism was negotiated by Americas governments, and represents a set of expectations, as well as a significant body of experience and policy experimentation which might provide a model for a potential regional cooperation mechanism.

As is explored in the following section, the *North American Free Trade Agreement* (NAFTA)[413] contains various innovative provisions related to sustainable development, and in parallel, it also includes the *North American Agreement for Environmental Cooperation*[414]

Zamora & R. A. Brand (eds.) 1990 at 529 [[hereinafter Treaty of Managua], consisting of El Salvador, Honduras, Nicaragua, Costa Rica and Guatemala; the Common Market of the Southern Cone (MERCOSUR), *Treaty Establishing A Common Market*, Mar. 26, 1991, 30 I.L.M. 1041 [hereinafter Treaty of Asuncion], consisting of Argentina, Brazil, Paraguay and Uruguay; the *North American Free Trade Area (NAFTA), The North American Free Trade Agreement*, Dec. 17, 1992, 32 I.L.M. 296 and 32 I.L.M. 605 [hereinafter NAFTA], consisting of the United States, Canada and Mexico; and the "Group of Three" (G-3), *G-3 Treaty*, June 13, 1994, online: < www.sice.oas.org/trade/G3_E/G3E_TOC.stm>, consisting of Mexico, Venezuela and Colombia.

408 M. C. Cordonier Segger *et al*., Trade Rules and Sustainability in the Americas (Winnipeg: IISD, 1999). See also M.C. Cordonier Segger and N. Borregaard, "Sustainability and Hemispheric Integration: A Review of Existing Approaches" in *Greening the Americas*, eds. D. Esty & C. Deere (Boston: MIT Press, 2002).

409 In 1960, the *Treaty of Montevideo* also established the Latin American Free Trade Association (with the unfortunate acronym of LAFTA, in English), a free-trade area with a mandate to cut tariffs among its members on a limited list of products, while each member maintained its own barriers toward non-LAFTA countries. After 20 years, LAFTA was re-cast as the Latin American Integration Association (LAIA, Montevideo, 1980). Intra-LAIA exports have grown, in relation to total exports, from 11.9 per cent in 1991, to 17 percent in 1995. The LAIA integration process continues negotiations—by 2005 trade among LAIA members will be mostly under preferential terms. See D.M. Ferrere, "New trends in Latin American foreign trade: The LAIS and its work," *The International Lawyer* 19 1985.

410 Discussions have also been held between Chile and CARICOM; Chile and CACM; CACM and MERCOSUR; the Andean Community and MERCOSUR; Venezuela and MERCOSUR; Mexico and MERCOSUR; Mexico and the northern triangle countries in Central American; Mexico and Nicaragua; Mexico and CACM as a whole; Mexico and Peru; and Mexico and Ecuador. Trinidad and Tobago expressed interest in joining NAFTA, and Chile and Mexico explored the potential for a NAFTA-plus agreement.

411 See M.C. Cordonier Segger et al, Social Rules and Sustainability in the Americas (Winnipeg: IISD, 2004). See also M.C. Cordonier Segger, K. Mayrand and M. Leichner Reynal (eds.) Beyond the Barricades: An Americas Sustainability Agenda and the FTAA (Winnipeg: IISD / IUCN/ UNEP, 2003). And see E. Leff and M. Bastida (eds*.) Comerico, medio ambiente y desarollo sustentable: Perspectivas de America Latina y el Caribe* (Mexico, D.F.: UNEP, 2001).

412 A brief survey of these agreements could also clarify the state of existing environmental and social mandates in the Americas, limiting potential for overlap and duplication in suggested areas for hemispheric cooperation. After all, the FTAA should try to avoid launching new initiatives in areas that are already being effectively addressed on a sub-regional level. However, it must be noted that the existence of a cooperation instrument on paper, particularly in the Americas, does not necessarily mean that a problem is being addressed in practice. Further research and institutional capacity assessment is needed to identify resources, coordination and capacity building needs required to ensure that these instruments can effectively complete their mandates.

413 *The North American Free Trade Agreement*, Dec. 17, 1992, 32 I.L.M. 296 and 32 I.L.M. 605, online: http://www.nafta.org.

414 *North America Agreement on Environmental Cooperation* (Washington, Ottawa, Mexico City), 8, 9, 14 September 1993, in force 1 January 1994; 32 I.L.M. (1993) 1480, available online:http://www.cec.org. For commentary on this aspect and

and the *North American Agreement on Labour Cooperation* (NAALC).[415] Building on a similar model, there are environmental side agreements to the more recent *Canada – Chile Free Trade Agreement*[416] and the *Canada – Costa Rica Free Trade Agreement.*[417] There are also labour side agreements in the *Canada – Chile Free Trade Agreement,*[418] and in the *Canada – Costa Rica Free Trade Agreement,* with the latter referring to specific obligations in the 1998 *ILO Declaration on Fundamental Principles and Rights at Work.*[419]

As will also be explored below, the Southern Common Market (*Mercosur*), the Andean Community (*CAN*) and the Central American Common Market (*MCCA*) have taken a more structured, institutional approach to both environmental cooperation[420] and socio-laboral cooperation.[421] In these sub-regions, though trade and investment law provisions can take sustainable development issues into account, most sub-regional social and environmental are directly addressed by particular cooperation mechanisms established as part of the overall integration project. For example, the Mercosur Socio-Laboural Commission is part of the overall Mercosur regional integration system,[422] and the Andean Community's Committee of Andean Environmental Authorities is part of the general process of CAN cooperation.[423] The Caribbean Community (CARICOM), due in part to its global links, is slightly different. Most Caribbean environmental and social cooperation takes place in the context of global programs for regional seas or environmental management, though their activities extend to the whole community and have a place in its structure.

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its relation to the FTAA, see C. Deere and D. Esty (eds.*) Greening the Americas: NAFTA's Lessons for Hemispheric Trade* (Cambridge, MA: MIT Press, 2002).

415 See NAALC Secretariat, online: http://www.naalc.org. See also Commission for Labor Cooperation, *Comparative Guide to Labor and Employment Laws in North America. Labor Relations Law In North America* (Washington: NAALC, 2000). And see K. Banks "Civil Society and the North American Agreement on Labor Cooperation" in *Linking Trade, Environment and Social Cohesion: NAFTA Experiences, Global Challenges* J. Kirton and V. Maclaren, eds. (Burlington: Ashgate, 2002).

416 The *Free Trade Agreement between the Government of Canada and the Government of Chile,* Ottawa and Santiago de Chile, 1998, and the *Agreement on Environmental Cooperation between the Government of Canada and the Government of Chile,* Ottawa and Santiago de Chile, 1998.

417 The *Free Trade Agreement Between the Government of Canada and the Government of the Republic of Costa Rica,* Ottawa and San Jose, 2002, and the *Environmental Cooperation Agreement between Canada and Costa Rica*, July 3, 2002, available online:http://www.ec.gc.ca.

418 The *Agreement on Labour Cooperation between the Government of Canada and the Government of Chile,* Ottawa and Santiago de Chile, 1998. See Ministerial Council Report on the Three-Year Review of the Canada-Chile Agreement on Labour Cooperation (December 2002) online: labour-travail.hrdc-drhc.gc.ca/psait_spila/aicdt_ialc/2003_2004/report_english.htm.

419 The *Agreement on Labour Cooperation between the Government of Canada and the Government of the Republic of Costa Rica,* Ottawa and San Jose, 2002.

420 See M.C. Cordonier Segger and N. Borregaard, "Sustainability and Hemispheric Integration: A Review of Existing Approaches" in *Greening the Americas*, eds. D. Esty & C. Deere (Boston: MIT Press, 2002). See also M.C. Cordonier Segger at al., *Ecological Rules and Sustainability in the Americas* (Winnipeg: IISD / UNEP, 2002).

421 See M.C. Cordonier Segger et al., *Social Rules and Sustainability in the Americas* (Winnipeg: IISD / OAS, 2004). See also A. Ciudad Reynaud, *Labour Standards and the Integration Process in the Americas (Geneva: ILO, 2001).* And see D. Martinez, V. Tokman and J. Wurgaft, *Las Dimensiones Laborales de la Integracion Economica en America Latina y el Caribe* Working Paper No. 8 (Geneva: ILO, 1995).

422 See O. Uriarte, "La ciudadanía laboral en el Mercosur" *Derecho Laboral*, Tomo XLI Nº 190, Montevideo 1998.

423 Statement of the Andean Environmental Authorities, Quito, Ecuador, July 03, 2001. Online: http://www.comunidadandina.org/ingles/document/Quito3-7-01.htm

Finally, the new *Chile – United States Free Trade Agreement* contains chapters on both environment and labour issues.[424] This model specifically references concrete commitments that will be delivered as part of the agreement, though it also does not prevent further environmental and social cooperation outside the context of the trade treaty.

Below, we will briefly review the cooperation programs or institutions each of these processes have established to address social and environmental issues, within the context (or not) of their economic integration or free trade projects.

The Mercosur

Mercosur Environmental Cooperation Regimes

In the Mercosur, meetings of the four environment ministers of the parties (Uruguay, Paraguay, Argentina and Brazil) laid a foundation for environmental cooperation.[425] The need for closer sub-regional environmental cooperation was recognised early in the Mercosur process. The Preamble of the Treaty of Asuncion recognises that the integration of national markets and resulting creation of a common market had to be achieved by the most effective use of the resources available, and the preservation of the environment. At Article 1, the Treaty refers to the need to coordinate macro-economic and sectoral policies of the parties, in order to determine the appropriate areas of competence, and harmonize their legislation in the relevant areas in order to strengthen the integration process. Indeed, the Mercosur has generated a series of norms harmonizing qualitative characteristics, including the sanitary and phyto-sanitary qualities of particular products (such as food additives, containers in direct contact with food, labelling, insecticide and fungicide residues in agricultural products). In terms of coordination of sectoral policies, a series of Mercosur norms has also been promulgated, such as the Agreement on the Transport of Dangerous Goods (2/12/94), the Sanitary and Phyto-Sanitary Agreement (6/12/96), and Basic Directives on Environmental Policy (Resolution 10/94).[426]

But the Mercosur has also developed a special trajectory of environmental cooperation. The 1992 *Canela Declaration* created an informal working group, the *Reunion Especializada en Medio Ambiente* (REMA), to study environmental laws, standards and practices in the four countries. This forum evolved into the creation of a *'Sub-Grupo No.6'* on the environment, one of the recognised technical working bodies of the Mercosur. This group examines issues such as environment and competitiveness, non-tariff barriers to trade, and common systems of environmental information. It provides mechanisms for direct participation by civil society organisations and technical experts, in particular

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[424] USTR Summary of Chile – US Free Trade Agreement, online: http://www.ustr.gov/regions/whemisphere/samerica/2002-12-11-chile_summary.pdf

[425] P. Tarak, *Bases para la armonización de exigencias ambientales en el Mercosur - El medio ambiente en el Mercosur* (Buenos Aires: Fundación Ambiente y Recursos Naturales, 1995) at 18. See also IDB, *Environmental Management in the Southern Cone: A Study of the Legal and Institutional Framework*, Background Studies Report ATN/II-5109-96 (Washington: Inter-American Development Bank, 1996).

[426] D. Ryan, "Mercosur and the Environment" in P. Konz (ed.) *Trade, Environment and Sustainable Development: Views from Sub-Saharan Africa and Latin America* (Geneva: UNU / ICTSD, 2000).

through informal consultations held before every meeting of Sub-Grupo No. 6. It negotiated a draft Mercosur *Environmental Protocol*,[427] and in 2001, approved the *Mercosur Framework Agreement on the Environment.*[428] This agreement, upon ratification by member states, will be added as a decision of the Common Market Council (Co*nsejo del Mercado Comun*) to the *Treaty of Asuncion* of the Mercosur.

The 2001 *Mercosur Framework Agreement on the Environment* is a comprehensive sustainable development law treaty, which establishes a shared objective of "sustainable development and environmental protection through the development of economic, social and environmental dimensions, contributing to a better quality of environment and life for the people."[429] It contains several interesting provisions. The text of the Framework Agreement provides for upward harmonisation of environmental management systems and increased co-operation on shared ecosystems, in addition to mechanisms for social participation and the protection of health. Public participation is an expressly pursued objective, and specific actions on civil society participation may yet be agreed upon in further protocols. In Chapter 1, Article 3, governments commit to the promotion of effective civil society participation in addressing environmental issues. Specific new provisions also offer some promise to implement this commitment. In Chapter 3, Article 6, the actors named to implement the accord include member states, with the participation of appropriate national organisations and civil society organisations. Activities include, as detailed at Article 6(a), "to increase information exchanges concerning environmental laws, regulations, procedures, policies and practice, including their social, cultural, economic, and health aspects, particularly those which might affect trade or competitiveness." The transparency system sets mechanisms in place, which, while bureaucratic in character, may be successful depending upon the way they are implemented. At Chapter 3, the Framework Agreement commits member states to cooperate on the development of instruments for environmental management, including quality standards, environmental impact assessment methods, environmental monitoring and costs, environmental information systems and certification processes. At Chapter 4 (Articles 8 to 11) there are provisions for the settlement of disputes, by reference to the existing Mercosur dispute settlement process, and other general mechanisms for implementation of the Framework Agreement.

An Annex to the Framework Agreement also provides a structure for the future development of protocols in three priority areas. First, it lays out the possibility of a protocol in the area of sustainable management of natural resources, such as protected areas, biological diversity, biosafety, wildlife management, forests, and hydrological resources. Second, it addresses quality of life and environmental management, such as hazardous waste management, urban planning, renewable energy, and improvement of soil and atmosphere/air quality. Third, it addresses environmental policy cooperation,

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[427] *Protocolo Adicional Al Tratado De Asuncion Sobre Medio Ambiente*, 2001 Draft, Capitulo XXVI, Montevideo, Uruguay.

[428] *Acuerdo Marco sobre Medio Ambiente del MERCOSUR*, Approved Text from the XX Reunión del Consejo Mercado Común, 22 June 2001, MERCOSUR/CMC/DEC.Nº 2/01. To be annexed, upon ratification by member states, to *El Tratado de Asunción, el Tratado de Ouro Preto*, la Resolución Nº 38/95 del Grupo Mercado Común y la Recomendación Nº 01/01 del SGT Nº 6 "Medio Ambiente".

[429] See *Acuerdo Marco sobre Medio Ambiente del MERCOSUR*, *ibid.*, at Article 4 where the objective is stated to be "desarrollo sustentable y la protección del medio ambiente, mediante la articulación de las dimensiones económicas, sociales y ambientales, contribuyendo a una mejor calidad del ambiente y de la vida de la población."

such as environmental impact assessment, economic instruments, environmental information exchange, and environmental awareness programs.

Three elements of this arrangement deserve particular attention. First, it is interesting to note that the Framework Agreement was established due to consideration of environmental issues from within the structures of the Mercosur Customs Union. In this instance, it appears that the international economic negotiations took environmental priorities into account, stimulating environmental cooperation as part of the general sub-regional economic integration process. But true progress was not made on a significant substantive environmental cooperation agenda until specific negotiations were undertaken, outside the economic cooperation context. Secondly, the model chosen is that of a traditional multilateral environmental agreement (MEA) – a framework of general cooperation is established, and then space is created for further protocols on specific areas of cooperation to be identified by the parties. Even the issues chosen by the parties in the sub-region are highly general, leaving scope for further adaptation and specific commitments to cooperation. Thirdly, there are clear provisions for civil society participation and broad sustainable development goals in the framework agreement, and hence all the protocols. This presents significant opportunities for integrated, inclusive agendas. If the Framework Agreement enters into force and can be effectively implemented, it presents a worthy model for broad cooperation on a scale up to now unknown among sub-regional environmental agreements.

Although the regime has much work to do to ensure that the promise of the 2001 Framework Agreement on the Environment is realised, important aspects are present. Indeed, civil society actors first expressed cautious optimism about this linkage at a sub-regional level.[430] However, concern has been generated by the fact that the Framework Agreement has not yet been ratified.

Mercosur Social Development Cooperation Regimes

The 1991 *Treaty of Asuncion* makes no express mention of social and labour matters, though its Preamble sets out a generic objective of accelerating development processes with social justice. However, the Mercosur *Labour Ministers 1991 Declaration of Montevideo* responded by highlighting the need to address labour aspects of Mercosur and improve working conditions, a proposal to create a working sub-group on labour issues, and considers the possibility of a Social Charter for Mercosur.[431] In Articles 28 - 30 of the *Protocol of Ouro Preto*, the Mercosur Economic and Social Consultative Forum (FCES) was established and given a role to guarantee participation of different sectors.[432]

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[430] See M. Leichner, "The Mercosur Framework Agreement on the Environment" (2001) 15 Bridges *Journal on Trade and Sustainable Development*.

[431] A. J. Robles, 'Balance y perspectivas de los organismos sociolalaborales del MERCOSUR' *Revista Pistas* Nº 8, Dec 2002. Report from Taller de Formación y Debate "El futuro del MERCOSUR", organised 30 April - 2 May, 2002 by the Coordinación de Asuntos Internacionales del Ministerio de Trabajo, Empleo y Seguridad Social. Online: http://www.fes.org.ar.

[432] With 9 representatives per country (36 members), the FCES advises the Common Market Council (the Consejo Mercado Común, or CMC). See Organisation of American States SICE Database on FTAA Issues, online: http://www.oas.org

Governments created a working sub-group to take up matters dealing with labour relations, employment and social security,[433] with eight committees to study various topics. Committee 1 handles individual work relationships; Committee 2, collective work relationships; Committee 3, employment and labour migration; Committee 4, vocational training; Committee 5, workers health and safety; Committee 6, social security; Committee 7, labour costs in land and ocean transport; and Committee 8 addresses the ILO Conventions. Sub-Group No. 10 and its committees, like the ILO, are formed with tripartite representation from government, labour and employers, and have held a number of meetings, some of which included representatives from civil society.[434] Sub-Group No. 10 drafted the *Mercosur Multilateral Convention on Social Security* (Recommendation Nº 3/95), and in 1998, the *Socio-Laboral Declaration of Mercosur.*

This Declaration led to the creation, in 1999, of a tri-partite Socio-Labour Commission with a regular calendar of meetings and a mandate to make consensus recommendations on social issues for adoption by the Common Market Group.[435] The Socio-Labour Commission has established a Labour Market Observatory (Observatorio del Mercado de Trabajo) of the Mercosur, and has successfully led a CMC Resolution on Professional Qualifications. Recently, the Technical Group on Social Development in the Mercosur, Chile and Bolivia has developed a Statistical System of Social Indicators (Sistema Estadístico de Indicadores Sociales).[436] Mercosur Ministers of Labour also meet to address regional issues and provide political high level guidance for the regime.

As part of the Mercosur social agenda, there is also a Working Sub-Group No. 11 on Health issues, and regular meetings take place between Mercosur Health Ministers. There is also a Specialised Meeting on Women's Issues, with a strategic plan and program of work for the sub-region.

As such, on the social side of the Mercosur agenda, much cooperative progress has been possible, though most initiatives are too new, as yet, for an evaluation of their concrete results. Both trade-related and non-trade-related issues are being addressed, and social development programs have also been recently developed between the member states. In spite of recent economic turbulence in the sub-region, these institutions have continued to develop and appear to be undertaking a series of ambitious common social programs within the overall framework of the Mercosur integration project.

The Andean Community

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[433] This began as Working Sub-Group No. 11, then became Working Sub-Group No. 10, through the provisions of the Consejo Mercado Común Decision Nº 20/95.

