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Trade, Democracy, and The FTAA Public Access to the Process of Constructing a Free Trade Area of the Americas

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TRADE, DEMOCRACY, AND THE FTAA: PUBLIC ACCESS TO THE PROCESS OF CONSTRUCTING A FREE TRADE AREA OF THE AMERICAS

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INTRODUCTION

From outside police barricades, the Eighth Meeting of Trade Ministers of the Americas looked familiar. Union rallies, marches and sporadic violence greeted ministers as they met in Miami in November 2003 to continue negotiating a Free Trade Area of the Americas (“FTAA”). Anti-globalization and anti-FTAA activists — joined by the agnostic and the merely curious — descended on Miami to voice concerns over the proposed regional accord. In a pattern traced from the First Meeting of Ministers in 1995 and punctuated during similar meetings for

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the World Trade Organization (“WTO”) such as the one in Seattle in 1998, trade activists used the occasion of the Ministerial meeting as a symbolic attention-getting device, but harbored little hope for meaningful dialogue with the assembled ministers and their delegations.

Inside the barricades, however, the landscape was changing. For the first time since FTAA negotiations had begun in 1995, governments offered a forum for non-profit, public interest, civil society organizations¹ (“CSOs”) to debate the proposed trade agreement and engage trade negotiators inside the so-called “hard security perimeter.”

Business interests (philosophically trade-positive) had won more robust access to ministers and delegates since the First

1. The term Civil Society Organization (“CSO”) is used in this Article rather than Non-Governmental Organization (“NGO”) to emphasize the non-profit nature of the organizations upon which this Article focuses. In practice, access to trade policy-making for the non-profit, or public interest, sector is distinct from access for business associations, chambers of commerce, and other organizations representing private, for-profit interests. Many hold that civil society generally encompasses all non-State actors (non-governmental, non-legislative, non-military). See e.g., Linda C. McClain & James E. Fleming, *Foreword: Legal and Constitutional Implications of the Calls to Revive Civil Society*, 75 CHI.-KENT L. REV. 289 (2000) (defining civil society as “a realm between the individual and the State, including the family and religious, civic, and other voluntary associations”). Others hold to a narrower definition of CSOs. See Samuel H. Barnes, *The Contribution of Democracy to Rebuilding Postconflict Societies*, 95 AM. J. INT’L. L. 86, 99 (Jan. 2001) (noting that “some define civil society as excluding associations that take a direct part in the political process”). The purpose of the distinction, though, is not to wade into that broader theoretical debate. For a view of the broader debate, see generally, JOHN EHRENBERG, *CIVIL SOCIETY: THE CRITICAL HISTORY OF AN IDEA* (1999); Tom Palmer, ‘Civil Society’ no Longer Means What it is Supposed to Mean, 1 J. CIV. SOC’Y 6, 12 (June-July 1997), available at <http://www.civnet.org/journal/issue2/jftpalm.htm>. Rather, the distinction is critical from a theoretical and a practical standpoint in the context of international trade policy. At a theoretical level, for-profit and not-for-profit interests have diverged over the rationale for shaping international trade policy with the former tending to emphasize the potential economic benefits of trade and the latter tending to emphasize the broader social concerns. At a practical level, the for-profit and non-profit sectors not only speak from different perspectives, but they have sought, and been afforded, different types and degrees of access to the treasury, commerce and trade officials who shape trade policy and draft trade agreements. While the for-profit sector has generally been perceived as pro-trade and has thus sought and been granted a more robust dialogue about the details of trade agreements, the non-profit sector has been far more ambivalent, heterogeneous and in some cases antagonistic to trade. The experience of non-profit groups has, perhaps consequently, ranged from being welcomed by trade negotiators and trade allies to being turned away outright. This Article deals with access for the range of non-profit sector actors — those who may perceive benefits or harms from the proposed FTAA; that is to say, civil society voices that may bring harmony or disharmony to the FTAA discourse.

Ministerial meeting in Denver in 1995, through workshops, cocktail parties, and thinly veiled lobbying efforts collectively denominated the Americas Business Forum (“ABF”).² But non-profit, public interest organizations (philosophically trade-negative or trade-ambivalent) had largely remained outside the formal Ministerial process, relegated to demonstrating or organizing parallel forums through coalitions such as the Hemispheric Social Alliance (“HSA”),³ which rely on teach-ins and street theater to gain attention and bring public pressure on negotiators.

While some governments have taken steps to open their trade policy-making to scrutiny and dialogue at a national level, prior to the Miami Summit no real public space had been created at a multilateral level for dialogue between representatives charged with negotiating an FTAA, and citizens who might challenge the details of the agreement. Instead, two separate discourses developed: one among governments negotiating under a cloak of confidentiality (with access for business leaders who largely supported their efforts), and the other among citizens outside the process. Prior FTAA Ministerial meetings in Toronto and Quebec, had seen brief, symbolic (and at times, surreal) meetings between a subset of CSOs and ministers who exchanged prepared statements and largely talked past each other. But Miami brought the civil society debate itself to a new “inside” status — at the doorstep of the delegates — and brought the delegates much closer to the concerns of their constituents.

As the FTAA Ministerial process has begun to open up, some obstacles have been overcome and others have been uncovered. But, in a word, public access to the multilateral negotiations for the FTAA has made progress.

This Article explores that progress. It traces the history of efforts by CSOs to engage senior government officials during FTAA Ministerial meetings, and highlights the priorities identified by civil society for strengthening the discourse and “democratizing” an FTAA. The Article also explores normative and practical issues surrounding public access to a multilateral pro-

2. The Americas Business Forum (“ABF”) is informally governed and relies on host committees in Ministerial cities to provide structure and financing for specific Ministerial meetings. See discussion *infra* Part V.A. For a view of the ABF, its perspectives and tactics, see, e.g., the website of the Miami host committee, available at http://www.miamiftaa2003.com/about_objective.htm (last visited Mar. 1, 2004).

3. See discussion *infra* Part V.B.

cess traditionally reserved for bureaucrats in a field traditionally reserved for technocrats. Finally, it describes a governmental initiative emerging from Miami to address some of these issues by creating a permanent consultative mechanism for civil society in the trade agreement itself, and offers some insights into the demands on such a mechanism.

The Article concentrates on access for non-profit or “public interest” elements of civil society rather than for-profit business interests, because public interest organizations have been more marginalized from the FTAA, and their interests are more diffuse and conflicting — rendering their integration more problematic. It also concentrates on the multilateral process in the context of Ministerial meetings rather than trade policymaking at a national level because of the symbolic value attached to meetings of ministers, and the unique opportunities for public dialogue offered by these high-level meetings.

I. THE FTAA IN CONTEXT

In 1994, presidents and heads of State from thirty-four of the thirty-five Western Hemisphere States⁴ met in Miami for what was billed as the “First Summit of the Americas.” In fact, it was the Third Presidential Summit in the Americas following the Second World War; the prior summits convened in 1956 and 1967.⁵ It was, however, the first meeting of leaders who could all claim to have been democratically elected. This distinction has become a central point in Inter-American summitry, and in the plans of action that emerge from the summits. It is also at the core of demands for greater public access to the FTAA.

The Miami Summit Plan of Action contained numerous commitments and pledges for action under twenty-three head-

4. A Summit invitation was not issued to Cuba, which has been prevented from taking its seat as a Member State of the Organization of American States (“OAS”) since 1962. See JOSÉ LUIS RESTREPO, *EL SISTEMA INTERAMERICANO: PERSPECTIVA HISTÓRICA [THE PAN-AMERICAN SYSTEM: HISTORIC PERSPECTIVE]* (White Paper from the OAS Secretariat of Juridical Affairs, 2003), available at http://www.oas.org/juridico/spanish/josé_luis_restrepo.htm (last visited Jan. 27, 2004) (on file with author).

5. Richard Feinberg, Address Before the Inter-American Dialogue (Sept. 20, 1994), in *ADVANCING THE MIAMI PROCESS: CIVIL SOCIETY AND THE SUMMIT OF THE AMERICAS 42* (Robin Rosenberg & Steve Stein eds., 1995) [hereinafter *ADVANCING THE PROCESS*]. Richard Feinberg was then the Special Assistant to the President of the United States and Senior Director for Inter-American Affairs, National Security Council.

ings grouped in four principal chapters, or “baskets”:⁶

- preserving and strengthening the community of democracies in the Americas;
- promoting prosperity through economic integration and free trade;
- eradicating poverty and discrimination in our hemisphere; and
- guaranteeing sustainable development and conserving our natural environment for future generations.⁷

These themes have been repeated and expanded in subsequent summits in Santa Cruz, Bolivia in 1996, Santiago, Chile in 1998, and Quebec City, Canada in 2001.⁸ A “special” or “extraordinary” summit was held in Monterrey, Mexico in January 2004 and again the themes echo those from the First Summit in Miami: economic growth with equity; social development; and democratic governance.⁹

While these presidential meetings have revealed a broad array of social and political ambitions — from health, education, and the environment to urban poverty, human rights and democracy — many governments in the region stake their princi-

6. 1 OFFICIAL DOCUMENTS OF THE SUMMIT PROCESS FROM MIAMI TO SANTIAGO 213-40 (OAS, 1998); First Summit of the Americas: Declaration of Principles and Plan of Action, Miami, Florida, Dec. 11, 1994, *reprinted in* 34 I.L.M. 808, at 810 (1995) [hereinafter First Summit: Declaration of Principles].

7. First Summit: Declaration of Principles, *supra* note 6, 34 I.L.M. at 814.

8. The Bolivia Summit was denominated the “Summit of the Americas on Sustainable Development” and has been classified as a “special summit.” Summit of the Americas on Sustainable Development: Declaration of Principles, Santa Cruz de la Sierra, Bolivia, Dec. 8, 1996, *available at* <http://www.summit-americas.org/Boliviadec.htm> [hereinafter Santa Cruz Summit]. As a result, the subsequent meeting in Santiago was referred to as the “Second” summit, and the one in Quebec City as the “Third.” Second Summit of the Americas: Declaration of Principles and Plan of Action, Santiago, Chile, Apr. 19, 1998, *reprinted in* 37 I.L.M. 947 (1998) [hereinafter Second Summit: Declaration of Principles]; Third Summit of the Americas: Declaration of Principles, Quebec City, Canada, Apr. 22, 2001, *available at* http://www.ftaa-alca.org/summits/quebec/declara_e.asp [hereinafter Third Summit: Declaration of Principles]. A complete summary of all summits, including official documents and their plans of action, can be found at <http://www.summit-americas.org/eng-2002/previous-summits.htm>. The Office of Summit Follow-up, General Secretariat, Organization of American States has also published a set of “Official Documents,” in three volumes as of early 2004 (copies on file with the author).

9. Special Summit of the Americas, Monterrey, Mexico, Jan. 13, 2004 (forthcoming 2004) [hereinafter Mexico Summit]. Updated information on the Mexico Summit can be found at <http://www.summit-americas.org/SpecialSummit/Mainpage-eng.htm> or <http://www.comormex.org/ceamexico/web/home.php>.

pal ambition on regional economic integration.¹⁰ In a word: trade. Some consider the prospect of an FTAA the “crown jewel” of the summit process — and it has certainly garnered the greatest resources and attention.¹¹ While many summit commitments have been orphaned, and others succeed only because particular governments or constituencies have taken an interest,¹² the pursuit of an FTAA has been robust and well funded. A tripartite committee of the Inter-American Development Bank, the U.N. Economic Commission for Latin America and the Caribbean, and the Organization of American States (“OAS”) has been tasked with promoting the FTAA,¹³ and trade ministers have met annually since the Miami Summit to advance the process. At the 2002 Ministerial meeting in Quito, Ecuador, ministers agreed to establish a Hemispheric Cooperation Program (“HCP”) to fund capacity-building initiatives aimed at improving the ability of states to participate in, and benefit from, an FTAA.¹⁴ By 2000, when FTAA negotiations officially began, working groups had already been established to hammer out the details of the proposed agreement, and these working groups in many cases became the formal negotiating groups to prepare an

10. This conclusion is based on numerous conversations by the author with government officials, summit negotiators, and summit officials between 1995 and 2003, and on the author’s participation as an observer and advisor in the context of summit preparatory meetings and summit follow-up programs. During this time, the author served first as an advisor to the United States Agency for International Development in designing summit follow-up initiatives and later as an advisor to the OAS in implementing summit programs.

11. *Id.* See also LEADERSHIP COUNCIL FOR INTER-AMERICAN SUMMITRY, ADVANCING TOWARD QUEBEC CITY AND BEYOND: POLICY REPORT III 7-10 (2001) [hereinafter LEADERSHIP COUNCIL REPORT].

