

**MULTISTAKEHOLDER CONSULTATION  
CONSULTATIONS MULTISECTORIELLES**

**CANADA AND THE FREE TRADE AREA OF THE AMERICAS (FTAA)  
LE CANADA ET LA ZONE DE LIBRE-ÉCHANGE DES AMÉRIQUES (ZLEA)**

**THURSDAY, FEBRUARY 27, 2003 / LE JEUDI 27 FÉVRIER 2003**

**Salle ♦ Capital Carleton ♦ Room  
Hôtel ♦ Marriott ♦ Hotel  
100, rue Kent Street, Ottawa**

**Workshop # 1: Investment**

Chair  
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**Background**

The Free Trade Area of the Americas (FTAA) was conceived in principle in December 1994 at the inaugural Summit of the Americas held in Miami. At the second Summit, held in Santiago, Chile, in April 1998, the leaders of the 34 democratic countries in the Americas launched negotiations aimed at creating a hemisphere-wide free trade area by 2005.

The FTAA negotiations are proceeding on two simultaneous tracks: the first focussing on the development of a general framework of rules including issues of an institutional nature: the second track dealings specifically with market access. The Government of Canada and the 33 other countries participating in the FTAA negotiations have begun the process of exchanging initial market access offers in goods, services, investment and government procurement.

**Recent developments**

The Seventh FTAA Ministerial Meeting was recently held in Quito, Ecuador, in November 2002. The Ministers Responsible for Trade in the Hemisphere (minus Cuba) charted a course to complete talks by the January 2005 target date and agreed to release the second version of the consolidated draft negotiating texts of the FTAA agreement.

On February 14, 2003, Canada made public its initial market access offers in services, investment and government procurement in the FTAA negotiations. In doing so, Canada was the first FTAA participant to provide public access to these offers and continues to lead the way in establishing an open and transparent process for multilateral trade negotiations by ensuring that Canadians have access to as much information as possible. The previous day, Canada tabled its initial market access offer for investment and services in the Negotiating Group on Investment.

## **Canada's Position on Investment**

As an open and dynamic economy with significant international trade and investment flows, Canada has consistently supported a strong, rules-based system, multilaterally, regionally and bilaterally. Canada believes that providing investors with protection from arbitrary and discriminatory actions is in our interest and in the interest of our FTAA partners. It promotes a stable and secure environment for international investment, which facilitates innovation, productivity and prosperity, both at home and abroad. FTAA Ministers have recognized the significant contribution that economic integration will make to the attainment of the Summit objectives, including creating prosperity. Investment flows will continue to be a significant component in the furtherance of such integration. It is precisely for this reason that smaller economies have such a strong interest in sending positive signals to foreign investors that they are willing and able to undertake credible and effective obligations with respect to investment disciplines and protection.

The Government has said that it would not replicate the NAFTA investor-state dispute settlement provisions, and that any positions that Canada supported or advanced on this issue in the FTAA would have to reflect the experience that Canada had gained in the implementation and operation of the NAFTA investment chapter. The Government has also stated its support for the inclusion of investment protection and effective dispute settlement provisions in the FTAA. The nature of these provisions is not yet defined, but will become clearer as negotiations progress with our 33 hemispheric partners.

Two of the underlying principles of the FTAA negotiations overall are that the rights and obligations of the Agreement should be shared by all FTAA countries, and that account should be taken of the differences in levels of development and size of the economies of these countries. Canada believes that there must be sufficient flexibility in the way that substantive obligations and market access commitments are structured in order to allow smaller economies to implement obligations according to their individual capacities.

## **Questions**

- As investment protection is a key element to Canada's prosperity, and mindful of the fact that high standard legal norms constitute the best incentive governments can provide to attract and protect foreign investments, how should this protection be best insured while preserving Governments' right to legislate in the public interest?
- Canada supports greater transparency in both the negotiation of international agreements, as well as in any dispute settlement mechanism. Canada believes that investor-state dispute settlement proceedings should be open to the public. Should there be limits on this principle? As well, Canada considers that *Amicus* briefs should be received by tribunals provided that such briefs comply with criteria determined by the Parties to the Agreement. What should those criteria be? Are there other ways to improve the effectiveness of dispute settlement with respect to investment protection?
- In terms of investment, there is already a great deal of flexibility inherent in the negative list approach that combines country-specific reservations, chapter-specific exceptions and general exceptions applicable to the FTAA Agreement as a whole. What additional mechanisms could be developed to assist smaller economies?
- What is the appropriate balance between rights and obligations on the one hand, and special and differential provisions on the other?