[434] See O. E Uriarte, 'La ciudadanía laboral en el Mercosur' *Derecho Laboral*, Montevideo 1998, Tomo XLI Nº 190. Online : http://www.ilo.org/public/spanish/region/ampro/cinterfor/publ/sala/ermida/ciud_lab/index.htm#(*)

[435] The Socio-Laboral Commission has a considerable discretion and means to accomplish its mandate. It delivers reports of its governments to the parties, makes observations, conducts reviews and responds to questions on the application of the Socio-Laboral Declaration. It receives complaints of non-compliance with the Declaration, and can even develop proposals to modify Declaration, as the Declaration itself provides opportunities for bi-annual updates and review. See http://www.mercosur.org.uy

[436] Grupo Técnico de la Reunión de Ministros y Autoridades de Desarrollo Social del Mercosur, Bolivia y Chile (21 y 22 de marzo de 2002), online: http://www.mercosur.org.uy/pagina1esp.htm

The Andean Environmental Cooperation Regimes

Environmental matters have been a fixed part of the Andean integration agenda since 1982, when the Andean Commission recognized the importance of regional cooperation in agriculture, food security and general environmental policy and research.[437] Then, in 1996, when the *Trujillo Protocol* launched a reinvigorated Andean integration system, environmental and sustainable development issues were part of the agenda. Working from a newly invigorated foundation, the Andean Commission agreed on a *Common Regime on Access to Genetic Resources*, in the 1996 Decision 391. This Decision empowers national authorities and indigenous and local communities, as custodians of traditional knowledge and resources, to grant prior informed consent to potential users in return for equitable returns.[438] An institution facilitates the sub-regional environmental cooperation agenda. In 1998, the Andean Commission created an Andean Committee of Environmental Authorities (the *Comite Andino de Autoridades Ambientales*, or CAAAM).[439] The goal of the CAAAM is to advise the General Secretariat of the Andean Community (ANCOM) on environmental matters and implement, monitor and enforce environmental decisions of the ANCOM. [440] For example, in 1998, the Inter-American Development Bank (IDB) and the ANCOM agreed to create a Regional Biodiversity Strategy for the countries of the Andean Tropics, which has provided a framework for joint bio-safety measures in the community.[441] CAAAM appears to have greatly increased involvement and cooperation between Andean environment ministers, and is attempting to proceed with an integrated agenda similar to that agreed in the 1996 Bolivia Santa Cruz Summit on Sustainable Development, mentioned above. In their 1999 Cartagena Summit, ANCOM Ministers also made a commitment to develop, as part of a broader social agenda, an Andean Community Sustainable Development Strategy.

General tools of the CAN may also serve to address sub-regional environmental problems. For example, international disputes, including those concerning the sub-regional environment or other claims, can be settled in the Andean Court of Justice.[442] The Court has jurisdiction over all disputes involving CAN norms, including disputes brought by member states or CAN institutions and, in appropriate cases, even disputes brought by private parties.[443] As such, in principle the Court has significant supra-

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[437] See E.F. Pardo, "La política ambiental en el Grupo Andino" in E. Guhl & J. G. Tokatlian, eds., *Medio ambiente y relaciones internacionales* (Bogota: Tercer Mundo Editores, 1992) at 179-189. See also online: http://www.sieca.org.gt/

[438] For a full text of this Decision see online: http://www.comunidadandina.org. According to the 1992 Convention on Biological Diversity (CBD), access to resources is subject to the prior informed consent (PIC) of the provider of such resources. This means that any company or individual seeking access to genetic resources must first seek and receive the consent of the custodian of these resources, before procuring any genetic resources from the provider's jurisdiction. Therefore, access must be granted on mutually agreed-upon terms, as defined by the seeker and provider.

[439] See Decision number 435 (1998) found online: http://www.comunidadandina.org.

[440] For a further explanation of the activities of the CAAAM and the Environmental Action Plan, see online: http://www.comunidadandina.org.

[441] "Comercio y medio ambiente en los acuerdos regionales" (Junio – Julio Agosto 1999) 2:1 *Puentes Entre el Comercio y el Desarollo Sostenible*

[442] *Agreement on Andean Subregional Integration*, May 26, 1969, at Ch. II, E Concerning the Andean Community Tribunal of Justice and I - Concerning Dispute Settlement. Then see *Treaty Creating the Court of Justice of the Cartagena Agreement,* May 28, 1979, 18 I.L.M. 1203 (1979) at 3, which resolved, in principle, a major gap in the earlier legislative process of the *1969 Cartagena Agreement.* A *Protocol Modifying the Treaty Creating the Court of Justice of the Cartagena Agreement* was later added.

[443] *1979 Andean Court of Justice Treaty*, *ibid.* at 1., 19, 27, 29, 33, 17-33. These norms include the *1969 Cartagena Agreement*, its protocols and instruments, the Treaty itself, the decisions of the Commission and the Resolutions of the Board.

national authority. The Court produces judgments, and member states found by the Court to be in non-compliance with CAN norms must take all necessary measures to come into compliance. National courts are required to refer questions of CAN law to the Court after exhausting local appeals to their rulings, and the interpretations of the Court must be adopted by the referring judge. While the Court's effectiveness was, in practice, until recently, affected by the general lack of political cooperation and coordination among CAN member states,[444] it now appears to be gaining credibility and recognition in the region as a viable place for dispute resolution.

This broad regional dispute resolution structure, as well as the new Consejo Andino de Autoridades Ambientales (CAAA) and the Andean Social Policy Forum, could offer ideas for future hemispheric cooperation mechanisms. While the issues addressed by the CAAA have links to trade concerns, they are often treated as environmental cooperation issues and effectively addressed in this way. For example, provisions of the Andean biodiversity strategy relate to sharing of benefits of genetic resources. These may affect trade liberalisation commitments on protection of intellectual property rights (IPRs), as will be described below. However, the IPR issues are addressed as part of the CAAA agenda. The CAAA's progressive agenda on new policy questions, though these require high degrees of ecosystem and also scientific knowledge, suggests that Andean countries are gaining capacity through the new institutional cooperation mechanism and workplans.

Andean Social Development Cooperation Regimes

In September 1995, the Andean *Declaration on Social Development* reaffirmed the right of all people of the region to education, to the fruits of science and technology, to culture, and to health.[445] While hortatory in nature, the Declaration focused on social, economic and cultural rights. It highlighted the pressing need to adopt specific measures for incorporating disadvantaged social groups into the economic, social, civic, cultural, and political life. It called for new strategies to promote employment and committed to eradicate all forms of social discrimination. Equitable income distribution was stressed as a basic aim of social development.

Four years later, the May 1999 *Act of Cartagena Social Agenda* focused on creating jobs and guaranteeing improvements in education, health, and social housing.[446] It provides for an Andean Community migration policy and a guarantee for migrant workers rights; an educational, cultural, and science and technology policy aimed at safeguarding and promoting the Andean identity; and an Andean strategy on sustainable development. In particular, Education Ministers were given the tasks of developing programs to

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Actions which can be brought concerning these norms include actions for nullification of acts of CAN institutions, actions for non-compliance on the part of a member state, and requests by national courts for advisory opinions.

[444] Most credibility gaps came from international critique of a strongly "regionalist" investment regime adopted by the ANCOM. See S. Horton, "Peru and ANCOM: A Study in the Disintegration of a Common Market" (1982) 17 Tex. Int'l L. J. 39 at 43-44. See, ten years later, E.A. Wiesner, "ANCOM: A New Attitude Toward Foreign Investment?" (1993) 24 U. Miami Inter-Am. L. Rev. 435 at 436-37 which argues that foreign direct investment in CAN member states has been impeded by the continuing vitality of the Calvo Doctrine.

[445] Andean *Declaration on Social Development,* 1995.

[446] *Act of Cartagena Social Agenda,* May 1999.

harmonize Andean educational systems and to secure mutual recognition of professional licenses, certificates, and degrees; taking measures to strengthen the Andean cultural identity and promote integration values; and prioritizing educational policies in border areas. Ministers of Culture undertook a programme to coordinate cultural policies, and to execute a multicultural project known as 'the Andean Route' to promote the sub-region's traditions, history, and common legacy. Assistance was provided to implement Health programmes within the framework of the *Hipólito Unanue Convention*, for issues such as building healthy frontiers, strengthening epidemiological surveillance systems, sub-regional coordination for emergency and disaster measures, harmonization of medicinal products and good manufacturing practice; multilateral and bi-lateral health agreements; and establishing telemedical and health promotion programs for Aymara communities in Bolivia, Peru, and Chile.

Emphasis was placed on the need to reinforce the participation of business people and workers in the integration process, and the General Secretariat was instructed to increase their support for Business and Labour Advisory Councils. Labour Ministers were instructed to take measures to move ahead with the coordination of policies on job promotion, labour studies and training, job health and safety, social security, and labour migration, and to prepare a *Draft Protocol Amending the Simón Rodríguez Convention*.[447] In June 2000, the Act of Lima created an *Andean Advisory Council of Labor Ministers*.[448] CAN Ministers of Labour coordinate efforts in five areas of social and labour integration: job promotion, job training, health and safety on the job, social security, and labour migration.

In the *Act of Carabobo* of June 2001, the Ministers responsible for executing social welfare, health, labor, education, and housing policies were entrusted with drawing up a Comprehensive Social Development Plan to confront the pressing problems of poverty, social exclusion, and inequality in the sub-region.[449] It was decided to set up an Andean Forum on social and economic development. As part of the effort to build up the Andean Statistical Information System, access to harmonized and periodical data on social development and the informal sector were emphasized. In the 2001 *Declaration of Machu Picchu*, a Working Committee on Indigenous Peoples Rights was established, with the participation of indigenous peoples organizations, human rights organizations, civil society, and representatives of the Member States. Strong support was to be given to all efforts aimed at promoting and protecting the basic rights and freedoms of the indigenous peoples, and to promote the OAS *Declaration on the Rights of Indigenous Peoples*.[450]

Other Andean social cooperation instruments are also being developed. An Andean Labour Observatory has been proposed to collect statistical data and information about labour provisions and employment programs. A proposal is being drafted with the assistance of the Iberian-American Social Security Organization (OISS) to amend

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[447] See the Declaration of Cartagena de Indias - Final declaration of the Meeting of Ministers of Labor of the Andean Community and Action Plan Approved at the Conclusion of the Meeting of Ministers of Labor of the Andean Community (Cartagena de Indias, May 23rd 1999). Online: http://www.comunidadandina.org/ingles/document/Act_n9.htm

[448] *Act of Lima,* June 2000.

[449] *Act of Carabobo,* June 2001.

[450] *Declaration of Machu Picchu,* Cusco, Peru, 2001.

Decisions 112, "Andean Social Security Instrument" and 148 "Regulations for the Andean Social Security Instrument." National legislation on labour migration has been reviewed with the assistance of the International Organization for Migration (IOM) and a proposal is being drawn up to amend Decision 116 "Andean Labour Migration Instrument."

As such, a new but vigorous program of social cooperation appears to be developing in the Andean sub-region. These initiatives, coordinated by the Andean integration process, focus on addressing key priorities for sub-regional cooperation. Where the social issues touch on trade, solutions appear to be found within the context of the labour, health or other social issues, though it is not clear how these different processes will relate to each other as they develop.

Central America

Central American Environment and Sustainable Development Cooperation Regimes

The environment became a significant international issue in Central America in 1989, following the signature of the 1989 *Central American Convention for the Protection of the Environment* (CPC), and the subsequent creation of the *Central American Commission for the Environment and Development* (CCAD) among Environment Ministers from seven countries of Central America.[451]

Establishment of the *Central American Integration System* in 1991 (*Tegucigalpa Protocol*) has led to the relatively rapid negotiation and adoption of multiple regional environmental agreements, covering biodiversity and protected areas, hazardous-waste movements, forest conservation, and climate change, among other areas.[452]

At the UN Conference on Environment and Development in 1992, the CCAD coordinated the development of a joint position ("Agenda 2000") for the region. Two tangible results of this cooperation can be highlighted. First, the CCAD supported the creation of a *Central American Inter-Parliamentary Commission on the Environment*, which led to a regional Forests Convention that is now being implemented by the Central American Forest Council. The CCAD created a regional forestry unit to work on a Tropical Forestry Action Program, which led to the adoption of common guidelines for forestry concessions.[453] Secondly, a Mesoamerican Biological Corridor (MBC) has been developed. This network of protected areas aims to serve as an effective biological link between North and South America.[454]

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[451] For more details about the Central American Commission on Environment and Development and ALIDES, see http://ccad.sgsica.org/antecedentes/alides/alides.htm.

[452] For more information, see online: http://www.sieca.org.gt.

[453] Guidelines include commitments to establishing a forestry policy based on zoning of permanent forestry, the adoption of a contractual system for the long-term use of forests, and the even-handed application of laws regulating forestry activities to national and foreign concessionaires.

[454] The concept of a Mesoamerican Biological Corridor is espoused in the *Central American Convention for the Conservation of Biodiversity and the Protection of Priority Natural Areas*, 5 June 1992. Article 21 states the six countries' commitment "to create, associated to the Central American Commission for Environment and Development, CCAD, the Central American Council for Protected Areas, with personnel and institutions related to the World Commission on Protected Areas, CNPPA, and financed by the Regional Fund for Environment and Development, as the main entity charged

The Alliance for Sustainable Development (ALIDES) was created in 1994, generating a conceptual and operational framework for sub-regional and national goals and strategies. ALIDES is a comprehensive sub-regional initiative that addresses political, moral, economic, social, and environmental issues that might otherwise have fallen to trade negotiators to resolve. National Councils on Sustainable Development in each country support the implementation of the ALIDES goals. ALIDES was seen as a potential foundation from which to strengthen environmental protection and other development priorities. It was a starting point for the 1994 CONCAUSA (Convenio CentroAmérica - USA), a partnership for sustainable development which provided funding to the region for a list of concrete commitments including environmental measures such as the conservation of biodiversity, development of renewable energy, environmental legislation standards and environmentally friendly industrial processes.

These priorities and a comprehensive regional strategic environmental program is being carried out by the CCAD and its partners.[455] The *Plan Puebla Panama* also brings new energy to sustainable development for a broader Mesoamerican cooperation with several south Mexican states on infrastructure, natural resource management and development.

As such, in terms of policy innovations which might provide lessons for a hemispheric regime, it is clear that Central Americans have comprehensive strategic action plans[456] and a reasonably robust institution for environmental cooperation, the CCAD, which seeks to address environment and development challenges for the region in an integrated way. While the economic integration process itself has not been very successful to date, the CCAD can arguably serve both to coordinate environmental (and developmental) cooperation, as a platform for sub-regional capacity building initiatives, and to attract development and environmental cooperation financing to the sub-region.

Central American Social CooperationRegimes

The Central American Integration System (SICA) has economic, social and sustainable development streams, and is supported by institutions such as the Central American Court of Justice as well as a general administrative secretariat.[457]

The social stream (SISCA) includes one principal Treaty, the 1995 *Central American Social Integration Treaty* (Tratado de la Integracion Social Centroamericana). This treaty commits

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with coordinating regional efforts towards harmonizing policies related to and for the development of the Regional Protected Area System as an effective Mesoamerican biological corridor." At their Regular Meeting during the 19th Central American Summit (1997), the region's presidents approved the Central American Council on Protected Areas' (CCAP) proposal for implementation of a Mesoamerican Biological Corridor Program.

[455] CCAD's success stems partly from its transparent and participatory decision-making process: civil society organizations, representatives of indigenous peoples, and businesses all participate in CCAD's quarterly meetings and other sponsored events. In addition, as only a small number of member countries with clear common interests are involved, progress on sensitive issues is possible.

[456] Central American Environmental Action Plan, 2002.

[457] See Central American Integration System, online: See also Solís, L. G. and Solano, P., 'Central America: The Difficult Road Towards Integration' FPP-01-07 (2001) online: http://www.focal.ca/images/pdf/central_america.pdf And see Consejo de Integración Social, Secretaría Técnica de la Integración Social, Visión Estratégica del Desarrollo y la Integración Social de Centroamérica para el Año 2020 y Estrategias Y Líneas De Acción Al 2010, SICA (San Salvador, 20 de octubre de 2000) online: http://www.sgsica.org/sisca/docs_sisca/Vision.pdf

governments to progressive social integration for sustainable development (Art. 1), cooperation and solidarity to provide basic services, develop the potential of all Central Americans and overcome poverty (Art. 2) and establishes a social sub-system of SICA (Art. 3). Among other principles, the treaty recognizes social development as a universal human right, the human being at the centre of sustainable social development, and commits to end social exclusion (Art. 6). Among other sub-regional activities, it commits governments to identify and cooperate on social development issues, gradual harmonization of social policies, dedicate resources to end structural causes of poverty, starting with the most disadvantaged, and promote local government and community action (Art. 8). As part of the Central American Social Sub-System, the treaty establishes a Social Consultative Committee (CCIS) to advise the Central American Common Market, and a council on social integration, (Consejo de la Integración Social), a Council of Social Ministers (Consejo de Ministros del Area Social) and a secretariat (Secretaría de la Integración Social), and recognizes the INCAP (Instituto de Nutrición de Centroamérica y Panamá), the BCIE (Banco Centroamericano de Integración Económica) and the ICAP (Instituto Centroamericano de Administración Pública as technical support (Art. 9), leaving an open door for other members (Art. 10). Articles 11 – 23 lay out the institutional structure, ratification procedures and other aspects of the treaty.

There is a Social Integration Council formed of relevant high level representatives, and a Secretariat for Central American Social Integation (SGSICA) based in Panama City.[458] These bodies coordinate a Strategic Plan for Development and Social Integration 2020. The SGSICA appears to play a role in obtaining funds for regional social sustainable development projects related to education, health and infrastructure development, such as a Social Vulnerability Reduction Program.[459]

As part of the economic stream (SIECA), there is also a Regional System of Labour Information, with an internet accessible database and a Programa Regional de Modernizacion del Mercado Laboral (a sub-regional IDB-USAID-SIECA initiative to promote Central American compliance with core labour standards and ILO Conventions, raise awareness and provide information).[460] These economic aspects of integration are considered fundamental to the broader Central American strategy for development.[461]

The CARICOM

The CARICOM mission statement is to "provide dynamic leadership and service, in partnership with Community institutions and Groups, toward the attainment of a viable, internationally competitive and sustainable Community, with improved quality of life for

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[458] SGSICA, online: http://www.sgsica.org/sisca/index.php.
[459] INCAE, *Centroamérica en El Siglo XXI : Una Agenda Para la Competitividad y el Desarrollo Sostenible* (Alajuela: INCAE, CLACDS Centro Latinoamericano para la Competitividad y el Desarrollo Sostenible and HIID Harvard Institute for International Development, 1999) at 1-23.
[460] SIECA, online: http://www.laboral.sieca.org.gt
[461] R. Najera 'Origenes, evolucion y perspectivas de la integracion centroamericana' *La integracion como instrumento de desarollo: sus perspectivas y desafios para Centroamerican, Panorama Centroamericano* 66 (Guatemala: Instituto Centroamericano de Estudios Politicos, 1997).

all." As such, the overall goal of this sub-regional integration project includes sustainable development and quality of life for all citizens.[462]

CARICOM Environmental Cooperation Regimes

Caribbean environmental cooperation crystallized in the 1983 *Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region* (Cartagena Convention), as part of the UNEP Regional Seas Programme.[463] This global initiative encourages nations to cooperate under a framework 'Regional Sea Convention' with subsequent affiliated protocols on specific areas of the marine environment.[464] The Cartagena Convention has led to the *Protocol concerning Co-operation in Combating Oil Spills in the Wider Caribbean Region* (Oil Spills Protocol), the *Specially Protected Areas and Wildlife* (SPAW) Protocol, which entered into force in 2000, and the *Land-Based Sources of Marine Pollution* (LBS) Protocol.

A Caribbean Environment Programme (CEP) was created in 1986 and is facilitated by the Caribbean Regional Co-ordinating Unit (CAR/RCU) located in Kingston, Jamaica. This Unit serves as Secretariat to the CEP and has a coordinating rather than implementing role. The objectives of the Secretariat are to provide assistance to all countries of the region, strengthen national and sub-regional institutions, co-ordinate international assistance, and stimulate technical co-operation among countries. A Caribbean Environmental Health Institute (CEHI) also has a well-developed capacity in the area of environment and health programming, and coordinates several excellent initiatives funded by the Global Environmental Facility (GEF), as well as the Caribbean participation in the Health and Environment Ministers of the Americas (HEMA) process.

The Caribbean has traditionally kept its common market negotiations fully separate from environmental legal frameworks, though it will address environmental issues if they emerge within the framework of economic cooperation. This is partly due to their membership in many global arrangements, and because the region's environmental programs are often externally stimulated and financed.

Should there be no agreement on links between trade and the environment within the 34 countries of the Americas, this model might be chosen instead. A parallel, and completely unconnected, environmental regime exists already in Latin America and the Caribbean, facilitated by United Nations Environment Programme Regional Office for Latin America and the Caribbean. If the Caribbean model were chosen, the UNEP Forum of Environment Ministers of Latin America and the Caribbean[465] could become coordinator or secretariat to several binding hemispheric environmental accords agreed by the Americas environment ministers, simply through the inclusion of Canada and the

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462 See online: http://www.focal.ca/images/pdf/caribbean.pdf

463 M.A. Miller, "Protecting the Marine Environment of the Wider Caribbean Region: the Challenge of Institution Building" in H. O. Bergesen and G. Parmann, eds., *Green Globe Yearbook of International Co-operation on Environment and Development* (Oxford: Fridtjof Nansen Institute-Oxford University Press, 1996) at 37-45.

464 For more information, see online: http://www.cep.unep.org/.

465 United Nations Environment Programme Forum of Ministers of the Environment of Latin America and the Caribbean, online: http://www.pnuma.org/foroalc/esp/engforum.htm.