12. See *From Talk to Action: How Summits Can Help Forge a Western Hemisphere Community of Prosperous Democracies* (Leadership Council for Inter-American Summitry, Mar. 1998), available at <http://www.sice.oas.org/geograph/westernh/summit01.asp>; *Advancing Toward Quebec City and Beyond* (Leadership Council for Inter-American Summitry, Mar. 2001), available at http://www.focal.ca/images/pdf/lciasiii_final.pdf. See also Annual Report of the Secretary General: 2001-2003, OEA/Ser.D/III.53, at 55 (OAS, 2003) (stating that the Tripartite Committee began its term in July 2002).

13. Free Trade Area of the Americas: Seventh Trade Ministerial Meeting, Declaration of Ministers, Quito, Ecuador, Nov. 1, 2002, available at http://www.ftaa-alca.org/Ministerials/Quito/Quito_e.asp (creating tripartite committee) [hereinafter Ministerial Declaration of Quito]. See also Free Trade Area of the Americas, Antecedents of the FTAA Process, at http://www.ftaa-alca.org/View_e.asp#STRUCTURE (last visited Mar. 16, 2004).

14. Ministerial Declaration of Quito, *supra* note 13.

FTAA text.¹⁵

In short, regional trade is front and center — the *sine qua non* — in hemispheric integration policy. Whether pursued through a regional FTAA, or through sub-regional or bilateral agreements,¹⁶ the prospect of trade has brought governments to the table and serves as a prime motivator of political behavior and compromise.

At the same time, trade does not stand in isolation, at least in theory. The proposal for an FTAA emerged from the context of broader social commitments made through the presidential summits and other regional instruments.¹⁷ Chief among these commitments is the promise of greater participatory democracy in the region.

15. For details on the “preparatory phase” working groups, now official negotiating groups, see the FTAA official website at http://www.ftaa-alca.org/ngroup_e.asp (last visited Jan. 22, 2004).

16. As of the writing of this Article, it is still unclear whether an FTAA, *per se*, will be successfully negotiated and ratified by participating countries. There has been progress, most recently in the Miami Ministerial meeting, and while some have argued that the document may be watered down, an FTAA is still a strong possibility. See, e.g., James Miller, *Accord Offers Buffet-Style Free Trade; Nations Can Spurn Parts They Dislike*, CHI. TRIB., Nov. 21, 2003, at C1. At the same time, the United States and other countries are pursuing sub-regional agreements, such as the Central America Free Trade Agreement (“CAFTA”) (for which negotiations concluded in December 2003) and bilateral trade agreements. For example, in a FINANCIAL TIMES editorial, U.S. Trade Representative Bob Zoellick stated that the United States will move forward with “can-do” countries where multilateral agreements are not feasible. Robert Zoellick, *America Will Not Wait for the Won't-Do Countries*, FIN. TIMES, Sept. 22, 2003, at 23. Later, a U.S. trade official speaking on background at a meeting of the Global Business Dialogue and the National Foreign Trade Council was quoted as saying that the United States will “push ahead with bilateral and regional agreements” where broader multilateral agreements are not possible. See Rossella Brevetti, *Trade Policy: U.S. Trade Official Says Trade Liberalization Will Be Harder for U.S. After Cancun Collapse*, BNA INT’L TRADE DAILY, Sept. 29, 2003, at D10. The United States has already started preliminary bilateral trade talks with Colombia, Peru, and other countries in the region, as a back up to broader multilateral accords. See *International Negotiations: Zoellick Announces FTA Talks With Four Andean Countries*, BNA INT’L TRADE DAILY, Nov. 19, 2003, at D14.

17. See *ADVANCING THE PROCESS*, *supra* note 5; see also *LEADERSHIP COUNCIL REPORT*, *supra* note 11; 3 *OFFICIAL DOCUMENTS OF THE SUMMIT PROCESS FROM MIAMI TO QUEBEC* (Office of Summit Follow-up, General Secretariat, OAS, 2002), available at www.summit-americas.org (last visited Feb. 18, 2004) (providing full text of all Summit Declarations and Plans of Action).

II. COMMITMENTS TO DEMOCRACY AND PUBLIC PARTICIPATION

A. *Inter-American Summits and the Democratic Charter*

From the early 1990s, Inter-American presidential summits have been grounded in the fundamental idea that the thirty-four active States in the Inter-American System are nominal democracies. This is a common denominator in regional relations, and it was made a condition precedent for continued participation in the presidential summit process through the so-called “democracy clause” in the Quebec Summit Declaration, where presidents declared:

We acknowledge that the values and practices of democracy are fundamental to the advancement of all our objectives. The maintenance and strengthening of the rule of law and strict respect for the democratic system are, at the same time, a goal and a shared commitment and are an essential condition of our presence at this and future Summits. Consequently, any unconstitutional alteration or interruption of the democratic order in a state of the Hemisphere constitutes an insurmountable obstacle to the participation of that state’s government in the Summit of the Americas process. Having due regard for existing hemispheric, regional and sub-regional mechanisms, we agree to conduct consultations in the event of a disruption of the democratic system of a country that participates in the Summit process.¹⁸

The Quebec City Declaration thus created a condition precedent for summit participation and at the same time contemplated extending this condition to the broader scope of Inter-American relations. In a subsequent provision, heads of State instructed their foreign ministers to prepare a charter document “to reinforce OAS instruments for the active defense of representative democracy.”¹⁹ This led to the preparation and adoption of the Inter-American Democratic Charter (“IADC”) in Lima, Peru on September 11, 2001.²⁰ The IADC commits countries in the region to democratic principles and democratic be-

18. Third Summit: Declaration of Principles, *supra* note 8.

19. *Id.* at 2.

20. Inter-American Democratic Charter, 28th Spec. Sess., OAS Doc. OEA/Ser.P/AG/RES.1 (XXVIII-E/01) (OAS General Assembly) (Sept. 11, 2001) [hereinafter IADC].

havior in broad terms, and disqualifies States from participating in Inter-American relations and mechanisms where the “democratic order” is “interrupted” or “seriously impaired.”²¹

Article 19 of the IADC states:

Based on the principles of the Charter of the OAS and subject to its norms, and in accordance with the democracy clause contained in the Declaration of Quebec City, an unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, constitutes, while it persists, an insurmountable obstacle to its government's participation in sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization, the specialized conferences, the commissions, working groups, and other bodies of the Organization.²²

Article 19 thus confirms, as some countries have long maintained, that the existence of a “democratic order” is a pre-requisite to OAS participation under the charter and norms of the organization. The IADC also extends the requirement to conferences, commissions, working groups, and “other bodies” of the OAS.²³

B. *The Democratic Charter and a Right of Access*

For citizens demanding access to a more democratic FTAA who might view the IADC as a binding mandate, article 19 raises two key questions. First, is the IADC a binding legal instrument? Second, to what extent does the “democratic order” connote participatory, as opposed to electoral or constitutional, democracy? While this Article will not respond definitively to these questions, it offers at least a brief examination.²⁴

While article 19 of the IADC may appear binding on its face — stating that disruptions or impairments of the “democratic

21. *Id.* art. 19.

22. *Id.*

23. *Id.*

24. This Article focuses on the construction of access mechanisms by governments against a background of regional guidelines and presidential promises. It recognizes that governments are beginning to construct these mechanisms on a voluntary basis, but does not argue that such mechanisms are legally mandated through any binding instrument. A more complete examination of this argument, and the legal implications of the Quebec Democracy Clause and article 19 of the IADC is certainly warranted, but it is beyond this Article's scope.

order” are an “insurmountable obstacle” to continued participation in the Inter-American System — it fails to prescribe or prohibit specific conduct, and this vagueness minimizes the normative value of the provision. Further, article 19 is not self-executing and the implementation mechanism, described in article 20, introduces a political element that limits its application in the absence of extraordinary circumstances. Under article 20, if an OAS Member State (or the Secretary General) believes that the democratic order of a neighboring State has been threatened, it may request that a “collective session” of the OAS Permanent Council be convoked. The Permanent Council must then “undertake a collective assessment of the situation and . . . take such decisions as it deems appropriate.”²⁵ Because the Permanent Council is a political, rather than a judicial body, the assessment will likely be based on pragmatic and political considerations — not a judicial determination. Thus, while article 19 might well give rise to a process that could suspend a State’s participation in regional mechanisms, it lacks the certainty and precision that are the hallmarks of a binding legal norm.

Even where article 19 can be brought to bear in the case of a “democratically challenged” State, its applicability to lapses in participatory democracy remains an obstacle to those seeking access to trade policy. The language of article 19 suggests that a failure of democracy must be of such magnitude to challenge the underlying political structure of a country before any threat of sanction or suspension is triggered. Certainly a military or administrative coup would constitute an “unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime.”²⁶ But the failure or refusal of a government to operate transparently or to consult its citizens on the development of national policies such as trade, without more, would not tip the scale. This is particularly true if national legislative and constitutional frameworks do not mandate such a consultation.²⁷

This is not to say that the IADC is concerned only with a

25. IADC art. 20.

26. *Id.* art. 19.

27. A case could be made for considering clearly *ultra vires* governmental actions as a challenge to the democratic order at a constitutional level, but probably not without evidence that national judicial remedies had been exhausted or were ineffectual. Even then, the OAS Charter principle of non-intervention would present an obstacle.

naked coup or constitutional crisis. The broader treatment of democracy in the Charter suggests that its signatories recognize a goal beyond simply clean elections and an unimpeded executive. The IADC explicitly links participation to the “full and effective exercise of democracy:”

Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order.²⁸

But this language emphasizes that participation will strengthen democracy; it does not suggest that the lack of participation, in itself, will bring down the democratic order. The IADC also speaks in terms of a “right” to participate:

It is the right and responsibility of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy.²⁹

This language — despite the use of normative terms like “right” and “necessary condition” — does not clearly connect participation to article 19 and its potential consequences. Article 6 certainly has relevance for the construction of an FTAA because decisions about international trade policy are linked to development — both implicitly where they represent a principal development strategy for the region, and explicitly through the presidential summit documents. But article 6 does not bind signatories to any particular course of conduct, and no enforcement provision or sanctions are afforded where rights are denied.³⁰ Thus, despite the language of rights, the participation articles of the IADC are more in the nature of non-binding statements of principle than normative tools.

C. International and Regional Instruments and a Claim of Access

Beyond the IADC, participation and access have been the

28. IADC art. 2.

29. *Id.* art. 6.

30. An argument could be constructed that these articles, taken together with national rights and other Inter-American instruments, might give rise to a claim for access in particular circumstances, but such an argument would be more productively made at a national level, rather than a regional level.

subject of a number of international and regional instruments signed and ratified by States in the Inter-American System. One of the first clear expressions of the right to participate was in the Declaration that emerged from the United Nations Conference on Environment and Development in 1992 ("Rio Declaration"). Principle 10 of the Rio Declaration states:

At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.³¹

Thus, Principle 10 "not only links participation in political processes to sustainable development, but also establishes three key principles that have since become the focus of formulating participation policy. These three principles can be described as: access to information; access to process; and access to justice."³² The language appears mandatory — individuals "shall have appropriate access." But it suffers the same debility as article 6 of the IADC: it does not bind States to any particular course of conduct.³³

At the Inter-American regional level, participation rights have repeatedly been addressed in presidential summits from Miami to Quebec City. In Miami in 1994, heads of State affirmed "the right of all citizens to participate in government."³⁴ They also committed to "facilitate fuller participation of our people in political . . . activity, in accordance with national legislation."³⁵ In Santa Cruz in 1996, heads of State and government pledged to "[s]upport and encourage, as a basic requisite for sustainable development, broad participation by civil society in the decision-making process, including policies and programs and

31. *Report of the United Nations Conference on Environment and Development*, Principle 10, U.N. Doc. A/CONF. 151/26/Rev. 1 (1992).

32. Eric Dannenmaier, *Democracy in Development: Toward a Legal Framework for the Americas*, 11 TUL. ENVTL. L.J. 1 (Winter 1997) [hereinafter *Democracy in Development*].

33. The Rio Declaration is, as an instrument, even less binding in character than the IADC.

34. First Summit: Declaration of Principles, *supra* note 6, 34 I.L.M. at 810.

35. *Id.* at 811.

their design, implementation, and evaluation.”³⁶

In Santiago in 1998, heads of State extended principles of participation explicitly to the FTAA:

The FTAA negotiating process will be transparent . . . in order to create the opportunities for the full participation by all countries. 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.³⁷

The Santiago Declaration also includes a pledge to “promote the necessary actions for government institutions to become more participatory structures.”³⁸

The Quebec Summit in 2001 went further. In addition to the Democracy Clause,³⁹ heads of State declared their commitment to “the full participation of all persons in the political, economic, social and cultural life of our countries.”⁴⁰ They also addressed participation in the context of an FTAA, committing to:

Ensure the transparency of the negotiating process, including through publication of the preliminary draft FTAA Agreement in the four official languages as soon as possible and the dissemination of additional information on the progress of negotiations;

[and to] Foster through their respective national dialogue mechanisms and through appropriate FTAA mechanisms, a process of increasing and sustained communication with civil society to ensure that it has a clear perception of the development of the FTAA negotiating process; [and to] invite civil society to continue to contribute to the FTAA process⁴¹

Thus the presidential summits, which have established both the impetus and context for an FTAA, clearly contemplate public access to the negotiating process and the FTAA itself as a central part of that process.

