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NAFTA Investor Rights Plus

An Analysis of the Draft Investment Chapter of the FTAA

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Contents

Introduction……………………………………………………………………………. 1

Major Findings…………………………………………………………………………. 2

Analysis of the Draft Text ……………………………………………………………. 3

1. **Investor-State Mechanism……………………………………………. 3**
2. **Expropriation and Minimum Standard of Treatment……………… 5**
3. **Capital Controls………………………………………………………. 7**
4. **National Treatment………………………………………………….... 8**
5. **Performance Requirements……………………………………….. 10**
6. **Definition of Investment…………………………………………… 11**

Conclusion………………………………………………………………………….. 12

The Development of this Analysis

This document is the first step in a broader effort by the Hemispheric Social Alliance to examine and evaluate the negotiations around the Free Trade Area of the Americas. The investment chapter analysis was produced jointly by individuals who are active in citizens networks in the three NAFTA countries that are affiliated with the Hemispheric Social Alliance: the Mexican Action Network on Free Trade (RMALC), the Alliance for Responsible Trade (United States), and Common Frontiers (Canada).

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As the rest of the FTAA draft text is made public, the HSA will continue to coordinate joint analyses focusing on the implications of this agreement for workers, the environment, indigenous peoples, women, children, and the struggle for relations in our hemisphere that place the goal of justice and sustainability above corporate profits.

INTRODUCTION

On April 18, 2001, citizens of the hemisphere got their first glimpse of the positions being negotiated by their governments in the Free Trade Area of the Americas. A U.S. nongovernmental organization, the Institute for Agriculture and Trade Policy, made the draft investment chapter of the FTAA available by posting a leaked copy on their web site.

There has been intense speculation over the FTAA investment negotiations, particularly on the question of whether the blueprint for these talks would be the investment rules of the North American Free Trade Agreement (NAFTA). NAFTA's Chapter 11 goes further than any other agreement in the world to extend rights and protections to international investors. The most controversial aspect of the agreement is that it allows private investors to sue the governments of the NAFTA parties directly to demand compensation for a breach of any of Chapter 11's long list of obligations. This unprecedented power granted to corporations restricts the ability of governments to protect the environment and public welfare and to ensure that foreign investment supports social, economic, and environmental goals.

In 1998, concerns about Chapter 11 fueled the international opposition that contributed to the abandonment of talks around a similar agreement among OECD nations called the Multilateral Agreement on Investment (MAI). These concerns have also contributed to opposition to a new round of negotiations in the World Trade Organization, which would likely include expansion of investment rules. The draft text reveals that governments are once again attempting to expand NAFTA's investment rules, this time through the FTAA. **Although virtually the entire draft is enclosed in brackets (indicating areas where there is not yet official consensus), the draft text closely mirrors NAFTA Chapter 11, including its "investor-state" provision.**

The Hemispheric Social Alliance has worked to advance an alternative approach to rules on investment that would ensure that basic human, labor, environmental, and indigenous peoples rights, as defined by international protocols, would take precedence over investor rights.[1] However, the draft makes it clear that FTAA negotiators have ignored these recommendations. The negotiators appear to have learned nothing from the defeat of the MAI or the alarming use of NAFTA's investment chapter to challenge legitimate public interest regulations. In fact in several areas, they are attempting to use the FTAA to grant investors even stronger protections than they enjoy under NAFTA.

These positions reflect the demands of the largest corporations in the hemisphere. On April 19, 2001, 29 U.S. corporations and corporate associations, including leading U.S. chemical and petroleum firms, signed a letter to top U.S. officials endorsing FTAA investment provisions modeled on NAFTA.[2] The letter lays out a wish list of provisions that includes the NAFTA rules that have been the target of the strongest public opposition.

This analysis focuses on these areas of controversy, highlighting the aspects of the FTAA draft that hold the most serious implications for democracy, environmental sustainability, and social and economic justice in our hemisphere.

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

MAJOR FINDINGS

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

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

Minimum Standard of Treatment: The draft also includes a vague and open-ended NAFTA obligation on minimum standard of treatment that has been used by foreign investors in all of the successful claims to date. This obligation is particularly problematic because investors have attempted to use it to expand the ambit of investor-state claims to include NAFTA obligations outside the agreement's investment rules.

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

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

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

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

ANALYSIS OF THE DRAFT TEXT

1. Investor-State Mechanism

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

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

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

- a Mexican municipality's decision to deny a permit to Metalclad Corporation for a hazardous waste facility;
- a Canadian measure challenged by Pope and Talbot Inc implementing a complex system of export quotas and fees on certain softwood lumber pursuant to an agreement with the United States; and
- another Canadian regulation challenged by S.D. Myers Inc. that briefly prohibited exports of toxic PCB wastes.[3]

Pending investor challenges include:

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

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

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

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

The draft text demonstrates that despite years of objections, criticisms, and a growing body of problematic investment cases under NAFTA, the FTAA negotiators are unwilling or unable to look for creative new approaches that would better balance the legitimate concerns of investors and the broad public and democratic interest in setting national development and social policies. Under NAFTA's deeply flawed arbitration process, the "judges" are chosen by the parties, are not subject to standard judicial ethics rules, and are unaccountable for their actions. The public is excluded from the proceedings. There is no appellate body to ensure that mistakes in legal interpretations are corrected.[4] The fact that these tribunals are asked to decide issues of Constitutional importance should disturb all citizens.