United States in its deliberations. Indeed, such independent cooperation could be undertaken anyway, without prejudice to any environmental provisions in the FTAA or other arrangements. Another possibility, depending on the scope of relevant mandates, would be to strengthen the Organisation of American States (OAS) Environment and Sustainable Development Unit, and ensure that is has the capacity to address issues of coherence, coordination and mutual supportiveness.[466]

CARICOM Social Cooperation Instruments

The main CARICOM institution to address social issues in the sub-region is the Council for Human and Social Development (COHSOD), which is also separate from the CARICOM trade liberalisation structures. COHSOD structures its work within a two-year cycle during which four (4) Ordinary Meetings are convened. An Inter-Sessional Committee comprising the current, outgoing and incoming Chairman is responsible for organizing the COHSOD between sessions, and Caribbean Community Secretariat is recognised as the Secretariat of the COHSOD, with assistance from a Committee of Officials from CARICOM member states.[467] The COHSOD coordinates cooperation on regional social programmes such as CCH11, Human Resource Requirements and Strategic Inter-Sectoral Alliances with Gender and Development, Youth and Drug Demand Reduction; as well as Regional Strategic Plans for HIV/AIDS, Prevention and Control Non-Communicable.

The CARICOM has a full suite of social cooperation programmes. CARICOM Member States, with the assistance of UNAIDS, have been holding 'en bloc' negotiations with pharmaceutical companies to gain access to cheap antiretroviral drugs. There are also regular meetings of CARICOM Ministers of Education, which coordinate to take advantage of sub-regional research and planning, and Ministries of Youth Affairs and National Youth Councils, which cooperate to attract funding for sub-regional efforts. There is also a significant civil society component of the CARICOM, which hosts Forums and Encounters for the sub-region, and responds to a Civil Society Charter of the CARICOM.

The CARICOM *Declaration of Labour and Industrial Relations Principles* sets out the general labour policy to which the sub-region aspires, consistent with international labour standards and other international instruments. These include principles on labour policy, industrial relations, labour relations, collective bargaining, equality of opportunity, remuneration, right to work, termination of employment, industrial action, occupational health and safety, social security, disputes settlement, employment policy, discrimination, CARICOM, labour administration, industrial relations.[468] In the 1982 *Cooperation Agreement between the International Labour Organization and the Caribbean Community* and its later Amendments, the ILO and CARICOM agree to cooperate with each other on

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[466] Organisation of American States, Environment and Sustainable Development Unit, online: http://www.oas.org/usde.

[467] See CARICOM, COHSOD V: Investing in Human Resource Development with Equity, online: http://www.caricom.org . See also 'Rules of Procedure for the Council for Human and Social Development (COHSOD), online: http://www.caricom.org.

[468] See CARICOM Declaration of Labour and Industrial Relations Principles, online: http://www.caricom.org/labourprinciples.htm

matters arising in the spheres of labour, social policy and related matters of mutual interest to the two agencies. A later modified Agreement sought to focus particularly on the areas of policy development, institution and capacity building, and other matters.[469]

Finally, as part of this extensive sub-regional system of social cooperation instruments, the 1996 CARICOM *Agreement on Social Security* is quite an interesting instrument, addressing the need for freedom from discrimination, and the need to protect the rights of the most vulnerable. It establishes harmonisation of the social security legislation of the member states of the Caribbean Community and equality of treatment with respect to invalidity pensions; disablement pensions; old age or retirement pensions; survivors' pensions, and death benefits in the form of pensions (Art. 2). It establishes mutual recognition of contribution periods for voluntary insurance; and bars reduction, modification, suspension, and forfeiture of benefits due to residence in any states party to the treaty (Art. 3 and 4). Its provisions lay out social security rules for persons employed in transnational companies operating in the region (Art. 7), itinerant persons (Art. 8), persons employed in international transport or on ships (Art. 9 and 10) and other circumstances, including exclusions. It contains provisions governing social security benefits for invalidity, old age, retirement, survivors, and disablement pensions, as well as death benefits, in all parties (Art. 16 to 24). It also lays out a common set of rules for determination of invalidity, investigations and medical examinations, duties of examination institutions and medical supervision, payment of claims, settlement of disputes and other matters (Art. 33 to 51). The treaty establishes a sub-regional Committee of Heads of the Social Security Schemes for CARICOM (Art. 25 – 26), administered by the CARICOM Secretariat. Essentially, the treaty lays out a common regime for social security for the CARICOM.[470]

The Caribbean Community is also far ahead in its formal mechanisms for civil society participation. First, in 1997, a *Civil Society Charter* was ratified, which recognises the need for participation for a wide range of actors. This Charter is now being revisited by the CARICOM, to strengthen existing mechanisms of consultation between government and civil society. It is planned that new mechanisms will be identified and a commitment to ongoing collaboration at national and regional levels will be sought. A range of issues deemed critical to the future development of the Caribbean Community is debated at the CARICOM Forum. Some of the proposed issues relate to the reform of the region's education systems and their relationship to employment, productivity and technology acquisition; recapturing or retaining migrating skills; instruments at the regional and national level to promote domestic savings; and focusing on the Caribbean as a 'zone of peace.' While these issues link with the trade and economic integration issues, they are being addressed in a holistic way, as social challenges, and have been proposed as elements of a 'New Model of Economic Development' for the Caribbean.[471]

North America

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[469] See Ammendment to 1982 http://www.caricom.org/archives/agreement-ilo-caricom-amendment.htm

[470] See 1996 CARICOM Agreement on Social Security, online: http://www.itcilo.it/english/actrav/telearn/global/ilo/blokit/carisoc.htm See also commentary, online: http://www.caricom.org/socsec.htm

[471] For more information, see online: http://www.caricom.org and http://www.caricom.org/chartercivilsoc.html.

The *North American Free Trade Agreement* (NAFTA)[472] is part of three independent but linked treaties and institutions, with the *North American Agreement for Environmental Cooperation*[473] and the *North American Agreement on Labour Cooperation* (NAALC).[474] These three parallel accords and institutions do not report to any central organising body, nor are institutional linkages between the three mediated in any formal way, beyond bridges between different officials within the countries themselves. It is not automatic that these institutions are 'mutually supportive', or that they will continue to develop in such a way. The NAFTA itself also contains various innovative provisions related to sustainable development.

North American Environmental Regime

The *North American Agreement for Environmental Cooperation* between Canada, Mexico and the United States has been well documented in scholarly literature, and several excellent studies survey its nature, development, and potential as a model for environmental cooperation in the Americas.[475] The NAAEC objectives are assigned to an institution, the *Commission for Environmental Cooperation* (CEC), which is served by a secretariat in Montreal, Canada, and governed by the Tri-partite Council of Environment Ministers that works to promote environmental cooperation among the three countries.[476] It may consider and develop recommendations on environmental issues, including: scientific research and technology; eco-labelling; pollution prevention techniques and strategies and public awareness of the environment.[477] If a persistent pattern of non-enforcement of environmental laws is identified, an appeals process also exists.[478]

The CEC, as an institution, has become the primary regional voice in North America for the promotion of environmental integrity. With guidance from its Joint Public Advisory Committee, it has established programs to link environment, economy and trade issues in North America, promote the conservation of biodiversity in the region, address

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[472] *The North American Free Trade Agreement*, Dec. 17, 1992, 32 I.L.M. 296 and 32 I.L.M. 605, online: http://www.nafta.org.

[473] *North America Agreement on Environmental Cooperation* (Washington, Ottawa, Mexico City), 8, 9, 14 September 1993, in force 1 January 1994; 32 I.L.M. (1993) 1480, available online:http://www.cec.org. For commentary on this aspect and its relation to the FTAA, see C. Deere and D. Esty (eds*.) Greening the Americas: NAFTA's Lessons for Hemispheric Trade* (Cambridge, MA: MIT Press, 2002).

[474] See NAALC Secretariat, online: http://www.naalc.org. See also Commission for Labor Cooperation, *Comparative Guide to Labor and Employment Laws in North America. Labor Relations Law In North America* (Washington: NAALC, 2000). And see K. Banks "Civil Society and the North American Agreement on Labor Cooperation" in *Linking Trade, Environment and Social Cohesion: NAFTA Experiences, Global Challenges* J. Kirton and V. Maclaren, eds. (Burlington: Ashgate, 2002).

[475] This accord makes environmental integrity a priority, recognizing as objectives the need to "foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations" as well as to "increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna." *North American Agreement for Environmental Cooperation,* 1994 available online:http://www.cec.org. See A. de Mestral, "The NAFTA Commission on Environmental Cooperation – Voice for the North American Environment?" in *Economic Globalization and Compliance with International Environmental Agreements* A. Kiss, D. Shelton and K. Ishibashi (eds.) Int'l Environmental Law and Policy Series 63 (The Hague: Kluwer Law International, 2003).

[476] Specifically, the Council will promote a co-operative work plan based on priority areas, including: establishing limits for specific air and marine pollutants; environmental assessments of projects with trans-boundary implications; and, reciprocal court access for damage or injury resulting from trans-boundary pollution.

[477] See *North American Agreement for Environmental Cooperation,* Articles 1 and 10:2.

[478] G. Alanis, *The NAAEC Article 14 and 15 Factual Submission Process* (Mexico City: CEMDA, 2001). See also C. Deere and D. Esty (eds*.) Greening the Americas: NAFTA's Lessons for Hemispheric Trade* (Cambridge, MA: MIT Press, 2002).

pollutants, promote health, and strengthen environmental law and policy, by compiling legal environmental measures in the sub-region, and reviewing existing mechanisms for compliance.[479]

The NAAEC is a particularly good model for a regional environmental agreement. Various innovative mechanisms have been implemented with some degree of success, founded on a firm mandate. The preamble of the Agreement recognizes the importance of civil society participation in the conservation, protection and improvement of the environment. Regarding access to information, the Agreement establishes a series of provisions related to public access to information at all levels.[480] The Agreement also contemplates the possibility of generating a factual record, even if solicited by civil society groups, in Articles 14 and 15.[481] It also grants highly controversial access to justice for investors in Chapter 11.[482] A program for bio-regional mapping of the sub-region has proved very useful in providing a common vision and base of knowledge for further cooperation.[483] Elements of the NAAEC, and certainly the CEC itself, demonstrate the usefulness of a credible institution as part of any regional regime that seeks to harmonize environment and trade objectives.

North American Labour Cooperation

The North American focus in social development cooperation is very narrow, with only one instrument on labour issues. The North American Agreement on Labour Cooperation (NAALC) carries forward the commitment of the Preamble to the NAFTA to "improve working conditions and living standards" (Art. 1) in all Parties; to "protect, enhance and enforce basic workers' rights"; to strengthen co-operation on labour issues among governments and citizens; to ensure that the Parties will work to protect high labour standards; and to ensure that each Party retains its ability to set its own labour standards.[484]

The NAALC elaborates eleven labour principles (Annex 1) that the countries are committed to encourage: freedom of association and the right to organize; the right to collective bargaining; the right to strike; prohibition of forced labour; labour protection for children and young persons; minimum employment standards; elimination of

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[479] See Commission for Environmental Cooperation, "Voluntary Measures to Ensure Environmental Compliance: A Review and Analysis of North American Initiatives," and "Environmental Management Systems and Compliance: Report to the Council of the Commission for Environmental Cooperation on Results and Recommendations Pursuant to Council Resolution 97-05," in M. Paquin, ed., *North American Environmental Law and Policy* (Cowansville: Les Editions Yvon Blais Inc., Fall 1998).

[480] According to Article 2, the parties should periodically produce reports about the state of the environment, which must be made public and administrative and legal procedures are contemplated to guarantee access. Similar provisions are in place regarding public participation. One of these mechanisms is established in Article 9, mandating that the Council hold public meetings in all its ordinary sessions and consult with non-governmental organizations, including independent experts, in the decision making process.

[481] G. Alanis, *The NAAEC Article 14 and 15 Factual Submission Process* (Mexico City: CEMDA, 2001).

[482] M. Araya and H. Mann, "Investment in the FTAA" C. Deere and D. Esty (eds.*) Greening the Americas: NAFTA's Lessons for Hemispheric Trade* (Cambridge, MA: MIT Press, 2002).

[483] For more details about the North American Commission for Environment Cooperation, see online: http://www.cec.org.

[484] 1994 North American Free Trade Agreement, online: http://www.nafta.org

employment discrimination; equal pay for women and men; prevention of occupational injuries and illnesses; compensation in such cases; and, protection of migrant workers.

The NAALC establishes a Commission for Labour Co-operation (Art. 8) which comprises a Ministerial Council (Art. 9) and a Secretariat (Art. 12). The Commission is assisted by a National Administrative Office (NAO) in each country (Art. 15). The Council, comprising cabinet-level representatives from each country, directs the implementation of the Agreement. The Secretariat, overseen by the Council and located in Dallas, Texas, prepares regular background reports and conducts studies and supports any working groups or committees as well as arbitral panels set up by the Council.[485]

The National Administrative Offices in each country compile and transmit information (Art. 21) to the Secretariat and receive and register public communications on a full range of issues including matters relating to the enforcement of labour laws. In addition, the NAOs respond to public requests for information, and issues relating to the enforcement of labour laws. The Secretariat, in co-operation with the NAOs, carries out analysis of labour laws, regulations, and administrative procedures, as well as with respect to employment rates, wages, labour productivity and human resource development. They also facilitate co-operative activities on a wide range of labour issues. Government to government co-operative consultations are held at several stages to resolve problems concerning the effective enforcement of labour laws by seeking constructive solutions.

Ministers (Art. 22) consult only after factual consultations at the officials' level (NAOs), and they are committed to make every effort to arrive at mutually satisfactory resolutions to any problem. Ministers can launch a comparative evaluation by independent experts of enforcement patterns related to occupational safety and health and other technical labour standards on trade-related matters (Art. 23). The report is made public and used as part of the consultation process (Art. 26).[486]

If the Council (Art. 27) is unable to resolve a trade-related labour dispute concerning the enforcement of the occupational safety and health, child labour and minimum wage laws it may, by a two-thirds vote, convene an arbitral panel (Art. 28-29). The panel will investigate and make public its findings (Art. 37). A compliance mechanism has been established in the event that an arbitral panel finds a persistent pattern of failure by a country to effectively enforce its labour law.[487] If a country fails to correct the problem (Art. 38-39), the panel may impose a fine (Article 39:5(b)), but this fine must stay under US$20 million for the first year. If the problem persists, future fines are limited to .007 percent of total tri-national trade of goods. If a fine is imposed on Canada, it would be enforceable by domestic courts. In the case of the US and Mexico, failure to pay the fine

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[485] See NAALC Secretariat, online: http://www.naalc.org See in particular Commission for Labor Cooperation, *Comparative Guide to Labor and Employment Laws in North America. Labor Relations Law In North America* (Washington: NAALC, 2000).

[486] See K. Banks "Civil Society and the North American Agreement on Labor Cooperation" in *Linking Trade, Environment and Social Cohesion: NAFTA Experiences, Global Challenges* J. Kirton and V. Maclaren, eds. (Burlington: Ashgate, 2002).

[487] For a summary of disputes to date under the NAALC, see Human Rights Watch, online: http://www.hrw.org/reports/2001/nafta/nafta0401-05.htm

would result in suspension of NAFTA benefits (Art. 41), including the imposition of a duty, based on the amount of the fine.

The NAALC entered into force on the same day as the NAFTA (Art. 51) and provides for the accession (Art. 53) of any country or group of countries to the agreement. A country may withdraw (Art. 54) from the NAALC on six months written notice.

New Bi-lateral Instruments

Several other instruments also deserve special attention in the search for innovative models for social cooperation in the Americas. In particular, four bi-lateral treaties, though several are extremely recent, are worthy of considerable analysis and study as they develop.

First, a technical assistance program was established, under the framework of NAFTA, between Mexican authorities and the U.S. Environmental Protection Agency. Through annual Congressional Allocations, the Border Environmental Cooperation Commission (BECC) funds projects under an *Integrated Border Environmental Plan*. It channels transfers of resources and establishes a joint action agenda of collaborative projects with strong social and environmental components to improve health, working conditions and polluted areas on the border with '*maquiladora*' factories.[488] Such a financial mechanism, adequately resourced, could do much to address environmental or even social aspects of the Americas integration process, particularly to address cooperative research, capacity building efforts and specific problems through sustainable development projects in desperately poor and polluted areas with a strong export-oriented economies.

Second, the *Chile-Canada Agreement on Environmental Cooperation* (CCAEC) bears special mention. The CCAEC provides a framework for bilateral cooperation on environmental issues, committing the Parties to effectively enforce their environmental laws and work cooperatively to protect and enhance the environment and promote sustainable development.[489] Modeled on the NAAEC, the CCAEC provides a commission for environmental cooperation, the provision of environmental information and a joint public advisory council process.[490] It also obliges parties to consider implementing limits to specific pollutants and prohibiting the export of domestically prohibited substances, to notify each other of domestic limits or restrictions, ensure transparency through publication and access to justice, including procedural guarantees. It has provisions for

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[488] See M. Kelly, C. Reed & L. Taylor, *The Border Environmental Cooperation Commission (BECC) and the North American Development Bank (NADBank): Achieving their Environmental Mandate* (Houston: Texas Centre for Policy Studies, 2001). And see M. Spalding, & J. Audley, *Promising Potential for the US-Mexico Border and for the Future: An Assessment of the BECC/NADBank Institutions* (Washington D.C.: National Wildlife Federation, 1997). See also C. Kovarik, "NAFTA and Environmental Conditions on the United States-Mexico Border" (Spring 1993) 2 Kan. J. L. & Pub. Pol'y 61; and see D.C. Esty, *Greening the GATT: Trade, Environment and the Future* (Washington: Institute for International Economics, 1994) at 376-378.

[489] A. Bowcott, Manager, Environment Canada, International Relations, 10 Wellington Street, Hull, Quebec, Canada, and Canada's chief negotiator for the Canada – Chile, Canada – Costa Rica, and Canada – Central America environmental side agreements. Series of interviews, January – April, 2003. Notes on file with the authors.

[490] W. Durbin, *A Comparison of the Environmental Provisions of the NAFTA, the Canada-Chile Trade Agreement and the Mexican-European Community Trade Agreement* (New Haven: Yale Centre for Environmental Law and Policy, 2000).

private access to remedies, establishes national secretariats to implement its mandate, and recognises any prior commitments under other environmental accords. The annexes, which phase-in the application of the agreement to Chilean environmental law, led to a comprehensive and valuable revision of environmental law in Chile.[491] The *Canada-Chile Free Trade Agreement* (CCFTA) aims to create an expanded and secure market for the goods and services produced in their territories, enhance the competitiveness of their firms in global markets, create new employment opportunities and improve working conditions and living standards in their respective territories, and protect, enhance and enforce basic workers' rights.

Following the 1996 negotiation of the *Canada-Chile Free Trade Agreement*, the *Agreement on Labour Cooperation* came into effect on July 5, 1997. Similar to the NAALC that complements the NAFTA, the bilateral agreement seeks to improve working conditions and living standards in both countries and protect, enhance and enforce basic workers' rights. Under this Agreement, the two participating countries are committed to effectively enforcing their own labour legislation; cooperating on labour matters; and promoting the following eleven labour principles: freedom of association, the right to bargain collectively, the right to strike, prohibition of forced labour, labour protection for children and young persons, minimum employment standards, elimination of employment discrimination, equal pay for men and women, prevention of occupational injuries and illnesses, compensation in case of occupational injuries or illnesses, and protection of migrant workers.[492]

There are six obligations undertaken by the Parties under the *Canada-Chile Labour Cooperation Agreement*. These include:

- Levels of Protection: each Party shall ensure that its laws and regulations provide for high labour standards, and shall strive to improve those standards;
- Government Enforcement Action: each Party shall promote compliance with and effectively enforce its labour law through appropriate government actions;
- Private Action: each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial (as appropriate), judicial or labour tribunals for the enforcement of the Party's law;
- Procedural Guarantees: each Party shall ensure that its proceedings for the enforcement of its labour law are fair, equitable and transparent;
- Publication: each Party shall ensure that its laws, regulations, procedures and administrative rulings of general application are made available; and
- Public Information and Awareness: each Party shall promote public awareness of its labour law.[493]

A Commission for Labour Cooperation was created to implement the Agreement. The Agreement has two main components: a Cooperative Work Program and a process for

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[491] *Agreement on Environmental Cooperation Between the Government of Canada and the Government of the Republic of Chile*, above. Articles 2, and 10, Sections 1 and 2.