## Reference documents

(See the Appendix)

- Quito Ministerial Declaration (Paras 4, 5, 6, 12, 13, 17, 19, 21, Annex 1:3)
- Range of Civil Society views on Investment (Section 3 of the Report of the Committee of Government Representatives on the Participation of Civil Society, presented to FTAA Ministers –August 2002-)
- Government Response to the Report of the Standing Committee on Foreign Affairs and International Trade “Strengthening Canada's Economic Links with the Americas”: [http://www.dfait-maeci.gc.ca/tna-nac/FTAA\\_rep-en.asp](http://www.dfait-maeci.gc.ca/tna-nac/FTAA_rep-en.asp) (Recommendation 7, 21 on Foreign Investment Protection Agreements, Double-Taxation Agreements, and Investor-State Provisions) – October 2002-

(Available on the web):

- Canada's Position and Proposal (Nov. 2002)  
<http://www.dfait-maeci.gc.ca/tna-nac/I-P%26P-en.asp>
- Initial FTAA Offer for Investment and Services (Feb. 2003)  
<http://www.dfait-maeci.gc.ca/tna-nac/FTAA/ex-io-en.asp>
- Second Draft Agreement - Chapter on Investment (Nov. 2002)  
[http://www.alca-ftaa.org/ftaadraft02/eng/ngine\\_1.asp](http://www.alca-ftaa.org/ftaadraft02/eng/ngine_1.asp)
- Description of the Chapter (Nov. 2002)  
<http://www.dfait-maeci.gc.ca/tna-nac/I-Desc-en.asp>
- Draft Chapter on Investment - Frequently Asked Questions (Nov. 2002)  
<http://www.dfait-maeci.gc.ca/tna-nac/I-FAQ-en.asp>
- Quito Ministerial Declaration (Nov. 2002)  
[http://www.zlea.org/ministerials/quito/minist\\_e.asp](http://www.zlea.org/ministerials/quito/minist_e.asp)

## APPENDIX

### MINISTERIAL DECLARATION OF QUITO

**Seventh Meeting of Ministers of Trade of the Hemisphere  
Quito, Ecuador  
1 November 2002**

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*(Paras 4, 5, 6, 12, 13, 17, 19, 21, Annex 1 Para 3)*

4. Among the achievements of this third phase of negotiations we wish to single out the fulfillment of tasks necessary for fulfilling the terms of the Buenos Aires Ministerial Declaration, fundamentally the elaboration of a second draft of the consolidated chapters prepared by the Negotiating Groups and the preliminary work of the Technical Committee on Institutional Issues (TCI) on the general and institutional aspects of the future FTAA Agreement, the initiation of market access negotiations in agricultural and non-agricultural goods, services, investment, and government procurement on 15 May 2002; the approval of the methods and modalities for negotiation to be applied in the next phase of the process and setting of the timetable for the exchange of market access offers with initial offers beginning on 15 December 2002;<sup>1</sup> the definition of modalities on the notification of the base tariff, the approval of the guidelines or directives for the treatment of differences in levels of development and size of the economies; and the Hemispheric Cooperation Program (HCP) which is attached in Annex III to this Declaration.

5. We reaffirm the principles and objectives that have guided our work since the First Summit of the Americas, in particular, the basic principle of consensus in decision making within the FTAA process and the achievement of a balanced and comprehensive agreement that is also consistent with the rules and disciplines of the World Trade Organization (WTO). We reaffirm that the result of the FTAA negotiations shall constitute a comprehensive single undertaking that incorporates the rights and obligations that are mutually agreed for all member countries. We reiterate that the FTAA can coexist with bilateral and sub-regional agreements, to the extent that the rights and obligations under these agreements are not covered by or go beyond the rights and obligations of the FTAA. We confirm the importance of making continuous, balanced, and substantial progress in all subject areas under negotiation, and also reiterate the need for the negotiating process to be conducted in a transparent and flexible manner so that all FTAA countries consider the results of the negotiating process to be balanced. We also reiterate that the rights and obligations of the FTAA shall be shared by all the countries.

6. We reaffirm our commitment to take into account in designing the FTAA, the differences in levels of development and size of economies in the Hemisphere, in order to ensure that these economies participate fully in the building of, and benefits resulting from, the Agreement and to create opportunities for these countries. We therefore welcome the incorporation of this commitment in document FTAA.TNC/20/Rev.1 as one of the general principles of the methods and modalities for the negotiations in the areas of market access, agriculture, investment, services, and government procurement.