The OAS, part of the FTAA tripartite committee and the

36. Santa Cruz Summit, *supra* note 8, at ¶ 8.

37. Second Summit: Declaration of Principles, *supra* note 8, 37 I.L.M. at 950 (emphasis added).

38. *Id.* at 951.

39. *See supra* Part II.A.

40. Third Summit: Declaration of Principles, *supra* note 8, at 3.

41. *Id.*, Plan of Action at 14-15.

central inter-governmental organization in the Western Hemisphere, has also sought to advance citizen participation through a multi-year process of technical consultation and dialogue among governments and representatives of civil society. This process resulted in a strategy document, called the *Inter-American Strategy for the Promotion of Public Participation in Decision-making for Sustainable Development* ("ISP"), which was adopted by the OAS Inter-American Council on Integral Development ("OAS/CIDI") in April 2000.⁴² The strategy provides a set of guidelines that are applicable at a national and regional level for strengthening participation. The ISP guidelines embrace six principles and offer "policy recommendations," including specific recommendations on legal frameworks and institutional procedures and structures.⁴³

Legal Frameworks Recommendation: Create, expand, and implement legal and regulatory frameworks that ensure the participation of civil society in sustainable development decisions.

Meaningful public participation in decision-making processes on sustainable development depends on laws and regulations that will ensure access to relevant and timely information, access to the decision-making process, and access to the justice system. In addition, legal frameworks should clarify and expand the legal standing of those persons and communities affected by development decisions, seek a reasonable balance in the roles and joint responsibilities of the various levels of government and civil society, and be adapted continuously to respond to changing reality or when they constitute an obstacle to public participation.

Institutional Procedures and Structures

Recommendation: 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, and encourage change within existing institutions to pursue a basis for long-term direct dialogue and innovative solutions.

Where necessary, institutions should strengthen and develop management mechanisms to expand and incorporate par-

42. See *Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development*, Organization of American States, Inter-American Council on Integral Development, CIDI Res. 98 (V-O/00) OEA/Ser.W/II.5, Apr. 20, 2000, available at <http://www.ispnet.org/Documents/CEPCIDI/ESTRAENG.RTF> [hereinafter *ISP*]. The *ISP* technical report adopted by the OAS Council on Integral Development consisted of a Policy Framework and a set of Policy Recommendations. *Id.*

43. See *ISP* Policy Framework, *supra* note 42, arts. 2, 3.

ticipatory practices and techniques in project design, implementation, and evaluation. The creation of partnerships between government and civil society, including all stakeholders, should be encouraged.⁴⁴

Beyond this strategic framework, the OAS has also created an accreditation program in an effort to open political meetings, technical consultations and other OAS processes to CSOs.⁴⁵ Modeled to some extent on the accreditation system of United Nations Educational, Cultural and Scientific Organization (UNESCO),⁴⁶ the OAS process is overseen by the Summits of the Americas Secretariat and it has made some progress in opening doors once closed to the public.⁴⁷

D. *Legal Rights vs. Moral Obligations*

Taken together, presidential summit commitments, the ISP, OAS accreditation, and the IADC demonstrate progress toward regional participatory frameworks, even participatory rights, in the Americas. In each case, the language can be tied explicitly or implicitly to the proposed FTAA, raising the prospect, at least, of a claim to participatory rights within such an agreement. But it would be difficult to argue that these instruments, without more, create a legally binding right to public participation in trade policy-making at a regional level. While the right to participate is universally acknowledged in the region, the standing to demand access to the FTAA process would appear for now less legal than moral.

III. *ACCESS TO FTAA NEGOTIATING GROUPS — THE SOC*

At the San Jose Ministerial meeting in 1998, governments

44. *Id.*

45. See generally Civil Society Participation in OAS Activities, at <http://www.civil-society.oas.org> (providing details about the accreditation program).

46. See Guidelines for the Participation of Civil Society Organizations in OAS Activities, adopted by the Permanent Council through resolution CP/RES. 759 (1217/99), and endorsed by the General Assembly through resolution AG/RES. 1707 (XXX-O/00).

47. Accredited CSOs have been invited to annual meetings with OAS staff and officials in Washington, D.C., and the OAS has created a forum within the annual OAS General Assembly for CSOs to present concerns directly to foreign ministers and vice ministers. In addition, the Secretariat has facilitated participation by CSOs in OAS and Summit-related events. See generally OAS Registration/Participation Mechanisms (2004) at <http://www.civil-society.oas.org/English%20MAIN%20-2.htm>.

agreed to create the Committee of Government Representatives on the Participation of Civil Society ("SOC")⁴⁸ to serve as a point of entry to the FTAA negotiating process for civil society. From 1998 through 2002, the SOC seemed to serve as little more than a post office box where written comments were deposited by CSOs and then distributed to technical working groups, depending on the subject of the comment. The mechanism was widely criticized as undifferentiated (it dealt with all issues that may arise from civil society without specialization), uni-directional (comments were a one-way street with no response from government and no dialogue), and superficial (no depth of expertise was expressed or implied in the committee itself).

The SOC also had no way to deal with public concerns in areas where no negotiating groups had been formed around key issues and chapters of the agreement, and this was the case with several key public concerns over the FTAA.⁴⁹ Thus, where comments related to an area where no negotiating group existed, such as trade and environment, no working group or committee could claim competence over the issue and citizen comments became dead letters. Even where a specific comment went to the heart of a negotiating group, the group has no obligation to respond to, or even consider, the input received.

The SOC has more recently supplemented its post office box function by holding periodic issue meetings that began in 2003, and sub-regional "seminars" on the broader theme of "opportunities and challenges of the FTAA."⁵⁰ The SOC is also the forum where governments formally launched the idea of a per-

48. Ironically, many governments call this committee the "Civil Society Committee" and members of civil society call it the "Committee of Government Representatives."

49. Current negotiating groups include Agriculture; Antidumping and Countervailing Duties; Competition Policy; Dispute Settlement; Government Procurement; Intellectual Property Rights; Investment; Market Access; Services; and Subsidies. No group has been formed, for example, to deal with environmental or labor concerns despite the prominence of these concerns. For a list of submissions (and in some cases links to the submissions themselves), see *FTAA, Participation of Civil Society, Contributions Received*, at http://www.ftaa-alca.org/SPCOMM/COMMCS_E.ASP.

50. Three issue meetings have been held to date: Agriculture, in Sao Paulo, Brazil on June 28, 2003; Services, in Santiago, Chile on Sept. 23, 2003; and Intellectual Property Rights, in Santo Domingo, Dominican Republic on Jan. 28, 2004. See *FTAA, Participation of Civil Society, Issue Meetings*, at http://www.ftaa-alca.org/SPCOMM/COMMCS_E.ASP (last visited Feb. 25, 2004).

manent consultative mechanism within the FTAA,⁵¹ and to which the responsibility for studying and shaping such a mechanism was assigned during the Miami Ministerial meeting.⁵²

This represents important progress from the first four years of the SOC's operation. Not only has the SOC become more proactive in its relations with the public during the negotiation of the FTAA, but it has also become something of an advocate for integrating citizens into the administration of the FTAA.⁵³ The ultimate impact of these efforts will depend upon the ability of SOC members to continue engaging the public on priority issues during the negotiations, to communicate public priorities effectively to negotiators, and to broaden the scope of the dialogue to areas where CSOs have repeatedly expressed concern (such as environment and labor). The SOC's impact will also be measured by its success in structuring a meaningful consultative mechanism within the FTAA — and in assuring the adoption of such a mechanism by negotiators.

IV. ACCESS TO FTAA ADMINISTRATION — THE DRAFT TEXT

The first release of official text was delayed until July 2001, more than six years after the first meeting of ministers in Denver. The text was so preliminary that almost all controversial issues were bracketed, often in several alternate forms.⁵⁴ No interpretation was offered as to the concerns that led to the bracketing, the technical issues underlying the concerns, or the positions of governments. Meaningful public input relating to

51. The Chilean government has taken a particular interest in strengthening the SOC and has shown leadership in the effort to gain broader acceptance for the idea. See Ecuadorian Center for Environmental Law and the Foundation for the Future of Latin America ("CEDA/FFLA") Proceedings, *infra* Part VI.A; Americas Trade and Sustainable Development Forum ("ATSDF") Proceedings (unpublished article) (on file with author) [hereinafter ATSDF Proceedings].

52. See *infra* Part VII.B.1.

53. The proposed permanent consultative mechanism approved for study in the Ministerial Declaration of Miami emerged from the SOC in Miami. See Free Trade Area of the Americas: Eighth Trade Ministerial Meeting, Declaration of Ministers, art. 28, Miami, Florida, Nov. 20, 2003, available at http://www.ftaa-alca.org/Ministerials/Miami/Miami_e.asp [hereinafter Ministerial Declaration of Miami]; see also discussion *infra* Part VII.B.1.

54. It is common in the negotiation of international accords to set apart with brackets, text that has been proposed by one or more parties, but not yet accepted as part of a unified draft text.

this text was necessarily rendered somewhat hypothetical. A revised draft of the text was released in conjunction with the Quito Ministerial in November 2002, and again during the Miami Ministerial in 2003, but both suffer the same debilities. Difficult issues remain bracketed and no explanatory text is provided.

An examination of the draft FTAA released in 2002 reveals a text largely devoid of public access to the institutions, procedures, and mechanisms that will be established under the agreement. In the 2002 draft text on "General and Institutional Issues," the preamble mentions "democratic values" and a "democratic and just society[.]" but these are limited and transitory references, and in both cases the language is still bracketed.⁵⁵ The same chapter also refers to "advancing economic prosperity" in a manner "[consistent with the underlying principles [of the Summit of the Americas] and overall objectives of the Summit of the Americas process;]".⁵⁶ Because Summit objectives fully embrace participatory decision-making,⁵⁷ this reference would appear to provide a theoretical foundation for participation under the FTAA. But again, the language only appears once, without elaboration or detail, and it remains bracketed.

A section on "Transparency" in the latest draft is focused principally on transparency between and among States' parties, not the broader public. Only one part of this section moves beyond inter-governmental transparency to call for relevant "laws, regulations, judicial decisions and administrative decisions of general application" to be published in order to "enable governments *and interested sectors* to become acquainted with them."⁵⁸ Assuming that "sectors" is meant to include more than business sectors, this language still falls short. While the publication of legal texts is important to investors (and others living under a regime), it does little to advance broader transparency and public participation.

The same section calls for the creation of "information cen-

55. FTAA — Free Trade Area of the Americas, Second Draft Agreement, Nov. 1, 2002, pmbl. FTAA.TNC/w/133/Rev.2 (not yet entered into force), *available at* http://www.ftaa-alca.org/ftaadraft02/draft_e.asp#uptonote1 [hereinafter Second Draft Agreement]. (Note that chapter numbers in this and all following citations are tentative and based on the text presented on the FTAA-ALCA website.)

56. Second Draft Agreement, *supra* note 55, at pmbl.

57. *See supra* notes 32-41 and accompanying text.

58. Second Draft Agreement, *supra* note 55, art. 7.1 (emphasis added).

ters,” but again these appear to be open to governments, not the public. There is also a proposed paragraph that calls for the FTAA Secretariat to “be a clearinghouse for information provided by the Member States in the cases established in this Agreement.”⁵⁹ It is not clear whether this is a public clearinghouse, or again inter-governmental, nor how much public information it would generate in any event. Also, once again, this provision is bracketed.

In the chapter on Dispute Resolution, a critical concern for the public, there is not yet a certain, meaningful mechanism for participation. Several provisions would call for non-State experts to join dispute panels or provide technical support to governments,⁶⁰ but the nature of this input would appear limited. Outside experts would serve in essence as government consultants, not public liaisons or community voices. While the experts would bring their experience and training to the table, and this has substantial merit, they would not be acting in a true non-governmental capacity. Their freedom to take positions at odds with their governmental counterparts, or to act in any representative capacity of a segment of civil society, would presumably be very constrained.

There is a bracketed provision that would require public notice when a dispute resolution panel is established,⁶¹ but competing provisions make it unclear whether proceedings thereafter would be open or closed to the public. Later in the draft, another bracketed paragraph (under the heading “Public Participation”) would provide notice to the public within a week after a dispute panel is chosen, to allow “members of the public to submit views on legal or factual issues to the neutral panel.”⁶² This is a very promising proposal because it could create, in essence, an *amicus curiae* process that would give non-State actors a direct voice in disputes. But a competing bracketed provision would resolve the matter in precisely the opposite manner. It states unequivocally that “non-governmental participation in the dispute settlement system in this Chapter shall not be permit-

59. *Id.* art. 8.5.

60. *See, e.g., id.* at Draft Chapter on Dispute Settlement, art. 12, ¶ 63.

61. *Id.* art. 39, ¶ 210.