[492] See First Annual Report Canada-Chile Agreement On Labour Cooperation (July 1997-June 1998) online: labour-travail.hrdc-drhc.gc.ca/doc/ialc-cidt/eng/e/backen.htm#background

[493] See First Annual Report Canada-Chile Agreement On Labour Cooperation (July 1997-June 1998) online: labour-travail.hrdc-drhc.gc.ca/doc/ialc-cidt/eng/e/backen.htm#background

handling issues of concern to the two countries. If differences arise, the Agreement provides for cooperative consultations, independent evaluations, and ultimately, a dispute resolution process (for cases when issues related to the enforcement of labour legislation cannot be resolved by the two countries through consultation). An assessed contribution, which goes into a fund to improve matters, can be levied if a party loses a dispute. The Commission for Labour Cooperation consists of a bi-national Ministerial Council that is supported by a National Secretariat in each country. The Council of Ministers of Labour or their designees is to meet every year and to review progress and approve the work plan, which the National Secretariats are responsible for implementing. In Canada, the Secretariat resides within the Labour Branch of Human Resources Development Canada. In Chile, the Secretariat has been established within the structure of the Ministry of Labour and Social Security. Each National Secretariat is responsible for planning and organizing participation in cooperative activities; responding to public requests for information; compiling and transmitting information to its counterpart; preparing reports and studies and providing support to any working groups or committees set up by the Council; and receiving and reviewing public communications on a range of labour issues including concerns relating to the enforcement of labour laws in the other country.[494]

Third, similar environmental and labour cooperation accords were signed between Canada and Costa Rica in Quito, Ecuador, at the FTAA Ministers of the Americas meeting in 2002. The *Canada – Costa Rica Environmental Cooperation Agreement* focuses more upon environmental information exchange and capacity building in the area of environmental enforcement and monitoring.[495] This agreement contains similar provisions to the CCCAE, but has a stronger focus on access to environmental information and capacity building for environmental policy and law-makers.[496] The agreement recognizes the relevance of transparency and public participation in the development of environmental laws and policies.[497] One objective is the promotion of public participation in the process of developing environmental laws.[498] Other provisions of the accord also deal with public participation and access to justice for violations of environmental laws, such as: the right of citizens to request authorities to investigate potential violations of environmental laws;[499] the development of cooperation programs which may involve the public and experts;[500] the right of any citizen or non-governmental organisation (NGO) to request information from any party on the effective implementation of environmental law in its territory and the duty to respond to this request, including making summaries of the question and response publicly available;[501] the appointment of focal points for the communication between any party and the public on matters related to the implementation of the cooperation agreement;[502] and the

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494 See Ministerial Council Report on the Three-Year Review of the Canada-Chile Agreement on Labour Cooperation (December 2002) online: labour-travail.hrdc-drhc.gc.ca/psait_spila/aicdt_ialc/2003_2004/report_english.htm

495 E. Gitli and C. Murillo, "A Latin American Agenda for a Trade and Environment Link in the FTAA" in C. Deere & D. Esty (eds.) *Greening the Americas: NAFTA's Lessons for Hemispheric Trade* (Cambridge, MA: MIT Press, 2002).

496 *Agreement between Costa Rica and Canada*, 1997, see online:http://www.ec.gc.ca.

497 See *Environmental Cooperation Agreement between Canada and Costa Rica*, July 3, 2002, available online:http://www.ec.gc.ca.

498 *Ibid.* at Article 1(d).

499 *Ibid.* Article 5.

500 *Ibid.* Article 8.

501 *Ibid.* Article 9

502 *Ibid.* Article 10

development of mechanisms to inform the public of the activities carried out under the agreement and to involve the public in such activities, as appropriate.[503]

While the *Canada – Costa Rica Labour Cooperation Agreement* (LCA) is structured in a way that parallels the NAALC and *Canada – Chile Labour Cooperation Agreement* (LCA), there are certain areas where differences are apparent. Administratively, the *Canada – Costa Rica LCA* is much simpler, and does not include provisions for national secretariats, evaluation committees of experts or panel rosters. As such, it might have a more direct relevance and be a more inclusive model for smaller economies in the Americas with less administrative capacity.

In terms of scope and coverage, both models cover eleven principles and rights. However, the *Canada - Costa Rica LCA* obligations in Annex 1 are directly related to the 1998 *ILO Declaration on Fundamental Principles and Rights at Work*, which came into effect after the *Canada – Chile LCA*. Review procedures also apply to all of Annex 1, so the difference in the area of consultations relates to coverage of the scope as well. In the *Canada - Chile LCA*, resolution of disputes applies to only three areas of enforcement. General Consultations are a separate Article (13) under Institutional Mechanisms and can take place on matters concerning the "interpretation and application of the Agreement" and "on any matter that may affect its operation". This includes concerns about the application of labour law in Annex 2 (minimum employment standards, occupational health and safety, occupational injuries etc.) Ministerial Consultations are part of the Review section and must relate to the obligations in Annex 1. In the *Canada - Chile Labour Cooperation Agreement*, consultations are not an institutional provision but can cover any matter related to the Agreement.

In addition, with regard to arbitral panels, the *Canada - Costa Rica LCA* does not contain monetary fines. If a failure has not been remedied, the other party may take "reasonable and appropriate measures, exclusive of fines or any measure affecting trade" to encourage remedies. This may be interpreted to include enhanced technical assistance but is not stated in the agreement.[504] Finally, in terms of cooperative activities, the developmental component of the *Canada - Costa Rica LCA* seems stronger than in the *Canada – Chile LCA*.

Finally, the *Free Trade Agreement between Chile and the United States* presents a different model. As with other recent U.S. trade agreements, this accord actually includes environmental and social provisions, not as side agreements but rather within the text of the free trade agreement itself.

Chapter 19 (Environment) established the Environmental Affairs Council. According to the Agreement, this council shall ensure a process for promoting public participation in its work and shall seek opportunities for the public to participate in the development and implementation of environmental activities.[505] Each party must consider public

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[503] *Ibid.* Article11.

[504] Communication with Dale Whiteside, Deputy Director, Strategic Trade Policy, Department of Foreign Affairs and International Trade, Government of Canada, 26 June 2003, on file with authors.

[505] See *US- Chile Free Trade Agreement*, 2003, available online athttp://www.ustr.gov, at Article 19.3.

communications on matters related to the Chapter, make available to the other party and its public all the communications it receives, and review them in accordance with its domestic procedures.[506] In addition, each party may also convene or consult existing, advisory committees to advise on the implementation of the Chapter, comprising members of its public (business representatives and NGOs).[507] Also under the procedural matters, access to conciliation and dispute settlement procedures is provided.[508] While these innovations are certainly of interest to the environment community, it remains to be seen whether such a chapter can be agreed in the context of the 34 countries of the Americas. If it can, a side agreement that provides for capacity building and other arrangements, might also be part of the package, or all concerns may be addressed in the 'Environmental Chapter.'

The *Free Trade Agreement between Chile and the United States* also contains a Labour Chapter 18 that lays out a cooperative agenda to promote worker rights. As such, labour obligations are part of the core text of the trade agreement.[509] Both parties reaffirm their obligations as members of the International Labour Organization (ILO), and commit to strive to ensure that their domestic laws provide for labour standards consistent with internationally recognized labour principles. The *Chile – US FTA* makes clear that it is inappropriate to weaken or reduce domestic labour protections to encourage trade or investment. The Agreement also requires that parties shall effectively enforce their own domestic labour laws, and this obligation is enforceable through the Agreement's dispute settlement procedures, including the establishment of a 12-member 'Labour Roster' to serve on panels. Procedural guarantees in the Agreement seek to ensure that workers and employers will have fair, equitable and transparent access to labour tribunals and courts. A cooperative mechanism is provided specifically to promote respect for the principles embodied in the 1998 *ILO Declaration on Fundamental Principles and Rights at Work*, and compliance with *ILO Convention 182 on the Worst Forms of Child Labour*. Cooperative activities may include discussions of legislation, practice and implementation of the core elements of the *ILO Declaration on Fundamental Principles and Rights* at systems for the administration and enforcement of labour laws.

All core obligations of the Agreement, including labour and environmental provisions, are subject to the dispute settlement provisions of the Agreement. Dispute panel procedures set high standards of openness and transparency, with open public hearings; public release of legal submissions by parties; a special roster of labour or environmental experts for disputes in these areas; rights for interested third parties to submit views. The emphasis is on promoting compliance through consultation, joint action plans and trade-enhancing remedies, and an innovative enforcement mechanism includes monetary penalties to enforce commercial, labour, and environmental obligations of the trade agreement.[510]

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[506] *Ibid.* Article 19.4.1
[507] *Ibid.* Article 19.4.3
[508] *Ibid.* Article 19.8
[509] Free Trade Agreement between the Government of the United States of America and the Government of the Republic of Chile, Article 18. Online: http://www.sice.oas.org/Trade/chiusa_e/Chap18_e.asp.
[510] USTR Summary of Chile – US Free Trade Agreement, online: http://www.ustr.gov/regions/whemisphere/samerica/2002-12-11-chile_summary.pdf

The *Canada – Costa Rica Free Trade Agreement*, with its parallel accords on environment and labour, and the *Free Trade Agreement between Chile and the United States*, with its labour and environment chapters, are the most recent agreements of this nature in the Americas. They probably present the best models - to date – to ensure social, economic and environmental 'mutual supportiveness' through parallel accords or chapters of the FTAA.

Three general observations can also be made, based on the survey of sub-regional and bi-lateral agreements provided above. First, most economic integration regimes in the Americas either contain provisions on environmental and social issues, provide space for parallel environmental and social cooperation institutions which address trade-related issues, or both. Such cooperation is not considered abnormal in the *modus operandi* of accord negotiation or implementation, though little work has been done to examine the mechanisms by which these parallel provisions can link or ensure coherence and 'mutual supportiveness' in their law and policy making. Second, environmental and social cooperation regimes in most sub-regions are recent, having developed over the past decade in several cases, and are becoming more prevalent in the Americas. Most provide for some kind of environmental or social cooperation institution, a council or commission, with provisions for public participation and review or monitoring of implementation of domestic environmental and labour law. Third, these cooperation mechanisms are by no means perfect. Environmental and social cooperation mechanisms across the Americas still face critiques that they are too weak: costly, un-coordinated, under-resourced and unable to live up to expectations. When civil society access is assured, cases are brought forward, but governments do not tend to trigger disputes on these 'non-enforcement' issues themselves, even when legal avenues are provided to allow for these challenges. There remains much work to be done to define these agendas, let alone to link them with new ones.

2.2 Proposals for Environmental and Social Cooperation in the FTAA

The survey of social and environmental provisions in Americas sub-regional and bi-lateral economic integration processes and free trade agreements, and of existing institutional mechanisms for cooperation, raises several leading questions. Most of the sub-regional processes have recently set in place international legal structures for environmental or social cooperation. If such accords lead to deeper integration between the economies of the Americas, can institutionalized structures for environmental and social policy coordination also become more integrated – toward hemispheric sustainable development law? Eventually, could trust and cooperation evolve to a point where harmonisation, mutual recognition and financing of health, labour and environmental standards and instruments is possible?[511] Will such provisions always be added as 'afterthought' or can they be part of the agenda-setting process? If so, what kind of

[511] Additional sources of financing for sustainable development initiatives are very much needed across the Americas. See A. Barcena et al., *Financing for Sustainable Development in Latin America and the Caribbean: From Monterrey to Johannesburg* (Santiago: ECLAC / UNDP: 2002). Other sub-regional or hemispheric cooperation could include harmonisation or mutual recognition of other mechanisms to implement social or environmental laws, such as impact assessment procedures or the judgements of labour tribunals. See M. C. Cordonier Segger et al., *Ecological Rules and Sustainability in the Americas* (Winnipeg: IISD / UNEP, 2002), and M.C. Cordonier Segger et al*., Social Rules and Sustainability in the Americas* (Winnipeg: IISD/ OAS, 2004).

hemispheric institutions are needed, what should be their mandates, and how could they be financed and implemented?

General Provisions

Before addressing these questions in greater detail, it must be noted that general sustainable development provisions can also achieve much for the FTAA. For example, hemispheric commitment to social development, poverty eradication, environmental protection and sustainable can be specifically mentioned in the preamble to the FTAA, along with recognition of the need for mutual supportiveness between economic, social and environmental policies. Sustainable economic development, as an overarching objective of Americas trade policy, can also be mentioned in the objectives or purpose of the accord, with a commitment toward consistency of the FTAA with other environmental and human rights treaty obligations. Such provisions can give guidance to dispute settlement processes and other occasions where the treaty must be interpreted. The need for reinforced environmental and social cooperation systems in the Americas, in the context of increasing economic integration, can also be recognised in the Preamble, and mechanisms for linkage between such cooperative systems can be later recognised in the provisions on institutional arrangements.[512] Such recognition, coupled with mechanisms to ensure policy coherence, can work to prevent isolated, disconnected decision-making between different fields of law and policy and ensure 'mutual supportiveness.'

The FTAA disputes settlement procedures could place the burden of proof in favour of maintaining human rights, health, environment and other public policy legislation that was alleged to restrict trade. In other words, a claimant could be required to establish a very robust *prima facie* case against a social or environmental law before it could be challenged. In addition, exceptions could be made broader, and policy-makers should not be required to demonstrated, beyond a reasonable level, that their social or environmental laws are 'necessary.' The FTAA could also include institutional provisions allowing dispute-settlement bodies to gain access to environmental, health and human rights expertise, from academia, hemispheric organisations, other specialist groups or civil society, if needed. For legitimacy and transparency, it could also include provisions to ensure that civil society and citizens can gain access to deliberations and proceedings. Such provisions can provide the conditions for dispute resolution processes to reach balanced results that take economic, social and environmental considerations into account where necessary.

As mentioned above, the FTAA can also include, either as parallel agreements or as chapters, cooperation mechanisms for social development and environmental law. Such agreements would probably recognise the sovereign rights of States to establish their own levels of protection for health, safety, labour and the environment. However, economic growth spurred by trade liberalisation, even wisely done, consumes natural resources and

[512] It can contain a clear commitment to implement such a cooperative programme and to develop systematic institutional cooperation mechanisms between trade, social and environment instruments. See, e.g., M.C. Cordonier Segger, "Ecosystems, Trade and Sustainability in the Americas: Sustainable Development Opportunities in the FTAA and Americas Summits Agenda" in E. Leff and M. Bastida (eds.*) Comerico, medio ambiente y desarollo sustentable: Perspectivas de America Latina y el Caribe* (Mexico, D.F.: UNEP, 2001).

results in pollution and social dislocation – it has an environmental and social cost. It should also deliver benefits. As hemispheric trade and economic integration proceeds, both systemic enforcement of environmental and human rights laws and hemispheric environmental and social programming will become increasingly necessary, to prevent competitive forces from pressuring regulators to lower standards or neglect enforcement of environmental and social laws, and to ensure that the FTAA delivers sustainable benefits. Binding new agreements on these issues can fulfil several important tasks. Furthermore, it is my proposal that such accords should be backed by adequately financed new mechanisms for ongoing sustainable development cooperation that will achieve concrete results.

An Americas Environmental Cooperation Mechanism?

The Americas is a contiguous geographic area with common migratory species and linked ecosystems. It shares many natural, cultural and historical characteristics, from interdependent chains of mountains, coasts and forests to common languages, indigenous peoples, colonial history and modernisation.[513] The region would benefit from a coherent environmental cooperation agenda to increase resources for environmental management and ensure better implementation of international and domestic environmental commitments.

A new environmental cooperation mechanism is needed to improve environmental protection as a foundation for sustainable development in the Western Hemisphere.[514] This article recommends that some form of Americas '*Framework Agreement on the Environment*' should be negotiated, in the context of the FTAA. A cooperative agenda on the environment can be addressed through an environmental chapter of the FTAA that recognises sustainable development as a goal, through a parallel environmental agreement to the FTAA, or through a combination of both.[515]

It is recommended that the agreement, whatever form it takes, provide for the development of an environmental cooperation mechanism, one which includes a strong institutional component. This could consist of a hemispheric environmental commission, governed by a council selected from a bi-annual Americas environment ministers forum or network of sub-regional environmental cooperation bodies. It should, perhaps in annexes, lay out an agenda for future cooperation (and financing) of specific environmental initiatives.

This begs two questions. First, what would an environmental cooperation agenda in the FTAA do? And second, why is a framework agreement, supported by a commission selected by a hemispheric environment ministers forum or sub-regional environmental authorities, recommended?

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513 M.C. Cordonier Segger *et al., Ecological Rules and Sustainability in the Americas* (Winnipeg: IISD / UNEP, 2002).

514 It could undertake Americas environmental cooperation, and also address hemispheric linkages between environment and health, trade and human rights issues.

515 For further ideas on form and substance for Americas environmental cooperation, see M-C. Cordonier Segger *et al., Ecological Rules and Sustainability in the Americas* (Winnipeg: IISD / UNEP, 2002). See also C. Deere & D. Esty (eds.) *Greening the Americas: NAFTA's Lessons for Hemispheric Trade* (Cambridge, MA: MIT Press, 2002).

An Americas environmental cooperation agenda (either within the FTAA or parallel to it) could fulfil several key tasks.

It can contain specific provisions to support more systematic development and enforcement of environmental standards and regulations by all parties, not just on a national level, but also for sub-regional and regional compliance with international accords.[516] This can be done through provisions for comparative analysis, capacity building, exchange of best practices and policy linkages. It can also be done through streamlined procedures for challenges of non-enforcement, which would permit greater accountability and settlement of any disputes. For effectiveness, such a non-enforcement challenge process should be open to civil society, as governments do not traditionally initiate disputes on environmental matters. In the interest of good governance, any discretion for enforcement of environmental laws granted by such a process should be very limited.[517] And if non-enforcement can be shown to be caused, in good faith, by lack of resources, a hemispheric financing mechanism is needed to help remedy these situations. Furthermore, such a mechanism should cover both commitments to enforce environmental law, and also commitments not to lower standards to attract investment or achieve competitiveness gains. However, rather than trade sanctions, such a mechanism can provide for assessed contribution mechanisms designed to improve environmental protection.[518] Such a preventive measure would essentially exist for damage control – to limit any 'race to the bottom' that might be linked to the FTAA.

But a positive Americas environmental cooperation agenda is also desirable, and possible in the context of the FTAA. Such an agenda could involve various commitments.

First, it could include a commitment to jointly compile and analyse aggregated, empirical data on environmental conditions in the Western Hemisphere, and share this information through reports and publications. Such data is, at the present, extremely difficult to obtain, and would be invaluable for researchers and scientists, as well as citizens and policy-makers, encouraging higher levels of focused cooperation on these issues across the Americas.

Second, it could provide a forum for countries of the Americas to jointly develop cooperative initiatives. These can include cooperative sustainable development related capacity building programs, and sustainability impact assessment of the FTAA, along with other concrete (and financed) initiatives, to take place at national but also sub-regional and regional levels. It can also include voluntary initiatives.[519]

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516 See M.C. Cordonier Segger at al., *Ecological Rules and Sustainability in the Americas* (Winnipeg: IISD / UNEP, 2002).

517 While voluntary environmental projects or programs may be implemented by governments on a discretionary basis, environmental laws, especially those which ensure compliance with internationally agreed treaties, are binding legal obligations established, through a democratic process, to protect national (and often regional or global) public interests. As such, any decisions not to enforce the law must carry a burden to be clearly and demonstrably reasonable, with the burden of proof on the party accused on non-enforcement.

518 As is done in the *Environmental Cooperation Agreement between the Government of Canada and the Government of the Republic of Costa Rica,* Ottawa and San Jose, 2002.

519 Such mechanisms might include civil society – academic – government partnerships or guidelines for environmental performance. They might also include information and expertise sharing on environmental protection; environmental

Third, it can provide a forum for discussions on systems for mutual recognition or, where appropriate, harmonised environmental product and service standards and certification systems. Indeed, in certain sectors, parties can use the mechanism to commit to measurable upward harmonisation of environmental and social standards over time, and provide incentives or financial resources to support such programs.[520] A mechanism for the recognition of business codes of social and environmental conduct (with an appropriate incentive systems) could also be established by the FTAA, to complement efforts made by the private sector.

Fourth, it can facilitate increased public participation regarding the FTAA's environmental aspects, and a co-operative environmental agenda for the Americas, more generally. The need, nature and scope of a permanent mechanism for public participation in the FTAA has been discussed elsewhere,[521] and is also addressed in this volume.

Fifth, it can provide a commitment to enhance the mutual supportiveness of environment, trade and human rights accords to which all FTAA members are also parties. In this instance, it should also suggest ways of resolving overlaps between the FTAA and other treaties to which some, but not all, FTAA members are parties. Such an environmental co-operation mechanism could save considerable time and resources by ensuring greater coherence between accords, and even by providing, where common agendas exist, regional negotiating mechanisms in multilateral environmental agreements.[522]

The second question, regarding the institutional structure of such a cooperation mechanism, is also worthy of greater examination.