12. We consider that the establishment of the FTAA, through increased trade flows, trade liberalization and investment in the Hemisphere, shall contribute to growth, job creation, higher standards of living, greater opportunities, and poverty reduction in the Hemisphere. For this to be possible, the establishment of the FTAA shall promote the application of

policies oriented to economic development, promoting the generation of employment and the effective operation of labor markets in the Hemisphere.

13. We also recognize the importance of encouraging the promotion of financial policies that are conducive to the growth of hemispheric trade and investment, which could help address the external debt problem of some countries in the Hemisphere.

17. We welcome the guidelines and directives for the treatment of the differences in the levels of development and size of economies.<sup>2</sup> We instruct the TNC to ensure that all the negotiating groups, in particular those undertaking market access negotiations, translate these guidelines into specific measures so that they are reflected in the results of the negotiations. Furthermore, we instruct the TNC, with the support of the Consultative Group on Smaller Economies (CGSE) and the Tripartite Committee, to report to us at our next meeting on the results of the progress achieved in relation to the treatment of differences in the levels of development and size of economies in each of the Negotiating Groups.

19. We underscore the importance of the TNC having provided initial guidance on the methods and modalities for the negotiations, which have enabled the negotiations to begin on market access for agricultural and non-agricultural goods, services, investment, and government procurement and we instruct the TNC to continue to provide guidance on this issue. We also note the progress made by the different negotiating groups and committees, which will play a decisive role in completing the negotiations. All negotiations shall be conducted in a transparent manner to ensure mutual advantage and increased benefits to all FTAA participants. We note the discussion on the methods for making tariff concessions and instruct the TNC to continue its discussion on principles, including the regional most-favored-nation (MFN) principle, to guide the negotiations. We reiterate that, in the development of offers, the negotiations shall give expression to the differences in the levels of development and size of economies.

21. In order to meet the deadlines to secure the entry into force of the FTAA Agreement, the Negotiating Groups should develop work programs consistent with the timetables for the exchange of initial offers established by the TNC; that is, between 15 December 2002 and 15 February 2003. We encourage the Groups to present comprehensive offers that contribute effectively to the liberalization of hemispheric trade, taking into account treatment according to the differences in levels of development and size of economies. This will facilitate the review of offers and submission of requests for improvements to offers between 16 February and 15 June 2003. We also remind countries that they should initiate the process for the presentation of revised offers and subsequent negotiations on improvements as of 15 July 2003. We instruct the TNC to supervise the process of presentation of offers on market access in the five negotiating groups dealing with this issue (NGMA, NGAG, NGSV, NGIN, and NGGP), taking into account the need to ensure confidentiality of the offers, and at the same time recognizing the multilateral nature and transparency of the process. We instruct the TNC to review the process of presentation of offers, with the objective of verifying progress in the market access negotiations and evaluating the offers as a whole. The Chairs of these Negotiating Groups shall also present to the TNC periodic reports on the progress they have made in these areas.

## **Annex 1**

3. We instruct the Negotiating Groups on Market Access, Agriculture, Services, Investment, and Government Procurement to carry out an ongoing discussion of methods and modalities for negotiations in order to facilitate the process of presenting revised offers and that the Chairs of these Groups keep the TNC apprised of the results of their discussions.



**Range of Civil Society views on Investment**  
**(Section 3 of the Report of the Committee of Government Representatives on the**  
**Participation of Civil Society, presented to the FTAA Ministers –Aug. 2002-).**

**Investment**

17. Some civil society proposals on investment indicated that the Agreement should not grant foreign investors any preferences over domestic investors, but that it should ensure that the governments of the Parties maintain a certain degree of flexibility in order to establish a regulatory framework that promotes development at all levels of government, especially in less-developed countries. There is concern regarding the international mechanisms for dispute settlement and their application to disputes between foreign investors and governments of FTAA Parties. On performance requirements, there are contributions in favor of their application, others against, and others for limited application.
  
18. By way of illustration, the following specific proposals were made:
  - the application of rules set out in the North American Free Trade Agreement protecting private investors (Chapter 11) should be prevented;
  - controls on capital outflows should be established;
  - the common legal framework established under certain subregional agreements should be respected;
  - ensure that investor protections do not weaken governments' ability to address regulatory concerns, e.g., health, safety, and the environment;
  - adopt a clear, common policy that strengthens investor protections and thus encourages foreign direct investment in order to increase employment, Gross Domestic Product, public revenues, and knowledge transfer; and
  - small and vulnerable economies should be allowed to enforce performance requirements; and
  - there were also proposals for strengthening human, environmental and labor rights as well as proposals against including labor and environmental issues in the FTAA.