62. *Id.* at ann. XX: Supplementary Rules of Procedure to Article 18 (Model Rules of Procedure), ¶ 259.

ted.”⁶³ The resolution of this issue is unclear, but it may be a critical turning point for public accountability and access to justice under the FTAA.

Finally, there is a proposed requirement that information filed in connection with a dispute be made public,⁶⁴ but again this is bracketed, and constrained by provisions for the protection of “confidential information” whose scope is yet unclear.⁶⁵

V. ACCESS TO FTAA MINISTERIAL MEETINGS: PRE-QUITO

From the first meeting of trade ministers in Denver in June 1995, non-profit CSOs have sought access to the ministers and their delegations, but without much success. In Denver, the Audubon Society and several other environmental organizations hosted a meeting on trade and the environment that was parallel to the Ministerial meeting, but organizers were unable to obtain credentials for NGO forum participants to attend sessions with the ministers or to interact directly with the ministers.⁶⁶ The Inter-American Organization of Workers and the AFL-CIO also organized a parallel labor forum and staged a protest outside the hotel where the ministers were meeting.⁶⁷ Over time, these early efforts gave rise to a periodic series of academic, expert and activist meetings and workshops where public concerns about the proposed FTAA were aired. Many of the organizations involved in these efforts eventually formed the Hemispheric Social Alliance (“HSA”).⁶⁸

Business organizations, for their part, had greater success in reaching trade negotiators. Beginning in Denver, businesses played host to trade delegations through conferences and cocktail parties. Some business associations reportedly paid for the travel and lodging of certain delegates from Latin America and

63. *Id.* art. 4, ¶ 26.

64. *Id.* art 39, ¶ 210.

65. *Id.* For examples of potential restrictions on information deemed “confidential,” see *id.* at 44(c), 263(e).

66. The author was a participant in the Denver CSO meeting on Trade and Environment and this reference is based on contemporaneous interviews and conversations with organizers.

67. BACK TO MIAMI: A HISTORY OF CITIZEN’S EVENTS PARALLEL TO THE OFFICIAL FTAA MEETINGS (White Paper from the Alliance for Responsible Trade, 2003) available at <http://www.art-us.org> [hereinafter ART White Paper].

68. See discussion *infra* Part V.B.

the Caribbean to attend the Denver Ministerial meeting.⁶⁹ These early efforts were repeated and expanded at subsequent Ministerial meetings and gave rise to the Americas Business Forum.

A. *The Americas Business Forum*

Business interests organized a forum parallel to the Denver Ministerial meeting in 1995 to discuss concerns of the for-profit sector, which ranged from market access to non-tariff barriers and investment provisions.⁷⁰ This forum, later denominated the “First” Americas Business Forum (“ABF”), enjoyed a special relationship to the official Ministerial meeting from the beginning, and its participants enjoyed special access. After Denver, the ABF refined its program and organized itself around thematic areas for which working groups were forming even before official FTAA negotiations began in 2000. As governments formed working groups, for example, to negotiate language on investment, services, and government procurement, the ABF held workshops with an identical structure. By the time of the Fourth Meeting of Ministers in San Jose, Costa Rica in 1998, the ABF claims to have “formulated around 210 recommendations covering a wide range of issues, which were considered official within the parameters of the FTAA working groups.”⁷¹

At the 2003 Ministerial meeting in Miami, the ABF continued its legacy of well-financed access. Former U.S. Ambassador to the OAS, Luis Lauredo, served as executive director of the 2003 ABF in Miami at the same time he was chairing “FTAA Miami, Inc.” — the official effort to bring the eventual FTAA Secretariat to Miami.⁷² On the eve of President Bush’s campaign to return to the White House (a campaign heavily dependent on

69. Interview with participants in Denver Ministerial, in Denver, Colo. (June, 1995).

70. See Miami FTAA 2003, Background, First Americas Business Forum (“ABF”), Denver, Colo., June 1995, at http://www.miamiftaa2003.com/background_forum_denver.htm.

71. Miami FTAA 2003, Background, Fourth Americas Business Forum, San Jose, Costa Rica, Mar. 1998, at http://www.miamiftaa2003.com/background_forum_costarica.htm.

72. See Media Advisory, Miami 2003 VIII Americas Business Forum, Wednesday Media Availability for Ambassador Luis Lauredo, the Executive Director for Miami FTAA (Nov. 18, 2003) available at http://www.co.miami-dade.fl.us/oem/FTAA/Library/FTAA/11.19.2003_AB_FPR2.pdf.

a Florida constituency), one need only imagine the access that such credentials might engender. In addition to hosting receptions and cocktail parties for trade delegates, ABF participants were granted access to senior officials and influential leaders, including appearances and speeches by Florida Governor Jeb Bush, U.S. Senator Bob Graham, and U.S. Assistant Secretary of State for Western Hemisphere Affairs Ambassador Roger F. Noriega.⁷³

B. *The Hemispheric Social Alliance*

Even as the ABF became more focused and more integrated into the Ministerial process from 1995 through 2002, the concerns of CSOs critical of an FTAA seemed to become more diffuse. FTAA critics in the non-profit world could not count on fundamental support for trade liberalization and the FTAA as a rallying point, and began to divide into two general camps: 1) those arguing that the FTAA being negotiated by trade ministers could be supported, with reservation, if it addressed fundamental concerns such as the environment and investment equity; and 2) those arguing that the FTAA is fundamentally flawed and should not be supported under any circumstances. For ease of reference, these two camps can be thought of as FTAA “reformers” and “resisters,” although there is a broad range of highly nuanced positions among CSOs that do not fit neatly into one category or another. Many CSOs might be considered conditional reformers,⁷⁴ and there are also many CSOs that use the language of resistance, yet do not claim to oppose trade liberalization under all circumstances.⁷⁵

No cohesive or consistent CSO mechanism surfaced until

73. Richard Noriega, Encouraging Success in the Western Hemisphere: Remarks to the Americas Business Forum's FTAA Ministerial State of Florida Luncheon (Nov. 18, 2003) available at <http://www.state.gov/p/wha/rls/rm/26359.htm>.

74. For example, some organizations take the position that the FTAA must address a particular key issue championed by the organization (a reform position); and if that issue is not addressed, the FTAA should be opposed (a resist position).

75. Some groups claim that they cannot support “this FTAA” as currently constructed by negotiators, and cite a range of conditions under which a regional trade accord would be acceptable. See, e.g., American Friends Service Committee, *Say Yes to Fair Trade — Say No to FTAA* available at <http://grassrootsvoices.org/ftaa.html> (last visited Mar. 1, 2004) (promoting what it calls “fair trade” principles, and adopting a pro-fair trade position and opposing an FTAA); Sarah Anderson, et al., *Alternatives for the Americas, Building a People's Hemispheric Agreement*, available at <http://www.web.ca/%7Ecomfront/alts4americas/eng/eng.html> (last visited Mar. 1, 2004) (arguing that

the HSA emerged from the early efforts of organized labor opposed to the FTAA. The HSA has been variously described as a "coalition" of "labor unions and citizens groups,"⁷⁶ a "protest group,"⁷⁷ a "multinational populist coalition,"⁷⁸ a "labor and NGO network,"⁷⁹ and a "network of organizations."⁸⁰ It can probably best be described as part network and part coalition. Its issue orientation, organizational capacity, and funding have been historically tied to organized labor, although it certainly has broader appeal. HSA has attracted CSOs that are concerned with the neo-liberal vision for integrating the Western Hemisphere through trade, and a deep mistrust of the proposed FTAA is a common denominator among the organizations that participate in its activities.⁸¹

The HSA organized a "parallel citizens forum"⁸² during the trade Ministerial meeting in Belo Horizonte, Brazil in 1997, and thirteen organizations issued a "Joint Declaration by unions and NGOs from around the western hemisphere on the Free Trade Area of the Americas," entitled "Building a Hemispheric Social Alliance to Confront Free Trade."⁸³ The document reflects ef-

"[a]t this stage of the struggle, it is not enough to oppose, to resist and to criticize. We must build a proposal of our own and fight for it").

76. Diana Marrero, *Miami Prepares for Trade Summit; Police Focus on Security Concerns*, SUN-SENTINEL, June 29, 2003, Broward Metro Edition, at 1B.

77. Ruth Walker, *Big Protests for a Big Trade Zone*, CHRISTIAN SCI. MONITOR, Apr. 23, 2001, at 6.

78. Bob Deans, *Summit of the Americas: Tough Barrier: Populist Opposition*, ATLANTA J.-CONST., Apr. 22, 2001, at 5B.

79. Doreen Hemlock, *Making World Trade Fair; Next Stop for Growing Movement is Getting a Seat at the Bargaining Table*, SUN-SENTINEL, May 6, 2001, Broward Metro Edition, at 1G.

80. *Santiago People's Summit Addresses Labor, Environment, Economic Issues*, 15 BNA INT'L TRADE REP. 16, Apr. 22, 1998, at 708.

81. See Frances Lee Ansley, *Rethinking Law In The Twenty-First Century Workplace: Article & Essay: Rethinking Law In Globalizing Labor Markets*, 1 U. PA. J. LAB. & EMP. L. 369, 425-26 (1998). See generally Alliance for Responsible Trade (U.S.-based organization), at <http://www.art-us.org/> (last visited Mar. 1, 2004).

82. "Parallel forums" is a name given to civil society events that are staged to coincide with official meetings of government officials as a way to bring attention to a range of issues that participants would like to see addressed in the formal meetings. In the Western Hemisphere, they have included "Peoples' Summits" staged parallel to the Presidential Summits of the Americas in Santiago, Chile in 1998 and Quebec City, Canada in 2001 and the parallel forums that gave rise to the HSA during Trade Ministerial meetings starting in Belo Horizonte, Brazil in 1997.

83. The Development Group for Alternative Policies, *Building a Hemispheric Social Alliance to Confront Free Trade* (May 15, 1997), available at <http://www.developmentgap.org/beloeng.html> (last visited Mar. 1, 2004).

forts to unite labor interests with broader social concerns relating to trade integration, and states an intention to “achieve effective complementarity between the perspectives and action strategies of the trade-union movement and those of other social movements.” Participants in parallel forums during the Presidential Summit in Santiago, Chile in 1998 and the trade Ministerial meeting in San Jose, Costa Rica in 1999 further discussed and shaped the HSA, and it was formally “launched” at the Presidential Summit of the Americas in Quebec City in 2001,⁸⁴ where participants helped organize the “Peoples’ Summit.”

Even before this formal launching, during the Toronto Ministerial meeting in 1999, HSA participants organized the first direct meeting between non-profit CSOs and trade ministers when eighteen ministers and deputy ministers attended a meeting with an estimated 200 civil society representatives.⁸⁵ The meeting was later described as “surreal” by one observer, as participants reportedly talked past each other, reading prepared statements and engaging in little real dialogue.⁸⁶

VI. THE QUITO MINISTERIAL

A. *The CEDA/FFLA Workshop — Background*

As planning took place for the Ministerial meeting in Quito, Ecuador in 2002, a new element was added to the public discourse by a group of CSOs focused on environment and sustainable development concerns. The Ecuadorian Center for Environmental Law (“CEDA”) and the Foundation for the Future of Latin America (“FFLA”) joined fourteen other CSOs and academic organizations to organize a two-day CSO conference in Quito to run parallel to the Quito Ministerial meeting. The CEDA/FFLA event included five simultaneous workshops on sustainability assessments, market access, investment, intellectual

84. Robin Wright, *Summit of the Americas Activists in Quebec Show Evolution of an Opposition Protests: The Myriad Groups and Individuals Clashing With Police Are United Not as Foes of Globalization But as Objectors to Its Human Cost*, L.A. TIMES, Apr. 21, 2001, at A10 (quoting John Cavanaugh, director of the Institute for Policy Studies in Washington, D.C. and an active participant in the HSA).

85. See ART White Paper, *supra* note 67, at 3.

86. See Karen Hansen-Kuhn, *Back to Miami: a History of Citizens’ Events Parallel to the Official FTAA Meetings*, in ALLIANCE FOR RESPONSIBLE TRADE (Mar. 2003) available at http://www.art-us.org/docs/back_miami.pdf.

property and biodiversity, and civil society participation.⁸⁷ About 100 participants from eighty CSOs attended the workshops, and although the sessions were held outside the Quito security perimeter, governmental delegates from at least five countries attended and participated in a number of sessions.⁸⁸

At the invitation of the Ecuadorian government, participants in the CEDA/FFLA workshops were permitted to present their results at a meeting of the trade ministers, along with the HSA and a forum of parliamentarians from the region.⁸⁹ One of the five workshops at the CEDA/FFLA event related to civil society participation, and the results of that workshop are outlined below.⁹⁰

B. *The CEDA/FFLA Public Participation Workshop — Issues and Priorities*

Because the most current revised draft FTAA text was not made public in advance of the CEDA/FFLA workshop, participants could not comment on specific issues in the text. Instead they used the first draft (released sixteen months earlier in July 2001) as point of departure, and focused on broader principles and mechanisms for public participation. Participants drew their proposals from comparative examples in constitutions and domestic laws, and from the terms of, and experience with, existing multilateral environmental and trade agreements.