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auditing and reporting; methods for improving efficiency of resource use or reducing environmental impacts; environmental monitoring; and collection of baseline data. Or they may include natural resource protection mechanisms such as financial incentives, incentives for the exchange or trade of environment-related permits or credits, and public recognition of environmental performers.

[520] For example, a 10 to 15 year agenda could be established to establish common standards and certification bodies in key sectors where civil society and industry associations were prepared to work together. As tariff levels have dropped, non-tariff or technical barriers to trade have become relatively more important for developing-country market access. Experience suggests that, without certain basic institutional infrastructure, developing countries cannot benefit from the provisions in trade agreements. Developing countries' experiences implementing environmental health and safety standards and technical regulations demonstrate that these are no different from other product quality requirements. Both are required for market access and both are developed and implemented within a complex institutional and legal framework. See T. Rotherdam, *Implementing Environmental, Health and Safety (EH&S) Standards, and Technical Regulations: The Developing Country Experience* (Winnipeg: IISD, 2003). Available online: http://www.iisd.org/publications/publication.asp?pno=531.

[521] See M.C. Cordonier Segger and J. Cabrera, "Green Smoke Signals: Public Participation in Americas Trade and Environment Regimes" in *Hemispheric Civil Society* (Montreal, McGill Centre for Developing-Area Studies, 2003). See also M. Rivas (CIECA), 'ALCA y participacion de la sociedad civil' in H. Blanco, M. Araya and C. Murillo (eds.), *ALCA y medio ambiente: Ideas desde Latinoamerica* (Santiago, Chile: CIPMA / GETS / CINPE, 2003); M. C. Cordonier Segger, N. Borregaard, M. Leichner and A. K. Gonzales "A New Mechanism for Hemispheric Cooperation on Environmental Sustainability and Trade" (2002) *Columbia Journal of Environmental Law* 27:2; and M.C. Cordonier Segger et al., *Social Rules and Sustainability in the Americas* (Winnipeg: IISD / OAS, 2004).

[522] Such joint positions could be followed up by cooperative implementation, monitoring and reporting which include hemispheric clearinghouses, experts networks, technology transfer and financing mechanisms.

A framework agreement mechanism would build on the model presented by the 2001 *Mercosur Framework Agreement on the Environment*, and by the 1987 *Caribbean Regional Seas Treaty* with their action-oriented 'protocols.' This structure has been successfully used for many other environmental agreements, as it provides a legal way to adapt to changing scientific and technological knowledge and environmental conditions. The agreement can lay out the intention to cooperatively address shared hemispheric environmental management challenges, adding value to the existing regimes. But these challenges may change over time. A 'framework agreement' allows further 'protocols' or annexes to be added later, laying out specific initiatives with targets and timetables.[523] These initiatives will coordinate cooperation to solve common hemispheric or sub-regional environmental issues, including those related to trade, health or human rights.[524]

But to be effective, the accord must be provided with a strong implementing institution, sensitive to the needs of the diverse sizes of economies and distinct ecological zones of the Americas. A hemispheric environmental commission is needed to provide necessary institutional support and continuity. This institution would require a small secretariat and office to support its activities,[525] a clear program of activities with financing, and a structure that ensures effective co-operation and feedback. For instance, existing national and sub-regional environmental instruments and environmental authorities have been gaining capacity and are becoming increasingly effective. A new hemispheric institution would require a mandate to work with these authorities in a structured manner. Similar to the Commission of Andean Environmental Authorities, the NACEC and the CCCAA, such a commission can be governed by an environment ministers council. These ministers could be elected from a plenary of the Environment Ministers of the Americas, or selected by the environmental authorities of existing sub-regional environmental cooperation mechanisms. Thirty-four ministers would be too many people and too costly to provide a functional governing body for an environmental treaty, when geographical distances are great and frequent meetings might be required. But a council of Environment Ministers of the Americas could be composed of one minister from each sub-region, with rotating seats. These could be selected by a bi-annual plenary meeting, which could act as a hemispheric environmental cooperation mechanism, or in esixting sub-regional environmental cooperation bodies.[526] Such a hemispheric environmental commission would need to hold periodic, substance-based meetings with whatever coordination mechanism emerges from the FTAA negotiations. Both could jointly attend

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[523] The initiatives defined in the 2001 Quebec City Summit of the Americas Plan of Action and in meetings of environment ministers provide a good starting point for an Americas environmental cooperation agenda, and have resonance with the declarations of prior regional forums, the priorities defined by sub-regional environmental entities, as well as existing global gaps in environmental law and policy.

[524] A programme for new environmental cooperation in the Americas could address key Americas environmental priorities such as sustainable forest products and forest nature tourism; reduction and elimination of unsustainable subsidies; land-based sources of marine pollution, and coastal ecosystems; a hemispheric environment and health program, a hemispheric environment and trade program, and a hemispheric program for migratory species and their habitat. See M-C. Cordonier Segger, *Our Americas Environment: A Proposal for Regional Environmental Governance* (Montreal: CISDL, 2003), online: www.cisdl.org.

[525] It could work in a 'virtual way' but should be independent, and based the same city as the FTAA Secretariat.

[526] The existing UNEP Environment Ministers Forum for Latin America and the Caribbean involves 33 countries of the Americas (including Cuba, which is part of the geographical and environmental territory of the region), and might provide a base for such a forum, working in cooperation with the five sub-regional environmental cooperation authorities. These five authorities include the North American Commission for Environmental Cooperation, the Mercosur Sub-Grupo No. 6, the Commission of Andean Environmental Authorities, the Central American Environment and Development Commission and the appropriate Caribbean environmental program.

to the task of issue identification, gathering and responding to input, and analysis in cooperation with appropriate advisory groups and an ongoing Western Hemisphere civil society trade and sustainable development forum.[527]

The process by which an FTAA environmental cooperation mechanism is developed will be crucial for its success. Negotiations should be launched through a series of high-level political and expert environmental policy dialogues, which could take place in the context of the Americas Summits agenda.[528] They will also need to identify a way to address environment and trade linkages, where these issues overlap.[529] The issue of financing deserves special emphasis. For negotiations to be successful, they must start with a clear commitment of new and additional resources to finance the result. Serious attention must be given to the establishment of mechanisms for new and additional resources to properly finance the agenda in a realistic, cost-effective manner which is controlled by the parties to the accord themselves in a just and equitable way. A new environmental cooperation mechanism in the Americas should not burden already over-stretched environmental ministries, particularly in smaller economies.[530] The NACEC, with binding contributions from each member government of $CAD3 million per year, has a budget of $CAD 9 million annually to address environmental cooperation for North America.[531] A realistic estimate of the costs involved in administering environmental cooperation for the Western Hemisphere, involving governments with very diverse resources, must take into account the needs of each sub-region. A comprehensive study of this issue, with budgets and comparative analysis of other international environmental institutions, would be very valuable. At a minimum, it can be estimated that a serious provision for

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[527] See C. Deere & D. Esty (eds.) *Greening the Americas: NAFTA's Lessons for Hemispheric Trade* (Cambridge, MA: MIT Press, 2002). See also M-C. Cordonier Segger, "Ecosystems, Trade and Sustainability in the Americas: Sustainable Development Opportunities in the FTAA and Americas Summits Agenda" in E. Leff and M. Bastida (eds*.) Comerico, medio ambiente y desarollo sustentable: Perspectivas de America Latina y el Caribe* (Mexico, D.F.: UNEP, 2001).; M-C. Cordonier Segger, *et al.*, *Trade Rules and Sustainability in the Americas above,* and N. Lucas, *Some Issues for Consideration on Participation*, Paper presented at Washington conference on "The FTAA and the Environment: What Can We Learn from the NAFTA Model?" as cited in C. Deere & D. Esty (eds.) *Greening the Americas: NAFTA's Lessons for Hemispheric Trade* (Cambridge, MA: MIT Press, 2002).

[528] They should be based on the following considerations. First, negotiations for a hemispheric environmental cooperation mechanism should be conducted in an open, transparent and accountable way, with careful preparations and full participation from all countries of the hemisphere from the start. It is essential to avoid last minute negotiations, which could alienate key actors and countries, as happened in the North American Agreement for Environmental Cooperation (NAAEC). Mechanisms will be needed to ensure coherence on global environmental policy while negotiations are proceeding, as otherwise, lack of consensus on global matters such as the Kyoto Protocol could de-rail regional goals and progress. Second, the negotiations should be coordinated by an *ad-hoc* Secretariat, formed by credible regional partners such as the UNEP Forum of Ministers of the Environment of Latin America and the Caribbean, OAS, and the IUCN (World Conservation Union). This could begin the process of building an institution to facilitate the work of a hemispheric environmental commission. Third, negotiations should be based on and informed by concrete data concerning real trade related environmental and health problems, for example, provided by the results of hemispheric or sub-regional environmental reviews or sustainability impact assessments of the various parts of the trade accord.

[529] This agenda could incorporate such issues as a gradual process of mutual recognition or harmonisation, where appropriate, of Americas-wide environmental standards and certification procedures (potentially on natural resources such as mining or forestry), and the promotion of trade or technology transfer in environmental goods and services. It could also examine ways to promote more environmentally beneficial investment policies, eliminate unsustainable subsidies, and settle eventual hemispheric trade and environment disputes.

[530] A. Bowcott, Manager, Environment Canada, International Relations, 10 Wellington Street, Hull, Quebec, Canada, and Canada's chief negotiator for the Canada – Chile, Canada – Costa Rica, and Canada – Central America environmental side agreements. Series of interviews, January – April, 2003. Notes on file with the authors.

[531] While each of the three member governments have significant environmental budgets of their own, so that the NACEC can build on their work and resources, North America is also an extremely extensive area, environmentally.

hemispheric environmental cooperation, at $9 million annually per sub-region, would cost $45 million. This amount seems quite reasonable compared to the sums committed for the FTAA Hemispheric Cooperation Program, to build trade technical assistance. In the interest of stability and consistency, such funds may need to be dedicated from government budgets, all governments making an assessed contribution on a scale, taking into account the common but differentiated responsibilities of the parties involved. Further project funds would also be necessary, and could be raised in innovative ways.[532]

Social Cooperation Mechanisms for the FTAA?

There is not just one FTAA social cooperation agenda, unless parties limit their deliberations exclusively to the NAFTA model which focuses only on labour rights. This might be particularly inappropriate in the hemispheric context, where so few workers are unionised or even part of a formal labour market. Rather, there are several key priorities that can be considered within or outside the context of the FTAA. This proposal will focus on four interrelated social development concerns for the Americas: labour, poverty (especially among the most vulnerable peoples), human rights, and health.

Labour issues are high on the hemispheric agenda. The 2001 Quebec City Summit of the Americas Plan of Action recognised that employment is the most direct way in which economic activity is linked to the improvement of the standard of living of citizens. They also recognised that true prosperity can only be achieved if it includes protecting and respecting basic rights of workers as well as promoting equal employment opportunities and improving working conditions for people in all countries in the region, with special attention to the most vulnerable groups.[533]

Many developing country governments fear and resist links between trade and labour standards. This is not actually a fear of labour standards improvement - indeed, most are parties to the ILO Conventions and have agreed to related Declarations. Rather, there is a fear that badly-drafted measures could limit access to new markets, or even worse, privilege competitors in countries that do not have to comply with such social or labour standards. Any labour-related provisions in FTAA[534] should contain a commitment not to condition otherwise agreed market access gains, nor create additional 'hoops' or protectionist 'red tape' for developing country producers.

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[532] One expert body worthy of consultation is the Inter-Agency Technical Committee of the Forum of Ministers of the Environment of Latin American and the Caribbean. Special funds, modelled on the ALIDES Central American Fund for Environment and Development project, can also be created to support regional environmental priorities.

[533] These include those in the informal sector, people belonging to ethnic and religious minorities, other vulnerable persons including women, youth, indigenous, migrant workers, persons with disabilities and persons with HIV/AIDS. They also noted the importance of investing in human resource development, of promoting employment security consistent with economic growth, and of developing mechanisms to assist workers with periods of unemployment. They also noted the need to strengthen cooperation and social dialogue on labour matters among workers, their organisations, employers and governments.

[534] One innovative proposal is that the FTAA could permit, or even support, preferential treatment for certain LAC *products* based on their compliance with core ILO standards or other multilaterally agreed and monitored measures. The distribution of trade preferences through a GSP regime based on *product* compliance with core ILO labour standards (rather than *country* compliance with such standards) could provide a more effective tool for linking trade benefits with socially desirable economic behaviour. See M.C. Cordonier Segger et al., Social Rules and Sustainability in the Americas (Winnipeg: IISD / OAS, 2004).

A positive, *co-operative* hemispheric socio-laboural agenda is also possible, and indeed, highly desirable. And unlike for the environment, an institutional cooperation labour mechanism already exists in the Americas. As such, a co-operative agenda can be defined and led by the meetings of Inter-American Conference of Labour Ministers.[535] This Conference provides for tri-partite (government, employers and labour unions) participation, and has been meeting for a number of years. However, such an agenda should be backed by a commitment to deliverable goals, measurable outcomes and specific monitoring and participation provisions. And in addition, direct trade-related labour and social cooperation measures are still quite useful, in the context of the FTAA.

Such measures should be capable of addressing trade related social issues which extend beyond labour concerns. For example, a hemispheric Commission on Socio-Labour Co-operation could be set up, modelled on the existing Mercosur *Socio-Laboural Commission*. This commission could address pressing labour issues in the FTAA, and also work on further social issues as appropriate.

In the FTAA, similar to the *Canada – Costa Rica*, and the *Chile – U.S.A.* Free Trade Agreements, it should be possible to confirm a commitment to adopt and implement the International Labour Organisation (ILO) 1998 *Declaration on the Fundamental Principles and Rights at Work*. Where these do not already exist, national offices can be established to facilitate this work and ensure greater public participation, similar to those which exist under the 1994 *North American Agreement for Labour Cooperation*.[536] The co-operative FTAA labour agenda can include actions to strengthen fundamental labour rights and their effective application; eliminate the worst forms of child labour[537]; improve labour administration, labour inspectorates and inspection systems; strengthen labour justice; and improve labour-management relations and working conditions (such as hours of work, minimum wages, and occupational safety and health). Further cooperation might also include work to support the development and implementation of more effective labour market policies; to collaborate with employers and labour organisations to develop and generate aggregated and comparative data and information on labour conditions and markets; to host tripartite consultations, dialogues and establish dispute resolution strategies. These dispute resolution strategies might include a mechanism similar to the one outlined above for environmental laws, as this could be applicable to the enforcement of labour law and respect for labour standards. Other issues of importance might include those addressed by the *Andean Advisory Council of Labour Ministers* such as job promotion, job training, social security, and labour migration.

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[535] The 2001 *Quebec City Plan of Action* re-affirmed the work of the Inter-American Conference of Ministers of Labour with its Plan of Action adopted in 1998, and asked Labour Ministers to collaborate to identify areas where further work needs to be done, in coordination with the Organisation of American States, the International Labour Organisation, the UN Economic Commission for Latin America and the Caribbean, as well as the Inter-American Development Bank and the World Bank.

[536] The experience of the NAALC to date demonstrates that linking labour standards enforcement to trade relations can have a positive impact on the attention and effort devoted to labour standards protection both domestically and internationally—and this even without the actual use of the trade measures available under such an agreement. Civil society groups have used the NAALC complaints procedure as part of their broader efforts to bring about positive social policy changes.

[537] The 2001 Summit of the Americas Plan of Action called for hemispheric ratification and implementation of the *ILO Worst Forms of Child Labour Convention, 1999 (No. 182)*, and identified the need for national laws, regulations and policies to come into conformity with this Convention.

The regional trade-related social development agenda is broader than simply labour. In accordance with the 2003 Summit of the Americas 'Declaration of Nuevo Leon', the FTAA could explicitly recognise the importance of the promotion and observance of economic, social, and cultural rights. It can also explicitly link with, and support, the efforts of existing OAS poverty eradication instruments.[538] Through the agenda of a socio-laboural commission, or links to other related instruments, trade-related aspects of important priorities such as social security, human rights and health can be addressed. These provisions can reiterate the commitment to focus on rights and basic needs of the most vulnerable in the Western Hemisphere such as women,[539] migrants,[540] and indigenous peoples.[541]

In relation to trade-related social issues which extend beyond labour, such as social security, human rights and health, the FTAA has the potential to make progress through recognition and a commitment to take the work of other instruments into account, or through explicit provisions. While a detailed consideration of these options is beyond the scope of this article, a few points can be made.

First, in the broader Summits of the Americas, the work of the Pan American Health Organization (PAHO) has been recognised, and the need to implement the *Shared Agenda for Health in the Americas* signed by PAHO, the IDB, and the World Bank has been highlighted. Many action initiatives, especially to combat HIV/AIDS and its consequences, have been announced, and more work is possible.[542] What more can be

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[538] Indeed, according to the 2003, the OAS mechanisms to fight poverty, such as the Inter-American Council for Integral Development, the Inter-American Committee on Social Development, and the Inter-American Program to Combat Poverty and Discrimination, desperately require strengthening. It should also take into account the recommendations of the 2003 High-Level Meeting on Poverty, Equity, and Social Inclusion, held on Isla de Margarita, Venezuela, to strengthen the hemispheric social agenda.

[539] The 2003 Summit of the Americas 'Declaration of Nuevo Leon' reiterated that the empowerment of women, their full and equal participation in the development of our societies, and their equal opportunities to exercise leadership are fundamental for the reduction of poverty, the promotion of economic and social prosperity, and for people-centered sustainable development. Specific proposals were made in the 2001 Quebec city Summit of the Americas, especially involving the strengthening of the OAS Inter-American Commission of Women.

[540] Respect for the rights of migrant workers, who are often made more vulnerable by abrupt international economic changes, is also important. Close co-operation is needed between countries of origin, transit and destination in order to ensure protection of the human rights of migrants. Further actions can help to implement the 1990 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. This Convention enlarges the protection of the fundamental human rights to all migrant workers, including undocumented workers, and establish additional rights for migrant workers in regular situation and their families. A new hemispheric instrument, linked to the FTAA and the commitments in the Protocol of San Salvador, and containing complaints procedures similar to those offered in the NAALC, might help to protect the rights of migrant workers. Such an accord could be modeled on the regional instruments in CARICOM, Andean Community and Mercosur, or could be achieved by giving hemispheric scope to the Regional Conference on Migration (Puebla Process) or the South American Conference on Migration (Lima Process).Commitments were made in 1998 at the Santiago Summit concerning the protection of the human rights of migrants, and also in the 2001 Quebec City Summit of the Americas. Governments will establish an inter-American program within the OAS for the promotion and protection of the human rights of migrants, including migrant workers and their families.

[541] In the context of the broader Summit of the Americas process, sustained progress is needed on the development and implementation of the *Inter-American Declaration on the Rights of Indigenous Populations*. Online: www.oas.org. Furthermore, modelled on the Andean *Machu Picchu Working Group,* a permanent Indigenous Peoples Forum can be established to undertake implementation activities and monitor progress in this area and supported by a co-operation mechanism and a strengthened OAS programme in this area.

[542] For example, a hemispheric equity-oriented health sector review and reform process can be launched, to ensure essential public health functions for all and improve quality of care. Hemispheric systems can also be set in place to promote use of common indicators for assessing effectiveness, equity and efficiency of health systems, accompanied by reliable funding. Regional cooperation initiatives could be considered for standards of practice, accreditation and

done specifically within the framework of hemispheric trade liberalization, especially if the FTAA includes liberalization of health services? In order to ensure that these programmes support hemispheric health co-operation efforts, parties may consider including a brief statement on trade-related health co-operation in the FTAA treaty, or negotiating a hemispheric agreement on principles of health co-operation.[543]

Second, more can also be done to ensure that the most vulnerable populations gain non-discriminatory access to social security, particularly if hemispheric integration deepens and movement becomes more common. Governments could also eventually consider negotiating a *Hemispheric Agreement on Social Security Benefits* (modelled on the Caribbean and Mercosur Social Security treaties).

Third, as agreed in the Quebec City Summit of the Americas, political and legal commitment to the mandate of the Inter-American Human Rights System must be significantly increased. As mentioned above, the Preamble and objectives of the FTAA can recognise that trade agreement is being negotiated within the context and framework of existing regional[544] and global human rights doctrines, and commit that trade measures will contribute to the progressive realisation of human rights, including social, economic and cultural rights.