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

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

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

2. Expropriation and Minimum Standard of Treatment

One of the most controversial aspects of NAFTA's Chapter 11 is its extremely broad definition of expropriation. Traditionally, expropriation has meant the taking of property without the owners' consent for a public purpose (such as when a government takes possession of land to build a public road). Domestic law rightly provides strong provisions for prompt and fair compensation in such extraordinary cases. However, in addition to this type of direct expropriation, NAFTA also requires compensation for indirect expropriation as well as measures "tantamount to" expropriation. This wording has allowed foreign corporations and individual investors to sue over any governmental act that may diminish their profits.

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

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

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

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

While NAFTA rules concerning expropriation have understandably provoked consternation and attracted considerable notoriety, another investor right is also highly problematic. This is the right to a minimum standard of treatment which is set out in

Article 1105 of NAFTA and included in the draft FTAA investment text. This provision is extremely vague. Essentially, it states that governments must treat investors in accordance with international law, including fair and equitable treatment and full protection and security.

There is absolutely nothing in the bracketed language of Article 6 “Fair and Equitable Treatment” that would ameliorate the corrosive influence of this provision on public policy and law. Indeed if anything, some versions of this text would actually embellish rather than moderate the impact of this obligation.

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

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

This is because under NAFTA, the unilateral right of foreign investors to sue was to have been contained, at least to some degree. While claims can be made for alleged violations of all NAFTA investment rules, the rest of the agreement (with two minor exceptions) is off limits to foreign investor-initiated disputes.[5]

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

For example, now United Parcel Service of America is making a similar argument to challenge public postal services in Canada. It is attempting to claim damages which it says arose from Canada Post’s failure to comply with a provision that is outside NAFTA investment rules and should for that reason not be subject to such claims.[6] Its argument turns on Article 1105. If UPS wins, foreign investors would have the right to enforce

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

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

many more provisions of NAFTA, or by logical extension, of the WTO agreements as well. If this comes to pass, instead of dozens of foreign investor claims there are likely to be hundreds.

3. Capital Controls

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

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

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

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

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

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

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

4. National Treatment

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

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

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

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

- " implement viable national development policies appropriate to their peoples' goals, while remaining open to the world economy;
- encourage productive investments that increase links between the local and the national economy and screen out investments that make no net contribution to development;
- make foreign investment play an active role in the creation of macroeconomic conditions for development;
- protect small, local, family and community enterprises from unfair foreign competition; and
- allow for legal measures that preserve public or state ownership in some sectors (e.g. petroleum); exclusive national ownership in other sectors (e.g.

> broadcasting); and obligatory national participation in the ownership of other sectors (e.g. finance)."

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

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

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

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

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

The FTAA would therefore compel governments to rely almost exclusively on reservations—or country-specific exceptions—to protect otherwise inconsistent measures or important areas of policy flexibility. Under Article 12 of the proposed text, governments would be given a one-time opportunity to exempt existing non-conforming measures from the national treatment obligation by listing them in a special annex. The onus is on every government to identify its non-conforming measures and to negotiate protection for them. Any non-conforming measure that is not listed would be lost.

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

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

5. Performance Requirements

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

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

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

- to export a given type or level or percentage of goods or services;
- to achieve a given level or percentage of domestic content;
- to purchase, use or accord a preference to goods produced or services provided in its territory or to purchase goods from producers or persons or services from service providers in its territory;
- to relate in any way the volume or value of imports to the volume or value of exports, or to the amount of foreign exchange inflows;
- to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- to transfer a particular technology, production process or other proprietary knowledge to a person in its territory (except when the requirement is imposed or the commitment is enforced by a court, administrative tribunal or competent authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement);
- to act as the exclusive supplier of the goods that it produces or the services that it provides to a specific regional or to the world market.

There is one potential significant difference between the NAFTA language on performance requirements and that in the draft FTAA text. NAFTA's bans on these requirements apply to both foreign and domestic investors. By contrast, Article 1 (Scope of Application) of the FTAA draft suggests that the prohibition on such requirements would only apply to foreign investors ("all investments of the investors of any *Party* ***in***

the territory of another Party.") This language is less intrusive than that in NAFTA because it would not affect governments' power to apply performance requirements on domestic firms. At the same time, this double standard could create even more advantages for multinational firms over local ones.

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

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

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

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

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

6. Definition of Investment

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

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

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

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

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

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

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

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

One proposal in the FTAA draft would extend coverage to "turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts".

This goes beyond the NAFTA clarification that does not include as investment "commercial contracts for the sale of goods and services." Other FTAA proposals contain the NAFTA clarification.

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

CONCLUSION

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

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