The following section highlights the key areas discussed by the Quito working group on participation, and seeks to provide some context for the issues and priorities that emerged during the workshop.⁹¹

1. Participation in Design and Implementation

Participants drew a distinction between participation in the

87. See TOWARDS CIVIL SOCIETY PARTICIPATION IN THE AMERICAS, MEMOIRS OF THE TRADE AND ENVIRONMENT WORKSHOPS IN THE QUITO MINISTERIAL (CEDA 2003) [hereinafter CEDA/FFLA PROCEEDINGS].

88. See *id.*, List of Participants, at 93.

89. See *infra* 144-47 and accompanying text.

90. See generally CEDA/FFLA PROCEEDINGS, *supra* note 87 (providing results of other workshops).

91. See CEDA/FFLA PROCEEDINGS, *supra* note 87, at ch. 5 (providing the report on the Public Participation Workshop). Because the outcome of the Public Participation working group was a consensus effort, the authoritative source for the interests of participants is the text of the consensus document. *Id.* at 90-91.

design of the agreement (during negotiations) and participation in the administration of the agreement itself through more permanent institutions and procedures. The mechanisms in each phase are distinct, as are the motivations for participation.⁹²

As a practical matter, participants acknowledged little time remains for participation during the negotiating process,⁹³ and that the draft has already moved forward without a mechanism for public input apart from the SOC. Nevertheless, participants emphasized the importance of including the public even in the final phases of negotiations. They also noted that, whatever solution is found for the short-term, a permanent mechanism for participation should be included in the FTAA text, and several recommendations address how this mechanism might operate.⁹⁴

2. Participation at a National and Regional Level

Participants stressed the need to create opportunities for participation at both a national and regional level. Although the CEDA/FFLA meeting was a regional event, many of the participant's concerns and recommendations (in all five parallel workshops) related to national policies. Workshop participants thus agreed that there is a need to implement regional policies and programs domestically — again emphasizing the importance of domestic dialogue relating to hemispheric priorities.

Participants cited the example of the United States, which has a number of trade-related public advisory committees that formalize participation in the formulation of national trade policy. The U.S. Trade and Environment Advisory Committee ("TEPAC"), membership, for example, includes "representatives from environmental interest groups, industry (including the environmental technology and environmental services industries), agriculture, services, non-federal governments, and consumer interests."⁹⁵ The TEPAC provides policy advice to the office of the U.S. Trade Representative ("USTR"), and following the negotiation of a trade agreement, prepares a report on the agreement

92. *Id.* at 72.

93. At the time of the Quito Workshop, only two years remained before the scheduled conclusion of FTAA negotiations.

94. See CEDA/FFLA PROCEEDINGS, *supra* note 87, at 73.

95. Off. of the U.S. Trade Rep., Charter of the Trade and Env't Policy Advisory Comm., ¶ 2 (2001), at <http://www.ustr.gov/outreach/tepaccharter.htm> (last visited Mar. 5, 2004).

to the President, to Congress, and to the USTR, including an “advisory opinion on whether and to what extent the agreement promotes the interests of the United States.”⁹⁶

There are also public advisory committees associated with the North American Free Trade Agreement (“NAFTA”), both at a national and tripartite level. The environmental side agreement to NAFTA creates a tripartite Joint Public Advisory Committee (“JPAC”) composed of presidential appointees from each of the three parties as well as National Advisory Committees in each country.⁹⁷ The JPAC meets regularly to discuss transboundary environmental matters relevant to the trade agreement and serves as a conduit for public input through hearings, meetings and workshops.⁹⁸ It also advises the North American Commission on Environmental Cooperation (“NACEC”) Council (the senior environmental officers in each country) through written communications and regular *in camera* sessions with Council.⁹⁹ The NACEC Council also holds annual open meetings to which the public is invited.¹⁰⁰

Participants also pointed to the work of *Grupo Zapallar* in South America as an example of a less formal, voluntary dialogue between government officials and non-governmental trade experts. Zapallar is an informal group of CSOs and government officials that meets and corresponds to exchange ideas, environmental issues related to trade, as well as broader economic and social concerns.¹⁰¹ While Zapallar is a regional group, one of its collateral functions is to permit interaction between governmental representatives and their nongovernmental counterparts about national concerns, in an informal, regional setting.

Participants also noted a more formal South American

96. *Id.* at ¶ 3.

97. North American Agreement on Environmental Cooperation, 1993, U.S.-Can.-Mex., arts. 16-17, available at http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/index.cfm?varlan=english (last visited Mar. 5, 2004) (referring to Joint Public Advisory Committee (“JPAC”), and the National Advisory Committee, respectively).

98. *Id.* art. 16.

99. *Id.* See also *Who We Are / Joint Public Advisory Committee*, at http://www.cec.org/who_we_are/jpac/index.cfm?varlan=english (last visited Mar. 5, 2004).

100. See *Who We Are*, Council for the Commission of Environmental Cooperation, at http://www.cec.org/who_we_are/council/index.cfm?varlan=english (last visited Mar. 5, 2004).

101. CEDA/FLA PROCEEDINGS, *supra* note 87, at 73, 81.

mechanism, Committee 6 of MERCOSUR,¹⁰² which provides some access to the public at a regional level, while creating an opportunity for government officials and their non-governmental counterparts to discuss issues of domestic concern.¹⁰³

Quito workshop participants concluded that access should be encouraged at the national level to inform national trade delegations and to encourage national solutions to the challenges of trade integration. At the same time, access at the regional level should be emphasized through cooperation, information exchange, and dialogue.¹⁰⁴ In some cases, regional mechanisms can serve to address trans-boundary issues, and in other cases regional discourse helps create a basis for informal dialogue about domestic issues away from the immediate pressures of domestic politics. Participants agreed that regional participation mechanisms add substantial value and should be strengthened and expanded.¹⁰⁵

3. Information Access and Transparency

Governments consistently emphasize that participation by civil society in governmental deliberations and policy-making should be "responsible."¹⁰⁶ While some officials undoubtedly use this term as a code word for supportive, polite (even enthusiastic) affirmations of governmental policies and programs, "responsible participation" is more appropriately understood to mean public input that is informed, articulate, and respectful of democratic processes and institutions, regardless of whether it is supportive of any particular individual, institution or issue.¹⁰⁷

But participation without information is not likely to be informed or articulate, and it is less likely to offer constructive

102. See Tratado para la Constitución del Mercado Común del Sur ("MERCOSUR") [Treaty Establishing a Common Market between Argentina, Brazil, Paraguay and Uruguay], Mar. 26, 1991, Arg.-Braz.-Para.-Uru., U.N. Doc. A/46/155 (Apr. 19, 1991), 30 I.L.M. 1041 (1991).

103. See, e.g., CEDA/FFLA PROCEEDINGS, *supra* note 87, at 81 (noting presentation of María Lechner at Quito Participation Workshop).

104. *Id.* at 73.

105. *Id.*

106. See *Democracy in Development*, *supra* note 32, at 12-13; see also Toward the Summit of the Americas on Sustainable Development: Inter-American Seminar on Public Participation in Sustainable Development, Report on Proceedings to Government of Uruguay, Montevideo, Uruguay, Aug. 28-30, 1996, at 6-7 (on file with author) [hereinafter Montevideo Report].

107. See Montevideo Report, *supra* note 106, at 6-7.

ideas that will prove useful as policy decisions are being formulated. The Quito working group on participation found serious failures in the transparency of FTAA negotiations to date, and there was broad agreement that more information should flow from the process in order to keep civil society better informed of progress, issues, and obstacles.¹⁰⁸ Participants recognized that there is a time and place for confidentiality, and appreciated the need to balance transparency and confidentiality to allow trade delegations to represent their constituents effectively. But participants also agreed that a balance between transparency and confidentiality in FTAA negotiations has been absent.¹⁰⁹ Secrecy has dominated the FTAA process at the expense of informed and constructive public participation. Quito participants called for a greater effort to open the negotiations and to inform the broader public about issues and concerns as they arise, and they were confident that this could be done without compromising the confidentiality to which trade delegations are entitled.¹¹⁰

The example cited above relating to alternate bracketed language for amicus participation in dispute resolution under the FTAA provides a useful case in point.¹¹¹ As delegations are formulating their positions relating to this critical aspect of the final text, the need for confidentiality is obvious. Confidentiality might even extend to the initial dialogue among negotiators about how to frame a compromise proposal on amicus participation. But once alternate language is offered — and competing proposals are tabled that are so clearly opposite in intent and result — the subtle art of negotiation has given way to public positions that are formulated, proffered, and published. At this point, the public has a right to know more about the proposed alternatives, including which delegation(s) proposed the alternative language and what intent is behind the competing proposals.

In this example, the alternatives are clearly opposite and manifestly important to the public in the operation of a future FTAA. The competing proposals in the draft text are:

Alternative 1: public notice of panel selection must be pro-

108. CEDA/FFLA PROCEEDINGS, *supra* note 87, at 73-74.

109. *Id.*

110. *Id.* at 74.

111. See discussion *supra* Part VI.B.3.

vided within one week in order to allow “members of the public to submit views on legal or factual issues to the neutral panel.”¹¹²

Alternative 2: “[non-governmental participation in the dispute settlement system in the Chapter shall not be permitted.]”¹¹³

If civil society organizations are provided with information about the alternate proposals, they will be in a better position to know what their governments are proposing in the name of the public. Again, the most compelling arguments for negotiating confidentiality are lost once delegations table specific language. There are no trade secrets, no private plans, no confidential business information, no scientific formulas, no blueprints or patents: only competing proposals on an issue that the public deems vital. Yet only the public remains in the dark. Giving the public information about which government has made which proposal will put the citizens who elected that government in a position to open a dialogue with their representatives and seek alternatives at a domestic level. Such an approach cannot harm the multilateral process, and instead will only facilitate the “responsible participation” so dear to the hearts of public officials. Of course, the same information might leak out through other delegations or observers in breach of formal protocols, but a system that relies on leaks and breaches to sustain transparency is inherently inefficient and flawed — one might even say irresponsible.

In some cases, myriad details may be superfluous — beyond the interest or expertise of much of the public. In other cases, details may be appropriately maintained in confidence to facilitate compromise during negotiations. Representative democracy does, after all, imply that public representatives will act in the best interest of the public in areas of their special expertise, and it recognizes the need for confidentiality in some circumstances. But where issues are so clearly central to the interests, aspirations, and expertise of identifiable groups and communities (in the case of amicus participation, the issue was raised not only by CSOs in Quito, but in a number of written submissions to the SOC prior to Quito),¹¹⁴ there is little justification in clos-

112. Second Draft Agreement, *supra* note 55, ch. 7, at 259 (emphasis added).

113. *Id.* at 26 (emphasis added).

114. See FTAA, Participation of Civil Society, Contributions Received, at http://www.ftaa-alca.org/SPCOMM/COMMCS_E.ASP (last visited Mar. 5, 2004).

ing the door. Unfortunately, blanket confidentiality does not even ask whether the public has an interest, or expertise, to offer. It limits the public view without discernment, and does little to serve the integrity of the process or the quality of the outcome.

4. Timeliness

Quito Participants also placed great emphasis on timeliness.¹¹⁵ This includes timely information to the public and timely input to negotiators. Many participants were concerned that draft text is published long after issues are actually negotiated.¹¹⁶ Again, responsible and constructive participation is not possible where the public is reading history books and trying to change decisions already made. The working group proposed specific mechanisms for the timely release of negotiating documents — in many cases, simply pointing to procedures that are already in place at the WTO.¹¹⁷ These procedures are neither expensive nor burdensome, and the FTAA Secretariat has the infrastructure in place to implement them in a matter of days.

5. Funding

The Quito working group on participation also noted that the lack of funds for participation is a major debility, even where the political will for participation exists.¹¹⁸ Many governments, particularly in less-developed countries, wish to consult their citizens about the FTAA, but lack the resources to do so. Small and poorly-funded trade delegations are not in a position to speak with civil society about the details of the proposed FTAA, and capacity within the broader public to understand the details of the agreement is also limited. Training, capacity building and education, along with open public dialogue about the FTAA, are obvious solutions.

At Quito, trade ministers announced the creation of a Hemispheric Cooperation Program (“HCP”) designed in part to provide resources to assure the success of the FTAA.¹¹⁹ To date,

115. CEDA/FFLA PROCEEDINGS, *supra* note 87, at 74-75.

116. *Id.* at 75.

117. *Id.*

118. *Id.*

119. *See, e.g.*, Second Draft Agreement, *supra* note 55, at ch. 4, art. 13.

most of the funding seems to be targeted for traditional infrastructure and logistics.¹²⁰ While these concerns are important, resources should also be devoted to informing and engaging citizens in the process of constructing and implementing the FTAA. Some resources should be targeted at concerns and priorities identified by the public through forums such as the Quito workshops, through the SOC and through other mechanisms.