3. Sustainable Development in the FTAA

While increased trade may lead to increased wealth, it is not clear that the FTAA will actually reduce poverty, and even less clear that it will lead to a more equitable distribution of wealth. It is also not clear how increased trade and investment might affect the environments of the Americas. Will the social costs of the FTAA be born by some, while the benefits all go to others, as some claim? How does trade liberalization affect equity (measured by such indexes as the Gini Coefficient), within regions and countries? In order to advance the FTAA agenda, there is a need to address the concerns

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licensing procedures, codes of ethics, and education and training programs for health personnel. A hemispheric programme could be launched on alternative health practices and medicinal products, to share experience and knowledge with other countries in the Americas. Smoking is still a serious threat to health throughout the Americas. Hemispheric programmes can be strengthened to promote ratification and implementation of the *Framework Convention on Tobacco Control* and to reduce the consumption of tobacco products, especially as they affect children and adolescents. See M.C. Cordonier Segger, *Social Rules and Sustainability in the Americas* (Winnipeg: IISD / OAS, 2003).

[543] Such a statement could be negotiated by the joint Health and Environment Ministers of the Americas (HEMA) process, and link the FTAA process with the goals of the Health and Environment Charter discussed above. It would serve to clarify the social benefits of the FTAA in the area of health care, to provide co-operative agreements or other measures to ensure that national investments in the training of health professionals are not lost, help to ensure that any liberalization commitments made in relation to the provision of health services are done in a framework which takes into account the special nature of these social policies.

[544] Indeed, within the broader context of the Summit of the Americas, it has been noted that the Inter-American human rights institutions need to be strengthened and granted increased financial support, and that improved mechanisms are needed facilitate access to justice. In this context, many have called for concrete measures to strengthen and improve the inter-American human rights system, in particular the functioning of the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights (IACHR). These efforts must focus on the universalization of the inter-American human rights system, increasing adherence to its founding instruments, especially the Protocol of San Salvador, strengthening compliance with the decisions of the Inter-American Court and following up on the recommendations of the IACHR, facilitating access to this protection mechanism and substantially increasing resources to maintain ongoing operations. In addition, both the Court and the IACHR should become permanent mechanisms. See M.C. Cordonier Segger et al., Social Rules and Sustainability in the Americas (Winnipeg: IISD / OAS, 2004). See also CEDHA, Access to Justice Program, online: www.cedha.org.

of smaller economies and the public about potential environmental and social impacts of trade liberalisation. This is difficult to do without accurate, independent information, analysis and awareness. There is a need for credible, impartial impact assessments of ongoing trade liberalization negotiations (on hemispheric, sub-regional or national levels). A process to conduct comprehensive, participatory sustainability reviews of the proposed FTAA could be helpful to address this need.

Various governments and inter-governmental agencies have recently begun to seek ways to prevent or mitigate impacts of new trade rules.[545] Through the use of national and regional assessments,[546] potential impacts can be considered and even avoided.[547] Such studies present one way to identify sequencing options, flanking measures and even provisions to be included in the FTAA, so that it can become an instrument of sustainable development law.[548] These assessments, and the decision-making processes that are informed by them, should be participatory. They can generate action plans, mitigation strategies or appropriate flanking measures, with measurable benchmarks that can be monitored. Such assessments take into account the economic impacts of deteriorating social conditions. Results can identify useful parallel measures for trade policy, support the development of sequencing options to mitigate or lower any negative social or environmental effects, and serve to strengthen the sustainable development benefits of liberalization. Such studies can also generate comparative data to identify perverse social or environmental subsidies leading to elimination programmes. They can identify key areas where clean technology and working conditions also provide the most efficient industrial gains. Such studies have been conducted for the North American Symposium for the Assessment of Trade and Environment policies.[549] There have also

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[545] See UNEP, Reference Manual for the Integrated Assessment of Trade-Related Policies (New York / Geneva: UN, 2001). Available online: www.unep.ch/etu/etp/acts/manpols/refmania_final.pdf.

[546] While there is no clear relationship between rates of economic growth and rates of environmental degradation, the "environmental Kuznet's curve" (where environmental protection improves as economies improve) has been discredited. Methodologies are becoming increasingly refined, including ways of studying effects by economic sector (agriculture, services), environmental media (air quality, water, biodiversity) or qualitative sustainability bench marking (such as using the Winnipeg Principles).

[547] Countries first called for national environmental reviews in 1996, see WT/CTE/W/37 23 July 1996. Discussions continued and were intensified in 2000 in the WTO Committee on Trade and Environment where countries described their respective efforts, see WTO document WT/CTE/M/23, 5 April 2000. The WTO Secretariat provided a background paper for the discussions, WTO document WT/CTE/171.For Canada, see DFAIT, *Framework for Conducting Environmental Assessments of Trade Negotiations*, February 2001, http://www.dfait-maeci.gc.ca/tna-nac/Environment-e.asp. For the USA, see *Environmental Review of Trade Agreements, Executive Order 13.141, 16 November 1999*, Federal Registry 64.222 18.11.1999 63.See also *EXECUTIVE OFFICE OF THE PRESIDENT Office of the United States Trade Representative (USTR), Guidelines for Implementation of Executive Order 13141: Environmental Review of Trade Agreements,* Tuesday, December 19, 2000, *ACTION: Guidelines for Implementation of Executive Order 13141- Environmental Review of Trade Agreements: Final,* in Federal Register Bd. 65 Nr. 244 S. 79442 ff.

[548] A comprehensive proposal for sustainability impact assessment in the context of the FTAA is provided in H. Blanco, "Evaluacion de la sustentabilidad de los acuerdos comerciales y su aplicacion en el contexto latinoamericano y del ALCA" in H. Blanco, M. Araya and C. Murillo, *ALCA y medio ambiente: Ideas desde Latinoamerica* (Santiago, Chile: CIPMA / GETS / CINPE, 2003).

[549] Models for sectoral reviews include above-mentioned processes conducted in the North American Commission for Environmental Cooperation, which focused on the corn in Mexico, cattle in the U.S. and Canada, and electricity in North America. For more details see "Evaluación de los efectos ambientales del tratado de Libre Comercio de América del Norte. Marco de Trabajo Analítico (Fase II) y Estudios Temáticos", available online: http://www.cec.org. See also K. P. Gallagher, "The Environmental Review of the FTAA: Examining the U.S. Approach" Carnegie Endowment for International Peace, *Trade, Equity, and Development Series, No. 7*, August 2003. See also F. Ackerman, T. A. Wise, K. P. Gallagher, L. Ney, and R. Flores "Free Trade, Corn, and the Environment: Environmental Impacts of US-Mexico Corn Trade Under NAFTA" in *Trade and Environment in North America: Key Findings for Agriculture and Energy* (Montreal: North American Commission for Environmental Cooperation, 2003). And see K. P. Gallagher and H. Blanco,

been studies of the Chilean mining sector, done by CIPMA for the United Nations Environment Programme, and a recent study of environmental effects changes in the export structures of Argentina, Bolivia, Brazil, Chile, Jamaica, Mexico and Peru, conducted by ECLAC.[550] Some governments have committed to perform national assessments in the context of global trade negotiations,[551] and have also undertaken assessments of the FTAA itself.[552] While not all studies integrate a strong social dimension, it is becoming increasingly accepted to do so. Social impact assessments can also run parallel to environmental impact assessments. However, a new approach could be most constructive, based on integrated consideration of both social and environmental impacts together: integrated or 'sustainability impact assessments."[553] In the Americas, it might be especially relevant to consider potential impacts on indigenous communities and other vulnerable populations. Recent methods have been developed by the Organisation for Economic Cooperation and Development (OECD) and in the European Union.[554] Building on this work, in collaboration with the Organisation of American States and other inter-American institutions, a series of assessments can be conducted for the FTAA. These assessments can be carried out *ex-ante* (prior to the conclusion of the agreement) at the hemispheric level, or hemispheric efforts can be applied to the development of a consistent methodology for use by sub-regional environmental and social institutions across the Americas. They can focus on both the potential physical environmental or social impacts of the FTAA, and predictable legal or regulatory impacts.

For a hemispheric study, appropriate efforts can be made to include not only partners such as the Inter-American Development Bank, the United National Economic Commission for Latin America and the Caribbean and Organisation of American States (hemispheric and regional institutions which provided in-depth analysis of the region's trade structures prior to the launch of the FTAA), but also smaller economies of Latin America and the Caribbean, through their sub-regional institutions. Civil society organizations should participate as partners in all aspects of the sustainability reviews.

"Sustainability Assessments: Tools for Effective Trade Policy in the Hemisphere", Americas Program, Interhemispheric Resource Center (IRC), April 9, 2003.

550 M. Schapher, "Environmental Impact of Changes in the Export Structure in Latin America and the Caribbean" in P. Konz (ed.) *Trade, Environment and Sustainable Development: Views from Sub-Saharan Africa and Latin America (*Geneva: UNU / ICTSD, 2000).

551 These include the NAFTA, NAFTA retrospective and Uruguay Round retrospective studies, which were announced in Declarations committing to environmental reviews of WTO agreements from the United States (WT/GC/W/304); the European Union (WT/GC/W/194) and Canada (WT/GC/W/358). Available online: http://www.wto.org/wto/online/ddf.htm.

552 On May 5, 2003, the Government of Canada released its Initial Environmental Assessment of the Free Trade Area of the Americas (FTAA) Negotiations. This is the first of three reports prepared for the Strategic Environmental Assessment, and Canada hopes it will help negotiators to better integrate environmental considerations into the negotiating process. See Canada, *Initial Strategic Environmental Assessment Report of the Free Trade Area of the Americas Negotiations* May 5, 2003 (Ottawa: DFAIT, 2003). Online: http://www.dfait-maeci.gc.ca/tna-nac/IYT/ea0422-en.asp#ES.

553 H. Blanco, "Evaluacion de la sustentabilidad de los acuerdos comerciales y su aplicacion en el contexto latinoamericano y del ALCA" in H. Blanco, M. Araya and C. Murillo, *ALCA y medio ambiente: Ideas desde Latinoamerica* (Santiago, Chile: CIPMA / GETS / CINPE, 2003).

554 For the EU, see C. Kirkpatrick, N. Lee and O. Morrissey, *WTO New Round: Sustainability Impact Assessment Study (Phase One Report),* and C. Kirkpatrick, N. Lee and O. Morrissey, *WTO New Round: Sustainability Impact Assessment Study (Phase Two Report*), available online: http://fs2.idpm.man.ac.uk/sia/Phase2/EXSUMFINAL.htm.

A comprehensive hemispheric sustainability assessment of the FTAA could be very useful for negotiators and policy makers.[555] In advance of such an effort, the next section of this article will, based on recent literature and academic debates, briefly illustrate some of the sustainability aspects of the FTAA.

As mentioned above, formal FTAA negotiations were launched at the San Jose Ministerial in 1998. The San José mandate created nine negotiations groups (Market Access - Investment - Services - Government Procurement – Dispute Settlement - Agriculture - Intellectual Property Rights - Subsidies, Antidumping and Countervailing Duties - Competition Policy), supervised by a trade negotiation committee. In addition, special committees were created on smaller economies, electronic commerce, and civil society. This last committee was presented as a formal consultation process through which trade-related social and environmental issues would be discussed.[556] The next section will focus, in order to illustrate the sustainable development aspects of the FTAA negotiations, on Subsidies, Intellectual Property Rights, Government Procurement and Competition Policy. It will also briefly mention social and environmental aspects of FTAA Market Access and Services negotiations. Investment and Agriculture negotiations are extremely important for sustainable development, but are well documented in the literature and should also be addressed by others in this volume.

Subsidies

The FTAA negotiations on subsidies present an opportunity for a common agenda between Americas trade, social development and environment communities.[557] All three oppose 'perverse subsidies' – subsidies that are harmful to social development priorities (such as workers livelihoods), the environment and the economy.[558] From a sustainable development perspective, subsidies distort prices and artificially lower the costs of doing business in an unsustainable way.[559] Distorted prices reduce one of the main potential gains from trade - increased efficiency, but this is one of the most complex areas of trade policy.[560] Agreements in the FTAA to restrict or disallow such subsidies could be highly

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555 M.C. Cordonier Segger, *Trade Rules and Sustainability in the Americas* (Winnipeg: IISD, 1999).

556 In Buenos Aires in June 1998, the first meeting of the trade negotiations committee was extended an extra day to set up a transitory instrument which would receive civil-society views on the FTAA. The committee was to receive commentary and present the range of views to trade ministers. Civil society groups were to present their views to the committee 'mailbox' in writing. M. Valente, "Civil Society Fighting Hard for Inclusion in FTAA" Buenos Aires, June 22, 1998, IPS/tra-so/mv/mj/sw/98. This mechanism has now evolved into an instrument with a mandate to hold meetings to consider civil society views on each aspects of FTAA issues, and facilitate transparency in the FTAA process. In Miami in 2003, an 'Americas Trade and Sustainable Development Forum' was also constituted, based on the experience of prior events in Quebec City (The Hemispheric Trade and Sustainability Symposium) and Quito (The Civil Society Trade and Environment Workshops), and recognised by the assembled ministers. See Centre for International Sustainable Development Law, *Report on the Americas Trade and Sustainable Development Forum* (CISDL: Montreal, 2004). Available online: www.dfait-maeci.gc.ca

557 IISD / UNEP, *Trade and Environment Handbook* (Winnipeg / Geneva: IISD / UNEP, 2001).

558 On a global level perverse subsidies have been valued at $500 billion to $1.5 trillion a year, and can result in considerable environmental damage, social injustice and economic inefficiency.

559 A subsidy is any measure that keeps prices for consumers below the market level or keeps prices for producers above the market level, or that reduces costs for consumers and producers by giving direct or indirect support. See J. Kent and N. Myers *Perverse Subsidies: How Tax Dollars Can Undercut the Environment and the Economy* (Winnipeg: IISD, 2001). See also A. Duraiappah, Trade-Related Subsidies - Bridging the North-South Divide (Winnipeg: IISD, 2003). Available online: http://www.iisd.org/publications/publication.asp?pno=590.

560 John Jackson, "World Trade Rules and Environmental Policies: Congruence or Conflict?" John Jackson, *The Jurisprudence of GATT & the WTO*. Cambridge: Cambridge University Press, 2000, p. 433 (based on John Jackson,

beneficial for sustainable development.[561] Several sectors of Americas economies are both highly subsidised and important to sustainable development, particularly agriculture, forestry, energy, transportation and fisheries.[562] In addition, subsidies for polluting or excessively centralised sectors and technologies can reduce incentives to develop more sustainable alternatives.[563] Parties to the FTAA have an opportunity to conduct studies identifying sectors in which 'perverse subsidies' have the highest impact on the environment and poverty. Even well-meant subsidies can become perverse due to lack of transparency in the institutional arrangements governing the use and distribution of subsidies, or the inevitable second-order effects created by distortions in other markets. Such subsidies can be targeted for restriction, reduction or phased-in elimination, and at a minimum, measures can be enacted to ensure transparency concerning their use.[564]

However, not all subsidies are perverse. A subsidy that pays for previously unpaid environmental or social benefits may be desirable for sustainable development.[565] Similarly, subsidies can be provided to certain industries in order to make adaptations necessary to allow them to employ disabled or other disadvantages individuals, or to provide employment training to traditionally marginalized groups. If environmental and social costs are factored in, such subsidies actually move prices closer to their true level. Parties to the FTAA could recognise that in certain instances, it is undesirable or against the public interest to impose a duty or countervailing measure against certain subsidies, effectively providing an exception in the agreement on Subsidies, Anti-Dumping and Countervailing Duties that allows for (for example, up to 20 per cent of the costs of a one-time expenditure, as is done in the WTO). The FTAA could also provide mechanisms, through 'public interest exceptions' or 'sustainable development box' to permit subsidies that, for example, help firms to meet social and environmental

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"World Trade Rules and Environmental Policies: Congruence or Conflict?" *Washington and Lee Law Review* 4.1992, pp. 1227–1278.

561 Agriculture, forestry, energy production and transportation are all hard on the environment and require significant public investment, and most of the environmental damage and social costs they entail are not built into the market price of the goods they produce. However, progress on subsidies, particularly in the area of agriculture, has been slow in the FTAA. See U.S., Brazil Play Brinksmanship in FTAA Talks (US/Brazil) *Reuters News Service* October 21, 2003. This is not surprising: Developed and developing countries have very strong feelings of ownership over their domestic subsidies

regimes and have serious objections when they are challenged or investigated.

562 Subsidies in the fisheries sector, for example, include low-interest loans to fishermen, fuel tax exemptions, and outright grants to purchase gear, boats and other infrastructure. These measures lower the cost of fishing and lead to over-exploitation of the resource. Collapse of a fishery affects livelihoods and can lead to increases in poverty. See C. Deere, *Net Gains: Linking Fisheries Management, International Trade, and Sustainable Development* (Washington: IUCN, 2000). See also UNEP, *Fisheries Subsidies and Overfishing: Towards a Structured Discussion* Working Paper November 2000, online: www.unep.ch/etu/etp/acts/manpols/fishery.htm. In other sectors, similar concerns exist.

563 For example, the $145 billion a year given in subsidies to the fossil fuel and nuclear energy sectors worldwide diverts physical, financial and intellectual capital from research and development for alternatives like solar energy, which might employ more people. See also A. de Moor, P. Calamai & M. Strong, *Subsidizing Unsustainable Development: Undermining the Earth with Public Funds* (Winnipeg: IISD / Earth Council, 1998). Online: http://www.iisd.org/trade/wto/vanlennep.asp.

564 Countries use the Producer Subsidy Equivalent (PSE), the Consumer Subsidy Equivalent (CSE) and the Aggregate Measure of Support (AMS) to document the level of subsidies provided to particular sectors. However, these indicators do not clearly demonstrate whether particular subsidies are 'perverse', or trade-distorting, and 'terms-of-trade' might even serve as a better measure. See R. Jean Louis and P. Roddy "

in A. Duraiappah, Trade-Related Subsidies - Bridging the North-South Divide (Winnipeg: IISD, 2003). Available online: http://www.iisd.org/publications/publication.asp?pno=590.

565 For example, many governments subsidize the development and dissemination of solar technologies as alternatives to fossil fuels since it could lower emissions of greenhouse gases and generate investment opportunities for small and medium sized enterprises.

regulations, or encourage the spread of environmentally sound or socially desirable products, practices or technologies. Hemispheric co-operation could also result in the design of new subsidies to benefit the environment and social development without unduly distorting trade.

Even those subsidies that are perverse deserve careful analysis. Dismantling them can cause hardship in the short run to those least able to absorb the shock.[566] Such considerations suggest that bridging measures should accompany subsidy removal.

It remains to be seen whether the FTAA can play a major role in dismantling perverse subsidies. Further research, concrete proposals and perhaps even investigations under mechanisms contemplated in the FTAA, are needed to identify ways that the FTAA can help reduce such subsidies, and how to design appropriate 'environmental and social windows' for subsidies. Building hemispheric consensus on such changes will not be an easy task, as every perverse subsidy supports a host of beneficiaries with great interest in seeing the measure remain.

Intellectual Property Rights

Intellectual property rights agreements usually set out the type of protection that different innovations should receive, and hold all parties to the same minimum standard of protection.[567] The FTAA provisions are likely to be *positively proscriptive*. That is, while other trade rules usually describe what countries should not do, an FTAA intellectual property rights (IPRs) chapter would probably seek to describe what countries *should* do.

Important sustainable development issues have been raised in debates concerning the FTAA.[568] First, there are concerns about how IPRs measures might affect innovation, and if applied strictly to essential medicines, might increase costs and lower access for the most poor in developing countries. Second, there are concerns about how stronger protection of IPRs might affect efforts to conserve biodiversity. There are also questions about whether (and how) collective rights to traditional knowledge, especially for indigenous peoples could be protected in a strong Americas IPR regime.

From a sustainable development perspective, IPRs trade off the welfare of an innovator, whose efforts deserve compensation, against the welfare of society at large, which would benefit by having unlimited access to the innovation. It is important to properly balance that trade-off. IPRs should serve the mutual advantage of producers and users of

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[566] Cutting fossil fuel subsidies in cold climates, for example, may hurt the poor who depend on such subsidies to heat their homes. Cutting fisheries subsidies may mean an initial loss of needed revenue for ports and fishing communities with no other sources of income. See A. Duraiappah, Trade-Related Subsidies - Bridging the North-South Divide (Winnipeg: IISD, 2003). Available online: http://www.iisd.org/publications/publication.asp?pno=590.

[567] For example, books must be protected by copyrights, industrial processes must be covered by patents, etc. IPRs are patents, copyrights or other means of protecting an innovator's exclusive ability to control the use of their innovation for a specified period. During that time the intellectual property rights holder will usually try to market and sell the idea, seeking to recoup their investment in research and development. See IISD / UNEP, *Trade and Environment Handbook* (Winnipeg / Geneva: IISD / UNEP, 2001).