**Government Response to the Report of the Standing Committee on Foreign Affairs  
and International Trade  
“Strengthening Canada's Economic Links with the Americas”**

**October 2002**

*(Recommendation 7, 21 on Foreign Investment Protection Agreements, Double –Taxation Agreements, and Investor-State Provisions)*

**FOREIGN INVESTMENT PROTECTION AGREEMENTS (FIPAs),  
DOUBLE-TAXATION AGREEMENTS (DTAs)**

**Recommendation 7**

*"That, as a preliminary step in enhancing its bilateral relationship with countries in Latin America and the Caribbean, the Government of Canada accelerate its efforts to complete ongoing negotiations with individual countries on Foreign Investment Protection and Promotion Agreements and double-taxation agreements."*

Enhancing its investment opportunities is essential to Canada's ongoing international competitiveness. Foreign investment promotion and protection agreements (FIPAs) provide important disciplines that enhance overall bilateral relationships by opening international markets and making them more secure for Canadian investors.

The Government's FIPA program includes extensive consultations with all stakeholders, including the business community, and provides a legal framework of protection to which Canadian investors may have recourse, if necessary. FIPA negotiations also complement ongoing regional and multilateral investment rule-making initiatives.

In the region, Canada has already concluded bilateral FIPAs with Barbados, Costa Rica, Ecuador, Panama, Trinidad and Tobago, Uruguay and Venezuela. Canada has also signed a bilateral free trade agreement with Chile that includes an investment protection chapter.

Investment negotiations with other countries in Latin America and the Caribbean are an integral aspect of the ongoing FTA initiatives with the Central America Four (CA4), the Caribbean Community and Common Market (CARICOM), the Andean Community countries, the Dominican Republic, and the Free Trade Area of the Americas (FTAA).

Where the tax systems of other countries in the hemisphere are similar enough to the Canadian regime to make the negotiation of a double taxation agreement (DTA) feasible, Canada has been very proactive, having already in force DTAs with Argentina, Barbados, Brazil, Chile, the Dominican Republic, Ecuador, Guyana, Jamaica, and Trinidad and Tobago. In other cases, DTAs have been signed and enacted in Canada but are awaiting approval in the partner country (e.g. Peru, Venezuela). With still other countries (e.g. Bolivia, Colombia, Costa Rica), efforts to advance negotiations continue, including, when appropriate, the provision of certain training sessions in Ottawa.

## INVESTOR-STATE PROVISIONS

### Recommendation 21

*"That the Government of Canada diligently strive to attain FTAA consensus on the importance of achieving a comprehensive agreement to protect investment within the FTAA. NAFTA type investor-state provisions should be excluded from the FTAA agreement."*

Investment is vital to the health of the Canadian economy. As a country more oriented toward international trade and investment than any of its competitors, Canada has a vested interest in keeping the flow of trade and investment strong.

The achievement of a fair, open and secure environment for international investment is of key importance for increasing Canada's productivity and prosperity. Accordingly, the Government supports the negotiation of comprehensive investment rules in the FTAA negotiations. While negotiations are still in the early stages, the Government believes that these rules should offer investors protection from arbitrary and discriminatory actions, an issue that is at the heart of liberalized trade. In doing so, Canada's approach will be informed by its past experiences with trade negotiations and the implementation of investment rules with other countries. Canada will ensure that it preserves its ability to adopt or maintain regulations, administrative practices or other measures in sectors of key policy interest, such as health, public education, social services or culture. As is the case for other trade agreements, the FTAA investment chapter will allow countries to file exceptions for those measures they wish to maintain and would otherwise not be allowed under the FTAA (e.g. performance requirements).

Although the set of investment rules contained in NAFTA Chapter 11 has worked relatively well, the Government is not advocating the replication of the NAFTA dispute settlement rules in the FTAA. Canada continues to collaborate with its NAFTA partners to promote the clarity and transparency of these rules. Last year, trade ministers from the three NAFTA countries confirmed the proper interpretation of two important aspects of Chapter 11: one on transparency, and the other on the body of law to which the minimum standard of treatment refers, namely customary international law.

This collaborative work is not over. Following the May 28, 2002, meeting of the NAFTA Free Trade Commission, experts were directed to continue their work examining the implementation and operation of Chapter 11, including developing recommendations as appropriate. This work will not only contribute to the effective and proper implementation of the Chapter, but will also serve to increase public understanding of its operation, as well as help us to build better and more transparent rules for future agreements.