The trade delegations that are negotiating and drafting the FTAA text recognize that the result of their work will be one of the most important regional economic instruments in recent history.¹²¹ As a regional instrument, its political, economic, and social impact could be unparalleled. If this is the case, why not invest the funds needed to assure that the FTAA is also a tool to strengthen and build democracy and an example of democratic governance at its best? Why not devote the resources to assure that the concerns and priorities articulated by the affected populations are discussed and resolved to the greatest extent possible? In simple economic terms, a participatory FTAA process should be viewed not as a cost, but as an investment in the instrument itself, an investment in public confidence and support, and an investment in democratic governance.

6. The Existing SOC

Workshop participants were critical of the existing Committee of Government Representatives on the Participation of Civil Society ("SOC") as a participation mechanism.¹²² Reasons for concern included:

- Substantive issues are submitted to a single source, with no expertise about particular issues, and thus limited ability to articulate those concerns within the FTAA.

120. Decisions about funding priorities are still being discussed by governments, but interviews by the author with trade officials and development officers from the region suggest that most funding will be targeted to trade infrastructure, with little emphasis placed on funding public input mechanisms.

121. This recognition is obvious from a review of the declarations issued from successive trade ministers meetings. See generally FTAA, Trade Ministerial Meetings, Ministerial Declarations, available at http://www.ftaa-alca.org/Minis_e.asp (last visited Mar. 5, 2004).

122. CEDA/FFLA PROCEEDINGS, *supra* note 87, at 75. While the Quito participation working group participants were critical of the SOC (referred to in the CEDA/FFLA PROCEEDINGS as the CGR), it should be noted that a number of changes to the SOC were implemented following Quito. See discussion *supra* Part III.

Several issues, such as the environment, present distinct challenges that must be addressed with a background of technical knowledge and expertise. An omnibus committee without specialized knowledge cannot adequately manage such issues.¹²³

- The process is a “mere post office box.” It requires CSOs and individuals to submit formal written comments but does not create any forum for a more dynamic exchange of information or ideas. There is no procedure for discussion or clarification. In essence, the SOC is not a participatory mechanism, but a tool for collecting written comment.¹²⁴
- There is no requirement that comments be taken into account by negotiators, or even substantively reviewed. The SOC simply passes comments on to working groups and summarizes the comments received. It is not clear what becomes of the comments after they enter the process.¹²⁵

While Quito participants did not call for the SOC to be abandoned, they were clear in their concern that this mechanism alone is insufficient. They urged that it be amplified and supplemented, and made a number of proposals toward that end.¹²⁶

Participants were joined by a representative of the Chilean government, who described a proposal to expand upon and improve the existing SOC mechanism,¹²⁷ but they expressed concern that the proposal would not fundamentally alter or supplement the existing model. Participants clearly appreciated the Chilean representative for taking the time to describe and consult with civil society regarding the proposal, and supported Chile’s desire to improve mechanisms for participation. Yet,

123. CEDA/FFLA PROCEEDINGS, *supra* note 87, at 75.

124. *Id.* at 75-76.

125. *Id.* at 76. It should be noted that several key changes were made to the SOC in the months immediately preceding and following the Quito workshop, including the development of a series of public workshops on key issues relating to the FTAA. See FTAA, Participation of Civil Society, *Issue Meetings and Regional Seminars*, at http://www.ftaa-alca.org/SPCOMM/COMMCS_E.ASP (last visited Mar. 5, 2004). These changes had not been fully implemented at the time of the Quito workshop.

126. See CEDA/FFLA PROCEEDINGS, *supra* note 87, at 76.

127. See Pablo Lazo, Representative of the Ministry of Foreign Relations, Chile, *Presentation*, in CEDA/FFLA PROCEEDINGS, *supra* note 87, at 82.

they cited the concerns outlined above as essential impediments to the efficacy of the SOC, and questioned how a meaningful alternative could be built upon the present model.¹²⁸

7. Preferential Access for the Americas Business Forum

There was a broad perception among the Quito working group participants that the business sector has had far greater access to trade officials than non-profit or public interest groups.¹²⁹ The degree of access varies from one government to the next, but there can be little doubt that the for-profit enterprises and their trade associations have the resources to reach out to officials, and have the clout to make that outreach meaningful. There can also be little doubt that even the public perception of preferential access has raised credibility questions and fueled opposition to an FTAA before it even gets off the ground.¹³⁰ Quito participants pointed in particular to the ABF and its preferential contacts with trade negotiators. They questioned the equity and fairness of ABF's access and called for a more balanced approach in future mechanisms for public participation. Quito participants asked that any special access for the Business Forum be extended to others or stopped altogether.¹³¹

8. Permanent Environmental Cooperation Mechanism

Quito participants agreed that the most important tool for participation in the long term under any final FTAA is the creation of a "permanent institutional mechanism for participation

128. See Miami ATSDF Proceedings, *supra* note 51. While Quito workshop participants expressed a number of concerns about the proposal presented at Quito, it should be noted that Chile continued to engage civil society on FTAA issues after Quito, and returned to the Miami Ministerial meeting in 2003 with a far stronger proposal for integrating civil society into the FTAA process. The Chilean proposal in Miami called for a permanent consultative mechanism and was ultimately reflected in the commitment to study and entertain such a proposal in the Miami Declaration. The author reviewed a copy of the proposal for a permanent mechanism that was tabled by Chile in Miami (on file with author). The same Chilean government representative, Pablo Lazo, joined the participation and democracy workshops at the ATSDF in Miami to present the new proposal and to discuss options and alternatives with civil society participants. Mr. Lazo was subsequently chosen as the Chair of the SOC. Chile has become a leader in the effort to engage civil society in the FTAA process, and its representatives have been willing to join in the public discourse about democratizing the trade process.

129. See CEDA/FFLA PROCEEDINGS, *supra* note 87, at 76.

130. *Id.*

131. *Id.* See also discussion *infra* Part VII.A (regarding the history of the ABF and its participation at the Miami Ministerial meeting).

and cooperation."¹³² They argued that such a mechanism would help citizens address trade-related concerns at a regional level and support FTAA parties in doing so at a local level.

Most of the participants in the Quito workshop were from academic and non-governmental organizations concerned with environmentally sustainable development or sustainable development more broadly¹³³ — and they expressed a particular interest in a mechanism that can address environmental issues in the context of an FTAA.¹³⁴ This would not exclude other mechanisms dealing with issues such as labor or indigenous rights,¹³⁵ but workshop participants focused on their area of expertise. They called for the creation of a “permanent hemispheric environmental cooperation mechanism,”¹³⁶ and cited examples such as the NAFTA Commission for Environmental Cooperation and the MERCOSUR Committee 6 as useful models to examine.¹³⁷ While some proposed a more general call for “mechanisms of cooperation,” the final consensus called for a single, permanent, mechanism for environmental cooperation; trade raises important and highly technical environmental issues that should be treated in a substantive manner by a specialized institution.¹³⁸

9. Access to Dispute Resolution

Many of the concerns of Quito workshop participants and others in civil society relating to the FTAA arise from the interpretation of existing trade agreements (such as the WTO and NAFTA) by dispute resolution panels and appellate bodies. Participants recognized that the jurisprudence of trade, and not just the text of trade agreements, has a great potential to shape the ultimate impact of the agreement in areas of public concern.¹³⁹

Participants agreed that the public should have a well-defined and substantive role in dispute resolution procedures. This should be done through transparent procedures and

132. CEDA/FFLA PROCEEDINGS, *supra* note 87, at 76-77.

133. *See id.* at 93-97 (providing list of participants at Quito workshops).

134. *Id.* at 76-77.

135. *Id.* at 76, n.45 (noting that participants agreed that cooperation mechanisms are appropriate with respect to other areas of keen public interest, such as labor and indigenous rights).

136. *Id.* at 76.

137. *See* discussion, *supra* Part VI.A.2.

138. *See* CEDA/FFLA PROCEEDINGS, *supra* note 87, at 77, 91.

139. *Id.* at 77.

through participatory mechanisms such as *amicus curiae* briefs. Amicus briefs are an established mechanism allowing interested parties to present views on the law and facts of a case to dispute resolution bodies supplementing the submissions of parties. They strengthen the integrity and substance of judicial outcomes without burdening the system or impeding efficiency.

Despite the broad acceptance of amicus briefs in judicial procedures, no such procedure is set forth clearly in the draft FTAA text. Instead, there are competing provisions relating to dispute resolution.¹⁴⁰ In one case, the proposal would specifically prohibit amicus briefs,¹⁴¹ and in the other, the language would appear to create a basis for them to be filed.¹⁴² Workshop participants supported the creation of a clear mechanism for the submission of amicus briefs by interested persons and organizations as a point of entry for citizens into the dispute procedures and jurisprudence of an FTAA.

C. *The CEDA/FFLA Workshop — Meeting with Ministers*

The meeting between civil society participants and trade ministers in Quito was more theater than dialogue.¹⁴³ In fact none of the twenty-two ministers and other governmental representatives present even took the podium.¹⁴⁴ The Ecuadorian government had arranged for approximately one hour with the ministers, which was to have been divided equally for presentations by representatives from the CEDA/FFLA workshops, the HSA and participants in a “Hemispheric Meeting Regarding FTAA and the Role of Legislators” (“Encuentro Continental sobre el ALCA y el rol de los Parlamentos”).¹⁴⁵ These were the

140. See discussion *supra* notes 60-65 and accompanying text.

141. Second Draft Agreement, ch. 7, at 26. The bracketed proposal states, “Non-governmental participation in the dispute settlement system in the Chapter shall not be permitted.”

142. *Id.* at 259. The bracketed proposal states that public notice of panel selection must be provided within one week in order to allow “members of the public to submit views on legal or factual issues to the neutral panel.”

143. The author was a participant in the session as part of the CEDA/FFLA delegation of approximately fifteen persons, and the account that follows is based on personal observation.

144. No official list was provided to confirm the number or identity of governmental participants, but the author counted twenty-two representatives and recognized several as trade ministers, including the ministers from Ecuador and Canada, and the U.S. Trade Representative, Robert Zoellick.

145. Meeting participants produced the “Quito Declaration,” outlining a number

three separate civil society forums or events that had taken place in Quito surrounding the Ministerial meeting. Each organizing group was invited to bring approximately fifteen representatives to the meeting and to use approximately twenty minutes to make their case.¹⁴⁶

What unfolded was chaos. The meeting took place in a small theater, and the governmental representatives were seated on the stage in folding chairs facing the CSO representatives, who were seated as an audience. Instead of fifteen representatives, more than fifty participants from the HSA meetings entered the room chanting slogans, and carrying signs and banners.¹⁴⁷ The presentations from each of the three groups amounted to little more than recitations from prepared texts, and no questions or answers followed. The HSA presentation was punctuated a number of times by applause and further chants from the audience; on occasion someone would stand up from the audience and shout at the governmental representatives. During the CEDA/FFLA presentation, audience members interrupted a number of times to shout derogatory slogans.¹⁴⁸ One of the hecklers made assertions about who could claim to “represent the true civil society.” Another claimed that the FTAA was a “Gringo neo-colonial conspiracy.” At one point, an audience member who had moved behind a CEDA/FFLA speaker as she was addressing the ministers began stepping forward and pushing her from behind.¹⁴⁹ In response, an officer from the Ecuadorian armed forces crossed the room and positioned himself between the two. The image of an Ecuadorian military officer creating a buffer between two “civil” society rep-

of concerns regarding the proposed FTAA, and made a presentation to the Ministers. Encuentro Continental sobre el ALCA y el rol de los Parlamentos [Hemispheric Meeting Regarding FTAA and the Role of Legislators], Declaracion de Quito [Quito Declaration], Oct. 29-30, 2002, available at <http://www.llacta.org/organiz/coms/com202.htm>. Information regarding the meeting can be found (in Spanish) at <http://www.llacta.org/notic/021031a.htm>.

146. This information was obtained in a conversation by the author with CEDA/FFLA organizers, who had negotiated the terms of participation with representatives of the Ecuadorian government.

147. One of the more memorable, and repeated, chants was “*Quito, Quito, Quito, con ALCA Cuidadito*,” [“Quito, Quito, Quito, be a little careful with the FTAA”].

148. These were audience members who had entered the room with the HSA, although the author does not know their affiliation.

149. The author does not know the individual, or their affiliation, although he had not been a participant in the CEDA/FFLA workshops.

representatives is one enduring metaphor for the encounter.¹⁵⁰

Although no substantive interaction occurred between CSOs and trade ministers during what was billed as the Quito “dialogue,” the event did serve to highlight the need for more careful planning to promote meaningful discourse in the future. The event also crystallized concerns about dynamics among various elements of civil society.

VII. THE MIAMI MINISTERIAL

A. *The ATSDF Workshop — Background*

Following Quito, some of the organizers of the CEDA/FFLA dialogue began to discuss the need to build on the experience in Quito.¹⁵¹ There was general agreement that the opening for a direct dialogue with the ministers was important, and needed to be expanded and strengthened, but there were three dominant concerns.