[568] See, e.g., J. Medaglia Cabrera and J. P. Sanchez Hernandez, "La confluencia de los derechos de propiedad intellectual y el ambiente en torno al tema de la integracion comercial en America" in H. Blanco, M. Araya and C. Murillo, *ALCA y medio ambiente: Ideas desde Latinoamerica* (Santiago, Chile: CIPMA / GETS / CINPE, 2003).

technological knowledge, fostering social and economic welfare and providing a balance of rights and obligations. Innovations, whether in energy efficiency, new medicines or improved agricultural varieties, are at the heart of sustainable development, but they do little good unless they are widely disseminated.[569] How do strong IPRs, such as could be included in the FTAA, affect that balance? On the positive side, they may help ensure that more innovation will take place.[570] Strong IPRs can also help the products of innovation, such as new technologies, be disseminated.[571] On the negative side, strong protection of intellectual property rights in the FTAA could also have a number of undesirable effects. First, if it is too strong, it tilts the balance too far toward the innovator.[572] Overly strong protection may thus slow down the spread of new technologies. Improperly applied, it may also stifle innovation. Finally, strong IPR protection may work against sustainable development objectives by making goods such as pharmaceuticals more costly and less accessible to the poor.[573] These potential effects run contrary to hemispheric policy, which calls for increased resources toward access to care and treatment, especially for high risk populations (coupled with research, prevention and education). In the 2001 *Quebec City Summit of the Americas Plan of Action*, heads of state committed to increase national access to treatment of HIV/AIDS-related illnesses. They placed high priority on the provision and affordability of drugs, as well as reliable distribution and delivery systems. Modelled on recent global agreements,[574] could more affordable anti-retrovirals and other drugs for HIV/AIDS treatment be secured through hemispheric (or a series of sub-regional) dialogues with the pharmaceutical industry? Recognising potential negative effects from granting strong IPRs, an exception could be drafted for the FTAA whereby parties are not obliged to grant patents for products or processes where they are necessary to protect public health and access to medicines, as well as animal or plant life or health, or to avoid serious prejudice to the environment. Such an exception, modelled on existing provisions in the WTO, could be carefully defined to leave the necessary flexibility for policy makers while still permitting the FTAA to provide adequate protection for IPRs.

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569 See IISD / UNEP, *Trade and Environment Handbook* (Winnipeg / Geneva: IISD / UNEP, 2001).

570 Without the guarantee of such protection, it seems unlikely that companies could afford to invest significant amounts to develop, for example, new software or new drugs, if this could be immediately copied by others and distributed at minimal costs. IP tends to have very high costs of development, but low costs of reproduction once developed. See IISD / UNEP, *Trade and Environment Handbook* (Winnipeg / Geneva: IISD / UNEP, 2001).

571 Technology transfer is usually a commercial venture, and advocates of strong IPRs suggest that innovators will be more comfortable in countries that are obliged to enforce strong protection of intellectual property rights. The obligation assures that innovations will not be freely pirated. Hence, strong intellectual property rights might increase the willingness of firms to disseminate their technologies in countries that adopt them.

572 Critics argue that a long term of protection, such as 20 years for patents and other intellectual property rights, over-reward the intellectual property rights holders, and punish the public by keeping the protected good too expensive for too long. See, e.g. M. Rowson and M. Koivusalo, "Who Will Inherit the Earth?" *Health Matters* Issue 41 Summer 2000. See also M. Khor, Intellectual Property, Biodiversity and Sustainable Development: Resolving Difficult Issues (London: Zed Books, 2003).

573 Several developing countries would be required to dismantle domestic industries based on cheap copying of foreign-patented drugs, forcing up prices dramatically. Patents in certain countries protect only the process used to make a product, not the product itself, so it is legally possible to make the same drug in a slightly different way without paying royalties. But strong IPRs demands *product* patents as well as *proces*s patents, putting an end to this kind of production. This would be counter-productive for sustainable development. See K. Balasubramaniam, "Access to medicines and public policy safeguards under TRIPS" in R. Meléndez-Ortiz, C. Bellmann and G. Dutfield (eds.) Trading in Knowledge: Development Perspectives on TRIPS, Trade and Sustainability (London: Earthscan, 2003).

574 R. Jourdain, "Intellectual property rights and public health in the Revised Bangui Agreement" in R. Meléndez-Ortiz, C. Bellmann and G. Dutfield (eds.) *Trading in Knowledge: Development Perspectives on TRIPS, Trade and Sustainability* (London: Earthscan, 2003).

Other important sustainable development law issues arise in the relationship between IPRs and biodiversity conservation, especially the protection of traditional knowledge. The CBD requires parties to co-operate to ensure that patents and other intellectual property rights 'are supportive of and do not run counter to' its objectives, implicitly recognizing the potential for conflict. The CBD emphasises the need to ensure that local and indigenous communities, especially in developing countries, have control over and share the benefits from their own biodiversity-related traditional knowledge and informal' innovations.[575] This kind of knowledge and innovation has immense and growing value. [576] Genetic resources provide the foundation for a range of new products and technological applications in biotechnology, agriculture, medicine and other areas. Knowledge developed and held in traditional knowledge systems of indigenous and local communities can provide clues to genetic resources or biochemicals that can be used for pharmaceuticals, herbal medicines and other products. They can also provide new genetic material for plant breeders, allowing them to confer desired traits such as pest and drought resistance to crop plants. The FTAA can include a new mechanism for access to biological and genetic resources and to the traditional knowledge, innovations, and practices of indigenous, Afro-American, and local communities, ensuring that these rights are conditioned to the prior informed consent of the Parties and the communities that provide it. Such a mechanism can guarantee compensation for such access, and a fair and equitable distribution of the benefits derived from biodiversity and genetic resources, or their derivatives. A commitment to take political, legal, and administrative measures necessary to ensure benefits are shared, and to respect the right of other FTAA members, and communities to these resources, could also be desirable.

Informal innovation and traditional knowledge should also receive some form of equal treatment under FTAA provisions on IPRs. The FTAA need not over-emphasise patents and other intellectual property rights defined under conventional IPR regimes, especially as these are mainly held in by inventors and corporations in the formal research sectors of developed countries. Instead, new hemispheric mechanisms could be provided to grant communities control over their knowledge, cultural artifacts and innovations, for example under provisions for 'traditional and folk culture of indigenous people and communities, Afro-American and local communities', in a way that ensures permission is sought and benefits are shared. Possible models for such provisions can be found in the

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[575] J. Medaglia Cabrera, "Synergy or conflict between intellectual property rights, access to genetic resources and the protection of traditional knowledge: Lessons learned from Costa Rica's Biodiversity Law" in M. C. Cordonier Segger, K. Mayrand and M. Leichner Reynal (eds.) *Beyond the Barricades: An Americas Sustainability Agenda and the FTAA* (Winnipeg: IISD / IUCN / UNEP, 2004).

[576] An example of traditional knowledge is the oral history held by an indigenous community of the herbs and plants that have medicinal properties. This information has great value to pharmaceutical researchers searching for new drugs. Informal innovation is innovation that is carried out by the actual user of the product or system. For example, farmers have traditionally created innovative new plant varieties by saving seed from previous crops, selecting and planting, generation after generation, those that perform best under their local conditions. See IISD / UNEP, *Trade and Environment Handbook* (Winnipeg / Geneva: IISD / UNEP, 2001). See also G. Aguilar, "Acceso a los recursos geneticos y el conocimiento tradicional de los pueblos indigenas" in E. Leff and M. Bastida (eds.*) Comerico, medio ambiente y desarollo sustentable: Perspectivas de America Latina y el Caribe* (Mexico, D.F.: UNEP, 2001). And see A.M. Hernández Salgar, "Traditional Knowledge and the Biotrade: the Colombian Experience"; and G. Utkarsh, 'Documentation of Traditional Knowledge: People's Biodiversity Registers" in R. Meléndez-Ortiz, C. Bellmann and G. Dutfield (eds.*) Trading in Knowledge: Development Perspectives on TRIPS, Trade and Sustainability* (London: Earthscan, 2003).

Central American and Andean IPR regimes.[577] Such provisions could help to deliver the kinds of incentives recognised by the CBD as essential to helping preserve cultural and biological diversity.[578] Local communities will have much more reason to help preserve this diversity if they derive some income from it.

The FTAA also need not require national intellectual property rights regimes to be identical. Diverse countries can be permitted the right to adopt higher standards than the FTAA requires, and they can address concerns related to the CBD by imposing certain requirements on the process of applying for intellectual property rights protection, such as certification of origin.[579] Parties to the FTAA can also create mechanisms within intellectual property rights law to achieve specific objectives, such as benefit sharing.

Government Procurement

Government procurement refers government purchases of goods and services, from paper supplies to hospital equipment to tanks. Government expenditures typically make up a large portion of GDP (10 to 25 per cent in OECD countries) and what governments decide to buy or not buy can have an enormous influence on the economy, on social development (particularly economically disadvantaged groups and those who face discrimination), and on environmental objectives. This fact has led many governments to institute programs to make their procurement more sustainable, making it a force for social or environmental protection.

Most such schemes involve either a price preference for goods or services that meet certain criteria,[580] or a specification of the product's attributes.[581] Because they are administratively straightforward, these measures can make a real difference, and because they portray the government favourably in the public eye, such schemes will undoubtedly be increasingly popular. However, programs aimed at more sustainable government procurement may have trade implications. Purchasing requirements may be based on process and production method (PPM) standards, and PPM-based standards not usually permitted in a trade agreement.[582] This is often for good reason - the PPM criteria set in

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577 See M. Ruiz, "The Andean Community regimes on access to genetic resources, intellectual property and indigenous peoples' knowledge"; and J. C. Medaglia "The Central American Regional Protocol on Access to Genetic and Biochemical Resources" in R. Meléndez-Ortiz, C. Bellmann and G. Dutfield (eds.*) Trading in Knowledge: Development Perspectives on TRIPS, Trade and Sustainability* (London: Earthscan, 2003).

578 See V. Normand, "The Role of Intellectual Property Rights in the Implementation of Access and Benefit-Sharing Arrangements" in E. Leff and M. Bastida (eds.*) Comerico, medio ambiente y desarollo sustentable: Perspectivas de America Latina y el Caribe* (Mexico, D.F.: UNEP, 2001).

579 See D. Vivas Eugui "Requiring the Disclosure of the Origin of Genetic Resources and Traditional knowledge: the Current Debate and Possible Legal Alternatives" in R. Meléndez-Ortiz, C. Bellmann and G. Dutfield (eds.*) Trading in Knowledge: Development Perspectives on TRIPS, Trade and Sustainability* (London: Earthscan, 2003).

580 For example, recycled paper can be up to 10 per cent more costly and will still be bought, or a certain company will be granted pre-award preference, in spite of slightly higher costs, because they employ racially discriminated minorities or women.

581 For example, all government fleet automobiles must have a certain fuel efficiency, or a provision ensures that all forestry or hospital equipment must meet a certain health and safety standard.

582 For example, governments may give preference to goods made that release little carbon into the atmosphere. Or they may simply require a domestic-level social justice or environmental certification, saving purchasing officers the trouble of verification and auditing. See IISD / UNEP, *Trade and Environment Handbook* (Winnipeg / Geneva: IISD / UNEP, 2001). See also C. McCruddeon, *Buying Social Justice* (Oxford: OUP, 2004 – forthcoming).

one country may not always be relevant in another. And specifications may be, intentionally or unintentionally, set up in ways that favour domestic producers.[583]

The FTAA government procurement agreement may cover only the need for further transparency, and it may be pluri-lateral. As such, countries may not automatically subscribe by being parties to the FTAA. The focus of the FTAA might be to force governments to tender bids for their purchases transparently and fairly. It should not prohibit discrimination among like products, but rather might focus specifically on discrimination between foreign and domestic suppliers. It may, for example, demand that any requirements should not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade. Such a requirement would require careful drafting, to ensure that it does not conflict with other cooperative efforts to build capacity and set in place green or social justice related procurement policies. The FTAA might require special provisions to ensure that limits on technical specifications in contracts do not preclude a government from preparing, adopting or applying technical specifications to promote the conservation of natural resources. However, the FTAA could mandate, in other areas, that technical specifications should be based on international standards, where these exist, or otherwise on national technical regulations, recognized national standards, or building codes. This presents a potential triple-win situation for the FTAA and sustainable development, if a significant effort can also be launched to develop, implement and monitor such standards on a hemispheric level, and the FTAA implementation can be delayed until such standards are firmly in place. It should also be made clear that the ISO 14001 would be permitted under such a regime, and, arguably, so would most national eco-labeling and fair trade programs. Transparency requirements should not threaten social and environmental linkages between pre and post-award procurement contracts, but rather, systematize such provisions across the Americas in a cooperative way. Because of their special nature, social services would need to be exempt from the FTAA.[584] Finally, exceptions similar to those in the WTO, for procurement measures which protect public morals, order or safety; human, animal or plant life or health; as well as goods or services of handicapped persons, philanthropic institutions or of prison labour, might need to be provided. Such exceptions do not need to be strictly limited, as it is a high burden for a regulator to prove that a procurement measures, aimed at a public purpose, is 'necessary' to achieve that purpose. These thoughts only begin to suggest an agenda for a 'sustainable procurement law' in the FTAA. Further research is needed in this area to develop a positive agenda, as is analysis and capacity building.

Civil society groups at the Americas Trade and Sustainable Development Forum emphasised the value of transparency provisions in government procurement to limit corruption in government contracting processes. These commentators identify

[583] For example, if a government requires that all the paper it buys be certified by a domestic eco-label, or that all construction companies employ a certain percentage of racially discriminated minorities, it enters the grey area between voluntary standards and mandatory technical regulations. See IISD / UNEP, *Trade and Environment Handbook* (Winnipeg / Geneva: IISD / UNEP, 2001).

[584] These include government services or functions, such as implementation of laws, social readaptation, unemployment pension or insurance services, or services related to social security, social welfare, public education, public instruction, health care and protection and childcare.

procurement legislation, practices and supportive institutional and civic mechanisms as the single most important priority in the effort to curb corruption, though there is also a need to encourage the private sector to apply anti-bribery policies, enforce internal controls and provide training throughout their organizations. They argue that transparency requirements in the FTAA Procurement Chapter should have the broadest application at all governmental levels and to all goods and services.[585]

Competition Law and Policy

The FTAA can only benefit the Americas if effective competition law and policy mechanisms are in place. Competition law and policy provides a way to prevent the capture of liberalization gains by monopolists or companies with market dominance.[586] Efficient, effective regulatory frameworks include competition laws to control certain types of economic behaviour. They prohibit direct or indirect selling arrangements (vertical agreements) and broad cooperation in cartels (horizontal agreements), to the benefit of all consumers.[587] Not all restrictions to trade or other agreements lead to inefficiency, market dominance or less distribution of economic gains. But those players overstepping the bounds of good behaviour need to be controlled or fined, and governmental measures must be applied to ensure this happens fairly.[588]

In this light, it makes sense to argue for hemispheric competition disciplines in the FTAA. Some seek to reduce and limit the role of competition law to economic purposes only; arguing that other public objectives (like health and safety) should done through other laws.[589] Other countries have included non-economic public policy goals in their competition laws.[590] This article recommends that FTAA provisions on competition law should take social and environmental priorities into account, rather than focusing purely on the economic priorities and imperatives. Given the lack of central hemispheric institutions with a mandate and jurisdiction to balance competing social, economic and environmental priorities, competition treaties themselves must contain balancing mechanisms. Countries may need to use competition law to support sustainable development objectives.

National competition laws are a relatively recent phenomenon, though now, more than 100 countries have competition laws.[591] Many competition laws were adopted in the

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585 Such transparency may 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. See Centre for International Sustainable Development Law, *Report on the Americas Trade and Sustainable Development Forum* (CISDL: Montreal, 2004). Available online: www.dfait-maeci.gc.ca.

586 F. Jenny, "Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation" in *International and Comparative Competition Law and Policies* 31, 33 (Yang-Ching Chao et al. eds., 2001).

587 *Ibid.*

588 A. I. Gavil, *et al.*, Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy (West 2002) 38.

589 A. I. Gavil, *et al.*, Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy (West 2002) 38.

590 WTO Working Group on the Interaction between Trade and Competition Policy, *Overview of Members' National Competition Legislation - Note by The Secretariat*, WT/WGTCP/W/128/Rev.2, 4 July 2001(counting the EU and its members separate since all EU member states have competition laws), Appendix 3.

591 A. I. Gavil, *et al.*, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* 4 (West 2002).

1990s, and these all contain provisions on mergers, horizontal and vertical restraints, as well as on the abuse of dominant positions.[592] However, many countries in the Americas do not yet have a fully functioning, efficient and transparent competition authority. And it is only in the last ten years that international competition laws have begun to develop.[593] Indeed, the North American Free Trade Agreement (NAFTA), at Chapter 15, contains very basic competition principles, recognising the value of competition law and the duty to cooperate in the enforcement of competition policy.[594] Other, more sophisticated models have also developed.

Improved competition rules could, in theory, support sustainable development goals *per se*. For example, small producers of energy or agricultural products have usually problems entering a monopoly market, but their survival is important from a social and environmental point of view, especially in terms of encouraging innovation in these sectors.

Building on the limited substantive work that has been done on these issues in the area of trade and investment negotiations,[595] three further ways can be identified to integrate the concept of sustainable development into FTAA discussions on competition law and policy.

First, certain sustainable development goals might merit the development of substantive hemispheric competition rules. For example, the FTAA can provide space for jurisdictions that have recognized the goal of consumer protection in their competition laws more expressly.[596] For example, in Jamaica, consumer protection can trigger an action against a company or serve as a justification for a legal dominant position. The institutional identity between competition and consumer protection authority reinforces this effect. Measures permitting such provisions in the FTAA would permit inclusion of public interests into the competition analysis. But such laws should only be used for very important policy goals, as they are not necessarily a very efficient way to accomplish the desired end, and may even reduce other intended socio-economic benefits of the FTAA disciplines. Another such mechanism is for the FTAA to include provisions permitting a competition tribunals or commissions to examine a transaction's impact on public

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[592] WTO Working Group on the Interaction between Trade and Competition Policy, *Overview of Members' National Competition Legislation - Note by The Secretariat*, WT/WGTCP/W/128/Rev.2, 4 July 2001(counting the EU and its members separate since all EU member states have competition laws), Appendix 3. See the WTO Competition Policy at: <http://www.wto.org/>.

[593] S. Evenett, A. Lehmann and B. Steil (eds.), Antitrust Goes Global – What Future for Transatlantic Cooperation? (2000).

[594] NAFTA Part Five: Investment, Services and Related Matters, Chapter Fifteen: Competition Policy, Monopolies and State Enterprises, Art. 1501, see Appendix 1.

[595] See D. Esty, *Greening the GATT* (Boston: IIEE, 1994).

[596] For example, the competition law of Jamaica is expressly aimed at consumer protection and its competition authority is equally responsible for consumer protection. As such Sec. 20 para. 1 e) of the Jamaican Fair Competition Act includes "the limitation of production of goods or services to the prejudice of consumers" in their definition of abuse of a dominant [market] position. Similar to the South African Competition Act, para. 2 concerns the opposite case: "[a]n enterprise shall not be treated as abusing a dominant position (a) if it is shown that (i) its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress; and (ii) consumers were allowed a fair share of the resulting benefit." See *Jamaican Fair Competition Act*, Act 9 of 1993, available at http://www.jftc.com/TheFCA/theact/PDFACT/Fair%20Competition%20Act.pdf

interest.[597] The application of such public interest evaluation provisions occurs in two ways. A merger that would be otherwise contrary to competition rules can be justified under the public interest evaluation. However and in addition, a competitive merger that would be positive for competition reasons can nonetheless be prohibited on public interest grounds.

A second, more common method is through the provision of express exceptions or exemptions from competition rules, where these rules might limit the abilities of countries to use social and environmental measures. The *Canada-Costa Rica Free Trade Agreement* provides one example.[598] This Agreement contains an innovative provision on exceptions,[599] which permits both parties to set and maintain their own exceptions, as long as they are transparent about it. Unlike the NAFTA, there is no need to amend an annex if the country decides to exclude a new sector or industry from the application of competition laws.

A third way is to negotiate enhanced application of competition rules, where fair competition can benefit sustainable development, small and medium sized enterprises, and other ecologically favourable effects. However, more research is required to fully understand the implications of competition law for sustainable development law. Two examples can illustrate this point. First, smaller economies often need to integrate public interest considerations into their competition laws.[600] Economic actors, including large companies are likely to change their behaviour up front, in order to accommodate new competition parameters. This means that generally, only very important issues should be included in competition considerations but also that it can be a powerful tool. In smaller economies, where resources for economic incentives are very finite, and the authorities still have to gain public support, there is a strong argument for public interest issues to become part of the competition analysis. The explicit inclusion of public interest considerations has the potential to rebuild or refocus an economy, to an extent that few

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[597] Such a provision would recognise that when determining whether a merger can or cannot be justified on public interest grounds, competition commission and tribunals must consider the effect that the merger will have on a particular industrial sector or region; employment; the ability of small business, or firms controlled or owned by historically disadvantaged persons, to become competitive; and the ability of national industries to compete in international markets.

[598] The agreement applies to "anticompetitive agreements, anticompetitive concerted practices or anticompetitive arrangements by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce." It includes a commitment to the principles of transparency (adopted or modified measures to proscribe anti-competitive activities should be published or publicly available); non-discrimination (the measures taken to proscribe anti-competitive activities should be applied on a non-discriminatory basis); and procedural fairness (judicial and quasi-judicial proceedings should be fair and equitable and there should be an appeal or review process to any final decision) with regard to competition law. See Canada-Costa Rica Free Trade Agreement, 23 April 2001, entered into force 1 November 2002 (Ley No. 8300 del 10 de setiembre del 2002, publicada en el Alcance No. 73 de la Gaceta No. 198 del 15 de octubre del 2002, vigente a partir del 1° de noviembre del 2002 & on 18 December 2001 legislation to implement the Canada-Costa Rica Free Trade Agreement (CCRFTA) had received Royal Assent in Canada.)

[599] The Agreement applies to all practices mentioned "unless such activities are excluded, directly or indirectly, from the coverage of a Party's own laws or authorized in accordance with those laws. All such exclusions and authorizations shall be transparent and should be periodically assessed by each Party to determine whether they are necessary to achieve their overriding policy objectives." (Article XI .2.3)

[600] Public interest considerations are "…not evidence of a fatally compromised competition regime. In one way or another it is a feature of most regimes and, in those regimes where it is a particularly strong feature, serious consideration of the public interest by the competition authorities is likely to underpin the credibility of fledgling authorities." See UNCTAD, Model Law on Competition - Draft Elements and Commentaries for Articles of a Model Law or Laws on Competition (Geneva: UNCTAD, 2002).

positive incentives could achieve so effectively. Second, the relationship between competition law and environmental law is not straightforward. There are several areas where strong enforcement of competition law can have a positive effect on environmental goals. For example, in the area of energy supply, access to a secure localized market can be very positive for the development of renewable energies.[601] However, competition laws can also limit environmental laws, as has occurred in the area of waste management.[602] Growing producer liability regulations, for example in electronic products, also pose difficult questions for the interaction of environmental and competition law.[603] Other problems with competition law could emerge from certain types of labeling requirements, as well.[604] Finally, the application of strict interpretations of competition law to environmental information and communication would raise some considerations.[605] However, generally speaking, special legal regimes for environmental products or services should take precedence over competition laws. For these, as for other exceptions, economic efficiency can be only one of the relevant considerations.

In the FTAA, countries can also simply providing for enhanced cooperation on competition law. As in the *Canada – Costa Rica Free Trade Agreement*, each party can commit to inform each other about anti-competitive activities that may affect other parties.[606] Additionally, the agreement can provide for further cooperation and mutual legal assistance agreements, arrangements. Most importantly, the FTAA can provide for technical assistance to develop understanding, analysis and implementation of more effective competition policy. This technical assistance can deliver development results. The FTAA might provide a useful, practical forum for capacity building and cooperation. Though many Americas competition authorities have recently signed a Memorandum of Understanding as members of a new International Competition Network (ICN),[607] concerns have been raised as to the transparency and accountability of such an informal network, and much of the same technical assistance could also take place in the FTAA.

Other Sustainable Development Provisions

Two other aspects of a 'sustainable development' agenda for the FTAA can also be highlighted. First, the FTAA could also establish a mechanism for the recognition of fair

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601 P. Duncanson, *Competition in Energy Markets: Law and Regulation in the European Union* (2002), W. Jaeger, Regulierter Wettbewerb in der Energiewirtschaft (2002) and G. Hermes, Staatliche Infrastrukturverantwortung : rechtliche Grundstrukturen netzgebundener Transport- und Übertragungssysteme zwischen Daseinsvorsorge und Wettbewerbsregulierung am Beispiel der leitungsgebundenen Energieversorgung in Europa (1998).

602 G. Posser, Grundfragen des Abfallrechts : Abgrenzung von Produkt/Abfall und Verwertung/Beseitigung (2001)

603 On one hand, the voluminous disposal of electronic waste is not good for the environment, but on the other hand, the recycling industry has considerable economic interest in this fraction of the waste stream. However, statutory obligations to enter into agreements with the producing industry can cause competition concerns to arise. See H. Vedder, *Competition Law, Environmental Policy and Producer Responsibility – Experiences in The Netherlands From a European Perspective* (Groningen, 2002).

604 T. Klindt, *Die Umweltzeichen "Blauer Engel" und "Europäische Blume" zwischen produktbezogenem Umweltschutz und Wettbewerbsrecht,*1998 Betriebsberater, 545.

605 I. Roth, Umweltbezogene Unternehmenskommunikation im deutschen und europäischen Wettbewerbsrecht (2000).

606 WTO Working Group on the Interaction between Trade and Competition Policy, *Joint Communication from Canada and Costa Rica,* WT/WGTCP/W/173, 2 July 2001, see Appendix 2.

607 This international network, founded in 2001, seeks to provide anti-trust authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition issues, especially with regard to enforcement. It tries to improve world-wide cooperation and to enhance convergence through focused dialogue. See at http://www.internationalcompetitionnetwork.org/members.html.

trade and eco-certification processes, and support such certification with preferential treatment in market access and other incentives. This would support trade in green goods, especially in the forests and agricultural sectors (organic products, coffee), as well as products that provide livelihoods to the poor, and contribute towards support cost internalisation and recognise the value of services provided by ecosystems. Second, the FTAA can emphasise liberalisation of environmental services, and define environmental services broadly to encompass under-developed areas where more efficient and effective provision of such services would be of benefit to the environment.[608] In doing so, the parties to the FTAA should also cooperate to ensure that services are not liberalised until the right laws and regulations are in place to that a good standard of service can be obtained or maintained through the liberalisation process, and to ensure that access to such services will be possible for vulnerable groups. Such emphasis, and improvements in the supply of services resulting from liberalisations, could simultaneously benefit trade, environment and social communities in the Americas.[609]

4. Conclusions and Future Directions

In the FTAA negotiations to date, environment and development issues have too often been viewed through the prism of their potential disruptive effects on trade flows or economic relations. Hence, there has not been sufficient scope for analysing and discussing the fuller set of trade and sustainable development linkages. This shortcoming is critical, not just from a sustainable development perspective but for the trade community as well. To achieve broad-based support for any new trade agreement, it is clear that environmental and social concerns will also have to be addressed in a sensitive, step by step hemispheric law and policy discussion. For governments of the Americas to develop a hemispheric trade liberalisation agenda that fosters rather than frustrates sustainability objectives, countries with extremely diverse development trajectories and economic conditions must be satisfied. An FTAA trade and sustainable development agenda can take a hemispheric approach to these issues, but must give strong emphasis on Latin American and Caribbean priorities. It must address current fears and concerns and it will be essential to avoid last minute negotiations, which could unnecessarily alienate key players.

At the hemispheric level, social, environmental and economic regimes, in spite of all that has been stated about sustainable development and 'mutually supportive' law and policy over the last two decades, are just beginning to meet. It will take more time for these policies to grow together. Nevertheless, as I have canvassed in this article, innovative, interesting integration experiences have occurred at different levels in the Americas, from the development of social and environmental institutions in each sub-region, to the negotiation of side agreements on environment and labour issues which parallel trade agreements, and trade agreements which integrate environmental and labour chapters. Future efforts to lay the foundations for effective integration must build upon the efforts

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608 See R. Arce, "The Services Sector and Mutli-lateral Rules: Perspectives for FTAA and the Environment" in H. Blanco, M. Araya and C. Murillo (eds.), *ALCA y Medio Ambiente: Ideas desde Latinoamerica* (Santiago, Chile: CIPMA / GETS / CINPE, 2003).

609 See A. Dale, "Services Trade Liberalisation: Assessing the Environmental Effects" in *Report of the North American Symposium on Trade and the Environment* Washington Nov. 2000 (Montreal: NACEC, 2000).

of existing hemispheric, sub-regional and national institutions in the social, environmental and economic spheres.

The opportunity, and the challenge, is clear. New trade liberalisations instruments can be positive for sustainable development if they are balanced with solid environmental and social cooperation mechanisms. Such mechanisms, in the Americas, are both necessary and possible. Whatever their forms, they must be strong, adequately resourced instruments for hemispheric cooperation toward sustainable development, and they must be woven into the broad, flexible networks of existing sub-regional, regional and hemispheric institutions and accords, many of which constitute regimes in their own rights. They must link with, and influence, trade liberalisation processes, perhaps by providing impact assessments, so that these can better support sustainable development. And they must find innovative ways of including all actors for an Americas integration process, which is legitimate, visionary and sustainable.

Ensuring that trade and sustainable development aspects of hemispheric co-operation are appropriately integrated is only part of the picture. It is also important to ensure that social and environmental aspects themselves are integrated, wherever there are potential synergies or significant trade-offs, into the FTAA itself in its substantive provisions. In the second part of this article, we have advanced some tentative thoughts and proposals on ways to do this, but it is our earnest contention that more hemispheric and sub-regional research, assessment and capacity building is still necessary to identify viable options for a sustainable Americas trade agenda.

Public support for trade liberalisation has been hanging in the balance since the Seattle events. In this concluding chapter, we have explored potential legal strategies for the FTAA, in the context of the broader Summit of the Americas process, to break the *'Seattle syndrome'* of public concern and mistrust relating to new trade agreements. We have argued that social and environmental aspects of trade should be taken into account, as part of a coherent and integrated strategy, with full participation of civil society. By addressing sustainability issues, and opening meaningful channels for civil society participation, the FTAA could start delivering its fruits to more than 850 million citizens.

This hemispheric sustainable development *early-harvest* agenda holds potential to end the zero-sum relationship that is otherwise developing between growing national public concerns and hemispheric trade liberalisation processes. There is, indeed, as recognised in Quebec City, an urgent need to ensure a balance between economic development, social development and the protection of the environment. These should be interdependent and mutually reinforcing areas of an Americas FTAA sustainable development law and policy agenda.

Acknowledgements:

The 2001 Quebec City Hemispheric Trade and Sustainability Symposium

Peripheral to the official Summit and prior to the protests, a Hemispheric Trade and Sustainability Symposium gathered 200 experts from across the Americas in Quebec City, Canada.[610] It sought to address the points of intersection between sustainable development and trade issues, and foster an inclusive yet constructive debate. It bridged communities and sectors, with speakers ranging from the leaders of the Peoples Summit to the heads of major corporations. It also aimed to lay the foundations for a hemispheric trade and sustainability agenda.

This book is based on the ideas and intellectual work of the experts involved in the Symposium, with many papers from scholars, Ministers, sustainable development professionals, activists and businesspeople who participated as honoured guests and expert speakers. The IISD, UNEP and IUCN gratefully acknowledge the support of their partner institutions and sponsors. These included the Government of Canada, the North American Commission on Environmental Cooperation, the National Roundtable on the Environment and the Economy (NRTEE) and the International Development Research Centre (IDRC) of Canada, the U.S. National Wildlife Federation, as well as prominent Canadian corporate citizens such Placer Dome and TransAlta, and industry associations, the Mining Association of Canada and the Forest Products Association of Canada.

The event was made possible through major contributions from the Government of Canada, namely the Department of Foreign Affairs and International Trade, the Canadian International Development Agency, and Environment Canada, and this book was made possible by a follow up contribution from the IDRC.

An Hemispheric Advisory Council helped to develop and shape the agenda, speakers lists and procedural aspects of the Symposium, and to give support for fundraising and confirming keynote speakers.

Hemispheric Advisory Council Members were Mr. Ricardo Melendez-Ortiz of the International Centre for Trade and Sustainable Development, Mr. Miguel Reynal of Fundacion ECOS, Dr. Daniel Esty of the Global Environment Trade Study, Dr. Rubens Ricupero of the U.N. Conference on Trade and Development, Mr. Mark Halle of the International Institute for Sustainable Development and Mr. David Smith, formerly of the Jamaican Conservancy Trust and IUCN. Their proposals for the agenda, political support and guidance throughout the organisation of the event was invaluable.

A Canadian Host Committee was also formed, with the task of organizing the reception of the guests and generating political support within Canada for the event. The Host Committee Members were Mr. David McGuinty of NRTEE, Mme. Janine Ferretti of the North American Commission for Environmental Cooperation, and Mr. Malcolm Mercer of IUCN-Canada.

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[610] The Quebec City Symposium was organized jointly by the International Institute for Sustainable Development (IISD), IUCN - the World Conservation Union, and the United Nations Environment Programme – Regional Office for Latin America and the Caribbean (UNEP/ROLAC) and took place at the Museum of Civilizations from April 17 to 19, 2001, in Quebec City, Canada. A sister conference to discuss Latin American perspectives on trade, environment and sustainable development had been organised in Mexico City in February, 2001. The event was mandated by the Forum of Ministers of Environment of Latin America and the Caribbean, and was organised by UNEP ROLAC in partnership with IISD, UNCTAD, COMEDES and other groups. It was attended by over 150 representatives from more than 20 countries of the Americas, primarily environment and trade negotiators, civil society groups and academics.

The editors of this book, Marie-Claire Cordonier Segger of IISD and Karel Mayrand of IUCN were directors of the event, and Maria Leichner Reynal of ECOS was an expert participant. Symposium chairs were David Runnalls, President and CEO of the International Institute for Sustainable Development, Pierre Marc Johnson, former Premier of the Province of Quebec and Counsel at Heenan Blaikie, and Enrique Leff from the United Nations Environment Programme Regional Office for Latin America and the Caribbean.

The 200 participants – of which 80 were speakers – from 20 countries[611] who attended the Symposium represented a broad diversity of countries, views, backgrounds and institutional bases from the business, civil society, governmental, inter-governmental, and academic sectors. Almost half of the participants were Latin American or from the Caribbean, and speakers addressed trade and sustainability issues related to the FTAA in the broader Summit of the Americas context.

The Symposium was opened by Canada's Ministers of Environment and of International Trade, Mr. David Anderson and Mr. Pierre Pettigrew. Keynote speeches were also given by Lic. Victor Lichtinger, Mexican Secretary of the Environment, Mme. Maria Minna, Canadian Minister of International Cooperation, Dr. Walter Francois, Minister of the Environment of St. Lucia, and Mme. Janine Ferretti, head of the North American Commission for Environmental Cooperation, as well as Mr. Henri Massé of the Fédération des Travailleurs du Québec, and a representative from the Minister of Environment of the Dominican Republic.

The Hemispheric Trade and Sustainability Debates

An opening panel with speakers from the OAS, UNEP and WWF brought participants up to date on the recent work of trade, environment and sustainable development initiatives in the Americas. The Symposium plenary debated panel and roundtable interventions from across the Western Hemisphere on key elements of a Hemispheric Trade and Sustainability Agenda, including proposals for more sustainable investment and financing for the Americas, regional lessons in competitiveness and sustainable trade, the role of civil society in the Americas integration process, and potential instruments or institutional models from the sustainability aspects of sub-regional trade regimes.

Six thematic sessions were able to enter into deeper discussions on key issues for a hemispheric trade and sustainability agenda such as Forests and Certification (sponsored by the Forest Products Association of Canada) which discussed methods of certification and market access for environmentally and socially sound forestry firms; Mining and Stakeholder Involvement (sponsored by the Placer Dome Ltd. and the Mining Association of Canada) which discussed methods of involving stakeholders in all aspects of mining and appropriate hemispheric policy frameworks; Drinking Water and Sanitation – Trade in Environmental Services and Technologies (sponsored by the National Wildlife Federation of the U.S.) which discussed the trade aspects of the provision of water services; Biodiversity, Indigenous Knowledge and Intellectual Property Rights which discussed the protection of traditional knowledge, trade opportunities and the links between global and hemispheric policy frameworks; Climate Change, Cost Internalisation and Energy (sponsored by TransAlta Petroleum and the Canadian Association of Petroleum Producers) which discussed joint research, mitigation and opportunities for emission reduction in the Americas; and the Cartagena Protocol, GMOs and Agriculture – Safe Release and Trade, which discussed trade in agriculture, phytosanitary standards and biosafety issues toward an Americas agenda.[612]

Two receptions were held during the Symposium. On April 17, Janine Ferretti Executive Director of the **North American Commission for Environmental Cooperation**, hosted a

[611] Antigua & Barbuda, Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, El Salvador, Ecuador, Jamaica, Mexico, Paraguay, Peru, St. Lucia, Trinidad & Tobago, United States, Uruguay, and Venezuela.

[612] The final programme of the Symposium, as well as speakers communications, can be found on the Symposium web-page, online: http://www.iisd.org/trade/qc2001

reception with a keynote presentation by Robert Page, president of TransAlta, a Canadian oil company. On April 18, David McGuinty, Director of the **National Roundtable on Environment and the Economy**, hosted another reception with keynote speaker Oscar Arias, former President of Costa Rica and 1987 Nobel Prize Laureate.

"Private Rights, Public Problems", by Mann and von Moltke, IISD - WWF 2001, was launched at the Symposium. The book outlines concerns that a rethink on the logic behind the FTAA's investment provisions should be conducted. During the NAFTA negotiations in the early 1990s, the investor-state provision was not so hotly contested. For Mexico, the provision was intended to encourage foreign investment, while for risk averse foreign investors from Canada and the US, the provision alleviated fears of investing in Mexico by offering legal recourse and rights to compensation in instances of property expropriation. The book summarises civil society groups' fears that the FTAA investment provisions will closely resemble those found in NAFTA's Chapter 11.

Two other book launches also took place at the symposium, highlighting recent work by the IISD in the Western Hemisphere, and in North America.

"Trade Rules & Sustainability in the Americas", by Cordonier Segger *et al.*, IISD – UNEP – ICTSD, 2000 in Spanish and French, examines the issue of how new trade rules could promote, instead of prevent, sustainable development in the Americas. This book examines global and subregional trade agreements and reviews trade regimes in the Americas. By applying IISD's Winnipeg Principles on trade and sustainable development, the document describes how trade rules can support sustainability and makes recommendations for those involved in the FTAA debates.

"Ecological Rules & Sustainability in the Americas", by Cordonier Segger *et al.*, IISD – UNEP, 2001, released in English as a working paper at the Symposium, examines the possibilities for a strengthened environmental cooperation agenda in the Americas. It surveys existing and potential environmental regimes on global, regional, sub-regional and bi-lateral levels in the Americas, and makes proposals, based on the Winnipeg Principles analysis, for new hemispheric environmental regimes

Corporate leaders engaged fully in the debates at the Symposium, chairing panels, presenting their views, and giving feedback during the dialogue sessions.

TransAlta is Canada's largest non-regulated electric generation and marketing company, with more than $US 7 billion in assets and 8,000 megawatts of capacity. As one of North America's lowest cost operators, TransAlta's growth is focused on developing coal and gas-fired generation in Canada, the U.S., and Mexico. The company's reputation for sustainable development was recognized in 1999 by the Dow Jones Sustainability Group Index which identified TransAlta as the world's leading electric company in its first group of global equity indexes.

The **Mining Association of Canada (MAC)** is the Canadian voice for the mining industry, and works to promote corporate citizenship among their members through joint action, education and policy analysis. **Placerdome** is one of MAC´s members, and is North America's third largest gold mining company and the fifth largest gold miner in the world. It operates 15 mines in 6 countries on 5 continents and employ 12,000 people around the globe. Placer Dome's commitment to sustainability is based on exploration and design, construction, operation and closing mines in a way that respects and responds to the social, environmental and economic needs of present generations and anticipates those of future generations.

The Forest Products Association of Canada (FPAC) (formerly the Canadian Pulp and Paper Association, founded in 1913) is the national voice of one of Canada's most vital and significant resource sectors. FPAC provides an active forum for advancing ideas and issues of key importance to the development of the forest products industry and the communities it sustains across the country. In collaboration with its member companies, FPAC is committed to promoting quality and excellence and building international markets through Canada's leadership in sustainable forest management and environmental stewardship.

NRTEE TRNEE

Government of Canada Gouvernement du Canada

Canada

IDRC CRDI

International Development Research Centre

Centre de recherches pour le développement international

FPAC
Forest Products Association of Canada

The Mining Association of Canada
L'Association minière du Canada