First, the CEDA/FFLA dialogue had involved CSOs focused on environmental and sustainable development issues. This was not an explicit or planned limitation, rather one that evolved more by virtue of the organizations that had agreed to host the event and the organizational contacts to which they reached out. This served a purpose in that it allowed the debate to take place among CSOs with a relatively high degree of expertise in the issues that were addressed, and it allowed conclusions and recommendations to be relatively concrete and focused. But it also led to some confusion, and even expressions of resentment by other CSOs, over the perceived claim that the CEDA/FFLA dialogue was somehow “representative” of civil society more broadly.

Second, the staging of the CEDA/FFLA dialogue outside of the security perimeter — and off of the official Ministerial calendar — limited the event’s impact on negotiators and trade delegations. While delegates from several countries did attend the event and join the discussions, their participation and interaction was necessarily limited. Moreover, CEDA/FFLA workshop participants had no direct “credentialed” access to the meeting

150. Photograph on file with author.

151. The author was part of this organizing committee and the report that follows is based on discussions and correspondence between and among members of that committee.

place for delegates, so outreach could not be a two-way street. The opportunity for lobbying in the original sense of the word was lost.

Finally, the brief interaction with trade ministers was generally conceded to be non-substantive and ineffective. Even discounting the “circus” atmosphere and the disruptions described above, the CEDA/FFLA presentation to ministers was little more than the recitation of findings to the group, who sat passively and did not respond. This was not a dialogue in any sense, and it was not effective advocacy. While the documentation that emerged from the CEDA/FFLA event was relatively substantive and concrete, participants were unable to discuss and promote these findings at the Ministerial level.

Planning for Miami focused on overcoming these perceived shortcomings and bringing the CSO dialogue even closer to the ministers and their delegations. Representatives of the USTR, as national hosts of the Miami Ministerial meeting, were open to the idea of building on the CEDA/FFLA workshop, and supported efforts to create a CSO forum at Miami from the outset. Initially, representatives of the University of Miami, acting as a local adjutant, sought to integrate the CEDA/FFLA issues (along with broader socio-economic concerns of the non-profit sector) into the agenda for the ABF.¹⁵² The USTR was supportive and sought to facilitate the proposal. But this effort soon failed, as local ABF hosts declined to expand their agenda to embrace broader social issues. In late March 2003, an alternative proposal was sent to local ABF organizers to create a separate “Americas Trade and Development Forum” that would hold separate sessions on social issues and integrate with the ABF through shared plenary sessions. ABF organizers also rejected this hybrid proposal.

By early April 2003, the organizations seeking to build upon the CEDA/FFLA forum at Quito had decided that they would need to establish an independent forum for non-profit civil society within the security perimeter at Miami — a forum that would be distinct from the ABF and would seek to overcome the short-

152. Dr. Robin Rosenberg, Deputy Director of the North-South Center of the University of Miami, served as principal local negotiator and adjutant for the post-Quito organizers.

comings of Quito.¹⁵³ This new forum, denominated the Americas Trade and Sustainable Development Forum (“ATSDF”), received formal approval from the USTR to hold a separate civil society forum within the security perimeter.¹⁵⁴

From a logistical standpoint, a number of hurdles remained. Along with having to identify and engage additional organizing groups, define the scope of the event, secure space, organize substantive sessions, find speakers, and plan for travel, ATSDF organizers needed to obtain participant credentials and arrange for security checks in a post-September 11th, and post-Seattle, security environment. Unlike the ABF, which could count on the fundraising capacity of the corporate sector and had close relations with the local host committee in Miami, the ATSDF was organized by a collection of volunteers without dedicated project funding and with no access to the deep pockets of the business community. To compound the logistical and financial obstacles, the ATSDF also faced political resistance from local ABF organizers who were less than enthusiastic about the creation of a “competing” public forum that would vie for the attention of ministers and delegates.

Another challenge to the ATSDF arose from an unexpected quarter when some of the organizations associated with the HSA raised questions, in essence, about the bona fides of the ATSDF as a civil society forum. Within days of receiving approval from the USTR to hold meetings inside the security perimeter, the initial organizing group of the ATSDF held a public meeting in Washington D.C., where a representative from the USTR announced the decision to approve the public forum, and ATSDF

153. The original organizing committee included the University of Miami North-South Center, the Carnegie Endowment for International Peace, the Tulane Institute for Environmental Law and Policy from the United States, the Canadian Foundation for the Americas, the International Institute for Sustainable Development (from Canada), Corporación Participa (from Chile), the Ecuadorian Center for Environmental Law (from Ecuador), and the Latin American Faculty of Social Sciences (from Argentina). Other organizations were added to the organizing committee over time, and came to include the Institute for Agriculture and Trade Policy, Transparency International, Partners of the Americas, the Inter-American Democracy Network, the National Coalition on Caribbean Affairs, the Caribbean Policy Development Centre, the Center for International Environmental Law, and the International Centre for Trade and Sustainable Development.

154. Correspondence relating to the creation of the ATSDF, including copies of official correspondence from the USTR, is on file with the author.

organizers outlined initial plans for the event.¹⁵⁵ Among other things, the ATSDF organizers described their desire to hold parallel workshops on a range of issues and concerns raised by civil society relating to the proposed FTAA.¹⁵⁶ They also invited any interested organization or network to comment on or make suggestions for an agenda in Miami, and expressly offered to integrate issues of concern into the agenda where groups or networks were willing to organize and facilitate sessions on the issues.¹⁵⁷

Following the May 21 meeting, a number of organizations associated with the HSA sent a letter to the ATSDF initial organizing committee declining “at this time to provide feedback regarding specifics of the ATSDF,” and instead setting out a series of questions relating to the history of planning for the ATSDF, and to the process for selecting issues to be addressed in Miami and for organizing workshops and panels, among other things.¹⁵⁸ ATSDF organizers responded by letter answering each of the questions, and again invited participation by HSA participants and other interested CSOs, stating:

We are actively seeking to involve as many interested organizations as possible in helping to plan and build a meaningful, productive and substantive dialogue in Miami — and we hope you and your colleagues will join us in this We are counting on groups like yours to make suggestions and offer their energy to facilitate and collaborate in these workshops and panels.¹⁵⁹

In late August, HSA groups responded by declining to partici-

155. More than 100 organizations attended this initial meeting on May 21, 2003 at the Carnegie Endowment for International Peace in Washington, D.C. Copies of the invitation, program, and participant list are on file with the author.

156. A document was circulated following the May 21 meeting entitled, “Suggested Issues for Americas Trade and Sustainable [sic] Development (“ATSDF”) Workshops,” based on the discussions during the meeting (copy on file with author). It included eleven possible themes: Trade and Public Participation; Trade and Environment; Trade and Labor; Trade and Migration; Trade and Corruption; Trade, Democracy and Human Rights; Trade, Institutional Reform and Capacity Building; Trade and Security; Trade, Gender and Indigenous Issues; Trade and Investment; Trade and Agriculture.

157. A copy of the report from the May 21 meeting was circulated to participants (on file with author).

158. The letter was sent electronically and bore the names of thirty-two organizations, beginning with the AFL-CIO (copy on file with author).

159. Letter from ATSDF Organizing Groups to HSA Participant Groups (June 13, 2003) (copy on file with author) [hereinafter June 13 Letter].

pate in developing or organizing the ATSDF, citing concerns about the limitations and parameters of an event inside the security perimeter and concerns that they were not initially consulted about the structure or the ATSDF.¹⁶⁰

This correspondence between ATSDF organizers and HSA groups raises interesting questions about “authenticity” and “legitimacy” in claiming to represent civil society viewpoints. The HSA groups asserted an interest in access for “legitimate representatives of civil society,” and “those who truly represent the broad views of civil society,” and expressed concern that the ATSDF might not provide such access.¹⁶¹ ATSDF organizers made no claim to be “representative” of civil society, and sought to clarify that they had simply secured a new public space for dialogue within the security perimeter of the FTAA and to offer access to that space to any interested organization.¹⁶²

One proposed element of the ATSDF was a one-hour “roundtable” with trade ministers following the two days of workshops and panels. The HSA groups asked for information about the “process for participating in the trade ministers roundtable and having questions answered by the ministers,” and the ATSDF organizers replied:

This has yet to be determined, and will most likely be a product of compromise with the USTR as host, and other governments. Note that the proposed roundtable is only one potential element for AFTSD (sic). By holding workshops and other educational activities within the “security perimeter” and accessible to governmental staff and negotiators, we hope to create opportunities for informal dialogue and learning throughout the two days of meetings. Also note that this proposed element of the program will be a briefing on the results of the discussions at the Forum. It will *not* be a representation to Ministers of the views of civil society as a whole — a distinction that will be made explicit.¹⁶³

The HSA groups’ response was:

Regrettably, it appears from your proposal that only groups willing to organize a workshop as part of the ATSDF will be

160. Letter from HSA Participant Groups, to ATSDF Organizing Groups (Aug. 25, 2003) (copy on file with author) [hereinafter August 25 Letter].

161. *Id.*

162. See June 13 Letter, *supra* note 159.

163. *Id.*

able to help shape or participate in the meeting with the ministers on the 19th. . . . We feel the pre-requisite of workshop participation may deny legitimate representatives of civil society the opportunity to present their views to trade ministers. The result of this filtering process will not be a meaningful dialogue between ministers and those who truly represent the broad views of civil society.¹⁶⁴

The HSA groups went on to state that they would remain focused on organizing activities outside the security perimeter without offering specific input or support for the ATSDF. In the end, a number of HSA participant groups, including some identified on the correspondence, did register for and participate in ATSDF events inside the perimeter as well as HSA events outside the perimeter, and the ATSDF organizing committee included groups active in the HSA. Nevertheless, this HSA-ATSDF correspondence and the underlying dynamic highlights fundamental challenges in formulating any civil society access mechanism, particularly at a multilateral level.

The ATSDF ultimately included parallel workshops on nine areas: trade and agriculture; trade, democracy and human rights; trade and environment; trade and smaller economies; trade, participation and access; trade and sustainable livelihoods; trade, corruption and transparency; trade, knowledge and intellectual property rights; and trade and investment. More than 300 CSO participants attended from over twenty countries and representatives from trade ministries of at least eight countries were present for at least part of the proceedings.

B. *The ATSDF Workshop — Issues and Priorities*

The ATSDF sessions on participation and access were combined with sessions on transparency and democracy for the purpose of developing consensus proposals in plenary.¹⁶⁵ The following describes the outcomes and proposals generated by participants in these sessions.

1. Permanent Consultative Mechanism

CSOs attending the ATSDF workshops on participation,

164. August 25 Letter, *supra* note 160.

165. See ATSDF Program, available at <http://www.miami.edu/nsc/pages/FTAA.html> (last visited Mar. 5, 2004) (on file with author).

transparency and democracy called for governments to create a permanent consultative mechanism for civil society within the FTAA.¹⁶⁶ Such a mechanism could institutionalize public access to the FTAA secretariat and provide the public with a point of entry into technical assistance programs and technical committees formed to address the social impacts of an FTAA.

ATSDF participants met with a trade delegate from Chile who serves on the SOC, and discussed in detail a Chilean proposal to create a consultative mechanism.¹⁶⁷ Participants expressed support for the Chilean efforts and noted that the proposal was far stronger than the document presented during the workshops in Quito in the prior year.

Miami Participants discussed the following challenges to creating a permanent consultative mechanism:

- How can civil society in its broadest sense be integrated into this mechanism? The tensions in Quito and in the preparation for Miami highlight the diversity of views among non-profit organizations relating to trade and it would be important not to have a civil society mechanism become captive by any one element of society.
- How can a balance be maintained where the for-profit sector forms part of a consultative mechanism? As the ABF has demonstrated, the for-profit sector has far greater resources and contacts — and its positions are more focused on trade for the sake of trade without regard for long-term social consequences. Any mechanism for consultation should recognize these perspectives and seek an equitable balance.
- How large should a consultative committee be? The Chilean proposal calls for four representatives, and CSOs found this inadequate. Greater numbers would more easily account for the diversity of the region and expand the opportunities for discourse. At the same time, too large a mechanism would become unwieldy.

Participants also urged that members of civil society form a fundamental part of any permanent mechanism — not just as

166. Summary of Outcomes: Workshop on Trade, Public Participation and Access, ATSDF, Miami 2003 (forthcoming 2004) (on file with author, available upon publication at www.law.tulane.edu/enlaw).

167. See *supra* note 127 and accompanying text.

observers or invitees, but also as integral members of the mechanism. This of course raises questions about legitimacy and the selection of participants to assure that CSO “members” of the mechanism are representative of the population of the region.¹⁶⁸ It also implies a need to balance geographic representation, gender, race, ethnicity, and the inclusion of traditionally marginalized persons. It would also require some consideration of representation from different sectors, organizations, and interest groups.

2. Transparency

Miami workshop participants expressed concern that FTAA negotiators continue to be largely inaccessible to the public despite progress represented by the ATSDF and the dialogue with ministers. The negotiating groups formed around FTAA issues remain opaque to civil society and the SOC, while improving, remains a very limited window on the process.

FTAA texts continue to be largely bracketed with no indication of which government has taken which position or offered which alternative. Providing such information would not affect the negotiations as governments already know which delegation has tabled which language, but it would allow citizens a window on their own government’s positions and create a much more meaningful domestic discourse about trade policy and negotiating ambitions.¹⁶⁹

Miami participants also raised concerns about corruption and transparency inherent in the international trading system, and sought commitments to use the FTAA as a way to combat those tendencies. The FTAA government procurement chapter, for example, could be used to improve transparency and minimize corruption in public sector contracting.¹⁷⁰

168. The use of the term “representative” always raises concerns as some in government insist, correctly, that democratically elected governments are intended to function as the representatives of their citizens. Nevertheless, CSOs represent viewpoints and sectors of society by voicing concerns and opinions on trade-related issues, and it is in this sense that the term is used. Here, the term is used as in a representative sample (one that expresses some of the divergent views found in the region), not as in a legal representative of a population.

169. See discussion *supra* Part V.A.3.

170. See Press Release, Transparency International, Santiago Summit of the Americas: Transparency International Calls for Concrete Action (Apr. 17, 1998) available at http://www.transparency.org/pressreleases_archive/1998/1998.04.17.santiago.html.

3. Access to Cooperative Mechanisms

Participants from four of the nine Miami thematic workshops (Participation, Transparency, Democracy, and Environment) held a special joint session on cooperative mechanisms under trade agreements, pointing to the experience of the NAFTA Commission on Environmental Cooperation as an example of addressing trade-related social impacts in the context of a trade agreement. The joint session highlighted such mechanisms as an opportunity for integrating the public into the trade process. The discussion centered on existing cooperative mechanisms, both formal and informal, within trade agreements such as the WTO, NAFTA, and MERCOSUR, and experts familiar with their operation discussed the successes and challenges to engaging citizens within these mechanisms.¹⁷¹

Based on the experiences described, participants recommended the inclusion of a cooperative mechanism within the FTAA that engages citizens in the strengthening of trade policy for sustainability. They proposed that such a mechanism consider and focus on the following elements:

- permanence;
- cooperation among governments, and not “shaming” them for failure to perform (such as the environmental enforcement provisions of NAFTA);
- a broad view of the link between trade and social issues so that cooperative programs can address priorities, even where the connection to trade and investment is more tangential;
- independence;
- capacity building;
- that the mechanism be demand driven; and that it
- provide a clear, adequate financing mechanism that can be adjusted for inflation and currency fluctuations.

4. Civil Society Coordination

As in Quito, the experience of the ATSDF in Miami pointed to a need for CSOs to do a better job of coordinating and collaborating among and across interest groups to make their input more articulate and more meaningful. A number of concerns

171. See discussion *supra* Part VI.B.2.

were raised on this point and recommendations focused on better communication mechanisms and the need for financing, among other things. The discourse with the HSA also highlights the need to think more carefully about issues of authenticity and legitimacy, and to assure that the ATSDF and other civil society mechanisms welcomed or created by governments do not provide a platform for one group of CSOs at the expense of another.

C. *The ATSDF Workshop — Meeting With Ministers*

Following two days of workshops in which a number of trade delegations participated,¹⁷² the USTR invited ATSDF participants to an interactive session between approximately twenty ATSDF participants and the thirty-four trade ministers. ATSDF representatives and Ministerial hosts made brief opening statements, followed by a more interactive question and answer period facilitated by a respected, and Pulitzer Prize-winning, local reporter. Unlike the one-sided and chaotic experience in Quito, the interaction between ATSDF participants and ministers in Miami was civil and relatively substantive. It was broadcast by a closed circuit system and is available for viewing on the web.¹⁷³

One of the most significant aspects of the meeting, from the standpoint of continued public access to the FTAA, was the ministers' response to the ATSDF proposal for a permanent consultative mechanism within the trade agreement itself. When ATSDF participants proposed the idea during the dialogue, seven ministers took the floor to endorse the concept.¹⁷⁴ Once the idea was tabled, and ministers began to speak on the topic, their interest and support seemed to grow visibly. Each minister seemed to go further than the next in expressing support for a consultative mechanism, culminating in the representative from

172. An informal count by the author indicates that representatives from at least eight countries attended ATSDF workshop sessions and participated in discussions. Many joined panels as part of the formal agenda, and others attended as observers or active audience participants. In addition, many talked informally with CSO participants between panel sessions.

173. See USTR Resources, FTAA Miami 2003 News, Webcasts, at www.ustr.gov/regions/whemisphere/ftaa2003/news.htm#webcasts.

174. See *ATSDF Presentation to Ministers (Part 1)*, Nov. 19, 2003, webcast, at http://ftaanews.primestream.com/mediacenter/mediacenter_player_56.asp (including comments from Trade Ministers or representatives from Argentina, Brazil, Chile, El Salvador, Mexico, Paraguay and the United States).

Paraguay calling for a “new global vision” of cooperation and public participation in shaping development policy. Even the representative from Mexico (a country reportedly cool to the idea of a permanent consultative mechanism)¹⁷⁵ spoke in support, although in less glowing terms than his counterparts.

It appeared that the opportunity to speak about the proposal during this broadcast session with civil society provided a context within which ministers and representatives could express and reaffirm their support publicly. Following the meeting with ministers, the Final Ministerial Declaration from Miami included language endorsing the idea of a permanent consultative mechanism and calling on the SOC to study the idea and report back.¹⁷⁶ Paragraph 28 of the Miami Declaration stated:

We express our interest in creating a civil society consultative committee within the institutional framework of the FTAA upon the Agreement's entry into force. Such a committee could contribute to transparency and the participation of civil society on an on-going basis as the FTAA is being implemented. We instruct the Committee on Government Representatives on the Participation of Civil Society, in coordination with the TCI, to continue to study the issue and make recommendations to the TNC concerning it. We ask the TNC to review these recommendations and make a proposal concerning this matter for our future consideration.¹⁷⁷

While there was momentum for the creation of such a committee prior to the ATSDF meeting with ministers, the language that emerged in the Miami Declaration clearly went further than an earlier draft,¹⁷⁸ and the idea may have been advanced by the ATSDF sessions on democracy and participation, and the interaction with ministers.¹⁷⁹

175. Interview with trade delegates other than Mexico, in Miami, Fla., (Nov. 2003).

176. Free Trade Area of the Americas: Eighth Trade Ministerial Meeting, Declaration of Ministers, Miami, Fla., Nov. 20, 2003, *available at* http://www.ftaa-alca.org/Ministerials/Miami/Miami_e.asp (last visited Mar. 5, 2004).

177. *Id.* at ¶ 28.

178. See FTAA — Free Trade of the Americas, Third Draft Agreement, Nov. 21, 2003, FTAA.TNC/w/133/Rev.3, at ch. XX1, art. 4 (not yet entered into force), *available at* http://www.ftaa-alca.org/FTAADraft03/Index_e.asp.

179. It is difficult to argue causality, but public praise for the proposal by ministers during the ATSDF interaction certainly did nothing to harm its prospects. Informal conversations between the author and trade delegates on background suggest that the ATSDF proposal and the dialogue were helpful in improving prospects for the proposal.

VIII. *CONCLUSIONS AND RECOMMENDATIONS*

Perhaps the most disappointing aspect of the historical failure to open the FTAA process to public participation is that the presidential promises, which created the context for the FTAA, remain unfulfilled. Even the Inter-American Democratic Charter — whether morally or legally binding — has not, to date, informed the FTAA.

At every Inter-American Summit, presidents and heads of State signed declarations affirming the “right” to participate (Miami 1994) as a “basic requisite for sustainable development” (Santa Cruz 1996). They sought to make “government institutions . . . more participatory structures” (Santiago 1998), and committed to “the full participation of all persons” (Quebec City 2001). They even linked participation directly to the heart of representative democracy, and affirmed that only democracies will be eligible to attend Summits (Santiago 1998) or join the FTAA (Quebec City 2001). But apart from offering a few bracketed statements that espouse democratic values or provide public notice, the current text of the FTAA seems largely divorced from the fundamental democratic principles to which Western Hemisphere heads of State have ascribed.

Does this mean that the Presidential Summit pledges are hollow, or that the draft trade agreement is not responsive to instructions from national capitals? Probably not. It does appear, however, that the many technical details of trade negotiation, and perhaps an understandable focus on the economics of trade, have pulled the text away from the broader context in which the FTAA is cast: sustainable economic prosperity must depend upon sustainable democracy.

There is a tendency to keep inter-governmental negotiations confidential — a necessary prerogative of Nation States — and this also may create a participation deficit in the process and outcomes of trade agreements. Transparency is, understandably, anathema to negotiators, not because they are anti-democratic, but because they believe a measure of secrecy will protect their State and assure the best result for their constituents. But, as a matter of principle, one would hope to see a greater concern for dialogue with those constituents as decisions are made in their names.

Public input is also problematic when one considers the vast

range of voices and interests that will surface from civil society during a process that is already rendered chaotic by the competing interests of thirty-four states. But more can and should be done to engage the public during the negotiation phase of the agreement for all of the same reasons that the Western Hemisphere heads of State so readily promote democracy in the first place. At both a national and regional level, public participation gives legitimacy to the process and result, and it strengthens the political will of populations who must support ratification and implementation after the text is finalized. The wide range of expertise that exists outside of governmental corridors is also more fully available to officials where an organic and meaningful exchange of ideas is part of the process. It is true that participation implies resource allocation and sometimes delay — but these are investments in a democratic outcome, and should not be viewed as costs.

Any justification for closed doors recedes even further when the negotiations are over and the trade agreement is being implemented. The principles of participation far outweigh the principles of secrecy when multilateral policies are applied at a national level.

A. Specific Recommendations: More Formal Commitment to Participation

1. Permanent Consultative Mechanism for FTAA

FTAA negotiators should follow through on their expression of interest in a permanent consultative mechanism for civil society into the operation of the FTAA. The Miami Declaration speaks of a civil society consultative committee, but the FTAA should include more than simply a committee of government representatives who are interested in public voices. This would do little more than extend the current SOC into the agreement itself. While the SOC has certainly improved in recent years, it cannot substitute for a more robust and meaningful point of entry.

Consideration should be given to organizing the permanent mechanism around issues that have emerged as priority public concerns, such as labor and the environment, and creating meaningful opportunities for continual discourse rather than formalistic communications. Citizen advisory committees would

be useful as long as they are focused on specific issues and have real access to government officials.¹⁸⁰ Working groups (again on targeted issues) made up of government and CSO members would be an even stronger interactive link between public representatives and the public. Consultative mechanisms should also extend to dispute resolution and the potential role for CSOs in filing amicus briefs to dispute resolution panels.

2. Permanent Consultative Mechanism in All Trade Agreements

While this Article is focused on the FTAA, many of the arguments for access to that agreement are equally applicable to the need to create meaningful public participation in all trade agreements — during negotiation and implementation. This is true of bilateral as well as multilateral agreements.

B. *Strengthening and Broadening the ATSDF*

1. Building Alliances

If and as the ATSDF continues as a means of bringing civil society participants together, organizers should pay greater attention to the need for cooperation and alliances with other organizations and networks active in the debate over trade liberalization. This certainly includes the HSA, which has been historically active and has a particular constituency among labor groups. It also likely includes the legislators and parliamentarians who have sought an audience in the FTAA process. While they may not be considered traditional civil society actors (they are, after all, elected officials), there is no doubt that they represent constituencies that have a strong interest in the outcome of trade negotiations. While organizations and networks will no doubt continue working on issues, and by means, that they deem most appropriate (an inevitable and important aspect of civil society), advantages can be gained through cooperation where resources, ideas and strategies are shared, and CSO efforts are mutually reinforcing.

180. The North American Free Trade Agreement's Commission on Environmental Cooperation (CEC), for example, features a tri-national Joint Public Advisory Committee ("JPAC") that regularly interacts with and provides advice to the senior environmental officials from the member countries. *See generally*, CEC, at http://www.cec.org/who_we_are/jpac/index.cfm?varlan=english.

2. Questions of Legitimacy

While no group can purport to “speak for” civil society, the experience at the FTAA ministers meeting in Miami highlights a certain tension among some CSOs about who is the “legitimate” or “authentic” voice of the public. This tension, perhaps more appropriate for exploration through a sociological or anthropological discourse, nevertheless has repercussions for how CSOs organize themselves and seek access to trade negotiations and trade instruments. While alternative strategies are inevitable, little will be gained by suspicion and ill will among civil society actors who pursue those strategies. While competition in ideas is vital (and inevitable in a diverse society — and a diverse hemisphere), care should be taken to assure that competition for access to the limited public space in the trade arena does not become counter-productive.